UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**6:05-CR-034-02-C**
	)	
v.	)	
	)	
XXX XXX XXX,	)	
	)	
Defendant.	)	
	)	

MOTION TO SUPPRESS FRUITS OF SEARCH AT 514 SOUTH NUECES STREET AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Defendant, XXX XXX XXX, hereby moves this Court to suppress the fruits of the search of his residence at 514 South Nueces Street, Coleman, Texas that took place on or about December 30, 2004. In support of this motion, Mr. XXX sets for the following facts and argument.

I. INTRODUCTION

The search of 514 South Nueces Street was done pursuant to a search warrant signed by a Coleman County Magistrate on December 29, 2004. The warrant was based upon an affidavit by Marty XXX. *See* Search Warrant Affidavit (the "Affidavit") attached hereto as Attachment A. To call the affidavit "bare bones" would be charitable. It simply states that "within the past 72 hours" (*i.e.*at early as December 26, 2004) a confidential informant saw Melanie XXX in possession of "a tan rock-like substance that [she] purported to be cocaine" at 514 South Nueces Street. No mention is made as to the amount of the "tan rock-like substance" or whether it was being used at the time it was seen.

II. DISCUSSION

The Fourth Amendment requires that probable cause support each warrant issued. Probable cause to search is "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). There must not only be probable cause to believe that a federal crime has been committed, but also a substantial basis to conclude that instrumentalities of a crime will be found on the premises to be searched. *United States v. Lockett*, 674 F. 2d 843, 846 (11th Cir. 1982).

The United States Supreme Court recognized, in *Sgro v. United States*, 287 U.S. 206, 211 (1932), that in order for a search warrant to be valid "the time within which proof probable cause must be taken by the judge or commissioner...must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." From that holding, the doctrine of "staleness" developed. Indeed, it is now well recognized that probable cause must be present and timely. *See, e.g., United States v. Diecidue*, 603 F. 2d 535 (5th Cir. 1979).

"Absent additional facts tending to show otherwise, a one-shot type of crime, such as a single instance of possession or sale of some form of contraband, will support a finding of probable cause only for a few days at best." 2 Wayne R. Lafave, *Search and Seizure*, § 3.7(a) at 275 (2004). Because stale, "bare bones" search warrant affidavits are a rarity in federal court, it is instructive to review state cases where defendants were charged with simple possession of contraband.

Louisiana v. Boneventure, 374 So. 2d 1238 (La. 1979) involved very similar facts to the instant case. There, a December 4, 1977 search warrant affidavit recited that an "informant had occasion to be present at 7164 Meadowpark on or about December 2, 1977 and observed a quantity of green vegetable material identified and offered for consumption as being marijuana

by the occupant of 7164 Meadowpark occupant being Alan Buchanan." *Id*. at 1239. As if talking about the instant case, the *Boneventure* court wrote:

> In the instant case the affidavit fails to establish probable cause to believe that the evidence or contraband observed by the informant at the defendants' residence was not disposed of but remained at the place to be searched. A "quantity" of marijuana is an indefinite amount. However, the entire "quantity" observed was "offered for consumption." Thus, the marijuana observed was a small amount which could be consumed by the person or persons to whom it was offered. Under the circumstances, as set forth in the affidavit, there was not probable cause to believe that the same consumable amount of marijuana which was offered to a person or persons for consumption approximately two days before remained at the place to be searched. Nor was there probable cause to believe, as opposed to grounds for suspicion, that other marijuana than that offered for consumption could be found at the place to be searched.

Id.

Similarly, in *State v. Kittredge*, 585 P.2d 423, 424 (Or. Ct. App. 1978), "[t]he only operative facts recited in the affidavit supporting issuance of the warrant are that (1) a confidential reliable informant was in certain premises 'within the past 96 hours' and that (2) while there he observed marijuana." Like the *Boneventure* court, the *Kittredge* court rejected such an affidavit as stale:

> The following facts, among others, are *not* made known: (1) *How much* marijuana was seen. The amount could have been as little as less than an ounce or more than a ton. The amount observed is significant because it affects the likelihood that some marijuana will be found there later. If only a single marijuana cigarette was observed, it was probably gone 96 hours later. If large quantities were observed, there would exist at least a permissible inference that some remained or that the premises were being used as a market for the sale of marijuana.

Id.

In *State v. Urbach*, 730 P.2d 571 (Or. Ct. App. 1986), the affidavit stated that "[t]he Confidential Reliable Informant (Hereafter referred to as CRI) stated that he/she had been present at 2145 S. Hwy 97 Redmond, OR. within 48 hours of our conversation, and had

personally observed 1/4 to 1/2 ounce of crank at the said residence." The Court found the warrant affidavit to be stale:

> There is no information telling the issuing magistrate the significance of 1/4 to 1/2 ounce of the drug: whether that is a small amount that would be consumed by one individual in a single day or whether it is an amount that would supply a user for several days. Additionally, there is nothing to indicate that there is continual drug traffic or use in defendant's residence. All the credible information which the affidavit discloses, vis-a-vis drug use or possession, is that the informant saw and reported a single incident of drug possession. There is nothing in the affidavit to support an inference that drugs would be present in defendant's residence 48 hours after the informant was there.

Id. at 572.

In *People v. Siemieniec*, 118 N.W.2d 430, 431 (Mich. 1962), a search warrant for liquor was issued based upon an affidavit of a police officer that, four days earlier, he had observed the defendant making illegal *sales* of liquor on the premises to be searched. The Michigan Supreme Court held that the affidavit was stale, noting:

> If Mrs. Siemieniec unlawfully sold or furnished for sale alcoholic beverages on September 13, 1958, she could have been prosecuted for doing so, but such sale alone afforded no ground for a finding of reasonable cause to believe that on September 17th, four days later, she was continuing to do so, thereby justifying issuance of the search warrant. Whether the affiant's observations are made 4, 6 or 66 days before application for a search warrant, the warrant may issue only upon a showing that reasonable cause exists to believe illegal activity is occurring at the time the warrant is sought. Just as in *People* v. *Wright, supra*, there was nothing in the affidavit presented in this case to indicate that the acts observed on September 13th continued to occure [sic.] on September 17th.

Id. at 431-32.

In *People v. David*, 326 N.W.2d 485, 487 (Mich. Ct. App. 1982), the affidavit was based upon a controlled *buy* made by a confidential informant three days earlier. Again the affidavit was held to be stale:

> [I]n the case at bar, the affidavit alleged only a single sale, not continuing drug sales. The affidavit did not even state that defendant possessed any marijuana after he made the sale to the informant. On the facts presented to the magistrate, there is absolutely no evidence to suggest that defendant would still possess marijuana three days after the sale to the informant. We find that, whether extending great deference to the magistrate's determination of probable cause or reviewing that determination for an abuse of discretion, the circuit court properly held that the magistrate's decision to grant the search warrant was erroneous.

Id. at 488.

In *State v. Whitley*, 993 P.2d 117, 118 (N.M. Ct. App. 1999) the affidavit at issue stated, *inter alia*: "Information received from the confidential source on 11-17-97 is that while at the Crane Motel, 1212 West Second, Room Number # 24, the confidential source has observed Paul Whitley *sell* marijuana in the past (48) forty-eight hours (emphasis added)." The Court, in holding the affidavit stale, noted that "the affidavit concerned the sale of marijuana, a highly consumable item." *Id. at 119.*

The instant case is very similar to the several cases cited above. Here, the only operative facts mentioned in the affidavit is that seventy-two hours prior to applying for the warrant (four days prior to conducting the search), Melanie XXX was seen in possession of "a tan rock-like substance that [she] purported to be cocaine." Like *Boneventure, Kittredge* there is no quantity of the drug mentioned in the affidavit. Indeed, like the analogy to the marijuana cigarette in *Kittredge*, the one rock appears to be one "serving" of a drug that could easily have been consumed by the time of the search and, in fact, might have been being consumed at the time the confidential informant witnessed the substance.[1] In any event there is certainly nothing in the affidavit to state "whether [there was] a small amount that would be consumed by one individual in a single day or whether it is an amount that would supply a user for several days.

Urbach, 730 P.2d at 572. Moreover, the facts in this case are even stronger than in *Siemieniec* and *Whitley*, because there is absolutely no allegation in the affidavit that Ms. XXX was distributing any drugs, as opposed to *using* drugs, and, from the affidavit, it appears that this was just a one-shot type of crime of possession of a controlled substance. In sum, all the affidavit contains is information that four days before the search a confidential informant alleges to have seen a single instance of drug possession. *See Urbach*, 730 P.2d at 572. There was no evidence presented to the Coleman County magistrate that this presumably consumable amount of cocaine would have still been present at 514 South Nueces Street four days after it was seen and the police did nothing to try to update the information to prevent it from being stale. *See Boneventure*, 374 So.2d at 1239.

III. CONCLUSION

The affidavit supporting the search warrant in this case was stale and, consequently, all fruits of the search conducted in reliance upon the stale warrant must be suppressed.

Respectfully submitted,

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Attorney for Defendant

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[1] In fact, the warrant is completely silent as to whether the rock existed at the time the informant left Ms. XXX or whether it had been consumed by that time.

XXX XXX XXX

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 5.1 of the Northern District of Texas, I, F. Clinton Broden, certify that I conferred on the attached motion with Jeffrey R Haag , the Assistant United States Attorney assigned to the case and it was determined that the government opposes the motion.

F. Clinton Broden

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on July 22, 2005, I caused the foregoing document to be served by first class mail, postage prepaid, on:

Jeffrey R Haag
US Attorney's Office
1205 Texas Ave
7th Floor
Lubbock, TX 79401

Gonzalo P Rios
Law Office of Gonzalo P Rios
228 West Harris Ave
San Angelo, TX 76903
325/655-6224

_____
F. Clinton Broden

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ORDER

Having considered Defendant XXX XXX XXX's Motion to Suppress Fruits of the Search of 514 South Nueces Street, said motion is this _____ day of _____, 2005 GRANTED.

ORDERED, all items seized during the search of 514 South Nueces Street, Coleman, Texas conducted on or about December 30, 2004 are hereby suppressed.

_____
SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE