

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 04-20067-JWL

ION MINDRECI,

Defendant.

MEMORANDUM AND ORDER

On September 13, 2004, the court held a hearing, pursuant to *Franks v. Delaware*, on defendant's motion to suppress evidence based upon a claim that the affidavit submitted to obtain a search warrant either deliberately or in reckless disregard for the truth contained materially false information which rendered the affidavit devoid of probable cause. 438 U.S. 154 (1978). Having carefully reviewed the evidence presented and arguments made by the parties, the court is now prepared to rule on defendant's Motion to Suppress Evidence Pursuant to the Fourth Amendment to the United States Constitution (Doc. #29). The court denies defendant's motion to suppress.

BACKGROUND

Defendant is charged in a one count indictment. He is charged with knowingly and unlawfully shipping and transporting in interstate and foreign commerce, possessing in and affecting interstate and foreign commerce, and receiving firearms which had been shipped and transported in interstate and foreign commerce. The charges arise from a search warrant that

was executed by the Federal Bureau of Investigation (“FBI”) on May 12, 2004 on an apartment and detached garage, both of which were rented to defendant.

To obtain the search warrant, Special Agent David Cudmore, of the FBI, presented an Application and Affidavit for Search Warrant to United States Magistrate Judge David Waxse on May 12, 2004. This sworn affidavit was based in part on observations by defendant’s neighbor, Michelle Knight, that were relayed to Agent Cudmore in a telephonic interview on May 11, 2004.

On May 10, 2004, Ms. Knight observed police officers detain Michael Strain and defendant as the entered a burgundy Mazda. Ms. Knight also witnessed Mr. Stain’s subsequent arrest.

On May 11, 2004, Ms. Knight contacted the FBI’s Kansas City office regarding “suspicious activity” by defendant. In the sworn affidavit, Agent Cudmore submits that:

Approximately ten minutes [after Mr. Strain was arrested], the neighbor observed Mindreci exit his apartment carrying a shotgun and a cardboard box containing an unknown number of smaller black boxes. The neighbor observed Mindreci holding the shotgun to his waist with the barrel pointed upward. The neighbor further described the shotgun as being “long” and its barrel being partially covered with “an orange colored sheet.” The neighbor observed Mindreci, upon leaving his apartment, as “making haste” and “feverishly” carrying the shotgun and cardboard box to a nearby garage within the apartment complex which is marked with the number 203. The neighbor then observed Mindreci making two additional trips from his apartment to the aforesaid garage. The trips were also characterized, by the neighbor, as “hasty” and also involved Mindreci carrying cardboard boxes containing an unknown number of smaller black boxes. Such descriptions are consistent with either ammunition boxes and/or storage containers for handguns.

Defendant challenges the accuracy of Mr. Cudmore's sworn affidavit. He claims that Ms. Knight did not see a shotgun or boxes which looked like ammunition boxes, and therefore there was no basis for probable cause to execute the search.

DISCUSSION

"It is a violation of the Fourth Amendment for an affiant to knowingly and intentionally, or with reckless disregard for the truth, make a false statement in an affidavit. Where a false statement is made in an affidavit for a search warrant, the search warrant must be voided if the affidavit's remaining content is insufficient to establish probable cause." *United States v. Basham*, 268 F.3d 1199, 1204 (10th Cir. 2001)(citation omitted).

Here, defendant argues that there was not probable cause for the May 12, 2004 search warrant because Agent Cudmore's sworn affidavit contained information that was intentionally false or in reckless disregard for the truth.

If a defendant establishes by a preponderance of the evidence that false statements included in an affidavit supporting a search warrant were made knowingly or with reckless disregard for the truth, and that the false statement was necessary to the finding of probable cause, the evidence seized during the resultant search must be excluded to the same extent that exclusion is warranted when probable cause is lacking on the face of the affidavit. *See United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997) (citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)). There will be no violation "if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause." *Franks*, 438 U.S. at 171-72.

However, a misstatement in an affidavit that is merely the result of simple negligence or inadvertence, as opposed to reckless disregard for the truth, does not invalidate a warrant. *Id.* 438 U.S. at 171-72.

Here, defendant argues that there are several false material facts that were either intentionally or in reckless disregard for the truth offered to obtain the search warrant. Defendant asserts that Ms. Knight did not say that she saw defendant was carrying a shotgun; that the barrel of the shotgun was partially covered with an orange colored sheet; and that defendant carried a cardboard box containing an unknown number of smaller black boxes.

The court will first examine the statements in the sworn affidavit regarding the shotgun. At the September 13, 2004 *Franks* hearing, Ms. Knight testified regarding what she saw on May 10, 2004 and what she told Agent Cudmore on May 11, 2004. She stated that she never told officer Cudmore that she saw a shotgun, but instead that she saw an object that was covered and that the way it was being held and its shape lead her to believe it was a gun. Ms. Knight assumed that the object was a shotgun, but was not sure because she does not have extensive knowledge of firearms. She never saw the barrel of the gun since it was covered. Instead, she saw a long object covered in an orange “sheath,” not “sheet.” Ms. Knight also stated that she had a hard time describing what she had seen because she is not familiar with firearms, but she was unwavering in her belief that she had seen the defendant carrying what she believed was a gun.

Ms. Knight’s testimony differs from the information contained in Agent Cudmore’s sworn affidavit. Therefore, the court must determine if there is materially false information

and if so whether it was offered intentionally or in reckless disregard for the truth. The court does not find the information in the affidavit regarding the shotgun to be materially false, knowingly false or made with reckless disregard for the truth.

The court is unable to find any applicable precedent in the Tenth Circuit, however, in *United States v. Vasquez de la Paz*, the Sixth Circuit examined a similar case. 2004 WL 1532214 (6th Cir. June 24, 2004). There the preparer of the affidavit included conclusions based upon the underlying facts, but presented the conclusions in the affidavit without stating that they were conclusions. The court found that it would have been better for the affiant to have stated the primary facts so that no conclusions would have been stated in the affidavit, but that the use of reasonable conclusions did not render the affidavit fatally materially false, knowingly false or made with reckless disregard for the truth. *Id.* at *3-4.

Here, the court finds that Agent Cudmore included conclusions based upon Ms. Knight's statements, rather than only relaying Ms. Knight's statements in his sworn affidavit. At the September 13, 2004 hearing, Agent Cudmore testified that Ms. Knight told him that defendant was carrying a shotgun, like what you see on television. Also, she did not use technical terms to describe the weapon, instead using "long part," which based upon his experience Agent Cudmore understood Ms. Knight to mean the barrel. Agent Cudmore also testified that Ms. Knight was adamant that she had seen a weapon on May 10, 2004.

The court finds that while it would have been better for Agent Cudmore to have submitted the facts, as provided by Mr. Knight, to the magistrate judge, his failure to do is not a fatal mistake so that the warrant must be invalidated. Agent Cudmore's conclusions based

upon the statements by Ms. Knight were reasonable and the discrepancies that are present can be attributed to Ms. Knight's difficulty in describing what she saw. The court does not believe that Agent Cudmore intended to embellish upon the information provided by Ms. Knight, but instead that he used his experience as a law enforcement officer to clarify Ms. Knight's statements. As the Tenth Circuit has found, law enforcement officers can infer the contents of some containers based on their experience. *See United States v. Walsh*, 791 F.2d 811, 816-17 (10th Cir. 1986) (trained BATF agents had probable cause to believe a briefcase contained contraband); *see also U.S. v. Bonitz*, 826 F.2d 954, 956 (10th Cir. 1987) (finding "that some containers such as gun cases may, by their very nature, support an inference as to their content from their outward appearance").

The court also finds that the discrepancy concerning whether the gun was covered in a "sheath" or "sheet" was a result of simple negligence or inadvertence, and in any case defendant cannot claim that this discrepancy was intentionally false or in reckless disregard for the truth since his own investigator, Kelly Werkmeister, believed that Ms. Knight was referring to a sheet. If anything, this mistake may have been beneficial to the defendant because Mr. Knight's use of the word "sheath" could have been descriptive of a gun case, which would have further supported a finding of probable cause.

The court will now examine defendant's claim that the statement in the affidavit that defendant carried a cardboard box containing an unknown number of smaller black boxes was either intentionally false or in reckless disregard for the truth. The court finds that neither Ms. Knight's testimony, nor any inference Agent Cudmore could have drawn from the primary

facts, support such conclusion. Ms. Knight testified that she could not see inside the box. The court sees nothing in Ms. Knight's testimony, nor does the government argue that the primary facts support an inference being drawn that any specific object was in the cardboard box. Therefore, the court finds this offered information was either intentionally false or in reckless disregard for the truth, and the court will not use this information in its probable cause determination. Without the information about the small black boxes, however, the court finds that there remains probable cause based on Ms. Knight's statements about a gun. *See Franks*, 438 U.S. at 171-72 (holding that the court should strike the affidavit of false information provided intentionally or with reckless disregard for the truth, and then examine if the affidavit is sufficient to support a finding of probable cause).

For the reasons explained above, the court finds that there was probable cause to issue the May 12, 2004 search warrant.

IT IS THEREFORE ORDERED BY THE COURT that the defendant's Motion to Suppress Evidence Pursuant to the Fourth Amendment to the United States Constitution (Doc. #29) is denied.

IT IS SO ORDERED this 12th day of October, 2004.

s/ John W. Lungstrum _____

John W. Lungstrum

United States District Judge