State of Wisconsin: Circuit Court: Milwaukee County:

State of Wisconsin,

Plaintiff,

v. Case No. 2008CF000488

Walter Missouri

Defendant.

Notice of Motion and Motion to Supress Evidence (defective warrant)

Please take notice that on the __22nd____ day of ___April_____, 2008, at ___8:30 a.m._____, or as soon thereafter as counsel may be heard, the above-named defendant will appear before that branch of the Milwaukee County Circuit Court presided over by the Honorable Jeffrey Kremers, and will then and there move the court to suppress all evidence seized by the police as a result of the search of the residence at 3239 N. 12th St., Milwaukee; including the statement given by Missouri during the time is was in police custody and subject to interrogation, following the search of the residence.

As grounds, the undersigned shows to the court that the affidavit filed in support of the search warrant application failed to establish probable cause to believe that contraband would be found in the residence; moreover, by the time the warrant was executed the information in the affidavit was stale. Additionally, the warrant authorized a "no-knock" entry into the residence and there was no reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. The affidavit filed in support of the warrant application was so defective that the court commissioner who signed the warrant could not possibly have fairly evaluated the existence of probable cause. As

such, the good faith exception does not apply.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008:

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Memorandum in Support of Motion to Supress Evidence (defective warrant)

Introduction

On January 22, 2008 Milwaukee police applied for a warrant to search a residence located at 3239 N. 12th St. in Milwaukee. Although the affidavit filed in support of the warrant request was four and one-half pages in length the vast majority of the text is boilerplate language. In its only pertinent part the affidavit alleges:

> Informant states MISSOURI uses the weapon for protection from home invasion robberies at the location . . . (Affidavit p. 2)

> That affiant knows through personal involvement in this investigation and through information provided by a confidential informants [sic] direct observations that a subject by the name of; [sic] Walter T. MISSOURI, black male 11-24-1972 is reported to be in possession of a large caliber handgun in a residence he lives in and controls at the location 3239 N. 12th Street, in the City of Milwaukee, County of Milwaukee, State of Wisconsin. The affiant was informed by a reliable confidential informant, who wishes to remain anonymous, due to its intimate knowledge about MISSOURI, that within the last seven (7) days, the confidential informant has observed the handgun in MISSOURI [sic] possession while delivering Marijuana [sic] packaged for sale in "corner cut" quantities in the residence. The informant knew the Marijuana was Marijuana because it has packaged and used Marijuana for sale in the past. The confidential informant states that it is familiar with

> weapons . . .

(Affidavit p. 2).

The application also requested that the search be without announcement (i.e. a "no knock" warrant). On that point, the affidavit alleged:

> That affiant knows that the presence of firearms in the residence presents a significant risk to the safety of the officers executing the search warrant, that it is common for more than one firearm to be located in a residence and that the information presented in this affidavit forms the basis to request a no-knock warrant. Specifically, affiiant states that the informant has seen MISSOURI armed with the handgun during drug use and transactions.

(Affidavit p. 4)

Based on the affidavit Court Commissioner Barry Phillips signed a warrant permitting a "no knock" search of the residence at 3239 N. 12th St. The warrant was signed on January 22, 2008.

The police did not execute the warrant until three days later on January 25, 2008. During a search of the residence police located at pistol. Missouri, who was present in the home during the search, was arrested and taken to the police department. There he was interrogated and made statement concerning his knowledge of the pistol's presence in the home.

Argument

I. The affidavit failed to state probable cause to believe that contraband would be found within the residence.

The affidavit filed in support of the warrant application is defective because it sets forth only the informant's legal conclusion that Missouri was "in possession" of the firearm. The affidavit recites no underlying facts or circumstances to support the conclusion that Missouri had possession of the firearm. As such, the magistrate had no basis upon which the evaluate the credibility nor the plausibility of the informant's conclusion that Missouri was in possession of the firearm.

In, *State v. Ward*, 2000 WI 3 (Wis. 2000) the Supreme Court explained:

> Whether there is probable cause to believe that evidence is located in a particular place is determined by examining the "totality of the circumstances." *DeSmidt*, 155 Wis. 2d at 131 (quoting *Gates,* 462 U.S. at 238). ..... a probable cause determination must be based upon what a reasonable magistrate can infer from the information presented by the police. "'The issuing magistrate ordinarily considers only the facts set forth in supporting affidavits accompanying the warrant application.'" *United States v. Khounsavanh*, 113 F.3d 279, 283 n.1 (1st Cir. 1997) (quoting *United States v. Zayas-Diaz*, 95 F.3d 105, 111 (1st Cir. 1996)). We therefore consider only the facts presented to the magistrate. A magistrate issuing a warrant must be neutral and independent and must act in a neutral and a detached manner. *State ex rel. Pflanz v. County Court*, 36 Wis. 2d 550, 560, 153 N.W.2d 559 (1967) (citations omitted). The subjective experiences of the magistrate are not part of the probable cause determination.
>
> Therefore, we must consider whether objectively viewed, the record before the warrant-issuing judge provided "'sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched.'" *State v. Kerr,* 181 Wis. 2d 372, 378, 511 N.W.2d 586 (1994) (quoting *State v. Starke*, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978)).

The sum and substance of the affidavit here is that a confidential informant ("CI") told a police detective (who is the affiant) that the CI had seen Walter Missouri "in possession" of a firearm in the residence within seven days of the warrant application. The CI says he made his observations during the course of some small marijuana transaction. The phrasing of the affidavit makes it impossible to determine whether it was Missouri who was delivering the marijuana or whether it was the CI who was delivering the marijuana. In any event, there are no further facts or circumstances alleged in the affidavit to substantiate the conclusion that Missouri was "in possession" of the firearm.

"In possession" is a *legal* conclusion- it is not a fact nor is it an underlying circumstance. Wis. JI-Criminal defines possession as follows:

> **1920 POSSESSION**

> "Possession" means that the defendant knowingly had actual physical control of the item.
>
> An item is also in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.
>
> It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.
>
> Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.

There are many facts and circumstances that go into the consideration of whether a person is "in possession" of any certain item. For example, did the CI see the pistol in Missouri's hand? Was it in the waistband of his pants? Was it placed beneath a chair? Did the CI I see it on a shelf in the room where the transaction took place? Was the pistol on the floor of a closet? If the pistol was not in Missouri's hand or in has pants what reason did the CI have to believe that Missouri knew that the weapon was present?

The facts and circumstances are essential if the magistrate is to perform his or her detached function and not to serve merely as a rubber stamp for the police. *State v. Starke*, 81 Wis.2d 399, 410, 260 N.W.2d 739, 745 (1978) (citing *United States v. Ventresca*, 380 U.S. 102, 108-09 (1965)). Where only the CI's conclusion is set forth it is the CI- and not the magistrate- who is drawing the legal conclusion concerning possession. The magistrate, then, has no factual basis upon which to evaluate the credibility and the plausibility of the CI's conclusion that Missouri was "in possession" of a firearm.

II. Authorization of a "no-knock" search was unreasonable

Additionally, the "no-knock" authorization was totally unreasonable. In the affidavit the detective merely alleged that the presence of firearms in the home presents a significant danger to officers executing the warrant. This is most certainly true. What the affidavit fails to explain, though, is why a no-knock entry is less dangerous than a "knock and announce" entry. Common sense dictates that a knock-and-announce entry

would be far less dangerous because under those circumstances the occupants are much less likely to mistake the police officers for armed robbers conducting a home invasion.

> One requirement of a reasonable search is that police officers executing a search warrant follow the rule of announcement. *State v. Ward*, 2000 WI 3, P40, 231 Wis. 2d 723, 604 N.W.2d 517 (citing *Wilson v. Arkansas*, 514 U.S. 927, 131 L. Ed. 2d 976, 115 S. Ct. 1914 (1995)). n6 The rule of announcement "'requires the police to do three things before forcibly entering a home to execute a search warrant: 1) announce their identity; 2) announce their purpose; and 3) wait for either the occupants to refuse their admittance or . . . allow the occupants time to open the door.'" *State v. Meyer,* 216 Wis. 2d 729, 734 n.4, 576 N.W.2d 260 (1998) (quoting *State v. Stevens*, 181 Wis. 2d 410, 423, 511 N.W.2d 591 (1994)). The rule of announcement fulfills three purposes: "1) protecting the safety of police officers and others; 2) protecting the limited privacy interests of the occupants of the premises to be searched; and 3) preventing the physical destruction of property." Meyer, 216 Wis. 2d at 734 n.4 (citing State v. Williams, 168 Wis. 2d 970, 981-82, 485 N.W.2d 42 (1992), overruled on other grounds, Stevens, 181 Wis. 2d at 430).
>
> The rule of announcement is not inflexible. *Richards v. Wisconsin,* 520 U.S. at 387. The police may dispense with the rule to serve countervailing law enforcement interests. Id. (citing *Wilson*, 514 U.S. at 934). In order to dispense with the rule of announcement, "the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin,* 520 U.S. at 394; see also Meyer, 216 Wis. 2d at 755.

State v. Eason, 2001 WI 98, P17-P18 (Wis. 2001)

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the

> crime by, for example, allowing the destruction of evidence. This standard--as opposed to a probable cause requirement--strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.

Richards v. Wis., 520 U.S. 385, 394 (U.S. 1997)

The sole purpose for the no-knock request, according to the affidavit, is that, "the presence of firearms in the residence presents a significant risk to the safety of the officers executing the search warrant." This is undoubtedly true. What the magistrate is left wondering, though, is why a "no-knock" entry would be less dangerous than a "knock-and-announce" entry. The affidavit provides us with no explanation.

Such an explanation is essential because common sense dictates that where the police are planning to search a residence for firearms that a "knock and announce" entry would be far less dangerous to both the occupants of the home and to the officers than would be a "no knock" entry. The affidavit itself alleges that Missouri kept the firearm as protection again armed robbers. Most armed robberies of drug houses are home invasion robberies. Thus, a no-knock entry by the police could very easily be mistaken by the occupants of the house as a home invasion robbery. This creates the risk of a flurry of gunfire before the occupants even realize that the people entering the residence are the police.

On the other hand, if the police knock on the door and inform the occupants that it is the police, that they have a search warrant, and that the house is surrounded by the tactical squad only a completely unbalanced imbecile would attempt to shoot his way out of such a situation.

This explanation, though, could be wrong. It is based only on the author's educated guess as to what might happen during the execution of a search warrant. There might be some reason, known only to the police, why it is actually safer for the officers to use a no-knock entry.

The problem, of course, is that the affidavit utterly fails to enlighten the reader. A magistrate reading the affidavit is left to speculate that there might, in fact, be such a

reason somewhere but we have no idea what the reason might be. In other words, the magistrate has to take the police officer's word for it because there are no facts or circumstances alleged that would permit the magistrate to evaluate the reasonableness of a no-knock entry. Under these circumstances a magistrate can be nothing more than a bobble-head with a rubber stamp if he or she approves of a no-knock entry.

Here, the magistrate totally abdicated his responsibility to act as a detached and neutral manner evaluator of the reasonableness of the request for a no-knock entry..

III. The good faith exception does not apply.

> Accordingly, we adopt a good faith exception to the exclusionary rule. We hold that where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies. We further hold that in order for a good faith exception to apply, the burden is upon the State to show that the process used in obtaining the search warrant included a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney. We also hold that this process is required by Article I, Section 11 of the Wisconsin Constitution, in addition to those protections afforded by the good faith exception as recognized by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984).

State v. Eason, 2001 WI 98, P74 (Wis. 2001).

The good-faith exception does not save the day for the state for two reasons: (1) The affidavit does not demonstrate that it was the culmination of a "significant" investigation; (2) Even someone who is not a legal scholar can see that the affidavit contains no facts or circumstances but, rather, mere legal conclusions that cannot be evaluated; and, (3) As such, by signing the warrant the court commissioner was not acting as a neutral and detached magistrate.

A reading of the affidavit leaves one with the impression that it was based on

nothing more than a tip from an informant. It may have been nothing more than a telephone call from the informant. The police made no effort to corroborate any of the conclusions drawn by the CI. There is no way that this affidavit demonstrates that it is the culmination of a good faith police investigation into Walter Missouri.

Secondly, one wonders whether the court commissioner actually read the affidavit. There are literally no facts or circumstances alleged that would permit the magistrate to evaluate the conclusion drawn by the informant that Missouri was "in possession" of a firearm. The magistrate cannot find probable cause just because the informant says there is probable cause.

As such, the magistrate in this case abdicated his function as a neutral and detatched magistrate. The commission could not have independently evaluated the veracity of the informant and the plausibility of the informant's story because there are no facts alleged that would permit such an evaluation.

Conclusion

For these reasons the court should find that the affidavit failed to establish probable cause to search the residence; that the affidavit failed to set for a reasonable basis to authorize a no-knock entry; and that the good faith exception does not apply because the affidavit is so defective that the court commissioner could not have discharged his function to fairly evaluate the circumstances.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008:

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