

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 16-10280-MLW
DAVID MAGLIO,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

MOTION HEARING
EXCERPT

RULING

October 2, 2018
2:41 p.m.

John J. Moakley United States Courthouse
Courtroom No. 10
One Courthouse Way
Boston, Massachusetts 02210

Kelly Mortellite, RMR, CRR
Official Court Reporter
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1 PROCEEDINGS

2 (Resumed, 12:31 p.m.)

3 THE COURT: As I've been immersed in this and know how
4 I'm going to decide the motions for a Franks hearing and to
5 suppress, I will issue this decision orally. The transcript
6 will be the record of the decision. It's possible I'll convert
7 it into a more formal memorandum and order.

8 For the reasons I'll explain in detail, the
9 defendant's motion for a Franks hearing and a motion to
10 suppress are hereby each denied. Therefore, the evidence
11 obtained in the search of his home pursuant to a warrant issued
12 by the Hingham District Court on March 10, 2016 will be
13 admissible. The issue of suppression, of course, arises out of
14 the application and affidavit in support of the application for
15 a search warrant. That's docket number 80-1 in this case.

16 First, it's axiomatic that federal law applies to the
17 admission of evidence in Federal Court. The First Circuit said
18 this in Sutherland, 929 F. 2d 765 at 770, in 1991. It
19 reiterated it in Charles, 213 F. 3d 10 at 19. And as the First
12:32 20 Circuit said in Charles, federal law applies regarding the
21 admissibility of evidence even when the evidence is obtained
22 pursuant to a state search warrant or in the course of a state
23 investigation.

24 The defendant seeks an exception to this rule under
25 the so-called "silver platter exception." As the First Circuit

1 said in Sutherland at 770, silver platter exception, the theory
2 that "in an extreme case of flagrant abuse of the law by state
3 officials, where federal officials seek to capitalize on that
4 abuse, the Federal Court might choose to exercise its
5 supervisory powers by excluding ill-gotten evidence."

6 Although the First Circuit said in Sutherland, "We
7 write here to clarify that, in this circuit, there is no such
8 exception," it did nevertheless seem to leave open the
9 possibility that if there were an extreme case of flagrant
10:34 10 abuse of the law by state officials where federal officials
11 seek to capitalize on that abuse, this court might choose to
12 exercise its supervisory powers by excluding ill-gotten
13 evidence. No case has ever done so in the First Circuit or as
14 far as I can discern anywhere.

15 However, even assuming, without finding, that the
16 exception or the supervisory power exists, this, for reasons
17 I'll explain, would not be the proper case to apply the
18 exception or exercise its supervisory power. I find that this
19 is not a case in which federal officials seek to capitalize on
12:36 20 abuse to obtain the admission of evidence in Federal Court that
21 wouldn't be admissible in state court. In Commonwealth v.
22 Long, 911 N.E. 2d 174 at 183, the Supreme Judicial Court said
23 that in deciding a motion to suppress under state law, the
24 judge ordinarily need not be concerned with the Franks
25 requirements but should, pursuant to the statute, conduct a de

1 novo review of the affidavit and omitted evidence, or I would
2 say false evidence, to determine whether there was probable
3 cause to authorize a wiretap. Essentially this focuses on the
4 second prong of the Franks test, as I'll describe it
5 momentarily. And if there is -- if a corrected affidavit
6 contains sufficient evidence to establish probable cause, I
7 don't believe the state court would suppress.

8 We are, however, in Federal Court. The standards
9 applying to a motion for a Franks hearing and for suppression
10 were succinctly summarized by the First Circuit in Gifford, 727
11 F. 3d 92 at 98. There the court wrote, "Information supporting
12 probable cause for a warrant is often set forth in an affidavit
13 provided by a law enforcement officer . . . An affidavit
14 supporting a search warrant is presumptively valid. But if a
15 defendant makes a substantial preliminary showing that a false
16 statement," here it says "with reckless disregard for the
17 truth" but also a false statement was intentionally made and
18 "included by the affiant in the warrant affidavit, and if the
19 allegedly false statement is necessary for the finding of
12:38 20 probable cause, the Fourth Amendment requires that a hearing be
21 held at the defendant's request."

22 As I'll explain, or as I'm finding, the second prong
23 of this requirement for getting an evidentiary hearing has not
24 been made. There hasn't been a substantial preliminary showing
25 of materiality.

1 The First Circuit in Gifford went on to explain that,
2 "For a warrant to be voided and the fruits of a search
3 excluded, the defendant must: one, show that the affiant in
4 fact made a false statement or omission knowingly and
5 intentionally or with reckless disregard for the truth; two,
6 make this showing by a preponderance of the evidence, and
7 three, show that the recklessly omitted information added to
8 the affidavit," or I would say with the false information
9 corrected in the affidavit.

12:39 10 The reformed affidavit fails to establish probable
11 cause. An allegation is made with reckless disregard for the
12 truth if the affiant in fact entertained serious doubts as to
13 the truth of the allegations or where circumstances evinced
14 obvious reasons to doubt the veracity of the allegations in the
15 application.

16 In Gifford, the First Circuit also discussed cases in
17 which it's necessary to evaluate the reliability of information
18 given by a confidential informant. These considerations would
19 also apply to a degree with regard to cooperating witnesses who
12:40 20 are not seeking confidentiality of their identity. The First
21 Circuit wrote, "Where the primary basis for a probable cause
22 determination is information provided by a confidential
23 informant, the affidavit must provide some information from
24 which a magistrate can credit the informant's credibility . . .
25 A probable cause finding may be based on an informant's tips so

1 long as the probability of a lying or inaccurate informer has
2 been" -- I'm sorry -- "so long as the probability of a lying or
3 inaccurate informer has been sufficiently reduced. We apply a
4 'non-exhaustive list of factors' to examine the affidavit's
5 probable cause showing, which include, among others: one,
6 whether the affidavit establishes the probable voracity and
7 basis of knowledge of persons supplying hearsay information;
8 two, whether an informant's statements reflect first-hand
9 knowledge; three, whether some or all of the informant's
10 factual statements were corroborated wherever reasonable or
11 practicable, e.g., through police surveillance; and four,
12 whether a law enforcement affiant assessed, from his
13 professional standpoint experience and expertise, the probable
14 significance of the informant's provided information."

15 The First Circuit also addressed the issue of
16 assessing the reliability of an informant or cooperating
17 witness in Tanguay, 787 F. 3d 44 at 50. It says that, "Even a
18 prior conviction for a crime of dishonesty is not always
19 dispositive of a witness's reliability." There can be
12:42 20 countervailing indicia of truthfulness. For example, an
21 informant's trustworthiness may be enhanced in a number of
22 ways, including by his willingness to reveal his identity, the
23 level of detail in his account, the basis of his knowledge, and
24 the extent to which his statements are against interest.

25 In this case, as I said, the affidavit in support of

1 the search warrant is docket number 80-1, beginning at page 4.
2 On page 5, the affiant, Hull police officer Craig J. Lepro,
3 stated his experience in conducting a marijuana investigation
4 and says, among other things, "I have worked alongside Local,
5 State and Federal Law Enforcement. Two such properties I have
6 investigated as indoor marijuana grows are currently under
7 civil forfeiture with the United States Department of Justice."
8 This is some of the evidence of his own experience and
9 expertise in making an assessment of the relevant information.

12:44 10 On page 8 of 17, Lepro made a statement which the
11 government acknowledges, I believe, is false. He wrote in
12 discussing the cooperating witness, Albuquerque, that based
13 on -- well, the detectives executed a search warrant resulting
14 in the discovery of a THC extraction lab, a lab that extracts
15 from marijuana which demonstrates the Boston Police were able
16 to corroborate information supplied by Albuquerque and the
17 seizure of the illegal lab.

18 "Albuquerque," Lepro wrote, "has provided reliable
19 information to law enforcement resulting in . . . discovery of
12:45 20 a THC lab and the prosecution of the offenders." That I find
21 is not true. Rather Albuquerque lived at 130 Grove Street in
22 West Roxbury. He was involved in a fight. The police came and
23 saw a THC extraction lab in plain view. They, as a result of
24 that information, got their search warrant. However, I note
25 that if the accurate information about Albuquerque was

1 included, it would have said that he lived at a location with a
2 THC extraction lab, it can be inferred that it was his lab at
3 least in part and that he had a reason to want to acquire
4 marijuana, which in this case, also in paragraph E, he claimed
5 he had obtained about 13 pounds with which he was caught from
6 the defendant Mr. Maglio.

7 On page 12 of 17, there is another inaccurate
8 statement. It says Maglio does not have a medical marijuana
9 registration. In a police report from Rutland, Massachusetts
10:47 10 that was available to Lepro, Mr. Maglio's mother said she
11 thought he did have a registration. If the record check had
12 been run properly, it would have shown he did have a marijuana
13 registration. However, I believe it's stipulated that the
14 marijuana registration permitted only the cultivation of 10
15 ounces for personal use. But I find that this misstatement
16 about Albuquerque providing information that led to the
17 discovery of the THC extraction lab in West Roxbury was
18 knowingly false or, at a minimum, in reckless disregard of the
19 truth. I find that the statement about Mr. Maglio not having a
12:48 20 medical marijuana license was false and, I assume for present
21 purposes, in reckless disregard for the truth.

22 However, these incorrect statements and any other
23 omissions were not material to whether probable cause exists.
24 Rather probable cause exists or would have existed even if the
25 inaccurate statements had been corrected. In Strother, 318 F.

1 3d 64 at 67, the First Circuit wrote, "In determining the
2 sufficiency of an affidavit supporting a search warrant, we
3 consider whether the 'totality of the circumstances' stated in
4 the affidavit demonstrates probable cause to search the
5 premises . . . we examine the affidavit 'in a practical
6 commonsense fashion and afford considerable deference to
7 reasonable inferences the issuing judicial officer may have
8 drawn from the attested facts.' Among the factors that may
9 contribute to a probable cause determination are: whether an
10 affidavit supports the probable veracity or basis of knowledge
11 of the person supplying hearsay information; whether informant
12 statements are self-authenticating; whether some or all of the
13 informant's factual statements were corroborated wherever
14 reasonable and practicable e.g., through police surveillance;
15 and whether a law enforcement affiant included a professional
16 assessment of the probable significance of the facts related by
17 the informant based on experience or expertise," something that
18 Lepro did in his affidavit.

19 With regard to probable cause, the First Circuit wrote
12:49 20 in Dixon, 787 F. 3d 55 at 59, "A warrant application must
21 demonstrate probable cause to believe that, one, a crime has
22 been committed -- the 'commission' element; and two, enumerated
23 evidence of the offense will be found at this place searched --
24 the so-called 'nexus' element. Whereas in Dixon "the basis for
25 the magistrate's probable cause finding was information from an

1 unnamed informant, the affidavit must provide some information
2 from which the magistrate can assess the informant's
3 credibility. Our inquiry is a 'practical, common-sense
4 one . . . that takes into account the totality of the
5 circumstances. The facts presented to the magistrate need only
6 warrant demand of reasonable caution to find that evidence of a
7 crime will be found. Probable cause does not require either
8 certainty or an unusually high degree assurance . . . rather
9 probability is the touchstone."

12:51 10 In this case, the affidavit established probable cause
11 to believe that marijuana in excess of the amount authorized by
12 a marijuana registration would be found at the place to be
13 searched, 83 Main Street in Hull, and that guns would be found
14 there as well.

15 On page 5 of 17 of docket number 80-1, as I said
16 earlier, Officer Lepro described his considerable experience in
17 investigating indoor marijuana grows and that his work had
18 contributed to two cases of civil forfeiture then impending, he
19 said, in the Department of Justice.

12:53 20 Page 7 of 17 of the affidavit explains that
21 Albuquerque was committed to the Essex Correctional Center
22 after being arrested by Danvers, Massachusetts police for
23 possessing over 10 pounds of cultivated marijuana. He offered
24 to provide information on a large-scale marijuana grow in Hull.
25 He said that the marijuana he was caught with belonged to David

1 Maglio, the defendant in this case, of 83 Main Street, Hull.

2 Albuquerque described a large-scale marijuana grow
3 located in Maglio's basement. He described an indoor marijuana
4 grow, which has a street value worth tens of thousands of
5 dollars. Albuquerque also described at least five firearms at
6 Maglio's residence in Hull, and at least one of them was a
7 TEC-9 or similar model. He observed the firearms, he said, in
8 the basement of 83 Main Street within a week of his arrest in
9 mid-January or about two months before the affidavit. He said
10:55 10 Maglio had five firearms hidden in a duffle bag in his basement
11 at 83 Main Street Hull.

12 Maglio -- I'm sorry -- Albuquerque, the investigation
13 showed, had correctly identified Maglio's address. As I said
14 earlier, the affidavit is incorrect in stating that Maglio did
15 not have a license to cultivate marijuana for personal use,
16 which I think the parties agree permits cultivation of up to 10
17 ounces of marijuana every six months. However, importantly, in
18 Canning, 28 N.E. 3d 1156 at 1165, the Supreme Judicial Court
19 said that having a license to cultivate marijuana for personal
12:56 20 use is not the end of the probable cause inquiry. More
21 specifically, the court said in footnote 15, "This is not to
22 say that such an affidavit must always contain facts directly
23 establishing that the person whose property the police seek to
24 search for evidence of unlawful marijuana cultivation is or is
25 probably not registered to do so; reasonable inferences may be

1 drawn that a suspected marijuana cultivation is unlawful from
2 other facts. For example, except for a registered medical
3 marijuana treatment center, it remains unlawful to cultivate
4 marijuana for sale. Facts indicating that a confidential
5 informant recently purchased marijuana from the owner of the
6 property where the cultivation operation is suspected to be
7 taking place would likely supply the requisite probable cause
8 to search that property for evidence of unlawful cultivation."

9 In this case Albuquerque didn't say he bought the more
10 than 10 pounds of marijuana from Maglio, but he did claim that
11 it belonged to Maglio, and more than 10 pounds is substantially
12 more than the amount authorized by a medical marijuana license
13 and is such a large amount that it would reasonably suggest
14 that it was being possessed for distribution rather than for
15 personal use.

16 In Richardson, 94 N.E. 3d 819 at 827, the Supreme
17 Judicial Court, citing Canning, said, "A search warrant
18 affidavit that merely sets out facts establishing probable
19 cause to believe a homeowner is growing marijuana on the
12:58 20 property to be searched, without more, does not establish
21 probable cause to believe a crime has been committed," meaning
22 under Massachusetts law. It went on to write, however, "Where
23 the target of the warrant has a valid hardship cultivation
24 registration, facts indicating that the person is selling the
25 marijuana or that 'in the opinion of a properly qualified

1 affiant, the number of plants exceeded the quantity necessary
2 to grow a sixty-day supply of ten ounces' can supply probable
3 cause." Albuquerque provided evidence indicating that Maglio
4 was selling marijuana, and Lepro did draw on his experience not
5 to -- in opining that probable cause for the items to be
6 searched for existed.

7 As indicated earlier, Albuquerque said, according to
8 the affidavit, that he saw five firearms in Mr. Maglio's
9 basement about two months before in a duffle bag. The fact
01:01 10 that it was two months before in the circumstances of this case
11 does not mean that that information was too stale to be
12 considered. As the First Circuit wrote in Ponzo, 853 F. 3d 558
13 at 573, Rejecting a claim of staleness, "firearms, unlike
14 drugs, are durable goods useful to their owners for long
15 periods of time." And then it cites cases holding that
16 six-month-old information about a firearm was not stale and
17 several months was not stale.

18 In this case, Albuquerque said that there was a large
19 marijuana grow and guns. There is a properly recognized
01:02 20 association between guns and drugs. Drug dealers often have
21 guns to protect themselves from being robbed or for other
22 purposes relating to their drug distribution, and so the
23 fact or the information concerning the large marijuana grow
24 made it somewhat more likely that guns would indeed be there.

25 In paragraph F of the affidavit of page 9 of docket

1 80-1, there is recitation of much but, as I understand it, not
2 all of Albuquerque's own criminal record. Many of the offenses
3 with which he was charged and in some cases convicted, are drug
4 offenses. One of the cases in which he was convicted was a
5 federal -- well, he was at least charged. I guess it's not
6 clear if he was convicted -- after being indicted in 2000 of
7 being in a conspiracy involving 5 kilograms of cocaine, 5 or
8 more kilograms of cocaine. But in any event, Albuquerque's
9 long record of being at least charged in drug cases shows,
01:04 10 indicates that he was knowledgeable about drug dealing. And
11 while it might raise on one hand questions about his veracity,
12 on the other hand, it made it quite credible that he operated
13 and worked with other people selling drugs.

14 In addition, on page 11 of 17, the affidavit explains
15 that after an automobile accident involving a vehicle owned by
16 Mr. Maglio's wife or partner who also resided at 83 Main
17 Street, an accident where the vehicle was being driven by a man
18 who lived at 130 Grove Street, the location of a THC extraction
19 lab, Mr. Maglio would not allow the police on his property to
01:05 20 view the car, his property at 83 Main Street in Hull. This was
21 suspicious. The affidavit, although it didn't highlight it,
22 also indicated that Albuquerque lived at 130 Main Street, the
23 location of the -- I'm sorry -- 130 Grove Street, the location
24 of the lab.

25 As I said earlier, on page 12 it was incorrect, false

1 to say that Mr. Maglio didn't have a medical marijuana
2 registration. Evidently Lepro tried to use the system to
3 determine if he had one and repeatedly did it incorrectly.

4 On page 12 also there's discussion of Mr. Maglio's
5 vast criminal record. It includes many charges for drug
6 distribution, including an open case in Rutland, Massachusetts
7 where the police report states that police seized a total of 59
8 marijuana plants, power supply inverter, and high intensity
9 lights from Mr. Maglio's residence. This again tends to show,
01:07 10 contribute to probable cause that Maglio was again growing
11 marijuana plants this time in Hull rather than in Rutland.

12 In addition, the same paragraph reports that in 2004,
13 Mr. Maglio was found guilty of possession of a firearm and
14 ammunition and sentenced to three to three and a half years in
15 state prison. Again, this is information contributing to
16 probable cause that he possessed a firearm.

17 There are also many factors in the affidavit that
18 support Albuquerque's reliability. He revealed his
19 identification. He didn't seek to be only a confidential
01:08 20 informant. He provided detailed information. He had personal
21 knowledge of the matters he was discussing, and his statements
22 were against his own self-interest. He was providing evidence
23 that could lead to his conviction for conspiracy with intent to
24 distribute marijuana, among other things.

25 In addition, Lepro and his colleagues did other things

1 to corroborate, to test and ultimately corroborate the
2 information that Albuquerque had given the Hull Police,
3 corroborated Albuquerque's statements by confirming Maglio's
4 address was as Albuquerque had said, noting a strong smell of
5 marijuana from a considerable distance outside of Maglio's home
6 and collecting electricity bills showing abnormally high usage
7 in Maglio's home.

8 So because the false or inaccurate statements were not
9 material, and there's been no substantial showing they were,
01:10 10 there's no process under Franks for an evidentiary hearing or
11 motion to suppress. If this case was prosecuted in state court
12 under the standard in Long, the evidence would also not be
13 suppressed because probable cause exists.

14 And this court doesn't condone, let alone commend, the
15 false or inaccurate information in the affidavit. But this is
16 not a case where the federal system has been used to get an
17 unfair advantage of conviction potentially in Federal Court
18 that couldn't be obtained in state court. It appears to me
19 that Mr. Maglio is in Federal Court because of his long record
01:11 20 and because of the guns. This is not a flagrant case that
21 would justify the unprecedented suppression of evidence as an
22 exercise of supervisory powers if that authority exists.

23 So for those reasons, the motion for a Franks hearing
24 and to dismiss are denied. It's now 1:15. We'll resume at
25 about 2:30. I have something I have -- I'm meeting with a

1 colleague before then. I'll hear your argument with regard to
2 detention and the situation with regard to Mr. Maglio's
3 detention at Plymouth.

4 MR. LEPORE: Just so you have it for your schedule,
5 we're going to be withdrawing the motion for a District Court
6 review of the detention order.

7 THE COURT: Okay. And I will say just for the record
8 that doesn't suggest you're ineffective by any means. You've
9 been zealous. You've engaged my attention. You've really done
01:12 10 a good job. But given the fact that this evidence is
11 admissible and, among other things, the case for detention is
12 strengthened, I would have listened with an open mind, but it's
13 very likely -- well, I'd be very surprised if I didn't order
14 his continued detention.

15 Well, what I'll do is I'll have -- come back at 2:30,
16 but we'll have the marshal come up as well. You still haven't
17 been able to resolve this issue of him seeing his wife,
18 correct?

19 MR. LEPORE: We have not.

01:13 20 THE COURT: All right. I believe Kevin Neal, the
21 marshal, is available. We'll resume at 2:30. We'll address
22 that issue. And we have a trial date, but I may build in some
23 interim --

24 MR. LEPORE: I would expect to ask the court to
25 schedule a Rule 11 hearing as well.

1 THE COURT: All right. But here, come back at 2:30
2 because I have one of my colleagues waiting for me. Okay?

3 MR. POHL: Judge, just so you know, I'll be before
4 Judge Saylor then, but Mr. Perez-Daple will be here.

5 THE COURT: He's doing fine.

6 MR. POHL: He certainly is. Thank you, Your Honor.

7 (Recess taken 1:13 p.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 10th day of October, 2018.

/s/ Kelly Mortellite

Kelly Mortellite, RMR, CRR

Official Court Reporter

10:33