

COMMONWEALTH OF MASSACHUSETTS

Filed
09/28/18

PLYMOUTH, SS

HINGHAM DISTRICT COURT
1658 CR 000366

COMMONWEALTH

V.

ERIKA ZERKEL

**FINDINGS, MEMORANDUM, AND ORDER ON DEFENDANT'S MOTIONS TO CONDUCT A
FRANKS HEARING AND TO SUPPRESS SEARCH WARRANT**

The defendant, Erika Zerkel, is charged with conspiracy to violate drug laws and distribution of a Class D Drug [marijuana]. The charges resulted from evidence collected in her home at 83 Main Street, Hull following the execution of a search warrant that was directed to her husband, David Maglio.

The defendant now moves to suppress the search warrant, asserting that it was issued without the requisite probable cause. In the alternative, the defendant moves for a so-called *Franks* hearing so she can challenge the accuracy and truthfulness of the information provided by the affiant, Hull Police Detective Craig Lepro.

Because the outcome of the motion for a *Franks* hearing will dictate the Court's action on the ancillary motion to suppress, the motion for a *Franks* hearing must necessarily be decided first.

The Defendant's Motion for a *Franks* Hearing

A *Franks* hearing challenges the truthfulness of factual statements made in the affidavit supporting an application for a search warrant. In order to qualify for a so-called *Franks* hearing under the Fourth and Fourteenth Amendments, the defendant must meet two criteria.

First, the defendant must make a substantial preliminary showing that the affiant knowingly or intentionally made a false statement or, at the very least, that the statement was made with "reckless disregard for the truth." Franks v. Delaware, 438 U.S. 154, 155-156 (1978).

The defendant's challenge must be more than conclusory. The defendant's offer of proof, which must include affidavits or sworn or otherwise reliable statements of witnesses, must point out, with specificity, the factual statements that are alleged to be false. Id.

Second, the defendant must also convince the court that the allegedly false [or recklessly made] factual statement(s) was necessary for a probable cause finding. Id.

Therefore, even if the defendant satisfies the first criterion, he is only entitled to a hearing if, after casting aside the false factual statement(s), the remaining factual statements set forth in the affidavit are insufficient to establish probable cause.

Here, the defendant challenges the accuracy and truthfulness of Detective Lepro's factual statements in the affidavit regarding Vinicio Albuquerque's reliability. The defendant contends that "Lepro made false statements and omitted significant facts concerning the basis for Albuquerque's reliability that were either known, or should have been known to Lepro." Specifically, the defendant points to Detective Lepro's statement that Albuquerque provided reliable information to law enforcement that resulted in the discovery of the THC lab at 130 Grove Street, West Roxbury, when, in fact, the police responded to a report of a fight, observed a THC extraction lab in plain view, and discovered the THC lab after obtaining a search warrant.

The Court agrees that Detective Lepro's statement on page 5 of his affidavit that "Albuquerque has provided reliable information to law enforcement resulting in [the] discovery of a THC lab and the prosecution of the offenders" appears to be false or at least made with reckless disregard its truth when considered against the backdrop of the information contained in the Danvers Police Department Incident Report and Detective William Samaras' Application for Search Warrant. To be sure, this statement could be read to suggest that Vinicio Albuquerque provided police with a tip that led to the discovery of a THC lab at the West Roxbury address, so as to establish his reliability. The Samaras Affidavit, however, clearly indicates that the Boston Police, when investigating a reported disturbance at 130 Grove Street, West Roxbury, observed indicia of a THC grow operation in plain view and confirmed its existence after obtaining a search warrant.

While the defendant has made a substantial preliminary showing that Detective Lepro's affidavit mischaracterized Vinicio Albuquerque's role in the discovery of the THC grow operation at 130 Grove Street, West Roxbury, arguably to establish his reliability, the Court finds that the defendant has failed to meet the second criterion for a *Franks* hearing. After a careful review of Detective Lepro's entire affidavit, the Court finds that the remaining factual statements were more than sufficient to establish probable cause for the search warrant for 83 Main Street in Hull.

When evaluating an application for a search warrant based on an informant's tip, the Court must apply the Aguilar-Spinelli test to evaluate the informant's basis of knowledge and reliability. Massachusetts decisional law draws a distinction between anonymous informants and named and identified persons. Where, as here, the informant is identifiable, the strict requirements of reliability that typically govern the analysis of an anonymous informant are relaxed. Com. v. Love, 56 Mass. App. Ct. 229, 232 (2002). Therefore, the court is left with an assessment of Albuquerque's basis of knowledge, together with any independent police corroboration that may compensate for deficiencies in one or both of these factors. Id. citing Com. v. Lyons, 409 Mass. 16, 19 (1990).

To the extent there is a deficiency with respect to Albuquerque's basis of knowledge and/or reliability, it is more than compensated by Detective Lepro's independent corroboration. Reciting the chronology of events that led to the application for the search warrant for 83 Main Street, Hull, Vinicio Albuquerque was arrested by the Danvers Police for possessing over ten pounds of cultivated marijuana. Unable to post the \$1,000 bail, Albuquerque was held at the Essex County Correction Facility. Albuquerque implicated David Maglio as the owner of the marijuana. Incensed that Maglio refused to post his bail, Albuquerque informed Deputy Sheriff John Campbell that Maglio was operating a large-scale indoor marijuana grow in the basement of 83 Main Street, Hull. Maglio pegged the street value of the cultivated marijuana at tens of thousands of dollars. Albuquerque additionally advised Deputy Sheriff Campbell that Maglio had five firearms in a duffle bag in his basement.

Deputy Sheriff Campbell passed along the tip he had received from Albuquerque to Detective Lepro. After obtaining and reading the report completed by the Danvers arresting officer, Detective commenced an investigation to attempt to marshal sufficient evidence to establish probable cause to search Maglio's Hull home. During the course of his pre-warrant investigation, Detective Lepro learned that the defendant and Maglio resided at 83 Main Street, Hull, that Maglio registered his car from that address, and that the defendant holds title to the property. Detective Lepro's review of Maglio's Board of Probation record informed him that Maglio's record reflected over one hundred adult charges, including convictions for drug offenses, a state prison sentence for possession of a loaded handgun, and an open case for possession of a Class D controlled substance with intent to distribute. The open drug charge was precipitated by the seizure of over fifty marijuana plants and cultivation equipment at an address in Rutland. Finally, Detective Lepro learned that Albuquerque had encounters with both the Hull and Hingham police on three separate occasions on or around January 6, 2016, just weeks before he was arrested with over fifteen pounds of cultivated marijuana at the Danvers hotel. In the end, there was both a geographic and temporal nexus between Albuquerque and Maglio and the Hull property he shared with the defendant.

In addition to obtaining information to establish a nexus between Maglio and Albuquerque and between Albuquerque and Hull, Detective Lepro surveilled 83 Main Street, Hull on January 29, 2016. Detective Lepro detected a "strong pungent odor of fresh marijuana" fifty or so feet from the property.¹

Detective Lepro's efforts to corroborate Albuquerque's reliability and basis of knowledge did not end there. Knowing from his training and experience that indoor marijuana grow operations require a significant amount of electricity usage, Detective Lepro then

¹ The defendant, in her motion papers, is dismissive of Detective Lepro's olfactory abilities given the distance [50 feet] and the season, [winter], when one would expect windows to be closed. She additionally suggests that, even if the Det. Lepro smelled marijuana, there is no way he would know whether the "amount of marijuana grown exceeded the amount lawfully allowed a person with a medical marijuana card. What the defendant ignores, however, is that indoor marijuana cultivation requires proper ventilation.

obtained and reviewed records from the Hull Municipal Light Plant to compare and contrast the electricity usage at 83 Main Street with the usage at neighboring properties during the same time frame. A comparison of the electric records demonstrated "excessive consumption" when compared to similar residences in the area. Detective Lepro knew from his training and experience that the equipment necessary to successfully operate an indoor marijuana grow uses an enormous amount of electricity. Moreover, the spikes in electricity usage coincided with

At the end of the day, while the defendant may have satisfied the first criterion, and even this is a stretch, she is unable to satisfy the second criterion. The remaining factual statements set forth in Detective Lepro's affidavit are more than sufficient to establish probable cause for issuance of the search warrant. Therefore, the motion for a *Franks* hearing is **DENIED**.

The Defendant's Motion to Suppress Search Warrant

The defendant seeks to suppress the search warrant on the four corners of the affidavit. The defendant argues that the clerk of the Hingham District Court issued the search warrant without the requisite probable cause.

In evaluating the sufficiency of the affidavit in support of the search warrant, the affidavit must be taken as a whole and read in a commonsense fashion." Com. v. Alfonso A., 438 Mass. 372, 375 (2003). The reviewing court must give considerable deference to the magistrate's determination of probable cause. Com. v. Anthony, 451 Mass. 59, 68-69 (2008). Preference is to be accorded to warrants for marginal or even doubtful cases. Id.

For the reasons discussed in detail above, there was sufficient probable cause for the issuance of the warrant.

First, although the impetus for the investigation that ultimately led to the issuance of the search warrant was a tip, the tip was from a named and identified informant, Vinicio Albuquerque. The strict requirements of reliability that apply for a confidential or anonymous informant's reliability, therefore, do not apply in this case.

Second, as the Commonwealth points out in its opposition papers, Albuquerque's admission to being a participant in a criminal enterprise lends credibility to his statements. The fact that his motivation for implicating Maglio may have been predicated on revenge because Maglio refused to post his bail does not lessen his credibility.

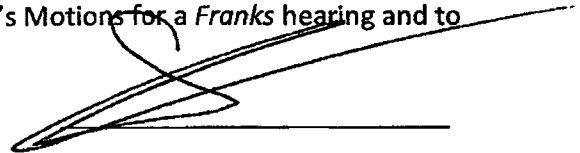
Third, and perhaps most significantly, to the extent that there are any deficiencies in Albuquerque's credibility and/or basis of knowledge, they are cured by the results of Detective Lepro's corroboration. The corroboration included Detective Lepro's observations when he surveilled 83 Main Street, Hull, notable the pungent odor of marijuana some 50 feet or so from the structure, the information gleaned from his review of Maglio's Board of Probation record, including the open case for possession of a Class D controlled substance with intent to distribute, the information in the Rutland Police Department report indicating the seizure of

over fifty marijuana plants and cultivation equipment at 8 Peters Avenue, Rutland, where Maglio operated a marijuana grow operation, and, finally, the results of Detective Lepro's review of records from the Hull Municipal Light Plant, which showed electricity consumption that was exponentially greater than the electricity used by similar residences in the area.

When considering the totality of the factual statements in Detective Lepro's affidavit and the reasonable inferences which may be drawn therefrom, there was sufficient probable cause for the issuance of the search warrant.

ORDER

For all of the foregoing reasons, the defendant's Motions for a *Franks* hearing and to Suppress the Search Warrant are DENIED.

A handwritten signature in black ink, appearing to read "Scott D. Peterson", written over a horizontal line.

Scott D. Peterson

Justice of the District Court Dept.

Dated: September 27, 2018