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COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

HINGHAM DISTRICT COURT
1658 CR 000366

COMMONWEALTH

v.

ERIKA ZERKEL

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION

The defendant, Erika Zerkel, was charged with conspiracy to violate drug laws and distribution of a Class D Drug [marijuana] following the discovery of a marijuana grow at the Hull home she shared with her husband, David Maglio. The Hull police discovered the marijuana grow after executing a search warrant at the home. The search warrant resulted from a tip passed along by a Deputy Sheriff at the Essex County Correction Facility to Hull Police detective Craig Lepro. The tipster, Vinicio Albuquerque, told the deputy sheriff that Maglio had a large marijuana grow operation at 83 Main Street, Hull that had a street value of tens of thousands of dollars, as well as a cache of firearms.

The defendant moved to suppress the search warrant on the four corners of the affidavit or, in the alternative, for a *Franks* hearing. The court conducted a non-evidentiary hearing and ultimately denied the defendant's motion. See "Findings, Memorandum, and Order" dated September 27, 2018. The defendant now asks the court to reconsider its ruling and, at the very least, to allow the defendant to proceed with a *Franks* hearing. In seeking relief, the defendant relies on the court's subsidiary finding that Detective Lepro, in his affidavit, made a false statement or, at the very least, a misleading statement to bolster Albuquerque's credibility and basis of knowledge.

The defendant filed a motion for reconsideration and a supporting memorandum. The Commonwealth filed an opposition memorandum.

The defendant seeks a *Franks* hearing because Detective Lepro intentionally or at least recklessly provided false and misleading information about Albuquerque, presumably to bolster his credibility and basis of knowledge. Specifically, the defendant asserts that Detective Lepro misrepresented that Albuquerque provided the Boston Police with a reliable tip that led to the discovery of a THC lab at 130 Grove Street, West Roxbury, when, in fact, the Boston Police, in the course of investigating a reported altercation at that address, observed indications of a THC lab in plain view and recovered evidence with a search warrant.

A defendant is only entitled to a *Franks* hearing if the affiant provided a false or misleading statement(s) and the remaining factual statements set forth in the affidavit are insufficient to establish probable cause. Franks v. Delaware, 438 U.S. 154, 155-156 (1978).

While it is true that the court found Detective Lepro's statement that "Albuquerque has provided reliable information to law enforcement resulting in the discovery of a THC lab and the prosecution of the offenders" was false or at least made with reckless indifference to its truth, the court also found that the remaining factual statements within the affidavit were more than sufficient to establish probable cause for the search warrant for 83 Main Street, Hull. Therefore, the defendant did not meet the criteria for a *Franks* hearing.

The defendant fares no better with respect to his motion to suppress the search warrant on the four corners of the affidavit. The court stands by its determination that there was sufficient probable cause for the issuance of a search warrant.

As a threshold matter, Detective Lepro did not rely on a tip from an *anonymous* tipster or informant. Had he done so, the strict requirements of reliability would have applied. Albuquerque was identified as the source of the tip. To be sure, 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).

More importantly, the information provided by Albuquerque was corroborated by virtue of Detective Lepro's thorough pre-warrant investigation. "Independent police corroboration may make up for deficiencies in either the informant's basis of knowledge and/or reliability. Com. v. Costa, 448 Mass. 510, 514 (2007).

The detective's investigation before he sought the warrant included but was not limited to the following: verifying that Maglio resided at and held title to 83 Main Street, Hull, and registered his car from that address; learning from Maglio's Board of Probation record that Maglio had 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; learning that the open drug case involved the seizure of over fifty marijuana plants and cultivation equipment at an address in Rutland; and learning that Albuquerque had encounters with both the Hull and Hingham police on three separate occasions on or around January 6, 2016, from which a reasonable if not strong inference could be drawn that Albuquerque was familiar with Maglio and had been to his property. Of note, the interactions with police in Hull and Hingham occurred just weeks before Albuquerque was arrested with over fifteen pounds of cultivated marijuana at the Danvers hotel, which he claimed belonged to Maglio.

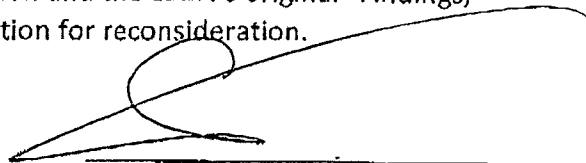
In addition to his research, Detective Lepro conducted surveillance at 83 Main Street, Hull on January 29, 2016. Detective Lepro detected a "strong pungent odor of fresh marijuana" fifty or so feet from the property.

Finally, Detective Lepro took the time and effort to review records he obtained from the Hull Municipal Light Plant to compare the amount of electricity that was used at 83 Main Street, Hull with the usage at neighboring properties. Although not an exact science and more in the way of circumstantial evidence, Maglio used a disproportionately large amount of electricity, which Detective Lepro knew from his training and experience is a hallmark of an indoor marijuana grow operation.

Even putting aside Detective Lepro's statement about Albuquerque's purported tip to the Boston Police about the THC lab at 130 Grove Street, West Roxbury, there was more than sufficient detailed information in the affidavit to satisfy probable cause for the issuance of the search warrant.

ORDER

After a careful review of the parties' submission and the court's original "Findings, Memorandum, and Order," the court **denies** the motion for reconsideration.



Scott D. Peterson

Justice of the District Court Dept.

Dated: February 25, 2019