

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) No. 4:03 CR 675 CEJ
) DDN
ROGER STEWART,)
SHEILA HICKS,)
LINDSAY SPEAKS, and)
BRANDON CHAD MILLER,)
)
 Defendants.)

**ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

This action is before the Court upon the pretrial motions of the parties which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). An evidentiary hearing was held on December 18, 2003.

Defendants Sheila Hicks and Lindsay Speaks filed no pretrial motions. On December 8, 2003, counsel for Hicks filed a written waiver of the right to file motions and to participate in an evidentiary hearing. (Doc. 45.) Speaks's counsel filed a similar motion on December 16. (Doc. 68.) Hicks and Speaks appeared with counsel in open court on December 18 and advised the undersigned that they had decided not to raise any issues by way of pretrial motions. They thereupon waived their rights to file pretrial motions and to have a pretrial hearing.

1. Pretrial disclosure of evidence.

Defendant Brandon Chad Miller has moved for production of statements and reports of witnesses (Doc. 48), for government agents to retain rough notes (Doc. 51), for an order requiring pretrial notice of the government's intention to use Federal Rule

of Evidence 404(b) evidence (Doc. 52), and for production and inspection of grand jury transcripts or reports (Doc. 53). Miller's above-noted motions are moot.

The government responded that it had turned over all such statements known to it except for the transcript of the grand jury testimony of a trooper, which it would turn over to Miller's counsel at the hearing. (Doc. 69.) At the hearing, the government described the materials that had been provided to defendants' attorneys. The court directed the government to make tapes of certain phone conversations available to opposing counsel. Miller's counsel acknowledged receiving additional discovery after the hearing. (Doc. 79.) Therefore, Miller either has received or will receive all information to which he is entitled.

The government also indicated (Doc. 72), and Miller's counsel acknowledged, that the government agreed to order its agents to retain their rough notes.

Finally, in response to the Rule 404(b) motion, the government stated that it will give reasonable notice of its intention to use Rule 404(b) evidence at the trial of Miller. If other evidence arguably subject to Rule 404(b) analysis comes to the government's attention, the government has agreed to give reasonable pretrial notice of such evidence to Miller's counsel. (Doc. 70.)

2. Motion for severance.

Defendant Miller has also filed an amended motion for severance under Federal Rule of Criminal Procedure 14. (Doc. 61.) At the hearing, the parties agreed that the court need not decide the motion at this time, given that Miller's concern was the prejudice that might arise in a joint trial and at this stage a joint trial has not been scheduled. The government requested leave to respond to the motion at a later time. In addition, the parties agreed to attempt to work out a resolution of the severance issue

without the court's involvement. Further, the court gave Miller until January 10, 2004, to provide the court in writing with any additional information about the severance issue. The parties have not made any additional filings regarding severance. Hence, the motion will be denied as moot but without prejudice.

3. Motion to dismiss.

Defendant Miller has also moved to dismiss the indictment. (Doc. 47.) He lists seven very general grounds for dismissal, e.g., "[t]he indictment attempts to charge the defendant under laws which are illegal, void, and unconstitutional as applied." At the hearing, defendant's counsel declined an opportunity to provide additional argument on the motion. Because the indictment is valid on its face and the motion lacks specificity and support, the undersigned believes the motion should be denied. See United States v. Middleton, 246 F.3d 825, 841 (6th Cir. 2001) ("a defendant wishing to challenge an indictment valid on its face bears a heavy burden").

4. Motions concerning evidence and statements.

Prior to the hearing, defendants Miller and Roger Stewart each filed a general motion to suppress evidence and statements. (Docs. 50, 65.) The government has moved for a pretrial ruling of admissibility of evidence and statements. (Doc. 66.) At the hearing, the government informed the court that Miller had not made any statements. After the hearing, Miller indicated that he did not wish to file any further legal memoranda and would rest on his motions. (Doc. 86.)

Stewart filed a post-hearing memorandum, arguing that misinformation presented by affidavit in support of a search warrant on November 12, 2002, and information obtained through an illegal entry into his home invalidate that warrant and require the

suppression of any items seized. He also argues that an April 10, 2003 search warrant was not supported by probable cause, because the information contained in the supporting affidavit came from the illegal entry on November 12, 2002, as well as information obtained in the execution of the faulty warrant on November 12. (Doc. 85 at unnumbered 1-2.) He also argues that his post-arrest statements at the Adair County jail on April 14, 2003, after he expressed his intention not to speak with law enforcement authorities without counsel, should be suppressed. (Id. at unnumbered 2, 4-5.) After the hearing, the government stated that it will not elicit, as part of its case at trial, evidence of any of Stewart's jailhouse statements in April. (Doc. 87 at unnumbered 4.)

From the evidence adduced at the hearing, the undersigned makes the following findings of fact and conclusions of law:

FACTS

1. On the morning of November 12, 2002, Sheriff Mike Kite of the Knox County, Missouri, Sheriff's Department (KCSD), who has narcotics training and 10 years of law enforcement experience, was informed by two citizens known to him that they had passed the Stewart residence and detected a strong odor of ether. They also stated that they had seen a Chevrolet Lumina with the license plate number 511-SPG leave the residence. They told him its direction. Kite, while driving, located the Lumina between 3.5 and 5 miles from Stewart's residence. He saw it turn right at a stop sign without signaling, which was a traffic law violation. After he activated his emergency lights, the Lumina turned onto a gravel road and accelerated. When it slowed, someone jumped from the passenger's side and escaped.

2. When the Lumina eventually stopped, Kite ordered the driver (Gregory Dent) to exit, put him on the ground, and handcuffed him. Next, he ordered a passenger (Lindsay Speaks) to

get out; he handcuffed her. Backup officers, including Missouri State Highway Patrol Trooper Cory W. Craig, an experienced law enforcement officer, soon arrived. When Dent was removed from the ground Craig found a film canister, with the lid off, under where Dent had been. Kite and Craig each believed the substance in the canister was methamphetamine; it had an odor of ether, which Craig believed suggested recent manufacture. Kite was aware that film canisters were often used to hide drugs. Marijuana was also found at the scene. A propane bottle was found in the vehicle's trunk.

3. Dent and Speaks were taken into custody for possession of methamphetamine and other charges. The vehicle was then taken into KCSO custody and towed to a garage, where an inventory search was conducted. A punctured ether can and lithium strips were found during the inventory search.

4. Trooper Craig, who had left the scene of the vehicle stop before Kite, went with other officers to the Stewart trailer residence. Upon arrival, he smelled a strong odor of ether coming from the trailer, which suggested recent or present manufacture of methamphetamine. He wanted to secure the residence for officer safety and to prevent disposal of evidence. He also was aware that active methamphetamine laboratories pose a public health risk.

5. Trooper Craig knocked on the door. Stewart answered. Craig then identified himself and informed Stewart that he was going to secure the residence while a search warrant application was being made. Stewart tried to close the door, but Craig grabbed and removed him from the residence. Craig asked whether anyone else was in the residence; Stewart responded that Sheila Hicks was present. Craig passed Stewart to another officer, but at some point Stewart managed to leave the scene.

6. Craig entered the residence and handcuffed Hicks. While in the residence he observed in plain view what he believed was methamphetamine and other powders in trays and packages on the

kitchen counter. He also saw numerous cans of camping fuel around the kitchen area. Craig telephoned Kite with information about what he had observed in the residence. He remained there to maintain security while Kite successfully applied to the Circuit Court of Knox County for a warrant to search the residence.

7. Kite's affidavit submitted in support of the warrant recounted the events that had transpired on November 12. He first described having received a complaint from a concerned citizen who had detected a strong odor of ether coming from Stewart's residence, then wrote that a "[t]raffic stop was attempted on a vehicle leaving the residence for failing to signal." Next, he described the securing of Stewart's residence and the items observed in plain view. Finally, Kite averred that, according to Craig, the powders appeared to be methamphetamine and/or pseudoephedrine, and that the other items were consistent with methamphetamine manufacture and distribution. (Gov. Ex. 1.)

8. Kite returned to the Stewart residence to execute the search warrant. The exterior of the residence, including a vehicle on the property, was searched. Craig seized numerous items, including cylinders with anhydrous ammonia, hydrochloride gas generators, pseudoephedrine "blister packs" from a burn pile, and a rust-colored powder that field-tested positive for methamphetamine.

9. An arrest warrant was issued for Stewart following his flight from the residence. On April 8, 2003, Kite contacted Craig and told him that a correctional officer, who had been monitoring Hicks's telephone conversations, learned that Stewart was going to be at the residence of Christina and Jason DuPree in Greentop, Adair County, in the Eastern District of Missouri, on April 10, 2003. Craig was familiar with the residence. He thereafter obtained a search warrant for the DuPree residence to search for methamphetamine trafficking evidence and for fugitive Stewart's

person. The 911 emergency center, that provided Craig with the DuPree residence address, omitted one middle digit of the DuPree's address when the information was conveyed to him. Craig, in turn, provided the incorrect address in the written affidavit to the issuing judge. Craig's application and the warrant also described the property as a north/south-sitting single-wide mobile home, with a large machine shed on the northwest corner of the property, located on the south side of Route AA, approximately 1.5 miles west of U.S. 63 in Adair County. (Gov. Ex. 3.)

11. Craig coordinated the execution of the warrant on April 10. He secreted himself in the woods about 75 yards from the residence to watch for Stewart while the warrant was being executed. Behind the residence Craig observed Stewart doing what Craig believed was manufacturing methamphetamine, i.e., stirring a pitcher. When the other officers pulled onto the driveway, Stewart dumped some items and began to enter the woods. Craig then approached, identified himself, and placed Stewart under arrest. The pitcher contained methamphetamine base and had a strong odor of anhydrous ammonia.

12. Craig then advised Stewart of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), reading them verbatim from a pre-printed card. Craig asked Stewart if he understood his rights; Stewart said he understood. Next Craig asked him if, keeping his rights in mind, he would make a statement. Stewart did not say whether he wanted to answer any questions or whether he wanted an attorney. Stewart appeared to understand, to be in command of his faculties, and to know what was going on. Craig asked him if he had anything else that was around the residence or property, such as weapons, needles, or items related to methamphetamine manufacture. Stewart replied that he had some items in the bedroom. Next, Craig participated in the execution of the search warrant and seized over 100 items that he believed were

methamphetamine related (e.g., Digitech scales with baggies and a tray with powder) or had been stolen.

13. Around 10:20 p.m., Craig tried to question Stewart at the jail in Adair County, where he had been brought after his arrest earlier that afternoon. Craig wrote on a waiver form that Stewart invoked his Miranda rights at 10:25 p.m. No statements were made that evening.

14. On April 14, 2003, Craig met with Stewart at the jail to return some personal items to him, including currency, a shaving kit, and a cell phone, which had been found in the bags in the bedroom on April 10. For evidentiary purposes, Craig retained other items, including pseudoephedrine, scales, and items containing powder residue, which also had been found in the bags. Stewart signed for the return of the money and shaving kit but stated that the cell phone was not his.

15. After releasing the first two items to Stewart, Craig re-advised him of his Miranda rights and asked if he would like to make a statement. Stewart told Craig that they had caught him, that he was going to prison, and that there was nothing else to say. He appeared to understand and to be in control of his faculties while interacting with Craig.

DISCUSSION

1. The vehicle stop and inventory search.

Regardless of the propriety of Sheriff Kite's actions surrounding the vehicle stop on November 12, 2002, Stewart and Miller--who did not own the vehicle and who were not in it when it came to a stop--lack standing to object to the admissibility of evidence seized from and around the Lumina. See United States v. Green, 275 F.3d 694, 698-99 (8th Cir. 2001) ("Fourth Amendment rights are personal and may not be asserted vicariously."); United States v. Pierson, 219 F.3d 803, 806 (8th Cir. 2000) (defendant

lacked standing to challenge the search's legality because the item searched was not his). In any event, the vehicle stop and search were proper. See United States v. Brown, 345 F.3d 574, 578 (8th Cir. 2003) ("An officer who observes a traffic violation, even a minor one, has probable cause to initiate a traffic stop."); United States v. Rowland, 341 F.3d 774, 779 (8th Cir.) ("Law enforcement may search a lawfully impounded vehicle to compile an inventory list of the vehicle's contents without violating the Fourth Amendment."), cert. denied, 124 S. Ct. 969 (2003).

2. The Stewart residence.

Trooper Craig's warrantless entry into Stewart's residence did not violate the Fourth Amendment, because probable cause and exigent circumstances justified the entry. See United States v. Kleinholz, 339 F.3d 674, 676 (8th Cir. 2003) ("Despite the protections of the Fourth Amendment, and the preference for search warrants, a search without a warrant is legal when 'justified by both probable cause and exigent circumstances'" (internal quotation omitted)). Probable cause existed, given that (1) concerned citizens told law enforcement officers of the odor of ether, a methamphetamine precursor, emanating from Stewart's residence, (2) the driver and passenger of the Lumina, which had recently left Stewart's residence, had just been arrested for methamphetamine possession under circumstances that suggested the methamphetamine had been manufactured recently, and (3) Trooper Craig smelled a strong odor of ether coming from the residence. See id. at 677 ("The smell of ether might alone support a finding of probable cause."). The facts taken together indicate probable cause existed to believe Stewart's residence contained a methamphetamine lab.

Although the government bears the burden of proving the existence of exigent circumstances, United States v. Walsh, 299 F.3d 729, 733-34 (8th Cir. 2002), "[d]ue to the volatile nature of

such labs, exigent circumstances justified an immediate but limited search," Kleinholz, 339 F.3d at 677; accord United States v. Kuenstler, 325 F.3d 1015, 1021 (8th Cir.) (exigent circumstances exist where law enforcement officers have a legitimate concern for the safety of themselves or others), cert. denied, 124 S. Ct. 1037 (2004). The likelihood that someone inside the residence would destroy evidence before a search warrant could be obtained further justified Trooper Craig's actions. See United States v. De Soto, 885 F.2d 354, 368 (7th Cir. 1989).

Once lawfully inside the residence, Craig saw in plain view numerous items he reasonably believed were associated with illegal narcotics activities and had probable cause to seize them even if a warrant had not been obtained later. See Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) ("Where the initial intrusion that brings the police within plain view of such an article [of incriminating character] is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate."); Kleinholz, 339 F.3d at 677 ("[O]nce law enforcement had entered the house legally, pursuant to probable cause and exigent circumstances, they were not required to ignore the illegal drug operation; rather, they were free to take note of and even seize anything in 'plain view.'"); United States v. Boyd, 180 F.3d 967, 976 (8th Cir. 1999).

Although Kite's November 12, 2002 affidavit in support of the search warrant application could have been written more precisely to indicate that Kite had not personally seen the vehicle leave Stewart's residence and that the traffic stop did not occur immediately after the vehicle left the residence, this lack of precision does not constitute a falsity. See United States v. Anderson, 243 F.3d 478, 482 (8th Cir. 2001) (mere misquotation does not support inference of intentional or reckless falsehood sufficient to merit a hearing under Franks v. Delaware, 438 U.S.

154 (1978)). Moreover, whether the vehicle "left" or was "leaving" the residence is immaterial to the totality of evidence set forth in the rest of Kite's affidavit. See United States v. Gumm, 229 F.3d 698, 699-700 (8th Cir. 2000) (looking at the evidence as a whole to ensure that it provides a substantial basis for finding probable cause to support the issuance of the warrant; "minor discrepancies" in an affidavit do not render a warrant invalid); see also United States v. Dukes, 147 F.3d 1033, 1035 (8th Cir. 1998).

3. The April 10 search warrant and statements after arrest

Although the April 10, 2003 search warrant omitted a digit from the address of the DuPree residence, it sufficiently described the residence to satisfy the Fourth Amendment's particularity requirement. See United States v. Valentine, 984 F.2d 906, 909 (8th Cir.) (finding a warrant sufficiently particular when it accurately described the target building, but listed the address as 3048 rather than 3050), cert. denied, 510 U.S. 828 (1993); United States v. Clement, 747 F.2d 460, 461 (8th Cir. 1984) (finding a warrant valid when it listed the proper building number but the incorrect apartment number and the officer personally knew which apartment was target of search); cf. United States v. Thomas, 263 F.3d 805, 807 (8th Cir. 2001) (search warrant that set forth the wrong house number, which was the only information in the warrant identifying the location to be searched, did not satisfy the particularity requirement), cert. denied, 534 U.S. 1146 (2002).

The undersigned believes the April 10 warrant was validly issued based on probable cause that evidence of criminal activity was to be found at the DuPree residence. See Warden v. Hayden, 387 U.S. 294, 301-02 (1967). As stated in Trooper Craig's affidavit, numerous recorded telephone conversations indicated that Hicks had been contacting Stewart at the DuPree residence and that he was

still involved in the manufacturing of methamphetamine. Moreover, because (as discussed above) probable cause supported the issuance of the November 12, 2002 warrant, and the entry into Stewart's residence that day was proper, Stewart's argument that the "illegality" of the November 12, 2002 search taints the affidavit and warrant from April 10, 2003, is not persuasive.

The statements Stewart made at the DuPree residence are admissible, because (1) he had been advised of and stated that he understood his Miranda rights, (2) he appeared to understand, to be in command of his faculties, and to know what was going on, and (3) no evidence indicates that Trooper Craig intimidated, deceived, or coerced him into making a statement. See Moran v. Burbine, 475 U.S. 412, 421-23 (1986); Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984). The fact that, after being advised of his rights, Stewart answered Craig's question without first stating that he wanted to answer questions or whether he wanted an attorney, does not require exclusion of his statements. See Simmons v. Bowersox, 235 F.3d 1124, 1131 (8th Cir.) ("to invoke one's right to remain silent, one must unequivocally express his desire to remain silent"), cert. denied, 534 U.S. 924 (2001); Burket v. Angelone, 208 F.3d 172, 198 (4th Cir. 2000) ("To effectuate a waiver of one's Miranda rights, a suspect need not utter any particular words.").

Finally, given that the government will not be offering Stewart's jail statements into evidence in its case, that portion of Stewart's motion to suppress is moot.

Whereupon,

IT IS HEREBY ORDERED that the motions of defendant Miller for production of statements and reports of witnesses (Doc. 48), for government agents to retain rough notes (Doc. 51), for an order requiring pretrial notice of the government's intention to use Rule 404(b) evidence (Doc. 52), and for production and inspection of grand jury transcripts or reports (Doc. 53) are denied as moot.

IT IS FURTHER ORDERED that the amended motion of defendant Miller for severance (Doc. 61) is denied as moot and without prejudice.

IT IS FURTHER ORDERED that the motion of the United States for a pretrial ruling of admissibility of evidence and statements (Doc. 66) is denied as moot.

IT IS HEREBY RECOMMENDED that the motion of defendant Miller to dismiss the indictment (Doc. 47) be denied.

IT IS FURTHER RECOMMENDED that the motion of defendant Stewart to suppress evidence and statements (Docs. 65) be denied.

IT IS FURTHER RECOMMENDED that the motion of defendant Miller to suppress evidence and statements (Doc. 50) be denied.

The parties are advised they have ten (10) days to file written objections to this Order and Recommendation. The failure to file objections may result in a waiver of the right to appeal issues of fact.



DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this 22nd day of March, 2004.