IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. CR-15-128-D
	)	
VICTOR DEWAYNE GAINES,	)	
	)	
Defendant.	)	

THE UNITED STATES' AMENDED MOTION TO RECONSIDER SUPPRESSION OF EVIDENCE

COMES NOW, the United States of America, through Sanford C. Coats, United States Attorney for the Western District of Oklahoma, by Wilson D. McGarry and Ashley Altshuler, Assistant United States Attorneys, and respectfully requests the Court to reconsider its Order (Doc. 37) granting the Defendant's motions to suppress evidence. The Government submits this motion to help address the Court's apprehension of certain material facts and controlling law, which directly affected the factual and legal conclusions reached in the Order. The Government contends that Oklahoma City Police Department Detective Keith Medley did not demonstrate a reckless disregard for the truth when authoring the affidavit at issue, but in any event, even considering the Court's modifications to the affidavit, as laid out in the Order, sufficient probable cause existed to support the issuance of the warrant.

In support of this motion, the United States submits the following brief:

BRIEF IN SUPPORT

I. Authority to Reconsider the Court's Order.

Although the Federal Rules of Criminal Procedure do not contain a provision for a motion to reconsider, federal courts recognize motions to reconsider in criminal matters according to the common law doctrine set forth in *United States v. Healy*, 376 U.S. 75 (1964). A court may grant a motion to reconsider when the court has misapprehended the facts, a party's position, or the law. *United States v. Huff*, 782 F.3d 1221, 1224 (10th Cir. 2015) (citing *Servants of The Paraclete v. Doe*, 204 F.3d 1005, 1012 (10th Cir. 2000)). The decision to grant or deny a motion to reconsider is within the discretion of the Court. *Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir. 1988).

II. The Material Facts, When Placed in Context, Do Not Suggest that Det. Medley Showed a Reckless Disregard for the Truth.

In this Court's Order, it found that Det. Medley exhibited reckless disregard for the truth when he made false statements in his affidavit and omitted material information from his affidavit in support of a search warrant for the residence located at 5516 Willow Cliff, apartment number 461, Oklahoma City, Oklahoma (Apartment 461). (Doc. 37, at 8-10). Certainly, Det. Medley's affidavit contained errors and omissions that the Court deemed material. But the context of his errors and omissions, when viewed in conjunction with the Court's finding that "Det. Medley testified candidly and credibly" during the suppression hearing, should provide reasonable grounds for the Court to reconsider its determination that Det. Medley acted with reckless disregard for the truth.

A. Det. Medley reasonably, and in good faith, relied on a police generated VARUNA report, which turned out to be inaccurate.

With regard to Det. Medley's reliance on the VARUNA report to determine Mr. Gaines' prior arrests for drug offenses, the Court found:

> Det. Medley candidly testified that he relied on a "cover sheet" of the VARUNA report *and that subsequent pages* and an October 2009 crime report, which he also reviewed, showed Mr. Gaines' other contacts with police officers included a prior arrest on an outstanding warrant for violation of a suspended sentence and not an arrest for the "CDS" offenses listed in the Affidavit.

(Doc. No. 37, at 6) (emphasis added). The Court also found that "Det. Medley based his statements that Mr. Gaines had a prior arrest for drug offenses on a cursory review of a VARUNA report that, *upon closer review* and reference to the pertinent crime report, showed the statement to be false." *Id.* at 8 (emphasis added).

In this case, confusion lies with Mr. Gaines' VARUNA report. During the hearing on the motions to suppress, Defense counsel provided Det. Medley with a copy of Mr. Gaines' VARUNA report. (Transcript of Hearing, Doc. 32, September 23, 2015, at 6-7)[1]; (Attached as Exhibit 1, *Mr. Gaines' VARUNA report*). Det. Medley testified that he referenced and relied on that VARUNA report to determine Mr. Gaines' prior arrests for purposes of the search warrant affidavit. *Id.* at 6:2-5; 7:6-12.

After providing Det. Medley with a copy of Mr. Gaines' VARUNA report, Defense counsel walked through the complete copy of Mr. Gaines' VARUNA report with Det. Medley—page by page, beginning on page one and ending on page four. *Id.* at

[1] The Court continued the hearing on the motions to suppress to November 18, 2015. (Doc. 38).

9:3-19.[2] Immediately thereafter, Det. Medley testified that the VARUNA report only showed that Mr. Gaines was listed as being arrested for the prior drug offenses; the report neither indicated whether he went to jail for those offenses nor did it provide any underlying details of his contacts with law enforcement. *Id.* at 9:16-19; 10:10-13.[3] In other words, in order for Det. Medley to know the circumstances of each arrest listed in Mr. Gaines' VARUNA report, and, therefore, to determine the true accuracy of the arrests, he would be required to look beyond the information contained in the VARUNA report—i.e., pull each separate crime report. *Id.* at 10:7-20.[4]

While the arrests listed in Mr. Gaines' VARUNA report turned out to be incorrect when compared to the separate crime reports, nothing in Mr. Gaines' VARUNA report suggested that the arrests were inaccurate. *See DeLoach v. Bevers*, 922 F.2d 618, 621–22 (10th Cir. 1990) (noting a Fourth Amendment violation where "the judicial finding of probable cause is based *solely* on information the officer knew to be false or would have known to be false had he not recklessly disregarded the truth" (emphasis added) (internal quotation marks omitted)). Significantly, Mr. Gaines' VARUNA report does not contain

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[2] If the document provided to Det. Medley was not the full and complete copy, then, based on the sequence of events at the hearing, defense counsel would have likely continued the walk through the report.

[3] In an attempt to clarify some confusion regarding the VARUNA report, Det. Medley explained that a VARUNA report is "almost like a cover sheet for a person." (Tr. Hr., Doc. 32, at 8:9-22).

[4] During the November 18, 2015 hearing, there appears to be some confusion regarding the number of VARUNA reports; however, Det. Medley maintained that he only relied on the information in Mr. Gaines' VARUNA report to establish Mr. Gaines' criminal history for the affidavit. (Tr. Hr., Doc. 38, at 6:7-13, 22-24).

subsequent pages that Det. Medley could have further reviewed to reveal the inaccuracy of the arrests. Admittedly, Det. Medley testified candidly that "[a]t one time" he had reviewed the underlying 2009 crime report, but, as he testified, it was "long ago," and he did not pull each separate crime report to verify the accuracy of the VARUNA report. (Tr. Hr., Doc. 32, at 11:10-13; 12:12-19).[5]

Det. Medley's decision to not pull additional documents to verify the accuracy of the VARUNA report does not render his actions reckless. The Tenth Circuit has held that "[t]he failure to investigate a matter fully, to exhaust every possible lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence rarely suggests a knowing or reckless disregard for the truth. To the contrary, it is generally considered to be token negligence at most." *Beard v. City of Northglenn Colo.*, 24 F.3d 110, 116 (10th Cir. 1994) (emphasis, internal quotation marks, and citations omitted).

Likewise, Det. Medley's reliance on Mr. Gaines' VARUNA report, despite its record-keeping error, does not render his conduct reckless. At most, his sole reliance on the VARUNA report should be characterized as negligent. *United States v. Colonna*, 360 F.3d 1169, 1174 (10th Cir. 2004) ("[A] misstatement in an affidavit that is merely the result of simple negligence or inadvertence, as opposed to reckless disregard for the truth, does not invalidate a warrant."). In *Herring v. United States*, 555 U.S. 135, 146 (2009), the Supreme Court affirmed the extension of the good-faith exception to cover a police officer's reasonable reliance upon a record-keeping error in the police computer database.

[5] The Court expressed unease regarding Det. Medley's undated review of the crime report, but police officers like Det. Medley review many crime reports throughout their investigations, and not at times these reports may involve the same individuals.

In that case, a police officer asked a county warrant clerk to check for any outstanding warrants for a defendant. *Id.* at 137. The clerk told the officer that the defendant had an outstanding warrant, so the officer pulled over the defendant and searched his vehicle—uncovering contraband. *Id.* However, the information regarding the warrant turned out to be incorrect. *Id.* The correct information had not been entered into the police database. *Id.* at 138. Nevertheless, the *Herring* Court found that the officer's reliance on the incorrect information was not so flagrant so as to exclude the evidence. *Id.* at 146.

The *Herring* Court curbed its holding by stating that not all record keeping errors are immune from the exclusionary rule. *Herring* then described two circumstances in which the exclusionary rule may apply to police record keeping errors. First, the exclusionary rule may apply when it is established that the police recklessly maintain their database or when police knowingly made false entries in the system to lay the ground work for future false arrests. *Herring*, 555 U.S. at 146*; see also United States v. Brown*, 618 F. App'x 743, 745 (4th Cir. 2015) (observing that "[i]f an officer acted with objectively reasonable reliance on incorrect database information, we conclude that the officer acted in good faith," and finding that the officer acted reasonably in relying on the NCIC database despite defendant's contention that it "is known to be frequently incorrect"). Neither of these two circumstances is present in the case before the Court. Rather, the Government submits that Det. Medley acted in good-faith in his reliance on Mr. Gaines' VARUNA report.

B. Det. Medley did not act with reckless disregard for the truth when he concluded that the substance on the sandwich baggies was marijuana residue.

The Court also concluded that Det. Medley acted recklessly when he stated that the substance in the sandwich baggies was marijuana despite not field testing the substance, even though marijuana test kits exist. (Doc. 37, at 7, 20). Although the Court acknowledged that Det. Medley "suspected" the substance was marijuana, Det. Medley failed to provide any factual basis in either the Affidavit or the hearing testimony for representing that the baggies contained marijuana residue. *Id.* at 9.

First, the Tenth Circuit has held that a well-trained officer can determine whether a substance is marijuana for purposes of finding probable cause without scientific testing. *United States v. McCormick,* 468 F.2d 68, 73 (10th Cir. 1972) ("A border patrol agent who has learned how to identify marijuana by sight or by its odor has probable cause. . . .").

Additionally, as recognized in *Acker v. Dinwiddie,* No. CIV-10-114-GKF-FHM, 2013 WL 607856, *4 (N.D. Okla. Feb. 19, 2013), "[u]nder well-settled Oklahoma law, it is not necessary to have a chemical analysis performed to determine if a substance is marijuana." Accordingly, Oklahoma law recognizes that a well-trained officer can conclusively rely on his training and experience to identify marijuana for purposes of establishing probable cause. *See Cory v. State,* 543 P.2d 565, 568-59 (Okla. Crim. App. 1975) (reinforcing the rule that identification of marijuana by police officers on the basis of expertise gained through training and experience was sufficient to present the issue to

the jury). Indeed, Det. Medley testified that presumptive testing is not commonly performed on marijuana. (Tr. Hr., Doc. 38, at 19: 18-23).

Second, Det. Medley's affidavit extensively set forth his experience identifying illegal narcotics. Det. Medley's affidavit stated, in part, "[y]our affiant has attended schools specializing in the detection, identification, and investigation of drug related offenses, to include transportation of drugs and money, distribution and sale of illicit drugs, methods of manufacture and use of illegal drugs . . . . As a result of the investigations your (sic) affiant worked as an undercover officer in the purchase of numerous firearms and pounds of illegal narcotics from local gang members." (Doc. 22-1, at 2). Det. Medley's testimony supported the conclusion that he was able to identify marijuana based on his training and experience over the years. (Tr. Hr., Doc. 38, at 19: 24-25; 20: 1-2). The combination of the information in Det. Medley's affidavit and his testimony sufficiently establish his ability to identify the marijuana residue—sufficient information for an Oklahoma District Judge to draw a reasonable inference that there was a fair probability that contraband would be found at the apartment. *See United States v. Simpson*, 152 F.3d 1241, 1246 (10th Cir. 1998) (stating that probable cause is the fair probability that contraband would be found at a location); *United States v. Rowland*, 145 F.3d 1194, 1205 (10th Cir. 1998) (stating that the judge issuing the search warrant may draw reasonable inferences from the warrant application); *United States v. Corral-Corral*, 899 F.2d 927, 931 (10th Cir. 1990) (explaining that the Supreme Court adopted a "totality-of-the-circumstances approach" to the "common-sense, practical question" of probable cause). As a result, the Government respectfully contends that Det. Medley's

determination regarding the marijuana residue supports a finding that probable cause existed.

C. The record supports that Det. Medley saw the child come from the doorway of Apartment 461, not the "vicinity" of the apartment.

In addition, Det. Medley's testimony supports a finding of fact that Det. Medley saw the child exit Apartment 461. Specifically, he testified that he saw the child exit the doorway of the apartment; he just did not see the actual door of the apartment. (Tr. Hr., Doc. 38, at 10, ln. 12-20). Det. Medley's affidavit states that Det. Medley observed "an unknown black male emerge[] from the apartment. . . ." (Doc. 22-1, at 4). According to Det. Medley's testimony, the affidavit could state that he observed "an unknown black male emerge[] from the [doorway of the] apartment. . . ." However, the Court concluded that Det. Medley observed "an unknown black male, who appeared to be an 8-10 year old child, emerge[] from the vicinity of the apartment. . . ." (Doc. 37, at Exhibit A). The term "vicinity" creates an overly broad implication of the area in which Det. Medley observed the child when compared to his testimony. Det. Medley simply conducted surveillance from a position perpendicular to the apartment—understandably prohibiting him from seeing the actual door, but not prohibiting him being able to see a person exit Apartment 461. *See Hernandez v. Conde*, 272 F. App'x 663, 672 (10th Cir. 2008) (affiant did not demonstrate a reckless disregard for the truth, despite saying that he saw an individual exit a particular trailer when, in fact, he did not, because the evidence "only indicate[d] that [the affiant] . . . mistook which trailer [the individual exited]," and this was "insufficient to show a culpable state of mind"); *see also United States v. Barros*,

340 F. App'x 509, 513 (10th Cir. 2009) (affirming the finding of no recklessness where affiant used "defendant" in place of "suspect" or "robber"). Consequently, the Government requests the Court to reconsider its finding of fact that Det. Medley saw the child come from the "vicinity" of the apartment.

D. The different address on the prescription pill bottle found in the trash associated with Apartment 461 should not materially impact the Court's probable cause determination.

Finally, the Court placed considerable weight on the fact that the prescription pill bottle found in the trash pull contained an address different from the apartment where the prescription pill bottle was found by Det. Medley. However, the different address on the prescription pill bottle should not materially impact to the probable cause determination.[6] The affidavit did not need to establish that Mr. Gaines lived in Apartment 461, it only needed to establish criminal activity at the apartment. Mr. Gaines might not live in Apartment 461. But equally, he might maintain two residences or use a different address as a cover.

The presence of the prescription pill bottle—even with a different address—strengthens the probable cause determination. At the time Det. Medley found the prescription pill bottle, law enforcement had information that Mr. Gaines sold illegal narcotics from Apartment 461. Additionally, Det. Medley had recently observed someone exit the doorway of Apartment 461 with trash bags ultimately containing the

[6] The Tenth Circuit defines an omission as "material" if it is "so probative as to negate probable cause." *United States v. Ruiz*, 664 F.3d 833, 838 (10th Cir. 2012); *see also DeLoach*, 922 F.2d at 621–22 (omitted information must be "clearly critical" to the finding of probable cause in a warrant to require reversal).

prescription pill bottle. Under those circumstances, discovering the prescription pill bottle with Mr. Gaines' name on the label in the trash associated with Apartment 461 sufficiently tied him to Apartment 461. *See United States v. Nolan*, 199 F.3d 1180, 1183 (10th Cir. 1999) ("To establish the required nexus, the affidavit supporting the search warrant need not contain direct evidence or personal knowledge that the items sought are located at the place to be searched. Rather, the issuing magistrate judge may draw reasonable inferences from the material provided in the warrant application." (internal citation and quotation marks omitted)).

Consequently, the Government requests that the Court reconsider the context of Det. Medley's errors and omissions to find that his conduct, at worst, amounted to negligence and not reckless disregard for the truth.

III. Even if the Court Declines to Reconsider its Finding of Facts, it Should still Reconsider its Order Because the Court-Found Facts Establish Probable Cause.

Even with the Court's corrections to the affidavit, the Court still should have found probable cause existed to issue the search warrant. To summarize, after the Court amended the affidavit to reflect the elimination of the false information and addition of the omitted material information, the Court was left with the following facts:

> (1) several confidential informants reported Mr. Gaines was selling drugs from his apartment at 5516 Willow Cliff #461;
>
> (2) Det. Medley observed Mr. Gaines enter apartment 461 on one occasion;
>
> (3) within 48 hours before the affidavit was submitted, an unknown child brought trash bags down from the doorway of apartment 461;

> (4) one of the trash bags contained a pill bottle bearing Mr. Gaines's name but an address different from the apartment and two sandwich baggies tear-offs with what Det. Medley suspected to be marijuana residue;
>
> (5) Det. Medley has the training and experience, through schools and undercover work purchasing illegal narcotics, to identify narcotics (Doc. 22-1, at 2);
>
> (6) Det. Medley did not attempt to confirm the substance was marijuana through further testing; and
>
> (7) Mr. Gaines is a member of the NHC 60 street gang.

(Doc. 37, Exhibit A).

Importantly, the remaining facts should be analyzed in combination with the fact that more than one confidential source told law enforcement that Mr. Gaines sold illegal narcotics from Apartment 461. These facts, viewed collectively, still supply sufficient probable cause to issue the search warrant for Apartment 461. *DeLoach*, 922 F.2d at 622–23; *see United States v. Becknell*, 601 F. App'x 709, 715 (10th Cir. 2015) (combination of unidentified informant and trash pulls containing trash with drug residue provided probable cause for search warrant); *United States v. Pace*, 154 F. App'x 734, 735 & n.1 (10th Cir. 2005) (holding probable cause existed based on informant's tip and trash pull, where trash bag contained marijuana residue and link to defendant and address searched); *Colonna*, 360 F.3d at 1175 (finding that personal-use amount of marijuana found in residence's trash justified search warrant); *United States v. Allebach*, 526 F.3d 385, 387 (8th Cir. 2008) ("We have little hesitancy in concluding a reasonable magistrate would conclude the materials found in the trash-two plastic bags with cocaine residue,

two corners torn from plastic bags, Brillo pads, a film canister with white residue-were sufficient to establish probable cause that cocaine was being possessed and consumed in Allebach's residence."); *Salmon v. Schwarz*, 948 F.2d 1131, 1140 (10th Cir. 1991) (holding that "not all errors or omissions will negate probable cause . . ., such as allegations grounded in negligence or innocent mistake.").

Det. Medley did not even need "hard" evidence to establish probable cause. *United State v. Biglow*, 562 F.3d 1272, 1279 (10th Cir. 2009) ("[P]robable cause to believe certain items will be found in a specific location is a practical, nontechnical conception that need not be based on direct, first-hand, or 'hard' evidence." (internal quotations and alternations omitted)). Even considering all the mistakes, the remaining facts in the affidavit sufficiently corroborated the confidential sources information to establish a fair probability that contraband would be found in Apartment 461.

CONCLUSION

In sum, Det. Medley's affidavit was not technically precise. Neither was it artfully written. While he relied on a police report that contained incorrect information, the correct information was not right in front of him. He could not have known the error from Mr. Gaines' VARUNA report. True, Det. Medley could have pulled the underlying crime reports, and at one time long ago he had reviewed the crime report with the correct information, but in drafting the affidavit he relied in good-faith on Mr. Gaines' VARUNA report. His mistakes, while negligent, should not rise to the level of reckless disregard for the truth. *United States v. Stiffler*, 400 F.App'x. 340, 344 (10th Cir. 2010) ("To be sure, the district court recognized the affidavit lacked pinpoint accuracy and was

perhaps inartfully drawn, but neither the Supreme Court nor the Tenth Circuit has ever suggested that those facts alone necessarily dictate a finding of malfeasance on the part of the affiant.").

Furthermore, even with the facts as found by this Court, sufficient probable cause existed to issue a search warrant of Apartment 461. Consequently, based on the foregoing, the United States respectfully requests the Court to reconsider its Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2016, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing for the following ECF registrants: Paul Antonio Lacy, Counsel for Victor Dewayne Gaines.

s/ WILSON D. McGARRY
Assistant U.S. Attorney