

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

MAY 03 2007

STATE OF OKLAHOMA)
Plaintiff,)
)
)
)
)
vs.)

PATRICIA PRESLEY, COURT CLERK
By _____
Deputy

Case No. CF-2006-3745

CHRISTINA HOLT

MOTION TO SUPPRESS EVIDENCE

Christina Holt hereby moves this Honorable Court to suppress all evidence seized in this case as such evidence was without lawful authority and in violation of Ms. Holt's rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article Two, Section Thirty of the Constitution of the State of Oklahoma. In support of this Motion counsel states as follows:

STATEMENT OF FACTS

The following is a factual summary of information found in the Affidavit for Search Warrant filed June 27, 2006 with the Oklahoma County District Clerk's Office and testimony taken from the preliminary hearing held February 14, 2007 before the Honorable Gregory J. Ryan. For roughly two years the joint efforts of the H.I.D.T.A. Task Force and O.C.P.D. conducted investigations concerning the co-defendant Eustacio Bustos. (Affidavit page 2, ¶ 7) The subject of this investigation was the purported involvement of Bustos in drug trafficking and distribution within

Oklahoma City. The intelligence gathered about these activities stemmed from an often used OCPD confidential informant whose information had purportedly been corroborated through "independent O.C.P.D. investigation". (Affidavit page 3, ¶ 1).

The affidavit further states that on two dates, May 16, 2006 and May 30, 2006, OCPD enlisted the services of this informant to supposedly purchase cocaine from Bustos at the location of 1601 W. Linwood Blvd. which is Mr. Bustos place of business, an auto and body shop. (Affidavit page 3, ¶ 3 and 4) (Please note that Christina Holt never worked at this location, and in fact, had another job.) The affidavit summarily mentions that "Multiple informants have told me that because Eustacio traffics and distributes such large amounts of narcotics, he keeps the narcotics stashed in multiple different locations including his auto repair shop, his residences and his family member's homes." (Affidavit page 3, ¶ 4). As well, the affidavit proffers, based on the affiant's training and experience, that it is very common for large quantity narcotics dealers to use multiple residences and/or businesses to store their "stash" of narcotics. (Affidavit page 5, ¶ 2).

Officer Jeffrey Springer testified he executed this search warrant on June 6, 2006. (TR 14, 18). During the search Springer located the following items: three bags of methamphetamine in a kitchen drawer which weighed roughly 28.7 grams, 28.8 grams, and 28.9 grams, a quantity of marijuana in an upstairs bedroom, \$3,600

cash found in a dresser drawer, \$3,920 cash located in a safe, and a surveillance camera which appeared to be functional. (TR 30-34). At the conclusion of the preliminary hearing defense counsel demurred specifically to the evidence as being unlawfully seized due to a constitutionally infirm affidavit. Specifically counsel proffered there was insufficient probable cause to support any search of the home located at 4025 West Park Place.

Mr. Scott Rowland, First Assistant District Attorney, came forward to assist Tony Evans in presenting argument. Mr. Rowland argued that when reviewing a search warrant "great deference" must be given to the issuing magistrate and in "close calls" the court should favor upholding the warrant. (TR 83-84). Upon considering arguments from counsel the reviewing magistrate overruled defense counsel's demurrer stating there was sufficient probable cause, noting "the Court was made aware of the proclivity of individuals situated in the dope distribution or drug distribution business to go ahead and maintain places, multiple—either residences or places of business wherein an individual could, quote, unquote, "stash" the controlled dangerous substances. That is this particular case, they had information which turned out to be correct..." (TR 89, 23-25, 90, 1-2).

BRIEF IN SUPPORT

Standing : As a preliminary matter counsel submits Christina Holt has standing to object to the unlawful search of 4025 West Park Place. At the time of the search Ms. Holt was an overnight guest and had a legitimate expectation of privacy in her temporary quarters. See *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684 (1990).

PROPOSITION I

THE O.C.P.D. OFFICERS SEIZED THE EVIDENCE IN VIOLATION OF MS. HOLT'S FOURTH AMENDMENT RIGHTS AS THE AFFIDAVIT FOR SEARCH WARRANT IS FATALLY DEFECTIVE IN ESTABLISHING PROBABLE CAUSE.

The test for constitutional sufficiency of an affidavit for search warrant based upon an informant was established by the United States Supreme Court in the case of *Aguilar v. Texas*, 378 U.S. 108, 114-115, 84 S.Ct. 1509, 1514 (1964) where the Court stated:

"the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant***was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,*** or, as in this case, by an unidentified informant."

Aguilar v. Texas, at 114-115 (emphasis added)

The above test was further explained in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969) and later by the Oklahoma Court of Criminal Appeals in *Leonard v. State*, 453 P.2e 257 (Okl. Cr. 1969). Both of those decisions require that the affidavit for search warrant must contain **detailed facts** to establish probable cause that evidence of a crime will be found at a designated location.

In this particular case the OCPD sought a warrant to search the residence located at 4025 W. Park Place although all previous observations and investigations concerning Mr. Bustos's drug dealing activity had been limited to his business at 1601 W. Linwood. While the affidavit mentions "multiple informants" claimed Bustos "stashed" dope at his residences, there is no investigatory evidence of any kind to substantiate this claim. For one, the affidavit fails to mention who these "multiple informants" are and how they are deemed to be reliable in this respect. As well, the affidavit doesn't mention that OCPD, HIDTA or any other representative body of law enforcement did any independent investigation of their own to corroborate this information. Although the affidavit mentions officers conducted surveillance of the Park Place residence, the affidavit fails to detail any facts which suggest a probability that illicit drug activity was taking place there. There is no mention of any observation of high foot traffic, hand to hand buys, or trash pulls discovering

contraband. There is nothing. To support a search of the residence there must be a factual connection and basis to support probable cause of unlawful drug activity AT THIS RESIDENCE.

To determine whether probable cause exists for the issuance of a warrant, the magistrate 'must judge for himself the persuasiveness of the facts relied upon by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion." *Giordenello v. United States*, 357 U.S. 480, 78 S. Ct. 1245 (1958), *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964). Even if probable cause exists to issue a search warrant for one location, this does not mean probable cause necessarily exists to search an adjacent location. See *McCann v. State*, 1972 OK CR 343, 504 P.2d 432 (Ok. Cr. 1972). Cause to search one place is not necessarily cause to search another place. *Id.*

In *McCann* the affiant, based upon observations of a Oklahoma City Fireman as well as independent investigation, believed McCann to be involved in illegal gambling operations in room 805 of the Roberts Hotel. *Id.* Through independent investigation the affiant discovered McCann had moved from room 805 to room 600 of the same hotel and later searched room 600 finding evidence consistent with illegal gambling activity. *Id.* In granting the Motion to Suppress the Court found that the allegations in support of the search warrant were mere "unilluminating assertions of

suspicion" entitled to no weight in appraising the magistrate's decision as the affidavit **contained no facts to support** that any criminal activity was occurring in room 600.

In *Sanders v. State*, 1980 OK CR 14, 610 P.2d 247 (Ok Cr. 1980). The court found that while there was sufficient evidence to establish probable cause for the search of defendant's business, there were no facts to support probable cause to search defendant's residence. As in this case, the officers used an informant to buy drugs from defendant's place of business and were informed by a confidential informant that defendant was in the business of trafficking drugs. *Id.* In *Sanders* the only information within the affidavit concerning the defendant's residence were phone records disclosing an unusually large number of long distance calls to California made from that location. *Id.* The Court found this was insufficient to establish probable cause for issuance of a warrant to search defendant's residence.

In this case, as in *Sanders* and *McCann*, there were insufficient facts to establish probable cause to search defendant's home. The officers conclusions that "it is very common for large quantity narcotics dealers to use multiple residences and/or businesses to reside and "stash" narcotics and drug proceeds" is akin to nothing more than unilluminating assertions of suspicion. These statements are flatly unsubstantiated due to the affidavit's failure to lay out any facts to support Bustos was actually dealing in "large quantities" of drugs or that he used his residence to conduct

any illicit drug activity. Most importantly, **no independent investigation** was ever done to corroborate any information provided relating to the residence. Consequently all evidence seized at 4025 W. Park Place must be suppressed.

PROPOSITION II

THE INFORMATION CONTAINED WITHIN THE "FOUR CORNERS" OF THE AFFIDAVIT IS INSUFFICIENT TO SUPPORT PROBABLE CAUSE FOR ISSUANCE OF A SEARCH WARRANT.

Only the information presented to the reviewing magistrate either in affidavits or testimony may be used to establish probable cause. *Whitley v. Warden State Penitentiary*, 401 U.S. 560 (1971, 91 S. Ct 1031, *United States v. Lockett*, 674 F.2d 84, 845 (1992), *United States v. Seta*, 669 F.2d 400, 404 (1982) (magistrate erred in allowing officer to supplement probable cause at suppression hearing), *Jones v. State of Oklahoma*, 1981 OK CR 93, 632 P.2d 1269 (Ok Cr. 1981) (referring to "four corners" rule and that the Court has consistently held that search warrants must describe the place to be searched with specificity and particularity to meet requirements of the Fourth Amendment).

As well, the United States Supreme Court, in what later became known as the "four corners rule", made it clear that later acquired information **will not** support probable cause. *Aguilar v. State of Texas*, 378 U.S. 108, 84 S.Ct 1509 (1964) ("It is

elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention" FN 1, citing *Giordenello v. United States*, 357 U.S. 480, 486, 78 S.Ct 1245,1250), *Spinelli v. United States*, 393 U.S. 410, S. Ct 584 (1969) (citing *Aguilar* for same proposition), see also *United States v Leon*, 468 U.S. 897. 104 S.Ct 3430 (1984) (the Court adopting "four corners" language stating, "Moreover, the four corners of the warrant plainly indicate that it was not intended to authorize a search for controlled substances." *Leon* FN 5).

In this instance, based upon the argument and authority presented the information provided within the four corners of the affidavit in support of search warrant is flatly insufficient to support probable cause to search the home of Ms. Holt. The State cannot later supplement or correct what is lacking. As the four corners of the affidavit in support of search warrant fails to establish probable cause, the case must be dismissed.

PROPOSITION III

**NO INDEPENDENT FACTS EXIST TO ESTABLISH
MS. HOLT HAD BOTH KNOWLEDGE AND
DOMINION CONTROL OF THE CONTRABAND
SEIZED.**

Possession of a controlled substance means more than being where the action

is; it involves the exercise of dominion and control over the thing allegedly possessed. *United States v. Romano*, 382 U.S. 136, 86 S.Ct 279 (1965), *Fitzpatrick v. United States*, 410 F.2d 513 (5th Cir. 1969), cited by *Brown v. State*, OK CR 55, 481 P.2d 475 (Ok. Cr. 1975). Possession, by its very nature, is unique to the possessor and it is not enough to simply **place someone in the presence of other persons having possession to impart possession to him.** *Commonwealth v. Reece*, 437 Pa. 422, 263 A.3d 463 (1979). The Oklahoma Court of Criminal Appeals has recognized that exclusive possession is not necessary where individuals jointly possess a drug and that possession may be proved by circumstantial evidence. *Patterson v. State*, 403 P.2d 515 (Ok. Cr. 1965). **However, it cannot be inferred from merely being present in a place where a drug is found that a defendant has knowledge of its presence and had dominion and control as there must be additional evidence of knowledge and control to sustain a conviction.** *Brown v. State.*

In *Brown*, the Court of Criminal Appeals reviewed a number of cases with facts similar to this case. In its review the Court found insufficient evidence of knowledge and dominion and control. In *People v. Antista*, 129 Ca.App. 2d 47, 276 P.2d 177 (1954) a defendant's conviction for possession of marijuana found in his apartment **was reversed** due to insufficient evidence of knowledge. Although there was no

question the apartment belonged to the defendant, there was evidence he did not have exclusive use of the apartment due to the comings and goings of others. In its decision the court noted:

...Guilty knowledge is not presumed. It has to be established by evidence. In a sense it can be said that one has possession of everything that is contained in the home or apartment in which he lives but this is not the sense in which 'possession' is used in the penal statute. In all the cases we have examined in which conviction was upheld **there was some incriminating statement or circumstance in addition to the presence of marijuana or narcotic** which indicated knowledge of the defendant of its presence and his control of it.

Antista at 179 (emphasis added)

In yet another similar case, a conviction for marijuana was reversed where the defendant shared the apartment with another. *Petty v. People*, 447 P.2d 217 (Colo. 1968). In *Petty* the court held "(W)here a person is in possession but not exclusive possession, of the premises, it may not be inferred that he knew of the presence of marijuana there and had control of it unless there are statements or other circumstances tending to buttress the inference." citing *Evans v. United States*, 9 Cir., 257 F.2d 121. As well, the court noted joint possession could not be established simply by the fact a defendant was in the company of another having possession of the substance absent additional independent factors linking him to the contraband.

In *Brown*, the court found there was insufficient evidence to support a

conviction as Brown did not have exclusive possession or use of the apartment because several others had equal access to the apartment. Although the Court applied the now defunct "evidence excluding every other hypothesis except guilt" standard, the result does not change. The law *vis-a-vis* knowledge and dominion and control is still the same. There must be some additional and independent factor -beyond mere presence - to show knowledge and dominion and control.

In this case **there is none**. The only evidence at all is that Christina Holt lived in the same residence where methamphetamine and marijuana were found. No evidence exists to suggest Ms. Holt was under the influence of drugs at the time and no paraphernalia (pipes, razors, straws) was found on her person to provide any inference of usage. Further, no evidence was found on her person to suggest she had recently sold drugs to anyone or for that matter had any involvement in any sale. Although the affidavit is replete with historical drug dealing information concerning Mr. Bustos, there is simply no evidence that Ms. Holt ever sold drugs to anyone. Further, there are no statements from Holt indicating she had any possessory interest in the drugs found. Any suggestion of "an independent" factor is mere conjecture, speculation and guess work. An individual's liberty cannot be deprived under such circumstances.

For the reasons stated herein there is insufficient evidence for this case to

proceed. Under these facts, the State of Oklahoma cannot sustain its burden of probable cause for these offenses. The State must prove Holt (1) **knowingly** (2) possessed a controlled dangerous substance. For these reasons Defendant Holt respectfully requests this Honorable Court to dismiss this case due to insufficiency of evidence.

PROPOSITION IV

THE REVIEWING MAGISTRATE SHOULD HAVE SUSTAINED DEFENDANT'S DEMURRER AS THE STATE'S POSITION IS NOT SUPPORTED BY RELEVANT AUTHORITY.

The arguments presented by the State at preliminary hearing are flawed for a number of reasons. The State's entire argument relies upon the reviewing court giving "great deference" to the magistrate's finding of probable cause. While *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 mandates this standard of review (See also *Gregg v. State*, 1992 OK CR 82, 844 P.2d 867 (Ok. Cr. 1992), such deference cannot save an affidavit which is **factually** deficient. The issuing authority must have a **substantial basis** for concluding that probable cause existed. See *United States v. Rutherford*, 824 F.2d 831(10th Cir. 1987) cited in *Gregg v. State*.

Here, the facts within the probable cause calculus are hardly substantial. There are no facts at all which establish that Mr. Bustos ever sold, stashed, or otherwise

conducted any drug activity at 4025 West Park Place. The affidavit fails to provide any details which a reviewing magistrate could use to determine probable cause existed to search this home. No pertinent factors, such as observing heavy traffic, undercover buys, or trash pulls, are listed which could support probable cause to search 4025 West Park Place. The only information contained in the affidavit having any suggestion of drug activity is the blanket statement that drug dealers frequently maintain multiple places as stash houses.

This boilerplate statement is akin to similar boilerplate language which has been held to be insufficient. For instance, the Oklahoma Court of Criminal Appeals has held merely stating that the evidence sought is a controlled dangerous substance which **could possibly** be distributed is insufficient to support a request for nighttime execution of a search warrant. *Solis-Avila v. State*, 830 P.2d 191, 192 (Okla. Crim. App. 1992), *Bingman v. State*, 832 P.2d 423, 424 (Okla. Crim. App. 1992). As well, the Tenth Circuit has similarly held "conclusory statements regarding the conduct of drug dealers will not by themselves justify an unannounced execution of a search warrant." *United States v. Stewart*, 867 F.2d 585 (10th Cir. 1989). The affidavit in this case falls short for the same reasons. The statement that "drug dealers maintain multiple places" is entirely speculative and conclusory *vis a vis* any drug dealings that may actually be occurring at 4025 West Park Place - it assumes Mr. Bustos will

be selling drugs at this address just because he is a drug dealer just as assuming that drug dealers will be armed and dangerous because they are drug dealers. Additionally, the proffered facts that Mr. Bustos's car was seen at 4025 West Park and his known relationship with Ms. Holt adds nothing but conjecture and speculation that drugs will be found at the residence.

Even under the "great deference" standard there is no basis for this search warrant to pass muster. Contrary to the State's position asserting *United States vs. Ventresca*, 380 U.S. 102 (1965) holds "that in marginal cases where the probable cause is in doubt, close calls go the runner, the runner being upholding the warrant" (TR 84, 13-16), the case does not stand for that proposition. In *Ventresca*, the Court, referring to its earlier decision in *Jones v. United States*, 362 U.S. 257, 270 (1960), merely stated "this Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant **may be sustainable** where without one it would fall. (Emphasis added). In *Jones* the Court explained, stating:

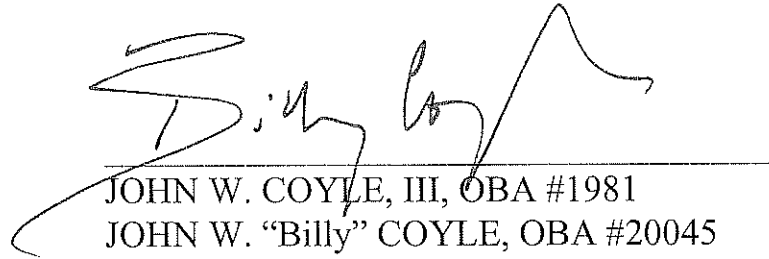
"In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.
Id.

In other words, while the Court has suggested the preference of using search warrants in marginal cases, it has not stated or suggested that it favors upholding the warrant in such cases. For these reasons the affidavit in support of search warrant does not establish a substantial basis to conclude probable cause existed for searching the 4025 West Park Place residence.

Conclusion

In *Minnesota v. Carter*, 525 U.S. 83, 99, 119 S.Ct. 469 (1998) the Supreme Court reinforced the importance of the sanctity of the home, stating "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." The Fourth and Fourteenth Amendments to the United States Constitution and Oklahoma counterpart affords Ms. Holt this same special protection irrespective of what the officers may have discovered incident to their unlawful search. In this instance, there can be no substantial basis for concluding there was probable cause of drug activity taking place at 4025 West Park Place. Affidavits in support of search warrants must be governed by credible facts which support probable cause, not conjecture or speculation. The affidavit contains no facts which would cause a person of reasonable caution to believe drug activity was actually taking place at this residence. For these reasons any evidence seized incident to the execution of the search warrant must be suppressed.

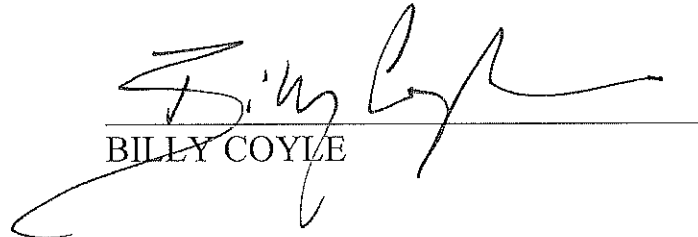
Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on this 2nd day of May 2007, a copy of the above and foregoing document was hand delivered to Tony Evans, Esq., Office of the Oklahoma County District Attorney, 320 Robert S. Kerr, Suite 505, Oklahoma City, Oklahoma 73102.



BILLY COYLE