UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7352
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DWIGHT LYNN HARRILL,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CR3 91 068 R)

(November 19, 1992)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

Appellant Harrill has been sentenced, inter alia, to 288 months imprisonment after being convicted on a three-count indictment surrounding his attempted manufacture of methamphetamine. On appeal, he challenges the validity of the search warrant for his office premises and the trial court's

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

exclusion of testimony from defense witness Patrick Fox. Finding no error, we affirm.

In the suppression hearing, the government defended the search of Harrill's "Southwest Coatings" office at 15530 LBJ Freeway, Suite 416, Mesquite, Texas, on the basis of the officers' good faith reliance upon a search warrant. United States v. Leon, 468 U.S. 897, 922-23, 104 S. Ct. 3405, 3420 (1984). The district court denied Harrill's suppression motion without reasons. Harrill contends that the affidavit underlying the warrant did not establish probable cause to search the premises, and the good-faith exception does not apply because DEA agent Juvrud omitted material facts that would have refuted the probable cause allegations in the affidavit. We need not reach the issue of probable cause if we determine that the Leon good-faith exception to the exclusionary rule applies. United States v. Kleinebreil, 966 F.2d 945, 949 (5th Cir. 1992).

There is a presumption that an affidavit supporting a search warrant is valid. Franks v. Delaware, 438 U.S. 154, 171, 98 S. Ct. 2674 (1978). The defendant bears the burden of proving deliberate falsehood or reckless disregard for the truth. Id. A law enforcement officer's omission of information from an affidavit in support of a search warrant may require exclusion of the evidence if (1) the omission was knowingly and intentionally made or was made in reckless disregard for the truth, and (2) the inclusion of the omitted information would render the affidavit insufficient to support a finding of probable cause. United States

v. Cronan, 937 F.2d 163, 165 (5th Cir. 1991). The requisite intent may be inferred from an affidavit omitting facts that are clearly critical to a finding of probable cause.[1]

It is unnecessary to recite the allegations of the affidavit supporting the search warrant. We merely observe that the warrant reflects the product of an investigative effort carried out by an experienced investigator of drug trafficking crimes over a period of weeks in which suspicion continuously built up around the type of chemical manufacturing that "Southwest Coatings" was engaged in.

Harrill's brief does not allege that Juvrud omitted facts from his affidavit intentionally or recklessly. Accordingly, Harrill must be suggesting that certain omitted facts were so crucial to a finding of probable cause that intentional omission should be inferred. We disagree with this characterization of the omitted facts. Harrill posits four "facts" that are allegedly contrary to the statements in the affidavit. Those "facts", together with the refutation of Harrill's arguments concerning them, are as follows:

(1) it is not illegal to purchase or possess ephedrine hydrochloride in tablet form;

(2) there are legitimate uses of ephedrine hydrochloride.

Juvrud's affidavit stated that "persons will distribute ephedrine hydrochloride in tablet form to circumvent federal regulations

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[1] Allegations of material omissions are treated in the same manner as claims of material misstatement. United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980).

restricting the distribution of ephedrine hydrochloride to only legitimate businesses." As the government points out, the common sense reading of this statement is that there are legal uses of ephedrine hydrochloride. The statement cannot reasonably be interpreted as having misled the judge who issued the warrant.

> (3) Harrill possessed a letter of authorization from the Texas Department of Public Safety to purchase laboratory glassware.

Juvrud testified at the suppression hearing that he was not aware when he prepared the affidavit that Texas's DPS issued waivers for businesses to purchase laboratory glassware. As Harrill does not challenge that fact, there is no evidence that Juvrud admitted this information intentionally or recklessly.

> (4) Juvrud's statement about Harrill's criminal arrest record was a misleading attempt to portray Harrill as a career offender.

As for Harrill's criminal record, Juvrud testified that he "just didn't put [the dispositions] in." If Juvrud had included the dispositions of Harrill's arrests, the magistrate would have known that Harrill had been convicted on one of the charges in state court. A more thorough criminal history investigation would have revealed three convictions for submitting false statements to a bank. There is no evidence that Juvrud intentionally omitted information of Harrill's criminal record to bolster a finding of probable cause.

In sum, the material omissions exception to the good-faith rule does not apply. The warrant establishes that the agents

acted in good faith in conducting the search, and their good-faith reliance was objectively reasonable. Leon 468 U.S. at 922, 104 S. Ct. at 3420. We do not reach the issue of probable cause. Because the first search of the premises was legal, evidence seized pursuant to the second search warrant obtained after the first search began is not inadmissible.

Harrill's subsidiary argument that the DEA's search exceeded the scope of the first warrant is meritless. The officers were permitted to search any area of the premises in which methamphetamine, described in the warrant, might be located. United States v. Ross, 456 U.S. 798, 821, 102 S. Ct. 2157 (1982). They were further entitled to seize evidence not described in the search warrant that was reasonably related to the offense that formed the basis for the warrant. United States v. Fortenberry, 860 F.2d 628, 636 (5th Cir. 1988). They took the additional precaution, however, of securing second warrant to seize evidence not named in the first warrant.

Harrill also contends that the district court erred in refusing to allow Patrick Fox to testify as a defense witness because Fox would not take an oath or affirm before testifying. We decline to consider the parties' arguments concerning the decision in Ferguson v. Commissioner of Internal Revenue, 921 F.2d 588 (5th Cir. 1991), because the district court also considered a proffer of Fox's testimony and rejected it for independent reasons. The district court did not abuse its discretion in concluding that

Fox's testimony would not have impeached testimony in favor of the prosecution provided by Harrill's co-conspirator Werner Koenig.

Harrill correctly asserts that the government's arguments somewhat miss the mark of his contention that Fox's testimony would have critically impeached that of Koenig, the "star" prosecution witness. Notwithstanding this problem, our review of the record demonstrates that Fox's testimony would not have impeached Koenig and, as the district court found, was essentially consistent with that of Koenig. Under such circumstances, the trial court's exclusion of that evidence cannot have been prejudicial or an abuse of discretion.

Harrill asserts that Fox would have testified to prior inconsistent statements of Koenig on two different matters: whether Koenig and Harrill had a plan that would have resulted in a severance of their trials, and whether Koenig told Fox that he and Harrill had not committed any crime and that Harrill's true purpose in purchasing ephedrine hydrochloride was to market the tablets as bronchodilators. Koenig was cross-examined on precisely these points at trial, and he did not deny that he might have made such statements. Proof of a prior inconsistent statement may be elicited by extrinsic evidence only if the witness on cross-examination denies having made the statement. Inability to recall the statement does not constitute a denial. United States v. Devine, 934 F.2d 1325, 1344-45 (5th Cir.), cert. denied, 112 S. Ct. 349 (1991).

Harrill also contends that Koenig told Fox that he did not have much to do with the ephedrine tablets but that his role was to develop a polymerization catalyst. Harrill argues that this statement is inconsistent with Koenig's testimony at trial that he actively assisted Harrill in the process of extracting the ephedrine from the tablets to make methamphetamine. Harrill's brief does not, however, quote the entire statement from the tape-recorded transcript in which Koenig told Fox, "no, I had -- with the metal shavings itself, no, I -- but my part was not really with anything concerning the tablets, my part was really with the development of the -- of a polymerization catalyst, you know, that's what Dwight had asked me to do initially when I came down there." The actual statement is consistent with Koenig's trial testimony that when he first arrived in Dallas, Harrill asked him to work on a reduction of alcohol that would be used as a polymerization catalyst. Not until later did he discover that Harrill was actually intending to manufacture methamphetamine. There would have been no impeachment value in introducing this statement.

For these reasons, the judgment of the district court is AFFIRMED.