

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9104
Summary Calendar

BILLY DELBERT DICKEY

Plaintiff-Appellant,

versus

ADRIAN HUDDLESTON, Agent, West
Central Texas Interlocal
Crime Task Force, ET AL.

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas
(6:92-CV-060)

(December 29, 1993)

Before GOLDBERG, KING, and GARWOOD, Circuit Judges.

PER CURIAM:*

I. Background

Billy Delbert Dickey, proceeding pro se and in forma pauperis, filed this action under 42 U.S.C. § 1983 against three officers of the West Central Texas Interlocal Crime Task Force ("Task Force") in both their individual and official capacities.

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Dickey alleged that these officers searched his farm house and his mother's home in violation of his Fourth Amendment rights. The complaint also named the Attorney General of Texas, in his individual and official capacities, and the State of Texas itself. Without requiring the defendants to answer, the district court referred this case to a magistrate judge for a report and recommendation. The magistrate judge ordered Dickey to submit a brief detailing the substance of his claims. After considering Dickey's response, the magistrate judge recommended that the claims brought against the defendants in their individual capacities be dismissed without prejudice because they were frivolous under 28 U.S.C. § 1915(d). The magistrate judge also recommended that the claims brought against the State and the other defendants in their official capacities be dismissed with prejudice because the Eleventh Amendment prohibited such claims from being brought in federal court. Over Dickey's objections, the district court adopted the recommendation of the magistrate judge and dismissed the complaint. Dickey appeals.

II. Analysis

A District Court may dismiss an in forma pauperis suit "if satisfied that the action is frivolous." 28 U.S.C. § 1915(d). A claim may be found to be frivolous under § 1915(d) only if it "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 329 (1989). We review a district court's dismissal of a suit under § 1915(d) for abuse of discretion. Id.

Dickey does not contest the dismissal of the State of Texas or of the Attorney General. Thus, we will only address Dickey's claims against the Task Force officers. We will first examine whether the district court abused its discretion when it found that the claims against these officers in their individual capacities lacked an arguable basis in law.

Dickey's claims center around two search warrants: one for his farm house and another for his mother's home. Defendant Adrian Huddleston requested and obtained these search warrants from a state magistrate on November 16, 1990. After these locations were searched, the property seized was turned over to federal agents, who in turn obtained a warrant for Dickey's arrest on narcotics charges. Dickey claims that the defendants violated his constitutional rights by procuring the search warrant for his farm house by relying on an affidavit from Huddleston that contained material omissions and intentional falsehoods. Dickey also maintains that the defendants violated his constitutional rights by searching his mother's home based on a warrant that plainly was not supported by probable cause. We will examine Dickey's allegations regarding each of these searches in turn.

A.

To be constitutionally valid, a search warrant must be based on probable cause. The execution of a search warrant that is not supported by probable cause, therefore, violates the Constitution. In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court considered the circumstances under which a defendant in a criminal

proceeding could challenge the veracity of an affidavit used by the police to obtain an otherwise valid search warrant. The Court held that a criminal defendant could challenge the truthfulness of a warrant affidavit and that the fruits of the resulting search could be suppressed if the defendant could show that the affidavit contained statements that were untrue and necessary to the magistrate's finding of probable cause. Specifically, the Court wrote that

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted . . . is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.

Id. at 171-72 (footnote omitted). Allegations that material facts were omitted from a warrant affidavit are treated similarly. If, when the material that was omitted is added to the magistrate's calculus, the affidavit would still support a finding of probable cause, the warrant is still considered to be valid.¹ Although

¹Whether there is probable cause for the issuance of a search warrant depends on whether "the magistrate was provided

Franks was a criminal case, courts have acknowledged that a material misrepresentation or omission from a warrant affidavit can give rise to a § 1983 claim for money damages. See, e.g., Olson v. Tyler, 771 F.2d 277 (7th Cir. 1985).

According to Dickey, a comparison of an affidavit that accompanies the federal arrest warrant and Huddleston's search warrant affidavit for the farm house shows that, in order to obtain the search warrant for the farm house, Huddleston fabricated some facts and omitted other material facts. Our review of the record does not lead us to this conclusion.

Huddleston's alleged fabrications and omissions are as follows: First, Dickey observes that Huddleston reported in the federal complaint affidavit that the confidential informant had not previously provided information to the Task Force. However, in the search warrant affidavit, Huddleston said that the informant had

with sufficient reliable information from which he could reasonably conclude that the items sought in the warrant were probably at the location sought to be searched.'" United States v. Wake, 948 F.2d 1422, 1428 (5th Cir. 1991) (citation omitted), cert. denied, 112 S. Ct. 2944 (1992). In the determination of probable cause, the magistrate "may draw reasonable inferences from the material he receives, and his ultimate probable cause decision should be paid great deference by reviewing courts." United States v. May, 819 F.2d 531, 535 (5th Cir. 1987). The magistrate must

must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (citation omitted).

given information on numerous occasions in the preceding two months. Second, Dickey notes that Huddleston stated in the search warrant affidavit that the confidential informant had personally viewed a methamphetamine laboratory at Dickey's farm. However, the federal affidavit states that the informant said that Guy Kincaid was the only person who could come and go from the lab. Third, the search warrant affidavit shows that the informant claimed to have personal knowledge that Dickey was distributing large quantities of methamphetamine. However, according to Dickey, the federal affidavit contains no statement that the informant had personal knowledge of Dickey's involvement in the distribution of methamphetamine. Fourth, in the search warrant affidavit, Huddleston said that the confidential informant had made arrangements to purchase methamphetamine from Ed Lane Smith. The federal affidavit, however, contains no such statement. Fifth, in the search warrant affidavit, Huddleston stated that the informant said that the lab was operated by a "Billy" and an individual named Ed Lane Smith. However, according to Dickey, in the federal affidavit, Huddleston said that the informant said that Billy Sider operated the lab. Finally, Dickey charges that the federal affidavit reveals that Huddleston omitted from the search warrant affidavit a statement that some glassware had been shattered and buried at the farm.²

²Apparently, such glassware is used in the production of controlled substances such as methamphetamine.

Dickey's attacks on the search warrant affidavit are not persuasive. The statement in the federal complaint affidavit that Guy Kincaid was the only person who could "come and go" to the laboratory can be read to be inconsistent with the statement in the search warrant affidavit that the informant had personally viewed the laboratory at Dickey's farm. However, in this case, this small discrepancy, without more, cannot nullify the validity of the search warrant for the farm house. Even if the informant's statement that he had personally viewed a methamphetamine laboratory at Dickey's farm is excluded from the warrant affidavit, that affidavit would still have sufficient content to support a finding of probable cause. See Franks, 438 U.S. at 172.

The search warrant affidavit states that the informant had given reliable information in the past, contradicting the federal complaint affidavit that says that the informant had not previously given information to the Task Force. However, the statement that the informant had provided reliable information in the past was not necessary to establish the informant's credibility. The district court noted that the search warrant affidavit also demonstrated that the confidential informant was reliable because, after the informant had led Huddleston to the farm house and told him that a methamphetamine laboratory operated by Billy and Ed Lane Smith was located there, another officer of the Task Force confirmed that the location was under the control of Dickey and Smith and that Dickey was presently suspected of distributing methamphetamine.

The other alleged discrepancies do not show that the search warrant affidavits contained false statements or material omissions. Dickey correctly notes that the search warrant affidavit contains statements (such as that Dickey had distributed methamphetamine and that the informant had arranged to purchase methamphetamine by telephoning Ed Lane Smith at Dickey's farm) that the federal complaint affidavit does not contain. However, nothing shows that the statements included in the search warrant affidavit are in any way false or that the search warrant affidavit omitted any fact that would cast doubt on the validity of the search warrant. Moreover, in both the search warrant affidavit and the federal complaint affidavit, Huddleston reported that the informant said that Billy and Ed Lane Smith operated a methamphetamine laboratory at the farm. Although the federal complaint affidavit also revealed that the informant told Huddleston that Billy Sider operated the methamphetamine laboratory, this additional fact does not establish that any statement in the search warrant affidavit is false or that any omission from the search warrant affected the validity of that warrant. The federal complaint affidavit revealed that Billy Sider was believed to be the plaintiff, Billy Delbert Dickey. Finally, Dickey's observation that the search warrant affidavit did not contain any reference to broken glassware is hardly surprising once it is realized that the broken glassware was observed two weeks after the search warrant affidavit was made.

In sum, the facts set out in this search warrant affidavit, including the facts outlined above and the facts that Dickey has

not even attempted to challenge (such as that another confidential informant reported that Dickey was in possession of methamphetamine at the farm house), show that the farm house search warrant was supported by probable cause. Therefore, to the extent that Dickey's complaint is based on the search warrant for his farm, the district court did not abuse its discretion in concluding that Dickey's claims have no arguable basis in law.

B.

Regarding the search warrant for Dickey's mother's home, Dickey contends that the search warrant affidavit was insufficient on its face to establish probable cause. Dickey claims that the house was not described in any way and that the facts given in the affidavit do not pertain to the house.

If a facial challenge to the sufficiency of a warrant affidavit is made, courts will examine the warrant affidavit to determine whether the totality of the circumstances indicate that the affidavit was supported by probable cause. Hale v. Fish, 899 F.2d 390, 398-99 (5th Cir. 1990).

Here, the search warrant affidavit reveals that Dickey was using the farm house as a narcotics laboratory and that some of the equipment related to this narcotics production was being moved from the farm house to Dickey's mother's house. The facts recited in the search warrant affidavit for Dickey's mother's house were sufficient to establish probable cause. Thus, to the extent that Dickey's complaint is based on the search warrant for his mother's

house, the district court did not abuse its discretion in concluding that Dickey's claims have no arguable basis in law.

III. Conclusion

We conclude that the district court did not abuse its discretion when it concluded that Dickey's claims against the officers in their individual capacities lacked an arguable basis in law. Given this conclusion, we need not address the district court's dismissal of the claims against the officers in their official capacities. The judgment of the district court is AFFIRMED.