

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-7539

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CARL PATRICK AUSTIN,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Mississippi  
(CR-J92-00081(W)(C))

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(September 6, 1994)

Before WIENER, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

PER CURIAM:\*

Defendant-Appellant Carl Austin appeals his conviction, following a conditional plea of guilty, of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The focus of Austin's appeal is the refusal of the district court to suppress evidence seized in a search that

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\* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Austin insists violated his Fourth Amendment rights. Concluding that the subject search was lawful, we affirm.

I.

FACTS AND PROCEEDINGS

Austin was arrested on the evening of June 12, 1992, as a result of the discovery of a quantity of crack cocaine, drug paraphernalia, cash and firearms in his apartment in Jackson, Mississippi. His arrest followed a search of the apartment by Drug Enforcement Administration (DEA) agents and other law enforcement officers. The investigation began at about 4:00 p.m. on that date, when DEA Special Agent Joe Bond was advised of a telephone call received by a law enforcement agency relative to the Grove Apartments and Racquet Club (the Grove Apartments) in Jackson. The call had been placed by the manager of the complex.

Bond drove immediately to the Grove Apartments, where the manager told him that two of her maintenance workers had entered Austin's apartment to service the air conditioning unit at a time when no one else was in the apartment. She said that the workers had told her that in the apartment they had seen an automatic rifle and two automatic handguns, some powder that appeared to be cocaine residue and marihuana residue, and a big set of scales. Bond spoke directly with the workers who told him that the "rifle . . . looked to be automatic," and that there were semiautomatic handguns. The workers said that they also saw some plastic baggies, a weight bench, a television set, and clothing scattered about, and that the apartment was otherwise without furniture. They also told Bond

that they had left a note on the weight bench informing the apartment's occupant or occupants that they (the workers) would return later to repair the air conditioner.

Bond testified that he and other agents who had arrived shortly after his arrival examined the surrounding area for sites from which they could set up surveillance of the subject apartment. They determined that there was no position from which they could maintain surveillance without detection. They considered the fact that all the adjacent apartments were occupied and that if they were to ask permission to use any of the other apartments, the tenants would have been placed at risk. The agents did not have at their immediate disposal any vehicle that they could use appropriately for surveillance; and they were concerned that other tenants might observe any surveillance and warn the occupants of Austin's apartment.

Having concluded that covert surveillance of the apartment was not feasible and realizing that the note would have alerted the occupants of the apartment that the workers had seen the guns, scales, drug residue and absence of furniture, Bond and two other agents decided to go to Austin's apartment and knock on the door. While one agent knocked, they announced that they were police officers. As the agents were in plain clothes, they had pulled out their badges to show to the occupants.

No one opened the apartment door, but twice someone peeked out of a curtained window. The agents again announced their official identity and asked the occupants to open the door. After the

second peek, Bond heard running inside the apartment. Because of the weapons that reportedly were in the apartment, Bond entered it via the bedroom window as the other two agents entered by kicking in the front door. These entries were made without a warrant.

In the bedroom, Bond took custody of Austin, who had been running toward the bedroom closet. A security sweep of the apartment revealed only one other occupant, McDonald. The two suspects were detained in the front room of the apartment while a state agent who was a member of the joint drug task-force obtained a search warrant from a state judge after the agent was unable to locate a federal judge. Meanwhile, Agent Walters had unloaded the semiautomatic assault rifle and the two handguns that were found in the front room and put them in a safe place. After the search warrant was obtained and brought to the premises, the agents searched the apartment, finding the crack and about \$4,000 in cash in the bedroom closet.

## II.

### ANALYSIS

Austin contends that the district court reversibly erred by holding that the agents' warrantless entry into his apartment was justified by exigent circumstances. He asserts that if such circumstances existed, they were created by the agents themselves, so that the intrusion violated his Fourth Amendment rights. Austin relies principally upon United States v. Munoz-Guerra, 788 F.2d 295 (5th Cir. 1986), which the government maintains to be factually distinguishable. Austin also contends that the district court

erred by holding that the search warrant for his apartment and the supporting affidavit were legally insufficient due to an absence of probable cause. He argues that the "affidavit and underlying facts and circumstances sheet . . . fails [sic] to supply sufficient information upon which probable cause and the issuance of a search warrant may be based."

Even assuming, arguendo, that we were to determine that the agents' initial warrantless entry into the apartment was not validated by the exigent circumstances exception, the Fourth Amendment would not require suppression of evidence observed and seized during a later search made pursuant to an otherwise valid warrant that was entirely independent of the initial entry. Murray v. United States, 487 U.S. 533, 541-42 (1988); United States v. Register, 931 F.2d 308, 311 (5th Cir. 1991). This is an application of the "inevitable discovery doctrine," which is "an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." Murray, 487 U.S. at 539. "The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." Id. at 542.

Relying upon Murray, the Register Court held that it was unnecessary "to reach the question whether under the facts of this case, exigent circumstances justified a warrantless entry into Register's condominium." 931 F.2d at 311. The Register Court held

further that the mere mention of the security sweep of the condominium in the affidavit did not invalidate the search warrant, as the affidavit was not based upon any "information elicited by the security sweep." Id.

The affidavit prepared for obtaining the warrant to search Austin's apartment was presented to Hinds County Court Judge Chet Henley by Lt. Gerald Dettman of the Mississippi Bureau of Narcotics, who was assigned to "the DEA state and local task force." In his affidavit, Dettman referred to the security sweep as follows: "Agent[s] Bond and Walters went to the door of the aforescribed apartment and knocked on the door. The occupants ran and agents entered and secured the premises and called for back up."

Dettman made oral statements to Judge Henley that enlarged on the information stated in the affidavit, which is permitted under Mississippi law. See Williams v. State, 583 So. 2d 620, 622 (Miss. 1991). Dettman gave the judge a description of the "weapons," clarifying that they were firearms, and explained the significance of the absence of furniture in the apartment. Prior to the agents' initial entry into Austin's apartment, the workers had described the rifle and two handguns to Bond, and had mentioned the absence of furniture. As no significant facts in the warrant or in Dettman's supplemental remarks to Judge Henley were learned from the warrantless entry and security sweep of the apartment, all such facts having come from apartment personnel, neither the affidavit nor the oral explanation tainted the later search based on the warrant. See Register, 931 F.2d at 311.

In his brief to this court Austin contends, as he alleged in his motion to suppress, that the affidavit did not "supply sufficient information upon which probable cause and the issuance of a search warrant [could] be based." (emphasis added.) The district court made specific findings in holding that the search warrant was validly based upon Dettman's presentation to Judge Henley.

The affidavit presented to Judge Henley contained the following information as furnished by the apartment workers to Agent Bond: A maintenance employee who entered the apartment "observed what he believed to be cocaine and paraphernalia as well as marijuana and paraphernalia and several weapons." This information was enlarged upon by Dettman's description of the "weapons" as automatic or semi-automatic firearms, and his explanation to Judge Henley of the significance of the absence of furniture. The affidavit also mentioned that when the agents "knocked on the door[, ] the occupants ran." As acknowledged by defense counsel in oral argument to this court, the agents did not violate any of Austin's rights by knocking on his apartment door so that mention of the knock on the door and the running of the occupants do not spoil the affidavit.

The personal observations of a confidential informant (CI), together with a basis for finding that he was a reliable source of information, can provide the issuing "magistrate with more than a 'bare bones' affidavit." United States v. Satterwhite, 980 F.2d 317, 321 (5th Cir. 1992). "In assessing the credibility of an

informant's report [upon review, this court] examine[s] the informant's veracity and basis of knowledge." Id. In Austin's case, the district court found that the information given by the workers was more reliable than that of a CI, as the workers were "[e]veryday citizens . . . who [were] named and readily identified, and who [could] later be contacted."

"[T]he Supreme Court [has] opted for a 'totality-of-the-circumstances' approach to a magistrate's finding of probable cause." United States v. Brown, 941 F.2d 1300, 1303-04 (5th Cir.) (quoting Illinois v. Gates, 462 U.S. 213, 230 (1983)), cert. denied, 112 S. Ct. 648 (1991). "A magistrate's determination [of probable cause] is entitled to great deference by reviewing courts." Brown, 941 F.2d at 1302. The Court held further that "[a]n affidavit may rely on hearsay as long as it presents a substantial basis for crediting the hearsay." Id. at 1304 (citations and quotation marks omitted). The search of Austin's apartment was legal because (1) the totality of the circumstances presented to Judge Henley by Dettman provided "a substantial basis for concluding that a search would uncover evidence of wrongdoing". Id. at 1302, and (2) all information presented to Judge Henley came from the apartment personnel, prior to and totally independent of the warrantless entry and sweep of Austin's apartment.

In the alternative, argues the government, even if the search warrant or the underlying affidavit were in some way found to be deficient, all of the evidence seized thereunder would nevertheless be admissible under the "good faith" exception of United States v.



Leon, 468 U.S. 897 (1984). Austin takes issue with this contention.

As shown by the foregoing discussion, we do not need to determine whether the good faith exception is applicable. Out of an abundance of caution, however, we do so, concluding in the alternative that even if neither the exigent circumstances exception to the warrantless search nor the inevitable discovery/independent search analysis were here sufficient to support the district court's refusal to suppress the evidence in question, the good faith exception under Leon is clearly applicable and sufficient to support the ruling of the district court. The agents who searched Austin's apartment in reliance on the warrant issued by Judge Henley on the strength of the affidavit clearly acted in good faith within the intendment of Leon.

### III

#### CONCLUSION

Pretermittting consideration of the district court's determination that exigent circumstances justified the warrantless search of the apartment and seizure of the evidence therein, we hold that the court's refusal to suppress the evidence found in the apartment is sustainable under the inevitable discovery/independent source doctrine. Moreover, and in the alternative, we hold that the Leon good faith exception is sufficient here to withstand Austin's assignment of error.

AFFIRMED.