

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-8693

(Summary Calendar)

UNITED STATES OF AMERICA,,

Plaintiff-Appellee,

versus

BUDDY RAY GUNN,,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(SA-93-CR-34-1)

(March 1, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Buddy Ray Gunn appeals his conviction for possession of more than 100 grams of a substance containing methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Gunn contends that the district court erred in denying his motion to suppress evidence seized from his residence. We affirm.

I

Linda Guthrie testified as a government witness in a criminal

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

case against her husband, Blair Guthrie, resulting in his conviction and incarceration. Four years later, after his release, Mr. Guthrie was arrested for a parole violation in Oakland, California. A few days after that arrest, Ms. Guthrie answered the door of her home in Dallas, Texas, to accept delivery of a bouquet of flowers. When Ms. Guthrie signed her name on the delivery man's receipt book, the man produced a gun and stated, "This is from Blair." Ms. Guthrie struggled for the gun and was shot twice. An analysis of the receipt book, which the assailant had dropped on the ground at Ms. Guthrie's house, revealed the fingerprints of Buddy Ray Gunn and his common-law wife.

Four months later, Special Agent Wendel Frost of the Bureau of Alcohol, Tobacco, and Firearms conducted a surveillance of 831 Overhill, San Antonio, Texas, the location listed on United States Probation Records as Gunn's residence. Frost observed someone strongly resembling Gunn working on a vehicle in the driveway. On the same day, he discovered that the electrical utilities for 831 Overhill were in Gunn's name, and that the San Antonio telephone book listed a phone number for Gunn at 831 Overhill, matching the number listed in the probation records.

One month later, Frost obtained telephone records that revealed that a call was made from 831 Overhill to Mr. Guthrie's residence two months after Ms. Guthrie's shooting. The records also revealed that three calls were placed from 831 Overhill to a hotel in Dallas, Texas: one on the day before, and two on the day of the shooting. Telephone records from the hotel indicated that

four calls were placed from the front desk of the hotel to 831 Overhill on the day of the shooting. As a result of these investigations, Frost believed that Gunn was involved in the assault on Ms. Guthrie. He listed his findings in an affidavit presented to a United States magistrate judge, who issued a search warrant for 831 Overhill. Incident to the search of Gunn's residence, agents found and seized sizeable quantities of currency and methamphetamine. Gunn was indicted for possession of more than 100 grams of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). The district court denied Gunn's motion to suppress the evidence seized during the search of his residence, and Gunn was convicted.

Gunn challenges his conviction, asserting that the district court erred in denying his motion to suppress. Specifically, Gunn contends that (1) the district court erred in concluding that probable cause existed to suspect Gunn of the assault on Ms. Guthrie, (2) the district court erred in concluding that probable cause existed to search Gunn's residence, and (3) the good faith exception to the Fourth Amendment's exclusionary rule does not apply.

II

In reviewing a district court's denial of a motion to suppress, we utilize a two-part test, "(1) whether the good-faith exception to the exclusionary rule applies, and (2) whether the warrant was supported by probable cause." *United States v. Laury*, 985 F.2d 1293, 1311 (5th Cir. 1993) (citing *United States v. Leon*,

468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)); *United States v. Satterwhite*, 980 F.2d 317, 320 (5th Cir. 1992)). However, if the good-faith exception applies, we need not decide the probable cause issue; therefore, we address first the good-faith issue.¹

When an officer's reliance upon the validity of a search warrant issued by a magistrate is reasonable, the good faith exception applies and we will not exclude evidence obtained from the search. *United States v. Mitchell*, 31 F.3d 271, 275 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 455, 130 L. Ed. 2d 363 (1994); *United States v. Fisher*, 22 F.3d 574, 578 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 529, 130 L. Ed. 2d 433 (1994).² An officer may rely in good faith upon the validity of a search warrant unless the warrant is based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923, 104 S. Ct. at 3420.³ This type of "bare bones" affidavit contains "wholly

¹ When the good faith exception applies, a reviewing court will ordinarily proceed to the probable cause issue only if the case presents a "novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates." *Laury*, 985 F.2d at 1311 (quoting *Illinois v. Gates*, 462 U.S. 213, 264, 103 S. Ct. 2317, 2346, 76 L. Ed. 2d 527 (1983) (White, J., concurring)); *accord Satterwhite*, 980 F.2d at 320. Because this case presents no such novel question of law, we do not reach Gunn's probable cause issue. See *United States v. Craig*, 861 F.2d 818, 821 (5th Cir. 1988) (determining staleness of information contained in affidavit was "primarily factual in nature," and resolution of issue "would not give substantial guidance to lower courts and law enforcement officials").

² The reasonableness standard is an objective one. *Leon*, 468 U.S. at 919 n.20, 104 S. Ct. at 3419 n.20.

³ "[P]robable cause is a fluid concept))turning on the assessment of probabilities in particular factual contexts))not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232, 103 S. Ct. at 2329. A magistrate's probable cause determination is a practical, common-sense

conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause." *Satterwhite*, 980 F.2d at 321. Thus, "[w]here a warrant is supported by more than a bare bones affidavit, an officer may rely in good faith on the warrant's validity." *Laury*, 985 F.2d at 1311; see also *United States v. Benbrook*, 40 F.3d 88, 91 (5th Cir. 1994) (holding that officer properly relied "on a warrant supported by an affidavit alleging more than wholly conclusory statements"). We review the district court's determination of the objective reasonableness of an officer's reliance upon a search warrant's validity issued by a magistrate *de novo*. *Satterwhite*, 980 F.2d at 321; *United States v. Wylie*, 919 F.2d 969, 974 (5th Cir. 1990)).

The affidavit tendered in support of the search warrant obtained for Gunn's residence contained several items of information relating to the assault on Ms. Guthrie:

- 1) Ms. Guthrie testified as a government witness in a case against her husband, resulting in his conviction.
- 2) Ms. Guthrie told agents that during the 1992 assault on her, the assailant stated that "[t]his is from Blair."
- 3) Gunn's fingerprints were found on the receipt book dropped at the scene of the assault.
- 4) Probation records and the San Antonio phone book list 831 Overhill as Gunn's residence.
- 5) Telephone records for 831 Overhill revealed that calls were placed to and from a Dallas hotel on the day of the assault. Telephone records also indicate that a telephone call was placed from Gunn's residence to Mr. Guthrie's residence approximately two months after the assault.

decision, *id.* at 231, 103 S. Ct. at 2328-29, determining whether, under the totality of the circumstances described in the affidavit, "there is a fair probability that contraband or evidence of a crime will be found in a particular place," *id.* at 238, 103 S. Ct. at 2332. "Determining probable cause does not require certainty, but only a probability that contraband or evidence is located in a certain place." *Satterwhite*, 980 F.2d at 321 n.5.

6) Based upon Frost's experience in murder-for-hire cases, assassins commonly keep at their residence evidence relating to the crime, such as gas receipts, hotel receipts, sales slips, convenience store receipts, telephone numbers, weapons, and information concerning the intended target.

Gunn asserts that the good faith exception should not apply in this case because Frost omitted information from his affidavit that was crucial to the magistrate's determination of probable cause. The good faith exception does not apply "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Leon*, 468 U.S. at 923, 104 S. Ct. at 3421.⁴ Thus, a defendant must show intentional or reckless conduct; "[a]llegations of negligence or innocent mistake are insufficient." *Franks v. Delaware*, 438 U.S. 153, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d. 667 (1978). An affidavit supporting a search warrant enjoys a presumption of validity, *Franks*, 438 U.S. at 171, 98 S. Ct. at 2684; *United States v. Breckenridge*, 782 F.2d 1317, 1322 (5th Cir.), *cert. denied*, 479 U.S. 837, 107 S. Ct. 136, 93 L. Ed. 2d 79 (1986); therefore, Gunn must "make a substantial showing that the affiant made the statement, or omission, knowingly or with reckless disregard for the truth," *Benbrook*, 40 F.3d at 92.

⁴ In creating the good faith exception, the Supreme Court recognized four instances in which suppression remains appropriate: "(1) [T]he magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit; (2) the magistrate abandoned his judicial role and failed to perform his neutral and detached function; (3) the warrant was based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;' (4) the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized." *United States v. Gant*, 759 F.2d 484, 487 (5th Cir.) (citations omitted) (summarizing and quoting *Leon*, 468 U.S. at 923, 104 S. Ct. at 3421), *cert. denied*, 474 U.S. 851, 106 S. Ct. 149, 88 L. Ed. 2d 123 (1985).

Gunn must also show that "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) (upholding search warrant in case in which inclusion of omitted information did not vitiate affidavit).

Gunn alleges several omissions which, according to Gunn, justify a rejection of the good faith exception.⁵ The first four omissions of which Gunn complains, are, in substance, legal conclusions concerning the quantum of evidence contained in Agent Frost's affidavit.⁶ These allegations go to the propriety of the magistrate's probable cause determination on the information provided, and not to whether Frost intentionally or recklessly omitted material information from the affidavit. As for the remaining alleged omissions, there is no indication in the record

⁵ The alleged omissions are: (1) Law enforcement officers had no evidence that Ms. Guthrie was involved in Mr. Guthrie's parole revocation; (2) law enforcement officers had no evidence that the attack on Ms. Guthrie was an attempted murder for hire; (3) law enforcement officers had no evidence that Gunn was in Dallas around the time of the attack on Ms. Guthrie when phone calls were placed from the Preston Suites Hotel to Gunn's residence; (4) law enforcement officers had no evidence connecting Gunn to the attack on Ms. Guthrie, save the fact that Gunn's fingerprints were found on the receipt book left at the scene; (5) the check through the organization FIN SIN revealed no bank or credit accounts in Gunn's name; (6) Mr. Guthrie was incarcerated on the date of the call from Gunn's residence to Mr. Guthrie's; (7) Ms. Guthrie failed to identify Mr. Gunn from a photo spread. Additionally, Gunn asserts that Agent Frost falsely stated in his affidavit that Gunn was not employed, had no place of business or office, and had no residence other than that at 831 Overhill.

⁶ Gunn directs us to no authority for the proposition that law enforcement officers must draw legal conclusions from the information provided in an affidavit in support of a search warrant. *Cf. United States v. Brown*, 941 F.2d 1300, 1303 (5th Cir.) (facts rather than mere conclusory statements are required to provide magistrates with sufficient information upon which to base judgment), *cert. denied*, 502 U.S. 1008, 112 S. Ct. 648, 116 L. Ed. 2d 665 (1991). Nor must the affiant detail every step in the investigation. *Id.* at 1304 ("There is no requirement that an affidavit detail the manner in which the affiant gathered information . . ."); *United States v. Mueller*, 902 F.2d 336, 342 (5th Cir. 1990) (refusing to require officer to include "every element of his reasoning process in the affidavit").

that Frost intentionally or recklessly failed to include the information.⁷ See *Mueller*, 902 F.2d at 341-42 (refusing to infer intentional or reckless falsity from inaccurate or incomplete statements in affidavit because omissions failed to render balance of statements misleading).

Moreover, even if Frost intentionally omitted the information, none of the alleged omissions is material to the determination of whether probable cause existed either to suspect Gunn of the assault⁸ or to search 831 Overhill. Frost's investigations indicated that Gunn resided at 831 Overhill. Where Gunn may or may not have resided in the past has no significant bearing on whether the evidence sought was likely to be found at his latest residence. Likewise, even if Frost intentionally misled the magistrate concerning Gunn's employment status,⁹ the fact that Gunn had a place of employment does not impinge on the likelihood of evidence being found at his residence. Therefore, evidence of other residences or a place of employment is not material to probable cause here because all the affiant must do is "establish a nexus

⁷ Frost testified at the suppression hearing that, although the investigation into Gunn's banking and credit activity through FIN SIN revealed no accounts in Gunn's name, such inquiries were not foolproof but rather only as accurate as the information provided by reporting institutions. Frost also testified that the sensitivity of the investigation precluded further inquiry into the availability of storage facilities at Gunn's school or other previous residences.

⁸ Gunn complains that Frost failed to indicate in his affidavit that Ms. Guthrie did not identify Gunn from a photo spread. Although this information might be material if supported in the record, the record does not reflect whether Ms. Guthrie in fact failed to identify Gunn as her attacker.

⁹ Frost's conclusion that Gunn was no longer employed rested upon information obtained from Gunn's probation officer.

between the house to be searched and the evidence sought." *Laury*, 985 F.2d at 1313. Moreover, we allow that nexus to be established through normal inferences as to where items sought would typically be located.¹⁰ We find it reasonable to infer from the information in the affidavit that evidence of the assault on Ms. Guthrie could be found at Gunn's residence.¹¹ Accordingly, we hold that the officer's good-faith reliance upon the validity of the search warrant was objectively reasonable, and the district court properly denied Gunn's motion to suppress the evidence obtained during the search.

III

For the foregoing reasons, we AFFIRM Gunn's conviction.

¹⁰ *Laury*, 985 F.2d at 1313; *Gant*, 759 F.2d at 488; *United States v. Freeman*, 685 F.2d 942, 949 (5th Cir. 1982).

¹¹ See *United States v. Pofahl*, 990 F.2d 1456 (5th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 266, 126 L. Ed. 2d 218 (1993):
The justification for allowing a search of a person's residence when that person is suspected of criminal activity is the common-sense realization that one tends to conceal fruits and instrumentalities of a crime in a place to which easy access may be had and in which privacy is nevertheless maintained. In normal situations, few places are more convenient than one's residence
Id. at 1475; see also *Laury*, 985 F.2d at 1314 (approving reliance on agent's statements that, based on his experience, individuals involved in that type of crime would keep evidence at their homes, and upholding warrant issued two months after bank robbery because suspects likely to retain evidence); *United States v. Thomas*, 973 F.2d 1152, 1157 (5th Cir. 1992) (finding inference that evidence would be at suspect's home reasonable because evidence not at scene of crime); *United States v. Pace*, 955 F.2d 270, 277 (5th Cir. 1992) (same).