UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60815
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BEVERLY JEAN BARNETT,
PERRY JACKSON, a/k/a Cathouse
Mouse and CARL RAY HOLLINGSWORTH,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Mississippi
(CR 1:94 8 3 & 4)

(September 8, 1995)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

This direct criminal appeal involves challenges to the district court's denial of motions to suppress and a challenge to the denial of a request for a psychologist. Finding no error, we

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

affirm.

I. FACTS AND PROCEDURAL HISTORY

Appellants Beverly Jean Barnett, Perry Jackson, and Carl Ray Hollingsworth, along with eight co-defendants, were charged with one count of conspiracy to distribute and to possess with intent to distribute a mixture containing a detectable amount of crystal methamphetamine ("crank").

Before trial, the court permitted Barnett and Hollingsworth to renew their motions to suppress evidence seized during two searches: (1) a search of their residence and (2) a warrantless vehicle stop and consensual search. After hearing testimony and argument, the district court denied the motions. The court also considered appellant Jackson's motion for the appointment of a psychologist or psychiatrist. After hearing argument, the district court denied the motion.

A jury found the appellants guilty as to count I of the indictment. The court sentenced Barnett to 240 months imprisonment, Jackson to 121 months imprisonment, and Hollingsworth to 121 months imprisonment. The appellants timely appealed.

II. SUPPRESSION OF EVIDENCE FROM RESIDENCE

Hollingsworth and Barnett challenge the district court's denial of their motion to suppress evidence seized as a result of the execution of a search warrant at their residence.[1] In

[1] Although Jackson also lists the suppression issues in his summary of argument in the brief, he does not address the issues. This Court does not review issues that are not briefed on appeal. Accordingly, the suppression issues are not properly raised as to Jackson.

reviewing a denial of a motion to suppress, we review the district court's findings of fact for clear error. The determination whether the search or seizure was reasonable under the Fourth Amendment is reviewed de novo. United States v. Seals, 987 F.2d 1102, 1106 (5th Cir.), cert. denied, 114 S.Ct. 155 (1993). The evidence must be reviewed most favorably to the prevailing party. United States v. Shabazz, 993 F.2d 431, 434 (5th Cir. 1993).

Hollingsworth argues that the underlying facts and circumstances contained in the affidavit used to secure the search warrant from the state magistrate were unreliable and insufficient to establish probable cause. He contends that the affidavit failed to indicate the informant's credibility, reliability, and basis of knowledge. Citing United States v. Barrington, 806 F.2d 529 (5th Cir. 1986), Hollingsworth argues that the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, and, thus, that the government may not rely upon the good-faith exception to the exclusionary rule developed in United States v. Leon, 468 U.S. 897 (1984).

Barnett similarly attacks the sufficiency of the affidavit. She argues that this court should condemn the practice of using a bare bones affidavit supplemented by oral testimony to obtain a warrant by use of the exclusionary rule. Although conceding that Mississippi permits the use of oral testimony to supplement the affidavit, Barnett argues that the practice, which is not permitted in federal court,[2] should be condemned because the practice

[2] See Fed. R. Crim. P. 41.

prevents any effective review of the probable-cause determination.

The affidavit for the issuance of the search warrant contained the following:

> Back in April an informant went with me to Mooreville to show me a house that a female was dealing drugs out of. This is the residence that's listed in section one of this article. The next day I took Officer Schuh and showed him the house. Last night, May the 4th, Officer Schuh observed heavy traffic going and coming from this residence. Tonight, May the 5th, I contacted the informant again; I got the same information as before.

At the suppression hearing, Officer Schuh testified that the affidavit summarized their information about drug dealing at the residence. He testified that the Sheriff's office first learned of the suspected drug activity when they received complaints from citizens who were concerned about the amount of activity at the house. An established informant for the sheriff's office, who had previously provided accurate information, told officers that crystal methamphetamine was being sold at the residence. Soon thereafter, Officer Schuh established surveillance around the residence during the early morning hours. He observed five to ten vehicles arriving at the residence; in each instance, the occupants would enter the residence and after a brief time exit, return to their vehicles, and leave. He also observed Barnett leave the residence twice, travel in the direction of a nearby truck stop, which was also suspected as a place for drug activity, return with another person, enter the residence, and again after a brief time exit the residence and leave in the vehicle; shortly thereafter, Barnett would return to the residence alone. Officer Schuh also observed Torry Ellis enter the residence. Officer Schuh knew Ellis

as a result of a prior arrest for possession of crystal meth-amphetamine. Before requesting the warrant, officers arrested Charles Eddy Davis and Ellis at the nearby truck stop for possession of crystal methamphetamine. Davis did not identify his supplier, but he stated that it was a woman who lived in the same area as Barnett's residence.

Based on this information Officer Schuh and Sheriff Presley presented the affidavit, with the application for the search warrant, to a state magistrate. After being placed under oath, the officers recounted the information provided by the informant, the concerned-citizen complaints, Officer Schuh's surveillance, and the information provided by Davis. Following the colloquy between the officers and the magistrate, the judge then executed the warrant.

The district court made the following fact findings: The search was conducted purely by state authorities. The officer relayed to the magistrate under oath information obtained by a reliable informant that crank was being sold from the residence. The officer did not rely only upon information from the informant. He conducted his own surveillance to corroborate the informant's information, witnessing the vehicle traffic at the residence and Barnett travelling to a nearby truck stop. The officers also had statements from co-defendant, Davis, who corroborated the officer's probable cause to believe that crank was being sold at the residence. Given the totality of the circumstances known to the magistrate, that is, the written affidavit and the sworn testimony of the officers, the district court determined that there was probable cause for the state magistrate to conclude that illegal

drugs were in the residence.

Appellants Hollingsworth and Barnett focus their attack on the affidavit. However, when determining whether probable cause existed for the issuance of a search warrant, the magistrate must consider the totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 238 (1983). The parties do not dispute that under Mississippi law "an affidavit lacking sufficient underlying facts and circumstances for probable cause, may be supplemented by oral testimony to establish probable cause." Roberson v. State, 595 So. 2d 1310, 1317 (Miss. 1992). The requirements of Fed. R. Crim. P. 41 do not apply to a warrant issued by a state magistrate based upon a showing of probable cause by state law enforcement officers. United States v. Shaw, 920 F.2d 1225, 1229 (5th Cir.), cert. denied, 500 U.S. 926 (1991).

In this instance, the information provided by Officer Schuh, the affidavit supplemented by his sworn testimony before the magistrate, was sufficient to find probable cause on which to issue the warrant. Accordingly, the district court did not err in denying the motion to suppress the evidence from the residence.

III. SUPPRESSION OF THE EVIDENCE FROM THE VEHICLE

Barnett challenges the district court's denial of her motion to suppress evidence seized as a result of a search of her vehicle.[3] She contends that the court did not adequately assess whether her consent was voluntary. Id. To be valid, consent to

[3] Counsel identifies this argument as one presented pursuant to Anders v. California, 386 U.S. 738 (1967). Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, Hollingsworth adopts the argument on appeal, but adds no additional argument.

search must be freely and voluntarily given. United States v. Kelley, 981 F.2d 1464, 1470 (5th Cir.), cert. denied, 113 S.Ct. 2427 (1993). "The voluntariness of consent is a question of fact to be determined from the totality of all the circumstances." Id. (internal quotation and citation omitted). This Court has considered six factors in evaluating the voluntariness of consent:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

Id. No single factor is dispositive. Id.; see also United States v. Jenkins, 46 F.3d 447, 452 (5th Cir. 1995).

Dennis Lewis, Jr., a co-conspirator, began cooperating with authorities and, at their behest, arranged for the sale of methamphetamine to Barnett and Hollingsworth. Law enforcement officers observed Barnett and Hollingsworth arrive at the appropriate time and place and in a vehicle matching the description provided to the officers. Law enforcement officers approached the vehicle and sought Barnett's consent to search. Officer Aldridge, the first to approach the vehicle, testified that he did not draw his weapon. Barnett consented to the search of the vehicle, but refused a consent of her person.

The court below made the following findings from Officer Aldridge's uncontroverted testimony: Officer Aldridge advised Barnett of the focus of the investigation and asked her consent. Barnett and Hollingsworth were free to leave. The court determined that Barnett knowingly and voluntarily consented to the search of

her truck, but not her person.

Barnett does not challenge the initial stop of the vehicle. She contends that she was "not voluntarily in custody" and she was "subject to coercive procedures by being ordered about the premises by officers."

The uncontroverted testimony demonstrates that the officers did not use coercive police procedures and that Barnett understood that she could withhold her consent. The record does not suggest that her education or intelligence limited her ability to give her consent voluntarily and freely. Accordingly, the district court did not err in denying the motion to suppress the evidence seized from the vehicle.

IV. DENIAL OF REQUEST FOR EXPERT WITNESS

Jackson argues that he did not possess the ability to assist in his defense and that the trial court erred in failing to grant an ex parte hearing on his motion for authorization to use expert assistance in the form of a psychologist and erred in refusing to authorize the use of a psychologist as provided by 18 U.S.C. § 3006A(e).

Shortly before trial, counsel allegedly learned of Jackson's addiction to amphetamines, and he concluded that Jackson was unable to cooperate or assist in his defense as a result. Counsel filed a motion for continuance of the trial based on Jackson's addiction and inability to assist in his defense. Counsel also filed a motion for the appointment of a psychologist pursuant to 18 U.S.C. § 3006A(e) and requested a hearing.

In addition to these motions, counsel filed a motion to

withdraw and substitute counsel, William R. Fortier, who had been contacted by Jackson's family and friends. When the district court refused to continue the trial, Fortier declined to represent Jackson.

On the day of trial, the district court heard arguments regarding Jackson's motion for the appointment of a psychologist. Counsel argued that, as a result of his addiction and his present medication, Jackson was unable to assist in his defense. When pressed by the judge, counsel stated that Jackson had failed in the last couple of weeks before trial to show up for appointments. In the last week, counsel had not been able to communicate with him. During this time, counsel learned that Jackson and his family were attempting to retain counsel to represent Jackson at trial.

The government objected to the motion and argued that Jackson simply wanted to delay the trial. The government noted that Jackson's alleged inability to assist in his defense coincided with his attempts to continue the trial on other grounds. The government also proffered evidence that Jackson had feigned illness days before the start of the trial in an attempt, the government argued, to delay the trial.

After hearing argument, the court found a lack of reasonable cause to believe that Jackson was presently suffering from a mental disease or defect which rendered him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. The court found it more likely that Jackson sought

another attorney at a late date and chose not to cooperate with his court-appointed attorney. The court denied the request to hire a psychologist for the purpose of determining Jackson's ability to assist in his defense.

Jackson argues that the court failed to hold an ex parte hearing as required by this Circuit, citing United States v. Theriault, 440 F.2d 713 (5th Cir. 1971); United States v. Hamlet, 456 F.2d 1284 (5th Cir. 1972); United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976); United States v. Pofahl, 990 F.2d 1456 (5th Cir.), cert. denied, 114 S.Ct. 266 (1993), and cert. denied, 114 S.Ct. 560 (1993). Jackson, however, did not object to the presence of government attorneys at the hearing. When a party fails to object to an alleged error before the district court, this Court will not disturb the court's ruling absent plain error. United States v. Pofahl, 990 F.2d at 1471. Under Fed. R. Crim. P. 52(b), we may correct forfeited errors only when the appellant shows the following factors: (1) there is an error, (2) that is clear or obvious, and (3) that affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing United States v. Olano, 113 S.Ct. 1770, 1776-79 (1993), cert. denied, 115 S.Ct. 1266 (1995)).

Jackson has not shown plain error. Jackson failed to show that he was unable to assist in his defense. His refusal to consider a plea agreement and his unwillingness to cooperate with his court-appointed counsel, although perhaps unwise, is not evidence of an inability to assist in his defense. Pofahl, 990 F.2d at 1472.

Accordingly, the district court's judgment is AFFIRMED.