IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 10-CR-194-JHP**
	)	
	)	
ALBERT SHANE MORGAN .	)	
	)	
Defendant.	)	

MOTION TO SUPPRESS

Defendant, by counsel, Kevin Adams, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, moves the Court for an Order suppressing and declaring to be inadmissible any and all evidence which was seized by the government, its agents, or agents of its agents, in violation of the constitutional and statutory rights of the Defendant. In support of his MOTION TO SUPPRESS EVIDENCE, the Defendant would inform the Court of the following:

Overview

On November 22, 2010 members of the Tulsa County Drug Task Force served a search warrant on the home of Albert Shane Morgan. At Mr. Morgan's home deputies seized a large number of weapons (the majority were hunting weapons), between 1 and 2 pounds of marijuana and a little over $2,000.

The warrant used to search Mr. Morgan's home is insufficient for the following reasons:

1. The search warrant affidavit contained material statements that were either intentionally false statements or statements made in reckless disregard for the truth. The search warrant affidavit also omitted material facts which make otherwise factual statements in the search warrant misleading.
2. The search warrant affidavit failed to establish probable cause that contraband would be found at the location to be searched.

The Search Warrant Affidavit

The search warrant affidavit used to gain the issuance of the search warrant to Mr. Morgan's home contained seven (7) numbered paragraphs that comprise the probable cause portion of the affidavit. (See exhibit A, Search Warrant Affidavit) Out of these seven (7) numbered paragraphs of the affidavit four (4) paragraphs contain information that purport to be specific to Mr. Morgan. The four (4) paragraphs that purport to contain information specific to Mr. Morgan are paragraphs two (2), three (3), four (4) and five (5); these paragraphs are listed below.[1]

Relevant Portions of Search Warrant Affidavit

> 2. On November 17, 2010 deputies from the Tulsa County Drug Task Force found Gordon Ray to be in possession of an indoor marijuana grow with approximately 82 plants. Gordan Ray made post miranda statements that he has been growing marijuana for several months and that he knew of two other subjects that also grow marijuana in their residence's. Gordan said that Shane Morgan was growing twice as

[1] The paragraphs were copied as they appear on the affidavit. The grammatical errors and misspellings are those of the affiant.

> many plants as he was. Gordan said that Shane moved to another house where he was growing his plants but he has never been there. I ran Shanes phone number through the records that Gordan provided. Roecords showed that Albert shane Morgan used that number and Gordan identified Albert Shane Morgan as the Shane that was growing plants.
>
> 3.Your affiant ran a utilities check on Albert Morgan and it showed that he moved to 1525 E 45 pl.
>
> 4. Your affiant ran a utility check on the residence to be searched and it showed that from July last year to July this year the electric use has doubled from 800 Kilowatts to 1600 Kilowatts.
>
> 5. I conducted surveillance on the residence to be searched and saw a van in front of the residence with A-one air conditioning on it. Your affiant also ran the tag number 268-EVO that was parked in the drive way of the residence to be searched and it checked to Albert Morgan.
>
> (See exhibit A, Search Warrant Affidavit)

Misrepresentations in the Affidavit

The material misrepresentations contained in the affidavit are contained in paragraphs three (3) and four (4). In paragraphs three (3) and four (4) Deputy Lance Ramsey stated the following:

> 3.Your affiant ran a utilities check on Albert Morgan and it showed that he moved to 1525 E 45 Pl.
>
> 4. Your affiant ran a utility check on the residence to be searched and it showed that from July last year to July this year the electric use has doubled from 800 Kilowatts to 1600 Kilowatts.

(See exhibit A, Search Warrant Affidavit)

In paragraph two (2) the affiant has described how law enforcement officials found Gordan Ray to be in possession of 82 marijuana plants. The affiant then describes how Gordan Ray allegedly told the officers "that Shane Morgan was growing twice as many plants as he was". However, in paragraph two (2) of the affidavit the affiant describes how Shane Morgan has moved to a new home and **Gordan Ray has never been to the new home**.

The statements in paragraph three (3) and four (4) attempt to establish probable cause to believe that marijuana is being grown at the new residence. So in the third (3) and fourth (4) paragraph Deputy Ramsey attempts to establish probable cause for the residence by stating in paragraph three (3) that he "ran a utilities check on Albert Morgan and it showed that he moved to 1525 E 45th Place" and then in paragraph four (4) the affiant attempts to establish probable cause for the residence to be searched by stating "Your affiant ran a utility check on the residence to be searched and it showed that from July last year to July this year the electric use has doubled from 800 Kilowatts to 1600 Kilowatts." Simply stated Deputy Ramsey indicates that the utilities check has showed that Mr. Morgan moved into a new residence at 1545 E 45th Place and that the from July of

2009 to July of 2010 that the electricity has doubled. The implication being that the electricity doubled because Mr. Morgan is growing marijuana[2].

In paragraph three (3) Deputy Ramsey stated that he "ran a utilities check on Albert Morgan and it showed that he moved to 1525 E 45th Place" what Deputy Ramsey omitted to tell the magistrate in the search warrant is that Mr. Morgan did not move into or establish electricity at the residence to be searched until September 17th of 2010. (See Attached exhibit B, Letter from American Electric Power & Attached Exhibit C Residential Lease Agreement) Deputy Ramsey's omissions regarding when Mr. Morgan established electricity at the residence make the statements contained in paragraph four (4) misleading. Or stated another way, the magistrate would have known that it was irrelevant what the electrical usage of the residence was in July of 2009 as compared to July of 2010 if the magistrate would have known that Mr. Morgan did not move into the residence or establish electricity until September 17th of 2010.

The other problem with the statements in the affidavits that the amount of electrical usage stated in the affidavit for the months of July of 2009 and July of 2010 are not what Deputy Ramsey claims they are. In paragraph 4 of the affidavit Deputy Ramsey stated "Your affiant ran a utility check on the residence to be searched and it showed that from July last year to July this year the electric use has

[2] The warrant the warrant does not state that increased electrical use is in any way connected to the growing of marijuana. This issue will be addressed later in this motion.

doubled from 800 Kilowatts to 1600 Kilowatts." Deputy Ramsey's statements in the affidavit are false. The electricity usage in July of 2009 was not 800 kilowatts it was 1065 kilowatts. (See Attached Exhibit D, AEP Bill of previous resident of 1525 E 45th Pl, Daniel Kellione, showing the utility usage of the residence for July of 2009 to be 1065 kilowatts.[3]) And contrary to the sworn statement of Deputy Ramsey the electricity use of the residence to be searched did not "double" from July 2009 to July 2010 the electricity use was the same, the electrical usage for both months was 1065. (See Attached Exhibit E, AEP Bill of the owner of the property of 1525 E 45th Pl, Dorthy Dodd, showing the utility usage of the residence from June 23, 2010 to July 23, 2010 to be 1065 Kilowatts.)[4]

Arguments and Authorities

The Fourth Amendment provides for the right of people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures. The law provides for the suppression of evidence secured as a result of a Fourth Amendment violation. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341 (U.S.1914).

> The tendency of those executing Federal criminal laws to obtain conviction by means of unlawful seizures and enforced confessions in violation of Federal rights is not to be sanctioned by the courts, which are charged with the support of constitutional rights.

[3] To see the electricity usage for July of 2009 look at the bottom portion of the bill under usage
[4] Exhibit E has a mailing address for Dorthy Dodd of 1519 E 35th Pl in Tulsa. However, half way down the page of the bill it shows that the bill is for service at 1525 E 45th Pl Tulsa, OK.

Id at 390.

Evidence should be suppressed in this case because it was seized in violation of Mr. Morgan's Fourth Amendment rights. The affiant who obtained the search warrant for the premises either falsified information for the search warrant affidavit or acted with reckless disregard for the truth under the standard outlined in Franks v. Delaware, 438 U.S. 154 (1978). *See* U.S. v. Cortina, 630 F.2d 1207 (7th Cir. 1980); U.S. v. Davis, 714 F.2d 896 (9th Cir. 1983); U.S. v. Leon, 468 U.S. 897 (1984). Furthermore, the affidavit for the search warrant fails to establish probable cause for the issuance of the search warrant.

PROPOSTION ONE: THE AFFIDAVIT CONTAINS FALSE OR RECKLESS STATEMENTS

Pursuant to Franks, where a defendant makes a substantial preliminary showing that a false statement "knowingly and intentionally," or "with reckless disregard for the truth," was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. Franks at 155-156. If, at that hearing, the allegation of false statements or reckless disregard "is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the

fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Franks at 156.

As described above the statements describing the electrical use for the residence to be searched (in paragraph four (4) of the affidavit) are false. The electrical use did not double between July of 2009 and July 2010 and without those untrue statements there are insufficient facts contained within the search warrant affidavit to establish “fair probability that contraband or evidence of a crime will be found in a particular place.” *See United States v. Rice*, 358 F.3d 1268, 1274 (10th Cir. 2004).

The affiant that obtained the search warrant also omitted a material fact relevant to the determination of probable cause. The fact that the affiant omitted was that Mr. Morgan was not living at the residence to be searched in July of 2010, so an alleged increase in electrical usage between July of 2009 and July of 2010 was irrelevant to the determination of probable cause[5]. The omission of facts material to a magistrate's determination of probable cause constitutes a misrepresentation or a misstatement because it interferes with the ability of the magistrate to consider the "totality of circumstances," as required by Illinois v. Gates, 462 U.S. 213 (1983). The 10th Circuit described this concept in the case of Stewart v. Donges 915 F.2d 572, 582 -583 (10th Cir. 1990), as follows:

[5] The records demonstrate there was no such increase. However, even if there were an increase it would be irrelevant and the omission of that material fact violates Franks.

> Prior to the time of plaintiff's arrest in this case, the Tenth Circuit had not addressed whether the standards of *Franks* governed omissions as well as affirmative misstatements. However, several of the other circuits had indicated that the "deliberate falsehood" and "reckless disregard" standards of *Franks* applied to material omissions, as well as affirmative falsehoods… (citations omitted). Therefore, we hold that at the time defendant submitted his affidavit and arrested plaintiff, it was a clearly established violation of plaintiff's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause.

Under Franks, when a statement is held to be made with reckless disregard for the truth, the affidavit's false material is set to one side, and the remaining content is tested for probable cause. Id at 156. This procedure is unworkable for an omission, however, so instead of setting the material to the side, the omitted truths are inserted, and probable cause is then tested. Stewart v. Donges, 915 F.2d 572, 583.

PROPOSITION TWO: THE AFFIDAVIT CONTAINS INSUFFICIENT PROBABLE CAUSE

When judging information provided by an informant as the foundation supporting probable cause for a search warrant, the District Court considers an informant's veracity, reliability, and basis of knowledge as relevant factors in assessing whether, "given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." United States v. Mathis, 357 F.3d 1200, 1205 (10th Cir. (Okla.)

2004) (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)).

The affidavit contains no information concerning the reliability of the informant in this matter. Counsel agrees that when there is sufficient independent corroboration of an informant's information, there is no need to establish the veracity of the informant, United States v. Danhauer, 229 F.3d 1002, 1006 (10th Cir. 2000). However, in the present case the affidavit does not contain sufficient independent corroboration as to relieve law enforcement of the requirement to establish the informant's veracity.

Deputies were told by an individual they had caught growing 82 plants of marijuana that Mr. Morgan was growing marijuana at his home; Mr. Ray admitted that he had never been to Mr. Morgan's home and the affidavit gives no indication of how Mr. Ray knew this information. The affidavit just makes a **c**onclusionary statement that Mr. Morgan is growing marijuana in his new home. The affidavit says that the affiant verified that Mr. Morgan had established a new residence, verified that Mr. Morgan used the phone number Gordon Ray claimed he did and verified that a vehicle registered to Mr. Morgan was at the residence. The affidavit contains no independent corroboration that marijuana was being grown at the location. The affidavit contains no facts to establish "there is a fair probability that contraband or evidence of a crime will be found in a particular place." United States v. Mathis, 357 F.3d 1200, 1205 (10th Cir. (Okla.) 2004) (citing Illinois v.

Gates, 462 U.S. 213, 238 (1983)).

In the recent 6th Circuit case of United States. v. Higgins, 557 F.3d 381 (6th Cir. 2009), the Court, in a somewhat similar factual scenario, examined the veracity of an informant who gave statements to police after they discovered drugs in his car. After noting that this gave the informant an incentive to cooperate with the police to help himself, the Court held that the police did not sufficiently corroborate the statements of the informant, under the totality of the circumstances test, holding, "…the district court erred in its conclusion that this warrant was supported by probable cause." Id at 390.

The present case is also similar to the case of United States v. Danhauer, 229 F.3d 1002 (10th Cir. 2000), the Court held that, where, "…the only police corroboration of the informant's information was the affiant's verification of the… residence's physical description, a records check to confirm that the [accused] resided at the premises in question, an observation of [the accused] coming and going from the house to the garage, and a search of the [accuseds'] criminal histories…," the affiant, "…neither established the veracity of the informant, nor obtained sufficient independent corroboration of the informant's information." Id at 1006. In the present case, just like in the Danhauer case the information the police corroborated was basic demographic information that did not corroborate the claims of the informant that illegal activity was occurring.

Additionally, the affidavit contains no statements that establish that an increase in electrical use is in anyway related to the growing of marijuana. There are numerous reasons that electrical use could increase from year to year or increase from one tenant to the next. The affidavit just claims an increase in electrical use without providing any factual nexus between the increase in electrical use and the growing of marijuana[6].

CONCLUSION

The classic admonition in *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886) is worth repeating here:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Mr. Morgan has made a sufficient preliminary showing that the invalid description in the Warrant for the place to be searched, the illegal warrantless seizure of evidence from the earlier encounter with the police and that the false or

[6] While the electrical use did not increase from July 2009 to July 2010 counsel is making the point that even if the electrical use had increased without more facts alleged in the affidavit the increase does not provide probable cause that illegal activity is being conducted at the residence.

reckless disregard for the truth of the contents of the Affidavit entitle him to a hearing.

WHEREFORE, the Defendant asks that this motion be set for hearing at the earliest convenient time, at which hearing the Defendant may be permitted to present evidence to make a substantial preliminary showing that the Affidavit for Search Warrant contains either false statements or statements made with reckless disregard for the truth, and that the Government be required to establish the legality of the search of the residence, and that any tangible or intangible evidence which were the fruits of said unlawful search which concern the Defendant be suppressed.

Respectfully submitted,

/s/ Kevin Adams

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2010, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

Joel-Lyn Mccormick
United States Attorney's Office (Tulsa)
110 W 7TH ST STE 300
TULSA , OK 74119

/s/ Kevin Adams

Kevin Adams