

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 17-cr-20213-TLP-tmp
)	
JASON NIXON,)	
)	
Defendant.)	

REPORT AND RECOMMENDATION

On July 27, 2017, a federal grand jury returned a one-count indictment charging defendant Jason Nixon with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (ECF No. 2.) Before the court by order of reference is Nixon's Motion to Suppress, filed on January 9, 2018. (ECF Nos. 18, 21.) In his motion, Nixon seeks to suppress all evidence obtained from a search of his residence on January 27, 2017, as well as statements he made while in police custody. The government filed a response on February 5, 2018.

On February 27, 2018, the undersigned Magistrate Judge conducted a suppression hearing. (ECF No. 26.) The court heard testimony from one witness, Agent Jeremy Hardee of the Ripley Police Department. The court received into evidence two

exhibits: the affidavit in support of the search warrant and a photograph of Nixon's residence.

For the reasons below, it is recommended that Nixon's Motion to Suppress be denied.

I. PROPOSED FINDINGS OF FACT

A. Search Warrant

The indictment in this case stems from a search warrant that Agent Jeremy Hardee obtained from a Tennessee General Sessions Judge on January 23, 2017. Agent Hardee prepared a two-page affidavit supporting the warrant to search a residence located at 187 College Street, in Ripley, Tennessee ("187 College residence"). The warrant authorized the seizure of controlled substances and drug paraphernalia, as well as any other evidence of criminal activity, including weapons and financial records. In his affidavit, Agent Hardee stated as follows:

Affiant has received information from a confidential source concerning possible illegal drug activity at 187 College [S]treet in Ripley Lauderdale [C]ounty TN. Due to strange activity and a large number of traffic to and from said residence. Acting on this information, Affiant began an investigation into the property, which revealed that a male black subject known only as "Rat"/Jason Nixon is living at said residence. And that Marijuana could be purchased from "Rat"/Jason Nixon located at his residence 187 College [S]treet, Ripley/Lauderdale County Tennessee. Acting on this information affiant has within the past seventy two hours conducted a controlled purchase of Marijuana from "Rat"/Jason Nixon through the use of a confidential and reliable informant. Affiant met

with, searched and equipped informant with an audio listening device and provided informant with U.S. currency. Affiant followed the informant to "Rat"/Jason Nixon residence and observed the informant enter the residence. After remaining inside the residence for a few minutes, informant did return to the affiant at a predetermined meeting location, and turned over to affiant Marijuana purchased during said controlled buy from "Rat" Jason Nixon at 187 College [S]treet.

. . . .

Affiant is a Narcotic Investigator with the Ripley Police Department assigned to the 25th District Drug Task Force. Affiant has approximately 5 years experience in drug investigations and a total of 10 years in Law Enforcement. Affiant has been to numerous Basic and advanced schools which had training in all aspects of drug related law enforcement including the detection of Marijuana and other illicit drugs. Affiant is also familiar with the customs and habits of the drug dealers in the Ripley/Lauderdale County Area. Affiant also knows through experience the basic methods of packaging Marijuana and identification of Marijuana. Affiant has made numerous arrests with convictions for Marijuana related offenses. Based on this training and experience Affiant believes that Marijuana is being packaged, stored and sold from said residence. Based on the foresaid facts Affiant believes that the burden of probable cause has been met and prays that a warrant be issued to search the persons and premises herein above described.

B. Execution of the Search Warrant

After obtaining the search warrant, Agent Hardee spent the following three days contacting several other law enforcement agencies in order to put together a team that would assist him with executing the warrant. During this time, he did not conduct any additional surveillance of the 187 College

residence. On January 27, 2017, four days after obtaining the warrant, Agent Hardee and approximately twelve other members of law enforcement executed the warrant. Nixon was inside the residence at the time the warrant was executed. As Nixon was being escorted out of the residence in handcuffs, he stated to an unidentified man standing in an adjacent yard, "It's over for me." During the booking process, as Agent Hardee was filling out the intake form, Nixon stated, "Just because it was in the room with me doesn't make it mine." Although Agent Hardee had not advised Nixon of his Miranda rights, Agent Hardee up to that point had only asked Nixon routine booking questions, such as asking for his Social Security number and birth date. Agent Hardee did not question Nixon about the controlled buy or the circumstances that gave rise to his arrest.

II. PROPOSED CONCLUSIONS OF LAW

A. Whether the Warrant Lacked Probable Cause

Nixon argues that the search warrant affidavit failed to establish probable cause because Agent Hardee did not explain how he came to the conclusion that Nixon sold marijuana before conducting the controlled buy, he did not establish the reliability of the confidential informant who participated in the buy, and he did not provide sufficient details about the buy. The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. To determine if probable cause exists, the task of the issuing judicial officer is “to make a practical, commonsense decision 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.” Illinois v. Gates, 462 U.S. 213, 238 (1983); United States v. Franklin, 622 F. App'x 501, 508-09 (6th Cir. 2015). “The standard of review for the sufficiency of an affidavit ‘is whether the magistrate had a substantial basis for finding that the affidavit established probable cause to believe that the evidence would be found at the place cited.’” United States v. Greene, 250 F.3d 471, 478 (6th Cir. 2001) (quoting United States v. Davidson, 936 F.2d 856, 859 (6th Cir. 1991)); United States v. Johnson, No. 1538, 2018 WL 1137518, at *6 (6th Cir. Mar. 2, 2018). Search warrant affidavits must be judged “based on ‘the totality of the circumstances, not line-by-line scrutiny.’” United States v. Brown, 857 F.3d 334, 339 (6th Cir. 2017) (quoting United States v. Thomas, 605 F.3d 300, 307 (6th Cir. 2010)). Review of the sufficiency of the evidence supporting probable cause is limited to the information presented in the four corners of the affidavit. United States v. Talley, 692 F. App'x 219, 221 (6th Cir. 2017).

In this case, the affidavit for the residence relied almost exclusively on the information of one confidential informant. "Judges faced with this type of affidavit must consider the veracity, reliability, and basis of knowledge of the informant's information" United States v. Archibald, 685 F.3d 553, 557 (6th Cir. 2012) (citing United States v. Brooks, 594 F.3d 488, 493 (6th Cir. 2010)). "[A]n explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles [the informant's tip] to greater weight than might otherwise be the case." Id. (quoting United States v. Weaver, 99 F.3d 1372, 1377 (6th Cir. 1996) (internal quotation marks omitted)). The Sixth Circuit has found that "a single controlled purchase is sufficient to establish probable cause to believe that drugs are present at the purchase location." Id. at 558 (citing United States v. Jackson, 470 F.3d 299, 307-08 (6th Cir. 2006) and United States v. Pinson, 321 F.3d 558, 565 (2003)).

The affidavit provided no information about the confidential source who informed Agent Hardee about "possible illegal drug activity" at the 187 College residence. The affidavit also did not provide any information about how Agent Hardee discovered that marijuana could be purchased from Nixon. Nevertheless, the affidavit explained how Agent Hardee, an experienced narcotics investigator, used a confidential

informant to purchase marijuana from Nixon from inside the residence. As described in the affidavit, prior to the undercover buy, Agent Hardee searched the informant, equipped the informant with an audio listening device, and gave the informant buy money. Agent Hardee then followed the informant to the 187 College residence, observed the informant enter the residence, and after a few minutes, met with the informant to retrieve the marijuana purchased from Nixon. Like the warrant at issue in Archibald, this court finds that Agent Hardee's affidavit contained sufficient information to support a finding of probable cause.

B. Staleness and Delay in Executing the Warrant

Nixon next argues that the warrant was stale due to the delay between the controlled purchase and the date when agents executed the warrant. Agent Hardee stated in his affidavit that the controlled purchase had taken place within the past seventy-two hours. In considering whether probable cause exists when a judge issues a warrant, "the critical question is whether the information contained in the affidavit, when presented to the judge, established that there was a fair probability that evidence would still be found at the location of the search." United States v. Abboud, 438 F.3d 554, 572 (6th Cir. 2006) (internal alterations and quotation marks omitted). The Sixth Circuit has held, in rejecting an argument that information was

stale three days after a single controlled buy, that “[i]t is reasonable that three days after the drug purchase that police would find narcotics, related paraphernalia, and/or the marked money in the residence.” Pinson, 321 F.3d at 560-61; see also Archibald, 685 F.3d at 558 (“Under this same reasoning [from Pinson], the probable cause established in the affidavit did not go stale by the time the state judge issued the warrant three days after the controlled purchase, and, therefore, the warrant was valid.”). For these same reasons, the court finds that the information contained in Agent Hardee’s affidavit was not stale by the time the state judge issued the warrant.

As for Nixon’s challenge to the four-day period from the date that the warrant was issued to the date it was executed, the Sixth Circuit has explained that “probable cause still exists for the purposes of delayed execution of a search warrant when the warrant was executed within the time frame of the rule and where there is nothing in the record to indicate that the circumstances related in the agent’s affidavit affording probable cause for the issuance of the search warrant had changed before it was executed.” Archibald, 685 F.3d at 559 (quoting United States v. Lemmons, 527 F.2d 662, 664 (6th Cir. 1975) (internal quotations marks omitted)). Tennessee Rule of Criminal Procedure 41 provides that a “warrant must be executed within five days after its date.” Tenn. R. Crim. P. 41(e)(3).

"[T]here is a rebuttable presumption [in Tennessee] that a warrant served within the statutory five (5) day period retains the probable cause validity attributed to it by the issuing magistrate, subject to a proper evidentiary showing to the contrary." Archibald, 685 F.3d at 559 (quoting Tennessee v. Evans, 815 S.W.2d 503, 505-06 (Tenn. 1991)). When a state warrant is executed within the time period set forth in the Tennessee Rules, courts must determine "first whether the cause of the delay was reasonable and next whether anything occurred during the period of delay that affected the presence of probable cause." Id.

Agent Hardee testified credibly that the purported delay in executing the warrant was caused by him having to coordinate schedules with approximately a dozen other members of law enforcement from multiple different agencies. This is a reasonable basis for the four-day delay. See id. at 559-60 (finding a five-day delay reasonable when it was caused by Memorial Day weekend and scheduling conflicts). Furthermore, Nixon has provided no evidence, other than the mere passage of time, to suggest that anything occurred during the period of delay that affected the presence of probable cause. See id. at 560 (stating that "we have never held that the mere passage of time within the parameters of the rules of procedure causes the dissipation of probable cause"). Thus, the court finds that the

officers did not violate Nixon's Fourth Amendment rights when they obtained the warrant within seventy-hours of the controlled purchase and executed the warrant four days after the state judge issued the warrant.

C. Miranda Rights

Nixon argues in his Motion to Suppress that both of his statements should be suppressed because he had not been advised of his Miranda rights when he made those statements.¹ "Statements made by a defendant in response to interrogation while in police custody are not admissible unless the defendant has first been apprized of the constitutional right against self-incrimination and has validly waived this right." United States v. Binford, 818 F.3d 261, 271 (6th Cir. 2016) (citing United States v. Cole, 315 F.3d 633, 636 (6th Cir. 2003) (citing Miranda v. Arizona, 384 U.S. 436, 478-79 (1966))). However, "spontaneous and unprovoked" statements are admissible. Cole, 315 F.3d at 637. Also, answers to routine booking questions are admissible. Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990); United States v. Clements, 333 F. App'x 981, 990 (6th Cir. 2009). Nixon's statements were unprovoked and spontaneous, and were not made in response to police interrogation. See Rhode Island v. Innis, 446 U.S. 291, 300 (1980) ("'Interrogation,' as

¹At the suppression hearing, Nixon conceded that the statement he made to the unidentified bystander while being escorted from his residence did not violate his Miranda rights.

conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.”). Thus, the court finds that the statements are admissible. See United States v. Chalmers, 554 F. App'x 440, 448 (6th Cir. 2014) (finding that a defendant's statements were admissible when they “were not made at the insistence of the authorities”).

III. RECOMMENDATION

For the reasons above, it is recommended that Nixon's Motion to Suppress be denied.

Respectfully submitted,

s/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

April 16, 2018

Date

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, ANY PARTY MAY SERVE AND FILE SPECIFIC WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.