

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 17, 2016

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BILLY DON FULLER,

Defendant - Appellant.

No. 15-7036
(D.C. No. 6:14-CR-00023-RAW-1)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **BRISCOE**, **LUCERO**, and **McHUGH**, Circuit Judges.

Billy Don Fuller appeals the denial of his motion to suppress evidence discovered during a search of his residence. We take the view of the district court as to the denial of the motion to suppress on the basis of the good faith exception. See United States v. Leon, 468 U.S. 897 (1984). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I

On or about December 23, 2013, Agent Eric Helms received information from a confidential informant (“CI”) that a large quantity of methamphetamine was located inside the residence of a man the CI knew as “Billy.” The CI had previously

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

provided reliable information to Helms. After the CI offered additional details about the location of the residence and drugs, Helms contacted Agent Travis Saulsberry because the Fuller residence was not in Helms' district. Saulsberry worked with Helms on prior investigations, and based on Helms' endorsement of the CI's reliability, Saulsberry drafted an affidavit for a search warrant.

Pursuant to department policy, Saulsberry submitted a draft of the warrant and affidavit to Assistant District Attorney Marion Fry. Fry instructed Saulsberry to revise the affidavit and add more detail. Saulsberry supplemented the affidavit consistent with Fry's recommendations, and submitted the affidavit to a state court judge. The affidavit stated, in part:

Within the past seventy-two (72) hours of December 23, 2013, a confidential informant, further referred to as "CI," was in the living room of the above described residence and saw a plastic bag containing a large quantity of a white crystal substance that he/she recognized to be methamphetamine.

I further state that this CI has provided accurate and reliable information on at least two (2) occasions where Controlled Dangerous Drugs were located. The CI is familiar with methamphetamine because he/she has used the substance in the past and has been present when others used the substance. On these two (2) occasions the informant made a controlled buy of controlled dangerous substances, which were later determined to be controlled dangerous substances by laboratory testing at the Oklahoma State Bureau of Investigations. A controlled buy is where a search is made of the CI and his/her vehicle before and after each of the occasions to ensure that the CI and his/her vehicle did not possess or contain controlled dangerous substances and/or currency.

The state court judge approved the warrant application, and a search of Fuller's residence was executed. Officers discovered more than four pounds of methamphetamine in the home.

Fuller was charged with possession with intent to distribute methamphetamine and conspiring to possess with intent to distribute methamphetamine. He filed a motion to suppress the evidence discovered in the search, claiming that the affidavit in support of the warrant was defective because it used boilerplate language upon which no issuing judicial officer could reasonably rely. A magistrate judge recommended that the motion be denied, and the district court adopted the recommendation. Fuller then entered a conditional guilty plea, preserving the right to appeal the denial of the motion. After the district court imposed a sentence of 262 months' imprisonment, Fuller timely appealed.

II

When reviewing the denial of a motion to suppress, “we review the court’s factual findings for clear error and view the evidence in the light most favorable to the government.” United States v. Hunter, 663 F.3d 1136, 1141 (10th Cir. 2011) (quotation omitted). But we review any questions of law, including the applicability of the good faith exception, de novo. United States v. Roach, 582 F.3d 1192, 1200 (10th Cir. 2009). Under Leon, evidence seized pursuant to a deficient warrant does not need to be suppressed if the executing officers relied on the warrant in good faith. 468 U.S. at 922. However, the good faith exception does not apply if the affidavit in support of the warrant was “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” Id. at 923 (quotation omitted).¹

¹ This is one of several exceptions identified in Leon, but the only one relevant in this case. Fuller argues a second exception on appeal: that the issuing judge

This occurs when an officer submits a “bare bones affidavit, containing only conclusory statements [that is] completely devoid of factual support.” United States v. Rowland, 145 F.3d 1194, 1207 (10th Cir. 1998). The standard for meeting the good faith exception is different than the threshold required for an affidavit to be constitutionally sufficient. See id.

Fuller contends that the affidavit is “bare bones” as to the CI’s veracity, reliability, and basis of knowledge. When assessing the use of a CI’s information to support an affidavit for a search warrant, courts must consider these factors. United States v. Avery, 295 F.3d 1158, 1167-68 (10th Cir. 2002) (quotation omitted).

“Veracity concerns whether there is reason to believe that the informant is telling the truth, including whether he faces criminal charges or whether his statement is against his own penal interest.” United States v. Quezada-Enriquez, 567 F.3d 1228, 1233 (10th Cir. 2009) (citation omitted). “Reliability determinations entail inquiry into whether the informant has provided accurate information in the past.” Id. “As for basis of knowledge, a firsthand observation is entitled to greater weight than secondhand information.” Id. “These factors are not absolute, independent requirements that must be satisfied in order for probable cause to exist; . . . a

“wholly abandoned his judicial role.” 468 U.S. at 922. However, this argument was not raised before the trial court and Fuller does not argue for plain error review. We accordingly conclude the issue has been waived. United States v. Jarvis, 499 F.3d 1196, 1201 (10th Cir. 2007) (“Whether to address [an] argument despite the litigant’s failure to raise it below is subject to this court’s discretion based on the circumstances of the individual case.”).

deficiency in one factor may be compensated for by a strong showing of another or by other indicia of reliability.” Id.

The affidavit does not provide much detail regarding the CI’s veracity. But it does establish that the CI provided reliable information on at least two prior occasions—demonstrating both veracity and reliability—and that the CI provided firsthand knowledge as to the location of the methamphetamine. Under these circumstances, we cannot say the affidavit contained “only conclusory statements and [was] completely devoid of factual support.” Rowland, 145 F.3d at 1207; see also Quezada-Enriquez, 567 F.3d at 1234 (applying good faith exception despite absence of information regarding CI’s basis of knowledge).

Fuller also argues that reliance on the warrant was unreasonable because a different state court judge ruled, in unrelated cases, that affidavits containing similar language regarding CIs were insufficient to establish probable cause. However, the judge who issued the warrant in this case was not bound by the prior determinations upon which Fuller relies. See generally Nicodemus v. Dist. Ct., 473 P.2d 312, 315-16 (Okla. Crim. App. 1970) (noting that magistrate and special judges are not bound by district court judges under Oklahoma state law). Even if Saulsberry or the issuing judge were aware of the prior rulings, Saulsberry could reasonably conclude that the issuing judge had made a permissibly different determination regarding the constitutionality of the challenged language. See Illinois v. Krull, 480 U.S. 340, 355 (1987) (under Leon, the inquiry “is an objective one; the standard does not turn on the subjective good faith of individual officers”).

III

Because Saulsberry acted in good faith reliance on the warrant, we **AFFIRM** the district court's denial of the motion to suppress.

Entered for the Court

Carlos F. Lucero
Circuit Judge