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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 24-CR-050-JFH**
	)	
LEE HOLT,	)	
	)	
JENNIFER CHARISA HARRINGTON,	)	
	)	
Defendant(s).	)	
	)	

JOINT OBJECTION TO REPORT AND RECOMMENDATION

COMES NOW defendant Lee Holt and Jennifer C. Harrington, by and through their respective counsel of record, and hereby object to the Report and Recommendation. (Dkt. No. 87). Because there is a pending motion for a continuance of the trial, Mr. Holt and Ms. Harrington respectfully request the ability to amend or supplement this objection if the continuance is granted, as the parties were not permitted a full 14 days under Fed. R. Crim. P. 59(b)(2) to file an objection. Further, because this court has referred the Unopposed Motion to Supplement the Motion to Suppress (Dkt. No. 91) to Magistrate Judge Little for consideration (Dkt. No. 102), the parties request the ability to amend or supplement this objection in accordance with any revisions or amendments to the Report and Recommendation or any denial of the defense request to supplement.

Mr. Holt and Ms. Harrington specifically object to Magistrate Judge Little's recommendation that Agent Tara Winter's good faith belief that the Cherokee Nation warrant contained adequate probable cause saves the evidence gathered from the search of Mr. Holt's home and the magistrate's recommendation that the search was not federal in character and that,

consequently, Fed. R. Crim. P. 41(b)(1) was not violated.

BACKGROUND

On August 29, 2023, Mr. Holt's home was searched pursuant to two warrants on the suspicion that Mr. Holt was distributing methamphetamine. The first affidavit was filed in the Cherokee Nation court system, and defense counsel argued that this warrant lacked probable cause. The second affidavit was filed in Tulsa County, which defense counsel argued lacked jurisdiction over Mr. Holt. Mr. Holt accordingly filed a Motion to Suppress, seeking the exclusion of evidence found during the search of his home. (Dkt. No. 67). Mr. Holt additionally argued in his Reply, Dkt. No. 83, that Oklahoma Bureau of Narcotics (OBN) Agent Tara Winter, the affiant on all affidavits, subverted Fed. R. Crim. P. 41(b)(1) by applying for a state warrant on a criminal investigation where the federal nature of the investigation was apparent.

An evidentiary hearing was held before Magistrate Judge Little on May 21, 2024.[1] The only witness called at the hearing, Agent Winter, stated that she filed three affidavits with Tulsa County before a warrant was finally issued. This fact was previously undisclosed to defense counsel. She additionally stated that she did not know if, at the time of the search, the criminal investigation would become a federal matter. However, Agent Winter noted in all submitted affidavits that Mr. Holt was a recognized member of the Cherokee Nation and that the residence in question was located in Collinsville, Tulsa County, Oklahoma.

Magistrate Judge Little filed the Report and Recommendation on May 28, 2024. (Dkt. No.

[1] Rule 59(b)(2) directs the objecting party to order a transcript. With the Report and Recommendation's accelerated schedule for objections and responses, the transcript will not be ready in time for either the defendants or the Government to review for our arguments, but they can been ordered, nonetheless. This objection will therefore address the Report and Recommendation to the best of counsel's recollection and in reliance on its recounting of testimony at the suppression hearing.

87). In it, she found that the Cherokee Nation Affidavit (Affidavit) and Warrant lacked probable cause, but that good faith exception applied so that suppression was not appropriate. *Id.* She also found that the search of Mr. Holt's home was not federal in character and that Rule 41(b)(1) was not violated, but even if it was, that suppression was not warranted because the violation was not deliberate, prejudicial, or of constitutional import. *Id.* Because the Government indicated that the Tulsa County warrant could not be validly executed at Mr. Holt's residence, the Report and Recommendation focused only on the Cherokee Nation warrant and Rule 41 issues.

ARGUMENT

Fed. R. Crim. P. 59(b)(2) allows a party to specifically object to the proposed findings and recommendations within fourteen days, or at some other time that the Court sets. Mr. Holt and Ms. Harrington object to the Report and Recommendation because the magistrate erred in the analysis and conclusions of both issues raised in Mr. Holt's Motion to Suppress. Specifically, there is error in the conclusions that: (1) the good faith exclusion applies as to the Cherokee Nation Warrant, (2) that Fed. R. Crim. P. 41(b)(1) was not violated, and (3) even if Fed. R. Crim P. 41(b)(1) was not violated, suppression was not warranted because the violation was not deliberate, prejudicial, or of constitutional import.

I. Good faith does not save the evidence collected pursuant to the Cherokee Nation Warrant.

In the Report and Recommendation, the magistrate concluded that there was not enough information provided in the Affidavit to support a probable cause finding. (Dkt. No. 87). The magistrate established this through three separate analyses. First, the information regarding the GPS tracking data were "entirely conclusory and lack any corroborating factual information." (*Id.* at 12, 21). Second, Mr. Holt's cited criminal history occurred in 1989 and 2017, which the magistrate concluded was too stale, particularly in light of the fact that the Affidavit did not present

any evidence that drug trafficking crimes had taken place in the prior six years. (*Id.* at 17). Third, the recent trash pull, which at most revealed evidence of personal drug use, was not bolstered by any recent evidence of drug distribution. (*Id.* at 22). In these analyses, Mr. Holt has no issue. However, while the Court stated the Affidavit lacked any factual details to support suspected drug distribution at Mr. Holt's residence, good faith applied nevertheless because "there is no evidence that Agent Winter presented false or misleading information or that she lacked a good-faith belief that the warrant was properly issued by a neutral Cherokee Nation judge." (*Id.* at 25). Here, the magistrate applied the incorrect standard and accordingly reached a flawed conclusion.

In *United States v. Leon*, the Supreme Court ruled that an exception applies to the exclusionary rule when an officer acts in good faith reliance on what they believe to be a valid warrant. 468 U.S. 897 (1984). The good faith exception of *Leon* is inapplicable here. Good faith reliance on a deficient search warrant will not be recognized where the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000). The question is whether the underlying documents are devoid of factual support, not merely whether the facts they contain are legally sufficient. *United States v. McKneely*, 6 F.3d 1447, 1454 (10th Cir. 1993). The burden rests with the government to prove the executing officer's reliance was objectively reasonable. *United States v. Leary*, 846 F.2d 592, 607 n.26 (10th Cir. 1988).

In *United States v. Gonzales*, 399 F.3d 1225, 1230 (10th Cir. 2005), the Court observed that police officers are presumed to have reasonable knowledge of the law. *Leon*'s good faith standard presents the question of whether a reasonably well-trained officer would have known the search was illegal despite judicial authorization. *Id.* If the affidavit is devoid of factual support, there cannot be good faith. *Id.* "The good faith exception to the exclusionary rule does not permit

consideration of information known to a police officer, but not included in the affidavit, in determining whether an objectively reasonable officer would have relied on the warrant." *United States v. Laughton*, 409 F.3d 744, 752 (6th Cir. 2005); *accord, United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988).

While there is a presumption of objective good faith when an officer's acts are supported by a warrant, *see United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir. 1985), this presumption may be overcome by a demonstration that the warrant was "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. The affidavit on review submitted to the Cherokee Nation alleges that Mr. Holt's residence was a "possible target source supply of methamphetamine." Aff. for Search Warrant, Cherokee Nation (Dkt. No. 66-1, p. 1). Agent Winter further swore that "[d]ue to the totality of the circumstances listed above, I believe that there is ongoing criminal activity in the residence to be searched and that the ongoing criminal activity is in reference to the **DISTRIBUTION OF A CONTROLLED SUBSTANCE**." Aff. for Search Warrant, Cherokee Nation (*Id.* at 5) (emphasis in original). However, the trash pull only provided evidence of personal use at best, yet Agent Winter misled the court by seeking a warrant for distribution. She further testified at the suppression hearing that the language submitted in the first affidavit to Tulsa County is identical and was rejected by Tulsa County Magistrate Judge Kasey Baldwin. A reasonably well-trained officer would have known that the search was illegal because no evidence of the suspected crime of distribution was discovered in the trash pull, meaning that the affidavit was "devoid of factual support." *McKneely*, 6 F.3d at 1454; *see Minner v. Kerby*, 30 F3d 1311, 1315-1316 (10th Cir. 1994) (reflecting that possession of a small amount of drugs absent other items such as cash is not consistent with distribution) (citing *United States v. Franklin*, 728 F.2d 994, 998-1000 (8th Cir.

1984); *United States v. Latham*, 874 F.2d 852, 862-63 (1st Cir. 1989)). There is no indication from the trash pull that evidence of distribution would be found in Mr. Holt's home. As the magistrate stated, "[t]he single trash pull in this case, which revealed, at most, evidence of personal drug use, ***was not bolstered by any recent, non-stale factual evidence regarding drug distribution*** in the Cherokee Nation Affidavit." (Dkt. No. 87, p. 22) (emphasis added). In this regard, because the trash pull lacked any evidence of drug distribution, it was objectively unreasonable for a law enforcement officer to rely on the Cherokee Nation Warrant in good faith with respect to the trash pull or Mr. Holt's prior criminal convictions.

Both Tulsa County Magistrate Judge Kasey Baldwin and Federal Magistrate Judge Little seem to agree that the Cherokee Nation affidavit lacked any facts supporting probable cause regarding the GPS tracking data as well. Agent Winter testified that Judge Baldwin rejected not just the first affidavit supplied to her, which contained identical language to the affidavit submitted to the Cherokee Nation, but she also rejected one subsequent affidavit for not including enough information regarding the GPS data and how it connected to Mr. Holt's residence. It can be inferred from Agent Winter's testimony that Judge Baldwin did not see that the trash pull, even in combination with Mr. Holt's stale criminal history, was enough to find probable cause, so the facts necessary to issue a constitutional warrant needed to come from the investigation involving Michael Leach and the confidential informant.

In the Report and Recommendation, the magistrate agreed that the GPS tracker did not provide enough information to warrant probable cause. The Cherokee Nation Affidavit outlined that the OBN attached a GPS tracker to the "vehicle of a known distributor of methamphetamine" and, based on that information, developed Mr. Holt's address "as a possible target source of supply for methamphetamine." The Report and Recommendation found that:

> **These statements are entirely conclusory and lack *any* corroborating factual information.** Glaringly missing from the Affidavit is any information regarding: (1) whether the GPS tracker was placed pursuant to a warrant; (2) whose vehicle the tracker was attached to; (3) how the OBN knew the operator of the vehicle was supposedly a "known distributor of methamphetamine"; (4) how long the tracker was on the vehicle; (5) what information was gleaned from the GPS tracker; (6) how or why the specific address at issue was "developed" from the tracker data; (7) whether, how often, and for how long the vehicle visited the targeted address; and (8) how or why the address was identified as a "possible target source of supply for methamphetamine.

(Dkt. No. 87, p. 12-13) (emphasis added). The Report and Recommendation further noted that the Affidavit "failed to identify *any* fact from the GPS data that involved the target residence or either of the defendants." (*Id.* at 6).

Because the trash pull—in conjunction with the stale criminal history—and the GPS data were both devoid of facts that could support probable cause, it was objectively unreasonable for a law enforcement officer to rely on the warrant. Agent Winter's reliance on such a warrant is "entirely unreasonable."

In her analysis for applying the good faith exception, magistrate also concluded that "it was objectively reasonable for Agent Winter to rely upon two warrants that she obtained from two different judge to 'cover her bases' for the residence of one occupant with tribal citizenship and one without…." (Dkt. No. 87, p. 25). Similar to the Government's conclusion that Agent Winter's reliance on the Cherokee Nation Warrant was an "objectively reasonable belief" because she relied on the evaluation of a neutral magistrate, this analysis is flawed. *See* Gov'ts Response to Def's Motion to Suppress, Dkt. No. 79 at 6. Neither the Government nor the magistrate can rely on the approval from one magistrate when another neutral and detached magistrate rejected the exact same language. Similarly, the magistrate cannot rely on a later-approved warrant by Tulsa County, which contained significantly more facts than the first draft which was rejected. Moreover, the denial of the first two affidavits provided to Tulsa County gave notice to the affiant, Agent Tara

Winter, that there was likely a deficiency with the probable cause provided to the Cherokee Nation, because the Cherokee Nation affidavit contained nearly identical language as the first rejected Tulsa County affidavit. There is no requirement under *Leon's* third situation which undercuts good faith (in which an officer would not have reasonable justification for believing that a warrant was properly issued) that the affiant present false or misleading information to the magistrate. (*See* Dkt. No. 87, p. 25.)

Mr. Holt and Ms. Harrington acknowledge that there is little caselaw that considers dueling magistrates, as this situation is largely a product of *McGirt*, however the internal logic required to reach the conclusion that reliance on one magistrate's approval where another issued a denial is internally inconsistent. The good faith exception is meant to avoid unnecessarily punishing law enforcement officers (and the public) for accidental Fourth Amendment violations when they rely on the judgement of a magistrate or the adequacy of court records. However, the rule in *Leon* evaluated warrants that are *later* found to be defective. *See Leon*, 468 U.S.; *see also Arizona v. Evans*, 514 U.S. 1 (1995); *see also Herring v. United States*, 555 U.S. 135 (2009). That is not what happened in this case. Agent Winter was on notice, days before the execution of either warrant, that there was an issue with the probable cause narrative in the affidavit. Agent Winter testified that Judge Baldwin articulated the particular areas (GPS tracking) in which she found the submitted affidavits to be insufficient. Agent Winter, and any objective officer in her position, could therefore not claim good faith reliance on the Cherokee Nation Warrant.

II. The evidence should be suppressed pursuant to Fed. R. Crim. P. 41(b)(1).

Fed. R. Crim. P. 41 established the methods for applying for a warrant that is federal in character. *United States v. Krueger*, 809 F.3d 1109, 1112 (10th Cir. 2015). Rule 41(b)(1) requires that officers seeking a warrant apply to a federal "magistrate with authority in the district" where the property or persons to be searched or seized is located "or if none is reasonably available," a

state court judge in the district. Mr. Holt objects to the findings that (1) the search was not federal in character and (2) even if it was federal in character, suppression is not warranted.

Mr. Holt noted in his Reply, Dkt. No. 83, that the pivotal question was whether the search warrant issued by Tulsa County retained its state character. A search warrant request "retains its state character" when, *inter alia*, "there is no evidence that a federal prosecution was envisioned at the time of the search." *United States v. Sadlowski*, 948 F.3d 1200, 1204 (10th Cir. 2020) (citing *United States v. Barrett*, 496 F.3d 1079, 1090–91 (10th Cir. 2007)). The magistrate found that regarding the question as to whether federal prosecution was envisioned at the time of the search, the evidence on record is mixed. Nevertheless, the magistrate concluded that the warrant was not federal in nature.

What was missing from this analysis is that the state of Oklahoma did not have jurisdiction over Mr. Holt, or his residence as outlined in the Tulsa County warrant because it named Mr. Holt—and only Mr. Holt—as the proposed defendant. The Affidavit notated that Mr. Holt was a member of the Cherokee Nation. The Affidavit also listed Mr. Holt's address in Tulsa County, which is generally accepted among law enforcement to be on tribal land. It is inappropriate to conclude that this search was not of a federal character because the only entities with jurisdiction over Mr. Holt at his home are the Cherokee Nation and the federal government. This was not the case in *Sadlowski,* which the magistrate relied on in her determination. Further, Agent Winter testified that at the time of the investigation, she was not sure where the case would be prosecuted. At the time of the hearing, she could not remember exactly when Homeland Security Investigations (HIS), a federal agency, became involved.[2] The investigation had to either be federal or tribal in

[2] Defense counsel received additional discovery on May 30, 2024, regarding the chain of custody of the items seized in the search. The items were received by HSI in the mid-afternoon on August 29, 2023, mere hours after the search took place. It is unclear why this was done so

nature; it could not lie with the State of Oklahoma. Thus, federal prosecution must have been envisioned at the time of the search.

Finally, Mr. Holt objects to the magistrate's conclusion that even if the search was federal in nature, suppression was not warranted. Suppression is warranted where the violation was deliberate, prejudicial, or of "constitutional import." *Krueger*, 809 F.3d at 1113-14. Agent Winter did not articulate why a state warrant was sought, and the Government conceded that the state did not have jurisdiction over Mr. Holt on this matter. It is common knowledge among law enforcement that many criminal matters involving Indians on Indian reservations will implicate federal or tribal jurisdiction. Agent Winter seemed to have recognized this herself. Notably, Agent Winter sought a Cherokee Nation warrant but failed to consider a federal affidavit. The magistrate omitted this fact in her analysis. Further, the Cherokee Marshall assisted in executing the warrants. The warrant return was filed in the tribal court alone, although this was done by an agent other than Agent Winter. Agent Winter also failed to file a return for the state and could not provide a reason for failing to file either herself. "She could not explain why a return was not filed in Tulsa County. It was unclear whether the Tulsa County Warrant was served or whether the search was purportedly executed in reliance on that Warrant, in addition to the Cherokee Nation Warrant." (Dkt. No. 87, p. 9).

The fact that a non-jurisdictional court issued a warrant for which no return was filed, taken with the fact that the evidence was nearly immediately surrendered to federal custody and the heavy presence of *McGirt* prosecutions in Tulsa County, it is unlikely that this was not an attempt to subvert the federal rules and avoid the process of filing a federal affidavit. Agent Winter could have filed a tribal and federal warrant to ensure her bases were covered, but she instead opted to

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promptly, as defense counsel did not have this information at the suppression hearing.

seek a warrant from an entity that she must have known had no jurisdiction over Mr. Holt. This behavior is clearly a deliberate attempt to circumvent the federal process.

CONCLUSION

Where a warrant is issued based on an affidavit that is devoid of factual support, as is the case with the Cherokee Nation Warrant and Affidavit, the good faith exception to the exclusionary rule is unavailable. The Report and Recommendation stated that the information provided about the events leading to the trash pull were "entirely conclusory and lack *any* corroborating factual information." Regarding the trash pull, Mr. Holt's criminal history is too attenuated for probable cause consideration. Further, the only evidence found of *any* drug activity listed in the Affidavit was found in the trash pull that occurred on the road in front Mr. Holt's home, where the general public had easy access. Lastly, the fact that another magistrate judge from Tulsa County had rejected Agent Winter's accounting of probable cause not once, but twice, would have put a reasonably well-trained officer on notice that the probable cause in the Cherokee Nation Affidavit was lacking prior to the execution of the warrant.

Rule 41(b)(1) also requires suppression. Federal prosecution was envisioned at the time of the search of Mr. Holt's residence. The seized items were turned over to HSI within a matter of hours. Agent Winter also first sought a warrant from the Cherokee Nation, indicating that she knew the implications of *McGirt* on the investigation. Her application for a state warrant—only in Mr. Holt's name—was a deliberate attempt to avoid seeking approval from a federal magistrate.

For the foregoing reasons, Mr. Holt and Ms. Harrington respectfully request that this objection to the Report and Recommendation be sustained.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May 2024, 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(s):

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