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

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **LEE HOLT,** **a/k/a "Lee Scott Holt,"** **a/k/a "Timothy Scott Holt,"** **JENNIFER CHARISA HARRINGTON,** **Defendants.**	**Case No. 24-CR-50-JFH**

Government's Response to Defendants' Joint Objection to Report and Recommendation

The Court should deny Defendant's Joint Objection to Report and Recommendation (Dkt. No. 103) because the totality of the facts in the Cherokee Nation search warrant affidavit (Dkt. No. 67-1) established probable cause to search Defendants' home. Further, even if the affidavit lacked probable cause, the evidence is still admissible under the good-faith exception. Finally, A warrant is not subject to Rule 41 because of the possibility of federal prosecution.

Relevant Facts

In June 2023, Oklahoma Bureau of Narcotics agents used a confidential

informant to buy methamphetamine from a known drug dealer, Michael Leach. Around a week later, they obtained a GPS tracker warrant for Leach's car based on this buy. On July 17, their informant told agents Leach planned to meet with his supplier that day. Agents tracked Leach through the GPS device. The GPS data showed Leach drive from Claremore to Collinsville, briefly stop at 117 N. 21st Street, before diving back to Claremore. Agents found Leach on his drive back and confirmed he was driving his car. The next night, agents used the informant for a second drug buy from Leach.

A month later, agents performed a trash pull at 117 N. 21st Street. They found two baggies containing meth reside, syringes, and mail addressed to Lee Holt and Jennifer Harrington listing that same address. Agents searched Holt's criminal history and found multiple prior felony convictions, including drug related convictions. They also learned Lee Holt is a member of the Cherokee Nation, and searched property records to learn 117 N. 21st Street is on Cherokee Nation land.

The next day, Agent Winter obtained a Cherokee Nation search warrant for Lee Holt's home**,** based on the GPS data, evidence from the trash pull, and Holt's criminal history. The affidavit said agents tracked a known methamphetamine dealer to Defendants' address, lists evidence recovered in their trash pull, and gave a limited summary of Holt's criminal history. That same day, agents submitted the same affidavit to Tulsa County. Tulsa County magistrate judge Kacey Baldwin asked agents to include more details about the

controlled buys. Agents added the requested details to the affidavit. Judge Baldwin approved the warrant on the third submission. The final state warrant affidavit gave more details regarding Leach's controlled buys and the GPS data, but otherwise remained the same as the Cherokee Nation affidavit. Agents executed both warrants on August 29, 2023.

Argument

I. The Cherokee Nation court had a substantial basis to find probable cause to search Defendants' home.

The incorrect standard was used to determine whether the Cherokee Nation search warrant had probable cause. The law forbids an "after-the-fact, de novo" review of the magistrate's probable cause determination. *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984). Under the totality of the circumstances, the Cherokee Nation judge had a substantial basis for finding probable cause to issue the search warrant.

A search warrant must be supported by probable cause, requiring "more than mere suspicion but less evidence than is necessary to convict." *United States v. Burns*, 624 F.2d 95, 99 (10th Cir. 1980). To determine if an affidavit establishes probable cause a magistrate must consider, under the totality of the circumstances, whether a "fair probability" exists that contraband or other evidence will be found in a particular place. *U.S. v. Biglow*, 562 F.3d 1272, 1279-80 (10th Cir. 2009) (*citing Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Once a

magistrate judge determines probable cause exists, a reviewing court's role is to "merely ensure the government's affidavit provided a substantial basis for reaching that conclusion." *Gates*, 462 U.S. at 238-39.

The law forbids a "after-the-fact, de novo scrutiny" of a magistrate's probable cause determination. *Upton*, 466 U.S. at 733. "The validity of a warrant is not determined by "nit-picking" discrete portions of the application." *United States v. Brown*, 586 F.Supp.3d 1075, 1083 (D. Kan. 2022). If the magistrate judge fulfilled its neutral and detached function, a reviewing court should give a magistrate's probable cause determination great deference. *Gates*, 462 U.S. at 236.

When officers find evidence of personal illegal drug use in a trash pull it shows that someone in the house uses illegal drugs, which "support[s] a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Colonna*, 360 F.3d 1169, 1173, 1175 (10th Cir. 2004), *overruled on other grounds by United States v. Little*, 829 F.3d 1177 (10th Cir. 2016). The court also noted, that probable cause existed without other statements in the deputy's affidavit because "the assertions concerning the evidence obtained from the trash [pull] support[ed] probable cause." *Colonna*, 360 F.3d at 1174. *See also United States v. Jenkins*, 819 F. App'x. 651, 660 (10th Cir. 2020) (holding a single bag with methamphetamine residue officers found in a trash pull, along with defendant's pending drug related charges, gave more than enough probable cause for a search warrant).

"Probable cause cannot be based on stale information that no longer suggests the items sought will be found in the place to be searched. To determine whether information is too stale, a reviewing court must consider "the nature of the criminal activity, the length of the activity, and the nature of the property to be seized." *Snow*, 919 F.2d at 1459. Although, "ongoing and continuous activity makes the passage of time less critical." *United States v. Le*, 173 F.3d 1258, 1267 (10th Cir. 1999). Wholly conclusory statements give a magistrate no basis to find probable cause. *Gates*, 462 U.S. at 2322.

Here, the court found that the GPS tracker portion of the affidavit, Holt's criminal history, and the evidence of personal drug use from the trash pull, *individually*, were not enough to support a finding of probable cause. (Dkt. No. 87 at 22). This is not the standard. The search warrant affidavit must be taken as a whole. Under the totality of the circumstances, the affidavit provided the Cherokee Nation court with a substantial basis for finding probable cause.

The totality of the facts laid out in the affidavit are since June 2023, agents used a GPS device to track a known meth dealer. Based on that GPS data, they suspected 117 N 21st Street, Collinsville, Oklahoma as a source of methamphetamine. Agents then searched the homes trash finding methamphetamine and mail addressed to Lee Holt and Jennifer Harrington at 117 N 21st Street. They found Holt had "prior charges from multiple states, including Oklahoma, Texas, and Missouri involving weapons and possession of controlled dangerous substances." (Dkt. No. 67-1). His most recent conviction

was in 2019[1] for possession of methamphetamine with intent to distribute. *Id*.

While individually, these facts do not support probable cause, taken as a whole, they provide a substantial basis for a magistrate's determination. The totality of the facts in the affidavit "would warrant a man of reasonable caution to believe that [drugs] would be found in [Holt and Harrington's home.] *Brown*, 586 F.Supp.3d at 1083. Unlike many of the cases where a court finds the defendant's criminal history is too stale, the criminal activity suspected here is the exact same crime from four years earlier.

Further, the affidavit states that Holt has multiple prior convictions involving controlled substances from at least three different states. (Dkt. No. 67-1). The prior convictions are revitalized by the very nature of the similar criminal conduct and agents finding the same type of drug in the trash. Unlike in *Brown*, the magistrate here did not rely on a single eight-year-old juvenile conviction, it relied on a criminal history of controlled substance convictions across multiple states, *starting in 1987*, and as recent as 2019. Stale information is information that "no longer suggests the items sought will be found in the place to be searched." *Snow*, 919 F.2d at 1459. Nothing about Holt's criminal history and agents finding methamphetamine in the trash the day before applying for the warrant suggests meth would not be found in the home.

Additionally, agents found two baggies with methamphetamine residue in

[1] While the incident of conviction occurred in 2017, all cases counsel found refer to the date of conviction, not date of the incident.

Holt's trash. Under *Colonna* and *Jenkins*, this is enough to establish probable cause. courts may properly rely on an officer's experience in finding probable cause. *U.S. v. Corral-Corral*, 899 F.2d 927, 937 (10th Cir. 1990). In the affidavit, Agent Winter states that based on her training and experience, she knows users and distributors of "controlled dangerous substances often house additional quantities of illegal substance at their residences[.]" (Dkt. No. 67-1). Weighing all the facts in the affidavit, including finding methamphetamine with mail addressed to Holt at the address, a lengthy criminal history of controlled substance offenses with the most recent also involving the distribution of methamphetamine, along with the knowledge that agents first suspected this address due to tracking a known methamphetamine dealer, along with Agent Winter's training and experience, would warrant a reasonable person to believe methamphetamine would be found at Holt's address. That is what the Fourth Amendment requires.

Probable cause is a fluid concept without a rigid set of rules. *Gates*, 462 U.S. at 232. This is why reviewing court give great deference to a magistrate's probable cause determination. *Id*. at 238. Here, while each fact fails on its own, the totality of the affidavit provides a substantial basis for the magistrate's finding of probable cause.

II. Even if the Cherokee Nation warrant lacked probable cause, the evidence is admissible under the good-faith exception.

The Fourth Amendment protects individuals from "unreasonable searches

and seizures." U.S. Const. amend. IV.4 "[E]vidence obtained in violation of the Fourth Amendment is generally inadmissible" under the exclusionary rule. *United States v. Wagner*, 951 F.3d 1232, 1243 (10th Cir. 2020) (quotations omitted). The exclusionary rule "serves to deter deliberate, reckless, or grossly negligent conduct, or recurring systemic negligence. *Herring v. United States*, 555 U.S. 135, 144 (2009).

The Supreme Court first established the good-faith exception to the exclusionary rule in *United States v. Leon*, 468 U.S. 897 (1984). *Leon* held that evidence should not be excluded "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Id*. at 920. "The rationale behind the exception is that when an officer acts in good-faith reliance on a search warrant, the deterrence rationale of the exclusionary rule is no longer applicable." *United States v. Russian*, 848 F.3d 1239, 1246 (10th Cir. 2017).

Whether the good-faith exception applies turns on whether "a reasonably well trained officer would have known that the search was illegal in light of all the circumstances[.]" *Leon*, 468 U.S. at 922 n.23. An officer's reliance on the warrant, however, must still be objectively reasonable. *Russian*, 848 F.3d at 1249. It is only when an officer's reliance on that warrant is "*wholly unwarranted*" that the evidence acquired should be suppressed. *United States v. Harrison*, 566 F.3d 1254, 1256 (10th Cir. 2009) (emphasis in original).

Reliance upon a warrant issued by a neutral magistrate creates a

"presumption … [that] the officer is acting in good faith." *United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir. 1985) (citing *Leon*, 468 U.S. at 925-26). The evidence is admissible when the police "act with objectively reasonable good-faith belief that their conduct is lawful or when their conduct involves only simple, isolated, negligence." *Workman*, 863 F.3d at 1317 (quotations omitted).

Here, even if the Court finds probable cause did not exist for the Cherokee Nation warrant, evidence from the search is admissible under the good-faith exception, since OBN agents reasonably relied on the warrant to search Defendants' home. A neutral magistrate issued the warrant after finding probable cause for the search. (*See Supra* Section I). Further, Defendants' home was within the borders of the Cherokee reservation and agents knew one person in the home, Lee Holt, is an enrolled member of the Cherokee Nation. Nothing about the affidavit, warrant, or their actions suggest a "wholly unwarranted" reliance on the Cherokee Nation warrant.

Additionally, defense argues that Agent Winter should have known the affidavit lacked probable cause because a second judge requested more information. "Probable cause is a fluid concept without a rigid set of rules." *Gates*, 462 U.S. at 232. Two judges can have differing opinions on what facts amount to probable cause. The 10th circuit in *Jenkins* noted that there was a split between the circuits on whether evidence of personal drug use alone was sufficient for probable cause. *Jenkins*, 819 F.App'x. at 660-661. To say that Agent Winter's reliance on a warrant issued by a neutral and detached

magistrate is "entirely unreasonable," when some of the top legal minds in the country cannot agree on the topic, is unreasonable.

This is simply a state agent trying to do the right thing by applying for a second search warrant in the chaos created by *McGirt*. Nothing about Agent Winter's actions, or the affidavit, suggest she acted in bad faith warranting the high cost of suppressing of the evidence. If the Court finds the Cherokee Nation warrant lacked probable cause, the evidence should be admitted under the good-faith exception.

III. A Warrant is not subject to Rule 41 because of the possibility of federal prosecution.

"[A] search is 'federal in character' when federal officers are directly involved in carrying out the search itself and in taking immediate custody of the fruits of the search." *United States v. Bookout*, 810 F.2d 965, 967 (10th Cir. 1987). "Generally, a warrant is not federal in character if no federal agents participated in obtaining the warrant or in conducting the search." *United States v. Barrett*, 496 F.3d 1079, 1090 (10th Cir. 2007)(internal quotations omitted).

If a search has minimal or no federal involvement, or there is no evidence that a federal prosecution was envisioned at the time of the search, then it is a state search. *U.S. v. Nelson*, 2020 WL 6343301 (D. Kan. 2020) (quoting *U.S. v. Millar*, 543 F.2d 1280, 1283, 1290 (10th Cir. 1976)). If a search is a state search, the warrant need only to conform to federal constitutional requirements, and the fact that the warrant issued from a court not of record does not render the fruits

of the search inadmissible in a subsequent federal criminal prosecution. *Id.* (quoting *United States v. Johnson*, 451 F.2d 1321, 1322 (4th Cir. 1971)).

Here, state agents, working for a state agency, investigated, obtained, and served tribal and state search warrants. Agent Winter's testimony at the hearing established that no federal agents contributed to the pre-search investigation or participated in the search itself.[2] Further, Agent Winter testified that her supervisor, also a state agent, requested they send the methamphetamine to the DEA for purity testing. The search is a "state search" because there was no federal involvement *before* the search.

The defense argues that the search was federal in character solely because there was a possibility of a federal prosecution. (Dkt. No. 103 at 9-10). By that standard, all crimes involving illegal drugs, store robberies, and felon in possession of a firearm, to name a few, would require approval by a federal magistrate. Potential constitutional issues aside, that cannot be the case. There is no evidence that the state agents envisioned a federal prosecution *before* searching Holt and Harrington's home.

Conclusion

For these reasons, the Court should deny Defendants' Joint Objection to Report and Recommendation, since probable cause supported the Cherokee Nation warrant.

[2] As defense noted in their objection, counsel for the government does not have a copy of the transcript. Counsel will reference Agent Winter's testimony to the best of his recollection. (Dkt. No. 103 at 2 n.1).

And, even if probable cause did not exist, the good-faith exception would apply.

Finally, the Cherokee Nation warrant would not invoke Rule 41, because the search is entirely state in character.

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 4, 2024, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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