

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	<b>CRIMINAL ACTION</b>
	)	
v.	)	No. 13-10156-MLB
	)	
JASON GIESY,	)	
	)	
Defendant.	)	
_____	)	

**MEMORANDUM AND ORDER**

This case comes before the court on defendant Jason Giesy's motion to suppress evidence seized pursuant to a search warrant. (Doc. 68). The motion has been fully briefed and is ripe for decision. (Docs. 69, 70). Giesy's motion is denied for the reasons herein.

**I. Facts**

Wichita Police Officer Michael Thode submitted an affidavit to Magistrate Judge Karen Humphreys which detailed the investigation of Giesy and co-defendant Jeremy Harris. The Wichita Police Department (WPD) began investigating Giesy in January 2012 when it learned through an internet tip that Giesy was selling drugs out of his home at 3407 E. Sunnybrook. Prior to early June 2013, Co-defendant Evan Woolsey would purchase (on a front) up to 100 pounds of marijuana from Jeremy Harris, who would instruct him to pick up the marijuana from the Sunnybrook house. Woolsey identified Giesy as the person who he picked up marijuana from at the Sunnybrook house. Woolsey would later pay Giesy or Harris for the marijuana.

On April 4, 2013, officers stopped Joel Salas as he left 3407

E. Sunnybrook with approximately two pounds of marijuana. Salas informed the officer that he picked up the marijuana to sell it. At a later date, Salas informed officers that Giesy kept marijuana in the deep freezer in his kitchen. Giesy also had surveillance cameras at the residence.

On April 17, Jeremy Harris spoke to Christopher Harris while he was being detained in the Sedgwick County Jail. Jeremy Harris stated that he believed his residence in Plainview was under surveillance because officers stopped Joel. The Sunnybrook house is in the Plainview area. The affiant believed that Harris was talking about the Sunnybrook house. Woolsey told officers that Harris spent money to move Giesy "out east" because the Sunnybrook house was being watched.

On June 28, 2013, WPD records reflected that Giesy claimed 9572 SW Eugene Rd., Augusta, Kansas, as his residence. The address was verified by checking utility records which showed that both Giesy and his wife resided at the Eugene address as of July 10, 2013.

On July 8, 2013, Tim Eldredge, a DEA task force officer, interviewed Tisha Neptune, Giesy's mother in law, who is also a parole officer with the Kansas Department of Corrections. Neptune stated that Giesy's wife told her about Giesy's drug dealing in June 2013. Giesy's wife also stated that Giesy has sold drugs for the last five or six years and stores the drugs in the deep freezer. Giesy's wife assists with the sales by exchanging the money for drugs.

On August 2, 2013, officers executed a search warrant at 14372 SW Butler Road, Rose Hill, Kansas. Tracy Freeman, Giesy's associate, told officers that they would find marijuana at this location. The

officers did in fact find approximately 1000 pounds of marijuana. Freeman also informed officers that co-defendant Harris is the head of a drug ring in Wichita, Kansas. Freeman identified Giesy as a person who provides a stash house for co-defendant Harris. Freeman stated that the stash house was located in Augusta, Kansas, at 9572 SW Eugene, and was used to break down a 1000 pound load of marijuana in mid-July.

Based on this information, affiant Thode requested permission to search the Eugene residence and seize financial records, currency, telephones, firearms, drugs and drug paraphernalia. On August 14, 2013, Magistrate Judge Karen Humphreys issued a search warrant for 9572 SW Eugene, Augusta, Kansas. The warrant authorized a "no-knock" search to be executed on or before August 23, 2013, in the daytime, between the hours of 6:00 a.m. and 10:00 p.m. According to the return, the search warrant was executed on August 15, 2013 at 6:00 a.m. The officers seized marijuana, baggies, packaging materials, guns, cameras, cellular phones and ammunition.

### **The Indictment**

Giesy and co-defendant Harris are charged in a superseding indictment with conspiracy to distribute marijuana (count 1), possession with intent to distribute marijuana (count 2), conspiracy to launder monetary instruments (count 3) and tampering with a witness (count 4). The superseding indictment also names two additional co-defendants.<sup>1</sup>

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<sup>1</sup> Co-defendant Amanda Harris is charged in count 5 with tampering with a witness. Giesy is charged with threatening officer Michael Thode while Amanda Harris is charged with threatening Re'anne Giesy. (Doc. 47). The last co-defendant, Woolsey, is charged in count

Giesy moves to suppress the items seized on the basis that the affidavit lacked probable cause and the search was executed during the nighttime in violation of the warrant.

## **II. Analysis**

The Fourth Amendment to the United States Constitution provides that:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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. The validity of a warrant is not determined by "nit-picking" discreet portions of the application. Rather, the test is whether, under the totality of the circumstances presented in the affidavit, the issuing judge had a "substantial basis" for determining that probable cause existed. Illinois v. Gates, 462 U.S. 213, 238-39 (1983); United States v. Harris, 369 F.3d 1157, 1165 (10th Cir. 2004). The Supreme Court has observed that "a magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" Gates, 462 U.S. at 236 (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).

Probable cause exists when "the facts presented in the affidavit would warrant a man of reasonable caution to believe that evidence of a crime will be found at the place to be searched." Harris, 369 F.3d at 1165 (quoting United States v. Hernandez-Rodriguez, 352 F.3d 1325, 1330 (10th Cir. 2003)). The Tenth Circuit has adopted the general

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6 with possession of a firearm during a drug trafficking crime.

rule that probable cause requires a "nexus between [the contraband to be seized] or suspected criminal activity and the place to be searched." United States v. Rowland, 145 F.3d 1194, 1203-04 (10th Cir. 1998)(quoting United States v. Corral-Corral, 899 F.2d 927, 937 (10th Cir. 1990)).

**A. Staleness**

Giesy asserts that probable cause was lacking in the affidavit because it was based on information that was stale. "Probable cause to search cannot be based on stale information that no longer suggests that the items sought will be found in the place to be searched." United States v. Snow, 919 F.2d 1458, 1459 (10th Cir. 1990). "However, the determination of whether information is stale depends on the nature of the crime and the length of criminal activity, not simply the number of days that have elapsed between the facts relied upon and the issuance of the warrant." United States v. Myers, 106 F.3d 936, 939 (10th Cir. 1997) (concluding gap of five months between tip and search warrant did not render information stale when drug activities were demonstrated to be continuous and ongoing). "Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time." United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972). But when an individual is suspected of engaging in criminal activity that is continuous and ongoing, the passage of time becomes less critical. United States v. Mathis, 357 F.3d 1200, 1206-07 (10th Cir. 2004).

In this case, Giesy is charged in an ongoing criminal conspiracy to distribute marijuana. Two different individuals informed officers

that Giesy was involved in the sale of large amounts of marijuana. One of the individuals also told officers that Giesy's house on Eugene had been used to break down a very large shipment of marijuana approximately one month prior to the search (35 days). The officers also learned from Salas and Neptune that Giesy stores the marijuana in a freezer at his residence. These facts corroborate the continuing nature of Giesy's criminal activity. Furthermore, although drugs are both portable and disposable, information from the informants told officers that the drugs were being stored at Giesy's residence. The lapse of thirty-five days since the Eugene house received its "reported" last large drug shipment does not make the information stale. See United States v. Hinson, 585 F.3d 1328, 1334 (10th Cir. 2009) (lapse of one month did not destroy probable cause when the criminal activity was ongoing).

The court finds that the affidavit, considered as a whole, provided a reasonable basis for the magistrate judge to determine with "fair probability" that evidence of a crime would be found at Giesy's residence.

Even if the affidavit were legally insufficient, however, the court would uphold the search because the officers executing the search warrant acted with an objective good-faith belief that the warrant was properly issued by a neutral magistrate. See United States v. Leon, 468 U.S. 897 (1984).

#### **B. Nighttime Execution**

Alternatively, defendant argues that the items seized must be suppressed because the warrant was executed at 5:30 a.m., which is

thirty minutes earlier than the time authorized by the warrant.<sup>2</sup> Rule 41(e) states that a warrant is to be executed during the daytime unless the magistrate judge authorizes execution at another time.

The Tenth Circuit has held that "unless there is a clear constitutional violation, non-compliance with Rule 41 requires suppression of evidence only where (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the rule." United States v. Rome, 809 F.2d 665, 669 (10th Cir. 1987); see also United States v. Sims, 428 F.3d 945, 955 (10th Cir. 2005). Giesy's motion does not assert that he was prejudiced by the early morning search or that the officers intentionally and deliberately disregarded the time provision. The court finds that the time of the search did not prejudice defendant and did not violate his Fourth Amendment rights.

### **III. Conclusion**

Giesy's motion to suppress is denied. (Doc. 68).

IT IS SO ORDERED.

Dated this 7th day of March 2014, at Wichita, Kansas.

s/ Monti Belot  
Monti L. Belot  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup> The return states that the warrant was executed at 6:00 a.m. The court, however, will presume for the purposes of this order that Giesy has evidence to support his position that the warrant was executed prior to 6:00 a.m.