Appendix A

United States Court of Appeals
For the Eighth Circuit

No. 18-1673

United States of America

Plaintiff - Appellee

v.

Dijon Rasheed Brown

Defendant - Appellant

Appeal from United States District Court
for the Western District of Missouri - Jefferson City

Submitted: February 14, 2019
Filed: July 16, 2019

Before SMITH, Chief Judge, BENTON and STRAS, Circuit Judges.

SMITH, Chief Judge.

Dijon Rasheed Brown was convicted of conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, and for possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A), for his involvement in a drug distribution

operation.[1] Police arrested Brown after conducting a controlled delivery of a methamphetamine-filled package addressed to the duplex where Brown was staying. Brown raises several issues on appeal in connection with his arrest and trial. Specifically, Brown argues that the district court[2] erred in (1) denying his motion to suppress the evidence collected as a result of the controlled delivery; (2) denying his motions for judgment of acquittal on both the conspiracy and possession with intent to distribute charges; (3) admitting certain photographs of him at trial; and (4) denying Brown a two-level minor role reduction at sentencing. We disagree, and we affirm the district court in all respects.

I. *Background*

In September 2015, Zachary Fennell was robbed at 4262 Santa Barbara Dr. in Columbia, Missouri ("the residence"), a duplex rented by his girlfriend, Melissa Guerra. Fennell was a drug dealer. He received methamphetamine from California through the mail at various addresses and then distributed the methamphetamine to others in the Columbia area for sale; Fennell's neighbors, Jeremy and Stephanie Maxwell, sold methamphetamine for Fennell. The men who robbed Fennell in September attacked him and stole drugs, money, and guns. Soon after the robbery, three men arrived from California and began staying with Fennell. One of these men was Brown.

Then, in October and November 2015, postal inspectors identified several suspicious packages being mailed from the Los Angeles, California area to various Columbia, Missouri addresses. In early November, postal inspectors identified a package from the Los Angeles area addressed to "Martha Guerra" at the residence as

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[1]Brown was also convicted of being a felon in possession of a firearm, but that conviction is not at issue in this appeal.

[2]The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri.

suspicious. Postal Inspector Christopher Farmer obtained a warrant for the package and discovered about 456 grams of methamphetamine inside. Inspector Farmer removed 356 grams from the package, leaving 100 grams inside.

Inspector Farmer then submitted an affidavit in support of an anticipatory search warrant for the residence. In his affidavit, Inspector Farmer explained that he had discovered about 456 grams of methamphetamine inside the package but that he had reinserted about 100 grams for the purpose of a controlled delivery. The affidavit also explained that the controlled delivery would be performed by a law enforcement agent wearing a United States Postal Service uniform. Specifically, the affidavit provided: "Delivery will be made only to an adult willing to accept delivery on behalf of 'Martha Guerra,' to whom the Subject Parcel is addressed. Every effort will be made to make delivery to 'Martha Guerra' and in no event will the package be delivered to a child." *United States v. Brown*, No. 2:15-cr-04067-SRB, 2017 WL 3275970, at *4 (W.D. Mo. July 21, 2017), *report and recommendation adopted*, No. 2:15-CR-04067-SRB, 2017 WL 3275719 (W.D. Mo. Aug. 1, 2017). Based on the contents of the package, Inspector Farmer believed there was a fair probability of drug activity on the premises. A magistrate judge agreed and issued an anticipatory warrant for the premises. The warrant included a "triggering event," providing that probable cause to search the residence would be established once "[a]n adult subject transport[ed] some or all of the methamphetamine inside the target address." *Id.* The warrant also included a notice providing that the "warrant shall be executed only after this act occurs. Otherwise, this warrant shall not be executed." *Id.*

Law enforcement scheduled the controlled delivery for November 10. Officers surveilled the residence prior to and during the delivery, and at 9:55 a.m., they observed Brown and another male entering an SUV parked in front of the residence. At 10:04 a.m., an undercover officer attempted delivery at the front door and then left the package near the front door. Inspector Farmer, who was on scene during the controlled delivery, "observed an individual inside of the residence opening and

closing the door several times as if they were looking at the package." Trial Tr., Day 1, at 42, *United States v. Brown*, No. 2:15-cr-04067-SRB (W.D. Mo. Apr. 13, 2018), ECF No. 520. At 10:31 a.m., the SUV drove past the residence, then returned and parked in the driveway. At trial, Inspector Farmer described this activity as "a heat run, which is a countersurveillance maneuver employed by individuals involved in criminal activity to scout for and look for the location of law enforcement in the area." *Id.* at 42–43. At 10:34 a.m., Brown and another man exited the vehicle and approached the residence. Brown then picked up the package and took it inside the residence.

Once Brown brought the package inside, Inspector Farmer alerted the officers that the triggering event had occurred. Within two minutes of Brown bringing the package inside, Fennell brought the package back outside onto the front doorstep and left it there. Officers soon entered the residence through the back door after being unable to breach the front door. Brown and others attempted to flee. Brown was later found hiding inside a nearby shed. After execution of the warrant, officers discovered that Brown had written "Return to Sender" on the package before placing it back on the doorstep.

During their search of the residence, officers discovered evidence of drug trafficking, including several weapons, a drug ledger, and incriminating text messages. Specifically, they discovered a loaded handgun under a bed in Brown's bedroom; a piece of paper with the initials "LT" written on it along with drug quantities and prices (later determined to be a drug ledger); and a text message associated with LT's phone number instructing someone to purchase drugs. Brown's DNA was found on the gun under his bed, and testing also suggested his DNA was on at least one other gun found inside the residence.

Subsequently, Brown was indicted for conspiracy to distribute methamphetamine and possession with intent to distribute methamphetamine;

Fennell, Guerra, and other coconspirators were also indicted. Prior to trial, Brown moved to suppress the evidence recovered during the November 10 raid. Brown argued that the anticipatory warrant was not supported by probable cause and that the triggering event to execute the warrant never occurred. The district court denied his motion. The court found the triggering event occurred when Brown brought the package inside the residence. It also found that even if the triggering event did not occur, law enforcement relied on the warrant in good faith. Brown also filed a motion in limine to exclude any evidence of his gang affiliation. The district court granted Brown's motion in part, instructing the government not to mention gang affiliation; however, the court allowed the government to introduce certain pictures of Brown, Fennell, and other codefendants.

At trial, the government argued that Brown had moved from California to assist Fennell with his drug distribution operation, specifically noting Brown's role in providing protection to Fennell after he had been robbed. The government called several witnesses, including Inspector Farmer, FBI Agent Stacy Banks, Guerra, a female client named Jessie Benedict, and Jeremy Maxwell. During Agent Banks's testimony, the government introduced several pictures of Brown, Fennell, and the other codefendants for the purpose of establishing the relationship among these individuals. Brown claimed these pictures were prejudicial because they allegedly depicted certain gang signs, and he objected to their introduction. However, the government made no mention of gangs or gang affiliation during the trial. Guerra identified Brown as "Little T" and also testified to seeing guns "[e]verywhere" when she visited the residence. Trial Tr., Day 2, at 143, *United States v. Brown*, No. 2:15-cr-04067-SRB (W.D. Mo. Apr. 13, 2018), ECF No. 521. Benedict stated that Brown sometimes accompanied Fennell when Fennell sold her drugs; she also described an occasion when Brown used her property for target practice. Maxwell testified that, on one occasion, Brown provided Fennell with methamphetamine.

At the close of the case, Brown moved for a judgment of acquittal, arguing that the evidence was insufficient to find him guilty beyond a reasonable doubt of either charge. The district court denied Brown's motion, and the jury found Brown guilty of both conspiracy to distribute methamphetamine and possession with intent to distribute methamphetamine.

At sentencing, the district court calculated Brown's Guidelines range as 210 to 262 months' imprisonment, a range reflecting an offense level of 34 and a criminal history category of IV. Brown moved for a two-level minor role reduction, but the court denied the motion after finding that Brown played a "more than [a] de minimis role" in the drug conspiracy. Sent. Tr. at 9, *United States v. Brown*, No. 2:15-cr-04067-SRB (W.D. Mo. Apr. 16, 2018), ECF No. 526. The district court ultimately sentenced Brown to two concurrent 188-month sentences.

II. *Discussion*

A. *Anticipatory Search Warrant*

Brown contends the district court should have suppressed the evidence uncovered during the search of the residence, as the anticipatory warrant allowing the search was not supported by probable cause and not properly executed. "We review the denial of a motion to suppress de novo but review the underlying factual determinations for clear error, giving due weight to the inferences of the district court and law enforcement officials." *United States v. Walker*, 324 F.3d 1032, 1036 (8th Cir. 2003) (internal quotations omitted).

1. *Probable Cause*

> The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." To find probable cause to issue a warrant, the issuing magistrate must determine that, in light of 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.

United States v. Tagbering, 985 F.2d 946, 949 (8th Cir. 1993) (internal quotation omitted). The Supreme Court has upheld the constitutionality of anticipatory warrants. *United States v. Grubbs*, 547 U.S. 90, 96 (2006) ("Anticipatory warrants are . . . no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is now probable that (2) contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed.").

> We review the district court's determination of probable cause [to issue an anticipatory warrant] under a clearly erroneous standard, and give considerable deference to the issuing judge's determination of probable cause. We affirm the district court's decision unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake was made. An anticipatory search warrant should be upheld if independent evidence shows the delivery of contraband will or is likely to occur and the warrant is conditioned on that delivery.

Walker, 324 F.3d at 1038 (cleaned up).

Brown argues that the evidence presented to the magistrate judge in the affidavit "failed to recite any facts indicating that an occupant or owner of the Residence was engaged in any criminal activity." Appellant's Br. at 21. As support, he notes Inspector Farmer's admission "that the affidavit was premised solely on the package itself." *Id.* Brown then incorrectly implies that the package and its contents could not support a finding of probable cause to issue an anticipatory warrant without additional evidence of criminal activity at the residence.

This argument is contrary to our decision in *Walker*, where we upheld an anticipatory warrant issued on near-identical grounds. *See* 324 F.3d at 1038. Brown attempts to distinguish *Walker* by noting that the package in *Walker* was addressed to an alias of the target residence's occupant and was personally accepted by that occupant. *Id.* at 1036. However, officers in *Walker* only discovered evidence that the occupant had used the alias *after* searching the target residence, *id.* at 1036, making that distinction irrelevant in assessing the existence of probable cause *before* the search. And, the fact that the suspect in *Walker* accepted the package in person would go not to whether probable cause existed to issue the warrant but to whether the warrant was properly executed. *See Tagbering*, 985 F.2d at 950.

The magistrate judge in the instant case issued the anticipatory warrant for the residence on the understanding that (1) a package containing a significant amount of methamphetamine had been addressed to the residence, and (2) the warrant would not be executed until officers performed a controlled delivery. As in *Walker*, the use of the mail system to deliver illegal drugs to a specific address provided sufficient evidence to support issuance of an anticipatory warrant to search the target residence. Therefore, the district court did not err in finding the warrant was supported by probable cause and in declining to suppress the evidence on the grounds that the warrant was improperly issued.

2. *Proper Execution*

"Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time—a so-called 'triggering condition.'" *Grubbs*, 547 U.S. at 94. Occurrence of the triggering condition establishes the requisite connection between "the item described in the warrant" and "the searched location." *Id.* If an anticipatory warrant is executed before the triggering event occurs, "then suppression may well be warranted for that reason." *Tagbering*, 985 F.2d at 950.

Brown contends the warrant was improperly executed, relying on Inspector Farmer's statement in his affidavit that officers would deliver the package "only to an adult willing to accept delivery." *Brown*, 2017 WL 3275970, at *4. Though the warrant itself contained no such condition, Brown argues the affidavit and warrant must be read together to formulate a sufficiently specific triggering event. Since the package was not unconditionally accepted—but rather, placed back outside the residence with instructions to "Return to Sender"—Brown argues the triggering event never occurred and the requisite relationship between the package and the residence was never established. Brown thus claims the evidence seized during the officers' search of the residence must be suppressed.

However, even if Brown is correct that the triggering event did not occur, suppression of the search results is unwarranted.

> When officers have relied upon a subsequently invalidated search warrant, *Leon* permits admission of the seized evidence unless "the magistrate abandoned his detached and neutral role" in issuing the warrant, or "the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."

Tagbering, 985 F.2d at 951 (quoting *United States v. Leon*, 468 U.S. 897, 926 (1984)).

Brown argues the officers could not reasonably have believed probable cause existed to execute the warrant after the package was placed back outside. However, there is nothing to indicate that the officers unreasonably relied on the warrant. Even if the warrant should have been more narrowly tailored, the text of the warrant itself only specified transportation of the methamphetamine inside the residence—an act which all parties agree occurred. Furthermore, Inspector Farmer testified that the officers did not realize "Return to Sender" had been written on the package until *after*

they executed the warrant. Finally, officers observed Brown and his coconspirators engaging in suspicious behavior before Brown brought the package into the residence, strengthening their belief that they had probable cause to execute the warrant.

Because the officers relied on the warrant in good faith, the district court did not err in failing to suppress the evidence on the ground that the officers lacked probable cause to execute the warrant.

B. *Sufficiency of the Evidence*

> Under Rule 29(a), a court must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. This court reviews the sufficiency of the evidence de novo, viewing evidence in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict. A court should not weigh the evidence or assess the credibility of witnesses. The standard is very strict, and this court will reverse the conviction only if we conclude that no reasonable jury could have found the accused guilty beyond a reasonable doubt.

United States v. Santana, 524 F.3d 851, 853 (8th Cir. 2008) (cleaned up).

1. *Conspiracy to Distribute*

"To establish the existence of a conspiracy, the government must prove that: 1) there was a conspiracy to distribute a controlled substance; 2) the defendant knew of the conspiracy; and 3) the defendant knowingly participated in the conspiracy." *United States v. Bordeaux*, 436 F.3d 900, 903 (8th Cir. 2006).

Brown argues that the evidence was insufficient to establish the elements of conspiracy and challenges the district court's decision to deny his motion for

judgment of acquittal. Brown particularly challenges the credibility of witness Jeremy Maxwell, who claimed he observed Brown engage in a drug transaction. However, "[d]etermining the credibility of witnesses is the province of the jury. As a result, we give significant weight to the jury's determinations as to the credibility of witnesses." *Id.* at 904 (internal citation omitted). Brown "has provided no basis for deviating from this rule." *Id.*

Furthermore, excluding Maxwell's testimony, the government presented sufficient additional evidence linking Brown to the conspiracy. Inspector Farmer testified to Brown's suspicious behavior during the controlled delivery, including the "heat run." It was further established that Brown fled the scene after police entered the residence. Inside the residence, officers discovered at least two guns with Brown's DNA, one of which was hidden under Brown's bed. This discovery, along with Guerra's testimony that there were guns throughout the house and Benedict's testimony that Brown had used her property for target practice and accompanied Fennell when Fennell sold her drugs, supported the government's claim that Brown was providing protection to Fennell and his drug operation. Officers also discovered a drug ledger bearing Brown's street name, "LT," and a text associated with LT's number referencing a drug transaction; Guerra identified Brown as "Little T" at trial.

In light of this evidence, we conclude the district court did not err in denying Brown's motion for a judgment of acquittal on the conspiracy charge.

2. *Possession with Intent to Distribute*

> To sustain a conviction for aiding and abetting with intent to distribute drugs, the government must prove: (1) that the defendant associated himself with the unlawful venture; (2) that he participated in it as something he wished to bring about; and (3) that he sought by his actions to make it succeed.

Santana, 524 F.3d at 853 (quoting *United States v. McCracken*, 110 F.3d 535, 540 (8th Cir. 1997)).

Brown argues the evidence was insufficient to convict him of possession with intent to distribute, claiming that he "never knowingly possessed 50 grams or more of methamphetamine." Appellant's Br. at 38. Brown claims he was not aware that the package he picked up and brought inside the residence contained 100 grams of methamphetamine. Brown's argument fails, because "in an aiding-and-abetting case, the government is not required to prove that the defendant possessed the controlled substance" and "knowing possession . . . is not an element of aiding-and-abetting." *Santana*, 524 F.3d at 854.

As discussed in Part II.B.1, the evidence presented at trial supported the government's theory that Brown was assisting Fennell with his drug distribution operation. The evidence presented at trial also supported the government's argument that Fennell directed a drug distribution operation. To the extent that Brown protected and supported Fennell, Brown "associated himself with [an] unlawful venture, participated in it as something he wished to bring about, and sought by his actions to make it succeed"—regardless of his knowledge about the package's content. *Id.* at 855. Furthermore, the government presented evidence to suggest that Brown *knowingly* possessed the 100 grams of methamphetamine inside the package. Most relevantly, Inspector Farmer testified to Brown's "countersurveillance maneuver" after the package was left on the doorstep; this maneuver suggests Brown was aware of the package's content. Trial Tr., Day 1, at 42.

In light of this evidence, we conclude the district court did not err in denying Brown's motion for a judgment of acquittal on the possession with intent to distribute charge.

C. *Photographs*

> Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. We review a challenged Rule 404(b) decision for abuse of discretion and reverse only when such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts.

United States v. Payne-Owens, 845 F.3d 868, 872 (8th Cir. 2017) (internal quotations omitted).

"We recognize [that] . . . general evidence as to gang culture, aimed at simply establishing a violent or lawless culture, is often unduly prejudicial and can be irrelevant." *Id.* at 873 (cleaned up). Therefore, the government may not "relentlessly attempt to convict [a defendant] by arguing guilt by association." *Id.* at 874. However, "[s]pecific and circumscribed evidence of gang association may be necessary in a trial to show the nature and extent of the defendants' association, which in turn bears on whether they conspired." *United States v. Johnson*, 28 F.3d 1487, 1497 (8th Cir. 1994) (cleaned up).

Brown challenges the district court's decision to admit photographs of him socializing with certain coconspirators. He claims the photographs depict gang signs and therefore unfairly prejudiced him; on this basis, he calls for a new trial. Brown's argument is without merit.

Prior to trial, Brown filed a motion in limine asking the district court to bar the government from presenting evidence of his gang affiliation. The district court granted his motion in part and prohibited the government from raising Brown's gang affiliation. At trial, however, the government moved to introduce certain photographs of Brown and his coconspirators. One photograph shows Brown, Fennell, and other

coconspirators drinking around a table inside the residence, another shows Brown in a canoe, and a third shows him seated on an airplane. While the photographs do show individuals making hand gestures, there is nothing self-evidently connecting these gestures to gangs in general or any gang in particular, and the government introduced no evidence suggesting such a connection. Neither did the government refer to Brown's gang affiliation at trial. Considering that we have previously upheld a district court's decision to allow testimony *affirmatively* establishing defendants' gang membership, where such membership was not "the entire theme of the trial," *id.* at 1497, Brown's mere speculations about how the jury potentially interpreted the photographs is insufficient to establish prejudice.

The district court did not err in admitting the photographs, and their introduction does not provide a basis for a new trial.

D. *Minor Role Reduction*

A two-level "minor participant adjustment applies to a defendant who is less culpable than most other participants . . . . Whether a defendant played a minor role is a question of fact reviewed for clear error. The burden of proof rests with the defendant to prove that he played a minor role." *United States v. Bradley*, 643 F.3d 1121, 1128 (8th Cir. 2011) (cleaned up).

> [W]hile relative culpability of conspirators is relevant to the minor participant determination, our cases make it clear that merely showing the defendant was less culpable than other participants is not enough to entitle the defendant to the adjustment if the defendant was deeply involved in the offense.

Id. at 1129 (internal quotations omitted).

Here, the evidence presented at trial suggested that Brown both provided protection to Fennell and his drug trafficking operation and engaged in drug

purchasing and distribution himself. While Brown may have been less involved then other members of the conspiracy, there was sufficient evidence for the district court to find that Brown's role was more than minor. Brown "was an active participant in the conspiracy . . . and therefore the court did not clearly err in determining he was not a minor participant. We affirm the court's rejection of the two-level reduction." *Id.*

III. *Conclusion*

For the foregoing reasons, we affirm Brown's conviction and sentence.

STRAS, Circuit Judge, concurring in part and concurring in the judgment.

The officers who searched the house relied in good faith on a validly issued and facially reasonable anticipatory search warrant, so even if the triggering condition was overly broad and failed to establish probable cause under the unusual facts of this case, Brown is not entitled to suppression. *See United States v. Leon*, 468 U.S. 897, 922 (1984); *United States v. Livesay*, 983 F.2d 135, 137–38 (8th Cir. 1993). Accordingly, I concur and join all but Part II.A of the court's opinion.

United States of America, Plaintiff - Appellee v. Dijon Rasheed Brown, Defendant - Appellant
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2019 U.S. App. LEXIS 21019
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July 16, 2019, Filed

Editorial Information: Prior History

{2019 U.S. App. LEXIS 1}Appeal from United States District Court for the Western District of Missouri - Jefferson City.United States v. Brown, 2016 U.S. Dist. LEXIS 90188 (W.D. Mo., June 21, 2016)

Counsel For United States of America, Plaintiff - Appellee: John Benton Hurst, Assistant United States Attorney, U.S. Attorney's Office, Kansas City, MO; Jim Lynn, Assistant U.S. Attorney, Ashley Turner, U.S. Attorney's Office, Western District of Missouri, Jefferson City, MO.

Dijon Rasheed Brown, Defendant - Appellant, Pro se, Adelanto, CA.

For Dijon Rasheed Brown, Defendant - Appellant: Scott A. Hamblin, Brydon & Swearengen, Jefferson City, MO.

Judges: Before SMITH, Chief Judge, BENTON and STRAS, Circuit Judges. STRAS, Circuit Judge, concurring in part and concurring in the judgment.

CASE SUMMARY Defendant's motion to suppress properly denied because anticipatory warrant was supported by probable cause and was properly executed as use of mail system to deliver illegal drugs to specific address provided sufficient evidence to support issuance of anticipatory warrant to search target residence, and officers relied on warrant in good faith.

OVERVIEW: HOLDINGS: [1]-The district court did not err in denying defendant's motion to suppress because the anticipatory warrant allowing the search was supported by probable cause and was properly executed as the use of the mail system to deliver illegal drugs to a specific address provided sufficient evidence to support issuance of an anticipatory warrant to search the target residence, and the officers relied on the warrant in good faith; [2]-Sufficient evidence supported defendant's conspiracy to distribute conviction under 21 U.S.C.S. §§ 841(a)(1), (b)(1)(A), and 846 because significant weight was given to the jury's determination as to the credibility of a witness who claimed he observed defendant engage in a drug transaction, and even excluding that testimony, the government presented additional evidence linking defendant to the conspiracy.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress
Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Motions to Suppress

The appellate court reviews the denial of a motion to suppress de novo but reviews the underlying factual determinations for clear error, giving due weight to the inferences of the district court and law enforcement officials.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause
Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Totality of Circumstances Test

The Fourth Amendment provides that no warrants shall issue, but upon probable cause, supported by oath or affirmation. To find probable cause to issue a warrant, the issuing magistrate must determine that, in light of 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.

Criminal Law & Procedure > Search & Seizure > Search Warrants
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants

The United States Supreme Court has upheld the constitutionality of anticipatory warrants. Anticipatory warrants are no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is now probable that (2) contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed.

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Search & Seizure

The appellate court reviews the district court's determination of probable cause to issue an anticipatory warrant under a clearly erroneous standard, and give considerable deference to the issuing judge's determination of probable cause. The appellate court affirms the district court's decision unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake was made. An anticipatory search warrant should be upheld if independent evidence shows the delivery of contraband will or is likely to occur and the warrant is conditioned on that delivery.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Execution of Warrant

Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time, a so-called triggering condition. Occurrence of the triggering condition establishes the requisite connection between the item described in the warrant and the searched location. If an anticipatory warrant is executed before the triggering event occurs, then suppression may well be warranted for that reason.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith

When officers have relied upon a subsequently invalidated search warrant, Leon permits admission of the seized evidence unless the magistrate abandoned his detached and neutral role in issuing the warrant, or the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

Criminal Law & Procedure > Trials > Motions for Acquittal

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Sufficiency of Evidence to Convict

Under Fed. R. Crim. P. 29(a), a court must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The appellate court reviews the sufficiency of the evidence de novo, viewing evidence in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict. An appellate court should not weigh the evidence or assess the credibility of witnesses. The standard is very strict, and the appellate court will reverse the conviction only if it concludes that no reasonable jury could have found the accused guilty beyond a reasonable doubt.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Conspiracy > Elements

To establish the existence of a conspiracy, the government must prove that: (1) there was a conspiracy to distribute a controlled substance; (2) the defendant knew of the conspiracy; and (3) the defendant knowingly participated in the conspiracy.

Criminal Law & Procedure > Appeals > Deferential Review > Credibility & Demeanor Determinations
Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses

Determining the credibility of witnesses is the province of the jury. As a result, a court gives significant weight to the jury's determinations as to the credibility of witnesses.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Intent to Distribute > Elements
Criminal Law & Procedure > Accessories > Aiding & Abetting

To sustain a conviction for aiding and abetting with intent to distribute drugs, the government must prove: (1) that the defendant associated himself with the unlawful venture; (2) that he participated in it as something he wished to bring about; and (3) that he sought by his actions to make it succeed.

Criminal Law & Procedure > Accessories > Aiding & Abetting
Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Intent to Distribute > Elements

In an aiding-and-abetting case, the government is not required to prove that the defendant possessed the controlled substance and knowing possession is not an element of aiding-and-abetting.

Evidence > Relevance > Prior Acts, Crimes & Wrongs
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence

Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. The appellate court reviews a challenged Fed. R. Evid. 404(b) decision for abuse of discretion and reverse only when such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts.

Evidence > Relevance > Prior Acts, Crimes & Wrongs

General evidence as to gang culture, aimed at simply establishing a violent or lawless culture, is often

unduly prejudicial and can be irrelevant. Therefore, the government may not relentlessly attempt to convict a defendant by arguing guilt by association. However, specific and circumscribed evidence of gang association may be necessary in a trial to show the nature and extent of the defendants' association, which in turn bears on whether they conspired.

A two-level minor participant adjustment applies to a defendant who is less culpable than most other participants. Whether a defendant played a minor role is a question of fact reviewed for clear error. The burden of proof rests with the defendant to prove that he played a minor role.

While relative culpability of conspirators is relevant to the minor participant determination, merely showing the defendant was less culpable than other participants is not enough to entitle the defendant to the adjustment if the defendant was deeply involved in the offense.

Opinion

Opinion by: SMITH

Opinion

SMITH, Chief Judge.

Dijon Rasheed Brown was convicted of conspiracy to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, and for possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A), for his involvement in a drug distribution operation.1 Police arrested Brown after conducting **a controlled delivery** of a methamphetamine-filled package addressed to the duplex where Brown was staying. Brown raises several issues on appeal in connection with his arrest and trial. Specifically, Brown**{2019 U.S. App. LEXIS 2}** argues that the district court2 erred in (1) denying his motion to suppress the evidence collected as a result of the controlled delivery; (2) denying his motions for judgment of acquittal on both the conspiracy and possession with intent to distribute charges; (3) admitting certain photographs of him at trial; and (4) denying Brown a two-level minor role reduction at sentencing. We disagree, and we affirm the district court in all respects.

I. *Background*

In September 2015, Zachary Fennell was robbed at 4262 Santa Barbara Dr. in Columbia, Missouri ("the residence"), a duplex rented by his girlfriend, Melissa Guerra. Fennell was a drug dealer. He received methamphetamine from California through the mail at various addresses and then distributed the methamphetamine to others in the Columbia area for sale; Fennell's neighbors, Jeremy and Stephanie Maxwell, sold methamphetamine for Fennell. The men who robbed Fennell in September attacked him and stole drugs, money, and guns. Soon after the robbery, three men arrived from California and began staying with Fennell. One of these men was Brown.

Then, in October and November 2015, postal inspectors identified several suspicious packages being**{2019 U.S. App. LEXIS 3}** mailed from the Los Angeles, California area to various Columbia, Missouri addresses. In early November, postal inspectors identified a package from the Los Angeles area addressed to "Martha Guerra" at the residence as suspicious. Postal Inspector Christopher

Farmer obtained a warrant for the package and discovered about 456 grams of methamphetamine inside. Inspector Farmer removed 356 grams from the package, leaving 100 grams inside.

Inspector Farmer then submitted an affidavit in support of an anticipatory search warrant for the residence. In his affidavit, Inspector Farmer explained that he had discovered about 456 grams of methamphetamine inside the package but that he had reinserted about 100 grams for the purpose of **a controlled delivery**. The affidavit also explained that the controlled delivery would be performed by a law enforcement agent wearing a United States Postal Service uniform. Specifically, the affidavit provided: "Delivery will be made only to an adult willing to accept delivery on behalf of 'Martha Guerra,' to whom the Subject Parcel is addressed. Every effort will be made to make delivery to 'Martha Guerra' and in no event will the package be delivered to a child."**{2019 U.S. App. LEXIS 4}** *United States v. Brown*, No. 2:15-cr-04067-SRB, 2017 U.S. Dist. LEXIS 120791, 2017 WL 3275970, at *4 (W.D. Mo. July 21, 2017), *report and recommendation adopted*, No. 2:15-CR-04067-SRB, 2017 U.S. Dist. LEXIS 120499, 2017 WL 3275719 (W.D. Mo. Aug. 1, 2017). Based on the contents of the package, Inspector Farmer believed there was a fair probability of drug activity on the premises. A magistrate judge agreed and issued an anticipatory warrant for the premises. The warrant included a "triggering event," providing that probable cause to search the residence would be established once "[a]n adult subject transport[ed] some or all of the methamphetamine inside the target address." *Id.* The warrant also included a notice providing that the "warrant shall be executed only after this act occurs. Otherwise, this warrant shall not be executed." *Id.*

Law enforcement scheduled the controlled delivery for November 10. Officers surveilled the residence prior to and during the delivery, and at 9:55 a.m., they observed Brown and another male entering an SUV parked in front of the residence. At 10:04 a.m., an undercover officer attempted delivery at the front door and then left the package near the front door. Inspector Farmer, who was on scene during the controlled delivery, "observed an individual inside of the residence opening and closing the door several**{2019 U.S. App. LEXIS 5}** times as if they were looking at the package." Trial Tr., Day 1, at 42, *United States v. Brown*, No. 2:15-cr-04067-SRB (W.D. Mo. Apr. 13, 2018), ECF No. 520. At 10:31 a.m., the SUV drove past the residence, then returned and parked in the driveway. At trial, Inspector Farmer described this activity as "a heat run, which is a countersurveillance maneuver employed by individuals involved in criminal activity to scout for and look for the location of law enforcement in the area." *Id.* at 42-43. At 10:34 a.m., Brown and another man exited the vehicle and approached the residence. Brown then picked up the package and took it inside the residence.

Once Brown brought the package inside, Inspector Farmer alerted the officers that the triggering event had occurred. Within two minutes of Brown bringing the package inside, Fennell brought the package back outside onto the front doorstep and left it there. Officers soon entered the residence through the back door after being unable to breach the front door. Brown and others attempted to flee. Brown was later found hiding inside a nearby shed. After execution of the warrant, officers discovered that Brown had written "Return to Sender" on the package before placing**{2019 U.S. App. LEXIS 6}** it back on the doorstep.

During their search of the residence, officers discovered evidence of drug trafficking, including several weapons, a drug ledger, and incriminating text messages. Specifically, they discovered a loaded handgun under a bed in Brown's bedroom; a piece of paper with the initials "LT" written on it along with drug quantities and prices (later determined to be a drug ledger); and a text message associated with LT's phone number instructing someone to purchase drugs. Brown's DNA was found on the gun under his bed, and testing also suggested his DNA was on at least one other gun found inside the residence.

Subsequently, Brown was indicted for conspiracy to distribute methamphetamine and possession with intent to distribute methamphetamine; Fennell, Guerra, and other coconspirators were also indicted. Prior to trial, Brown moved to suppress the evidence recovered during the November 10 raid. Brown argued that the anticipatory warrant was not supported by probable cause and that the triggering event to execute the warrant never occurred. The district court denied his motion. The court found the triggering event occurred when Brown brought the package inside the residence.**{2019 U.S. App. LEXIS 7}** It also found that even if the triggering event did not occur, law enforcement relied on the warrant in good faith. Brown also filed a motion in limine to exclude any evidence of his gang affiliation. The district court granted Brown's motion in part, instructing the government not to mention gang affiliation; however, the court allowed the government to introduce certain pictures of Brown, Fennell, and other codefendants.

At trial, the government argued that Brown had moved from California to assist Fennell with his drug distribution operation, specifically noting Brown's role in providing protection to Fennell after he had been robbed. The government called several witnesses, including Inspector Farmer, FBI Agent Stacy Banks, Guerra, a female client named Jessie Benedict, and Jeremy Maxwell. During Agent Banks's testimony, the government introduced several pictures of Brown, Fennell, and the other codefendants for the purpose of establishing the relationship among these individuals. Brown claimed these pictures were prejudicial because they allegedly depicted certain gang signs, and he objected to their introduction. However, the government made no mention of gangs or gang affiliation**{2019 U.S. App. LEXIS 8}** during the trial. Guerra identified Brown as "Little T" and also testified to seeing guns "[e]verywhere" when she visited the residence. Trial Tr., Day 2, at 143, *United States v. Brown*, No. 2:15-cr-04067-SRB (W.D. Mo. Apr. 13, 2018), ECF No. 521. Benedict stated that Brown sometimes accompanied Fennell when Fennell sold her drugs; she also described an occasion when Brown used her property for target practice. Maxwell testified that, on one occasion, Brown provided Fennell with methamphetamine.

At the close of the case, Brown moved for a judgment of acquittal, arguing that the evidence was insufficient to find him guilty beyond a reasonable doubt of either charge. The district court denied Brown's motion, and the jury found Brown guilty of both conspiracy to distribute methamphetamine and possession with intent to distribute methamphetamine.

At sentencing, the district court calculated Brown's Guidelines range as 210 to 262 months' imprisonment, a range reflecting an offense level of 34 and a criminal history category of IV. Brown moved for a two-level minor role reduction, but the court denied the motion after finding that Brown played a "more than [a] de minimis role" in the drug**{2019 U.S. App. LEXIS 9}** conspiracy. Sent. Tr. at 9, *United States v. Brown*, No. 2:15-cr-04067-SRB (W.D. Mo. Apr. 16, 2018), ECF No. 526. The district court ultimately sentenced Brown to two concurrent 188-month sentences.

II. *Discussion*

A. *Anticipatory Search Warrant*

Brown contends the district court should have suppressed the evidence uncovered during the search of the residence, as the anticipatory warrant allowing the search was not supported by probable cause and not properly executed. "We review the denial of a motion to suppress de novo but review the underlying factual determinations for clear error, giving due weight to the inferences of the district court and law enforcement officials." *United States v. Walker*, 324 F.3d 1032, 1036 (8th Cir. 2003) (internal quotations omitted).

1. *Probable Cause*

> The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." To find probable cause to issue a warrant, the issuing magistrate must determine that, in light of 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.

United States v. Tagbering, 985 F.2d 946, 949 (8th Cir. 1993) (internal quotation omitted). The Supreme Court has upheld the constitutionality of anticipatory warrants. *United States v. Grubbs*, 547 U.S. 90, 96, 126 S. Ct. 1494, 164 L. Ed. 2d 195 (2006) ("Anticipatory**{2019 U.S. App. LEXIS 10}** warrants are . . . no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is now probable that (2) contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed.").

> We review the district court's determination of probable cause [to issue an anticipatory warrant] under a clearly erroneous standard, and give considerable deference to the issuing judge's determination of probable cause. We affirm the district court's decision unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake was made. An anticipatory search warrant should be upheld if independent evidence shows the delivery of contraband will or is likely to occur and the warrant is conditioned on that delivery.*Walker*, 324 F.3d at 1038 (cleaned up).

Brown argues that the evidence presented to the magistrate judge in the affidavit "failed to recite any facts indicating that an occupant or owner of the Residence was engaged in any criminal activity." Appellant's Br. at 21. As support, he notes Inspector Farmer's admission "that the affidavit was premised solely**{2019 U.S. App. LEXIS 11}** on the package itself." *Id.* Brown then incorrectly implies that the package and its contents could not support a finding of probable cause to issue an anticipatory warrant without additional evidence of criminal activity at the residence.

This argument is contrary to our decision in *Walker*, where we upheld an anticipatory warrant issued on near-identical grounds. *See* 324 F.3d at 1038. Brown attempts to distinguish *Walker* by noting that the package in *Walker* was addressed to an alias of the target residence's occupant and was personally accepted by that occupant. *Id.* at 1036. However, officers in *Walker* only discovered evidence that the occupant had used the alias *after* searching the target residence, *id.* at 1036, making that distinction irrelevant in assessing the existence of probable cause *before* the search. And, the fact that the suspect in *Walker* accepted the package in person would go not to whether probable cause existed to issue the warrant but to whether the warrant was properly executed. *See Tagbering*, 985 F.2d at 950.

The magistrate judge in the instant case issued the anticipatory warrant for the residence on the understanding that (1) a package containing a significant amount of methamphetamine had been addressed to the residence, and**{2019 U.S. App. LEXIS 12}** (2) the warrant would not be executed until officers performed **a controlled delivery**. As in *Walker*, the use of the mail system to deliver illegal drugs to a specific address provided sufficient evidence to support issuance of an anticipatory warrant to search the target residence. Therefore, the district court did not err in finding the warrant was supported by probable cause and in declining to suppress the evidence on the grounds that the warrant was improperly issued.

2. *Proper Execution*

"Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time-a so-called 'triggering condition.'" *Grubbs*, 547 U.S. at 94. Occurrence of the triggering condition establishes the requisite connection between "the item described in the warrant" and "the searched location." *Id.* If an anticipatory warrant is executed before the triggering event

occurs, "then suppression may well be warranted for that reason." *Tagbering*, 985 F.2d at 950.

Brown contends the warrant was improperly executed, relying on Inspector Farmer's statement in his affidavit that officers would deliver the package "only to an adult willing to accept delivery." *Brown*, 2017 U.S. Dist. LEXIS 120791, 2017 WL 3275970, at *4. Though the warrant itself contained no such condition, Brown argues**{2019 U.S. App. LEXIS 13}** the affidavit and warrant must be read together to formulate a sufficiently specific triggering event. Since the package was not unconditionally accepted-but rather, placed back outside the residence with instructions to "Return to Sender"-Brown argues the triggering event never occurred and the requisite relationship between the package and the residence was never established. Brown thus claims the evidence seized during the officers' search of the residence must be suppressed.

However, even if Brown is correct that the triggering event did not occur, suppression of the search results is unwarranted.

> When officers have relied upon a subsequently invalidated search warrant, *Leon* permits admission of the seized evidence unless "the magistrate abandoned his detached and neutral role" in issuing the warrant, or "the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."*Tagbering*, 985 F.2d at 951 (quoting *United States v. Leon*, 468 U.S. 897, 926, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)).

Brown argues the officers could not reasonably have believed probable cause existed to execute the warrant after the package was placed back outside. However, there is nothing to indicate that the officers**{2019 U.S. App. LEXIS 14}** unreasonably relied on the warrant. Even if the warrant should have been more narrowly tailored, the text of the warrant itself only specified transportation of the methamphetamine inside the residence-an act which all parties agree occurred. Furthermore, Inspector Farmer testified that the officers did not realize "Return to Sender" had been written on the package until *after* they executed the warrant. Finally, officers observed Brown and his coconspirators engaging in suspicious behavior before Brown brought the package into the residence, strengthening their belief that they had probable cause to execute the warrant.

Because the officers relied on the warrant in good faith, the district court did not err in failing to suppress the evidence on the ground that the officers lacked probable cause to execute the warrant.

B. *Sufficiency of the Evidence*

> Under Rule 29(a), a court must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. This court reviews the sufficiency of the evidence de novo, viewing evidence in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable inferences**{2019 U.S. App. LEXIS 15}** that support the verdict. A court should not weigh the evidence or assess the credibility of witnesses. The standard is very strict, and this court will reverse the conviction only if we conclude that no reasonable jury could have found the accused guilty beyond a reasonable doubt.

United States v. Santana, 524 F.3d 851, 853 (8th Cir. 2008) (cleaned up).

1. *Conspiracy to Distribute*

"To establish the existence of a conspiracy, the government must prove that: 1) there was a conspiracy to distribute a controlled substance; 2) the defendant knew of the conspiracy; and 3) the defendant knowingly participated in the conspiracy." *United States v. Bordeaux*, 436 F.3d 900, 903 (8th Cir. 2006).

Brown argues that the evidence was insufficient to establish the elements of conspiracy and challenges the district court's decision to deny his motion for judgment of acquittal. Brown particularly challenges the credibility of witness Jeremy Maxwell, who claimed he observed Brown engage in a drug transaction. However, "[d]etermining the credibility of witnesses is the province of the jury. As a result, we give significant weight to the jury's determinations as to the credibility of witnesses." *Id.* at 904 (internal citation omitted). Brown "has provided no basis for deviating from this rule." *Id.*

Furthermore, excluding Maxwell's testimony,**{2019 U.S. App. LEXIS 16}** the government presented sufficient additional evidence linking Brown to the conspiracy. Inspector Farmer testified to Brown's suspicious behavior during the controlled delivery, including the "heat run." It was further established that Brown fled the scene after police entered the residence. Inside the residence, officers discovered at least two guns with Brown's DNA, one of which was hidden under Brown's bed. This discovery, along with Guerra's testimony that there were guns throughout the house and Benedict's testimony that Brown had used her property for target practice and accompanied Fennell when Fennell sold her drugs, supported the government's claim that Brown was providing protection to Fennell and his drug operation. Officers also discovered a drug ledger bearing Brown's street name, "LT," and a text associated with LT's number referencing a drug transaction; Guerra identified Brown as "Little T" at trial.

In light of this evidence, we conclude the district court did not err in denying Brown's motion for a judgment of acquittal on the conspiracy charge.

2. *Possession with Intent to Distribute*

> To sustain a conviction for aiding and abetting with intent to distribute drugs, the**{2019 U.S. App. LEXIS 17}** government must prove: (1) that the defendant associated himself with the unlawful venture; (2) that he participated in it as something he wished to bring about; and (3) that he sought by his actions to make it succeed.

Santana, 524 F.3d at 853 (quoting *United States v. McCracken*, 110 F.3d 535, 540 (8th Cir. 1997)).

Brown argues the evidence was insufficient to convict him of possession with intent to distribute, claiming that he "never knowingly possessed 50 grams or more of methamphetamine." Appellant's Br. at 38. Brown claims he was not aware that the package he picked up and brought inside the residence contained 100 grams of methamphetamine. Brown's argument fails, because "in an aiding-and-abetting case, the government is not required to prove that the defendant possessed the controlled substance" and "knowing possession . . . is not an element of aiding-and-abetting." *Santana*, 524 F.3d at 854.

As discussed in Part II.B.1, the evidence presented at trial supported the government's theory that Brown was assisting Fennell with his drug distribution operation. The evidence presented at trial also supported the government's argument that Fennell directed a drug distribution operation. To the extent that Brown protected and supported Fennell, Brown "associated himself with [an] unlawful venture,**{2019 U.S. App. LEXIS 18}** participated in it as something he wished to bring about, and sought by his actions to make it succeed"-regardless of his knowledge about the package's content. *Id.* at 855. Furthermore, the government presented evidence to suggest that Brown *knowingly* possessed the 100 grams of methamphetamine inside the package. Most relevantly, Inspector Farmer testified to Brown's "countersurveillance maneuver" after the package was left on the doorstep; this maneuver suggests Brown was aware of the package's content. Trial Tr., Day 1, at 42.

In light of this evidence, we conclude the district court did not err in denying Brown's motion for a judgment of acquittal on the possession with intent to distribute charge.

C. *Photographs*

> Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. We review a challenged Rule 404(b) decision for abuse of discretion and reverse only when such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts. *United States v. Payne-Owens*, 845 F.3d 868, 872 (8th Cir. 2017) (internal quotations omitted).

"We recognize [that] . . . general evidence as to gang**{2019 U.S. App. LEXIS 19}** culture, aimed at simply establishing a violent or lawless culture, is often unduly prejudicial and can be irrelevant." *Id.* at 873 (cleaned up). Therefore, the government may not "relentlessly attempt to convict [a defendant] by arguing guilt by association." *Id.* at 874. However, "[s]pecific and circumscribed evidence of gang association may be necessary in a trial to show the nature and extent of the defendants' association, which in turn bears on whether they conspired." *United States v. Johnson*, 28 F.3d 1487, 1497 (8th Cir. 1994) (cleaned up).

Brown challenges the district court's decision to admit photographs of him socializing with certain coconspirators. He claims the photographs depict gang signs and therefore unfairly prejudiced him; on this basis, he calls for a new trial. Brown's argument is without merit.

Prior to trial, Brown filed a motion in limine asking the district court to bar the government from presenting evidence of his gang affiliation. The district court granted his motion in part and prohibited the government from raising Brown's gang affiliation. At trial, however, the government moved to introduce certain photographs of Brown and his coconspirators. One photograph shows Brown, Fennell, and other coconspirators drinking around a table inside**{2019 U.S. App. LEXIS 20}** the residence, another shows Brown in a canoe, and a third shows him seated on an airplane. While the photographs do show individuals making hand gestures, there is nothing self-evidently connecting these gestures to gangs in general or any gang in particular, and the government introduced no evidence suggesting such a connection. Neither did the government refer to Brown's gang affiliation at trial. Considering that we have previously upheld a district court's decision to allow testimony *affirmatively* establishing defendants' gang membership, where such membership was not "the entire theme of the trial," *id.* at 1497, Brown's mere speculations about how the jury potentially interpreted the photographs is insufficient to establish prejudice.

The district court did not err in admitting the photographs, and their introduction does not provide a basis for a new trial.

D. *Minor Role Reduction*

A two-level "minor participant adjustment applies to a defendant who is less culpable than most other participants . . . . Whether a defendant played a minor role is a question of fact reviewed for clear error. The burden of proof rests with the defendant to prove that he played a minor role." *United States v. Bradley*, 643 F.3d 1121, 1128 (8th Cir. 2011) (cleaned up).

> [W]hile**{2019 U.S. App. LEXIS 21}** relative culpability of conspirators is relevant to the minor participant determination, our cases make it clear that merely showing the defendant was less culpable than other participants is not enough to entitle the defendant to the adjustment if the defendant was deeply involved in the offense. *Id.* at 1129 (internal quotations omitted).

Here, the evidence presented at trial suggested that Brown both provided protection to Fennell and

his drug trafficking operation and engaged in drug purchasing and distribution himself. While Brown may have been less involved then other members of the conspiracy, there was sufficient evidence for the district court to find that Brown's role was more than minor. Brown "was an active participant in the conspiracy . . . and therefore the court did not clearly err in determining he was not a minor participant. We affirm the court's rejection of the two-level reduction." *Id.*

III. *Conclusion*

For the foregoing reasons, we affirm Brown's conviction and sentence

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

UNITED STATES OF AMERICA

v.

DIJON RASHEED BROWN

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **15-04067-03-CR-C-SRB**
§ USM Number: **28302-045**
§ **Scott Allen Hamblin**
§ Defendant's Attorney

THE DEFENDANT:

☒ was found guilty on count(s) 1ss, 2ss and 8ss after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1), (b)(1)(A) and 846 Conspiracy to Distribute 500 Grams or More of Methamphetamine	11/10/2015	1ss
21 U.S.C. § 841(a)(1) and 841(b)(1)(A) Possession with Intent to Distribute Methamphetamine	11/10/2015	2ss
18 U.S.C. § 922(g)(1) and 924(a)(2) Felon in Possession of Firearms	11/10/2015	8ss

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) 1, 1s, 2, 2s and 8s ☐ is ☒ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 22, 2018
Date of Imposition of Judgment

/s/ Stephen R. Bough
Signature of Judge

STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

March 22, 2018
Date

DEFENDANT: DIJON RASHEED BROWN
CASE NUMBER: 15-04067-03-CR-C-SRB

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at http://www.mow.uscourts.gov/ppts.

Defendant's Signature _____ Date _____

DEFENDANT: DIJON RASHEED BROWN
CASE NUMBER: 15-04067-03-CR-C-SRB

SPECIAL CONDITIONS OF SUPERVISION

a) The defendant shall successfully participate in any outpatient or inpatient substance abuse counseling program, which may include urinalysis, sweat patch, or Breathalyzer testing, as approved by the Probation Office and pay any associated costs as directed by the Probation Office.

b) Successfully participate in any mental health counseling program, as approved by the Probation Office, and pay any associated costs, as directed by the Probation Office.

c) The defendant shall submit his person and any property, house, residence, office, vehicle, papers, computer, other electronic communication or data storage devices or media and effects to a search, conducted by a U.S. Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

d) The defendant shall not consume or possess alcoholic beverages or beer, including 3.2 percent beer, at any time, and shall not be present in any establishment where alcoholic beverages are the primary items for sale.

e) The defendant shall comply with the Western District of Missouri Offender Employment Guideline which may include participation in training, counseling, and/or daily job searching as directed by the probation officer. If not in compliance with the condition of supervision requiring full-time employment at a lawful occupation, the defendant may be required to perform up to 20 hours of community service per week until employed, as approved or directed by the probation officer.

f) Satisfy any warrants/pending charges within the first 60 days of supervised release.

ACKNOWLEDGMENT OF CONDITIONS

I have read or have read the conditions of supervision set forth in this judgment and I fully understand them. I have been provided a copy of them.

I understand that upon finding of a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

_____ _____
Defendant Date

_____ _____
United States Probation Officer Date

DEFENDANT: DIJON RASHEED BROWN
CASE NUMBER: 15-04067-03-CR-C-SRB

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$300.00		$.00	$.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $300.00 for Counts 1ss, 2ss and 8ss which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 15-4067-03-CR-C-SRB
	)	
	)	
DIJON RASHEED BROWN,	)	
	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Pending before the Court is defendant Dijon Rasheed Brown's motion to suppress evidence, and suggestions in support thereof. (Doc. 203). Defendant alleges suppression is warranted for the following reasons: (1) the affidavit in support of the Anticipatory Search Warrant was insufficient to establish probable cause to issue the warrant; (2) the triggering event to execute the Anticipatory Search Warrant never occurred; and (3) the good faith exception does not apply here because the officers did not have an objectively reasonable belief that there was probable cause to enter the house. The Government filed suggestions in opposition to defendant Brown's motion to suppress (doc. 213), to which defendant Brown filed a reply. (Doc. 222). The Court held an evidentiary hearing regarding Defendant's pending motion to suppress on May 15, 2017.

Factual Background

In the instant case, Defendant is charged in Counts 1, 2, and 8 of the Second Superseding Indictment. (Doc. 70). Count 1 charges Defendant with conspiracy to distribute methamphetamine, Count 2 charges Defendant with possession with intent to distribute methamphetamine, and Count 8 charges Defendant with being a felon in possession of a firearm.

In or around November of 2015, St. Louis Postal Inspectors identified a suspicious parcel in the mail stream. The parcel was addressed to "Martha Guerra, 4246 Santa Barbara Dr. Columbia, MO 65201," and had a return address of "Carlos Rufio, 11523 Adco Ave Downey CA 90241." (Hereinafter known as the "Parcel.") On or about November 9, 2015, Postal Inspectors

retrieved the Parcel and due to its suspicious characteristics, a canine sniff was requested. On November 9, 2015, Columbia Police Department Officer Sgt. Scott Hedrick responded with his drug canine, Kane. Kane reacted to the Parcel in a positive manner. Thereafter, Postal Inspector Christopher J. Farmer applied for and obtained a federal search warrant for the Parcel. Execution of the search warrant revealed a hollowed-out book containing approximately 456 grams of field-tested methamphetamine. Upon the discovery of the Parcel containing methamphetamine, officers replaced a portion of the methamphetamine and resealed the Parcel. Postal Inspector Farmer then applied for and obtained an Anticipatory Search Warrant authorizing the search of 4262 Santa Barbara Drive, Columbia, Missouri 65201.

On November 10, 2015, in the morning hours, officers assembled for the execution of the warrant. Postal Inspector Farmer and Columbia Police Detective Tim Giger established surveillance near the residence. At 9:55 a.m., two black males exited the residence and entered a white Chevrolet Suburban parked in front of the residence. At 10:04 a.m., an undercover Postal Inspector delivered the Parcel to the residence and the Parcel was left near the front door. A black male opened and closed the door several times and looked toward the Parcel through the screen door. At 10:31 a.m., the Suburban returned, drove past the residence once, and then returned and parked in the driveway of the residence. At 10:34 a.m., the driver of the Suburban, identified as Favbion Dawayne Holmes, and Defendant, who was the passenger in the Suburban, exited the vehicle and approached the residence. Defendant picked up the Parcel and took it into the residence. At 10:36 a.m., Zachary Troy Fennell brought the Parcel back outside the residence and placed it next to the front door.

Subsequently, law enforcement officers, including the Boone County Sheriff's Department SWAT Team, approached the residence to execute the Anticipatory Search Warrant. Entry was attempted at the front door, but officers were unable to breach the front door because the door had been reinforced. Officers were forced to make entry at a secondary location at the rear of the residence. Upon execution of the Anticipatory Search Warrant, Postal Inspector Farmer retrieved the Parcel from the front door and found the words "return to sender" had been written on the package in black marker.

Analysis

In the instant case, Defendant advances several theories in support of his claim that suppression of the evidence is warranted. Defendant alleges suppression is warranted because:

(1) the facts in support of the Anticipatory Search Warrant were insufficient to establish probable cause to support issuance; (2) the triggering event to execute the Anticipatory Search Warrant never occurred; and (3) the good faith exception does not apply here because the officers did not have an objectively reasonable belief that there was probable cause to enter the house. Consequently, Defendant alleges that the search of the residence, and the evidence recovered, was the product of an illegal search and seizure in violation of Defendant's rights under the Fourth Amendment to the United States Constitution, and therefore suppression of the evidence is required. The Government has responded by stating that the affidavit in support of the Anticipatory Search Warrant set forth sufficient facts to establish probable cause to believe that evidence of drug activity would be found within the residence upon delivery of the Parcel. Further, the Government asserts that the triggering event, which authorized execution of the Anticipatory Search Warrant, occurred, and finally even if the search warrant and affidavit were found to be insufficient, the officers relied in good faith upon the validity of the warrant, therefore, no basis for suppression of evidence exists. The Court will address each of these arguments below.

A. Probable Cause to Issue the Anticipatory Search Warrant

Defendant first asserts that issuance of the Anticipatory Search Warrant was not proper in this case because the affidavit in support of the warrant failed to establish probable cause.

The Fourth Amendment to the United States Constitution provides in relevant part, "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. Probable cause to issue a warrant exists if, "in light of 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." United States v. Tagbering, 985 F.2d 946, 949 (8th Cir. 1993) (quoting United States v. Martin, 866 F.2d 972, 976 (8th Cir. 1989)). A "totality-of-the-circumstances" approach is employed in determining whether probable cause existed. Illinois v. Gates, 462 U.S. 213, 238 (1983).

"An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place.' Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time – a so-called 'triggering condition'." United States v.

Grubbs, 547 U.S. 90, 94 (2006) (internal citations omitted). "Anticipatory warrants are, therefore, no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed." Id. at 96. (emphasis in original).

Defendant asserts that the affidavit in support of the Anticipatory Search Warrant failed to set forth sufficient facts to support a probable cause determination and therefore issuance of the warrant was improper. Defendant supports this assertion by stating the affidavit fails to recite any facts showing that the owner or any occupant of the residence was engaged in criminal activity, that no person at the residence was observed trafficking drugs, and that the affidavit did not cite any drug activity by an owner or occupant of the residence. Defendant's suggestions in support of his motion to suppress also list many things that are not within the affidavit to support issuance of the warrant, i.e., "[t]here were no facts that the owner or occupants were drug dealers. There were no facts the owner or occupants offered to provide drugs. There were no controlled buys." See Doc. 203 at 4-5. Finally, Defendant claims simply because the Parcel was addressed to 4262 Santa Barbara Dr., Columbia, Missouri, is not sufficient to establish probable cause to issue a search warrant for that address, particularly because Postal Inspector Farmer had previously determined no one by the name Martha Guerra resided at the address listed.

Upon review of the affidavit in support of the Anticipatory Search Warrant, the Court finds that here, based on the totality of the circumstances, at the time the warrant was issued, there was a fair probability that contraband would be found at the residence when the warrant was executed. Having so found, the Anticipatory Search Warrant was properly issued in this case. The affidavit in support of the warrant stated that following the obtainment and execution of a search warrant on the Parcel, officers discovered approximately 456 grams of a crystalline substance, a representative sample of which was field-tested and produced a positive result for methamphetamine. The affidavit further asserted that a representative amount of approximately 100 grams of methamphetamine was reinserted into the package for the purpose of conducting a controlled delivery of the Parcel to 4262 Santa Barbara Dr., Columbia, Missouri 65201, the residence the Parcel was originally addressed to for delivery. Additionally, the affidavit described the procedure that would be in place to conduct the controlled delivery, and stated that a law enforcement agent, wearing a USPS letter carrier uniform, would attempt to deliver the Parcel to the residence.

Therefore, the Court finds that at the time the warrant was issued, there was a fair probability that contraband and evidence of drug activity would be on the described premises when the warrant was executed. See United States v. Grubbs, 547 U.S. 90, 96 (2006). With regards to issuance of an anticipatory search warrant, that is all that is required. Therefore, Defendant's claim that suppression of the evidence is warranted under a theory that the Anticipatory Search Warrant was not supported by probable cause is meritless and should be denied.

B. Triggering Event Authorizing Execution of the Anticipatory Search Warrant

Defendant next argues that the so called "triggering event," which authorized the execution of the Anticipatory Search Warrant, never occurred in this case, thus invalidating the subsequent execution of the warrant. To support his claim that the triggering event never took place, Defendant advances two theories: (1) the Parcel was left outside the front door, rather than being placed in the possession of anyone willing to accept delivery; and (2) the Parcel was not accepted, but rather was rejected, because the Parcel was returned outside to the front door with the words "return to sender" written on the package. The Government has responded in opposition asserting that the triggering event occurred in this case, as the Parcel was delivered to the residence by an undercover Postal Inspector and taken inside the residence by Defendant. The Government further asserts that the warrant was not invalidated when the Parcel was subsequently placed back outside the residence by the front door.

As previously stated, "most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time – a so-called 'triggering condition'." Grubbs, 547 U.S. at 94. (internal citations omitted) In the instant case, the execution of the Anticipatory Search Warrant was conditioned on the occurrence of a triggering event. The warrant provided, "I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property UPON OCCURRENCE OF THE FOLLOWING CONDITION(S) . . .: An adult subject transporting some or all of the methamphetamine inside the target address. NOTICE TO AGENT AND OFFICERS: This warrant shall be executed only after this act occurs. Otherwise, this warrant shall not be executed." (Government's Exhibit 4).

Defendant's first theory that the triggering event did not occur argues that the procedures for conducting the controlled delivery, which were laid out in paragraph 7(b) of Postal Inspector Farmer's affidavit, were not carried out in this case. Paragraph 7(b) of the affidavit states,

"Delivery will be made only to an adult willing to accept delivery on behalf of 'Martha Guerra,' to whom the Subject Parcel is addressed. Every effort will be made to make delivery to 'Martha Guerra' and in no event will the package be delivered to a child." Defendant's contention that suppression is warranted in this case focuses on acceptance of the Parcel.

Here, the Court finds that the triggering event was satisfied and the Anticipatory Search Warrant was lawfully executed. The Court notes from the outset that affidavits in support of search warrants should be reviewed and interpreted in a commonsense manner, rather than hyper technically. See United States v. Ventresca, 380 U.S. 102, 109 (1965) ("... when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.").

In the warrant, the Court specifically stated that probable cause to search the residence would be established "UPON OCCURRENCE OF THE FOLLOWING CONDITION(S) . . .: An adult subject transporting some or all of the methamphetamine inside the target address. NOTICE TO AGENT AND OFFICERS: This warrant shall be executed only after this act occurs. Otherwise, this warrant shall not be executed." (Government's Exhibit 4). The Court finds that the triggering event in this case was "an adult subject transporting some or all of the methamphetamine inside the target address." This is the condition the Court stated would establish probable cause, and further stated the warrant shall not be executed absent this occurrence. Therefore, once the Parcel was picked up by Defendant and carried into 4262 Santa Barbara Drive, Columbia, Missouri 65201, the triggering event was satisfied, probable cause was established, and the warrant could be lawfully executed.

In regards to Defendant's argument that the Postal Inspector did not meet the delivery conditions of paragraph 7(b) of the affidavit, the Court acknowledges that the Parcel was left outside the front door, rather than being physically handed to an individual. However, at the evidentiary hearing regarding this motion to suppress, Postal Inspector Farmer testified regarding the delivery of the Parcel to the residence. Postal Inspector Farmer testified that an undercover Postal Inspector, who posed as a USPS letter carrier, walked up to the front doorstep, attempted delivery of the Parcel, and then left the Parcel at the front doorstep and vacated the area. Postal Inspector Farmer testified that this was consistent with both Postal Inspector and Postal Service Policy in terms of making a delivery. The Court finds this to be sufficient for delivery in this

case, and a commonsense reading of the affidavit and the search warrant does not warrant suppression based on this theory.

Defendant additionally argues that when the Parcel was returned outside the front door with "return to sender" written on the package, the Parcel was rejected by the occupants of the residence. As the Court has already addressed, the triggering event occurred when Defendant carried the Parcel into the residence. Nothing within the search warrant indicated that execution was conditioned on the Parcel remaining within the residence. Once the triggering event occurred, execution of the Anticipatory Search Warrant was authorized. See United States v. Becerra, 97 F.3d 669, 671 (2d Cir. 1996) ("[A]n anticipatory warrant whose perfection requires no more than the delivery of a package to, or in the presence of, the suspect, is not invalidated because the parcel is taken off the premises after delivery.") See also United States v. Jackson, 55 F.3d 1219, 1224 (6th Cir. 1995) ("We conclude that once the package was taken inside the Bardwell house, probable cause existed to search the premises not only for the contraband itself, but also for other evidence of drug trafficking.")[1]

Defendant attempts to distinguish Becerra, from the instant case because in Becerra, the package was hand delivered to the defendant's apartment and the defendant answered the door, signed for, and accepted the package. However, the Court is not persuaded by this distinction. At the evidentiary hearing, Postal Inspector Farmer testified to the circumstances surrounding the delivery in this case and stated that they were consistent with both Postal Inspector and Postal Service Policy regarding delivery. Further, the Court believes that a commonsense reading of the affidavit and Anticipatory Search Warrant provide that the purpose behind the anticipatory warrant, and the timing of its execution, was to provide law enforcement with the authority to execute the warrant upon the occurrence of an adult person taking the Parcel, which contained a substantial amount of methamphetamine, into the residence. See Grubbs, 547 U.S. at 94. (internal citations omitted) (holding that affidavits and warrants should be interpreted in a commonsense manner rather than hyper technically). Therefore, once the Parcel was delivered

[1] The Court notes that while the factual circumstances of the contraband being removed from the residence, and the precise language of the event to trigger the execution of the search warrant in Jackson are not identical to those in the instant case, the Court believes that the proposition from Jackson to be sound, and the case to be persuasive.

to and carried inside the residence, the triggering event authorizing execution of the warrant was satisfied and removing the Parcel from the residence did not invalidate the warrant.[2]

Additionally, Postal Inspector Farmer testified to the additional suspicious behavior he witnessed between the time the Parcel was delivered and the warrant was executed. This suspicious behavior included the white Suburban driving past the residence in what appeared to be counter-surveillance, and the front door opening and closing several times with an individual looking at the Parcel. Such behavior only added to the probable cause to execute the warrant once the triggering event had taken place.

Here, the Court finds that based on all of the above, the triggering event occurred and the warrant was lawfully executed. Further, the warrant was not invalidated by the Parcel being placed back outside the front door. Therefore, suppression of the evidence in this case, under a theory that the triggering event did not occur, is without merit and should be denied.

C. Good Faith Exception

Finally, Defendant argues that were the Court to invalidate the warrant in this case, the good faith exception to the exclusionary rule, as set forth in United States v. Leon, would not be applicable. In Leon, the United States Supreme Court recognized an exception to the exclusionary rule and held that suppression of evidence obtained following the execution of a warrant that was subsequently found to invalid was not required, so long as the officers relied in good faith on a warrant that was signed by a neutral, detached magistrate, and if their reliance was objectively reasonable. 468 U.S. 897, 922-23 (1984).

Here, Defendant asserts that the officers could not have had an objectively reasonable belief that probable cause existed to enter the house because the Parcel was returned outside the front door after it was taken into the house. The Government asserts that the white Suburban driving past the house once before returning, which appeared to the law enforcement officers to be an attempt of counter-surveillance, and the individual in the residence opening and closing the front door several times and looking out toward the Parcel, coupled with the fact that the Parcel

[2] The Court also notes that Postal Inspector Farmer testified at the evidentiary hearing regarding the Parcel being returned to the doorstep and stated that through interviews, training, and experience, he has learned that individuals involved in narcotics trafficking through the mail have been known to write return to sender on packages in order to distance themselves from the actual controlled substances. He also testified that law enforcement did not become aware that "return to sender" had been written on the package in this case until after the warrant was executed and he recovered the Parcel.

contained a substantial amount of methamphetamine and was taken into the residence, provided the officers with ample basis to rely on the validity of the search warrant.

In this case, the Court finds nothing to support Defendant's argument that the officers lacked an objectively reasonable basis for relying on the search warrant. The suspicious behaviors of the Defendant and the driver of the Suburban, as well as the individual inside the residence opening and closing the door several times, combined with the Parcel containing a substantial amount of methamphetamine and being carried into the residence by Defendant provided the officers with an objectively reasonable basis for relying on the validity of the search warrant. Therefore, even if the Court were to find that the search warrant was not properly issued, which the Court does not find, the good faith exception to the exclusionary rule would be applicable here and suppression of the discovered evidence would not be warranted.

Conclusion

For the reasons stated above, the Court concludes that the Defendant's contentions regarding suppression of evidence in this case are without merit, and the motion to suppress should be denied.

IT IS THEREFORE RECOMMENDED that defendant Brown's motion to suppress evidence should be DENIED. (Doc. 203).

Counsel are reminded that they have fourteen days from the date of receipt of a copy of this Report and Recommendation within which to file and serve objections. A failure to file and serve exceptions by this date shall bar an attack on appeal of the factual findings in the Report and Recommendation which are accepted or adopted by the district judge, except on the grounds of plain error or manifest injustice.

Dated this 21st day of July, 2017, at Jefferson City, Missouri.

/s/ Matt J. Whitworth
MATT J. WHITWORTH
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:15-cr-04067-SRB-3
	)	
DIJON RASHEED BROWN,	)	
	)	
Defendant.	)	

ORDER

Before the Court is Magistrate Judge Whitworth's Report and Recommendation recommending that Defendant Brown's Motion to Suppress Evidence be denied. (Doc. #250). Defendant Brown filed objections to the Report and Recommendation (Doc. #256) asking the Court to sustain his Motion to Suppress Evidence (Doc. #203) and suppress all evidence and statements following the execution of an anticipatory search warrant on or about November 10, 2015. Defendant Brown argues: 1) there were insufficient facts to establish probable cause for the issuance of the anticipatory search warrant; 2) the triggering event to execute the anticipatory search warrant never occurred; and 3) the officers did not have an objectively reasonable belief that probable cause existed to enter the house.

After an independent and careful review of the record, the applicable law, and the parties' arguments, the Court OVERRULES Defendant Brown's objections, and ADOPTS Judge Whitworth's Report and Recommendation (Doc. #250). Defendant Brown's Motion to Suppress Evidence (Doc. #203) is DENIED.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH, JUDGE
UNITED STATES DISTRICT COURT

Date: August 1, 2017

UNITED STATES OF AMERICA, Plaintiff, v. DIJON RASHEED BROWN, Defendant.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION
2016 U.S. Dist. LEXIS 90188
No. 15-4067-CR-C-SRB
June 21, 2016, Decided
June 21, 2016, Filed

Editorial Information: Subsequent History

Adopted by, Motion denied by United States v. **Brown**, 2016 U.S. Dist. LEXIS 89824 (W.D. Mo., July 12, 2016)Magistrate's recommendation at United States v. **Brown**, 2017 U.S. Dist. LEXIS 120791 (W.D. Mo., July 21, 2017)Appeal dismissed by, Judgment entered by United States v. **Brown**, 2017 U.S. App. LEXIS 27709 (8th Cir. Mo., Aug. 21, 2017)Magistrate's recommendation at United States v. **Brown**, 2017 U.S. Dist. LEXIS 167174 (W.D. Mo., Sept. 25, 2017)

Counsel **{2016 U.S. Dist. LEXIS 1}**For Zachary Troy Fennell, Defendant: David Harold Johnson, LEAD ATTORNEY, Kansas City, MO.

For Favbion Dawayne Holmes, Defendant: Jeffrey R. Kays, LEAD ATTORNEY, Ashland, MO.

For **Dijon Rasheed Brown**, Defendant: Scott Allen Hamblin, LEAD ATTORNEY, Brydon, Swearengen & England, PC, Jefferson City, MO.

For Kameron Terrell Howard, Defendant: Steven R Berry, LEAD ATTORNEY, Van Matre, Harrison, Hollis, Taylor, & Elliott, PC, Columbia, MO.

For Melissa Guerra, Defendant: Angela Silvey, LEAD ATTORNEY, Silvey & Associates, Jefferson City, MO.

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For Stephanie Anne Maxwell, Defendant: Benjamin Sidney Faber, LEAD ATTORNEY, Bukowsky Law Firm, Columbia, MO; Erik A Bergmanis, LEAD ATTORNEY, Andrew Lyskowski, Bergmanis Law Firm, LLC, Camdenton, MO.

For USA, Plaintiff: Jim Y. Lynn, Jr, LEAD ATTORNEY, United States Attorney's Office-JCMO, Jefferson City, MO.

Judges: MATT J. WHITWORTH,**{2016 U.S. Dist. LEXIS 2}** United States Magistrate Judge.

Opinion

Opinion by: MATT J. WHITWORTH

Opinion

ORDER

Pending before the Court is Defendant **Dijon Rasheed** Brown's motions for severance and to dismiss the Indictment. (Docs. 31, 33). The Government has filed suggestions in opposition. (Docs. 37, 38).

Severance

Defendant requests that his trial be severed from those of his co-defendants and conspirators, arguing that he will be prejudiced by a joint trial. Defendant asserts he is prejudiced by two issues: (1) the continuance request filed by a co-defendant, which was granted by the Court, which he asserts is jeopardizing his right to a speedy trial; and (2) the serious risk his defense will be irreconcilable with his co-defendants, will infringe on his cross examination and confrontation rights, and will result in the jury wrongfully attributing characteristics, facts, and/or guilt to him simply due to his association with and trial alongside the four other codefendants.

Rule 8(b) of the Federal Rules of Criminal Procedure provides that "[t]he indictment or information may charge two or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of actions or transactions, constituting an offense or offenses." Fed. R. Crim. P. 8(b). All defendants need not be charged**{2016 U.S. Dist. LEXIS 3}** in each count. Id. Rule 14(a) provides that "[i]f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a).

There is a preference in the federal system for joint trials of defendants who are indicted together. Zafiro v. United States, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). Joint trials promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. Id. at 537. As a general rule, persons charged in a conspiracy will be tried together, especially where the proof of the charges against each of the defendants is based on the same evidence and acts. United States v. O'Meara, 895 F.2d 1216, 1218 (8th Cir. 1990). Defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials. United States v. Adkins, 842 F.2d 210, 212 (8th Cir. 1988). Nor is severance required whenever codefendants have conflicting defenses. Zafiro, 506 U.S. at 538-39. Disparity in the weight of the evidence as between parties also does not entitle a defendant to severance. United States v. Pecina, 956 F.2d 186, 188 (8th Cir. 1992). Similarly, a defendant's limited involvement in a conspiracy also does not warrant severance. United States v. Kaminski, 692 F.2d 505, 520 (8th Cir. 1982). In the context of a conspiracy, severance will rarely,**{2016 U.S. Dist. LEXIS 4}** if ever, be required. United States v. Searing, 984 F.2d 960, 965 (8th Cir. 1993).

In the instant case, Defendant is charged in a methamphetamine distribution conspiracy, along with every other defendant. The charges against him are based on his actions which are similar to and intertwined with that of the others charged in the conspiracy. The evidence and witnesses in Defendant's case overlap with that of his co-defendants.

Defendant's desire to be tried earlier than his co-defendants does not establish a basis for severance. Granting a co-defendant's motion for continuance does not violate the rights of the Defendant to a speedy trial. United States v. Shepard, 462 F.3d 847, 864 (8th Cir. 2006) (citing United States v. Fuller, 942 F.2d 454, 457 (8th Cir. 1991) ("Motions filed by one defendant in a multi-defendant case count as motions filed by all the defendants, and . . . will count as excludable time for all defendants.")).

Defendant provides no factual basis for his assertion that his defense will be irreconcilable with his co-defendants, will infringe on his cross examination and confrontation rights, and will result in the

jury wrongfully attributing characteristics, facts, and/or guilt to him simply due to his association with and trial alongside the four other co-defendants. Moreover, to the extent that there might be evidence that is admissible against**{2016 U.S. Dist. LEXIS 5}** some defendants that may be damaging to Defendant, such possible prejudice could be cured by the Court giving a proper limiting instruction to the jury at trial. Zafiro, 506 U.S. at 540. Defendant has not alleged that a jury could not differentiate and compartmentalize evidence as to each defendant charged in the case. See Mickelson, 378 F.3d at 817-18 (8th Cir. 2004) (a defendant can show real prejudice on his right to a fair trial by showing the jury will be unable to compartmentalize). Limiting instructions would minimize any concern of the Defendant that evidence implicating codefendants would possibly spill over and prejudice him. Juries are presumed to follow the instructions given to them. Zafiro, 506 U.S. at 540.

Based on the foregoing, the Court finds Defendant's arguments in support of severance are without merit. The continuance of a co-defendant was properly granted and such continuance does not violate Defendant's speedy trial rights. Moreover, Defendant has failed to make any claim of specific prejudice in his being tried with his co-defendants. Defendant has failed to provide a factual or an applicable legal basis that applies to this case that would support his argument for severance.

Motion to Dismiss

Defendant argues that Count I of the Indictment provides**{2016 U.S. Dist. LEXIS 6}** no factual statement which would form the basis of any conspiratorial agreement, and provides no information regarding facts the Government intends to prove as the overt acts committed by Defendant. Defendant asserts that Count II of the Indictment is similarly inadequate.

The Government argues that Count I and II of the Indictment contain all elements necessary to support charges of conspiracy to distribute methamphetamine and possession with intent to distribute methamphetamine. The Government argues it is not required to allege the specific facts giving rise to the charges or provide a description of overt acts.

Upon review the Court finds that the Indictment is facially sufficient. "An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution." United States v. Wessels, 12 F.3d 746, 750 (8th Cir. 1993); Fed. R. Crim. P. 7(c). Typically an indictment is insufficient only if an essential element of the offense is omitted from it. United States v. White, 241 F.3d 1015, 1021 (8th Cir. 2006); United States v. Mallen, 843 F.2d 1096, 1102 (8th Cir. 1988). "An indictment will ordinarily be held sufficient unless it is so defective**{2016 U.S. Dist. LEXIS 7}** that it cannot be said, by any reasonable construction, to charge the offense for which the defendant was convicted." United States v. Hayes, 574 F.3d 460, 472 (8th Cir. 2009) (quoting United States v. Sewell, 513 F.3d 820, 821 (8th Cir. 2008)).

The essential elements of conspiracy under 21 U.S.C. § 846 are the existence of an agreement between two or more individuals to distribute drugs, that the defendant knew of the agreement, and that he intentionally joined the agreement. United States v. Moore, 639 F.3d 443, 447 (8th Cir. 2011) (stating elements of drug conspiracy). An indictment charging conspiracy to distribute a controlled substance under 21 U.S.C. § 846 does not require a description of the overt act. United States v. Shabani, 513 U.S. 10, 15, 115 S. Ct. 382, 130 L. Ed. 2d 225 (1994).

In United States v. Huggans, 650 F.3d 1210 (8th Cir. 2011), Huggans claimed that the indictment charged him with conspiracy to distribute cocaine was insufficient because it failed to provide him with adequate notice as to the nature of the charges against him, and was insufficient to enable him

to plead his prior conviction as a bar to prosecution if charged again. Huggans argued that the conspiracy count of the indictment failed to specify the person with who, and the locations and time at which, he conspired to possess and distribute cocaine during the seven year period charged. The Court of Appeals rejected Huggans' claim, holding that "[a]n indictment provides sufficient specific facts constituting the offense if it apprises**{2016 U.S. Dist. LEXIS 8}** the defendant of the time frame of the alleged drug conspiracy and the type of drugs involved." Id. at 1218.

The Indictment in the instant case includes the essential elements of a conspiracy charge under 21 U.S.C. § 846, and mirrors the indictment upheld in Huggans. The Count I conspiracy count alleges that Defendant "[f]rom an unknown date, through November 10, 2015, . . . in Boone County, in the Western District of Missouri . . . knowingly and intentionally combined, conspired, and agreed . . . with others, known and unknown to the Grand Jury, to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine . . . ." The Indictment sufficiently apprised the Defendant of the charges against him, including the time frame of the conspiracy and the type of drugs involved. The Indictment as to the Count I conspiracy charge is legally sufficient.

Similarly, Count II of the Indictment, which charges the Defendant and others with possession with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, is legally sufficient. Count II contains all the essential elements of the offense charged under 21 U.S.C. § 841(a)(1), and alleges the date the**{2016 U.S. Dist. LEXIS 9}** offense occurred and the type and quantity of drug possessed.

Based on the foregoing, the Indictment is legally sufficient, and there is no basis to dismiss.1

It is therefore,

RECOMMENDED that Defendant **Dijon Rasheed** Brown's motions for severance and to dismiss be denied. (Docs. 31, 33).

Dated this 21st day of June, 2016, at Jefferson City, Missouri.

/s/ Matt J. Whitworth

MATT J. WHITWORTH

United States Magistrate Judge

Footnotes

1

The Court notes that this is an open discovery case, with the Government making available to the Defendant the Government's investigative file. Thereby, Defendant is not without specific information or details as to the charges set forth in the Indictment

UNITED STATES OF AMERICA, Plaintiff, v. DIJON RASHEED BROWN, Defendant.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION
2017 U.S. Dist. LEXIS 120791
No. 15-4067-03-CR-C-SRB
July 21, 2017, Decided
July 21, 2017, Filed

Editorial Information: Subsequent History

Adopted by, Motion denied by, Objection overruled by United States v. **Brown**, 2017 U.S. Dist. LEXIS 120499 (W.D. Mo., Aug. 1, 2017)

Editorial Information: Prior History

United States v. **Brown**, 2016 U.S. Dist. LEXIS 90188 (W.D. Mo., June 21, 2016)

Counsel **{2017 U.S. Dist. LEXIS 1}**For Zachary Troy Fennell, Defendant: David Harold Johnson, LEAD ATTORNEY, Kansas City, MO.

For Favbion Dawayne Holmes, Defendant: Jeffrey R. Kays, LEAD ATTORNEY, Ashland, MO.

For **Dijon Rasheed Brown**, Defendant: Scott Allen Hamblin, LEAD ATTORNEY, Brydon, Swearengen & England, PC, Jefferson City, MO.

For Melissa Guerra, Defendant: Angela Silvey, LEAD ATTORNEY, Silvey & Associates, Jefferson City, MO.

For Morgan Dion Calhoun, Defendant: Charles Douglas Shull, LEAD ATTORNEY, The Law Office of C. Douglas Shull, Columbia, MO.

For Fernando Chavez, Defendant: Talmage E. Newton, IV, LEAD ATTORNEY, Newton Barth LLP, St. Louis, MO.

For Calvanisha Yvette West, also known as Calvinisha Yvette West, Defendant: Clark L Jones, LEAD ATTORNEY, Jones, Schneider & Stevens, LLC, Columbia, MO.

For Jeremy Dennis Maxwell, Defendant: Gerald Gray, II, LEAD ATTORNEY, G Gray Law LLC, Kansas City, MO.

For Stephanie Anne Maxwell, Defendant: Erik A Bergmanis, LEAD ATTORNEY, Andrew Lyskowski, Bergmanis Law Firm, LLC, Camdenton, MO.

For USA, Plaintiff: Jim Y. Lynn, Jr, LEAD ATTORNEY, United States Attorney's Office-JCMO, Jefferson City, MO.

Judges: MATT J. WHITWORTH, United States Magistrate Judge.

CASE SUMMARY Recommended that defendant's motion to suppress be denied because issuance of an anticipatory search warrant for a residence did not violate the Fourth Amendment, and the triggering event authorizing execution of the warrant occurred when defendant picked up a parcel containing methamphetamine and took it into the residence.

OVERVIEW: HOLDINGS: [1]-Issuance of an anticipatory search warrant for a residence did not violate the Fourth Amendment because there was a fair probability that contraband would be found there when the warrant was executed. The warrant affidavit stated that methamphetamine was found in a parcel addressed to the residence, and a representative amount of methamphetamine was reinserted into the

package for the purpose of conducting a controlled delivery of the parcel; [2]-The triggering event authorizing execution of the anticipatory search warrant occurred, as defendant picked up the parcel and carried it into the residence. The fact that the parcel was left outside the front door by the Postal Inspector did not prevent the delivery conditions from occurring, nor was the warrant invalidated when the parcel was returned outside the door with "return to sender" written on the package.

OUTCOME: Recommended that the motion to suppress be denied.

LexisNexis Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Totality of Circumstances Test

Probable cause to issue a search warrant exists if, in light of 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. A totality-of-the-circumstances approach is employed in determining whether probable cause existed.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause
Criminal Law & Procedure > Search & Seizure > Search Warrants > Execution of Warrant

An anticipatory warrant is a warrant based upon an affidavit showing probable cause that at some future time but not presently certain evidence of a crime will be located at a specified place. Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time--a so-called triggering condition. Anticipatory warrants are, therefore, no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is now probable that (2) contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > Examination Upon Application

Affidavits in support of search warrants should be reviewed and interpreted in a commonsense manner, rather than hyper technically. When a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Execution of Warrant

Once the triggering event occurs, execution of an anticipatory search warrant is authorized. An anticipatory warrant whose perfection requires no more than the delivery of a package to, or in the presence of, the suspect, is not invalidated if the parcel is taken off the premises after delivery.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith

The United States Supreme Court has recognized an exception to the exclusionary rule and has held that suppression of evidence obtained following the execution of a warrant that was subsequently found to be invalid is not required, so long as the officers relied in good faith on a warrant that was signed by a

neutral, detached magistrate, and if their reliance was objectively reasonable.

Opinion

Opinion by: MATT J. WHITWORTH

Opinion

REPORT AND RECOMMENDATION{2017 U.S. Dist. LEXIS 2}

Pending before the Court is defendant **Dijon Rasheed** Brown's motion to suppress evidence, and suggestions in support thereof. (Doc. 203). Defendant alleges suppression is warranted for the following reasons: (1) the affidavit in support of the Anticipatory Search Warrant was insufficient to establish probable cause to issue the warrant; (2) the triggering event to execute the Anticipatory Search Warrant never occurred; and (3) the good faith exception does not apply here because the officers did not have an objectively reasonable belief that there was probable cause to enter the house. The Government filed suggestions in opposition to defendant Brown's motion to suppress (doc. 213), to which defendant **Brown** filed a reply. (Doc. 222). The Court held an evidentiary hearing regarding Defendant's pending motion to suppress on May 15, 2017.

Factual Background

In the instant case, Defendant is charged in Counts 1, 2, and 8 of the Second Superseding Indictment. (Doc. 70). Count 1 charges Defendant with conspiracy to distribute methamphetamine, Count 2 charges Defendant with possession with intent to distribute methamphetamine, and Count 8 charges Defendant with being a felon in possession of**{2017 U.S. Dist. LEXIS 3}** a firearm.

In or around November of 2015, St. Louis Postal Inspectors identified a suspicious parcel in the mail stream. The parcel was addressed to "Martha Guerra, 4246 Santa Barbara Dr. Columbia, MO 65201," and had a return address of "Carlos Rufio, 11523 Adco Ave Downey CA90241." (Hereinafter known as the "Parcel.") On or about November 9, 2015, Postal Inspectors retrieved the Parcel and due to its suspicious characteristics, a canine sniff was requested. On November 9, 2015, Columbia Police Department Officer Sgt. Scott Hedrick responded with his drug canine, Kane. Kane reacted to the Parcel in a positive manner. Thereafter, Postal Inspector Christopher J. Farmer applied for and obtained a federal search warrant for the Parcel. Execution of the search warrant revealed a hollowed-out book containing approximately 456 grams of field-tested methamphetamine. Upon the discovery of the Parcel containing methamphetamine, officers replaced a portion of the methamphetamine and resealed the Parcel. Postal Inspector Farmer then applied for and obtained an Anticipatory Search Warrant authorizing the search of 4262 Santa Barbara Drive, Columbia, Missouri 65201.

On November 10, 2015, in the morning**{2017 U.S. Dist. LEXIS 4}** hours, officers assembled for the execution of the warrant. Postal Inspector Farmer and Columbia Police Detective Tim Giger established surveillance near the residence. At 9:55 a.m., two black males exited the residence and entered a white Chevrolet Suburban parked in front of the residence. At 10:04 a.m., an undercover Postal Inspector delivered the Parcel to the residence and the Parcel was left near the front door. A black male opened and closed the door several times and looked toward the Parcel through the screen door. At 10:31 a.m., the Suburban returned, drove past the residence once, and then returned and parked in the driveway of the residence. At 10:34 a.m., the driver of the Suburban, identified as

Favbion Dawayne Holmes, and Defendant, who was the passenger in the Suburban, exited the vehicle and approached the residence. Defendant picked up the Parcel and took it into the residence. At 10:36 a.m., Zachary Troy Fennell brought the Parcel back outside the residence and placed it next to the front door.

Subsequently, law enforcement officers, including the Boone County Sheriff's Department SWAT Team, approached the residence to execute the Anticipatory Search Warrant. Entry**{2017 U.S. Dist. LEXIS 5}** was attempted at the front door, but officers were unable to breach the front door because the door had been reinforced. Officers were forced to make entry at a secondary location at the rear of the residence. Upon execution of the Anticipatory Search Warrant, Postal Inspector Farmer retrieved the Parcel from the front door and found the words "return to sender" had been written on the package in black marker.

Analysis

In the instant case, Defendant advances several theories in support of his claim that suppression of the evidence is warranted. Defendant alleges suppression is warranted because: (1) the facts in support of the Anticipatory Search Warrant were insufficient to establish probable cause to support issuance; (2) the triggering event to execute the Anticipatory Search Warrant never occurred; and (3) the good faith exception does not apply here because the officers did not have an objectively reasonable belief that there was probable cause to enter the house. Consequently, Defendant alleges that the search of the residence, and the evidence recovered, was the product of an illegal search and seizure in violation of Defendant's rights under the Fourth Amendment to the United States Constitution, and therefore suppression of**{2017 U.S. Dist. LEXIS 6}** the evidence is required. The Government has responded by stating that the affidavit in support of the Anticipatory Search Warrant set forth sufficient facts to establish probable cause to believe that evidence of drug activity would be found within the residence upon delivery of the Parcel. Further, the Government asserts that the triggering event, which authorized execution of the Anticipatory Search Warrant, occurred, and finally even if the search warrant and affidavit were found to be insufficient, the officers relied in good faith upon the validity of the warrant, therefore, no basis for suppression of evidence exists. The Court will address each of these arguments below.

A. Probable Cause to Issue the Anticipatory Search Warrant

Defendant first asserts that issuance of the Anticipatory Search Warrant was not proper in this case because the affidavit in support of the warrant failed to establish probable cause.

The Fourth Amendment to the United States Constitution provides in relevant part, "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. Probable cause to issue a warrant exists if, "in light of**{2017 U.S. Dist. LEXIS 7}** 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." United States v. Tagbering, 985 F.2d 946, 949 (8th Cir. 1993) (quoting United States v. Martin, 866 F.2d 972, 976 (8th Cir. 1989)). A "totality-of-the-circumstances" approach is employed in determining whether probable cause existed. Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

"An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place.' Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time - a so-called 'triggering condition'." United States v. Grubbs, 547 U.S. 90, 94, 126 S. Ct. 1494, 164 L. Ed. 2d 195 (2006) (internal citations omitted). "Anticipatory warrants are, therefore,

no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed." Id. at 96. (emphasis in original).

Defendant asserts that the affidavit in support of the Anticipatory Search Warrant failed to set forth sufficient facts to support a probable cause determination and therefore issuance of the warrant was improper. Defendant supports this assertion**{2017 U.S. Dist. LEXIS 8}** by stating the affidavit fails to recite any facts showing that the owner or any occupant of the residence was engaged in criminal activity, that no person at the residence was observed trafficking drugs, and that the affidavit did not cite any drug activity by an owner or occupant of the residence. Defendant's suggestions in support of his motion to suppress also list many things that are not within the affidavit to support issuance of the warrant, i.e., "[t]here were no facts that the owner or occupants were drug dealers. There were no facts the owner or occupants offered to provide drugs. There were no controlled buys." See Doc. 203 at 4-5. Finally, Defendant claims simply because the Parcel was addressed to 4262 Santa Barbara Dr., Columbia, Missouri, is not sufficient to establish probable cause to issue a search warrant for that address, particularly because Postal Inspector Farmer had previously determined no one by the name Martha Guerra resided at the address listed.

Upon review of the affidavit in support of the Anticipatory Search Warrant, the Court finds that here, based on the totality of the circumstances, at the time the warrant was issued, there was a fair probability that contraband**{2017 U.S. Dist. LEXIS 9}** would be found at the residence when the warrant was executed. Having so found, the Anticipatory Search Warrant was properly issued in this case. The affidavit in support of the warrant stated that following the obtainment and execution of a search warrant on the Parcel, officers discovered approximately 456 grams of a crystalline substance, a representative sample of which was field-tested and produced a positive result for methamphetamine. The affidavit further asserted that a representative amount of approximately 100 grams of methamphetamine was reinserted into the package for the purpose of conducting a controlled delivery of the Parcel to 4262 Santa Barbara Dr., Columbia, Missouri 65201, the residence the Parcel was originally addressed to for delivery. Additionally, the affidavit described the procedure that would be in place to conduct the controlled delivery, and stated that a law enforcement agent, wearing a USPS letter carrier uniform, would attempt to deliver the Parcel to the residence.

Therefore, the Court finds that at the time the warrant was issued, there was a fair probability that contraband and evidence of drug activity would be on the described premises when the**{2017 U.S. Dist. LEXIS 10}** warrant was executed. See United States v. Grubbs, 547 U.S. 90, 96, 126 S. Ct. 1494, 164 L. Ed. 2d 195 (2006). With regards to issuance of an anticipatory search warrant, that is all that is required. Therefore, Defendant's claim that suppression of the evidence is warranted under a theory that the Anticipatory Search Warrant was not supported by probable cause is meritless and should be denied.

B. Triggering Event Authorizing Execution of the Anticipatory Search Warrant

Defendant next argues that the so called "triggering event," which authorized the execution of the Anticipatory Search Warrant, never occurred in this case, thus invalidating the subsequent execution of the warrant. To support his claim that the triggering event never took place, Defendant advances two theories: (1) the Parcel was left outside the front door, rather than being placed in the possession of anyone willing to accept delivery; and (2) the Parcel was not accepted, but rather was rejected, because the Parcel was returned outside to the front door with the words "return to sender" written on the package. The Government has responded in opposition asserting that the triggering event occurred in this case, as the Parcel was delivered to the residence by an undercover Postal Inspector and taken**{2017 U.S. Dist. LEXIS 11}** inside the residence by Defendant. The Government further

asserts that the warrant was not invalidated when the Parcel was subsequently placed back outside the residence by the front door.

As previously stated, "most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time - a so-called 'triggering condition'." Grubbs, 547 U.S. at 94. (internal citations omitted) In the instant case, the execution of the Anticipatory Search Warrant was conditioned on the occurrence of a triggering event. The warrant provided, "I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property UPON OCCURRENCE OF THE FOLLOWING CONDITION(S) . . .: An adult subject transporting some or all of the methamphetamine inside the target address. NOTICE TO AGENT AND OFFICERS: This warrant shall be executed only after this act occurs. Otherwise, this warrant shall not be executed." (Government's Exhibit 4).

Defendant's first theory that the triggering event did not occur argues that the procedures for conducting the controlled delivery, which were laid out in paragraph 7(b) of Postal Inspector Farmer's affidavit, were not carried**{2017 U.S. Dist. LEXIS 12}** out in this case. Paragraph 7(b) of the affidavit states, "Delivery will be made only to an adult willing to accept delivery on behalf of 'Martha Guerra,' to whom the Subject Parcel is addressed. Every effort will be made to make delivery to 'Martha Guerra' and in no event will the package be delivered to a child." Defendant's contention that suppression is warranted in this case focuses on acceptance of the Parcel.

Here, the Court finds that the triggering event was satisfied and the Anticipatory Search Warrant was lawfully executed. The Court notes from the outset that affidavits in support of search warrants should be reviewed and interpreted in a commonsense manner, rather than hyper technically. See United States v. Ventresca, 380 U.S. 102, 109, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965) ("... when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.").

In the warrant, the Court specifically stated that probable cause to search the residence would be established "UPON OCCURRENCE OF THE FOLLOWING CONDITION(S) . . .: An adult subject transporting some or all of the methamphetamine inside the target address. NOTICE TO AGENT AND OFFICERS: This warrant shall**{2017 U.S. Dist. LEXIS 13}** be executed only after this act occurs. Otherwise, this warrant shall not be executed." (Government's Exhibit 4). The Court finds that the triggering event in this case was "an adult subject transporting some or all of the methamphetamine inside the target address." This is the condition the Court stated would establish probable cause, and further stated the warrant shall not be executed absent this occurrence. Therefore, once the Parcel was picked up by Defendant and carried into 4262 Santa Barbara Drive, Columbia, Missouri 65201, the triggering event was satisfied, probable cause was established, and the warrant could be lawfully executed.

In regards to Defendant's argument that the Postal Inspector did not meet the delivery conditions of paragraph 7(b) of the affidavit, the Court acknowledges that the Parcel was left outside the front door, rather than being physically handed to an individual. However, at the evidentiary hearing regarding this motion to suppress, Postal Inspector Farmer testified regarding the delivery of the Parcel to the residence. Postal Inspector Farmer testified that an undercover Postal Inspector, who posed as a USPS letter carrier, walked up to the front doorstep,**{2017 U.S. Dist. LEXIS 14}** attempted delivery of the Parcel, and then left the Parcel at the front doorstep and vacated the area. Postal Inspector Farmer testified that this was consistent with both Postal Inspector and Postal Service Policy in terms of making a delivery. The Court finds this to be sufficient for delivery in this case, and a commonsense reading of the affidavit and the search warrant does not warrant suppression based on this theory.

Defendant additionally argues that when the Parcel was returned outside the front door with "return to sender" written on the package, the Parcel was rejected by the occupants of the residence. As the Court has already addressed, the triggering event occurred when Defendant carried the Parcel into the residence. Nothing within the search warrant indicated that execution was conditioned on the Parcel remaining within the residence. Once the triggering event occurred, execution of the Anticipatory Search Warrant was authorized. See United States v. Becerra, 97 F.3d 669, 671 (2d Cir. 1996) ("[A]n anticipatory warrant whose perfection requires no more than the delivery of a package to, or in the presence of, the suspect, is not invalidated because the parcel is taken off the premises after delivery.") See also United States v. Jackson, 55 F.3d 1219, 1224 (6th Cir. 1995) ("We conclude that**{2017 U.S. Dist. LEXIS 15}** once the package was taken inside the Bardwell house, probable cause existed to search the premises not only for the contraband itself, but also for other evidence of drug trafficking.")1

Defendant attempts to distinguish Becerra, from the instant case because in Becerra, the package was hand delivered to the defendant's apartment and the defendant answered the door, signed for, and accepted the package. However, the Court is not persuaded by this distinction. At the evidentiary hearing, Postal Inspector Farmer testified to the circumstances surrounding the delivery in this case and stated that they were consistent with both Postal Inspector and Postal Service Policy regarding delivery. Further, the Court believes that a commonsense reading of the affidavit and Anticipatory Search Warrant provide that the purpose behind the anticipatory warrant, and the timing of its execution, was to provide law enforcement with the authority to execute the warrant upon the occurrence of an adult person taking the Parcel, which contained a substantial amount of methamphetamine, into the residence. See Grubbs, 547 U.S. at 94. (internal citations omitted) (holding that affidavits and warrants should be interpreted**{2017 U.S. Dist. LEXIS 16}** in a commonsense manner rather than hyper technically). Therefore, once the Parcel was delivered to and carried inside the residence, the triggering event authorizing execution of the warrant was satisfied and removing the Parcel from the residence did not invalidate the warrant.2

Additionally, Postal Inspector Farmer testified to the additional suspicious behavior he witnessed between the time the Parcel was delivered and the warrant was executed. This suspicious behavior included the white Suburban driving past the residence in what appeared to be counter-surveillance, and the front door opening and closing several times with an individual looking at the Parcel. Such behavior only added to the probable cause to execute the warrant once the triggering event had taken place.

Here, the Court finds that based on all of the above, the triggering event occurred and the warrant was lawfully executed. Further, the warrant was not invalidated by the Parcel being placed back outside the front door. Therefore, suppression of the evidence in this case, under a theory that the triggering event did not occur, is without merit and should be denied.

C. Good Faith Exception

Finally, Defendant argues that**{2017 U.S. Dist. LEXIS 17}** were the Court to invalidate the warrant in this case, the good faith exception to the exclusionary rule, as set forth in United States v. Leon, would not be applicable. In Leon, the United States Supreme Court recognized an exception to the exclusionary rule and held that suppression of evidence obtained following the execution of a warrant that was subsequently found to invalid was not required, so long as the officers relied in good faith on a warrant that was signed by a neutral, detached magistrate, and if their reliance was objectively reasonable. 468 U.S. 897, 922-23, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

Here, Defendant asserts that the officers could not have had an objectively reasonable belief that

probable cause existed to enter the house because the Parcel was returned outside the front door after it was taken into the house. The Government asserts that the white Suburban driving past the house once before returning, which appeared to the law enforcement officers to be an attempt of counter-surveillance, and the individual in the residence opening and closing the front door several times and looking out toward the Parcel, coupled with the fact that the Parcel contained a substantial amount of methamphetamine and was taken into**{2017 U.S. Dist. LEXIS 18}** the residence, provided the officers with ample basis to rely on the validity of the search warrant.

In this case, the Court finds nothing to support Defendant's argument that the officers lacked an objectively reasonable basis for relying on the search warrant. The suspicious behaviors of the Defendant and the driver of the Suburban, as well as the individual inside the residence opening and closing the door several times, combined with the Parcel containing a substantial amount of methamphetamine and being carried into the residence by Defendant provided the officers with an objectively reasonable basis for relying on the validity of the search warrant. Therefore, even if the Court were to find that the search warrant was not properly issued, which the Court does not find, the good faith exception to the exclusionary rule would be applicable here and suppression of the discovered evidence would not be warranted.

Conclusion

For the reasons stated above, the Court concludes that the Defendant's contentions regarding suppression of evidence in this case are without merit, and the motion to suppress should be denied.

IT IS THEREFORE RECOMMENDED that defendant Brown's motion to suppress evidence**{2017 U.S. Dist. LEXIS 19}** should be DENIED. (Doc. 203).

Counsel are reminded that they have fourteen days from the date of receipt of a copy of this Report and Recommendation within which to file and serve objections. A failure to file and serve exceptions by this date shall bar an attack on appeal of the factual findings in the Report and Recommendation which are accepted or adopted by the district judge, except on the grounds of plain error or manifest injustice.

Dated this 21st day of July, 2017, at Jefferson City, Missouri.

/s/ Matt J. Whitworth

MATT J. WHITWORTH

United States Magistrate Judge

Footnotes

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The Court notes that while the factual circumstances of the contraband being removed from the residence, and the precise language of the event to trigger the execution of the search warrant in Jackson are not identical to those in the instant case, the Court believes that the proposition from Jackson to be sound, and the case to be persuasive.

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The Court also notes that Postal Inspector Farmer testified at the evidentiary hearing regarding the Parcel being returned to the doorstep and stated that through interviews, training, and experience, he has learned that individuals involved in narcotics trafficking through the mail have been known to

write return to sender on packages in order to distance themselves from the actual controlled substances. He also testified that law enforcement did not become aware that "return to sender" had been written on the package in this case until after the warrant was executed and he recovered the Parcel.

UNITED STATES OF AMERICA, Plaintiff, v. DIJON RASHEED BROWN, Defendant.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION
2017 U.S. Dist. LEXIS 120499
Case No. 2:15-cr-04067-SRB-3
August 1, 2017, Decided
August 1, 2017, Filed

Editorial Information: Prior History

United States v. **Brown**, 2017 U.S. Dist. LEXIS 120791 (W.D. Mo., July 21, 2017)

Counsel **{2017 U.S. Dist. LEXIS 1}**For Zachary Troy Fennell, Defendant: David Harold Johnson, LEAD ATTORNEY, Kansas City, MO.

For Favbion Dawayne Holmes, Defendant: Jeffrey R. Kays, LEAD ATTORNEY, Ashland, MO.

For **Dijon Rasheed Brown**, Defendant: Scott Allen Hamblin, LEAD ATTORNEY, Brydon, Swearengen & England, PC, Jefferson City, MO.

For Kameron Terrell Howard, Defendant: Steven R Berry, LEAD ATTORNEY, Van Matre, Harrison, Hollis, Taylor, & Elliott, PC, Columbia, MO.

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For Morgan Dion Calhoun, Defendant: Charles Douglas Shull, LEAD ATTORNEY, The Law Office of C. Douglas Shull, Columbia, MO.

For Jeremy Dennis Maxwell, Defendant: Gerald Gray, II, LEAD ATTORNEY, G Gray Law LLC, Kansas City, MO.

For Stephanie Anne Maxwell, Defendant: Erik A Bergmanis, LEAD ATTORNEY, Andrew Lyskowski, Bergmanis Law Firm, LLC, Camdenton, MO.

For USA, Plaintiff: Jim Y. Lynn, Jr, LEAD ATTORNEY, United States Attorney's Office-JCMO, Jefferson City, MO.

Judges: STEPHEN R. BOUGH, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: STEPHEN R. BOUGH

Opinion

ORDER

Before the Court is Magistrate Judge Whitworth's Report and Recommendation recommending that Defendant Brown's Motion to Suppress Evidence**{2017 U.S. Dist. LEXIS 2}** be denied. (Doc. #250). Defendant Brown filed objections to the Report and Recommendation (Doc. #256) asking the Court to sustain his Motion to Suppress Evidence (Doc. #203) and suppress all evidence and statements following the execution of an anticipatory search warrant on or about November 10, 2015. Defendant Brown argues: 1) there were insufficient facts to establish probable cause for the issuance of the anticipatory search warrant; 2) the triggering event to execute the anticipatory search warrant never

occurred; and 3) the officers did not have an objectively reasonable belief that probable cause existed to enter the house.

After an independent and careful review of the record, the applicable law, and the parties' arguments, the Court OVERRULES Defendant Brown's objections, and ADOPTS Judge Whitworth's Report and Recommendation (Doc. #250). Defendant Brown's Motion to Suppress Evidence (Doc. #203) is DENIED.

IT IS SO ORDERED.

/s/ Stephen R. Bough

STEPHEN R. BOUGH, JUDGE

UNITED STATES DISTRICT COURT

Date: August 1, 2017

United States of America, Plaintiff - Appellee v. Dijon Rasheed Brown, Defendant - Appellant
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2017 U.S. App. LEXIS 27709
No: 17-2807
August 21, 2017, Decided

Editorial Information: Prior History

{2017 U.S. App. LEXIS 1}Appeal from U.S. District Court for the Western District of Missouri - Jefferson City. (2:15-cr-04067-SRB-3).United States v. **Brown**, 2016 U.S. Dist. LEXIS 90188 (W.D. Mo., June 21, 2016)

Counsel For United States of America, Plaintiff - Appellee: Jim Lynn, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Western District of Missouri, Jefferson City, MO.

Dijon Rasheed Brown, Defendant - Appellant, Pro se, Rolla, MO.

For **Dijon Rasheed Brown**, Defendant - Appellant: Scott A. Hamblin, BRYDON & SWEARENGEN, Jefferson City, MO.

Judges: Before WOLLMAN, GRUENDER and SHEPHERD, Circuit Judges.

Opinion

JUDGMENT

The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed for lack of jurisdiction.

UNITED STATES OF AMERICA, Plaintiff, v. DIJON RASHEED BROWN, Defendant.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION
2017 U.S. Dist. LEXIS 167174
No. 15-4067-03-CR-C-SRB
September 25, 2017, Decided
September 25, 2017, Filed

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Adopted by, Objection overruled by, Motion denied by United States v. **Brown**, 2017 U.S. Dist. LEXIS 166769 (W.D. Mo., Oct. 10, 2017)

Editorial Information: Prior History

United States v. **Brown**, 2016 U.S. Dist. LEXIS 90188 (W.D. Mo., June 21, 2016)

Counsel **{2017 U.S. Dist. LEXIS 1}**For Zachary Troy Fennell, Defendant: David Harold Johnson, LEAD ATTORNEY, Kansas City, MO.

For Favbion Dawayne Holmes, Defendant: Jeffrey R. Kays, LEAD ATTORNEY, Ashland, MO.

For **Dijon Rasheed Brown**, Defendant: Scott Allen Hamblin, LEAD ATTORNEY, Brydon, Swearengen & England, PC, Jefferson City, MO.

For Melissa Guerra, Defendant: Angela Silvey, LEAD ATTORNEY, Silvey & Associates, Jefferson City, MO.

For Morgan Dion Calhoun, Defendant: Charles Douglas Shull, LEAD ATTORNEY, The Law Office of C. Douglas Shull, Columbia, MO.

For Fernando Chavez, Defendant: Talmage E. Newton, IV, LEAD ATTORNEY, Newton Barth LLP, St. Louis, MO.

For Calvanisha Yvette West, also known as, Calvinisha Yvette West, Defendant: Clark L Jones, LEAD ATTORNEY, Jones, Schneider & Stevens, LLC, Columbia, MO.

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For Stephanie Anne Maxwell, Defendant: Erik A Bergmanis, LEAD ATTORNEY, Andrew Lyskowski, Bergmanis Law Firm, LLC, Camdenton, MO.

For USA, Plaintiff: Jim Y. Lynn, Jr, LEAD ATTORNEY, United States Attorney's Office-JCMO, Jefferson City, MO.

Judges: Willie J. Epps, Jr., United States Magistrate Judge.

Opinion

Opinion by: Willie J. Epps, Jr.

Opinion

REPORT AND RECOMMENDATOIN{2017 U.S. Dist. LEXIS 2}

Pending before the Court is defendant **Dijon Rasheed** Brown's motion to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12.4. (Doc. 286). The Government has responded in opposition (Doc. 290), to which Defendant has filed a reply. (Doc. 295).

Defendant has been charged in Counts 1, 2, and 8 of the Second Superseding Indictment. (Doc. 70). Count 1 is a charge for conspiracy to distribute methamphetamine; Count 2 is a charge for possession with intent to distribute methamphetamine; and Count 8 is a charge for felon in possession of a firearm. (Doc. 70). Defendant seeks to have the indictment against him dismissed based on the Government's failure to file a statement disclosing the victim of the alleged crime, pursuant to Rule 12.4.

Federal Rule of Criminal Procedure 12.4 provides:

> (a) Who Must File.
>
> (1) Nongovernmental Corporate Party. Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.
>
> (2) Organizational Victim. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim**{2017 U.S. Dist. LEXIS 3}** is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.
>
> (b) Time for Filing; Supplemental Filing. A party must:
>
> (1) file the Rule 12.4(a) statement upon the defendant's initial appearance; and
>
> (2) promptly file a supplemental statement upon any change in the information that the statement requires.Fed. R. Crim. P. 12.4.

Defendant alleges the Government is required to file a statement that identifies the victim of the alleged criminal activity in this case and the Government's failure to do so has been prejudicial to Defendant. Defendant asserts he cannot determine a theory of defense because the Government has failed to file a statement identifying the victims of the alleged criminal activity. Such failure, Defendant claims, has also prejudiced his Fifth and Sixth Amendment rights under the United States Constitution. (Doc. 286).

Here, the Court is not persuaded by Defendant's assertions and therefore recommends that the motion to dismiss the indictment be denied. The Advisory Committee Notes provide the purpose and background of Rule 12.4 and state, "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest**{2017 U.S. Dist. LEXIS 4}** in the subject matter in controversy.'" Fed. R. Crim. P. 12.4 Advisory Committee Notes. The Advisory Notes continue and state, "Rule 12.4(a)(2) requires an attorney for the government to file a statement that lists any organizational victims of the alleged criminal activity; the purpose of this disclosure is to alert the court to the fact that a possible ground for disqualification might exist." Id.

The purpose of Rule 12.4 is to clearly identify a nongovernmental corporate party to a proceeding or an organizational victim of an offense, in order to assist judges in determining whether they must recuse themselves from a particular case because of a conflict of interest. See United States v. Cohen, 2015 U.S. Dist. LEXIS 60840, 2015 WL 2261661 at *16 (N.D. Md. May 7, 2015) ("Rule 12.4 is intended 'to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject in controversy.'") (citing Fed. R. Crim. P. 12.4 Advisory Committee Notes); United States v. Simpson, 2011 U.S. Dist. LEXIS 126978, 2011 WL 5321912 at Note 1 (N.D.

Tx. November 2, 2011) ("[Rule 12.4] disclosure is made 'to assist judges in determining whether they must recuse themselves.'") (citing Fed. R. Crim. P. 12.4 Advisory Committee Notes). The Court finds that Rule 12.4 has no application in Defendant's case because the case does not involve a party that is a nongovernmental corporate party or an organizational victim. Therefore, the Court finds Defendant's**{2017 U.S. Dist. LEXIS 5}** motion to dismiss the indictment, because of the Government's failure to file a statement identifying the victim of the alleged criminal activity pursuant to Rule 12.4, to be meritless and should be denied.

Conclusion

For the reasons stated above, the Court concludes that Defendant's motion should be denied.

IT IS THEREFORE RECOMMENDED that defendant Brown's motion to dismiss the indictment pursuant to Rule 12.4 be DENIED. (Doc. 296).

Counsel are reminded that they have fourteen days from the date of receipt of a copy of this Report and Recommendation within which to file and serve objections. A failure to file and serve exceptions by this date shall bar an attack on appeal of the factual findings in the Report and Recommendation which are accepted or adopted by the district judge, except on the grounds of plain error or manifest injustice.

Dated this 25th day of September, 2017, at Jefferson City, Missouri.

/s/ Willie J. Epps, Jr.

Willie J. Epps, Jr.

United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.