NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 19a0610n.06

CASE No. 19-5122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES of AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	**ON APPEAL FROM THE**
	)	**UNITED STATES DISTRICT**
DEONDAY EVANS,	)	**COURT FOR THE MIDDLE**
	)	**DISTRICT OF TENNESSEE**
Defendant-Appellant.	)	

Before: BATCHELDER, WHITE, and MURPHY, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. A criminal defendant appeals his conviction and sentence for being a felon in possession of a firearm and ammunition. We affirm.

I.

On April 26 and 27, 2016, the police oversaw two controlled buys of cocaine from Deonday Evans's apartment. On April 28, police obtained and executed a search warrant for Evans's apartment, where they found a loaded handgun, cocaine, marijuana, digital scales, a counterfeit money detector, and two pre-recorded $100 bills from the two controlled buys. The police arrested Evans. During questioning, he admitted to owning the handgun and the cocaine, that cocaine was sold from his apartment, and that he had purchased the handgun on the street, for protection.

The prosecutor filed four charges: a drug-trafficking charge, 21 U.S.C. § 841(a)(1), a firearm-in-furtherance-of-drug-trafficking charge, 18 U.S.C. § 924(c), and two felon-in-possession charges, for the handgun and ammunition, 18 U.S.C. § 922(g)(1). Ultimately, the jury convicted Evans on the two felon-in-possession charges but acquitted him of the others.

Prior to trial, Evans moved to suppress the evidence seized from the search, arguing that the warrant application contained false statements and material omissions. The district court denied the motion. At jury selection, the prosecutor used six peremptory challenges; five to strike Caucasians and one to strike an African-American. The court stepped in and urged the prosecutor not to strike the African-American, but the prosecutor would not relent, explaining that he was removing the African-American and two Caucasians for the same reason, namely, that they had initially said they did not support the legalization of recreational marijuana use, but later said they did. Evans made a formal motion under *Batson v. Kentucky*, 476 U.S. 79 (1986), which the district court denied. In the end, the jury had one African-American juror. At the close of the evidence, Evans requested a jury instruction that, to be found guilty on the felon-in-possession charges, he must have "directly caused" the firearm and ammunition "to cross state lines through a commercial transaction." The district court denied that instruction as contrary to controlling law and instructed the jury that it need only find that that firearm and ammunition were manufactured in a state other than Tennessee. After trial, Evans moved the court to reconsider its denial of his suppression motion, arguing that the testimony bolstered his claim that the affidavit was flawed due to material omissions. He did not argue staleness. The district court denied the motion.

At sentencing, based on an investigative summary report stating that an initial check of the National Crime Information Center (NCIC) database listed the gun as stolen, the prosecutor sought a two-level increase under U.S.S.G. § 2K2.1(b)(4). Evans opposed the increase and the prosecutor acknowledged that, at the time of sentencing, the NCIC database no longer listed the gun, but explained that it was normal for a stolen gun to be de-listed once it had been returned to the rightful owner. The district court found that the gun was stolen and applied the two-level increase. Ultimately, the court imposed a within-guidelines sentence of 72 months in prison. Evans appeals.

II.

Evans argues that the district court erred by finding in favor of the prosecutor on his *Batson* claim, claiming that the prosecutor's explanation was pretextual and, therefore, he had proven purposeful racial discrimination. Our "review of the trial court's factual determinations in a *Batson* hearing [is] highly deferential," such that the "court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) (quotation marks and citations omitted). The prosecutor here used one of six challenges to remove an African-American (leaving one African-American on the jury); did not exhibit any objective evidence of discriminatory consideration during voir dire questioning or when discussing the proffered challenges; and, as evidenced by the district court's ruling, apparently convinced the district court of his credibility. The only argument Evans can muster is that the prosecutor's proffered reason for the challenge (i.e., that the African-American had changed his answer about his view of legalizing recreational-marijuana use) applied to many of the jurors. But the prosecutor *did* strike two Caucasians for the same reason and explained to the district court, persuasively it appears, that he was unable to note all those who had changed their answers but had struck the three he had noted. We cannot conclude from these facts that the district court's finding was clearly erroneous.

Evans next argues that the district court erred by refusing his requested jury instruction, which would have required the district court to ignore or "overturn" controlling precedent, namely *Scarborough v. United States*, 431 U.S. 563 (1977), and *United States v. Murphy*, 107 F.3d 1199, at 1210-11 (6th Cir. 1997), which prescribe only a "minimal nexus" between the handgun and interstate commerce, rather than Evans's asserted "direct causation" requirement. Neither we nor the district court are at liberty to ignore or overturn our published precedent, much less that of the

Supreme Court. *See United States v. Burris*, 912 F.3d 386, 406 (6th Cir. 2019). Therefore, the district court did not err by refusing the requested instruction.

Evans also argues that the district court erred by imposing the two-level enhancement for the handgun's being stolen, based on his belief that the officer's hearsay statement was insufficient to prove that the gun was stolen. But "[d]istrict courts routinely rely on hearsay for the factfinding part of a sentencing decision [and] [s]o long as the information has 'some evidentiary basis' to satisfy a 'minimal indicium of reliability,'" we review that decision for clear error. *United States v. Armstrong*, 920 F.3d 395, 398 (6th Cir. 2019). Here, Evans had conceded that he bought the gun "off the street" and a police officer had determined that the gun was listed on the NCIC database as having been stolen. This is enough to overcome a claim of clear error.

Finally, Evans argues that the district court erred by denying his motion to suppress, based on his belief—which is contrary to controlling precedent—that evidence of a controlled buy is stale after 12 hours, rendering any warrant application that relies on such (stale) evidence insufficient. Evans never raised this argument in the district court. Regardless, controlling precedent has rejected staleness challenges when a controlled buy occurred 72 hours before the warrant application. *United States v. Archibald*, 685 F.3d 553, 558 (6th Cir. 2012); *United States v. Jackson*, 470 F.3d 299, 308 (6th Cir. 2006). Neither we nor the district court can ignore or overturn published precedent. *Burris*, 912 F.3d at 406.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT

MIDDLE District of TENNESSEE

UNITED STATES OF AMERICA
v.
DEONDAY EVANS

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:16-00218
USM Number: 250007-075
Kyle Mothershead
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 2 and 3 of the Indictment. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C.§922(g)(1)	Felon in Possession of Firearm	4/28/2016	2
18 U.S.C.§922(G)(1)	Felon in Possession of Ammunition	4/28/2016	3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 1 and 4 of the Indictment.

☐ Count(s) _____ ☐ 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.

February 1, 2019
Date of Imposition of Judgment

Signature of Judge

ALETA A. TRAUGER, U.S. DISTRICT JUDGE
Name and Title of Judge

February 6, 2019
Date

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

DEFENDANT: DEONDAY EVANS
CASE NUMBER: 3:16-00218

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

72 months on each of counts 2 and 3 to run concurrently with each other, with time served from his arrest on 4/28/2016 when defendant was arrested by state authorities on the instant offense and detained.

X The court makes the following recommendations to the Bureau of Prisons:
1. That defendant receive drug treatment.
2. That defendant be housed in a federal facility close to Murfreesboro, Tennessee.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DEONDAY EVANS
CASE NUMBER: 3:16-00218

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:
3 years as to each of counts 2 and 3 to run concurrently with each other.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. **X** You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DEONDAY EVANS
CASE NUMBER: 3:16-00218

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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: DEONDAY EVANS
CASE NUMBER: 3:16-00218

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program of drug testing and substance abuse treatment which may include a 30-day inpatient treatment program followed by up to 90 days in a residential reentry center at the direction of the United States Probation Office. The defendant shall pay all or part of the costs if the Probation Officer determines the defendant as the financial ability to do so or has appropriate insurance coverage to pay for such treatment.

2. The defendant shall furnish all financial records, including, without limitation, earnings records and tax returns, to the United States Probation Office upon request.

DEFENDANT: DEONDAY EVANS
CASE NUMBER: 3:16-00218

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	$ 200	$	$	$

☐ The determination of restitution is deferred _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered until after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $_____ $_____

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for ☐ fin ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* 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.

DEFENDANT: DEONDAY EVANS
CASE NUMBER: 3:16-00218

SCHEDULE OF PAYMENTS

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

A **X** Lump sum payment of $ 200 due immediately, balance due (special assessment)

☐ not later than _____, or
☐ in accordance with ☐ C ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐C, ☐D, or ☐F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Case No. 3:16-00218
	)	
DEONDAY EVANS	)	

ORDER APPOINTING CJA PANEL ATTORNEY AND DIRECTING U.S. MARSHAL TO SERVE SUBPOENAS AT GOVERNMENT EXPENSE

The individual named below has provided a sworn financial affidavit or otherwise satisfied this Court that he/she (1) is financially unable to retain counsel or pay for expert services, and (2) does not waive his/her right to counsel. Because the interests of justice so require, the Court finds that the Defendant is indigent and that counsel should be appointed.

IT IS ORDERED that **Kyle Mothershead, Esq.,** is hereby appointed to represent Defendant, **Deonday Evans.**

IT IS FURTHER ORDERED that the Clerk of this Court shall issue subpoenas upon oral request and submission of prepared subpoenas by Appointed Counsel. Counsel may serve those subpoenas directly on witnesses or request that the United States Marshals Service serve the defense subpoenas without further Order from this Court. The cost of process, fees and expenses of witnesses so subpoenaed shall be paid as witnesses subpoenaed on behalf of the Government. The Court is satisfied the Defendant is unable to pay fees and expenses of subpoenaed witnesses pursuant to Federal Rule of Criminal Procedure Rule 17(b), and the United States Marshals Service shall provide such subpoenaed witnesses advance funds for the purpose of travel and subsistence. For any subpoenas served on behalf of the Defendant, the return of service to this Court shall be sealed and served only on Appointed Counsel, unless otherwise ordered.

IT IS FURTHER ORDERED that, upon motion of the Government, the Court may order repayment or partial repayment from Defendant for the attorney and witness fees for these services should it appear Defendant has such ability at a later time.

DATED 10/2/2018, nunc pro tunc to 10/2/17.

ALETA A. TRAUGER
UNITED STATES DISTRICT JUDGE

STATE OF TENNESSEE - RUTHERFORD COUNTY
AFFIDAVIT FOR SEARCH WARRANT

Personally appeared before **HONORABLE Ben McFadin Jr. JUDGE OF GENERAL SESSIONS PART I** for Rutherford County, Tennessee, the undersigned **DETECTIVE SEDRIC FIELDS** lawful officer of said County and State, who makes affidavit that there is probable cause to believe and that affiant does believe, that **JOHN DOE, JANE DOE** are now unlawfully keeping a quantity of **COCAINE, PROCEEDS, ELECTRONICS AND RECORDS** for the purpose or with the intention of unlawful possession, sale or distribution, and upon their persons or in their possessions, custody or control upon premises used, occupied, possessed or controlled by them, and which premises are located and described as follows:

The premise to be searched is a three story multi-family apartment complex constructed of tan brick. The residence has a blue aluminum roof and white gutters. The front door is white and is identified by the numeric (117) affixed to the door. The door is accessed by a concrete walkway on the bottom level of the apartment. The residence to be searched has a mailing address of 902 Greenland Drive Apt (117)Murfreesboro, TN 37130 in Rutherford County.

1). Affiant has been employed by the Rutherford County Sheriff's Department for approximately ten years. Your affiant spent two and a half of these years assigned to the Patrol division as a certified Deputy Sheriff. During this assignment your affiant attended training specializing in Patrol Response to Street Drugs, Roadside Interview techniques, Interview and Interrogations and Drug Enforcement Administration Narcotics Undercover School. For the past six and a half years, your affiant has been a Detective with the Narcotics Division at Rutherford County Sheriff's Office. During this assignment your affiant has conducted numerous undercover narcotic buys utilizing confidential sources.

2). In the month of February 2016, a confidential source under my direction arranged to purchase felony amounts of Cocaine from an unwitting subject who advised he would have to obtain the Cocaine from his source. During the transactions, the subject advised that he could get as much Cocaine as the confidential source needed. On each transaction, the confidential source would provide marked currency to the unwitting subject and in return would receive a felony amount of Cocaine. The transactions occurred just as the unwitting subject told the confidential source they would transpire.

In the month of April 2016, a confidential source under my direction arranged to make a Cocaine purchase from an unwitting subject. Said confidential source advised that the unwitting subject told him that he needed a ride to Campus Villa Apartments to obtain the Cocaine. Prior to meeting with the unwitting subject,

affiant provided the confidential source with electronic monitoring devices, marked currency and searched the confidential source's person and vehicle. Said confidential source was then followed to the residence of the unwitting subject. Sgt. Hall, who was providing surveillance at the residence of the unwitting subject, observed the unwitting subject enter the confidential source's vehicle. After picking up the unwitting subject, the confidential source provided that unwitting subject with marked currency to purchase the Cocaine. The confidential source and the unwitting subject were then followed to Campus Villa Apartments off of Greenland Drive. Detective Beane, who was stationary at Campus Villa apartments, observed the unwitting subject exit the source's vehicle and enter apartment (117). Detective Beane was able to obtain video of the unwitting subject exiting apartment (117) at the Campus Villa Apartments. Once the unwitting subject entered the vehicle, the unwitting subject provided that confidential source with the Cocaine obtained from 902 Greenland Drive Apt (117). Your affiant via electronic surveillance, could hear the confidential source and the unwitting subject talk about the cocaine and the supplier always "staying with it". Through your affiant's knowledge and experience, "staying with it" is a statement that refers to the supplier always having Cocaine. After leaving Campus Villa Apartments, the confidential source and the unwitting subject were followed back to the unwitting subject's residence. Once at the unwitting subject's residence, the unwitting subject exited the confidential source's vehicle. The confidential source was then followed back to a predetermined location to conclude the transaction. Once meeting with the confidential source, your affiant was provided with a felonious amount of Cocaine obtained from 902 Greenland Drive Apartment (117).

In the past seventy hours, a confidential source under my direction arranged to purchase to purchase a felony amount of Cocaine from an unwitting subject. Prior to the transaction, your affiant provided the confidential source with electronic monitoring devices, marked currency and while at the meet location searched that confidential source's person and vehicle. After equipping the confidential source with an electronic monitoring device and marked currency, detectives and your affiant followed the confidential source to the residence of the unwitting subject. Sgt. Hall, who was providing surveillance, observed the unwitting subject enter the passenger side of the confidential source's vehicle. The confidential source and the unwitting subject were followed from the unwitting subject's house to 902 Greenland Drive. Once at 902 Greenland Drive, Detectives Beane and McFerrin observed the unwitting subject exit the confidential source's vehicle and once again enter apartment (117). Detective McFerrin was able to capture video of the unwitting subject entering and exiting the apartment (117). After the unwitting subject entered the confidential source's vehicle, they were followed back to the residence of the unwitting subject. After the confidential source dropped off the unwitting subject, the confidential source was followed back to the predetermined meet location to conclude the transaction. Once meeting back with confidential source, your affiant was provided with a felony amount of Cocaine obtained from 902 Greenland Drive Apartment (117).

3). The confidential source working under affiant's direction has conducted approximately thirty prosecutable buys under affiant's direction. Information provided by the confidential source has proven to be truthful and reliable. Affiant knows no reason why the confidential source would falsify or fabricate any of the information given herein.

4). These things lead affiant to believe a quantity of, **COCAINE, PROCEEDS, ELECTRONICS AND RECORDS.** still remain on the above-described premises.

Wherefore, affiant prays that the Court issue a warrant authorizing search of the person or persons of **JOHN DOE, JANE DOE** and of the premises above described for said **COCAINE, PROCEEDS, ELECTRONICS AND RECORDS.**

\#554

Affiant

Sworn to and subscribed before me, on this **28th day of April, 2016**

Judge of the General Sessions Court

STATE OF TENNESSEE - RUTHERFORD COUNTY
AFFIDAVIT FOR SEARCH WARRANT

Personally appeared before **HONORABLE Ben McFerrin Jr. JUDGE OF GENERAL SESSIONS PART 1** for Rutherford County, Tennessee, the undersigned **DETECTIVE SEDRIC FIELDS** lawful officer of said County and State, who makes affidavit that there is probable cause to believe and that affiant does believe, that **JOHN DOE, JANE DOE** are now unlawfully keeping a quantity of **COCAINE, PROCEEDS, ELECTRONICS AND RECORDS** for the purpose or with the intention of unlawful possession, sale or distribution, and upon their persons or in their possessions, custody or control upon premises used, occupied, possessed or controlled by them, and which premises are located and described as follows:

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In the month of April 2016, a confidential source under my direction arranged to make a Cocaine purchase from an unwitting subject. Said confidential source advised that the unwitting subject told him that he needed a ride to Campus Villa Apartments to obtain the Cocaine. Prior to meeting with the unwitting subject,

affiant provided the confidential source with electronic monitoring devices, marked currency and searched the confidential source's person and vehicle. Said confidential source was then followed to the residence of the unwitting subject. Sgt. Hall, who was providing surveillance at the residence of the unwitting subject, observed the unwitting subject enter the confidential source's vehicle. After picking up the unwitting subject, the confidential source provided that unwitting subject with marked currency to purchase the Cocaine. The confidential source and the unwitting subject were then followed to Campus Villa Apartments off of Greenland Drive. Detective Beane, who was stationary at Campus Villa apartments, observed the unwitting subject exit the source's vehicle and enter apartment (117). Detective Beane was able to obtain video of the unwitting subject exiting apartment (117) at the Campus Villa Apartments. Once the unwitting subject entered the vehicle, the unwitting subject provided that confidential source with the Cocaine obtained from 902 Greenland Drive Apt (117). Your affiant via electronic surveillance, could hear the confidential source and the unwitting subject talk about the cocaine and the supplier always "staying with it". Through your affiant's knowledge and experience, "staying with it" is a statement that refers to the supplier always having Cocaine. After leaving Campus Villa Apartments, the confidential source and the unwitting subject were followed back to the unwitting subject's residence. Once at the unwitting subject's residence, the unwitting subject exited the confidential source's vehicle. The confidential source was then followed back to a predetermined location to conclude the transaction. Once meeting with the confidential source, your affiant was provided with a felonious amount of Cocaine obtained from 902 Greenland Drive Apartment (117).

In the past seventy hours, a confidential source under my direction arranged to purchase to purchase a felony amount of Cocaine from an unwitting subject. Prior to the transaction, your affiant provided the confidential source with electronic monitoring devices, marked currency and while at the meet location searched that confidential source's person and vehicle. After equipping the confidential source with an electronic monitoring device and marked currency, detectives and your affiant followed the confidential source to the residence of the unwitting subject. Sgt. Hall, who was providing surveillance, observed the unwitting subject enter the passenger side of the confidential source's vehicle. The confidential source and the unwitting subject were followed from the unwitting subject's house to 902 Greenland Drive. Once at 902 Greenland Drive, Detectives Beane and McFerrin observed the unwitting subject exit the confidential source's vehicle and once again enter apartment (117). Detective McFerrin was able to capture video of the unwitting subject entering and exiting the apartment (117). After the unwitting subject entered the confidential source's vehicle, they were followed back to the residence of the unwitting subject. After the confidential source dropped off the unwitting subject, the confidential source was followed back to the predetermined meet location to conclude the transaction. Once meeting back with confidential source, your affiant was provided with a felony amount of Cocaine obtained from 902 Greenland Drive Apartment (117).

3). The confidential source working under affiant's direction has conducted approximately thirty prosecutable buys under affiant's direction. Information provided by the confidential source has proven to be truthful and reliable. Affiant knows no reason why the confidential source would falsify or fabricate any of the information given herein.

4). These things lead affiant to believe a quantity of, **COCAINE, PROCEEDS, ELECTRONICS AND RECORDS,** still remain on the above-described premises.

Wherefore, affiant prays that the Court issue a warrant authorizing search of the person or persons of **JOHN DOE, JANE DOE** and of the premises above described for said **COCAINE, PROCEEDS, ELECTRONICS AND RECORDS.**

554

Affiant

Sworn to and subscribed before me, on this **28th day of April, 2016.**

Judge of the General Sessions Court

STATE OF TENNESSEE-RUTHERFORD COUNTY

vs.

JOHN DOE, JANE DOE

Search Warrant for

COCAINE, PROCEEDS, ELECTRONICS AND RECORDS

TO THE SHERIFF OR ANY LAWFUL OFFICER TO EXECUTE AND RETURN:

Proof by affidavit having been made before me by **Detective Sedric Fields** that there is probable cause to believe that **JOHN DOE, JANE DOE** are now unlawfully keeping a quantity of **COCAINE, PROCEEDS, ELECTRONICS AND RECORDS** for the purpose or with the intention of unlawful possession, sale or transportation thereof, and upon their persons, or in their possessions, custody or control upon premises used, occupied, possessed or controlled by them, and the Court being satisfied that there is probable cause for such belief:

You are, therefore, hereby commanded to make immediate search of the person or persons of **JOHN DOE, JANE DOE** and of the following described premises:

The premise to be searched is a three story multi-family apartment complex constructed of tan brick. The residence has a blue aluminum roof and white gutters. The front door is white and is identified by the numeric (117) affixed to the door. The door is accessed by a concrete walkway on the bottom level of the apartment. The residence to be searched has a mailing address of 902 Greenland Drive Apt (117)Murfreesboro, TN 37130 in Rutherford County.

including all the buildings, outbuildings and vehicles under the control of **JOHN DOE, JANE DOE** and upon said premises, and if you find the said **COCAINE, PROCEEDS, ELECTRONICS AND RECORDS** or any part thereof, to bring it forthwith before me at the courthouse in Murfreesboro, Tennessee.

Given under my hand on this, the **28th day of April, 2016.**

Judge of the General Sessions Court

(T.C.A. 40-6-105)

This is to certify that the within search warrant, and two exact copies thereof, were issued by me and that after retaining one of said exact copies as part of my official records, I delivered the original and remaining exact copy for execution to **Detective Sedric Fields**, Sheriff or other lawful officer for Rutherford County, Tennessee, at 9:51 o'clock P.M. on this the **28th day of April, 2016.**

Judge of the General Sessions Court

ACCEPTED, RETURN TO:

This, the 9th day of May, 2016
at 9:55 o'clock A.M.

Judge of the General Sessions Court

OFFICER'S RETURN

The within warrant came to hand the same issued and executed on this 28 day of April, 2016 searching the person (s) and premises herein described and taking there from as evidence the following:

SEE ATTACHED EVIDENCE SHEET

Person(s) receiving the search warrant:

And by delivering to the person(s) so searched. Complaint # 160427-22264

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Lawful Officer for Rutherford County, Tennessee

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Crim. No. 3:16-cr-00218**
	)	**Judge Aleta A. Trauger**
DEONDAY EVANS	)	

MEMORANDUM

Before the court is the Motion to Suppress Fruits of Search Warrant Execution (Doc. No. 79) filed by defendant Deonday Evans, seeking to suppress evidence seized pursuant to a search warrant for the residence located at 902 Greenland Drive, Apartment 117, in Murfreesboro, Tennessee ("902 Greenland" or "Apartment 117"). The government has filed a Response (Doc. No. 87), and the defendant filed a Reply (Doc. No. 92). For the reasons set forth herein, the court will deny the Motion to Suppress.

I. Background

In support of his April 28, 2016 application for a search warrant for 902 Greenland, Detective Sedric Fields of the Rutherford County Sheriff's Office ("RCSO") submitted an Affidavit for Search Warrant ("Affidavit") to Judge Ben McFarlin, Jr., of the General Sessions Court for Rutherford County, Tennessee, in which he attested under oath that there was probable cause to believe that unidentified individuals ("John Doe, Jane Doe") were "unlawfully keeping a quantity of COCAINE, PROCEEDS, ELECTRONICS AND RECORDS for the purpose or with the intention of unlawful possession, sale or distribution." (Doc. No. 79-2, at 1.) The Affidavit described with some particularity the premises to be searched as "a three-story multi-family apartment complex constructed of tan brick. The residence has a blue aluminum roof and

APPENDIX E

white gutters. The front door is white and is identified by the numeric (117) affixed to the door. The door is accessed by a concrete walkway on the bottom level of the apartment." (*Id.*) The Affidavit included the following summary of facts in support of the warrant:

> 1). Affiant has been employed by the [RCSO] for approximately ten years. Your affiant has spent two and a half of these years assigned to the Patrol division as a certified Deputy Sheriff. During this assignment your affiant attended training specializing in Patrol Response to Street Drugs, Roadside Interview techniques, Interview and Interrogations and Drug Enforcement Administration Narcotics Undercover School. For the past six and a half years, your affiant has been a Detective with the Narcotics Division of the [RCSO]. During this assignment your affiant has conducted numerous undercover narcotic buys utilizing confidential sources.
>
> 2). In the month of February 2016, a confidential source under my direction arranged to purchase felony amounts of Cocaine from an unwitting subject who advised he would have to obtain the Cocaine from his source. During the transactions, the subject advised that he could get as much Cocaine as the confidential source needed. On each transaction, the confidential source would provide marked currency to the unwitting subject and in return would receive a felony amount of Cocaine. The transactions occurred just as the unwitting subject told the confidential source they would transpire.
>
> In the month of April 2016, a confidential source under my direction arranged to make a Cocaine purchase from an unwitting subject. Said confidential source advised that the unwitting subject told him that he needed a ride to Campus Villa Apartments to obtain the Cocaine. Prior to meeting with the unwitting subject, affiant provided the confidential source with electronic monitoring devices, marked currency and searched the confidential source's person and vehicle. Said confidential source was then followed to the residence of the unwitting subject. Sgt. Hall, who was providing surveillance at the residence of the unwitting subject, observed the unwitting subject enter the confidential source's vehicle. After picking up the unwitting subject, the confidential source provided that unwitting subject with marked currency to purchase the Cocaine. The confidential source and the unwitting subject were then followed to Campus Villa Apartments off of Greenland Drive. Detective Beane, who was stationary at Campus Villa Apartments, observed the unwitting subject exit the source's vehicle and enter apartment (117). Detective Beane was able to obtain video of the unwitting subject exiting apartment (117) at the Campus Villa Apartments. Once the unwitting subject entered the vehicle, the unwitting subject provided that confidential source with the Cocaine obtained from 902 Greenland Drive Apt (117). Your affiant via electronic surveillance, could hear the confidential source and the unwitting subject talk about the cocaine and the supplier always "staying with it." Through your affiant's knowledge and experience, "staying with it" is a statement that refers to the supplier always having Cocaine. After leaving Campus

Villa Apartments, the confidential source and the unwitting subject were followed back to the unwitting subject's residence. Once at the unwitting subject's residence, the unwitting subject exited the confidential source's vehicle. The confidential source was then followed back to a predetermined location to conclude the transaction. Once meeting with the confidential source, your affiant was provided with a felonious amount of Cocaine obtained from 902 Greenland Drive Apartment (117).

In the past seventy hours, a confidential source under my direction arranged to purchase a felony amount of Cocaine from an unwitting subject. Prior to the transaction, your affiant provided the confidential source with electronic monitoring devices, marked currency and while at the meet location searched that confidential source's person and vehicle. After equipping the confidential source with an electronic monitoring device and marked currency, detectives and your affiant followed the confidential source to the residence of the unwitting subject. Sgt. Hall, who was providing surveillance, observed the unwitting subject enter the passenger side of the confidential source's vehicle. The confidential source and the unwitting subject were followed from the unwitting subject's house to 902 Greenland Drive. Once at 902 Greenland Drive, Detectives Beane and McFerrin observed the unwitting subject exit the confidential source's vehicle and once again enter apartment (117). Detective McFerrin was able to capture video of the unwitting subject entering and exiting the apartment (117). After the unwitting subject entered the confidential source's vehicle, they were followed back to the residence of the unwitting subject. After the confidential source dropped off the unwitting subject, the confidential source was followed back to the predetermined meet location to conclude the transaction. Once meeting back with the confidential source, your affiant was provided with a felony amount of Cocaine obtained from 902 Greenland Drive Apartment (117).

3). The confidential source working under affiant's direction has conducted approximately thirty prosecutable buys under affiant's direction. Information provided by the confidential source has provide to be truthful and reliable. Affiant knows no reason why the confidential source would falsify or fabricate any of the information given herein.

4). These things lead affiant to believe a quantity of COCAINE, PROCEEDS, ELECTRONICS AND RECORDS still remain on the above-described premises.

(*Id.* at 1–3.)

On the basis of that Affidavit, Judge McFarlin issued the requested Warrant at 9:51 a.m. on April 28, 2016. (*Id.* at 8.) The RCSO executed the Warrant on the same day. According to Detective Fields' initial report, the "bust" of 902 Greenland resulted in the seizure of six grams of cocaine powder, three grams of marijuana, two digital scales, $200 in marked "buy money," a

handgun and ammunition, and in the arrest of the two occupants of the apartment, including the defendant. (Doc. No. 79-3, at 2–3.) Subsequent lab reports reflect that only 2.53 grams of cocaine and 1.13 grams of marijuana were actually seized from 902 Greenland. (*Id.* at 5.)

Based on that evidence, defendant Deonday Evans was arrested and taken into custody on state charges. According to Detective Fields' synopsis of the events of that day, Evans waived his Miranda rights and agreed to speak with police. He made numerous self-incriminating statements, including that the firearm seized from 902 Greenland was his and that he had been selling cocaine "for a short time." (*Id.* at 3.)

On November 2, 2016, Evans was indicted on federal charges of knowingly and intentionally possessing cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (Count One); knowingly possessing a firearm after having previously been convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1) and 922 (Count Two); knowingly possessing ammunition after having previously been convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1) and 924 (Count Three); and knowingly possessing a firearm in furtherance of a federal drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). (Doc. No. 1.) He was arrested on these charges and taken into federal custody on November 29, 2016.

On June 12, 2017, Evans entered a plea of guilty to Counts One and Two of the Indictment. Before he was sentenced, however, the court granted the defendant's *pro se* motion for appointment of new counsel and, subsequently, his *pro se* Motion to Withdraw Plea of Guilty and his new attorney's Amended Motion to Withdraw Guilty Plea. New counsel thereafter filed the currently pending Motion to Suppress Fruits of Search Warrant Execution. (Doc. No. 79.)

II. Legal Standards

The Fourth Amendment prohibits the issuance of a search warrant without probable cause. U.S. Const. amend. IV. The Supreme Court has recognized that the right of a citizen to retreat into the home and "there be free from unreasonable governmental intrusion" stands at the core of the Fourth Amendment. *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

"One of the touchstones of the reasonableness requirement is that the police must generally obtain a warrant based upon a judicial determination of probable cause before entering the home." *Ziegler v. Aukerman*, 512 F.3d 777, 785 (6th Cir. 2008). The job of the magistrate presented with a search warrant application is "simply to make a practical, common-sense decision whether, given 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." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "There must, in other words, be a nexus between the place to be searched and the evidence sought." *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (*en banc*) (internal quotation marks omitted). The court reviewing a motion to suppress has a duty to ensure that the magistrate who issued the warrant had a "substantial basis for concluding that probable cause existed." *Id.* (quoting *Gates*, 462 U.S. at 214). Generally, "[t]he review of the sufficiency of the evidence supporting probable cause is limited to the information presented in the four corners of the affidavit." *United States v. Berry*, 565 F.3d 332, 338 (6th Cir. 2009). "[W]hether an affidavit establishes a proper nexus is a fact-intensive question resolved by examining the totality of circumstances presented." *United States v. Brown*, 828 F.3d 375, 382 (6th Cir. 2016) (citing *Gates*, 462 U.S. at 238.)

If the warrant is not supported by probable cause, then its execution results in a violation of the Fourth Amendment. *See United States v. Leon*, 468 U.S. 897, 900 (1984). Separate from the question of whether a constitutional violation occurred, however, is the question of a remedy. "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). The exclusionary rule applies as well to the "fruits" of the illegally seized evidence. *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963). The purpose of the exclusionary rule, however, is not to redress the injury to the privacy of the search victim, as "[t]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *United States v. Calandra*, 414 U.S. 338, 347 (1974) (quoting *Linkletter v. Walker*, 381 U.S. 618, 637 (1965)). Instead, "the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Id.*

In light of its purpose of preventing future violations, the exclusionary rule is subject to broad exceptions. In particular, if the evidence in question was "obtained in objectively reasonable reliance" on a "subsequently invalidated search warrant," it should not be suppressed. *United States v. Leon*, 468 U.S. 897, 922 (1984). But the good-faith exception rule is itself subject to exceptions. Specifically, the good-faith exception does not apply in four situations:

> (1) when the affidavit supporting the search warrant contains a knowing or reckless falsity; (2) when the magistrate who issued the search warrant wholly abandoned his or her judicial role; (3) when the affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable; or (4) when the warrant is so facially deficient that it cannot reasonably be presumed valid.

United States v. McPhearson, 469 F.3d 518, 525 (6th Cir. 2006) (citations omitted).

III. Analysis

In his Motion to Suppress, the defendant does not actually argue that the Affidavit provided in support of the search warrant did not supply probable cause. Rather, his motion to suppress the evidence seized during the execution of the warrant and the incriminating statements made after he was taken into custody is purportedly premised on *Franks v. Delaware*, 438 U.S. 154 (1978). In support of his claim that *Franks* requires suppression of the evidence seized as well as the fruits of the unlawful seizure, he argues generally that "the combination of the outright false claims . . . , the claims that were later impeached by 'hard' evidence . . . , the material omissions . . . , the insufficient evidence of the [confidential source's] reliability, the total failure to establish [the unwitting subject's] reliability, and the lack of ongoing nexus between Apartment 117 and drug trafficking beyond the two [April] buys all combine to undermine the validity of the warrant." (Doc. No. 79, at 11.) That is, he argues that, once the discredited and false claims are withdrawn, and "especially in light of the omitted information," the Affidavit is not supported by probable cause. He further argues that, because Fields made false claims to procure the warrant, it is not saved by the *Leon* "good faith" exception to the exclusionary rule.

A. The Allegedly False Claims

The court notes, as an initial matter, that the Affidavit in this case supplies probable cause on its face. It details two controlled buys of felony quantities of cocaine from Apartment 117 at 902 Greenland, at least one of which took place within seventy hours of the search warrant application.[1] The Sixth Circuit has held that an affidavit describing a single controlled drug

[1] In fact, the record reveals that the controlled buys took place on April 26 and 27, within approximately forty-eight hours of the date of the warrant application (April 28, 2016), but the exact dates of the buys were not included in the Affidavit.

purchase by a confidential informant that occurred within seventy-two hours of the application for a search warrant provided probable cause, because it was reasonable to believe that "three days after the drug purchase . . . police would find narcotics, related paraphernalia, and/or the marked money in the residence." *United States v. Pinson*, 321 F.3d 558, 565 (6th Cir. 2003).[2] The court understands the defendant here to be arguing that the probable cause finding is vitiated by materially false statements in the Affidavit and the omission of material information.

Under *Franks*, a defendant is entitled to an evidentiary hearing on his motion to suppress if he (1) "makes a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement or material omission in the affidavit," and (2) if he "proves that the false statement or material omission is necessary to the probable cause finding in the affidavit." *United States v. Pirosko*, 787 F.3d 358, 369 (6th Cir. 2015) (citations and internal quotation marks omitted). "[A] defendant who challenges the veracity of statements made in an affidavit that formed the basis for a warrant has a heavy burden." *United States v. Green*, 572 F. App'x 438, 441 (6th Cir. 2014) (quoting *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990)). Likewise, to merit a hearing based on the omission of material from an affidavit, the defendant must make a "strong preliminary showing that the affiant intended to mislead the judge by omitting the information from the affidavit." *Hale v. Kart*, 396 F.3d 721, 726–27 (6th Cir. 2005) (discussing omissions in a § 1983 action). "The mere existence of omissions alone is ordinarily not enough to make this strong preliminary showing." *Id.* at 727. If the defendant makes the requisite showing of either false statements or

[2] The defendant makes a half-hearted staleness argument, which is completely undermined by *Pinson* and subsequent Sixth Circuit authority. *See, e.g., United States v. Jackson*, 470 F.3d 299, 308 (6th Cir. 2006). The defendant notes only that, to the extent *Pinson* and other precedent "weigh heavily" against his staleness claim, "the prior precedents are wrong and should be reversed because the Fourth Amendment requires 'certainty and precision.'" (Doc. No. 79, at 7 n.2.) He provides no basis for this court to disregard binding precedent.

material omissions, the court must then consider the affidavit, after excising the false statements and including the omitted portions, and determine whether probable cause still exists. *United States v. Wilson*, 501 F. App'x 416, 422 (6th Cir. 2012) (holding that a *Franks* hearing was not required where the court redacted "admittedly false statements" from the affidavit, considered information omitted from the affidavit, and found that the modified affidavit provided a sufficient nexus to searched premises to support probable cause for the warrant).

The defendant does not actually request a *Franks* hearing. The court surmises that his position is that certain statements in the Affidavit are contradicted by "hard evidence," making them demonstrably false and rendering a hearing unnecessary. In any event, the defendant identifies the following as factually false or intentionally and materially misleading statements in the Affidavit:

> (1) Fields' statement that he overheard "the confidential source and the unwitting subject talk about the cocaine and the supplier always 'staying with it'" (meaning that the supplier always had a ready supply of cocaine) (Doc. No. 79-2, at 2);
>
> (2) Fields' statement that video of the second April transaction captures an image of the unwitting subject entering and exiting Apartment 117 (Doc. No. 79-2, at 3);
>
> (3) Fields' suggestion that the "John Doe" supplier of the drugs in the February transactions was the same as the "John Doe" supplier of the drugs purchased by the confidential source and unwitting subject in the April transactions (*id.* at 5–6); and
>
> (4) Fields' attestations regarding the credibility and reliability of the confidential source, including his statement that he knew of "no reason why the [confidential source] would falsify or fabricate any of the information" (Doc. No. 79-2, at 3), which are contradicted by facts in the record showing that the confidential source was paid both for the cocaine transactions and also on a contingency basis and that he has a significant criminal history (Doc. No. 79, at 9–10).

In addition, the defendant maintains that the Affidavit omitted material information, specifically the locations of the February transactions, thus falsely implying that they took place

at 902 Greenland when, in fact, they took place at a Speedway gas station five miles away from 902 Greenland. (*Id.* at 6.)

First, regarding Fields' statement in the Affidavit that he overheard the unwitting subject tell the confidential source that the drug supplier at 902 Greenland "stays with it," the defendant argues that the audio provided by the government is unintelligible and does not substantiate Fields' claim of having overheard that comment. The government responds that, beginning at approximately 31:00 on the audio recording related to the first April 2016 buy, "it is possible to hear the unwitting subject and the source discussing various aspects of drug trafficking." (Doc. No. 87, at 7.) In fact, the conversation that takes place from approximately 30:39 until 47:00 is almost completely unintelligible, at least on the disk provided to the court. (Def.'s Manually Filed Ex. C, 4/26/16 Audio, Doc. No. 82.) It is conceivable, however, that the officer listening to the conversation contemporaneously through electronic surveillance might have been able to decipher what was being said. Moreover, beginning at approximately 50:00 on the same audio recording, as the government points out, Fields can be heard debriefing the confidential source after the buy. During that conversation, the confidential source states that the unwitting subject did not tell him how much cocaine his contact had but did say that the supplier "stays with it," meaning, according to Fields, that the supplier always has cocaine. (*Id.*; Doc. No. 79-2, at 2; Doc. No. 87, at 7.)

In other words, it is clear that Fields actually heard the comment, at least from the confidential source, if not also from the unwitting subject. The defendant has not offered any evidence that Fields intentionally or recklessly misrepresented that he heard the conversation himself in order to improperly bolster the Affidavit. Moreover, even if the court disregards the statement altogether, the probable cause analysis is unaffected. As set forth above, the Affidavit

establishes that the reliable source traveled with the unwitting subject to 902 Greenwood on two dates in April, including a date no later than seventy hours prior to submission of the Affidavit, and that the unwitting subject obtained a felony quantity of cocaine from inside the premises on both occasions. Under *Pinson*, little else is required.

In his Reply, the defendant argues that the conversation between the confidential source and Fields further undermines probable cause, because the confidential source not only makes it clear that the unwitting subject told him that the supplier at 902 Greenland was not his regular supplier, but also indicates that the unwitting subject did not buy from Apartment 117. The confidential source states on the audio recording: "I think he went up to the second floor, and, uh, he, uh, was gone about five minutes, and just came back, handed it to me." (Def.'s Manually Filed Ex. C, 4/26/16 Audio, Doc. No. 82.) The video recording of the transaction, however, shows the unwitting subject exiting Apartment 117 (Def's Manually Filed Ex. D, Doc. No. 82), and the Affidavit states that police officers actually saw him go into and come out of Apartment 117. While the confidential source's belief that the unwitting subject "went upstairs" provides a basis for cross examining the witnesses, the defendant has not shown that its omission from the Affidavit was intended to mislead the magistrate issuing the warrant. Moreover, its omission from the Affidavit is not material, and its inclusion would not have vitiated the existence of probable cause.

Next, the defendant argues that the statement in the Affidavit that video of the second April 2016 transaction captures an image of the unwitting subject entering and exiting Apartment 117 (Doc. No. 79-2, at 3), is factually false, because the government never turned over to the defendant video capturing that transaction. (Doc. No. 79, at 5.) In response, the government states that it located the missing video recording after the defendant filed his motion and has now

supplied it to the defendant. (Doc. No. 87, at 8.) The government asserts that the statement that the video exists is true and that it does in fact show the unwitting subject entering and exiting Apartment 117. The defendant concedes this point in his Reply brief. (Doc. No. 92, at 2.)

He further argues, however, that probable cause is lacking because the Affidavit does not supply enough information from which it can reasonably be concluded that a drug buy took place at Apartment 117. It just states that the unwitting subject entered the apartment, exited the apartment, and returned to the confidential source's vehicle. He argues that "what goes unsaid is whether the subject went to any other apartments in the complex, or made any other stops during their drive," in light of which the mere fact that he went into Apartment 117 is not sufficient. (Doc. No. 92, at 2–3.) The defendant's speculation that the affiant might have omitted from the Affidavit such material facts as additional stops does not amount to a substantial showing that he in fact did so. Moreover, the Affidavit's statements that the confidential source provided buy money to the unwitting subject, who went into Apartment 117, exited just a few minutes later, and handed over cocaine to the confidential source immediately thereafter, is sufficient to support the conclusion that the cocaine was purchased from Apartment 117 and not from another apartment in the same complex or elsewhere.

Next, the defendant argues that Fields misrepresented the nature of the February 2016 transactions by improperly and falsely implying that the confidential source purchased drugs from 902 Greenwood during that time frame. The government argues that that information was included in the Affidavit purely for background, as part of Fields' history of dealing with the confidential source, "simply to show that the source had successfully conducted controlled drug buys for law enforcement in the past." (Doc. No. 87, at 9.) For the same reason, the omission of the location of the February buys was not material, as the information regarding the February

buys was, the government maintains, intended to "to establish that the source in this case had a track record of obtaining narcotics through the unwitting subject, not to establish that narcotics would be found at apartment 117." (*Id.* at 10.)

The defendant is correct that the information about the February buys does not establish or contribute to a finding of probable cause, principally because the Affidavit does not identify where the transactions took place. However, while evidence of the affiant's intentions are not in the record, it seems clear that the information was included to establish that the confidential source and the unwitting subject had a relationship and a track record of providing accurate information. Regardless, even if the information about the February transactions is omitted from the Affidavit entirely, the information about the April buys, standing alone, is still sufficient to establish probable cause, as set forth above. *Accord Pinson, supra.*

The defendant also maintains that the confidential source's reliability was "essential to the validity of the warrant" and that Fields' assertions regarding the confidential source's reliability were intentionally and materially misleading. Specifically, he claims that Fields' averment that he knew of no reason why the confidential source would falsify or fabricate information is contradicted by information Fields failed to disclose, namely the police department's payments to the confidential source and his extensive criminal history. The government responds that, because the information provided by the confidential source was corroborated by the police officers' independent investigation, Fields was not required to provide any information about the confidential source's reliability. It also argues that the information Fields provided regarding the source's reliability in the past is all that the Sixth Circuit requires. (*See* Doc. No. 87, at 12.)

The court agrees. Generally speaking, an affidavit is "judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added." *United States v. Martin*, 526 F.3d 926, 936 (6th Cir. 2008) (quoting *United States v. Allen*, 211 F.3d 970, 975 (6th Cir. 2000)). The Sixth Circuit has repeatedly held that "the affiant need only specify that the confidential informant has given accurate information in the past to qualify as reliable." *Id.* (quoting *United States v. Greene*, 250 F.3d 471, 480 (6th Cir. 2001)); *see also United States v. May*, 399 F.3d 817, 826 (6th Cir. 2005) (holding that an affidavit was sufficient where it stated only that the "cooperating source has provided assistance in unrelated drug investigation cases" and that "[t]he affidavit need not include a detailed factual basis for [the affiant's] statement in order to support the judge's finding of probable cause"); *United States v. Smith*, 182 F.3d 473, 483 (6th Cir. 1999) ("[I]f the prior track record of an informant adequately substantiates his credibility, other indicia of reliability are not necessarily required."). In this case, the Affidavit states that the confidential source had "conducted approximately thirty prosecutable buys under affiant's direction" and that the information that the source had provided in the past had "proven to be truthful and reliable." (Doc. No. 79-2, at 3.) This level of detail about the source's track record of working with law enforcement is sufficient to support his reliability and veracity. That he was paid for working with the police and had a criminal history, besides being unremarkable facts, would not have changed that conclusion. Moreover, the defendant has not made a "strong preliminary showing" that the affiant intended to mislead the judge by omitting that information. *Accord Martin*, 526 F.3d at 937 (finding that the defendant's "bare assertion" that information omitted from the affidavit, if included, "could have dispelled probable cause" was not sufficient to warrant a *Franks* hearing in the absence of actual allegations of deliberate falsehood or reckless disregard for the truth, accompanied by an offer of proof).

Further, as the government points out, the information provided by the confidential source was of relatively little importance in this case, where the source and his vehicle were searched before each drug buy to ensure that he had no contraband on his person; he was provided with marked buy money prior to each transaction; police officers conducted real-time surveillance of the controlled buys, and they recovered the contraband from the source immediately after both transactions. A court must consider "all the circumstances set forth in the affidavit" to determine whether probable cause exists. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Here, the information regarding the reliability of the informant, coupled with the police officers' efforts to independently corroborate the information provided to them by the source, together were clearly sufficient to provide probable cause to believe that contraband would be found in Apartment 117 at 902 Greenland.

In sum, the defendant has not made a "substantial preliminary showing" that Fields knowingly and intentionally, or with reckless disregard for the truth, included false statements in, or omitted material information from, the Affidavit. Even if the defendant had made such a showing, he has not established that any allegedly false statement is necessary to the finding of probable cause or that including the omitted information about the confidential source would have dispelled probable cause.

B. The Reliability of the Unwitting Subject

The defendant next argues that the Affidavit completely fails to establish the unwitting subject's reliability, which independently vitiates the probable cause finding. The court can certainly envision circumstances in which an unwitting subject's reliability would be critical to a finding of probable cause, but those circumstances are not presented here.

The only representation by the unwitting subject on which the Affidavit arguably relied was his statement to the confidential source that he needed a ride to the Campus Villa Apartments, *i.e.*, 902 Greenland. That statement was corroborated by officers who, twice, followed the confidential source's vehicle from the unwitting subject's residence to 902 Greenland, observed the unwitting subject exit the confidential source's vehicle, enter Apartment 117, exit the apartment, and re-enter the vehicle. Police then followed the vehicle back to the unwitting subject's residence and, immediately thereafter, met with the confidential source to retrieve from him the cocaine purchased from Apartment 117. Because the information provided by the unwitting subject was independently corroborated, the police officers had no need to establish his credibility or reliability.

In his Reply, the defendant continues to argue that the reliability of the unwitting subject is critical, because his participation in the buys at issue in this case means that the buys were not actually "controlled" buys. That is, the unwitting subject himself was not searched before or after the transactions and was not wired for electronic surveillance. The defendant implies, without stating it in so many words, that the unwitting subject could have set up the residents of 902 Greenland by purchasing the cocaine from some other supplier prior to his rendezvous with the confidential source, especially since the record makes it clear that he had multiple suppliers.

The defendant would be free to raise this argument at trial and to cross examine witnesses regarding this possibility. The court nonetheless finds that the defendant's speculation and suppositions are not sufficient to overcome the probable cause established by the relatively simple and straightforward facts set forth in the Affidavit.

Moreover, even if the fact that the transactions took place through an intermediary—the unwitting subject—whose reliability has never been established were sufficient to lead to a

conclusion that the warrant is invalid, the court would find that the *Leon* good faith exception applies. In *Leon*, as set forth above, the Supreme Court created an exception to the exclusionary rule for evidence "seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." 468 U.S. at 905. Following *Leon*, courts presented with a motion to suppress claiming a lack of probable cause must ask "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's decision." *United States v. Hodson*, 543 F.3d 286, 293 (6th Cir. 2008) (quoting *Leon*, 468 U.S. at 923 n.23). Suppression is appropriate only if the answer is "yes."

To assist courts in determining whether the exception applies, *Leon* identified four situations in which an officer's reliance on the warrant would *not* be reasonable and when, therefore, the exception would not apply:

> (1) when the affidavit supporting the search warrant contains a knowing or reckless falsity; (2) when the magistrate who issued the search warrant wholly abandoned his or her judicial role; (3) when the affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable; or (4) when the warrant is so facially deficient that it cannot reasonably be presumed valid.

McPhearson, 469 F.3d at 525 (citing *Leon*, 468 U.S. at 914–23). The defendant here has failed to show that the warrant contains knowing or reckless falsities, and he makes no attempt to argue that any of the other situations exists here. The Affidavit in this case was not so lacking in indicia of probable cause as to render belief in its existence unreasonable, nor is the warrant facially deficient. The information about the February transactions provided a reasonable basis for believing that the confidential source and the unwitting subject had a relationship and that the unwitting subject had a history of providing accurate information about his drug contacts to the confidential source. The Affidavit also establishes a clear nexus between 902 Greenland and the sale of cocaine sufficient to support an officer's good faith belief in the warrant's validity. Thus,

even if the information provided in the Affidavit failed to establish probable cause, suppression would not be warranted under *Leon*.

IV. Conclusion

For the reasons set forth herein, the court will deny the Motion to Suppress Fruits of Search Warrant Execution (Doc. No. 79) without a hearing. An appropriate order is filed herewith.

ENTER this 29th day of June 2018.

ALETA A. TRAUGER
United States District Judge