2023 WL 3963620
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United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Perry Wayne SUGGS, Jr., Defendant - Appellant.

No. 22-1024
|
FILED June 13, 2023

(D.C. No. 1:18-CR-00089-WJM-1) (D. Colorado)

Attorneys and Law Firms

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Before PHILLIPS, MURPHY, and EID, Circuit Judges.

ORDER AND JUDGMENT *

Allison H. Eid, Circuit Judge

***1** Perry Wayne Suggs Jr. was indicted for being a felon in possession of a firearm and ammunition. He moved to suppress evidence from a residential search. The district court held a hearing and denied the motion. A jury convicted Suggs. Suggs appealed, and we held the residential search warrant violated the Fourth Amendment's particularity requirement and could not be cured by the severability doctrine. *United States v. Suggs* ("*Suggs I*"), 998 F.3d 1125, 1130 (10th Cir. 2021). We remanded for the district court to consider in the first instance whether the good-faith exception to the Fourth Amendment's exclusionary rule applied. On remand, the district court applied the exception and denied the motion. Suggs appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. [1]

I.

We assume the parties' knowledge of this case and only detail the required facts. The driver of Perry Wayne Suggs Jr.'s vehicle fired a shot at a pedestrian. Colorado Springs Police Department Officer Adam Menter obtained a state court warrant to arrest Suggs and search his residence. As part of the warrant application, Officer Menter submitted an affidavit that detailed the circumstances of the shooting and his investigation's fruits. The application asked for authority to search Suggs's home for items listed in an "Attachment B," which described the targeted property as:

> The following person(s), property or thing(s) will be searched for and if found seized:
>
> GENERAL INFO
>
> • General photographs of the scene
>
> • Indicia of residency
>
> • Identification which would identify any occupants of the residence
>
> GUNS INVOLVED
>
> • Any and all firearms: specify if known
>
> • Any and all ammo: specify if known
>
> • Any documentation showing the ownership of a firearm
>
> • Any and all sales records showing the purchase of a firearm
>
> • Any projectiles
>
> • Any and all spent shell casings
>
> • Any item commonly used to carry and transport a firearm (i.e. holster & gun carrying case, magazines, cleaning kits)
>
> VEHICLE
>
> • Indicia of ownership of vehicle
>
> • Vehicle registration
>
> MISCELLANEOUS
>
> • Any item identified as being involved in crime
>
> NO OTHER ITEMS ARE SOUGHT FOR SEIZURE

Id. at 1131. A Colorado state court issued a warrant that identified the place to be searched as Suggs's home. Regarding the items to be searched for and seized, the warrant incorporated by reference Attachment B. However, the warrant did not expressly incorporate Officer Menter's affidavit.

Suggs was arrested while away from his residence. CSPD Officer Teresa Tomczyk then led a SWAT team to Suggs's home to execute the warrant. Sergeant Keith Wrede and Officer Aaron Lloyd assisted Officer Menter in the search; the officers located a box of ammunition that matched ammunition used in the shooting. During a protective sweep of the residence, Officer Tomczyk noticed firearms inside an SUV parked under the carport. Officer Tomczyk told Officer Menter about the guns outside. Officer Menter soon used this information to obtain a warrant to search the SUV; the second warrant was almost identical to the residential warrant. Officer Menter then returned to Suggs's home, executed the vehicle warrant, and located guns and more ammunition.

Suggs was indicted for being a felon in possession of a firearm and ammunition. He moved to suppress the evidence, arguing that the residential search warrant violated the Fourth Amendment's particularity requirement and that the evidence from the SUV should be suppressed as fruit of an unconstitutional search. The district court held a hearing and then denied the motion. A jury convicted Suggs, and the district court sentenced him to ninety months' imprisonment.

***2** Suggs appealed the suppression issue. We reasoned that the residential search warrant violated the Fourth Amendment's particularity requirement and could not be cured by the severability doctrine. "Read as a whole, the warrant told officers they could search for evidence of any crime rather than only evidence related to the vehicle shooting." *Id.* at 1135. Accordingly, we reversed and remanded for the district court to consider whether the good-faith exception applied, observing that "[t]he inquiry on the good-faith exception requires not only an examination of the warrant's text but also a careful consideration of the totality of the circumstances to determine whether officers reasonably relied on the invalid warrant." *Id.* at 1140. We noted "potentially material" aspects of that inquiry included: (1) whether officers limited their search to evidence related to the vehicle shooting; (2) whether the officers who conducted the search read the warrant or reviewed its supporting documents beforehand; and (3) whether the searching officers were informed of the warrant's contents or briefed on what to look for. *Id.* at 1140–41. We determined that "[e]ven if the district court declines to take additional evidence on remand, the good-faith question is close on the current record. And before issuing a definitive decision, this court would benefit from a district court judgment that addresses the implications of previously unaddressed facts." *Id.* at 1141. "In particular, is it fair to say Officer Tomczyk reasonably relied on the residential search warrant when she testified that she never received a copy of the warrant or reviewed Officer Menter's affidavit?" *Id.* "Maybe the answer is yes, since Officer Tomczyk was on Defendant's property only to conduct a protective sweep, not to search for any items." *Id.* "Or perhaps Officer Tomczyk relied on the warrant in good faith because her supervisor, Sergeant Wolf, had reviewed the entire warrant package and directed her to lead the SWAT team in his stead." *Id.* "Then again, maybe not, as the warrant was the supposed lawful basis for Officer Tomczyk's entry into Defendant's property." *Id.*

On remand, the district court applied the good-faith exception and denied the suppression motion. Observing that we "found the catch-all phrase swept too broadly to pass muster under the Fourth Amendment," the court reasoned that the warrant was not so facially deficient that a reasonably well-trained officer would have known the search was illegal. R. Vol. I at 193. The court held that the warrant specified the place to be searched and the things to be seized, and while "the final catch-all phrase doom[ed] this warrant under the Tenth Circuit's particularity analysis ... the good faith exception stretche[d] more broadly...." *Id.* at 193–94. Thus, the district court concluded that "[a]n objectively reasonable officer acting in good faith could have read the warrant—particularly the specific list of items to be seized—and interpreted it as restricting the scope of the search to items involved in the shooting under investigation." *Id.* at 194.

In addition, the district court held that the totality of the circumstances showed that the officers relied in good faith on the warrant's text. The court depended on testimony of law enforcement officers to reach its conclusion. First, the court established that Officer Menter prepared the warrant, application, and affidavit, and then executed the search. The district court applied Tenth Circuit precedent to hold that a warrant application and affidavit can support a finding of good faith where the officer who prepared those documents also executed the search.

Next, the district court determined that the officers confined their search to the evidence specified in Attachment B, which

indicated "that they acted in good faith and in objectively reasonable reliance on what they believed was a valid warrant." *Id.* at 197. In doing so, the district court depended on Officer Menter's testimony and the fact that the officers only seized firearms, ammunition, and indicia of residency—all of which were listed in Attachment B and consistent with the shooting crime under investigation.

Subsequently, the district court inferred from Officer Menter's "highly probative" testimony that Sergeant Wrede and Officer Lloyd were aware of the vehicle shooting and only searched for items connected with that incident. *Id.* The court also reasoned that other testimony demonstrated Sergeant Wrede knew he was searching for evidence related to the shooting. The court then verified "that Officer Menter followed his normal practice of telling officers assisting a search what they are looking for before they started searching," which supported applying the good faith exception. *Id.* at 200.

The district court ultimately held that Officer Tomczyk reasonably relied on the search warrant. The court concluded that under our precedent, as an assisting officer at the scene specifically there to perform a protective sweep, Officer Tomczyk need not have read the warrant nor ensured its validity. While the district court recognized "the evidence with respect to Officer Tomczyk's reasonable reliance on the warrant is arguably weak in comparison with the reliance of Officer Menter, Sergeant Wrede, and Officer Lloyd, since Officer Menter—drafter of the warrant—did not advise her of the search's parameters," the court held that "Officer Tomczyk's testimony that she was aware of the vehicle shooting demonstrates that she had a basis to believe that the weapons she discovered in the car in the carport were connected to the alleged crime under investigation." *Id.* at 203. The court also observed that "the evidence concerning Officer Tomczyk, particularly because *she was not an officer involved in the search*, does not militate in favor of suppressing...." *Id.* (emphasis in original).

***3** Next, the district court held that "given that two different magistrate judges approved the warrants containing the catch-all language, it was nevertheless reasonable for Officer Menter to rely on the judges' approval of the residential and vehicle warrants and to search the residence for the items listed in Attachment B." *Id.* at 204–05. The district court banked on the fact that, in addition to signing the warrant, a magistrate judge signed Officer Menter's application and affidavit, both of which incorporated Attachment B by reference. The district court reasoned that Tenth Circuit precedent endorses the idea that a magistrate judge's approval of the application and affidavit further supports the objective reasonableness of an officer's reliance on a warrant.

Finally, the district court held that excluding the challenged evidence would not serve the exclusionary rule's purpose. The court noted that Officer Menter was not required to obtain a separate vehicle warrant, but still did so, which demonstrated "he made every effort to comply with the law." *Id.* at 205. From the totality of the circumstances, the court "easily" concluded that Officer Menter was not the law enforcement official for whom the exclusionary rule was judicially crafted. *Id.*

Accordingly, the district court denied the motion to suppress. Suggs now appeals.

II.

"[W]e review a district court's application of the good-faith exception to the warrant requirement de novo." *United States v. Knox*, 883 F.3d 1262, 1268 (10th Cir. 2018). This "review does not involve viewing the evidence in the light most favorable to the government." *Id.* at 1269 n.4 (cleaned up). The government is burdened with "proving that its agents' reliance upon the warrant was objectively reasonable." *United States v. Leary*, 846 F.2d 592, 607 n.26 (10th Cir. 1988). We examine factual findings for clear error. *United States v. Nelson*, 868 F.3d 885, 889 (10th Cir. 2017).

Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *Knox*, 883 F.3d at 1273 (cleaned up). 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.* (cleaned up). Altogether, the rule is "a disincentive for law enforcement to engage in unconstitutional activity." *Id.*

However, "[e]ven if a warrant fails to satisfy the Fourth Amendment's particularity requirement, the exclusionary rule should not be applied to suppress evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate judge that is ultimately deemed invalid." *United States v. Russian*, 848 F.3d 1239, 1246 (10th Cir. 2017) (cleaned up). In such cases, we apply the good-faith exception. *Id.* (cleaned up).

The exception's rationale "is the underlying purpose of the exclusionary rule—namely, to deter police misconduct. When an officer acts in good faith, there is nothing to deter." *Id.* Consequently, "the suppression of evidence obtained pursuant to a warrant should be ordered only in the unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.* (cleaned up).

"But the officer's reliance on the defective warrant still must be objectively reasonable: the government is not entitled to the good faith exception when a warrant is so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Id.* (cleaned up). "The test is an objective one that asks whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *United States v. Otero*, 563 F.3d 1127, 1134 (10th Cir. 2009) (cleaned up). "Not every deficient warrant, however, will be so deficient that an officer would lack an objectively reasonable basis for relying upon it." *Id.* "Even if the court finds the warrant to be facially invalid ... it must also review the text of the warrant and the circumstances of the search to ascertain whether the agents might have reasonably presumed it to be valid." *Id.* (cleaned up). "We must consider all of the circumstances, not only the text of the warrant, and we assume that the executing officers have a reasonable knowledge of what the law prohibits." *Id.* (cleaned up).

III.

***4** We conclude that the good-faith exception applies here. [2] Multiple factors support our decision. While the warrant's text failed to satisfy our particularity analysis under the Fourth Amendment, a reasonable officer could have understood the warrant as limited to the shooting crime under investigation and presumed the warrant to be valid. *Id.* As the district court noted, the warrant specified that Suggs's residence was the place to be searched, and Attachment B contained a detailed list of things to be searched for and seized. Similarly, Officer Menter's understanding of the warrant's text was not so unreasonable that a reasonable officer would have known it was wrong, especially since he prepared the application and affidavit. *Russian*, 848 F.3d at 1246 ("Although a warrant application or affidavit cannot save a warrant from facial invalidity, it can support a finding of good faith, particularly where, as here, the officer who prepared the application or affidavit also executed the search."); *see also United States v. Cotto*, 995 F.3d 786, 796 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 820 (2022).

Likewise, the totality of the circumstances demonstrates that law enforcement relied on the warrant in good faith. The executing officers understood the search was limited to the shooting under investigation, which validates that they acted in good faith. Officer Menter's involvement with the warrant from drafting to execution—as well as his understanding of its confines and acts consistent with them—shows he acted in good faith. *Cotto*, 995 F.3d at 796 ("[I]t is indicative of good faith when the officer who prepares an affidavit is the same one who executes a search.").

Neither can we fault the district court for relying on testimony that the officers limited their search to the crime under investigation, especially since the items seized were consistent with a shooting. *United States v. Riccardi*, 405 F.3d 852, 864 (10th Cir. 2005) ("The officers remained within the terms of the warrant as well as the affidavit, and did not conduct a 'fishing expedition' beyond the scope of the authorized investigation. They did not search for, or seize, any materials for which probable cause had not been shown.").

Officer Menter also briefed Sergeant Wrede and Officer Lloyd to look for evidence of the crime under investigation, which corroborates their good faith and grasp of the warrant's restrictions. *Otero*, 563 F.3d at 1135 ("The fact that the officer conducting the ... search had not been involved from the beginning of the investigation does not alone militate against good faith when that officer received—and, more importantly, followed—search instructions that limited the scope of his search to crimes for which there was probable cause.").

Similarly, although a close call, we cannot say that the district court's determination that Officer Tomczyk also understood the nature of the search and the crime under investigation was clearly erroneous, even if the argument in favor is weaker than argument in favor of the other officers. *See id.* The district court reasonably relied on the record, which contained just enough support to determine that Officer Tomczyk limited her search. *Wigley v. City of Albuquerque*, 567 F. App'x 606, 610 (10th Cir. 2014) (unpublished) [3] ("[P]laintiffs have not pointed to, nor are we aware of, any law clearly establishing that ... one of the many SWAT team members assisting in the execution of the warrant, ... who was briefed that the search included stolen guns and body armor, had a duty to read the warrant or affidavit and assess whether handcuffed detention was justified.").

***5** By the same token, the fact that a state magistrate judge signed Officer Menter's application and affidavit supports law enforcement's good faith here. *Russian*, 848 F.3d at 1247 ("The magistrate judge's approval of the application and affidavit—and reference to both documents in the first paragraph of the warrant—further supports the objective reasonableness of [law enforcement's] reliance on the warrant."). "Courts applying the good faith exception have concluded that, at least when the magistrate neither intimates he has made any changes in the warrant nor engages in conduct making it appear he has made such changes, the affiant-officer is entitled to assume that what the magistrate approved is precisely what he requested." *Id.* (cleaned up).

Finally, suppression would not serve the underlying deterrent purpose of the exclusionary rule. *Knox*, 883 F.3d at 1273. Officer Menter's actions are not the kind of flagrant or deliberate violation that the rule was meant to deter, as the "rule's prime purpose is to deter future unlawful police conduct...." *Id.* Since Officer Menter acted in good faith, as evidenced by his leaving Suggs's home to acquire another warrant, "there is nothing to deter." *Russian*, 848 F.3d at 1246.

IV.

We AFFIRM the district court's denial of Suggs's motion to suppress.

Phillips, J., dissenting.

Though I sympathize with the majority's outcome, I would rule otherwise based on our ruling in *Cassady v. Goering*, 567 F.3d 628 (10th Cir. 2009), our reasoning in our earlier review of this same case, *United States v. Suggs* (*Suggs I*), 998 F.3d 1125 (10th Cir. 2021), and controlling case law dictating that the warrant was "so facially deficient" that no officer could reasonably rely on it. Because the warrant was "so facially deficient," I see no reason why the conduct of other officers involved in the search would be relevant to suppression. I respectfully dissent.

Even the good-faith exception has its exceptions. *United States v. Leon*, 468 U.S. 897, 922–23 (1984) (citations omitted). Relevant here, the good-faith exception doesn't apply when a warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Id.* at 923 (citation omitted).

This language in *Leon* creates an inflection point in the good-faith analysis. If we conclude that a warrant is "so facially deficient" that no officer could have reasonably relied on it, then our inquiry ends. *See id.*; *Groh v. Ramirez*, 540 U.S. 551, 564–65 (2004) (denying qualified immunity when "even a cursory reading of the warrant in this case—perhaps just a simple glance—would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal"). An officer relying on a warrant that is obviously deficient doesn't act objectively reasonably, so we deny qualified immunity in civil cases and suppress the evidence in criminal cases. *See Cassady*, 567 F.3d at 636–37, 643–44 (holding a warrant unconstitutionally overbroad when it "permitted officers to search for *all* evidence of *any* crime," finding that the "clearly established prong is easily satisfied," and denying qualified immunity); *Groh*, 540 U.S. at 565 n.8 (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)). But if we find that a deficient warrant wasn't *so* deficient that no officer could have reasonably relied on it, then we move on to a multifactor inquiry in which we examine the officers' behavior in executing the search. *See, e.g.*, *United States v. Potts*, 586 F.3d 823, 833–35 (10th Cir. 2009) (concluding that a warrant wasn't "so facially deficient" that officers couldn't reasonably rely on it and addressing the totality of the circumstances of the search to conclude that the good-faith exception applied (citations omitted)).

***6** The majority brushes past the threshold question—whether the warrant was so facially deficient—and then dives headfirst into discussing the totality of the circumstances. Maj. Op. 10. If we could reach the totality of the circumstances, then I might credit the majority's reasoning that the officers acted in good faith by limiting the scope of the search to the crime under investigation. But we shouldn't even reach this step. As I read *Cassady*, it dictates a conclusion that the warrant to search Suggs's home was so facially deficient that no officer could reasonably rely on it. That's where our inquiry should end. *See Groh*, 540 U.S. at 558, 563–65 (focusing on the text of the warrant—and not discussing the limited scope of the search or the officer's oral communications to the residents—when the warrant "plainly did not comply" with the particularity requirement (citation omitted)).

We assume that officers executing a search "have a reasonable knowledge of what the law prohibits." *United States v. Cook*,

854 F.2d 371, 372 (10th Cir. 1988) (quoting *Leon*, 468 U.S. at 919–20). And "objective reasonableness" in our Fourth Amendment exclusionary-rule analysis is directly linked to clearly established law in qualified-immunity cases. *Groh*, 540 U.S. at 565 n.8 (quoting *Malley*, 475 U.S. at 344). We apply "the same standard of objective reasonableness ... in the context of a suppression hearing in *Leon*" that we apply to determine whether an officer is entitled to qualified immunity. *Id.* (quoting *Malley*, 475 U.S. at 344). In evaluating whether the good-faith exception should apply, we deem officers to be aware of binding precedent clearly establishing a rule. *United States v. Herrera*, 444 F.3d 1238, 1253 & n.16 (10th Cir. 2006) (citations omitted).

The catchall provision in the warrant used to search Suggs's home suffers the same defect as the catchall provision in the warrant in *Cassady*, 567 F.3d at 645. Like the warrant to search Suggs's home, the search warrant in *Cassady* listed evidence to be seized, followed by a catchall provision allowing officers to search for "all other evidence of criminal activity." *Id.* In *Cassady*, we held that the catchall provision doomed the warrant by violating the Fourth Amendment's particularity requirement. *Id.* at 641–43. If the warrant in *Cassady* was unconstitutionally overbroad, so was the warrant to search Suggs's home. *See Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (explaining that precedent provides clearly established law when it "place[s] the statutory or constitutional question beyond debate" (quoting *Ashcroft v. alKidd*, 563 U.S. 731, 741 (2011))). And because the warrant was invalid under clearly established law, Officer Menter could not reasonably rely on it to conduct a search. [1] *Groh*, 540 U.S. at 565 n.8 (quoting *Malley*, 475 U.S. at 344); *Herrera*, 444 F.3d at 1253 & n.16 (citations omitted). In obtaining and enforcing a search warrant, Officer Menter is subject to *Cassady*'s rule: A warrant with a catchall provision allowing the search and seizure of all evidence of any crime is overbroad and violates the Fourth Amendment. 567 F.3d at 636, 643–44.

***7** In *Suggs I*, we could see no material difference between the warrant in Suggs's case and the warrant in *Cassady*. *Id.* at 1135. We closely tethered our reasoning to *Cassady*, both on whether the warrant violated the Fourth Amendment and whether it was severable. *Id.* at 1135, 1139–40 (citations omitted). In holding that the warrant in *Suggs I* "flubbed the Fourth Amendment's particularity requirement," we reasoned that the *Cassady* warrant contained a "similar catch-all phrase" and that "[w]e have no basis to reach a different conclusion here." *Id.* at 1135 (citing *Cassady*, 567 F.3d at 635). And in holding that the warrant wasn't severable, we reasoned that "the invalid portions of the search warrant are just as broad and invasive as the tainted provisions in the *Cassady* warrant." *Id.* at 1140.

Now, in addressing the good-faith exception, I would make explicit what we implied but didn't hold in *Suggs I*: *Cassady* clearly establishes that the warrant to search Suggs's home violated the Fourth Amendment's particularity requirement. Applying the good-faith exception here runs counter to *Leon*'s rule that evidence should be suppressed when the warrant is "so facially deficient ... that the executing officers cannot reasonably presume it to be valid." 468 U.S. at 923 (citation omitted).

Next, because I believe the warrant is "so facially deficient" that no officer could reasonably rely on it, I see no room for the majority to save the warrant by considering any good-faith conduct of the other officers conducting the search—Wrede, Lloyd, or Tomczyk. Maj. Op. 11–12. The majority concludes that Wrede, Lloyd, and Tomczyk understood the search to be limited to the shooting crime under investigation and that their understanding favors applying the good-faith exception. *Id.* True, for qualified-immunity purposes, line officers may sometimes act in good faith without reading the warrant that the lead officer prepared. *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1028 (9th Cir. 2002) (citations omitted), *aff'd on other grounds sub nom. Groh*, 540 U.S. 551, *and abrogated on other grounds by United States v. Grubbs*, 547 U.S. 90, 98–99 (2006). But even if Wrede, Lloyd, and Tomczyk each acted in good faith, that would be relevant only for qualified immunity—not for suppression. *See id.* (citation omitted). In *Ramirez*, the Ninth Circuit explained that line officers were entitled to qualified immunity when they relied in good faith on a lead officer's briefing about a warrant that turned out to be glaringly deficient. *Id.* (citations omitted). But the court suggested that the line officers' good behavior wouldn't have saved the evidence from suppression in a criminal case. *See id.* (citations omitted).

For qualified-immunity purposes, we consider the objective reasonableness of each officer individually, but for suppression purposes, we consider the objective reasonableness of the government as a whole. *Id.* (citations omitted). The government offers no authority showing that the good-faith reliance of subordinate officers can insulate a search when the search warrant itself is "so facially deficient." Rather, the government relies on its argument that "[t]his is not a case in which Officer Menter used other officers

to end-run an obviously deficient warrant." But as I have explained, Officer Menter prepared an obviously deficient warrant. Whether Officer Menter actually realized it or not, the warrant's deficiencies require suppression because they mirror the deficiencies of the warrant in *Cassady* and because we impute knowledge of clearly established law to officers executing a search. *See Herrera*, 444 F.3d at 1253 & n.16 (citations omitted); *Groh*, 540 U.S. at 564–65 & n.8 (citations omitted).

***8** Finally, the majority concludes that suppressing the evidence would offer no deterrent value because "Officer Menter's actions are not the kind of flagrant or deliberate violation that the rule was meant to deter." Maj. Op. 12 (citation omitted). I disagree. In *Groh*, the Supreme Court cited *Leon* to conclude that the culpability inquiry ends when a court holds that a warrant is "so facially deficient ... that the executing officers cannot reasonably presume it to be valid." 540 U.S. at 565 (quoting *Leon*, 468 U.S. at 923). Since *Groh*, the Supreme Court has emphasized that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States*, 555 U.S. 135, 144 (2009). But I agree with the Sixth Circuit that "*Herring* does not purport to alter that aspect of the exclusionary rule which applies to warrants that are facially deficient warrants *ab initio*." *United States v. Lazar*, 604 F.3d 230, 237–38 (6th Cir. 2010). Declining to suppress the evidence because Officer Menter was personally unaware of *Cassady*'s prohibition on catchall provisions would obliterate our rule imputing knowledge of clearly established law to officers executing a search. *Cook*, 854 F.2d at 372 (quoting *Leon*, 468 U.S. at 919–20); *Herrera*, 444 F.3d at 1253 & n.16 (citations omitted).

What's more, in drafting the obviously defective warrant, Officer Menter relied on a template that the Colorado Springs Police Department regularly used to apply for search warrants. R. vol. 2, at 46 (¶¶ 12–15). Suppressing the evidence in this case would deter police officers and departments from drafting warrants that serve as blank checks to search for evidence of any crime.

I would hold that the good-faith exception doesn't apply, so the evidence should be suppressed.

All Citations

Not Reported in Fed. Rptr., 2023 WL 3963620

Footnotes

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1 During the pendency of this appeal, Suggs filed a motion to expedite oral argument and a motion to expedite this ruling. We deny these motions as moot.

2 Our dissenting colleague avows that *Suggs I* and Tenth Circuit caselaw demand that we decline to apply the good-faith exception here. In the dissent's view, if we conclude that a warrant is so facially deficient that no officer could have reasonably relied on it, then our inquiry ends. But the dissent's analysis fails to fully address the impact of *Suggs I* on this case. True, the *Suggs I* panel held that the warrant here was facially deficient, but remanded so that the district court could determine in the first instance whether to apply the good-faith exception. By remanding the case, the *Suggs I* panel left open the question of whether the warrant was *so* facially deficient that *no* reasonable officer could rely on it. "The inquiry on the good-faith exception requires not only an examination of the warrant's text but also a careful consideration of the totality of the circumstances to determine whether officers reasonably relied on the invalid warrant." *Suggs I*, 998 F.3d at 1140. The *Suggs I* panel accordingly reasoned that "[e]ven if the district court declines to take additional evidence on remand, the good-faith question is close on the current record." *Id.* That logic supports our decision here.

3 "Unpublished decisions are not precedential, but may be cited for their persuasive value." Fed. R. Civ. P. 32.1; 10th Cir. R. 32.1 (2023).

1 Our unpublished decision, *United States v. Dunn*, 719 F. App'x 746 (10th Cir. 2017) (per curiam), only bolsters my conclusion that *Cassady* clearly establishes the rule that a catchall provision in a warrant invalidates the warrant for lack of particularity. The warrant in *Dunn* "listed particular items to be searched, but prefaced the list with a catch-all phrase, stating that the items to be searched 'include but are not limited to' the listed items." *Id.* at 748. We explained that "[t]he infirmity in the warrant was obvious under *Cassady*," so the good-faith exception didn't apply. *Id.* at 752 (citation omitted). Because *Cassady* prohibits catchall provisions in warrants, and because the warrant to search Dunn's apartment was "even broader than the one in *Cassady*," we held that the "officers could not reasonably rely on the warrant." *Id.* Having held that the warrant was so facially invalid that the officers couldn't reasonably rely on it, we didn't discuss the totality of the circumstances of the search. *See id.*

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998 F.3d 1125
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Perry Wayne SUGGS, Jr., Defendant - Appellant.

No. 19-1487
|
FILED June 2, 2021

Synopsis

Background: Defendant indicted on charge of being a felon in possession both of firearm and of ammunition filed motion to suppress, alleging that evidence against him was obtained through unconstitutionally overbroad search warrants. The United States District Court for the District of Colorado, No. 1:18-CR-00089, William J. Martinez, J., 371 F.Supp.3d 931, denied motion, and after he was convicted of the crimes charged on jury verdict, the defendant from the suppression ruling.

Holdings: The Court of Appeals, Baldock, Senior Circuit Judge, held that:

warrant for search of defendant's home, inter alia, for "[a]ny item identified as being involved in crime" failed to satisfy the particularity requirement of the Fourth Amendment;

search warrant did not incorporate officer's supporting affidavit, and thus information in affidavit could not cure a lack of particularity in search warrant;

facially invalid search warrant, which authorized seizure of not only two valid categories of evidence, but two invalid categories as well, including a broad "catchall" category of "[a]ny item identified as being involved in crime," was not severable; and

the Court of Appeals would remand case to the district court to determine in the first instance whether the evidence could nonetheless be admitted under the "good faith" exception to the exclusionary rule.

Vacated and remanded.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

***1129 Appeal from the United States District Court for the District of Colorado (D.C. No. 1:18-CR-00089-WJM-1)**

Attorneys and Law Firms

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Before MATHESON, BALDOCK, and MORITZ, Circuit Judges.

Opinion

BALDOCK, Circuit Judge.

***1130** This appeal stems from an incident at the corner of a crosswalk in Colorado Springs. It is an unusual product of a familiar conflict: the pedestrian and the right-hand turn. A pedestrian wanted to cross the street. At the same time, the driver of a vehicle wanted to turn right. Words were exchanged. Then the driver pulled out a gun and took a shot at the pedestrian. Fortunately the bullet didn't strike anyone. The vehicle sped off, and the pedestrian called 911. Law enforcement focused their investigation on Defendant Perry Suggs. Warrants were issued, Defendant's home was searched, and incriminating evidence was discovered.

A federal grand jury charged Defendant with possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Before trial, Defendant moved to suppress the evidence found during sequential searches of his home and an SUV parked under his carport. He argued that the warrant to search his home violated the Fourth Amendment's particularity requirement and that officers would not have found the evidence used against him but for the invalid warrant. The district court disagreed and denied the motion. Defendant now appeals that decision.

We have jurisdiction under 28 U.S.C. § 1291 to consider whether the district court erred when it denied Defendant's motion to suppress. We hold that it did. Because the residential search warrant failed to meet the Fourth

Amendment's particularity requirement and cannot be saved by the severability doctrine, we vacate the order denying Defendant's suppression motion. Yet the question remains whether the good-faith exception to the exclusionary rule saves the incriminating evidence from suppression. We remand for the district court to resolve underlying factual disputes and consider the remedial question in light of this opinion.

I.

What started out as a verbal altercation at the corner of a crosswalk in Colorado Springs quickly escalated when the driver of a vehicle pulled out a gun and fired a shot at a pedestrian's feet. Officer Adam Menter responded to the incident. He interviewed witnesses and identified Defendant as the driver and owner of the vehicle involved in the shooting.

After concluding his initial investigation, Officer Menter got an arrest warrant for Defendant. He also applied for a search warrant with the state district court. As part of the application, Officer Menter submitted an affidavit (labeled as Attachment A) that detailed the circumstances of the vehicle shooting and the fruits of his investigation. In addition, the affidavit noted that Defendant was a confirmed gang member, suspected to be involved in several other crimes, and had prior felony convictions for menacing and possession of a weapon by a previous offender. The warrant application requested authority to search Defendant's home for the items listed in "Attachment B," which described the targeted property as follows:

***1131**

The following person(s), property or thing(s) will be searched for and if found seized:

GENERAL INFO
- General photographs of the scene
- Indicia of residency
- Identification which would identify any occupants of the residence

GUNS INVOLVED
- Any and all firearms: specify if known
- Any and all ammo: specify if known
- Any documentation showing the ownership of a firearm
- Any and all sales records showing the purchase of a firearm
- Any projectiles
- Any and all spent shell casings
- Any item commonly used to carry and transport a firearm (i.e. holster & gun carrying case, magazines, cleaning kits)

VEHICLE
- Indicia of ownership of vehicle
- Vehicle registration

MISCELLANEOUS
- Any item identified as being involved in crime

NO OTHER ITEMS ARE SOUGHT FOR SEIZURE

Suppl. ROA, Vol. I at 52.

The state district court issued a warrant that identified the place to be searched as Defendant's home. As for the items to be searched for and seized, the warrant incorporated by reference the same Attachment B that had accompanied the warrant application. Officer Menter's affidavit (Attachment A), on the other hand, was not expressly incorporated into the warrant.

While conducting surveillance in anticipation of the search, officers observed Defendant drive away in the vehicle involved in the shooting. After Defendant parked the vehicle at a nearby gas station, members of the SWAT team arrested him. Officers then went to Defendant's home to execute the search warrant.

Led by Officer Teresa Tomczyk, the SWAT team conducted a protective sweep of Defendant's home and then cleared the outside surrounding area of any threats. During this process, Officer Tomczyk shined her flashlight through the window of an SUV (not the vehicle involved in the shooting) parked under the carport, looking for persons who might be hiding. She did not see any people. What she saw instead were two guns, a magazine, and two handgun cases.

With the premises secure, officers conducted the search of Defendant's home. One officer found and seized a box of ammunition that matched the ammunition used in the vehicle shooting. Officer Menter discovered a bank statement linking Defendant to the residence. He also found and seized a retail sale contract for the vehicle involved in the shooting.

At some point, Officer Tomczyk told Officer Menter about the guns she saw in the SUV parked under the carport. After taking a look for himself, Officer Menter returned to the police station and used this information to obtain a warrant to search the SUV. This warrant was almost identical to the residential search warrant. Officer Menter then returned to Defendant's home and executed the vehicle warrant. During the search of the SUV, Officer Menter found and seized a handgun, a rifle, ammunition, gun carrying cases, and the vehicle's registration document.

A grand jury indicted Defendant on one count of being a felon in possession of a firearm and ammunition, in violation of ***1132** 18 U.S.C. § 922(g)(1). Defendant filed a motion to suppress the evidence found in his home and in the SUV. He argued that the residential search warrant was invalid because it violated the Fourth Amendment's particularity requirement and that the evidence found in the SUV should be suppressed

as fruit of the initial, unconstitutional search. The district court denied Defendant's motion.

After trial, the jury convicted Defendant. The district court sentenced him to 90 months' imprisonment, to be followed by a 3-year term of supervised release. Defendant now appeals the denial of his suppression motion.

II.

We accept the district court's factual findings unless they are clearly erroneous, but we review de novo the district court's ultimate determination of reasonableness under the Fourth Amendment. *United States v. Burgess*, 576 F.3d 1078, 1087 (10th Cir. 2009).

III.

As he did before the district court, Defendant contends that the residential search warrant lacked particularity, rendering the search of his home unconstitutional and requiring suppression of the evidence discovered as a result of the initial illegality. Meanwhile, the Government argues that the residential search warrant was valid and that, even if it wasn't, both the severability doctrine and the good-faith exception to the exclusionary rule save the evidence from suppression.

We begin our analysis by considering the validity of the residential search warrant and determine that it violated the Fourth Amendment's particularity requirement. We next consider whether the severability doctrine applies and conclude that the warrant is not a good candidate for this remedy. Finally, rather than decide whether officers relied on the invalid warrant in good faith, we remand for the district court to resolve underlying factual disputes and fully address the issue in the first instance.

A.

Defendant first argues that the search warrant for his home was invalid because it failed to describe with particularity the things to be searched for and seized. We agree.

1.

Our analysis begins, as it must, with the Fourth Amendment's text. The Fourth Amendment provides that "no Warrants shall issue" without "particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This particularity requirement, as it has come to be known, was most immediately the product of contemporary revulsion against a regime of general warrants that gave British officials carte blanche to search and seize property of American colonists. *Stanford v. Texas*, 379 U.S. 476, 481–82, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). The Framers constitutionalized the requirement to ensure that a "search will be carefully tailored to its justifications" and "will not take on the character of the wide-ranging exploratory searches" English kings once favored. *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987). To this end, a search warrant must "describe the items to be seized with as much specificity as the government's knowledge and circumstances allow." *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988).

The warrant here targeted some particular items but also included a catch-all phrase authorizing the search and seizure of "[a]ny item identified as being ***1133** involved in crime." Wisely, the Government does not contest that this language, on its face, would be anything but a license for the sort of general rummaging outlawed by the Fourth Amendment. The Government's claim, instead, is that under a natural reading of the warrant, "[a]ny item identified as being involved in crime" actually means "any item identified as being involved in the vehicle shooting under investigation."

It is true, as the Government emphasizes, that we construe search warrants in a practical and commonsense fashion, avoiding a hypertechnical reading of their terms. *Leary*, 846 F.2d at 600. A search warrant need not meet the rigors of Strunk, White, Roget, Merriam, and Webster to satisfy the particularity requirement. *United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009). But the problem here is that no reasonable construction of the residential search warrant —be it technical, practical, or otherwise—can sustain the Government's interpretation.

For one thing, the word "crime" does not necessarily mean a single act or specific incident constituting an offense punishable by law, as the Government suggests. Depending on how the word is used, "crime" means such acts "collectively," Webster's New World College Dictionary 328 (3d ed. 1997), or "criminal activity" in general, Random House Dictionary of the English

Language 476 (2d unabridged ed. 1987); *see also* American Heritage Dictionary of the English Language 313 (New College ed. 1978) (defining "crime" as "[u]nlawful activity in general"). One might say, for example, that "[t]he profits of crime are untaxed," *Crime*, Oxford English Dictionary (3d ed. 2010) (accessed online) (defining "crime" as criminal "acts collectively"), or that "efforts to fight crime" too often go unrewarded, *Crime*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/crime (last visited April 27, 2021) (defining "crime" as "criminal activity"); *see also* Random House Dictionary of the English Language, *supra*, at 476 (noting the same usage). In those sentences, the word "crime" does not mean a specific act or incident punishable by law, but criminal activity in general. So too with the search warrant for Defendant's home.

The residential search warrant's catch-all phrase does not refer to "the crime," which could indicate a nexus exists between "[a]ny item" sought and the specific offense that prompted the warrant. Nor does the catch-all phrase contain the words "a crime," which might suggest, given proper context, that it covers all suspected offenses specified elsewhere. The residential search warrant, instead, uses the prepositional phrase "in crime," which more naturally means criminal activity in general. *See Pennsylvania v. Ashe*, 302 U.S. 51, 54–55, 58 S.Ct. 59, 82 L.Ed. 43 (1937) (using the phrase "in crime" to mean crime generally). Thus, the warrant's plain language authorized officers to search for and seize evidence of *any* crime.

There is more. The language and structure of the search warrant, taken as a whole, indicate that the phrase "[a]ny item identified as being involved in crime" has broad meaning. Those words are not tacked onto or linked with any of the other operative sentences describing the items to be searched for and seized. Rather, they sit by themselves under Attachment B's "MISCELLANEOUS" heading, which suggests they authorized officers to search for items different than those expressly listed elsewhere. "Differences such as subject headings and paragraph formation might seem insignificant, but if we are to follow our command of reading each part of the warrant in context, these structural indicators are useful tools." *Otero*, 563 F.3d at 1133. And when these structural ***1134** features are considered in the context of the overall warrant, they indicate the catch-all provision was subject to no affirmative limitations other than that the items sought must be evidence of criminal activity.

A notable omission in the language of the residential search warrant confirms this interpretation. When a warrant does not otherwise describe the evidence to be searched for and seized with sufficient particularity, that gap can sometimes be filled if the warrant specifies the crime under investigation. *See, e.g.*, *Burgess*, 576 F.3d at 1083 (upholding a warrant authorizing a search for "evidence to show the transportation and delivery of controlled substances"); *United States v. Brooks*, 427 F.3d 1246, 1252 (10th Cir. 2005) (upholding a warrant authorizing officers to search for "evidence of child pornography"). In other words, a warrant may satisfy the particularity requirement if its text constrains the search to evidence of a specific crime such that it sufficiently narrows language that, on its face, sweeps too broadly. *Compare United States v. Robertson*, 21 F.3d 1030, 1032 (10th Cir. 1994) (concluding that a warrant authorizing agents to search for and seize four items specifically mentioned "and other instrumentalities and fruits of the crime of armed carjacking" was sufficiently particularized), *with Leary*, 846 F.2d at 601–02 (holding that a reference to two federal statutes did not sufficiently limit the search because those statutes cover a broad range of activity).

Had the warrant here specified that the search of Defendant's home was being undertaken in connection with the vehicle shooting, it might be possible to read the catch-all phrase, in context, as authorizing a search only for evidence related to that crime. But the warrant didn't do that. Nowhere does the warrant reference any specific offense—let alone the particular firearm-related crime under investigation. In fact, the warrant never even mentions the vehicle shooting. To adopt the Government's interpretation, then, we would have to rewrite the warrant to include what it lacks: a reference to the targeted crime(s). We of course can't do that.

The Government tries to head off this conclusion by arguing that its construction of the residential search warrant is consistent with the Supreme Court's decision in *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). But the Government's reliance on *Andresen* is misplaced. In *Andresen*, the challenged warrants listed several items related to a specific real estate transaction involving "Lot 13T" and then closed with the phrase: "together with other fruits, instrumentalities and evidence of crime at this (time) unknown." *Id.* at 479, 96 S.Ct. 2737. Immediately preceding the allegedly problematic catch-all phrase, the warrant referred to the specific crime under investigation: "the crime of false pretenses, in violation of Article 27, Section 140, of the Annotated Code of Maryland." *Id.* at 480 n.10, 96

S.Ct. 2737. Accordingly, the Court found "it clear from the context that the term 'crime' in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T." *Id.* at 480–81, 96 S.Ct. 2737.

Andresen lends no succor to the Government's position here because the search warrant for Defendant's home does not tie any of the items sought for seizure to a specific crime. All the warrant says is that probable cause existed to believe the things to be searched for and seized *either*

- "ha[d] been used as a means of committing a criminal offense,"
- were "illegal to possess,"
- "[w]ould be material evidence in a subsequent criminal prosecution, or required, authorized or permitted by a statute of the State of Colorado,"

***1135** • "[were] kept, stored, transported, sold, dispensed, or possessed in violation of state law under circumstances involving a serious threat to the public safety, or order, or to the public health, *or*"

- "would aid in the detection of the whereabouts of or in the apprehension of a person for whom a lawful arrest order is outstanding."

Suppl. ROA, Vol. I at 47 (emphasis added). This broad, disjunctive language provides no context from which to constrain the search to evidence of a specific crime. *See Cassady v. Goering*, 567 F.3d 628, 635 (10th Cir. 2009).

Read as a whole, the warrant told officers they could search for evidence of any crime rather than only evidence related to the vehicle shooting. So open-ended is the description that the warrant can only be described as a general one, akin to the instruments of oppression vivid in the memory of newly independent Americans when the Fourth Amendment was adopted. *See Garrison*, 480 U.S. at 84, 107 S.Ct. 1013. We addressed a search warrant with a similar catch-all phrase in *Cassady v. Goering*. There, we invalidated a warrant that listed "specific items mostly related to a narcotics operation" but also contained a catch-all phrase authorizing officers to search for "all other evidence of criminal activity." 567 F.3d at 635. We have no basis to reach a different conclusion here. For the reasons just given, the warrant to search Defendant's home flubbed the Fourth Amendment's particularity requirement.

2.

The Government urges us to reach a contrary conclusion about the validity of the residential search warrant. It gives several reasons why the affidavit submitted in support of the warrant application, which details the vehicle shooting and the investigation that followed, supplies the required particularity. But not one of them holds water.

A supporting affidavit can sometimes cure a warrant's lack of particularity. *Leary*, 846 F.2d at 603. But to remedy the defect, two requirements must be met: (1) the warrant and the affidavit must be attached; and (2) the warrant must expressly incorporate the affidavit. *Id.* As to the latter requirement, a warrant does not incorporate an affidavit merely by mentioning the affidavit or reciting that the magistrate judge found probable cause to authorize the search. *See Groh v. Ramirez*, 540 U.S. 551, 557–58, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). Instead, "the search warrant must expressly refer to the affidavit *and* incorporate it by reference using suitable words of reference." *United States v. Williamson*, 1 F.3d 1134, 1136 n.1 (10th Cir. 1993) (emphasis added) (quoting *Leary*, 846 F.2d at 603).

Officer Menter's affidavit may have been physically attached to the search warrant, as the district court found, but the warrant did not incorporate the affidavit. The warrant mentions the affidavit only once, noting that Officer Menter "has made an Application and Affidavit to the Court for the issuance of a Search Warrant." To be sure, this lone notation does not suggest the affidavit was incorporated into the warrant. And nowhere else does the warrant use suitable words of reference to expressly incorporate the affidavit.

The Government conceded as much before the district court. But now it reverses course, claiming the warrant incorporated the affidavit because it provides that "probable cause is found for the issuance of a Search Warrant to search the person(s) or premises specified in the application." That language, the Government insists, incorporated the supporting affidavit ***1136** under this court's "intervening precedent" in *United States v. Sadlowski*, 948 F.3d 1200 (10th Cir. 2020). Appellee's Br. at 26. We are not persuaded.

Even if *Sadlowski* qualifies as an "intervening" precedent in this context—a dubious proposition, *see United States v. Titties*, 852 F.3d 1257, 1264 n.5 (10th Cir. 2017)—it does not help the Government here. The warrant in *Sadlowski*

not only authorized officers to search "the persons and/or place described in the *affidavit*," 948 F.3d at 1205 (emphasis added) (brackets omitted), but also provided: "A copy of the Affidavit is attached and made a part of this Search Warrant," [1] Mot. to Suppress Evid., Ex. 1, *United States v. Sadlowski*, No. 1:16-cr-00847-JCH (D.N.M. Aug. 18, 2016), ECF No. 38-1. Given such language, it is unsurprising we said that "the warrant plainly incorporated the underlying affidavit." *Sadlowski*, 948 F.3d at 1205. In visible contrast to *Sadlowski*, the warrant to search Defendant's home plainly did *not* incorporate the supporting affidavit.

The rest of the language in the residential search warrant confirms this conclusion. Although the warrant did not expressly incorporate Attachment A (the affidavit) by reference, it did the opposite with Attachment B. As for the things to be searched for and seized, the warrant provides: "See Attachment 'B' which is hereby incorporated in reference." This language, as a matter of common sense as well as logic, shows that the warrant's drafter knew how to use appropriate words of incorporation. *Cf. United States v. Sanders*, 796 F.3d 1241, 1250 (10th Cir. 2015) (invoking the negative-implication canon, under which the expression or inclusion of one thing implies the exclusion of others, in the Fourth Amendment context). It also dispels any doubt that the affidavit was not expressly incorporated into the warrant. [2]

Relying on our decision in *United States v. Ortega-Jimenez*, 232 F.3d 1325 (10th Cir. 2000), the Government says the unincorporated affidavit can still cure the facially invalid warrant to search Defendant's home. This is so, the Government maintains, because the officer who prepared the affidavit was among the officers who executed the search. There are several problems with this argument.

First, and foremost, the Fourth Amendment by its terms requires that the *warrant*—not the supporting documents presented to the judicial officer asked to issue the warrant—particularly describe the things to be seized. U.S. Const. amend. IV. And for good reason: the description of what is sought to be seized is written in, or incorporated into, the warrant to ensure that the executing officer(s) stay within the specific bounds set by the issuer. *Leary*, 846 F.2d at 600. That important function would not necessarily be vindicated if we allowed an unincorporated affidavit, rather than the warrant itself, to dictate what can be searched for and seized. To the contrary, doing so ***1137** would create a danger that officers will conduct a search that goes beyond constitutional limits. By the same token, without clear incorporation of an affidavit into a search warrant, we cannot simply assume the former shapes the latter. Otherwise, we might indeed elevate the author of the unincorporated affidavit over the warrant's issuer, thereby transforming the independent magistrate into little more than a rubber stamp.

Second, *Ortega-Jimenez* has little, if any, bearing on the question before us because it involved a dispute about whether a search exceeded the scope of a "facially valid" warrant's particularized terms, not whether the warrant lacked particularity. 232 F.3d at 1329. The Government attempts to brush aside this distinction, suggesting that scope and particularity are two sides of the same coin. Not so. *See United States v. Angelos*, 433 F.3d 738, 745–46 (10th Cir. 2006) (treating particularity and scope as separate inquiries and concluding that a search conducted pursuant to a warrant that "met the Fourth Amendment's particularity requirement" was unconstitutional because it exceeded the warrant's scope). We have never applied *Ortega-Jimenez* in the particularity context, and we decline the Government's invitation to do so today.

Third, *Ortega-Jimenez*'s suggestion that "an officer's knowledge of the terms of [an] affidavit [can] cure a lack of particularity on the face of a warrant," 232 F.3d at 1329, is based on a misreading of our decision in *United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998). *Simpson* addressed whether a search went beyond the scope of a warrant that contained an internal inconsistency about the place to be searched, which was described in detail, not whether the warrant lacked particularity. 152 F.3d at 1247–48. Although *Simpson* noted, in dicta, that the affidavit supported the district court's conclusion that the officer acted "in good faith," we did not suggest that an unincorporated affidavit can save an insufficiently particularized warrant. *See id.* at 1248. On the contrary, this court declared just the opposite: that an affidavit "not physically attached to the warrant nor specifically incorporated into the warrant ... cannot cure a lack of particularity." *Id.* (citing *United States v. Dahlman*, 13 F.3d 1391, 1395 (10th Cir. 1993)).

Finally, to the extent *Ortega-Jimenez* can be read to hold otherwise, it is at odds not only with *Simpson* itself but with earlier, settled precedent. In *Leary*, for example, the law enforcement agent who produced the supporting affidavit also executed the search warrant. 846 F.2d at 594. Yet we refused to consider the affidavit when determining whether the warrant lacked particularity. *Id.* at 603–04. So too in *Williamson*. 1 F.3d at 1135, 1136 & n.1. "In cases of

conflicting circuit precedent our court follows earlier, settled precedent over a subsequent deviation therefrom." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1334 n.1 (10th Cir. 2014) (cleaned up). And as earlier, settled precedent makes clear here, particularity in Officer Menter's affidavit could not cure the defect in the warrant for Defendant's home because the warrant did not expressly incorporate the affidavit.

B.

Although the residential search warrant's catch-all phrase sweeps too broadly, this constitutional infirmity does not necessarily doom the entire warrant. Sometimes we can apply the doctrine of severability to save a facially invalid warrant. *United States v. Sells*, 463 F.3d 1148, 1154–55 (10th Cir. 2006). Under this doctrine, we sever the offending portion from the warrant, suppress any evidence collected under it, and admit the evidence ***1138** collected under the valid portions that remain. *Id.* at 1155.

We apply a multistep analysis to determine whether a warrant is severable. First, we divide the warrant in a commonsense way. *Id.* at 1155–56. Then we examine the validity of each section. *Id.* at 1156–57. If at least one section passes constitutional muster—meaning it satisfies the probable cause and particularity requirements of the Fourth Amendment—we determine whether the valid parts are distinguishable from the invalid ones. *Id.* at 1158. When "each of the categories of items to be seized describes distinct subject matter in language not linked to language of other categories, and each valid category retains its significance when isolated from [the] rest of the warrant, then the valid portions may be severed from the warrant." *Id.*

"But just because the portions of a warrant *can* be severed does not necessarily mean we *may* sever them in all instances." *United States v. Cotto*, 995 F.3d 786, 799 (10th Cir. 2021). Even when a part of a warrant is valid and distinguishable, blanket suppression may still be required if "the invalid portions so predominate the warrant that the warrant in essence authorizes a general, exploratory rummaging in a person's belongings." *Cassady*, 567 F.3d at 638 (quoting *Sells*, 463 F.3d at 1158). In those situations, courts may admit seized items only when the valid and distinguishable portions "make up the greater part of the warrant." *Sells*, 463 F.3d at 1158 (quoting *United States v. Naugle*, 997 F.2d 819, 822 (10th Cir. 1993)).

This "greater part" inquiry "focuses on the warrant itself rather than upon an analysis of the items actually seized during the search." *Id.* at 1159. In conducting the inquiry, we use a commonsensical approach that examines both the quantitative and qualitative aspects of the valid parts of the warrant relative to the invalid parts. *Id.* at 1160. So while we will tally the valid and invalid parts of the warrant, we must also examine "the relative scope and invasiveness" of each part. *Id.*

Applying the severability framework here, the residential search warrant already did the first step for us. The warrant is divided into four separate categories of items to be searched for and seized: "GENERAL INFO"; "GUNS INVOLVED"; "VEHICLE"; and "MISCELLANEOUS." Because this division is both logical and sensible, we have no reason to divide the warrant further. *See Naugle*, 997 F.2d at 820–22 (dividing a list of items into four general categories); *Cassady*, 567 F.3d at 638 (dividing the warrant "into three general parts"). Breaking down Attachment B's sections so that each of their thirteen bullet points is a separate part, as the Government suggests, would only risk an improper "hypertechnical" reading of the warrant. *See Sells*, 463 F.3d at 1156.

Turning to step two, we evaluate each section of the warrant to determine whether it is valid. Because there is no dispute the "general info" section is valid, we will assume that it is. And we already concluded that the "miscellaneous" section, which authorized officers to search for and seize "[a]ny item identified as being involved in crime," is invalid because it lacks particularity. That leaves the "guns involved" and "vehicle" sections.

We agree with Defendant that the "vehicle" section is invalid. This section authorized officers to search for and seize "[i]ndicia of ownership of vehicle" and "[v]ehicle registration." Use of the singular "vehicle" suggests that this part of the warrant targeted only evidence related to one vehicle. But it does not identify any particular vehicle, even though Officer Menter had specific information about the vehicle involved ***1139** in the shooting when he authored the warrant application. As a result, the warrant did not "describe the items to be seized with as much specificity as the government's knowledge and circumstances allow." *Leary*, 846 F.2d at 600.

We disagree with Defendant about the "guns involved" section of the warrant. This section authorized officers to

search for "[a]ny and all firearms" and "any and all ammo," as well as five other types of items related to possessing a firearm. In *United States v. Pulliam*, we held that a warrant authorizing officers to search for, among other things, "[a]ny and all firearms and ammunition" was sufficiently particularized because the defendant was a felon and felons cannot legally possess firearms. 748 F.3d 967, 972 (10th Cir. 2014). A similar conclusion fits this case.

Both Defendant's suspected involvement in the vehicle shooting and status as a convicted felon were disclosed in the affidavit submitted as part of the warrant application. The affidavit also noted that Defendant "is a confirmed gang member with the Gangster Disciples," has prior felony convictions involving weapons, and was the suspect in several other investigations, including two felony assaults. Officer Menter concluded his affidavit by stating that, based on his training and experience, "parties with gang affiliations and a history of violent criminal behavior" are "likely" to "possess more than one firearm." Given this information, the "guns involved" section particularly describes evidence for which probable cause existed: any and all firearms and ammunition, along with related paraphernalia. "No specific description of a gun [or ammo] was necessary." *Pulliam*, 748 F.3d at 972.

Our next step is to distinguish the valid parts of the warrant from the invalid parts. That's an easy task when, like here, the categories of items targeted by the warrant make no reference to any of the other categories and all deal with different types of property. *Cotto*, 995 F.3d at 800. The first and second categories of items ("general information" and "guns involved") to be searched for and seized under the warrant are valid and distinguishable from the third and fourth categories of the warrant ("vehicle" and "miscellaneous") that are invalid.

The only remaining question as to severability is whether the valid portions "make up the greater part of the warrant." *Sells*, 463 F.3d at 1160. They do not. Because the warrant has two valid and two invalid sections, we might have had a draw if the "greater part" inquiry was limited to merely counting parts. But given the scope and invasiveness of the invalid parts—particularly the "miscellaneous" catch-all section authorizing officers to search for and seize "[a]ny item identified as being involved in crime"—the valid parts do not constitute the greater part of the warrant.

Cassady, once again, is instructive. There we divided the warrant into "three general parts: (1) the section authorizing seizure of narcotics and related illegal contraband; (2) the section authorizing seizure of all other evidence of criminal activity; and (3) the section authorizing seizure of [the defendant's] personal property if its seizure is authorized on a number of enumerated grounds totally unrelated to a narcotics operation." 567 F.3d at 638. We assumed the first section was valid and found the second and third sections invalid. *Id.* at 638–39. We then held that "the invalid portions of the warrant [were] sufficiently 'broad and invasive' so as to 'contaminate the whole warrant.' " *Id.* at 641 (quoting *Sells*, 463 F.3d at 1151). That's because the invalid portions "permitted search and seizure of any evidence of *any* crime," *id.* at 642, "whether or not related to [the underlying crime], and largely subsume[d] those provisions that would have ***1140** been adequate standing alone," *id.* at 641 (quoting *Voss v. Bergsgaard*, 774 F.2d 402, 406 (10th Cir. 1985)).

The same circumstances are present here. The residential search warrant's catch-all section authorized the search and seizure of evidence of any crime—"be it murder, robbery, stolen property, fraud, tax evasion, or child pornography, to name just a few examples." *See id.* at 642. Thus, the invalid portions of the search warrant are just as broad and invasive as the tainted provisions in the *Cassady* warrant. So even though some portions of the warrant to search Defendant's home are valid and distinguishable, those portions do not make up the greater part of the warrant.

The Government makes two contrary arguments, both unconvincing. First, it attempts to distinguish *Cassady* as a civil suit where the social cost of total suppression was not present. This argument is a nonstarter. While *Cassady* was civil in nature, we "conclude[d] that the severability doctrine would not apply [t]here even if th[e] appeal were from a criminal suppression hearing." *Id.* at 637. Second, the Government contends that the officers in this case did not treat the residential search warrant as a general one because their search was limited to firearm-and-vehicle-related evidence. Even if that's true, the point is irrelevant for the purpose of the "greater part" inquiry. That inquiry turns on what the warrant itself authorized, not "the extent of the actual search or the number of items seized." *Sells*, 463 F.3d at 1159. And here, the warrant empowered officers to search for evidence of any crime. The warrant is therefore both invalid and non-severable.

C.

We have concluded that the residential search warrant violated the Fourth Amendment's particularity requirement and cannot be severed. Yet the question of remedy remains.

1.

In general, evidence "obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion." *Segura v. United States*, 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984). But as with most general rules, this one has a few exceptions. The Government urges us to apply one of them here: the good-faith exception to the exclusionary rule.

The district court initially said it would not address the good-faith exception because it found the residential search warrant sufficiently particularized. But later the court summarily concluded that even if the warrant was invalid, Officer Tomczyk reasonably relied on it when she conducted the initial sweep of Defendant's home and saw the guns in the SUV parked under the carport. Because that's all the district court said about the subject, the reasoning behind its conclusion is unclear.

It may be within our discretion to affirm the denial of Defendant's suppression motion based on the good-faith exception. *See United States v. Mosley*, 743 F.3d 1317, 1324 n.2 (10th Cir. 2014). But it is no less an option for us to remand for the district court to fully address the issue in the first instance. And in this case, we think that is the more prudent course.

The inquiry on the good-faith exception requires not only an examination of the warrant's text but also a careful consideration of the totality of the circumstances to determine whether officers reasonably relied on the invalid warrant. *Russian*, 848 F.3d at 1244, 1246. And here, the parties disagree on some potentially material aspects of the inquiry, such as whether officers limited their search to evidence ***1141** only related to the vehicle shooting. The parties also dispute whether Officers Keith Wrede and Aaron Lloyd, who assisted Officer Menter search Defendant's home, either read the warrant or reviewed any of its supporting documents before they executed the search. It's also unclear from the record whether Officer Wrede or Officer Lloyd were otherwise informed of the warrant's contents or briefed on what items to look for during the search.

The district court noted that Officer Menter's testimony on those subjects was scattered (neither Officer Wrede nor Officer Lloyd testified), but it did not make any relevant factual findings. In these circumstances, we think it wise to allow the district court to do so given its superior resources for factfinding and the fact-intensive nature of the good-faith inquiry. *See United States v. Gaines*, 918 F.3d 793, 802–03 (10th Cir. 2019) (remanding for the district court to resolve factual disputes and decide reasonable suspicion in the first instance); *United States v. Nelson*, 868 F.3d 885, 892 (10th Cir. 2017) (declining to consider whether the good-faith exception applied "because the record lack[ed] factual development on key issues").

Even if the district court declines to take additional evidence on remand, the good-faith question is close on the current record. And before issuing a definitive decision, this court would benefit from a district court judgment that addresses the implications of previously unaddressed facts. In particular, is it fair to say Officer Tomczyk reasonably relied on the residential search warrant when she testified that she never received a copy of the warrant or reviewed Officer Menter's affidavit? Maybe the answer is yes, since Officer Tomczyk was on Defendant's property only to conduct a protective sweep, not to search for any items. Or perhaps Officer Tomczyk relied on the warrant in good faith because her supervisor, Sergeant Wolf, had reviewed the entire warrant package and directed her to lead the SWAT team in his stead. Then again, maybe not, as the warrant was the supposed lawful basis for Officer Tomczyk's entry into Defendant's property.

We won't dwell on the point further, except to say that the good-faith question should get the full vetting it deserves so this court ultimately might be in a position to offer a judgment with the degree of confidence the question merits. Mindful that we are "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005), we will remand for the district court to determine whether the good-faith exception saves the incriminating evidence against Defendant from suppression.

2.

But wait, says the Government. It argues that even if the district court erred by admitting evidence discovered in Defendant's home, the guns and ammunition found in the SUV are sufficient alone to uphold his conviction. As

the Government correctly points out, Fourth Amendment violations, like most constitutional violations, "do not require reversal of a conviction if the court concludes the error was harmless beyond a reasonable doubt." *Russian*, 848 F.3d at 1248. To apply that rule here, however, the evidence found in the SUV must have at least been admissible. *See id.* This is where the Government's argument runs into a roadblock.

The exclusionary rule generally applied in Fourth Amendment cases requires courts to suppress not only evidence obtained as a "direct result of an illegal search or seizure" but also "evidence later discovered and found to be derivative of an illegality." ***1142** *Utah v. Strieff*, —— U.S. ——, 136 S. Ct. 2056, 2061, 195 L.Ed.2d 400 (2016) (quoting *Segura*, 468 U.S. at 804, 104 S.Ct. 3380). This so-called "fruit of the poisonous tree" doctrine does not demand a particularly tight causal chain between the illegal search and the discovery of the evidence sought to be suppressed. To satisfy the threshold causation requirement, a defendant need only show that "the evidence sought to be suppressed would not have come to light but for the government's unconstitutional conduct." *United States v. Nava-Ramirez*, 210 F.3d 1128, 1131 (10th Cir. 2000).

But-for causation, however, is only a necessary condition for suppression; it is not a guarantee the incriminating evidence will be suppressed. *United States v. Shrum*, 908 F.3d 1219, 1233 (10th Cir. 2018). Once a defendant establishes but-for causation, the Government may avoid suppression by breaking the causal chain. To do so, the Government must show that "the incriminating evidence was discovered by means sufficiently distinguishable from the initial illegality to be purged of the primary taint." *Id.*

Here, Defendant has established the requisite causal chain between illegal police conduct and the incriminating evidence he seeks to suppress. But for the invalid residential search warrant, Officer Tomczyk would not have entered the curtilage of Defendant's home and seen the guns in the SUV parked under his carport. *See Collins v. Virginia*, —— U.S. ——, 138 S. Ct. 1663, 1670–71, 201 L.Ed.2d 9 (2018) (holding that a partially enclosed carport constituted curtilage of the defendant's home). And had Officer Tomczyk not seen those guns during the unlawful invasion of the home's curtilage, *see id.*, Officer Menter would not have used that information to procure the vehicle warrant, which led directly to the seizure of the evidence from the SUV.

The Government has made little effort to break the causal chain between the unconstitutional conduct and the evidence found in the SUV. It has not invoked the "attenuation" doctrine, which would allow it to avoid suppression by showing that "the connection between unconstitutional police conduct and the evidence is remote." *Strieff*, 136 S. Ct. at 2061. Nor has the Government argued that the guns and ammunition found in the SUV would have been discovered even without the constitutional violation. *See Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (adopting the inevitable-discovery doctrine).

In addition, the Government has not pointed to an independent source—that is, "a source wholly separate" from the initial unconstitutional intrusion—for the discovery and seizure of the evidence. *Shrum*, 908 F.3d at 1235. Although Officer Menter obtained a second warrant to search the SUV, he used information obtained during the illegal entry into the curtilage of Defendant's home to secure the warrant. The Government has not explained how, under these circumstances, the warrant to search the SUV could serve as an independent source that purged the evidence of the primary taint arising from the unlawful entry. *See Segura*, 468 U.S. at 814, 104 S.Ct. 3380 (applying the independent-source doctrine because "[n]one of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment"). And because it is the Government's burden to show the independent-source doctrine applies, its failure to do so prevents us from upholding the denial of the suppression motion on that theory. *Shrum*, 908 F.3d at 1235.

The Government's remaining arguments to avoid suppression of the evidence found in the SUV assume either the validity of ***1143** the residential search warrant—a faulty premise—or that Officer Tomczyk relied on the invalid warrant in good faith, which has yet to be determined. So, at this point, we cannot conclude that any error in denying Defendant's motion to suppress the evidence found in his home was harmless beyond a reasonable doubt.

IV.

For these reasons, we VACATE the denial of Defendant's suppression motion and REMAND for the district court to determine whether the good-faith exception to the exclusionary rule saves the incriminating evidence against Defendant from suppression.

All Citations

998 F.3d 1125

Footnotes

1 Although the search warrant in *Sadlowski* is not part of the record on appeal in this case, we take judicial notice of it under Federal Rule of Evidence 201. *United States v. Duong*, 848 F.3d 928, 930 n.3 (10th Cir. 2017) ("taking judicial notice of all filings of the parties and rulings of the district court" in a different case).

2 In addition to signing the residential search warrant itself, the issuing judge signed Officer Menter's affidavit. The state judge's signature at the bottom of the affidavit cannot substitute for express incorporation or otherwise save the warrant from facial invalidity. *See* *United States v. Russian*, 848 F.3d 1239, 1243, 1246–47 (10th Cir. 2017) (concluding that a warrant lacked particularity even though it referenced the supporting affidavit, which was signed by the magistrate judge and particularly described the place to be searched and the things to be seized).

582 F.Supp.3d 849
United States District Court, D. Colorado.

UNITED STATES of America, Plaintiff,
v.
Perry Wayne SUGGS, Jr., Defendant.

Criminal Case No. 18-cr-089-WJM
|
Signed 01/25/2022

Synopsis

Background: Defendant indicted on charge of being a felon in possession both of firearm and of ammunition filed motion to suppress, alleging that evidence against him was obtained through unconstitutionally overbroad search warrants. The United States District Court for the District of Colorado, William J. Martinez, J., 371 F.Supp.3d 931, denied motion, and after he was convicted of the crimes charged on jury verdict, the defendant appealed from the suppression ruling. The United States Court of Appeals for the Tenth Circuit, 998 F.3d 1125, vacated and remanded.

Holdings: On remand, the District Court held that:

warrant was not so facially deficient that good-faith exception to exclusionary rule could not apply;

officer who executed search having been involved in investigation and having prepared warrant application and affidavit supported application of good-faith exception to exclusionary rule;

officers having confined search to the evidence specified in attachment to warrant supported application of good-faith exception;

evidence that officer who executed search warrant told assisting officers what they were looking for before they started searching supported application of good-faith exception;

evidence that officer who performed protective sweep never received a copy of search warrant did not militate in favor of suppressing evidence;

magistrate judge having signed officer's warrant application and affidavit supported application of good-faith exception; and

excluding evidence would not serve the underlying purpose of the exclusionary rule.

Motion denied.

Procedural Posture(s): Pre-Trial Hearing Motion.

Attorneys and Law Firms

***852** Emily May Treaster, Elizabeth Jane Young, Hetal Janak Doshi, Karl L. Schock, Federal Agency Attorneys, U.S. Attorney's Office, Denver, CO, for Plaintiff.

ORDER ON REMAND FROM THE TENTH CIRCUIT APPLYING THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE AND DENYING DEFENDANT'S MOTION TO SUPPRESS

William J. Martinez, United States District Judge

The Government charges Defendant Perry Wayne Suggs, Jr., with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). (ECF No. 24.) This case is before the Court on remand from the Tenth Circuit Court of Appeals, with directions to address whether the good faith exception to the exclusionary rule saves the incriminating evidence from suppression. *United States v. Suggs*, 998 F.3d 1125, 1143 (10th Cir. 2021).

In connection with this mandate, the Court received briefing from the parties, including the United States' Brief In Support of Application of the Good Faith Exception to the Exclusionary Rule ("Government's Brief") (ECF No. 239), Brief of Defendant Suggs ("Defendant's Brief") (ECF No. 241), and the United States' Reply In Support of Application of the Good Faith Exception to the Exclusionary Rule [ECF No. 239] ("Government's Reply") (ECF No. 242).

For the following reasons, the Court finds that the good faith exception to the exclusionary rule applies in this case, and Defendant's Motion to Suppress (ECF No. 54) should still be denied on that basis.

I. BACKGROUND AND PROCEDURAL HISTORY

The Court presumes the parties' familiarity with the factual and procedural background of this case and only recites the following background and procedural history as is necessary to resolve the issue before the Court.

Following a February 25, 2019 evidentiary hearing (ECF No. 77), on March 11, 2019, the Court issued its Order Denying Motion to Suppress (ECF No. 89). *United States v. Suggs*, 371 F. Supp. 3d 931 (D. Colo. 2019), *vacated and remanded*, 998 F.3d 1125 (10th Cir. 2021). In that Order, the Court denied Defendant's Motion to Suppress evidence seized from his residence and a vehicle on the property on the grounds that the residential and vehicle warrants, which contained challenged language allowing law enforcement to search for "Any item identified as being involved ***853** in crime," were sufficiently particular and did not violate the Fourth Amendment. (ECF No. 89 at 4, 28.)

Thereafter, a jury trial was conducted from March 25, 2019 through March 29, 2019, after which the jury convicted Defendant of the sole count in the Superseding Indictment. (ECF Nos. 125, 127–30, 136.) On December 26, 2019, Defendant appealed. (ECF No. 187.)

On June 2, 2021, the Tenth Circuit vacated the denial of Defendant's suppression motion and remanded the case for this Court to determine whether the good faith exception to the exclusionary rule saves the incriminating evidence against Defendant from suppression. *Suggs*, 998 F.3d at 1143. In so holding, the Tenth Circuit concluded that the residential search warrant violated the Fourth Amendment's particularity requirement because the catch-all phrase authorizing the search and seizure of "[a]ny item identified as being involved in crime" swept too broadly. *Id.* at 1132–33, 1137. Specifically, the Tenth Circuit found that "no reasonable construction of the residential search warrant—be it technical, practical, or otherwise" could sustain a ruling that the warrant did not violate the Fourth Amendment's prohibition against general warrants. *Id.* at 1132–33.

Having found that the warrant lacked particularity, the Tenth Circuit addressed whether the good faith exception to the exclusionary rule applied. *Id.* at 1140. Although the Tenth Circuit noted that "[i]t may be within [its] discretion to affirm the denial of Defendant's suppression motion based on the good-faith exception," ultimately, the Tenth Circuit determined that the "more prudent course" was to remand for this Court to fully address the issue in the first instance. *Id.* First, the Tenth Circuit recited the legal standard for examining whether the good faith exception applies, stating that the "inquiry on the good-faith exception requires not only an examination of the warrant's text but also a careful consideration of the totality of the circumstances to determine whether officers reasonably relied on the invalid warrant." *Id.* Next, the Tenth Circuit provided some guidance for this Court to apply in its analysis of the good faith exception. The court delineated certain "potentially material aspects of the inquiry" on which it determined the parties disagree, including:

- whether officers limited their search to evidence only related to the vehicle shooting;
- whether Officers Keith Wrede [1] and Aaron Lloyd, who assisted Officer Adam Menter search Defendant's home, either read the warrant or reviewed any of its supporting documents before they executed the search; and
- whether Officer Wrede or Officer Lloyd were otherwise informed of the warrant's contents or briefed on what items to look for during the search.

Id. at 1140–41.

Additionally, the Tenth Circuit questioned whether "it [is] fair to say Officer Tomczyk reasonably relied on the residential search warrant when she testified that she never received a copy of the warrant or reviewed Officer Menter's affidavit." *Id.* at 1141. Critically, the court stated that "[e]ven if the district court declines to take additional evidence on remand, the good-faith question is close on the current record. And before issuing a definitive decision, this court would benefit from a district ***854** court judgment that addresses the implications of previously unaddressed facts." *Id.*

The mandate issued on June 24, 2021. (ECF No. 224.) At the July 29, 2021 status conference before the undersigned, Defendant was directed to inform the Court by August 27, 2021 as to whether he requested a second evidentiary hearing. (ECF Nos. 230, 232.) The Court received no such request from either party and similarly finds that another evidentiary hearing is not necessary to resolve the instant issue.

II. LEGAL STANDARD

"Even if a warrant fails to satisfy the Fourth Amendment's particularity requirement, the exclusionary rule should not be applied to suppress evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate judge that is ultimately deemed invalid." *United States v. Russian*, 848 F.3d 1239, 1246 (10th Cir. 2017) (citing *United States v. Leon*, 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). According to the Tenth Circuit, "[t]he rationale for *Leon*'s good faith exception is the underlying purpose of the exclusionary rule—namely, to deter police misconduct." *Id.* When an officer acts in good faith, there is nothing to deter. *Id.* (citation omitted). Thus, "the suppression of evidence obtained pursuant to a warrant should be ordered only in the unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.* (quoting *United States v. Riccardi*, 405 F.3d 852, 860 (10th Cir. 2005)).

But the officer's reliance on the defective warrant still must be objectively reasonable: the government is not entitled to the good faith exception when a warrant is "so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 922–23, 104 S.Ct. 3405. "The test is an objective one that asks 'whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.' " *United States v. Otero*, 563 F.3d 1127, 1134 (10th Cir. 2009) (quoting *Leon*, 468 U.S. at 922 n.23, 104 S.Ct. 3405). "Not every deficient warrant, however, will be so deficient that an officer would lack an objectively reasonable basis for relying upon it." *Id.* "Even if the court finds the warrant to be facially invalid...it 'must also review the text of the warrant and the circumstances of the search to ascertain whether the agents might have reasonably presumed it to be valid.' " *Riccardi*, 405 F.3d at 863 (quoting *United States v. Leary*, 846 F.2d 592, 607 (10th Cir. 1988)).

III. ANALYSIS

A. Text of the Warrant

First, the Court reviews the text of the warrant. The Court acknowledges that the Tenth Circuit found the catch-all phrase swept too broadly to pass muster under the Fourth Amendment. However, the Court determines that the warrant is not so "facially deficient" that a reasonably well-trained officer would have known the search was illegal.

Here, the warrant specifies the place to be searched and the things to be seized. (ECF No. 54-1.) The text of the warrant itself specifies that it is Defendant's residence that is to be searched: 2525 Nadine Drive, located in the City of Colorado Springs, County of El Paso, State of Colorado, 80916. (*Id.* at 2.) Additionally, in Attachment B there is a detailed list of things to be searched for and seized if found, including under the heading "GENERAL INFO," general photographs of the scene, indicia of residency, and identification ***855** which would identify any occupants of the residence; under the heading "GUNS INVOLVED," any and all firearms, any and all ammo, any documentation showing the ownership of a firearm, any and all sales records showing the purchase of a firearm, any projectiles, any and all spent shell casings, and any item commonly used to carry and transport a firearm (*i.e.* holster & gun carrying case, magazines, cleaning kits); under the heading "VEHICLE," indicia of ownership of vehicle and vehicle registration; and under the heading "MISCELLANEOUS," any item identified as being involved in crime. (*Id.* at 7.)

Although the final catch-all phrase dooms this warrant under the Tenth Circuit's particularity analysis, the Court finds that the good faith exception stretches more broadly in this instance. An objectively reasonable officer acting in good faith could have read the warrant—particularly the specific list of items to be seized—and interpreted it as restricting the scope of the search to items involved in the shooting under investigation. *United States v. Christie*, 717 F.3d 1156, 1165 (10th Cir. 2013).

Additionally, the Court agrees with the Government that Officer Menter's detailed description of the vehicle shooting and related investigation in the supporting affidavit bolsters the conclusion that he reasonably relied on the warrant in good faith. (ECF No. 54-1 at 3–6.) According to the Tenth Circuit, "[a]lthough a warrant application or affidavit cannot save a warrant from facial invalidity, it can support a finding of good faith, particularly where, as here, the officer who prepared the application or affidavit also executed the search." *Russian*, 848 F.3d at 1246 (citing *United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998) ("[T]he affidavit certainly supports the district court's conclusion that Deputy Johnson [the affiant] in good faith believed he was obtaining a warrant to search Simpson's residence as well as his person."); *see also United States v. Tracey*, 597 F.3d 140, 153 (3d Cir. 2010) ("We also note that the application of the good faith exception is appropriate because [Officer] Holler,

who drafted the narrower affidavit and was aware of its limits, led the search team at Tracey's home.")).

Moreover, as explained further below, the totality of the circumstances supports the Court's conclusion that the officers relied on the text of the warrant in good faith, despite the overly broad catch-all phrase.

B. Totality of the Circumstances

The Tenth Circuit observed that "the good-faith question is close on the current record." *Suggs*, 998 F.3d at 1141. While the Court agrees that the question is a close call, for the following reasons, the Court concludes that law enforcement's reliance on the warrant in this case was objectively reasonable.

First, Officer Menter was involved in the investigation, prepared the warrant, application, and affidavit, in which he identified the types of evidence which he intended to seize, and executed the search. (ECF No. 239 at 8.) As described above, a warrant application and affidavit can support a finding of good faith where, as here, the officer who prepared those documents also executed the search. *See Russian*, 848 F.3d at 1246; *Riccardi*, 405 F.3d at 864 ("officers executing the warrant were involved in the investigation throughout" is a factor in support of applying the *Leon* exception). This case is similar to *Otero*, in which the Tenth Circuit found that although the drafter of the warrant did not "accomplish her goals" of crafting a warrant that would authorize a search for certain evidence, "one can see how a reasonable officer might have thought that ***856** the limitations in the first portion of Attachment B would be read to also apply to the second portion." *Otero*, 563 F.3d at 1134. As in *Otero*, the Court finds that it is reasonable that Officer Menter believed the specific list of items to be seized applied to the entire warrant, which authorized a search for items related to the vehicle shooting alone, despite the overly broad catch-all phrase. Indeed, his testimony at the evidentiary hearing supports this conclusion. Officer Menter testified:

> Q: You also mentioned this last phrase under the title Miscellaneous. What did you understand that item to include?
>
> A: The miscellaneous of any item identified as being involved in the crime, I understood is anything related to the incident we were investigating.
>
> Q: Did you understand that to mean that you could look for any item identified as being involved in any crime?
>
> A: No.

(ECF No. 82 at 21.) Such testimony supports the application of the good faith exception, where Officer Menter, the drafter and executor of the warrant, was aware of its limits and, according to his unrebutted testimony under oath, acted consistently with that understanding.

To the extent Defendant cites *Cassady v. Goering*, 567 F.3d 628 (10th Cir. 2009), *United States v. Dunn*, 719 F. App'x 746 (10th Cir. 2017), and other cases to argue that the good faith exception should not apply (ECF No. 241 at 15), the Court finds this argument is without merit. In *Cassady*, the warrant authorized a search for "*all* possible evidence of *any* crime in *any* jurisdiction," and there, the officers "treated it as such" and searched for evidence of the crime under investigation *and* "all other evidence of criminal activity." 567 F.3d at 635, 641 (emphasis in original). In that manner, *Cassady* is distinguishable from this case, where Officer Menter testified that he understood the catch-all phrase to mean "anything related to the incident we were investigating" and that it did *not* mean he could search for any item being involved in any crime. (ECF No. 82 at 21.)

For the same reasons, the Court finds that *Dunn* is distinguishable. The *Dunn* warrant was "even broader than the one in *Cassady*," because it authorized a search for "not only any item, but also any item for any reason." 719 F. App'x at 752. Thus, the *Dunn* court concluded that no executing officer could reasonably rely on the warrant. However, in this case, the unrebutted testimony of the officers executing the search shows that they interpreted the phrase "any item as being involved in crime" as limited to the crime under investigation. Considering the totality of the circumstances, the Court finds that—despite the deficiency in the warrant's language identified by the Tenth Circuit in *Suggs*—the officers reasonably relied on the warrant in good faith.

Second, the Court examines "whether officers limited their search to evidence only related to the vehicle shooting," which is one of the factual disputes identified by the Tenth Circuit in *Suggs*. *See Suggs*, 998 F.3d at 1140–41. Here, the Court finds that the officers confined their search to the evidence specified in Attachment B of the warrant, which further indicates that they acted in good faith and in

objectively reasonable reliance on what they believed was a valid warrant. *See Russian*, 848 F.3d at 1247; *Otero*, 563 F.3d at 1136 ("The inspectors in this case had reason to believe the warrant was valid, considered themselves authorized to search only for evidence of crimes for which they had probable cause, and conducted their search accordingly."); *Riccardi*, 405 F.3d at 864 ("The officers remained within the terms of the warrant as well as the affidavit, and did not conduct a 'fishing ***857** expedition' beyond the scope of the authorized investigation.").

At the evidentiary hearing, Officer Menter testified that "we looked for stuff related to firearms." (ECF No. 82 at 47.) Moreover, this testimony is buttressed by the fact that there is no evidence that the officers seized anything other than firearms, ammunition, and other indicia of residency, all of which were listed in Attachment B. (ECF No. 239 at 12.) Had the officers seized, for example, evidence such as drugs, scales, baggies, or other evidence completely unrelated to the alleged shooting, the Court would likely reach a different conclusion. But here, the items seized were consistent with the alleged crime under investigation: a shooting involving a vehicle.

Third, the Court addresses "whether Officers Keith Wrede and Aaron Lloyd, who assisted Officer Menter search Defendant's home, either read the warrant or reviewed any of its supporting documents before they executed the search." *Suggs*, 998 F.3d at 1141. Relatedly, the Court examines "whether Officer Wrede or Officer Lloyd were otherwise informed of the warrant's contents or briefed on what items to look for during the search. *Id.*

In the Government's Brief, the Government points out that in the Order denying the motion to suppress, the Court noted that Officer Menter's testimony was "scattered" as to what he told Officer Lloyd. (ECF No. 239 at 9 (citing ECF No. 89 at 8 n.5).) Despite this observation, the Government cites testimony from the evidentiary hearing that the Court finds highly probative of what Officer Menter told both Officer Lloyd and Sergeant Wrede. Regarding Officer Lloyd, Officer Menter testified:

> Q. Are you aware of specifically what [Officer Lloyd] may or may not have been looking for?
>
> A. I informed him [of] the type of things we were looking for. Obviously indicia [of residency] and, you know, anything related to firearms. But other than that, I -- you know, I wasn't looking over his shoulder when he was doing his search.

(ECF No. 82 at 35.) Similarly, regarding what Sergeant Wrede was told in connection with the search, Officer Menter testified:

> Q. Okay. At the same -- the same questions for Sergeant Wrede: Are you aware of exactly where he was searching?
>
> A. I didn't -- I didn't watch everything he searched, but, you know, he was aware of this case and was aware of what we were looking for.

(*Id.* at 35–36.) Although it is true that Officer Menter could not recall precisely what he said to Officer Lloyd and Sergeant Wrede, the Court can reasonably infer from his testimony that these officers were aware of the vehicle shooting and that they were searching for items in connection with that incident, and only that incident.

Additional evidence demonstrating that Sergeant Wrede knew he was searching for evidence related to the shooting includes Bureau of Alcohol, Tobacco, Firearms, and Explosives Task Force Officer Adam Brewer's testimony explaining what Sergeant Wrede told him about the search. Officer Brewer testified that Sergeant Wrede played a supervisory role in this case when the initial investigation began on January 3, 2018. (ECF No. 82 at 97.) Further, Officer Brewer testified as follows:

> Q. Based upon your conversations with Sergeant Wrede, did he describe to you what he was looking for when he assisted in the execution of the search of 2525 Nadine Drive?
>
> ***858** A. Yes. Sergeant Wrede explained to me that he was looking for weapons-related items because he was familiar with the case, so he knew generally what they were looking for related to the investigation.
>
> ...
>
> Q. Based upon your review [of Sergeant Wrede's body-worn camera footage], albeit a long time ago, do you recall whether Sergeant Wrede said or did anything on the body-worn camera to suggest he was looking for anything other than firearms-related items?
>
> A. Based on what I saw and what I remember, no.

(*Id.* at 97–98.)

As noted above, Officer Menter admitted at the evidentiary hearing that he could not precisely remember what he told the officers before they executed the search warrant. (*Id.* at 22.) However, Officer Menter testified that his normal practice before a search was to notify officers of the type of evidence for which they are about to search:

> Q. How did Officer Lloyd and Sergeant Wrede know what to search for?
>
> A. So Sergeant Wrede was aware of this case prior, I believe from the day before. I can't remember exactly what I said, but usually before we execute a search warrant, I notify officers, "Hey, we're looking for guns, or we're looking for this, or we're looking -- it's a case we're investigating, here's the type of stuff we're looking for."
>
> Q. And do you recall if you did that in this case?
>
> A. I don't remember exactly what I said and I can't remember the meeting, but that's usually what we do or what I do before a -- any type of search warrant to let them -- if someone isn't involved in the case, to brief them on what we're looking for.

(*Id.* at 22–23; *see also id.* at 42–43.) Based on this unrebutted testimony, considered in conjunction with the aforementioned testimony regarding what Sergeant Wrede and Officer Lloyd knew or were told about the evidence to be seized, the Court finds it reasonable to conclude that Officer Menter followed his normal practice to tell officers assisting a search what they are looking for before they started searching. Such evidence also supports the application of the good faith doctrine here.

Fourth, the Court examines SWAT Officer Teresa Tomczyk's involvement in this case. The final question the Tenth Circuit posed with respect to whether the good faith application might apply concerned Officer Tomczyk. The Tenth Circuit queried:

> [I]s it fair to say Officer Tomczyk reasonably relied on the residential search warrant when she testified that she never received a copy of the warrant or reviewed Officer Menter's affidavit? Maybe the answer is yes, since Officer Tomczyk was on Defendant's property only to conduct a protective sweep, not to search for any items. Or perhaps Officer Tomczyk relied on the warrant in good faith because her supervisor, Sergeant Wolf, had reviewed the entire warrant package and directed her to lead the SWAT team in his stead. Then again, maybe not, as the warrant was the supposed lawful basis for Officer Tomczyk's entry into Defendant's property.

Suggs, 998 F.3d at 1141. In the Order denying the motion to suppress, the Court concluded that Officer Tomczyk could reasonably rely on the search warrant even though she did not receive a copy of it. (ECF No. 89 at 24 n.15.) However, as the Tenth Circuit commented in *Suggs*, the ***859** Court did not fully explain its reasoning in reaching this conclusion. *Suggs*, 998 F.3d at 1140. It does so now.

As an initial matter, the Government emphasizes that as a SWAT officer tasked with performing a protective sweep of Defendant's residence, Officer Tomczyk was an assisting officer in this case. (ECF No. 239 at 11.) As such, the Government argues that under *Wigley v. City of Albuquerque*, 567 F. App'x 606, 610 (10th Cir. 2014), as an assisting officer, she did not need to review the warrant, nor did she need to independently assess its validity. (*Id.*) In *Wigley*, the Tenth Circuit stated:

> But plaintiffs have not pointed to, nor are we aware of, any law clearly establishing that Officer Williamson, as one of the many SWAT team members assisting in the execution of the warrant, and who was briefed that the search included stolen guns[ ] and body armor, had a duty to read the warrant or affidavit and assess whether handcuffed detention was justified.

Wigley, 567 F. App'x at 610. While Officer Menter's role as leader of the search required him to read the warrant and ensure its validity, as an assisting officer at the scene specifically to perform a protective sweep, under *Wigley*, Officer Tomczyk need not have fulfilled the same obligation.

The Court finds *Wigley* persuasive on this matter and finds it telling that Defendant does not acknowledge *Wigley* in his response. (*See generally* ECF No. 241.) However, given the Tenth Circuit's direction that the Court should give the disputed issues it identified a "full vetting," the Court finds it necessary to examine the specific testimony surrounding Officer Tomczyk's involvement in this case for a proper totality of the circumstances analysis.

The Government explains in the Government's Brief that the record "is not clear as to whether Officer Tomczyk received a copy of the warrant or reviewed the affidavit." (ECF No. 239 at 13 n.2.) Officer Tomczyk testified that she did not believe that she was given a copy of the search warrant (ECF No. 82 at 82), or reviewed Officer Menter's affidavit or any of the attachments to the affidavit (*id.* at 89). However, Officer Tomczyk apparently did receive some type of information related to the search. She testified that she obtained information about Defendant "[t]hrough [SWAT] Sergeant Wolf" and through her "review [of] the packet provided by Officer Menter," which contained "information given about the location of the search warrants and then factors which would contribute to a high-risk search warrant." (*Id.* at 67.)

Despite this less than clear testimony as to what Officer Tomczyk knew, as the Tenth Circuit stated in its opinion, Officer Tomczyk was on Defendant's property "only to conduct a protective sweep, not to search for any items."[2] *Suggs*, 998 F.3d at 1141. Officer Tomczyk testified that she ***860** was contacted by Sergeant Wolf, who told her that officers had obtained a search warrant for Defendant's residence and an arrest warrant for Defendant. (ECF No. 82 at 66.) She further testified that she was "advised that a[n] arrest warrant was obtained for first degree assault, which is a felony, and a weapon by a previous offender. We were told it stemmed from a road-rage situation that resulted in a shooting." (*Id.*)

Defendant argues that the Government has offered no competent evidence that Officer Tomczyk understood the search as being limited to evidence related to the shooting. (ECF No. 241 at 14.) Moreover, he argues that "it would be anomalous to hold that Office Tomczyk relied on the residential search warrant in good faith when she freely admitted that she never even had a copy of the warrant." (*Id.* at 14–15.) It is true that the evidence with respect to Officer Tomczyk's reasonable reliance on the warrant is arguably weak in comparison with the reliance of Officer Menter, Sergeant Wrede, and Officer Lloyd, given that it was not Officer Menter—drafter of the warrant—who advised her of the search's parameters. However, Officer Tomczyk's testimony that she was aware of the vehicle shooting demonstrates that she had a basis to believe that the weapons she discovered in the car in the carport were connected to the alleged crime under investigation. Moreover, this analysis considers the totality of the circumstances; under these circumstances, the Court concludes that the evidence concerning Officer Tomczyk, particularly because *she was not an officer involved in the search,* does not militate in favor of suppressing the evidence in question.

Fifth, in addition to signing the warrant itself, the magistrate judge signed Officer Menter's application and affidavit. (ECF No. 54-1.) The application and affidavit specifically incorporate by reference Attachment B, which contains the list of items to be seized and the catch-all phrase that the Tenth Circuit found impermissibly broad. (*Id.* at 3–7.) According to the Tenth Circuit, a "magistrate judge's approval of the application and affidavit—and reference to both documents in the first paragraph of the warrant—further supports the objective reasonableness of [an officer's] reliance on the warrant." *Russian*, 848 F.3d at 1247 (citing *United States v. Allen*, 625 F.3d 830, 839 (5th Cir. 2010) (reasoning "the executing officer who prepared the warrant, the affidavit and the attachment ... had additional objective reason to believe the warrant was valid," because the magistrate judge "signed not only the warrant, but also the affidavit, to which the list of items to be seized was attached")). "Courts applying the good faith exception 'have concluded that, at least when the magistrate neither intimates he has made any changes in the warrant nor engages in conduct making it appear he has made such changes, the affiant-officer is entitled to assume that what the magistrate approved is precisely what he requested.' " *Id.* (citing 1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.3(f) (5th ed. 2012)).

Despite Defendant's argument that "the State of Colorado district court judge became nothing more than a 'rubber stamp' in issuing two separate search warrants in this case[,] both of which contained the same fatal flaws," the Court disagrees. (ECF No. 241 at 9.) The totality of the circumstances in this case, as described in detail above, lead the Court to conclude that while not the most artfully drafted warrant, given that two different magistrate judges approved the warrants containing the catch-all language, it was nevertheless reasonable for Officer Menter to ***861** rely on the judges' approval of the residential and vehicle warrants

and to search the residence for the items listed in Attachment B.

Finally, the Court concludes that excluding the challenged evidence would not serve the underlying purpose of the exclusionary rule. "As the Supreme Court has emphasized, the exclusionary rule is not an individual right, but rather a judicially fashioned remedy whose focus is not on restoring the victim to his rightful position but on deterring police officers from knowingly violating the Constitution." *Russian*, 848 F.3d at 1247 (internal quotation marks and citations omitted). It is worth noting that although Officer Menter was not required to obtain a separate vehicle warrant, he obtained one nonetheless. (ECF No. 54-5.) A premises search warrant "permits officers to search vehicles located on the curtilage when the objects of the search might be located in those vehicles." *United States v. Dahlman*, 13 F.3d 1391, 1394–95 (10th Cir. 1993). Officer Menter's "belt and suspenders" approach of obtaining a second but legally unnecessary warrant, out of what appears to be an abundance of caution, demonstrates that at each step of the investigation, he made every effort to comply with the law. *See Russian*, 848 F.3d at 1247.

"[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916, 104 S.Ct. 3405. As the Supreme Court observed in *Leon*, "since judges and magistrates are 'neutral judicial officers' with 'no stake in the outcome of particular criminal prosecutions,' the exclusionary sanction 'cannot be expected significantly to deter them.' " *Russian*, 848 F.3d at 1247 (quoting *Leon*, 468 U.S. at 917, 104 S.Ct. 3405). From the totality of the circumstances, the Court easily concludes Officer Menter is not the law enforcement official for whom the exclusionary rule was judicially crafted.

Accordingly, given the reliance in good faith by Officer Menter and the other officers conducting the search in question on the two warrants they reasonably believed to be valid, the Court declines to apply the exclusionary rule in this case.

IV. CONCLUSION

For the reasons stated above, the Court ORDERS that the good faith exception to the exclusionary rule applies in this case. Accordingly, Defendant's Motion to Suppress, considered on remand from the Tenth Circuit, (ECF No. 54), is DENIED.

All Citations

582 F.Supp.3d 849

Footnotes

1 The record and Tenth Circuit opinion refers to Keith Wrede as both "Officer" and "Sergeant." It appears as though his correct title is "Sergeant," but the Court will quote the Tenth Circuit opinion as written.

2 Defendant argues it is a "misnomer" to claim that Officer Tomczyk's search of the house was a "protective sweep" as defined by the Fourth Amendment. (ECF No. 241 at 13.) He contends that the facts in this case, including that Defendant was in custody at the time of the protective sweep, do not justify a "protective sweep." (*Id.* at 13 n.3.) However, the Tenth Circuit conclusively stated that "Officer Tomczyk was on Defendant's property only to conduct a protective sweep, not to search for any items." *Suggs*, 998 F.3d at 1141.

It appears as though Defendant's attempt to recategorize the protective sweep as a part of the search is an effort to recast Officer Tomczyk's role from SWAT officer conducting a protective sweep to an officer conducting the search. However, given the Tenth Circuit's conclusion that Officer Tomczyk was at Defendant's residence to perform a protective sweep and not to search for items, the Court finds this argument to be without merit.

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371 F.Supp.3d 931
United States District Court, D. Colorado.

UNITED STATES of America, Plaintiff,
v.
1. Perry Wayne SUGGS, Jr., Defendant.

Criminal Case No. 18-cr-089-WJM
|
Signed 03/11/2019

Synopsis

Background: Defendant indicted on charge of being a felon in possession of a firearm and ammunition filed motion to suppress, alleging that evidence against him was obtained through two unconstitutionally overbroad search warrants.

Holdings: The District Court, William J. Martinez, J., held that:

"miscellaneous" section of search warrants did not render warrants invalid for lack of particularity;

search warrant for vehicle parked on defendant's property did not violate particularity requirement;

probable cause supported issuance of search warrant for any and all firearms and ammunition located on defendant's property;

defendant had standing to contest search of vehicle located on his property; but

seizure of guns observed in plain view during execution of warrant did not violate the Fourth Amendment.

Motion denied.

Procedural Posture(s): Pre-Trial Hearing Motion.

Attorneys and Law Firms

***933** Emily M. May, U.S. Attorney's Office, Denver, CO, for Plaintiff.

ORDER DENYING MOTION TO SUPPRESS

William J. Martinez, United States District Judge

The Government charges Defendant Perry Wayne Suggs, Jr. ("Suggs"), with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). (ECF No. 24.) Currently before the Court is Suggs's Motion to Suppress, arguing that evidence against him was obtained through two unconstitutionally overbroad search warrants. (ECF No. 54.) The Court held an evidentiary hearing on February 25, 2019. (ECF No. 77.) For ***934** the reasons explained below, the Court denies Suggs's motion.

I. BACKGROUND

The Court makes the following findings of fact based on the testimony and exhibits received at the evidentiary hearing.

A. The Shooting

On January 3, 2018, a man named Daniel Johnson was crossing a street at a crosswalk in Colorado Springs and prevented a black BMW sedan from turning. Johnson and the driver of the BMW exchanged words, upon which the driver pulled out a black handgun and fired it at the ground near Johnson's feet. The driver sped away but a mother and daughter, who had been behind the black BMW in traffic, observed the incident and followed the BMW to the next intersection. They obtained a photo of the BMW's license plate (Colorado plate OXD692).

B. Menter's Investigation

At some point, the police were called. A patrol officer with the Colorado Springs Police Department, Adam Menter, was the first on the scene. While there, he recovered a silver Smith & Wesson .40 caliber shell casing with the word "Speer" printed on it. He also viewed the license plate photo taken by the mother and daughter, who had returned to the scene of the shooting.

When police interviewed Johnson about the incident,[1] he was fairly certain that the license plate was UXD692, only one character off from the actual plate. Johnson described the shooter as a black male with a dark complexion, a small

goatee, probably in his late 20s or early 30s, with a thin to medium build.

After obtaining this evidence, Menter continued the investigation. Using databases available to law enforcement, he found that license plate OXD692 was registered to a black BMW sedan owned by Suggs and associated with 2525 Nadine Drive, Colorado Springs. Menter found Suggs's profile in a police database and the associated photo showed a black male with a dark complexion and a goatee. Menter arranged for that photo to be part of a double-blind sequential photo line-up presented to Johnson. When Johnson reached Suggs's photo, he stated he was 80% certain that the man in the photo was the same one who shot at him.

Menter investigated Suggs further through a police database and found that he had been convicted in Colorado state court of felony menacing and felon-in-possession, and had been investigated multiple times for burglary, felony assault, and domestic violence. He was also a confirmed member of the Gangster Disciples street gang.

C. The Nadine Drive Warrant

Menter authored an application for a warrant to search the home associated with Suggs at 2525 Nadine Drive in Colorado Springs. In his affidavit in support of a warrant (Attachment A to the application), Menter recited his investigation in detail. (ECF No. 54-1 at 4–6.)[2] He further noted, based on his "training and experience," that he is "aware that parties with gang affiliations and a history of violent criminal behavior" are "likely" to "possess more than one firearm." (*Id.* at 6.)

***935** Concerning the scope of the search warrant, Menter's Attachment B to the warrant application proposed searching for and seizing the following items:

GENERAL INFO

- General photographs of the scene
- Indicia of residency
- Identification which would identify any occupants of the residence

GUNS INVOLVED

- Any and all firearms: specify if known
- Any and all ammo: specify if known
- Any documentation showing the ownership of a firearm
- Any and all sales records showing the purchase of a firearm
- Any projectiles
- Any and all spent shell casings
- Any item commonly used to carry and transport a firearm (i.e. holster & gun carrying case, magazines, cleaning kits)

VEHICLE

- Indicia of ownership of vehicle
- Vehicle registration

MISCELLANEOUS

- Any item identified as being involved in crime

NO OTHER ITEMS ARE SOUGHT FOR SEIZURE

(*Id.* at 7 (formatting in original).) Menter derived this list by drawing on a template, which he usually does because, as a patrol officer, he does not regularly write warrant applications.

A Colorado state court judge issued the warrant. The warrant states that the reviewing judge found probable cause to search for items that "[had] been used as a means of committing a criminal offense" and items that are "illegal to possess." (*Id.* at 2.) The warrant described the scope of items to be seized by cross-reference to "Attachment 'B' which is hereby incorporated in [*sic*] reference." (*Id.* at 1.) The warrant did not incorporate Attachment A (Menter's affidavit) by reference. The judge also issued warrants for Suggs's arrest and for the search of his black BMW sedan, which are not challenged here.

D. Suggs's Arrest

The next day, January 4, 2018, Menter and another officer named Bergstresser set up surveillance of 2525 Nadine Drive at about 5:30 PM. The black BMW sedan was parked in front of the house, but the officers saw no activity. Just before 6:00 PM, the officers observed an unrelated incident—a man

chasing a woman down the street—and decided to break off their surveillance to address that situation. They used their patrol vehicles to catch up with the footchase, taking them out of sight of 2525 Nadine Drive. As they were dealing with that situation, Bergstresser noticed Suggs's black BMW driving by. At Menter's direction, Bergstresser returned to his patrol vehicle and followed the black BMW until the Colorado Springs version of a SWAT team, known as the Tactical Enforcement Unit ("TEU"), arrived to assist in what would presumably be the execution of the arrest warrant for Suggs. The TEU's participation was considered prudent given Suggs's alleged volatile behavior the day before and his criminal record.

The TEU soon arrived and the officers approached the driver of the black BMW, which had been parked at a gas station. The TEU officers identified Suggs and arrested him there pursuant to the previously issued warrant. A member of the TEU obtained a house key from Suggs, who told the officers that no one else was inside 2525 Nadine Drive but that he had ***936** two dogs there in kennels. Menter, having resolved whatever situation led to the footchase, showed up at the gas station later, just in time to see Suggs being placed in the back of a patrol vehicle.

E. Execution of the Nadine Drive Warrant

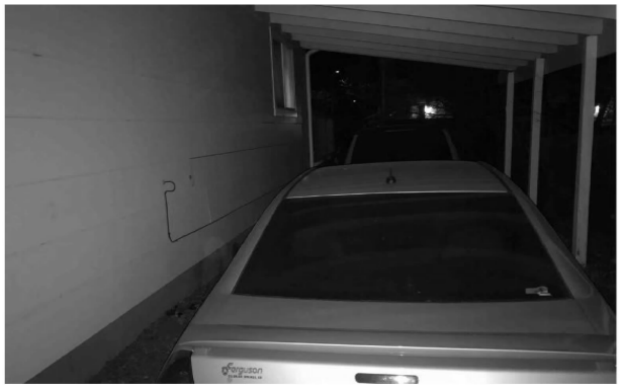
Having obtained a house key from Suggs, the TEU then assembled at Suggs's Nadine Drive residence. They were led by TEU officer (and acting sergeant) Teresa Tomczyk, and their goal was to "clear" the residence, or in other words, to look for any persons or things that might pose a threat to the officers who would execute the search warrant.

The Nadine Drive residence is a west-facing single-family structure with a carport attached to the south side of the home. It looked substantially as follows on the night in question:

(Government's Exhibit 1 (excerpt).)

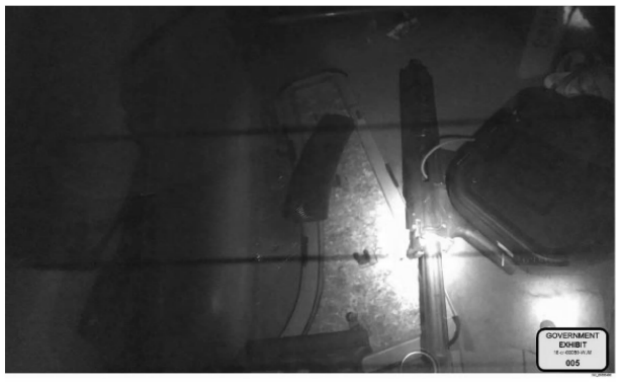
The TEU officers approached the front door, knocked three times and demanded entry three times, and received no response. They let themselves in with Suggs's key, "swept" the residence, and found no one inside and nothing else of note beyond two dogs in kennels.

The TEU officers then proceeded to clear the outside environs of the property. In particular, Tomczyk and another TEU officer inspected the carport, in which they found two parked vehicles: a gray sedan and a maroon Ford SUV. The following photograph is taken from the driveway leading into the carport, and it shows the gray sedan in the foreground and the outline of the Ford SUV just beyond the gray sedan:



***937** (Government's Exhibit 3 (excerpt).)

Tomczyk shined her flashlight through the windows of both vehicles, looking for persons that might be hiding there. When she shined her flashlight into the rear cargo area of the Ford SUV, she immediately noticed an AR15-style rifle, a long magazine for that rifle, a Glock handgun, and two handgun cases. The scene looked as depicted in this photograph taken through the rear window of the Ford SUV:



(Government's Exhibit 5 (excerpt).) [3]

Eventually Tomczyk considered the scene secure and Menter arrived to conduct the search. The search team comprised

Menter, a supervising sergeant named Keith Wrede, and another officer named Aaron Lloyd. Menter brought the complete warrant with him, including Attachment A (his affidavit). [4] Menter does ***938** not know if Wrede or Lloyd reviewed the warrant package. Menter's usual practice is to brief other officers about what they will be searching for before executing the warrant, but he could not recall if he did so in this case. [5]

Menter also could not recall if either of those officers physically entered the Nadine Drive residence before he did. He remembered, however, that he first took pictures of the undisturbed interior of the residence before he and the other officers began searching for evidence.

When the search began, Menter began in the living room, working his way through that room and a connected dining room into a connected kitchen (from living room to kitchen was "an open space" with "no walls in between"). Lloyd started in the kitchen. Wrede began in a bedroom he reportedly characterized as "the grandfather's bedroom."

Before Menter made his way to the kitchen, Lloyd found there, above the microwave, a box of ammunition. He called Menter over, who observed that the ammunition was Smith & Wesson .40 caliber with the word "Speer" printed on it—thus matching the shell casing Menter had found at the scene of the shooting. There was also one round of a different kind of .40 caliber ammunition. The officers seized the ammunition as evidence. [6]

In the kitchen or the dining room, Menter located and seized a bank statement addressed to Suggs at 2525 Nadine Drive. Menter and Lloyd then moved to a "back bedroom" (not the same as "the grandfather's bedroom" where Wrede searched). There, Menter located a retail sale contract for the black BMW sedan, which he seized as evidence.

Finally, Menter searched the bathroom, but found nothing.

F. The Ford SUV Warrant

At some point, Tomczyk informed Menter of the items she had observed in the rear cargo area of the Ford SUV. It is not clear if this conversation happened before or after Menter and his partners searched the residence. Regardless, Menter himself went to the carport, shined his flashlight through the rear window of the Ford SUV, observed what Tomczyk had observed, and took the photo reproduced above. Menter ran the Ford SUV's plate and learned that it was registered to someone named Camisha Mobley. Mobley herself showed up after the search of the residence had concluded, reporting that she had come to take care of the dogs in the house. Menter ***939** had a conversation with her about the Ford SUV. Mobley reported that the vehicle belonged to her but she had loaned it to Suggs over a year ago.

Menter then returned to the police station and authored a new warrant application for the Ford SUV. (ECF No. 54-5.) [7] The accompanying affidavit (again, "Attachment A") repeated verbatim the affidavit from the Nadine Drive application and then added a description of the Nadine Drive search and Menter's subsequent conversation with Mobley. As for the scope of the search, the application again contained an "Attachment B," which was identical to the previous Attachment B (quoted in Part I.C, above) except that ": specify if known" was removed from the first two lines under the "GUNS INVOLVED" heading. A Colorado state court judge issued the warrant, again setting forth the scope by cross-reference to Attachment B, and not incorporating Attachment A by reference.

G. Execution of the Ford SUV Warrant

Menter and his partner from earlier that evening, Bergstresser, executed the warrant on the Ford SUV at about 10:20 PM that same night. Wrede supervised. Menter seized the Glock handgun, the rifle, the ammunition, the Glock carrying cases, and also the vehicle's registration document (which indeed showed Mobley as the registered owner). [8]

II. ANALYSIS

A. General Standards and Burdens

Suggs invokes the Fourth Amendment's "particularity requirement," italicized below:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly*

describing the place to be searched, and the persons or things to be seized.

The purpose of the particularity requirement is to prohibit "the 'general warrant' abhorred by the colonists" and thereby prevent an "exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). "The particularity requirement ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985).

At times the Tenth Circuit has employed demanding and inflexible language when speaking about this requirement, for example: "[T]he fourth amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized." *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988) (internal quotation marks omitted). But even so, "[t]he test applied to the description of the items to be seized is a practical one." *Id.* Thus, "[w]hen interpreting warrants, [the ***940** question is] practical accuracy rather than technical precision." *United States v. Ortega-Jimenez*, 232 F.3d 1325, 1328 (10th Cir. 2000) (internal quotation marks omitted). A warrant may be upheld even if it "could have been clearer." *United States v. Simpson*, 152 F.3d 1241, 1248 (10th Cir. 1998); *see also id.* (requiring "a practical rather than a technical standard").

A particularity challenge usually precedes in up to four phases. At the first phase, it is the defendant's burden to show a particularity problem on the face of the warrant. *United States v. Carhee*, 27 F.3d 1493, 1496 (10th Cir. 1994) ("Generally, if the search or seizure was pursuant to a warrant, the defendant has the burden of [proving that the search violated the Fourth Amendment]." (internal quotation marks omitted)). The face of the warrant alone, without reference to other materials (*e.g.*, the supporting affidavit), may be enough either to establish—or at least raise a sufficient suspicion of—a failure of particularity, *see, e.g.*, *Cassady v. Goering*, 567 F.3d 628, 635 (10th Cir. 2009), or to dispel that suspicion, *see, e.g.*, *Andresen v. Maryland*, 427 U.S. 463, 478–82, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

If the warrant raises particularity concerns not cured by other context on the face of the warrant, the analysis moves to the second phase. At this phase, the question is whether the affidavit in support of the warrant may be consulted to "cure" language that might otherwise be "overbroad." *Leary*, 846 F.2d at 603. "Two requirements must be satisfied to reach this result: first, the affidavit and search warrant must be physically connected so that they constitute one document; and second, the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference." *Id.* (internal quotation marks omitted; alterations incorporated). If both requirements are satisfied, the affidavit is considered part of the warrant and the context the affidavit provides may be considered. But even if these requirements are not satisfied, the task of giving the warrant a "practical" interpretation may still draw on the affidavit if "the same officer both produced the affidavit and executed the warrant." *Ortega-Jimenez*, 232 F.3d at 1329.

Because this second phase is, like the first phase, dealing with practical construction of the warrant, the Court presumes that the burden remains on the defendant. This means both the factual burden of proof to show that the *Leary* and *Ortega-Jimenez* requirements are not satisfied, or, if they are satisfied, the burden of persuasion that the affidavit nonetheless fails to provide the necessary context to provide a "practical" construction that avoids particularity problems.

The third phase arises if the defendant persuades the Court that the *Leary* and *Ortega-Jimenez* requirements were not satisfied (such that the affidavit cannot be considered), or that the warrant still lacks particularity even considering the affidavit. At this phase, the question is whether the insufficiently particular parts of the warrant may be severed. "The infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant, but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized—on plain view grounds, for example—during their execution)." *United States v. Brown*, 984 F.2d 1074, 1077 (10th Cir. 1993) (internal quotation marks omitted; alterations incorporated). "To make the severability doctrine applicable the valid portions of the warrant must be sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant." ***941** *United States v. Naugle*, 997 F.2d 819, 822 (10th Cir. 1993). "Greater part" is a qualitative more than a quantitative analysis. *See United States v. Sells*, 463 F.3d 1148, 1159–60 (10th Cir. 2006).

The burden at this third phase appears to fall on neither the defendant nor the Government. The Tenth Circuit has spoken of severability as an analysis that falls on the Court, with no hint of a default presumption in favor of upholding or striking down the warrant. *See id.* at 1158–62.

Finally, if severability is unjustified, the fourth phase asks whether the officers executing the warrant relied on it in good faith. *United States v. Leon*, 468 U.S. 897, 920, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *see also Massachusetts v. Sheppard*, 468 U.S. 981, 987–88, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). If a police officer's "reliance on the magistrate's determination of probable cause [and consequent approval of a search warrant] was objectively reasonable, [then] application of the extreme sanction of exclusion is inappropriate." *Leon*, 468 U.S. at 926, 104 S.Ct. 3405. But, "depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Id.* at 923, 104 S.Ct. 3405. The Government bears the burden to persuade the Court that the good faith exception should apply. *See id.* at 924, 104 S.Ct. 3405 ("When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time."). [9]

Here, steps one and two resolve Suggs's motion, so the Court need not analyze steps three or four.

B. Both Warrants: "Any Item Identified as Being Involved in Crime"

1. Facial Analysis

Suggs primarily challenges the bullet point under the "MISCELLANEOUS" section of both warrants: "Any item identified as being involved in crime." The absence of a definite or indefinite article before "crime" means this language could be read as Suggs reads it, that is, to authorize a search for anything associated with any crime. (ECF No. 54 at 7–8.) The Government responds that Suggs's reading "is not a practical reading of the warrant on its face.... 'Crime' indicates one incident .... [C]ontext supports that reading." (ECF No. 58 at 5.) Both Suggs and the Government have case law arguably supporting their competing views.

On the Government's side is *Andresen*, *supra*, where the two warrants in question defined their scope through an elaborate run-on sentence describing numerous items relevant to the "sale, purchase settlement and conveyance of lot 13, block T," but concluding with "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." 427 U.S. at 479–80 & n.10, 96 S.Ct. 2737 (alteration in original). The Supreme Court upheld the warrants, reasoning that

> the challenged phrase must be read as authorizing only the search for and seizure of evidence relating to the crime of false pretenses with respect to Lot 13T. The challenged phrase is not a separate sentence. Instead, it appears in each ***942** warrant at the end of a sentence containing a lengthy list of specified and particular items to be seized, all pertaining to Lot 13T. We think it clear from the context that the term "crime" in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T.

Id. at 480–81, 96 S.Ct. 2737 (citations, certain internal quotation marks, and footnote omitted). In other words, a general reference to "crime," not preceded by a definite or indefinite article, can, in context, be construed to contain the definite article and thereby to refer back to the suspected crime that justifies the warrant.

On Suggs's side is *Cassady*, *supra*, a civil lawsuit claiming that a search warrant was so obviously overbroad on its face that the sheriff who supervised its execution could be held liable under the Fourth Amendment via 42 U.S.C. § 1983. The suspected crime was illegal cultivation of marijuana, but the deputy sheriff assigned to draft the warrant "had never before sought a drug-related search warrant" and "admitted to not knowing what he was doing," so he obtained some amount of assistance from "an officer in another police department who had experience with drug-related investigations." 567 F.3d at 632. But the deputy sheriff apparently did not receive the sort of help he needed, because the resulting warrant was an "ungrammatical" mess, *id.* at 635, particularly in its use of fragmentary paragraphs interrupting other paragraphs— as if language was hastily copied and pasted from templates or prior warrants with no thought to where it should go, even if in the middle of an unrelated sentence, *see id.* at 645–46. [10] Although much of this language arguably related to marijuana

cultivation, the warrant also explicitly authorized a search for "all other evidence of criminal activity." *Id.* at 645. As if to dispel any possibility of finding that phrase ambiguous, the warrant went on to authorize a search for evidence

> that [seized] property is stolen or embezzled; or is designed or intended for use as a means of committing a criminal offense; or is or has been used as a means of committing a criminal offense; or the possession of which is illegal; or would be material evidence in a subsequent criminal prosecution in this state or another state; or the seizure of which is expressly required, authorized or permitted by any statute of this state.

Id. at 645–46. The Tenth Circuit held that the warrant was facially overbroad, that the overbroad portions could not be severed from the valid portions, and that the sheriff could not have reasonably relied on it. *Id.* at 635–44. [11]

***943** This case is much closer to the *Andresen* end of the spectrum than the *Cassady* end. The only potentially significant difference is that, in *Andresen*, the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown," 427 U.S. at 480 n.10, 96 S.Ct. 2737 (alteration in original), came at the end of a single run-on sentence, whereas the corresponding phrase in Menter's warrants—"[a]ny item identified as being involved in crime"—was the last bullet point among many, and under a separate heading. But the Court does not understand *Andresen* to hold that the key feature of a valid warrant in this circumstance is the purely formal mechanism of a run-on sentence, so that otherwise similar warrants will survive a challenge if formatted as a run-on sentence, but may be invalidated if formatted with mechanisms readily available in modern word processing programs that make lists easier to read. The point of *Andresen* was that the formatting of the warrant (which happened to be a run-on sentence in that case) was enough to assure the Supreme Court that "crime," unmodified by a definite or indefinite article, must refer back to the crimes under investigation.

Here, the Court is similarly assured. Nothing in the two warrants suggests that the final bullet point should be read disjunctively from all preceding bullet points. And the Court is not persuaded that the heading "MISCELLANEOUS" before the final bullet point changes this analysis. That heading is substantively no different from the words "together with other fruits, instrumentalities and evidence" in the *Andresen* warrant.

Even so, there is a subtle elision in the *Andresen* analysis that this Court likely should not ignore. In *Andresen*, the Supreme Court was assured "from the context that the term 'crime' in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T." 427 U.S. at 480–81, 96 S.Ct. 2737. But nothing in the *Andresen* opinion establishes how any executing officer would know that "the crime of false pretenses" was at issue. The header to the run-on sentence refers to the "sale, purchase settlement and conveyance of lot 13, block T," *id.* at 480 & n.10, 96 S.Ct. 2737, but does not name any *crime* potentially associated with those activities. The Supreme Court provides no other details about the warrant that might have supplied this detail to the executing officers. [12]

Andresen apparently found this untroubling, and so—following *Andresen*—it may likewise be untroubling here, although the two Attachment B's do not describe what crimes may be at issue and neither do the warrants themselves. [13] Under that analysis, the "MISCELLANEOUS" section of the two warrants is not insufficiently specific, does not authorize an "exploratory rummaging," *Coolidge*, 403 U.S. at 467, 91 S.Ct. 2022, and therefore does not raise particularity concerns.

2. Menter's Participation in the Searches

If *Andresen* should not be read as facially validating the "MISCELLANEOUS" section of the two warrants in this ***944** case, the Court may nonetheless give that section a practical construction with reference to Menter's affidavits, if the affidavits were attached to and incorporated by reference in the warrants, *Leary*, 846 F.2d at 603, or if Menter (the affiant) executed the warrant, *Ortega-Jimenez*, 232 F.3d at 1329.

Menter's affidavits were attached to, but *not* incorporated by reference in, the respective warrants. *Leary* therefore cannot apply. But Menter *did* execute the warrant, so it appears that his affidavits may provide context for a practical construction, per *Ortega-Jimenez*. The only potentially lingering question is the effect of multiple executing officers, or in other words,

how much must the officer-affiant participate in a search carried out by that officer *among others* to fairly say that the officer-affiant "executed" the warrant? *Ortega-Jimenez* itself demonstrates that the officer-affiant need not be the sole officer involved in the execution. *See* 232 F.3d at 1328 ("Detective Ferguson [the officer-affiant] arrived with the search warrant and executed it. The Detectives [plural] picked the two locks on the storage unit and opened it. The search of the storage unit yielded a large quantity of controlled substances and paraphernalia associated with the distribution of controlled substances. Following the search of the storage unit, the Detectives [plural] conducted a further search of Juan, Armando, and the white pickup truck. They found no evidence on the person of either Juan or Armando. Their search of the pickup truck, however, yielded keys that fit the locks on the storage unit."). But must the officer-affiant be part of every aspect of the search (*e.g.*, be present in the same room where other officers are searching)? Must the officer-affiant be the first one in the door and the last one out?

Suggs does not mount a challenge along these lines, so the Court need not resolve the question. But, in the unlikely event it would be plain error not to address it, the Court would find that Menter participated in both searches in a manner consistent with saying that he "executed" both warrants, despite the assistance of other officers. As to Nadine Drive, Menter was present and available the entire time, at least within earshot of other officers, in what was a fairly small residence (a connected living room/dining room/kitchen, two bedrooms, and a bathroom). As to the Ford SUV, the same is also true for an even more confined area.

Because Menter authored the affidavit and executed the warrant, the Court may consider the affidavit when giving the warrant a practical construction. In this light, any lingering doubt about *Andresen*'s applicability is dispelled because the reference to "crime" may receive limiting context through Menter's own knowledge of the contents of his affidavit and of the crimes under investigation. In that light, the "MISCELLANEOUS" section of the two warrants, practically construed, does not fail on particularity grounds.

C. The Nadine Drive Warrant

Suggs also argues that the vehicle-related and gun-related portions of the Nadine Drive warrant are insufficiently particular.

1. The Vehicle-Related Portions of the Warrant

Suggs argues that the two bullet points under the heading "VEHICLE"—namely, "[i]ndicia of ownership of vehicle" and "[v]ehicle registration" (ECF No. 54-1 at 7)— render the Nadine Drive warrant overbroad because "[t]he government already knew that the vehicle involved in the shooting was a black BMW registered to Mr. Suggs, and thus should have specified ***945** what kind of vehicle was the target of the search." (ECF No. 54 at 7.) Ideally, Menter would have done so, but warrants may survive particularity challenges even if they "could have been clearer." *Simpson*, 152 F.3d at 1248. Given that Menter was the affiant and the executing officer, as discussed above (Part II.B.2), a practical construction of the challenged bullet points demands that the Court construe them as narrowed to Suggs's black BMW sedan.

Suggs further argues that "a search for *any* vehicle was unnecessary: By the time that the search was executed, the black BMW associated with the crime being investigated was in the government's possession." (ECF No. 54 at 7 (emphasis in original).) But the warrant did not authorize a search for a vehicle, much less "*any* vehicle." It only authorized a search for documentary evidence related to the vehicle. To the extent Suggs means to say that the warrant need not have authorized a search for documentary evidence related to the vehicle because the Colorado Springs police already had evidence supporting ownership and registration, then: (a) it is not clear that this goes to the *particularity* of the challenged bullet point; and (b) Suggs cites no authority, and the Court has found none, holding that a warrant may be invalidated because the police already have evidence of the same type they wish to search for.

For all these reasons, Suggs's particularity challenge to the vehicle-related portions of the Nadine Drive warrant cannot succeed.

2. The Gun-Related Portions of the Warrant

For the first time in his reply brief, Suggs argues that the "GUNS INVOLVED" section of the Nadine Drive warrant is overbroad because it authorized a search for any type of firearm or ammunition when the Colorado Springs police knew they were searching for "a black handgun of a specific caliber." (ECF No. 63 at 5.) Suggs argues that this is all the more egregious because whatever template Menter worked from contained the words "specify if known" after "[a]ny and all firearms" and "[a]ny and all ammo" (ECF No. 54-1), yet Menter did not specify what he was searching for. Although the Court could treat this argument as forfeited given that Suggs only raised it for the first time in his reply brief, the

Court will reach it anyway because the outcome on the merits is plain.

The fact that Menter knew the caliber of the firearm to search for, or even the color to search for, does not mean he could *only* search for that type of gun and ammunition. To begin, on the cover page to the warrant application, Menter represents that "probable cause exists" to seize the items listed in Attachment B because "probable cause exists to believe that [they] ... [are] or [have] been used as a means of committing a criminal offense *or* [they are] illegal to possess." (ECF No. 54-1 at 3 (emphasis added).) The reviewing judge approved these search justifications. (*Id.* at 2.)

Next, in the warrant affidavit, Menter noted that Suggs already had violent felonies on his record, and also a conviction for "Felony Possession of a Weapon by a Previous Offender." (*Id.* at 6.) Any felony on a criminal record at least gives rise to a suspicion that the felon cannot possess a firearm, and surely someone who has already been convicted specifically of felon-in-possession cannot legally possess a firearm, absent exceedingly unusual circumstances.

Finally, Menter concluded his affidavit by noting Suggs's Gangster Disciples membership and that, through experience, Menter has learned "that parties with ***946** gang affiliations and a history of violent criminal behavior" are "likely" to "also possess more than one firearm." (*Id.*)

In sum, Menter's application demonstrated probable cause to search for any and all firearms and ammunition, along with related paraphernalia. Attachment B to the Nadine Drive warrant justifiably instructed executing officers that they could search for those items, and need not have been more particular. [14]

D. The Ford SUV Warrant

1. Generally

Suggs separately challenges the search of the Ford SUV. Specifically, he claims that Tomczyk did not view the guns in the Ford SUV from a lawful vantage point and so the resulting warrant was invalid because it was based on Tomczyk, and then Menter, unlawfully viewing the guns; and, in any event, the scope of the warrant was insufficiently specific.

If the warrant for 2525 Nadine Drive was valid, and the Court has concluded that it was, it is not clear these arguments matter. "[A] warrant authorizing the search of a certain premises that is otherwise adequately described permits officers to search vehicles located on the curtilage when the objects of the search might be located in those vehicles, even though the warrant does not specifically authorize the search of vehicles." *United States v. Dahlman*, 13 F.3d 1391, 1394–95 (10th Cir. 1993). Suggs asserts, and it is probably undeniable in any event, that the carport was part of his curtilage. (ECF No. 63 at 8.) *See also Collins v. Virginia*, —— U.S. ——, 138 S.Ct. 1663, 1675, 201 L.Ed.2d 9 (2018) ("So long as it is curtilage, a parking patio or carport into which an officer can see from the street is no less entitled to protection from trespass and a warrantless search than a fully enclosed garage."). Accordingly, Tomczyk or Menter, or both, probably could have performed a full Fourth Amendment search of the Ford SUV on the authority of the Nadine Drive warrant, without first gaining suspicion that guns might be in the vehicle. The second warrant was belt-and-suspenders, so to speak. [15]

The Government, however, does not make any such argument. The Court will therefore resolve the matter on the arguments presented.

2. Standing

The Government first contests Suggs's standing to challenge the search of the Ford SUV because Mobley, not Suggs, was the vehicle's owner. (ECF No. 58 at 11– 12.) *See also Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) ("Fourth Amendment rights are personal rights which ... may not be vicariously asserted."). When a defendant moves to suppress a vehicle search but is not the vehicle's registered owner, the defendant "bears the burden of establishing ***947** that he gained possession from the owner or someone with authority to grant possession." *United States v. Eckhart*, 569 F.3d 1263, 1274 (10th Cir. 2009) (internal quotation marks omitted).

The Government's only argument in this regard is that Suggs has not satisfied his burden. (ECF No. 58 at 1.) But Mobley told Menter that she was the Ford SUV's owner (which turned out to be true) and that she had loaned it to Suggs. Furthermore, the vehicle was also parked on Suggs's property, not Mobley's. Finally, the gun used to commit the crime was found inside that vehicle. The Court finds that Suggs has discharged his burden to establish his standing to contest the search of the Ford SUV.

3. "Protective Sweep" & "Plain View"

Tomczyk characterized her activities in and around the carport at 2525 Nadine Drive as part of a protective sweep to ensure no one was hiding in the Ford SUV. Suggs argues that the Supreme Court's "protective sweep" doctrine only extends to executing arrest warrants when there is a specific, articulable basis for believing that someone dangerous is on the property at the time of execution. Here, the Colorado Springs police were not executing an arrest warrant. Suggs claims that Tomczyk thus could not conduct a protective sweep and, in consequence, was not lawfully in a place where she could peer into the Ford SUV's rear window and see the guns and ammunition in the vehicle's passenger compartment. (ECF No. 54 at 9–12.) In response, the Government "does not rely on a protective sweep theory," but instead argues that Tomczyk was lawfully on the premises because the search warrant was valid and the guns and ammunition were in "plain view" from a place Tomczyk could lawfully be while executing the warrant. (ECF No. 58 at 11–12.)

"Plain view," according to the Government's cited authorities (*see* ECF No. 58 at 12), governs when an item outside the scope of a search warrant may be seized while executing that warrant. *See United States v. Soussi*, 29 F.3d 565, 570 (10th Cir. 1994); *see also Coolidge*, 403 U.S. at 465–66, 91 S.Ct. 2022. Neither Tomczyk nor Menter seized the guns inside the Ford SUV without a warrant. So "the concern here is with plain view in a quite different sense, namely, as descriptive of a situation in which [according to the Government] there has been no Fourth Amendment search at all." 1 Wayne R. LaFave, *Search & Seizure* § 2.2(a) (5th ed., Oct. 2018 update).

> It is a fair generalization that if a law enforcement officer is able, by the use of his natural senses, to discover what is inside a vehicle while standing in a place where he had a right to be, this discovery does not constitute a Fourth Amendment search.
>
> * * *
>
> If a vehicle is located on private property, but the police have made a lawful entry upon that property for some legitimate reason, what they see in plain view in the car while present at a place on that property consistent with the reason for their presence is also admissible.

Id. § 2.5(c) (internal quotation marks and footnotes omitted).

Suggs's arguments exclusively assume that Tomczyk lacked a valid warrant, and so, at best, her only lawful vantage points were the walkway up to the front porch and the front porch itself. (ECF No. 63 at 8–9.) *See also Florida v. Jardines*, 569 U.S. 1, 8, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (police officers without a warrant may nonetheless "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave ... because ***948** that is no more than any private citizen might do"). Tomczyk could not enter the carport on the pretense of doing would any other private citizen may do. *See Collins*, 138 S.Ct. at 1675

However, the Court has found that the Nadine Drive warrant was valid. Furthermore, the warrant named the carport as part of the premises to be searched. (ECF No. 54-1 at 2.) Thus, Tomczyk, and then Menter, could lawfully view the guns inside the SUV while standing in the carport. Accordingly, no "search" within the meaning of the Fourth Amendment occurred when they viewed the guns with their own eyes.

4. The Gun-Related Portions of the Warrant

Suggs further argues that the "GUNS INVOLVED" section of Ford SUV warrant's Attachment B was insufficiently specific. (*See* ECF No. 54 at 13; ECF No. 63 at 9.) Suggs points out that Menter knew precisely which firearms and ammunition he was searching for—having seen them through the window—and so should not have requested (or received) permission to search for "[a]ny and all firearms" or "[a]ny and all ammo." (*Id.*)

For the same reasons already discussed (Part II.C.2), Menter's warrant application fully justified a search for all firearms, ammunition, and related paraphernalia, given the suspicion that Suggs was unlawfully possessing firearms and the reason to believe that he possessed more than one. No requirement of which the Court is aware, from the Fourth Amendment or otherwise, mandated that Menter could only search for the gun used in the shooting the day before. Accordingly, Suggs's argument in this regard fails.

III. CONCLUSION

For the reasons explained above, Suggs's Motion to Suppress (ECF No. 54) is DENIED. By separate order, the Court will set a new trial date and related deadlines.

All Citations

371 F.Supp.3d 931

Footnotes

1 The record is unclear whether Menter personally interviewed Johnson or received a report of that interview as part of his investigation.

2 Admitted in evidence at the suppression hearing as Government's Exhibit 16.

3 Menter took this photo a little later, as described below, but Tomczyk testified that the photo represents what she saw that night when she shined her flashlight into the Ford SUV. Only the barrel of the handgun is visible in the photo, at the bottom center. Only one of the Glock cases is visible in the photo, just above the flashlight glare on the window.

4 In pre-hearing briefing, the parties appeared to agree that Menter's affidavit was *not* attached to the executed warrant. (ECF No. 54 at 1, 3; ECF No. 58 at 6.) The Court called for a supplemental brief from the Government on this matter because Menter's affidavit "appear[s] to be part of one physically connected package containing the warrant itself, the cover page of the application, attachment A (the affidavit), and attachment B (the scope of the warrant ...)." (ECF No. 69.) The Court therefore asked the Government to explain "its basis for asserting that the warrant affidavit[ ] [was] not physically attached to the resulting warrant[ ]." (*Id.*) The Government responded that the application submitted to the reviewing judge was a physically connected package containing all the items just described, but that the officers did not leave the entire packet at 2525 Nadine Drive after executing the warrant because "Colorado Springs Police Department officers are taught not to leave warrant affidavits with the warrants at the scene" due to sensitive information sometimes contained in those affidavits. (ECF No. 70 at 1.) However, the Government continued, neither Menter nor Wrede could "remember if the warrant packages (including the affidavits) were taken to the scene." (*Id.* at 2.) Nonetheless, at the hearing, Menter himself testified that he "usually" brings the "entire copy" with him when executing warrants, but he simply could not "picture it in [his] head if it was with [him]" when he executed the Nadine Drive warrant. The Court is thus persuaded that Menter brought the full warrant package with him. Menter's hesitance to say as much reflects his desire not to testify beyond his memory, and does not convince the Court that the package he brought to 2525 Nadine Drive failed to include the affidavit.

5 His testimony was scattered on the subject, particularly as to Lloyd. Menter began by saying that he could not recall if he gave any briefing, although he usually does. He later stated that he informed Lloyd of "the type of things we were looking for." But, even later, he stated that Lloyd "wasn't there much, if any"; that the briefing would have been with Wrede; and that perhaps Wrede briefed Lloyd. Nonetheless, the Court did not get the sense that Menter was changing his story so much as exploring his memory of details that he had not before considered, and that he was waxing and waning in his certainty about those details.

6 The additional round of ammunition and the fact that the officers seized all of it did not come into evidence at the hearing. The details of certain papers that were seized and the fact that the papers were seized, as described below, also did not come into evidence at the hearing. These facts are reported in Menter's after-action report, which was the Government's proposed Exhibit 20 (never moved into evidence), and which Suggs previously put into the record as ECF No. 54-4. Because these facts appear undisputed, the Court disregards the lack of evidence introduced to support them at the hearing itself.

7 Admitted in evidence at the suppression hearing as Government's Exhibit 17.

8 The Government claims that later ballistic analysis confirmed that the Glock handgun found in the Ford SUV was the weapon that ejected the spent shell casing found at the scene of the shooting. (ECF No. 58 at 4.) This is immaterial to the charges Suggs currently faces.

9 These four phases are well-established in the case law, but there is no explanation of why a severance analysis should precede a good faith analysis. It stands to reason, at least, that if an objectively reasonable officer could rely in good faith on a warrant, severability and its consequent partial suppression of evidence is inappropriate. But the circumstances of this case give the Court no reason to explore this tension further.

10 "In fact, it seems the officer took a form warrant that could be applied to almost any crime and added language but deleted nothing, thereby creating an extremely broad warrant." *Id.* at 636 n.5.

11 At the suppression hearing, Suggs also emphasized *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). In *Groh*, the search warrant affiant accidentally repeated the description of the location to be searched in the portion of the proposed warrant where he should have specified the items to be seized. *Id.* at 554–55, 124 S.Ct. 1284. The Supreme Court held that this warrant "was plainly invalid." *Id.* at 557, 124 S.Ct. 1284. This circumstance—total failure to list the items to be seized—does not apply here. Suggs also emphasized the non-precedential decision in *United States v. Dunn*, 719 F. App'x 746 (10th Cir. 2017). Even if *Dunn* were binding, the two opinions in that decision do not provide sufficient detail about the warrant to permit this Court to make a reasoned comparison. But it appears the primary problem was that the list of items to be seized was preceded by an "include but are not limited to" clause and a generic authorization to look for "other" items (in contrast to, *e.g.*, items that had been used in committing a crime, items that would be illegal to possess, etc.). *Id.* at 748–49, 755. Those infirmities are not comparable to the alleged infirmities at issue here.

12 Nor does the lower court opinion under review. *See Andresen v. State*, 24 Md.App. 128, 331 A.2d 78, 102–03 (Md. Spec. App. 1975).

13 Menter's affidavits provide this context, but they were not incorporated by reference into the warrants—a matter the Court addresses in Part II.B.2.

14 For the first time in his reply brief, Suggs asserts that "no part of the warrant satisfies the particularity requirement." (ECF No. 63 at 5.) In support, however, he only challenges the two gun-related bullet points and the two vehicle-related bullet points discussed already. (*Id.*)

15 Even if the warrant for 2525 Nadine Drive was invalid, the Court would find that Tomczyk relied on it in good faith. *See Leon*, 468 U.S. at 920–26, 104 S.Ct. 3405. Thus, for the reasons just explained and other reasons explained below, she could *at least* stand in the carport and shine her flashlight into vehicles parked there. Her knowledge alone of what she saw (apart from showing it to Menter), combined with everything Menter knew before executing the Nadine Drive warrant, would have been enough to justify the Ford SUV warrant, assuming it was sufficiently particular.

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FILED
United States Court of Appeals
Tenth Circuit

August 17, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PERRY WAYNE SUGGS, JR.,

Defendant - Appellant.

No. 22-1024
(D.C. No. 1:18-CR-00089-WJM-1)
(D. Colo.)

ORDER

Before **PHILLIPS**, **MURPHY**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk