APPENDIX

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No. 16-2575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIMMY RENEE CRUZ, JR.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

OPINION

BEFORE: NORRIS, MOORE, and STRANCH, Circuit Judges.

ALAN E. NORRIS, Circuit Judge. Jimmy Renee Cruz, Jr., entered into a conditional guilty plea to two counts of a three-count indictment. He pleaded guilty to one count of possession with intent to distribute heroin, 21 U.S.C. § 841(a)(1), and one count of possessing a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c). In exchange for his plea, the government agreed to dismiss the third count, 18 U.S.C. § 922(g)(1) (felon in possession of a firearm). He was subsequently sentenced to a 123-month term of imprisonment.

On appeal he challenges the denial of his motion to suppress the results of a search of his hotel room. He also contends that his sentence is substantively unreasonable. We find no merit in either contention and therefore affirm the judgment of the district court.

I.

The plea agreement contains the following stipulations:

> On March 19, 2015, Jimmy Cruz was a fugitive, wanted for absconding on parole as well as being sought on six outstanding criminal cases for which warrants had been issued. On that same date, a Kalamazoo Police Officer saw

> Cruz driving a new white Nissan Altima with Illinois license plates within one mile of the Red Roof Inn in Kalamazoo. The officer had earlier communicated to his fellow officers that a confidential informant had told him within the last week that Cruz was living at and selling drugs from a room at the Red Roof Inn. *Cruz disputes, however, that the officer truly had that information.*
>
> On March 19, 2015, other officers of the Kalamazoo Police Department drove through the parking lot of the Red Roof Inn and saw a new white Nissan Altima with Illinois license plates parked outside room 129. The staff at the Inn reported that Cruz had rented room 129 using a different name. The officers checked Cruz's criminal history and noted that he was on parole for a felony drug offense and had prior drug convictions; they also confirmed the existence of the arrest warrants. The officers then observed Cruz exit room 129 and enter the white Nissan. Several police officers in clearly marked uniforms attempted to apprehend Cruz, but he was able to put the vehicle in gear and then drive in a reckless and highly dangerous fashion during which he escaped pursuing police officers. . . .
>
> Two of the officers who had attempted to arrest Cruz could smell the distinctive odor of marijuana emanating from within Room 129 immediately after Cruz had exited it. A certified K-9 drug detection dog also alerted outside Room 129 and did not alert outside nearby rooms. Officers obtained a search warrant for Room 129. When officers executed the search warrant they recovered 29 grams of a mixture containing heroin, a stolen, loaded Bersa .380 caliber semiautomatic pistol, serial Number 546718, approximately $5,400 in cash and a small quantity of marijuana. The heroin and the pistol were found together within the room's safe.
>
> By his guilty plea, Cruz admits that he possessed the heroin in Room 129 with the intent to distribute it to others. Cruz also admits that the firearm was possessed by him in furtherance of his drug trafficking activities, specifically his possession with the intent to distribute the heroin alleged in Count One and that the firearm had travelled in and affected interstate commerce.

(Page ID 328-29) (emphasis added).

Despite these stipulations, there is one troubling aspect of the investigation that led to this prosecution: defendant and Kalamazoo Sergeant Derrick Turner, who is the officer alluded to in the italicized sentence quoted above, were both allegedly involved with a woman named Desiree Downing. While Sergeant Turner did not submit the affidavit in support of the warrant to search defendant's hotel room, the officer who did, Justin Wolbrink, included the following statement in the affidavit:

> Within the past week, Sgt. Turner from Kalamazoo Public Safety received information from a confidential informant that Jimmy Renee Cruz Jr. 10/31/80, was staying at the Red Roof Inn on West Michigan Avenue in Kalamazoo in Room 229. The informant also advised that there was heavy drug trafficking occurring from the same room.

(Page ID 55.) Given Sergeant Turner's alleged personal animus against defendant, counsel argues that the affidavit is suspect and that the district court should have permitted a *Franks* hearing.[1]

A motion to suppress was filed on behalf of the defendant. While the motion did not request a *Franks* hearing, the district court addressed the issue and concluded that a *Franks* hearing was not warranted. It then denied the motion to suppress. Its reasoning is summarized below.

New counsel subsequently filed a motion for reconsideration of the denial of the earlier motion to suppress. The motion included information purporting to document Sergeant Turner's romantic involvement with Ms. Downing. The district court again denied relief.

II.

Motion to Suppress

We review the denial of a motion to suppress for clear error as to factual findings and de novo as to conclusions of law. *United States v. Brown*, 732 F.3d 569, 572 (6th Cir. 2013). The denial of a *Franks* hearing is reviewed under the same standard. *United States v. Mastromatteo*, 538 F.3d 535, 545 (6th Cir. 2008) (quoting *United States v. Graham*, 275 F.3d 490, 505 (6th Cir. 2001)). We view the evidence "in the light most likely to support the district court's decision."

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[1] *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) ("[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.").

United States v. Garcia, 496 F.3d 495, 502 (6th Cir. 2007) (quotation omitted). We also owe great deference to a magistrate's determination of probable cause. *Brown*, 732 F.3d at 573.

On appeal, defendant argues that he was entitled to a *Franks* hearing because he made a substantial showing that the affidavit in support of the warrant at issue included a false statement, made knowingly or intentionally, or with reckless disregard for the truth. *Franks*, 438 U.S. at 155-56. In his view, the information provided by the confidential informant about drug trafficking at the Red Roof Inn lacked probative value because there was nothing to establish either his veracity or past reliability. And, as already explained, Sergeant Turner's own objectivity was suspect because of his alleged involvement with Ms. Downing.

In denying the motion to suppress, the district court offered this reasoning:

> Cruz has failed to satisfy the threshold requirement of making a substantial preliminary showing that there was a false statement in the affidavit. Although Cruz surmises that Turner fabricated the tip from the confidential informant, he provides no basis for such assertion. Even if Turner was involved in a "love triangle" as Cruz asserts, that fact alone is not enough to show that Turner fabricated any information. Moreover, Wolbrink, and not Turner, filed the affidavit with the state-court judge. Even if Turner lied about the confidential tip, there is no basis to believe that Wolbrink knew or should have known that the information was false.

(Page ID 76.) The court also observed that a *Franks* hearing was not needed because "there was sufficient information in the affidavit to support probable cause apart from any allegedly false information." *Id.* We agree with the district court's reasoning, particularly its finding that probable cause had been sufficiently established without the information provided by the anonymous informant. Officer Wolbrink included in his affidavit the following untainted information: officers confirmed that defendant was staying in Room 129; they knew of his outstanding arrest warrants and the fact that he had absconded from parole; he fled the scene when approached; and a drug detection dog alerted outside Room 129. These factors definitively establish probable cause particularly given the deference that we accord the magistrate's determination. *Brown*, 732 F.3d at 573.

Was the Sentence Substantively Unreasonable?

We review challenges to a sentence based upon substantive reasonableness for an abuse of discretion. *United States v. Wright*, 747 F.3d 399, 413 (6th Cir. 2014). When, as here, the sentence falls within the guidelines range, it is presumed to be reasonable. *Id.* (citing *United States v. Vonner*, 516 F.3d 382, 389-90 (6th Cir. 2008) (en banc)). A sentence is substantively unreasonable "if the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." *Id.* (quoting *United States v. Camiscione*, 591 F.3d 823, 832 (6th Cir. 2010)).

Defendant does not argue that his sentence was based upon an impermissible factor nor does he fault the district court for giving undue weight to "any pertinent factor." Rather, he contends that, despite his extensive criminal history, he has never faced a sentence of even two years. In his view, the current sentence is simply too long. While, as a public policy matter, one could argue that the federal drug laws at times impose excessively long sentences, they have not been found legally wanting. In the instant case, the district court imposed a sentence at the low end of the guidelines range. The sentence imposed was substantively reasonable.

III.

The judgment is **affirmed**.

United States District Court

Western District of Michigan

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

-vs-

Case Number: 1:15:CR:140-01

JIMMY RENEE CRUZ, JR.

USM Number: 18828-040

Scott Graham
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to Counts 1 and 2 of the Indictment.

☐ pleaded nolo contendere to Count(s) ___, which was accepted by the court.

☐ was found guilty on Count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Offense Ended	Count No.
21 U.S.C. § 841(a)(1), (b)(1)(C) and 21 U.S.C. § 851	March 19, 2015	One
18 U.S.C. § 924(c)(1)(A)(i)	March 19, 2015	Two

Nature of Offense

Count One: Possession with Intent to Distribute an Unspecified Quantity of a Mixture or Substance Containing a Detectable Amount of Heroin

Count Two: Possession of a Firearm in Furtherance of a Drug Trafficking Crime

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

☒ Count 3 is dismissed on the motion of the United States.

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

Date of Imposition of Sentence: November 2, 2016

DATED: November 2, 2016

/s/ Gordon J Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **one hundred twenty-three (123) months, consisting of sixty-three (63) months on Count One, and sixty (60) months on Count Two to be served consecutively to Count One**.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The Defendant shall surrender to the United States Marshal for this district:
- ☐ at _______________ on __________________.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2:00 P.M. on __________.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

____

____

____

Defendant delivered on ________________________ to ________________________________

at ________________________________, with a certified copy of this judgment.

____
United States Marshal

By: ______________________________
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **six (6) years on Count One and two (2) years on Count Two, to run concurrently**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;
7. the defendant shall refrain from all use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer, and shall pay at least a portion of the cost according to his ability, as determined by the probation officer.

2. The defendant shall not use/possess any alcoholic beverages and shall not frequent any establishments whose primary purpose is the sale/serving of alcohol.

3. The defendant shall provide the probation officer with access to any requested financial information.

4. The defendant shall participate in cognitive behavioral therapy as directed by the probation officer. The defendant shall provide the probation officer with access to any requested financial information.

CRIMINAL MONETARY PENALTIES[1]

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the following pages.

Assessment	Fine	Restitution
$200.00	**waived**	-0-

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

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

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

Name of Payee	Total Loss	Restitution Ordered	Priority or Percentage

☐ Restitution amount ordered pursuant to plea agreement: $

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

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

☐ the interest requirement is waived for the fine.

☐ the interest requirement is waived for the restitution.

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

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

[1] Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payment of **$200.00** due immediately. The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to any outstanding court-ordered financial obligations.

☐ not later than ________, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F, below; or

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

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

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

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

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

The restitution and/or fine is to be paid in minimum quarterly installments of $25.00 based on IFRP participation, or minimum monthly installments of $20.00 based on UNICOR earnings, during the period of incarceration, to commence 60 days after the date of this judgment. Any balance due upon commencement of supervision shall be paid, during the term of supervision, in minimum monthly installments of $50.00 to commence 60 days after release from imprisonment.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, 399 Federal Building, 110 Michigan N.W., Grand Rapids, MI 49503, unless otherwise directed by the court, the probation officer, or the United States Attorney.

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

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

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

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

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 1:15:CR:140

v.

HON. GORDON J. QUIST

JIMMY RENEE CRUZ, JR.,

Defendant.

/

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

On August 4, 2015, the Government filed an indictment charging Defendant, Jimmy Renee Cruz, with drug and weapons crimes. Cruz filed a motion to suppress certain evidence, which the Court denied. Thereafter, Cruz obtained new counsel and filed a motion for reconsideration of the Court's previous order. For the reasons that follow, the Court will deny Cruz's motion.

Background

On March 19, 2015, Kalamazoo Public Safety Officer Justin Wolbrink obtained a warrant to search Room 129 of the Red Rood Inn based on his affidavit that stated as follows:

- Sergeant Turner, another Kalamazoo officer, had received information from a confidential informant that Cruz was staying in Room 229 of the Red Roof Inn, and that there was heavy drug trafficking activity occurring from that room. (Dkt. #22-2 at Page ID#55.)
- Wolbrink saw a vehicle that matched the description of a vehicle Turner had seen Cruz driving earlier that day outside Room 129 of the Red Roof Inn. (*Id.*)
- Staff at the Red Roof Inn told police that Cruz was staying in Room 129. (*Id.*)

- Wolbrink saw Cruz exit Room 129 and get into a vehicle. (*Id.*) Wolbrink and another officer, who were both in uniform, approached the vehicle with their weapons drawn and shouted at Cruz to stop. (*Id.*) After the officers opened the driver and front passenger doors, Cruz drove off at a high rate of speed, pulling the doors from the officers' hands and almost hitting one of the officers. (*Id.*) Cruz then sped around another officer's vehicle and fled at a high rate of speed with his lights extinguished, going the wrong way down one way roads. (*Id.*)
- A dog certified for narcotics detection indicated for the odor of drugs outside Room 129, and two officers detected the odor of marijuana outside the room. (*Id.* at Page ID#56.)

In his previous motion, Cruz argued that the search warrant affidavit did not establish probable cause because Turner fabricated the tip from the confidential informant. The Court found that Cruz failed to provide a factual basis to believe that Turner fabricated the tip or that Wolbrink knew the tip was fabricated. The Court further concluded that Cruz was not entitled to a *Franks* hearing because there was sufficient information in the affidavit to support probable cause apart from the tip.

Discussion

A party moving for reconsideration "shall not only demonstrate a palpable defect by which the Court and the parties have been misled, but also show that a different disposition of the case must result from a correction thereof." W.D. Mich. LCrR. 47.3. Cruz appears to argue that the Court was misled because his previous motion did not contain sufficient information regarding Turner's motive to fabricate a tip. Cruz includes an extensive discussion of the relationship between Turner and Desiree Downing, a woman who was also romantically involved with Cruz, and argues that many of Turner's co-workers (and possibly Wolbrink) knew of that relationship. Although it provides for interesting reading, the description of the relationship between Turner and Downey is ultimately unnecessary to determine whether the affidavit established probable cause for the search warrant.

The Court previously concluded that Cruz was not entitled to a *Franks* hearing because, even if the confidential tip was excluded, the warrant affidavit contained sufficient facts to support probable cause. Cruz takes issue with this conclusion, arguing that everything discussed in the affidavit was discovered as a result of the tip from Turner, and that it therefore constitutes fruit of the poisonous tree and cannot be used to support probable cause.

The fruit of the poisonous tree doctrine bars admission of evidence that police obtain derivatively from unconstitutional action. *United States v. Pearce*, 531 F.3d 374, 381 (6th Cir. 2008). A defendant seeking to exclude evidence based on the fruit of the poisonous tree doctrine must establish not only that a constitutional violation was the but-for cause of police obtaining the evidence, but also that "the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* (internal quotation marks omitted).

Cruz has failed to demonstrate that there was any unconstitutional action, as would be required to trigger the fruit of the poisonous tree doctrine. Cruz asserts that Turner was jealous of his relationship with Downey, and interfered with Cruz's constitutional right to engage in a sexual relationship by following him and fabricating a trip. This argument is not supported by case law or common sense. Cruz was a convicted felon and fugitive, and he did not have a constitutional right to be ignored by police, even if those police acted out of jealousy. Because there was no constitutional violation, the fruit of the poisonous tree doctrine is not implicated in this case.

Cruz's argument regarding police interaction with the clerk at the Red Roof Inn fares no better. Cruz argues that the warrant affidavit's statement that the clerk advised that Cruz had been staying in Room 129 was untrue. Rather, Cruz asserts, the clerk stated that he did not know the name of the individual in Room 129, but rather answered in the affirmative when asked if the man shown in a photograph (Cruz) was staying in Room 129. Whatever weaknesses may exist with photo identifications, they are not implicated in this case. Police saw Cruz leave Room 129, which confirmed the clerk's identification. Moreover, the warrant affidavit would be sufficient to establish probable cause if the statement about the clerk was excised.

Cruz has failed to demonstrate a palpable defect by which the Court was misled, or that a different disposition of the case would result even if there was such defect. Therefore,

IT IS HEREBY ORDERED that Defendant's Motion for Reconsideration (ECF No. 45) is **DENIED.**

IT IS FURTHER ORDERED that Defendant's Motion for Leave to File (ECF No. 50) is **DENIED as moot.**

Dated: May 26, 2016

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 1:15-CR-140

v.

HON. GORDON J. QUIST

JIMMY RENEE CRUZ, Jr.,

Defendant.

/

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

On August 4, 2015, the Government filed an indictment charging Defendant, Jimmy Renee Cruz, with drug and weapons crimes. Cruz has moved to suppress evidence discovered during a March 19, 2015 search conducted pursuant to a warrant, arguing that the warrant was not supported by probable cause. The Government has responded to Cruz's motion, and Cruz has filed a reply. For the reasons that follow, the Court will deny Cruz's motion.

Background

On March 19, 2015, Kalamazoo Public Safety Officer Justin Wolbrink learned that another officer, Sergeant Turner, had received information from a confidential informant that Cruz was staying in Room 229 of the Red Roof Inn, and that there was heavy drug trafficking activity occurring from that room. (Dkt. #22-2 at Page ID#55.) At around 8 p.m. that evening, Wolbrink and other investigators went to the Red Roof Inn. (*Id.*) Investigators saw a new white Nissan Altima with Illinois plates—which matched the description of a vehicle Turner had seen Cruz driving earlier that day—outside Room 129. (*Id.*) The investigators learned from the staff at the Red Roof Inn that Cruz had been staying in Room 129 since March 13, 2015. (*Id.*)

While conducting surveillance on Room 129, officers observed Cruz exit Room 129 and get into the white Nissan. (*Id.*) Wolbrink and another officer, who were both in uniform, approached the vehicle with their weapons drawn and shouted at Cruz to stop. (*Id.*) After the officers opened the driver and front passenger doors, Cruz drove off at a high rate of speed, pulling the doors from the officers' hands and almost hitting one of the officers. (*Id.*) Cruz then sped around another officer's vehicle and fled at a high rate of speed with his lights extinguished, going the wrong way down one way roads. (*Id.*)

After Cruz drove off, the officers secured Room 129. (*Id.* at Page ID#56.) A dog certified for narcotics detection indicated for the odor of drugs outside Room 129, and two officers detected the odor of marijuana outside the room. (*Id.*) Based on the information acquired during the course of the day, Wolbrink filed an affidavit for search warrant. That evening, a state court judge issued a search warrant authorizing a search of Room 129, and officers executed the warrant. (*Id.* at Page ID#53.) The officers discovered heroin, marijuana, a firearm, and cash during the search.

Discussion

Cruz argues that the search warrant did not establish probable cause, pointing in particular to the warrant affidavit's statement that Turner received information from a confidential informant. Cruz argues that Turner was romantically involved with a woman who was also involved with Cruz, and that Turner fabricated the tip based on this "three way love triangle." Cruz further requests a *Franks* hearing to allow him challenge the portions of the affidavit that are based on information from Turner.

In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), the Supreme Court held that a criminal defendant is entitled to a hearing if he "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *Id.* at 155-56, 89 S. Ct. at 2676. As the Sixth Circuit has explained:

> To obtain a Franks hearing, the movant must provide a substantial preliminary showing that a false statement was made either knowingly or intentionally, or with reckless disregard for the truth. The movant must also show that the allegedly false statements were necessary for the magistrate's determination of probable cause. Therefore, if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. What remains of the affidavit establishes probable cause if it provides the magistrate judge with a basis for finding there was a fair probability that contraband or evidence of a crime would be found at the stated location.

United States v. Mastromatteo, 538 F.3d 535, 545 (6th Cir. 2008) (internal quotation marks and citations omitted).

Cruz has failed to satisfy the threshold requirement of making a substantial preliminary showing that there was a false statement in the affidavit. Although Cruz surmises that Turner fabricated the tip from the confidential informant, he provides no basis for such assertion. Even if Turner was involved in a "love triangle" as Cruz asserts, that fact alone is not enough to show that Turner fabricated any information. Moreover, Wolbrink, and not Turner, filed the affidavit with the state-court judge. Even if Turner lied about the confidential tip, there is no basis to believe that Wolbrink knew or should have known that the information was false.

Furthermore, even if Cruz could demonstrate that there was a false statement in the affidavit, he would not be entitled to a *Franks* hearing because there was sufficient information in the affidavit to support probable cause apart from any allegedly false information. An affidavit establishes probable cause for a search warrant if "'given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Berry*, 565 F.3d 332, 338 (6th Cir. 2009) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). *See also United States v. Lattner*, 385 F.3d 947, 951 (6th Cir.2004) (noting that probable cause involves "reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion") (internal quotation marks omitted). "When reviewing a magistrate judge's probable cause determination, a reviewing court should give great deference to a magistrate judge's probable cause determination and reverse that decision only if it was arbitrarily made." *United States v. Frechette*, 583 F.3d 374, 379 (6th Cir. 2009). Thus, the magistrate judge's probable cause determination will stand unless "the affidavit did not set forth a substantial basis for finding probable cause." *Id.*

In this case, the affidavit included a number of facts to support probable cause, including that (1) Cruz was the confirmed occupant of Room 129; (2) Cruz fled from police; (3) a trained K9 indicated the exterior of Room 129 for the presence of drugs; (4) officers detected the odor of marijuana outside Room 129; and (5) Cruz had several convictions for drug possession and delivery. (Dkt. #22-2.) Such evidence is more than sufficient to provide probable cause for a search warrant.

The Sixth Circuit has held that "the alert of a properly trained and reliable drug dog 'is sufficient to establish probable cause for the presence of a controlled substance.'" *United States v. Howard*, 621 F.3d 433, 453 (6th Cir. 2010) (quoting *United States v. Diaz*, 25 F.3d 392, 393–94 (6th Cir.1994)). The affidavit indicated that the dog in this case had proper training, and Cruz has not questioned as much. The alert from the dog, combined with the odor of marijuana emanating from the room, provided sufficient evidence to establish probable cause for a search warrant. *See United States v. Crumb*, 287 F. App'x 511, 514 (6th Cir. 2008) (noting that the Sixth Circuit has consistently held that "the detection of a narcotic's odor, by itself, is sufficient to provide probable cause to conduct a lawful search of a vehicle."). The fact that Cruz had prior convictions for drug possession and distribution, while not enough on its own to establish probable cause, bolstered the probable cause determination. *See United States v. Kaplan*, 526 F. App'x 208, 213 (3d Cir.2013) (quoting *United States v. Stearn*, 597 F.3d 540, 557 (3d Cir.2010)) ("Prior arrests or convictions can help establish probable cause, 'particularly where the previous arrest or conviction involves a crime of the same general nature as the one which the warrant is seeking to uncover.'"). *See also United States v. Wagers*, 452 F.3d 534, 541 (6th Cir. 2006) (finding that a prior conviction for a similar crime "was relevant, though not dispositive" in determining probable cause). Finally, the fact that Cruz fled officers, and the reckless actions he took in doing so, was suggestive of guilt. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676 (2000) ("Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."). Although Cruz's flight could have been attributable to other factors, such as his knowledge that there were outstanding warrants for his arrest, it helped establish probable cause for a search in combination with the other evidence.

In sum, the Court concludes that there was ample evidence in the search warrant affidavit to support probable cause, even if any information from Turner was removed. Accordingly, Cruz is not entitled to a *Franks* hearing or to suppression of the evidence discovered during the March 19, 2015 search. Therefore,

IT IS HEREBY ORDERED that Defendant's Motion to Suppress (dkt. #22) is **DENIED.**

Dated: February 18, 2016

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE