APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 25-2448

Fredrick Burns

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:25-cv-00345-RFR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 26, 2025

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

FREDRICK BURNS,

Defendant.

8:22CR272

MEMORANDUM AND ORDER

On June 21, 2024, defendant Fredrick Burns ("Burns") waived indictment (Filing No. 60) and pleaded guilty to a two-count information (Filing No. 58) pursuant to a written plea agreement (Filing No. 64). Under that agreement, Burns pleaded guilty to one count of knowingly and intentionally possessing "with intent to distribute 5 grams or more of methamphetamine (actual) . . . and 100 grams or more of fentanyl analogue," in violation of 21 U.S.C. § 841(a)(1) and (b)(1), and one count of knowingly using and carrying a firearm "during and in relation to" a drug-trafficking crime and knowingly possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C § 924(c)(1)(A).

In his petition to change his plea to guilty (Filing No. 63), Burns stated he was satisfied with his counsel and averred his plea was not only voluntary but also was made "completely of [his] own choice, free of any force or threats from anyone." He further stated he was not promised anything to cause him to plead guilty beyond what was documented in his plea agreement. When asked, "What acts did you do that cause you to think you are guilty of the charge(s) to which you want to plead GUILTY?," Burns responded, "I possessed drugs with the intent to sell them while possessing a firearm."

At his change-of-plea hearing, the Court carefully described the elements and penalties for both the drug and gun charges against Burns (Filing No. 103). He stated under oath that he committed each of those crimes and admitted to a factual basis that included

both drugs and guns. Burns advised the Court he had no questions about the charges against him and the government's evidence. He again averred that no one forced him, threatened him, nor made promises to him to get him to plead guilty. At the end of the hearing, the Court found that Burns's guilty plea was knowing, voluntary, and intelligent.

Burns appeared for sentencing on February 6, 2025 (Filing No. 122). The Court sentenced him to 87 months in prison on the drug charge and 60 months in prison on the gun charge, to run consecutively. *See* 18 U.S.C. § 924(c)(1)(A)(i) (requiring a consecutive mandatory minimum sentence for the gun charge). It also imposed concurrent 5-year terms of supervised release. Burns did not appeal. He is serving his time at the Federal Correctional Institution in Pekin, Illinois ("FCI Pekin"). His projected release date is December 9, 2034.

Now before the Court is Burns's *pro se* Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Filing No. 129). "Section 2255 'was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus.'" *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (quoting *Davis v. United States*, 417 U.S. 333, 343 (1974)). Relief "is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *Walking Eagle v. United States*, 742 F.3d 1079, 1081-82 (8th Cir. 2014) (quoting *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996)).

Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts requires the Court to complete an initial review of Burns's § 2255 motion. If it "plainly appears" that Burns is not entitled to relief based on the motion, attached exhibits, and the record, the Court will dismiss the motion. *Id.* If not, the Court must order the United States Attorney to "file an answer, motion, or other response" or take some other action. *Id.*; *accord* 28 U.S.C. § 2255(b).

Burns asserts two grounds for relief. First, he argues his retained counsel was ineffective because he knowingly induced Burns to plead guilty to using a firearm when he never actively employed or possessed a firearm. Second, he presents a related claim for "ineffective assistance of counsel and prosec[u]torial misconduct due-process vi[o]lation in the pl[e]a agreement." In that claim, he argues his counsel and the prosecutor knowingly induced him to plead guilty to possessing property found at a residence that was not his.

To prove ineffective assistance of counsel, Burns must show not only that his counsel's performance was deficient, that is, that he "made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," but also that his poor performance prejudiced Burns's defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *accord Burnett v. United States*, 125 F.4th 912, 914 (8th Cir. 2025). "To show prejudice, a defendant" like Burns "who pleaded guilty 'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Sharp v. United States*, 132 F.4th 1094, 1098 (8th Cir. 2025) (quoting *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985)). "Failure to establish either *Strickland* prong is fatal to an ineffective-assistance claim." *Worthington v. Roper*, 631 F.3d 487, 498 (8th Cir. 2011).

To prevail on a claim of prosecutorial misconduct, Burns must prove the prosecutor's conduct was improper and that the "conduct prejudicially affected [his] substantial rights so as to deprive him a fair trial." *United States v. Ziesman*, 409 F.3d 941, 953 (8th Cir. 2005) (quoting *United States v. Beckman*, 222 F.3d 512, 526 (8th Cir. 2000)). A prosecutor's "vigorous advocacy," *United States v. Bussey*, 942 F.2d 1241, 1253 (8th Cir. 1991), and hard bargaining do not suffice, *see Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (explaining that "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty"). Indeed, Burns would have to show misconduct "so egregious that

[it] fatally infected the proceedings." *Jones v. Jones*, 938 F.2d 838, 844-45 (1991) (quoting *Blair v. Armontrout*, 916 F.2d 1310, 1324 (8th Cir. 1990)); *cf. Roberts v. Bowersox*, 137 F.3d 1062, 1066 (8th Cir. 1998) (explaining "prosecutorial misconduct does not warrant federal habeas relief unless the misconduct infected the" proceedings "with enough unfairness to" make the defendant's "conviction a denial of due process").

Burns would also have to overcome his failure to raise the issue during prior proceedings in this Court or on appeal. *See, e.g., United States v. Hamilton*, 604 F.3d 572, 574 (8th Cir. 2010) ("Claims not made during district court proceedings or on direct appeal are procedurally defaulted and may not be raised for the first time in a § 2255 motion."); *Sun Bear*, 644 F.3d at 702 n.3 (explaining that failing to raise an issue on direct appeal requires the defendant "to avoid that procedural default using the cause and prejudice analysis mandated by *United States v. Frady*, 456 U.S. 152, 165-69 (1982)").

Burns undoubtedly faces a "heavy burden" to prove either of his claims. *Apfel*, 97 F.3d at 1076; *Mack v. Caspari*, 92 F.3d 637, 643 (8th Cir. 1996). And he falters right out of the gate. The Court can dismiss a § 2255 motion "without an evidentiary hearing if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusory." *Evans v. United States*, 200 F.3d 549, 551 (8th Cir. 2000). Burns gets no farther than that.

His vague assertions that he had nothing to do with the gun or drugs seized in this case and that his counsel and the prosecutor induced him to plead guilty despite knowing he was innocent directly contradict multiple sworn statements he made in response to the Court's questions during an extensive plea colloquy. Burns told the Court in no uncertain terms that he was happy with his counsel, was pleading guilty knowingly and voluntarily, and that he was in fact guilty of the crimes charged in the information. Burns does not even try to explain those stark contradictions or his change of heart. *See Strickland*, 466 U.S. at 689 ("It is all too tempting for a defendant to second-guess counsel's assistance

after conviction or adverse sentence."). On these facts, the Court finds Burns's sworn statements far more credible than his post-sentencing regrets and sees no miscarriage of justice in holding him to his agreement. *See Walking Eagle*, 742 F.3d at 1081-82.

One last question remains. Before Burns can appeal the Court's denial of his § 2255 motion, he must obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). The Court cannot issue such a certificate unless Burns "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do that, he must demonstrate that a "reasonable jurist" would find this Court's denial of his "claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because he has not made that showing, the Court will not issue a certificate of appealability.

In sum, the Court's initial review of Burns's § 2255 "motion and the files and records of the case conclusively show that [he] is entitled to no relief." 28 U.S.C. § 2255(b). Accordingly,

IT IS ORDERED:

1. Defendant Fredrick Burns's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Filing No. 129) is denied.
2. No certificate of appealability will issue.
3. A separate judgment will be entered.
4. The Clerk of Court is directed to send a copy of this Memorandum and Order to Burns at his address of record.

Dated this 30th day of May 2025.

BY THE COURT:

Robert F. Rossiter, Jr.
Chief United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 25-2448

Fredrick Burns

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:25-cv-00345-RFR)

JUDGMENT

Before SHEPHERD, KELLY, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

October 21, 2025

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

APPENDIX D

UNITED STATES OF AMERICA, Plaintiff, vs. FREDRICK BURNS, Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA
2023 U.S. Dist. LEXIS 231595
8:22CR272
November 28, 2023, Decided
November 28, 2023, Filed

Counsel **{2023 U.S. Dist. LEXIS 1}**For Fredrick Burns, Defendant: Yvonne D. Sosa, FEDERAL PUBLIC DEFENDER'S OFFICE - OMAHA, Omaha, NE.

For USA, Plaintiff: Kimberly C. Bunjer, U.S. ATTORNEY'S OFFICE - OMAHA, Omaha, NE USA.

Judges: Michael D. Nelson, United States Magistrate Judge.

Opinion

Opinion by: Michael D. Nelson

Opinion

FINDINGS AND RECOMMENDATION

This matter is before the Court on the Motion to Suppress (Filing No. 35) filed by Defendant, Fredrick Burns. Defendant seeks to suppress evidence obtained from the search of a residence pursuant to a search warrant, asserting the warrant was not supported by probable cause. Defendant filed a brief (Filing No. 36) in support of the motion, and the government filed a brief (Filing No. 42) in opposition. The government also filed an Index of Evidence containing Exhibit 1, which is the search warrant and supporting application and affidavit challenged by Defendant in this motion. (Filing No. 43-1). Defendant initially requested an evidentiary hearing, but following a status conference held with counsel for Defendant on November 17, 2023, Defendant withdrew his request for an evidentiary hearing.1 Because Defendant only moves to suppress evidence obtained from the execution of a search warrant allegedly issued without**{2023 U.S. Dist. LEXIS 2}** probable cause, the Court's review will be limited to whether the four corners of the warrant affidavit and application established probable cause. See *United States v. Saddler*, 19 F.4th 1035, 1039 (8th Cir. 2021) ("[O]nly that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause.") (quoting *United States v. Roberts*, 975 F.3d 709, 713 (8th Cir. 2020)). Accordingly, the matter is now fully submitted. For the following reasons, the undersigned magistrate judge recommends that the motion be denied.

BACKGROUND

On July 7, 2022, a Nebraska county court judge signed a search warrant for a residence at 3820 S 24th Street in Omaha, Nebraska, based upon an application and affidavit submitted by Omaha Police Department Detective Christopher Perna ("Officer Perna"). (Filing No. 43-1). The affidavit set forth the following information:

> Affiant Officer was contacted by a reliable confidential informant hereafter referred to as C/I. The C/I stated that he/she knew of a party named, Aliyah FREEMONT, who is known to actively sell

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imitation oxycodone (Fentanyl) pills in the Omaha area. The C/I described FREEMONT as being a light skinned or mixed-race black female, approximately 5'2", approximately 20 years of age.

Within 48 hours of 23 June 2022,**{2023 U.S. Dist. LEXIS 3}** during the daytime hours, Affiant Officer met with the C/I. The C/I stated he/she had set up a fentanyl pill transaction with FREEMONT. The C/I stated that he/she would be buying the blue "M30" imitation oxycodone pills. The C/I stated he/she was instructed by FREEMONT to pick he up in the area of S 36th and Orchard St. The C/I stated that FREEMONT said that once he/she picked FREMONT they were going to 3820 S 24th St apartment #2 to meet a white male named "Dro", who will supply FREEMONT the imitation oxycodone pills. Affiant Officer knew of this location and of "Dro" from a previous interview. Affiant Officer interviewed Xavier RODRIGUEZ after he was arrested for a warrant and drug possession on 13 June 2022. RODRIGUEZ stated that he was buying imitation oxycodone pills from a "Dro" at 3820 S 24th St, apartment #2. RODRIGUEZ described Dro as a white male in his late 20"s. RODRIGUEZ stated that apartment #2 was located on the upstairs floor on the left. RODRIGUEZ stated that Dro lives alone and is always armed with a handgun.

Affiant Officer met with the C/I at a meet spot. Prior to meeting with the C/I surveillance units went to the area of 3820 S 24th St and put a camera in the hallway**{2023 U.S. Dist. LEXIS 4}** outside of 3824 S 24th St, apartment #2. The C/I and C/I's vehicle were searched and no items of evidence were located. The C/I was given money from the Omaha Police Buy fund to purchase the pills from FREEMONT. The C/I was given a recording device in order to record the transaction. Surveillance Officers observed the C/I go to the area of S 36th and Orchard St. Surveillance officers observed the C/I pick up a light skinned black female in the area of S 36th and Orchard St. Surveillance units then followed the C/I to the address of 3820 S 24th St. The unknown black female was observed exiting the C/I's vehicle and enter the door located to the right of the front door of 3820 S 24th St, this doorway leads to the stairway up to apartment #2. Approximately 10 minutes later the unknown black female was observed exiting 3820 S 24th St. and re-enters the C/I's vehicle. Surveillance officers then followed the C/I's vehicle to S 36th and Orchard St where the unknown female exits. Surveillance officers then followed the C/I back to the meet location.

Affiant Officer interviewed the C/I at the meet location. The C/I stated that he/she went to S 36th and Orchard St and picked up the person they**{2023 U.S. Dist. LEXIS 5}** know as Aliyah FREEMONT. The C/I stated that FREMONT needed to go to 3820 S 24th St apartment #2, to get the pills. The C/I stated that he/she dropped off FREEMONT at 3820 S 24th St and watched her enter a side door off the front porch. The C/I stated that after a few minutes FREEMONT returned with the blue imitation oxycodone pills. The C/I stated he/she gave FREEMONT money from the Omaha Police Buy Fund and in return received blue imitation oxycodone pills in a plastic baggie. The C/I stated they then dropped FREMONT back off in the area of S 36th and Orchard St.

Affiant Officer took the blue pills to the Omaha Police Department Property/Evidence room. There were 10 pills, blue in color and imprinted with an M on one side and 30 on the opposite side. Affiant Officer knows through training and experience that the blue pills are imitation oxycodone pills and contain fentanyl.

Within 48 hours of 7 July 2022, during the daytime hours, Affiant Officer met with the C/I. The C/I stated he/she had set up a fentanyl pill transaction with FREEMONT. The C/I stated that he/she would be buying the blue "M30" imitation oxycodone pills. The C/I stated he/she was instructed by FREEMONT to come to**{2023 U.S. Dist. LEXIS 6}** 3820 S 24th St. FREEMONT stated that she was at "Dro's" apartment and would be able to get them pills right from "Dro".

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Affiant Officer knew of this location and of "Dro" from a previous transaction and interview.

Affiant Officer met with the C/I at a meet spot. Prior to meeting with the C/I surveillance units went to the area of 3820 S 24th St and observed FREEMONT sitting on the front porch of 3820 S 24th St. The C/I and CI's vehicle were searched and no items of evidence were located. The C/I was given money from the Omaha Police Buy fund to purchase the pills from FREEMONT. The C/I was given a recording device in order to record the transaction. Surveillance Officers observed the C/I go to 3820 S 24th St Surveillance officers observed FREEMONT leave the front porch of 3820 S 24th St and get into the C/I's vehicle. FREEMONT is observed exiting the C/I's vehicle, go back to 3820 S 24th St and go up the side stairs to apartment #2. Approximately 4 minutes later FREEMONT was observed exiting of 3820 S 24th St and re-enters the C/I's vehicle. After a couple of minutes FREEMONT is observed exiting the C/I's vehicle and is seen walking south on S 24th St. Surveillance officers then followed**{2023 U.S. Dist. LEXIS 7}** the C/I back to the meet location.

Affiant Officer interviewed the C/I at the meet location. The C/I stated that he/she went to 3820 S 24th St and met with the person they know as Aliyah FREEMONT. The C/I stated that he/she gave FREEMONT the money from the Omaha Police Buy Fund, to get the pills. FREEMONT stated that she was going to get the pills from "Dro" who was in his apartment at 3820 S 24th St, apartment #2. The C/I said FREEMONT went inside 3820 S 24th St and after a few minutes came back to the C/I's vehicle. The C/I stated that FREEMONT gave him/her 10 blue pills that were then turned over to Affiant Officer. The C/I stated they then left FREEMONT at 3820 S 24th St.

Affiant Officer took the blue pills to the Omaha Police Department Property/Evidence room. There were 10 pills, blue in color and imprinted with an M on one side and 30 on the opposite side. Affiant Officer knows through training and experience that the blue pills are imitation oxycodone pills and contain fentanyl.

Affiant Officer also knows that parties involved in the manufacture and/or distribution of illegal narcotics will coordinate sales via cellular telephones through phone calls, texting and even social media**{2023 U.S. Dist. LEXIS 8}** if the phone is so equipped. These parties will often times store contact information, photographs, schedules and even videos in these same phones, computers and electronic storage devices. Affiant Officer also knows that these parties will sometimes be in possession of weapons to protect their investments and have been known to keep detailed records of drug transactions and can be in possession of money that is profited from the sale of the illegal narcotics.

The C/I in the past had made controlled purchases of illegal narcotics under the direction of Affiant officer. These controlled purchases have tested positive for the narcotics he/she was purchasing. The C/I is familiar with illegal narcotics and how they are packaged and sold. The C/I is under no terms of parole, probation, or work release.(Filing No. 43-1 at pp. 1-4).

Based upon the above information, the county court judge issued a no knock search warrant for apartment #2 at 3820 S 24th Street, Omaha, Nebraska. During execution of the search warrant, law enforcement seized methamphetamine, a number of pills marked "M30," over $4,500 in U.S. currency, and a handgun with magazine. (Filing No. 42 at p. 4). According to the parties'**{2023 U.S. Dist. LEXIS 9}** briefing, Defendant arrived at the apartment during the search and made certain statements to officers. (Filing No. 42 at p. 4).

On December 13, 2022, the grand jury returned a two-count indictment against Defendant charging him with possession with intent to distribute methamphetamine and a fentanyl analogue, in violation

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of 21 U.S.C. §§ 841(a)(1), 841(b)(1), and with knowing possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). (Filing No. 1). Defendant has now filed the instant motion to suppress evidence obtained as a result of the execution of the search warrant. Defendant asserts the warrant application and affidavit did not contain sufficient information to establish probable cause to believe a crime or evidence of a crime would be found at the apartment. Defendant further contends the warrant affidavit was so lacking in indicia of probable cause that it was not objectively reasonable for officers to rely on the warrant in good faith. (Filing No. 36).

ANALYSIS

"A supporting affidavit establishes probable cause to issue a search warrant if it 'sets forth sufficient facts to establish that there is a fair probability that contraband or evidence of criminal activity will be found**{2023 U.S. Dist. LEXIS 10}** in the particular place to be searched.'" *United States v. Lindsey*, 43 F.4th 843, 848 (8th Cir. 2022) (quoting *United States v. Brackett*, 846 F.3d 987, 992 (8th Cir. 2017); see also *United States v. Reed*, 921 F.3d 751, 757 (8th Cir. 2019) ("Probable cause exists when, viewing the totality of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'") (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). "In addition to probable cause that contraband or evidence of a crime will be found, 'there must be evidence of a nexus between the contraband and the place to be searched.'" *United States v. Randle*, 39 F.4th 533, 536 (8th Cir. 2022) (quoting *United States v. Tellez*, 217 F.3d 547, 550 (8th Cir. 2000)). "The requisite nexus between a particular location and contraband is determined by the nature of the crime and the reasonable, logical likelihood of finding useful evidence." *United States v. Colbert*, 828 F.3d 718, 726 (8th Cir. 2016) (quoting *United States v. Etheridge*, 165 F.3d 655, 657 (8th Cir. 1999)). When relying on an affidavit to establish probable cause, "the probable cause determination must be based upon only that information which is found within the four corners of the affidavit." *United States v. Stults*, 575 F.3d 834, 843 (8th Cir. 2009). "Search warrant [a]pplications and affidavits should be read with common sense and not in a grudging, hyper technical fashion." *United States v. Ryan*, 293 F.3d 1059, 1061 (8th Cir. 2002) (quotations and citations omitted). An issuing judge's determination of probable cause "should be paid great deference by reviewing courts." *United States v. Mutschelknaus*, 592 F.3d 826, 828 (8th Cir. 2010).

After review, the undersigned magistrate concludes the application and affidavit set forth sufficient facts**{2023 U.S. Dist. LEXIS 11}** to establish a fair probability that contraband or evidence of criminal activity, specifically, narcotics trafficking, would be found at apartment #2 at 3820 S. 24th Street. Defendant primarily contends probable cause did not support the warrant because law enforcement did not sufficiently confirm or establish the reliability of certain information contained in the affidavit. First, Defendant argues there was insufficient investigation or follow-up on statements made by the arrestee, Xavier Rodriguez, and the dealer, Aliyah Freemont, that a white male in his 20s named "Dro" lived in the upstairs apartment #2 at 3820 S. 24th Street and was a source of narcotics. Defendant contends this information is insufficient or unreliable because law enforcement never found records confirming a white male in his 20s lived at that address, never confirmed the identify of "Dro," and never confirmed a past of narcotics dealing by anyone named "Dro." Second, Defendant challenges law enforcement's failure to confirm whether Fremont actually entered apartment #2 or interacted with anyone inside the apartment during either of the two controlled buys at 3820 S. 24th Street. Defendant also takes issue with**{2023 U.S. Dist. LEXIS 12}** the affidavit for mentioning that law enforcement placed a surveillance camera outside apartment #2, but then failing to mention anything that was captured by the camera.

Defendant's arguments primarily focus on what the affidavit lacked. However, a search warrant affidavit is "judged on the adequacy of what it does contain, not on what it lacks, or on what a critic

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might say should have been added." *United States v. Daigle*, 947 F.3d 1076, 1081 (8th Cir. 2020), *reh'g denied* (Mar. 10, 2020) (quoting *United States v. Allen*, 211 F.3d 970, 975 (6th Cir. 2000)). It is useful to recount all relevant information contained in the affidavit. The affidavit provided that Officer Perna was contacted by a confidential informant (CI) stating that Freemont, a light skinned or mixed-race black female, was known to be selling imitation oxycodone (Fentanyl) pills in the area. The affidavit included information to support the reliability of this CI, specifically, that Officer Perna had utilized this CI in the past to make controlled purchases of illegal narcotics that tested positive for the narcotics the CI was purchasing. Controlled buys under the direction of law enforcement establish a CI's reliability. See, e.g., *United States v. Neal*, 528 F.3d 1069, 1073-74 (8th Cir. 2008) (finding reliability of informant was supported by a single controlled buy from defendant). This reliable**{2023 U.S. Dist. LEXIS 13}** CI reported that Freemont stated she would get her imitation oxycodone pills from a white male named "Dro" at apartment #2 at 3820 S. 24th Street. Because the CI had demonstrated his/her reliability in the past through controlled buys, there is a permissible inference that this information from the CI was also reliable. See *United States v. Keys*, 721 F.3d 512 (8th Cir. 2013) ("If information from an informant is shown to be reliable because of independent corroboration, then it is a permissible inference that the informant is reliable and that therefore other information that the informant provides, though uncorroborated, is also reliable."); see also *United States v. Oliver*, 950 F.3d 556, 564 (8th Cir. 2020) ("An informant's track record of providing trustworthy information establishes reliability."). Further, under the observation of surveillance officers, the CI conducted a controlled purchase of pills from Freemont. During the controlled buy, surveillance officers observed the CI make contact with a light skinned black female; followed the CI and the unknown black female to 3820 S. 24th Street; watched the unknown black female head through a doorway that leads to the stairway up to apartment #2; and watched the unknown black female return to the CI's vehicle approximately ten minutes**{2023 U.S. Dist. LEXIS 14}** later. At Officer Perna's prearranged meet location with the CI, the CI stated the unknown black female was Freemont, and produced 10 blue pills labeled M on one side and 30 on the opposite side in a plastic baggie that Freemont had sold the CI. See, e.g., *United States v. Roberts*, 2019 U.S. Dist. LEXIS 164333, 2019 WL 4648456 (E.D. Mo. 2019) (probable cause for search of property found when: reliable informant purchased narcotics from unwitting informant, unwitting informant entered property immediately prior to transaction, officer had prior tips to corroborate suspicion of narcotics at the property, and controlled purchase was made under surveillance by officers).

The CI's information regarding "Dro" selling imitation oxycodone pills from his apartment was also independently corroborated by another source. Prior to and independent from the CI's information, Officer Perna had interviewed an individual named Xavier Rodriguez after he was arrested for drug possession. During Rodriguez's interview with Officer Perna, Rodriguez stated he was buying imitation oxycodone pills from a white male in his late 20s named "Dro" at apartment #2 at 3820 S. 24th Street. Rodriguez stated Dro lived alone and is always armed with a handgun. This information from a named individual providing**{2023 U.S. Dist. LEXIS 15}** identical details as the reliable CI's information regarding Dro's sale of imitation oxycodone from his apartment also tends to establish the reliability of the information. See *United States v. Solomon*, 432 F.3d 824, 827-28 (8th Cir. 2005) (providing that known informants are generally more credible because they can be held accountable for false statements); *United States v. Knutson*, 967 F.3d 754, 759 (8th Cir. 2020) (concluding two known informants without an adequate track record of reliability "verified each other by independently providing highly-detailed, nearly-identical accounts.").

The deficiencies cited by Defendant-failure to investigate "Dro" and whether records establish a "Dro" lived at apartment #2 and failure to provide information as to what was captured by the surveillance camera outside apartment #2-does not negate or defeat the information that was present in the affidavit. Freemont's sale of narcotics and her access to 3820 S. 24th Street

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immediately prior to both controlled buys was reported by a reliable CI and corroborated by surveilling officers. Rodriguez's independent and prior identification of apartment #2 at 3820 S. 24th Street as a source of narcotics provided further corroboration and support. This information supports a finding that there was a fair probability that apartment**{2023 U.S. Dist. LEXIS 16}** #2 at 3820 S. 24th Street was a source of narcotics and that there was a reasonable, logical likelihood of finding useful evidence at the residence. See *Reed*, 921 F.3d at 757 ("Probable cause exists when, viewing the totality of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'"); *Colbert*, 828 F.3d at 726 ("The requisite nexus between a particular location and contraband is determined by the nature of the crime and the reasonable, logical likelihood of finding useful evidence."); see also *United States v. Brackett*, 846 F.3d 987, 922 (8th Cir. 2017) (An issuing judge may "draw reasonable inferences from the totality of the circumstances in determining whether probable cause exists to issue a warrant.").

Defendant further contends the search warrant affidavit was inadequate because it does not reflect that laboratory testing confirmed whether the pills obtained during the transaction between Freemont and the CI were in fact controlled substances. Defendant reasons that law enforcement had ample time to test the substances, but instead made conclusory and unsupported statements that the officer knew, based on "training and experience" that the pills contained controlled substances. However, issuing judges may rely**{2023 U.S. Dist. LEXIS 17}** on warrant applications that include opinions based on officers' training and experience. See, e.g., *United States v. Turner*, 953 F.3d 1017, 1020 (8th Cir. 2020) (probable cause was established when officer found, based on his training and experience, that drug traffickers often use rental cars to transport drugs and money). The affidavit provides that on two separate occasions, law enforcement set up a "fentanyl pill" transaction with Freemont and on both occasions, Freemont provided the informant with blue pills with "M" on one side and "30" on the other side. Officer Perna knew from "training and experience" that these kinds of pills were imitation oxycodone and contained fentanyl. This is further supported by the affidavit's statement that the pills were obtained through a reliable CI that had made controlled purchases of illegal narcotics in the past, and that the CI's past purchases tested positive for the narcotics he/she was purchasing. Although laboratory testing of the pills could have provided additional support for probable cause, it was not necessary based on the other reliable information contained in the affidavit.

Viewing the totality of the circumstances, the undersigned magistrate judge finds the four corners of the warrant**{2023 U.S. Dist. LEXIS 18}** affidavit and application contained sufficient information establishing that there was a "fair probability that contraband or evidence of criminal activity" would be found at apartment #2 at 3820 S. 24th Street. See *United States v. Wallace*, 550 F.3d 729, 733 (8th Cir. 2008) ("[O]nly a probability of criminal conduct need be shown in the affidavit."). Because the warrant was issued pursuant to a proper showing of probable cause, Defendant's motion to suppress should be denied.

Defendant further asserts that probable cause was so lacking that the *Leon* good faith exception does not apply. "In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *United States v. Leon*, 468 U.S. 897, 920, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). "In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *United States v. Perry*, 531 F.3d 662, 665 (8th Cir. 2008) (quoting *Leon*, 468 U.S. at 922 (1984)). Under *Leon*, evidence seized in reliance on a search warrant is not subject to suppression unless:

(1) the supporting affidavit or testimony includes a false statement made knowingly**{2023 U.S.**

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Dist. LEXIS 19} and intentionally or with reckless disregard for the truth to mislead the issuing judge; (2) the issuing judge wholly abandoned his judicial role in issuing the warrant; (3) the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that no police officer could reasonably presume the warrant to be valid.*United States v. Ortiz-Cervantes*, 868 F.3d 695, 702-03 (8th Cir. 2017) (citing *Leon*, 468 U.S. at 923). Only if the officer knew or should have known that the search was unconstitutional under the Fourth Amendment should the evidence be suppressed. See *United States v. Mayweather*, 993 F.3d 1035, 1041 (8th Cir. 2021), *reh'g denied* (May 19, 2021).

Defendant does not assert any of the above conditions apply in this case except for (3), that the warrant was "so lacking in indicia of probable cause" as to render belief in its existence entirely unreasonable. However, the undersigned magistrate judge finds that even if the warrant affidavit did not establish probable cause, the *Leon* good faith exception would apply. The affidavit contained information that a reliable informant conducted two controlled purchases of narcotics in which the seller the seller reported to the informant that her source was located in apartment #2 at 3820**{2023 U.S. Dist. LEXIS 20}** S 24th Street; the seller entered 3820 S. 24th Street immediately prior to the sale; surveillance officers observed the seller enter 3820 S. 24th Street; the seller exited 3820 S. 24th Street, and provided informant with pills which the officer knew from training and experience contained fentanyl. Additionally, prior to and independent from these controlled purchases, an arrestee provided law enforcement with a tip that an individual living in apartment #2 at 3820 S. 24th Street was a source of narcotics. Given this information, it was not "entirely unreasonable" for law enforcement to rely on the warrant to search that apartment for evidence related to ongoing narcotics sales.

Upon consideration,

IT IS HEREBY RECOMMENDED to Robert F. Rossiter, Jr., Chief United States District Court Judge, that Motion to Suppress (Filing No. 35) be denied.

Dated this 28th day of November, 2023.

BY THE COURT:

/s/ Michael D. Nelson

United States Magistrate Judge

ADMONITION

Pursuant to NECrimR 59.2, any objection to this Findings and Recommendation shall be filed with the Clerk of the Court within fourteen (14) days after being served with a copy of this Findings and Recommendation. Failure to timely object may constitute**{2023 U.S. Dist. LEXIS 21}** a waiver of any such objection. The brief in support of any objection shall be filed at the time of filing such objection. Failure to file a brief in support of any objection may be deemed an abandonment of the objection.

Footnotes

1

In Defendant's motion, he also indicates one of his statements contained in a police report "potential[ly]" is inadmissible. (Filing No. 35 at ¶ 11). During the status call with counsel, Defense counsel clarified that the sole basis for seeking suppression of any statements would be as fruit of

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the warrant issued without probable cause.

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