

INTRODUCTION

Mr. NAME is a twenty-seven year old young man with no prior arrests. He is charged with conspiracy to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. § 846. He is also charged with distribution of methamphetamine, in violation of 21 U.S.C. § 841(a). If found guilty of these offenses, he could face a mandatory minimum sentence of up to ten years.

On May 12, 1998, Humboldt County Drug Task Force ("HCDTF") agents sought and received a search warrant for an apartment on STREET NAME, Eureka, California. The warrant was based on an affidavit that failed to establish probable cause that illegal activity was taking place in this apartment. The affidavit also impermissibly relied on racial stereotypes to bridge gaps in the logic of the probable cause showing. A final flaw was the affidavit's reliance on facts that were too stale to support a showing of probable cause. Viewed in the totality of circumstances these shortcomings fatally undermined the affidavit and search warrant, and the evidence arising from the search of the STREET NAME apartment should accordingly be suppressed.

BACKGROUND

I. The Confidential Informant

In April of 1998, Humboldt County Drug Task Force ("HCDTF") Agent Kirkpatrick met with a confidential informant who alleged that defendants NAME and NAME sold methamphetamine, and that NAME sold illegal ("cloned") cell phones. *Exhibit A, Search Warrant Affidavit of May 12, 1998* at 3026 ("Affidavit"). The informant knew Mr. NAME only as "NAME," and did not know where he lived. *Id.* The informant had not previously provided information which led to the arrest of felony offenders, and provided information to Agent Kirkpatrick "for consideration in pending criminal charges." *Id.* at 3027.

Mr. NAME was twenty-seven years old in April of 1998, and had no prior criminal history or outstanding warrants. *Id.* at 3027.

II. Initial Contact with NAME

On April 22, the informant and HCDTF undercover agent Baker met with FIRST NAME at the Coastal Auto Mart in Eureka. *Id.* at 3028. The three were under surveillance by law enforcement agents. *Id.* Agent Baker and Mr. NAME discussed the sale of methamphetamine. *Id.* at 3028-29. NAME

then left Agent Baker at the car dealership, drove to 803 L Street in Eureka, and returned with 72 grams of methamphetamine. *Id.* at 3029. NAME sold the drug to the agent. *Id.*

III. The April 28 Controlled Buy

On April 27, Agent Baker spoke with NAME on the phone and negotiated the purchase of one pound of methamphetamine. *Id.* at 3030. Baker met with NAME at Coastal Auto Mart the following day, April 28, at 2:07 pm. *Id.* They were under surveillance by law enforcement agents. *Id.* NAME said that the methamphetamine would arrive in twenty minutes. *Id.* While waiting, Agent Baker asked if NAME still sold "clone" phones. *Id.*

NAME introduced Mr. NAME to Agent Baker, and NAME sold her a cell phone for \$180. *Id.* at 3031. He retrieved the phone from the trunk of a black Jetta. *Id.*

The Jetta was registered to NAME NAME, NAMEX, Arcata, California. *Id.* Arcata is a small town north of Eureka.

Because the drug had still not been delivered, Agent Baker left and returned at 5:09 pm. *Id.* She stayed at the dealership and talked to NAME and NAME. *Id.* The agent observed Mr. NAME speaking in Spanish on a cell phone, discussing the delivery of methamphetamine. *Id.* NAME and NAME gave Baker their business cards. *Id.* at 3032.

At 6:48, NAME told Agent Baker that he could deliver one pound of methamphetamine. *Id.* at 3031. The agent said that she only wanted a half-pound. *Id.* NAME said he would measure out a half-pound with a friend, and then left Coastal Auto Mart in his Jetta. *Id.*

Surveillance units followed Mr. NAME to Chope Street, Eureka. *Id.* Chope Street is several blocks from Coastal Auto Mart. An agent saw NAME enter Apartment Six at 30 Chope Street. *Id.*

At approximately 7:30, NAME returned to Coastal Auto Mart and walked with Agent Baker to her vehicle. *Id.* at 3032. Inside the vehicle, Mr. NAME sold the agent approximately one-half pound of methamphetamine for \$4,000. *Id.*

IV. Phone Numbers and Addresses

On April 28, Mr. NAME gave what he described as his home number to Agent Baker: 555-5555. *Id.* NAME gave what he described as his home number, 555-5555, and a pager number, 555-5555. *Id.*

Phone records revealed that NAME's home number was listed at 803 L Street, Eureka. *Id.* The number provided by NAME was listed at 2882 STREET NAME, Apartment B, Eureka. *Id.* The phone service at STREET NAME, however, listed neither NAME or NAME. *Id.* at 3033. NAME's car was not registered to the STREET NAME address, but to a residence in Arcata. *Id.* at 3031. The STREET NAME apartment is on the opposite side of Eureka from the Coastal Auto Mart and the Chope Street apartment.

Sometime in late April, Officer Kirkpatrick called the property management company for the STREET NAME address. *Decl. of Sobol at 1, Exhibit B.*⁽²⁾ Kirkpatrick asked the property manager, Sherrie Sobol, for the names of the renters of Apartment B. *Id.* Ms. Sobel told the officer that the apartment was being rented by Mr. Fernando Vargas and Ms. Blanco Jimenez. *Id.* Officer Kirkpatrick told Ms. Sobol that he found that odd, because those names did not match those listed on the phone account. *Id.*

The search warrant affidavit later submitted omitted the facts that Agent Kirkpatrick had called Ms. Sobol, that the apartment was rented out to two other individuals, and that Mr. NAME was not listed as a renter or resident of the apartment.

On May 7 a law enforcement officer went to the Chope Street apartment and spoke with a man named Manual Martinez. *Id.* at 3034. On May 8--eleven days after the controlled buy on April 28--agents saw Mr. NAME enter the apartment complex on STREET NAME, but did not see which apartment he entered. *Id.* An agent knocked on Apartment B and asked for a fictitious female, Sally. *Id.* NAME "said that he lived in the apartment for approximately one month and did not know the female that Agent Cummings had asked for." *Id.*

V. The May 12, 1998 Search Warrant Application and Affidavit

On May 6, 1998, Agent Baker called NAME at Coastal Auto Mart and discussed the sale of pound quantities of methamphetamine. *Id.* On May 7, 1998, the agent again spoke to NAME about the possibility of purchasing ten pounds of methamphetamine. *Id.*

On May 12, 1998, Officer Brett M. Fabbri submitted a search warrant application and affidavit. *Id.* at 3036. Officer Fabbri's training included "Mexican Nationals Involved/Meth," and "Methamphetamine and Mexican Nationals." *Id.*

Officer Fabbri reported that he and Agent Kirkpatrick had been the lead investigators in the case for two months. *Id.* at 3026. Fabbri incorporated Agent Kirkpatrick's investigation results throughout the

affidavit. *See, e.g., id.* at 3026-28, 3032-35. As noted above, however, Officer Fabbri omitted from the affidavit the fact that Agent Kirkpatrick had contacted property manager Sobol, and that Mr. NAME was not listed on the STREET NAME apartment lease.

Officer Fabbri reported that Mr. NAME is Hispanic. *Id.* at 3027. Fabbri stated in his affidavit that "[m]any of the people involved in the transportation and distribution of significant amounts of [methamphetamine] . . . are hispanic persons with ties to other parts of this state." *Id.* at 3025.

According to Fabbri, these "hispanic persons" will use techniques such as "multiple locations" and "pagers" to avoid detection by law enforcement. *Id.* Hispanic traffickers, according to Fabbri, "will often use a 'street name' which is not their real name so that it is more difficult for law enforcement to determine who the trafficker is based on the street name." *Id.* "Often the telephone or pager number will be billed to a female, or a variation of their own or other person's names." *Id.* at 3025.

Fabbri claimed in his affidavit that "these hispanic drug traffickers" commonly "use a variety of addresses, but will frequently use one address to collect mail, and list on their vehicle registrations and drivers licenses." *Id.*

Officer Fabbri omitted from the affidavit the fact that there was no showing that Mr. NAME had ever used an alias or false address before the April 28 controlled buy, or that he was using a false name or address in April or May.

Fabbri submitted the affidavit on May 12, fourteen days after the controlled buy on April 28. There is no allegation in the affidavit of criminal activity in the STREET NAME apartment. There is also no allegation in the affidavit of criminal activity by Mr. NAME between April 28 and May 12.

VI. The May 12 Controlled Buy and Searches

On May 12, apparently after the affidavit was completed, Agent Baker bought ten pounds of methamphetamine from NAME at Coastal Auto Mart. *Arrest Summary* at 3043, *Exhibit C*. Defendants NAME and NAME were arrested. *Id.* Mr. NAME was not at the Coastal Auto Mart, and was not found in Arcata or at the STREET NAME apartment.

Agents served a search warrant on the STREET NAME apartment by using a battering ram to break down the door. *Investigation Report* at 2094-5, *Exhibit D*. No one was found in the apartment. *Id.*

Inside the apartment agents recovered cell phones and cloning equipment, an electronic scale, roughly 39 grams of methamphetamine, and a marijuana bud. *Id.* at 2095, 2098. The officers also searched a black Jetta which was found in the STREET NAME apartment parking lot. *Id.* at 2095. "ESN" numbers, hand tools, and computer cables were found inside the car. *Id.* at 2100.

Mr. NAME self-surrendered on May 21, 1998 to a Humboldt County Marshal. *Id.* at 2214.

ARGUMENT

The search warrant issued for the STREET NAME apartment was based on an affidavit that was fatally flawed. The affidavit failed to demonstrate probable cause that evidence of illegal activity would be found in the STREET NAME apartment. The affidavit also impermissibly relied on racial and ethnic stereotypes to imply that NAME was using aliases and false telephone listings, and to support an inference that NAME lived in the apartment. Finally, facts alleged in the affidavit were too attenuated from the date of the warrant request and too stale to support probable cause. The appropriate remedy for the cumulative effect of these flaws is suppression of all evidence gathered from the search of the STREET NAME apartment.

I. The Affidavit Failed to Establish Probable Cause That Evidence of Illegal Activity Would be Found in the STREET NAME Apartment

The affidavit for the May 12 warrant made no allegation of any illegal activity at the STREET NAME apartment. It instead relied on a characterization of drug dealers inapplicable to the facts of this case.

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation . . ." U.S. Const. amend. IV. A valid warrant must demonstrate both probable cause as to criminal activity, and "a showing that evidence probably will be found at the locations searched." *United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir. 1995); *see also United States v. Hove*, 848 F.2d 137 (9th Cir. 1988); *United States v. Guitterez*, 983 F.Supp. 905, 917 (N.D. Cal. 1998) ("the facts set forth in a search warrant affidavit must establish a 'reasonable nexus' between the allegedly criminal activity and the place to be searched.")

Affiant Fabbri alleged no criminal activity inside the STREET NAME apartment. Instead, the affidavit reported that a drug transaction involving NAME took place across town from STREET NAME; at Coastal Auto Mart and on the Chope Street apartment.

The Ninth Circuit has cautioned that "[p]robable cause that a resident of the location has committed a crime is inadequate, in itself, to satisfy th[e] [requirement that evidence or contraband will probably be found at the premises to be searched]." *Gil*, 58 F.3d at 1418; *see also United States v. Ramos*, 923 F.2d 1346, 1351 (9th Cir. 1991) ("[p]robable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for a suspect's home.") The May 12 affidavit, however, relied upon precisely this inadequate chain of logic. NAME had been observed participating in one drug transaction. There was evidence that he lived at the apartment on STREET NAME. The reasoning implicit in the affidavit is that evidence of illegal activity would therefore be found at STREET NAME.

The Ninth Circuit has been willing to assume that evidence of illegal activity will be found in drug dealers homes, but has done so in cases involving repeated sales. In *United States v. Angulo-Lopez*, 791 F.2d 1394 (9th Cir. 1986), the Court reviewed an affidavit wherein two of Lopez's relatives had admitted to selling heroin. *Id.* at 1395-96. Lopez had been seen at his relative's residence, and an informant had been told that the suspect was living at that residence. *Id.* at 1396. One of the Lopez's relatives told an informant that the suspect could sell him heroin, and the informant had obtained heroin from Lopez in a shopping lot. *Id.*

Over the course of two months police surveillance observed three exchanges of items between Lopez and unidentified individuals in shopping lots. *Id.* Informants stated that Lopez was selling heroin out of a residence on Fuhrer Street, and police investigations revealed that Lopez was on the electric and telephone records for the Fuhrer Street address. *Id.*

The Court observed that "Direct evidence that contraband or evidence is at a particular location is not essential to establish probable cause to search the location." *Id.* at 1399. "A magistrate," explained the Court, "is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense." *Id.*

According to the Court in *Angulo-Lopez*, "in the case of drug dealers, evidence is likely to be found where drug dealers live." *Id.* The Court found Lopez's argument "meritless" that probable cause was lacking at the Furher Street address.

The inference relied upon in *Angulo-Lopez*, however, cannot be read broadly enough to establish probable cause in the present affidavit. Informants in that case reported that Lopez was selling heroin out of the Furher Street address. *Id.* at 1396. By contrast, there is no showing in the May 12 affidavit that there was any illegal activity at the STREET NAME apartment. Lopez was listed on the electric and telephone records of the Furher Street address. *Id.* NAME was on neither the phone records nor the lease of the STREET NAME apartment. *See Guitierrez*, 983 F.Supp at 918 (finding an insufficient nexus to a residence when suspect and his wife were not listed on the utilities of address searched). Lopez was observed during--and informants reported--repeated drug sales in April and May. *Angulo-Lopez*, 791 F.2d at 1395-96. NAME was observed in one drug transaction, fourteen days before the search warrant.

A magistrate may draw reasonable inferences about drug dealers who are reported to be dealing out of their residences and who deal on multiple occasions, when there is clear evidence that they live at a particular residence. *See id.* None of these facts supporting an inference of probable cause are found in the present case. *Compare Gil*, 58 F.3d at 1417-19 (employing inference that evidence is likely to be found where drug dealers live, when affidavit contained observations of counter-surveillance driving, car switches, the use of pagers and public telephones, suspicious deliveries, the use of a truck that bore the characteristics of a load vehicle, and two kilograms of cocaine were recovered from a woman who had just been in the suspect's car).

The affidavit underlying the search of the STREET NAME apartment relies on a characterization so sweeping that it swallows the warrant requirement. It posits that one sale of illegal drugs creates sufficient probable cause to search any residence--or possible residence--of the seller, despite the absence of any showing of illegal activity in that residence.

Every era has had its own perceived threat used to justify encroachment upon the protections of the Fourth Amendment and its precursors; seditious libel in the 1700's,¹ alcohol in the early 1900's,² and now the War on Drugs. Courts have long refused, however, to permit involvement with politicized offenses to dilute the requirements of the warrant requirement. Although Mr. NAME is alleged to have sold drugs, the affidavit still lacks sufficient facts to permit a reasonable inference that evidence of illegal

¹ See Timothy Lynch, *Unreasonable Searches: Reassessing the Exclusionary Rule*, *The Champion*, Dec. 1998 12, 57 (describing *Entick v. Carrington*, 19 Howell's State Trials 1029 (C.P. 1765)).

² See *id.* at 60 (quoting *Wallace v. State*, 157 N.E. 657, 660 (1927)).

activity would be found in the STREET NAME apartment. The search warrant was therefore invalid, and the results of the search should be suppressed.

II. Improper Reliance on Racial and Ethnic Stereotypes Undermines the Validity of the Warrant Affidavit

"Probable cause determinations are to be made by viewing the 'totality of the circumstances' set forth in the affidavit." *United States v. Stanert*, 762 F.2d 775, 778 (9th Cir.), *amended*, 769 F.2d 1410 (9th Cir. 1985). An analysis of the totality of the circumstances set forth in the May 12 affidavit reveals that Affiant Fabbri impermissibly relied on racial and ethnic stereotypes. The resulting warrant and ensuing search were therefore invalid, and the evidence arising from the search must be suppressed.

The May 12 affidavit begins with a dubious premise: one drug sale automatically creates probable cause for all residences of the seller. To complete this false syllogism, Officer Fabbri was forced to show that Mr. NAME resided at STREET NAME. Fabbri turned to racial stereotypes to explain evidence that tended to undermine this proposition.

Considerable evidence showing that Mr. NAME did *not* reside at the STREET NAME apartment complicated the magistrate's decision on May 12. NAME's car was not registered to STREET NAME, Eureka, but to an address in an entirely different city. The phone service at the STREET NAME apartment was not listed to NAME. Moreover, according to the affidavit no officer had actually seen NAME enter the apartment. *See United States v. Taylor*, 716 F.2d 701, 705 (9th Cir. 1983) ("The validity of the search warrant depends upon the sufficiency of what is found within the four corners of the underlying affidavit.")

Missing from this morass of contradictory evidence is the one piece of information that could conclusively establish residency: the names listed on the apartment's lease. Recognizing the potential value of this information, Agent Kirkpatrick called the property manager of the STREET NAME apartment, only to discover that two other men--and not Mr. NAME--were listed on the lease. This fact was not included in the affidavit.

Affiant Fabbri was thus confronted with two pieces of evidence tending to show that NAME did not live on STREET NAME. The first fact, NAME's absence from the phone records, was reported in the affidavit. The second fact, his absence on the lease records, was not shared with the magistrate. To explain the inconsistency of the phone records, and, perhaps unconsciously, to explain the inconsistency of the lease information, Officer Fabbri relied upon stereotypes of "hispanic drug traffickers."

According to Fabbri, "[m]any of the people involved in the transportation and distribution of significant amounts of [methamphetamine] . . . are hispanic persons with ties to other parts of this state." *Exhibit A* at 3025. Fabbri declared that these "hispanic persons" will use techniques such as "multiple locations" and "pagers" to avoid detection by law enforcement. *Id.* Fabbri explained that the hispanic drug traffickers use aliases or "street names," and commonly "use a variety of addresses, but will frequently use one address to collect mail, and list on their vehicle registrations and drivers licenses." *Id.*

Officer Fabbri impermissibly relied on racial and ethnic stereotypes to patch holes in the logic of the affidavit. Mr. NAME had only been observed in one sale, and had gone to an apartment on Chope--not STREET NAME--Street during that sale. Fabbri conceded in the affidavit that NAME was not on the STREET NAME phone listings, and Fabbri's partner, Kirkpatrick, knew that he was not on the STREET NAME apartment lease. To explain these inconsistencies, affiant Fabbri observed that Mr. NAME was hispanic. The officer then attributed to NAME a host of behavioral patterns because of his race. Fabbri neglected to report that there was no evidence that Mr. NAME, the individual, had ever had used an alias or a false address.

The Ninth Circuit has recognized that race-based searches and seizures can rise to the level of "egregious conduct" warranting suppression. *See Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (suppressing evidence in an administrative hearings when confronted with an egregious violation of the Fourth Amendment based on race). In *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1446 (9th Cir. 1994), the Court upheld a finding that the petitioner's stop was based solely on his hispanic appearance. The Court concluded that "[b]ecause this race-based stop was an egregious constitutional violation, we are required to suppress the evidence obtained." *Id.* at 1452. The Court in *Gonzalez-Rivera* identified the exact type of subconscious racial stereotyping at work in the present case:

[A]s we have recognized in prior cases, racial stereotypes often infect our decision-making processes subconsciously. *See, e.g., United States v. Bishop*, 959 F.2d 820, 826-28 (9th Cir. 1992) (acknowledging that racism often affects decision-making only unconsciously). Thus, Border Patrol officers may use racial stereotypes as a proxy for illegal conduct without being subjectively aware of doing so. *See Charles R. Lawrence III, The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan.L.Rev. 317, 322 (1987) (explaining that "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation"). *Id.* at 1450. Officer Fabbri's use of racial stereotypes courted subconscious racism in the reviewing magistrate. The reasoning of the affidavit is

clear, if implicit: although some evidence suggested that NAME did *not* live at STREET NAME, he is hispanic, and hispanic drug traffickers use aliases, multiple locations, and false phone listings. Inconsistencies in the evidence supporting probable cause are thus explained away by Mr. NAME's race.

While Officer Fabbri's omission of the lease information from the affidavit was unprofessional, his reliance on racial stereotypes to bolster the affidavit was egregious. When viewed in the totality of the circumstances, the affidavit's open reliance on racial and ethnic stereotypes is a fatal flaw that invalidates the subsequent warrant and search.

III. The Facts Underlying the Affidavit Were Impermissibly Stale

While analyzing a prohibition-era statute under the Fourth Amendment, the Supreme Court emphasized that a search warrant must be timely:

While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case.

Sgro v. United States, 287 U.S. 206, 211 (1932).

The Ninth Circuit has carefully distinguished the past possession of illegal goods and the present invasion of property:

The facts submitted to the Commissioner must be sufficient to justify a conclusion by him that the property which is the object of the search is probably on the person or premises to be searched at the time the warrant is issued. The most convincing proof that the property was in the possession of the person or upon the premises at some remote time in the past will not justify a present invasion of privacy. There must be reasonable grounds for believing that the immediate search for which authority is sought may be fruitful.

Durham v. United States, 403 F.2d 190, 193 (9th Cir. 1968). The Court in *Durham* rejected a bright-line rule for evaluating staleness: "The length of the time lapse alone is not controlling since *even a brief delay* may preclude an inference of probable cause in some circumstances while in others a long delay may not do so." *Id.* at 194 n.6 (emphasis added).

In the present case, there was a delay of fourteen days from the observation of illegal activity by Mr. NAME to the pursuit of the search warrant. The affidavit does not report any continuing illegal activity by NAME in that period, and does not allege that he had any renewed access to drugs.

The Ninth Circuit in *Angulo-Lopez* stated that old information may support of a search warrant where "there is sufficient basis to believe, *based on a continuing pattern* or other good reasons, that the items to be seized are still on the premises." *Angulo-Lopez*, 791 F.2d at 1399 (quoting *United States v. Gann*, 732 F.2d 714, 722 (9th Cir. 1984)) (emphasis added). The Court the observed that, "[w]ith respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity." *Id.*

The present case, however, is not one where a "pattern" of drug trafficking sustains probable cause for several weeks or months. Mr. NAME is accused of engaging in a single sale over two weeks before the affidavit was issued. To procure the drug NAME went not to the STREET NAME apartment, but to an apartment belong to someone else on Chope Street. He returned to Chope, not STREET NAME, Street after the sale.

The specific facts of the present case suggest that methamphetamine would *not* be at the STREET NAME apartment two weeks after the first sale. Methamphetamine is a highly fungible and expensive product, easy to transport and unlikely to be hoarded in one locale for two weeks. *Compare United States v. Lacy*, 199 F.3d 742, 745-46 (9th Cir. 1997)(rejecting staleness challenge based on collectors' desire to store child pornography for long periods). Any tenuous probable cause to believe drugs were in the STREET NAME apartment on April 28 had long since dissipated two weeks after the first controlled buy. *Compare United States v. Greany*, 929 F.2d 523, 525 (9th Cir. 1991) ("When the evidence sought is of an ongoing criminal business *of a necessarily long-term nature*, such as marijuana growing, *rather than that of a completed act*, greater lapses in time are permitted if the evidence in the affidavit shows the probable existence of the activity at an earlier time.") (*emphases added*).

Because the passage of time had destroyed whatever logical link there may have been to evidence of illegal activity at the STREET NAME apartment, the affidavit was impermissibly stale and evidence arising from a warrant based on the affidavit must be suppressed.

CONCLUSION

Based on the above, Mr. NAME respectfully requests that the Court suppress all evidence arising from the May 12 search of the STREET NAME apartment and his car.

MotionToSuppress-BadWarrantBasedonRacialPrejudice[1999]