

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**vs.**

**THOMAS RAY REINHART,**

**Defendant.**

**No. CR08-0015**

**REPORT AND RECOMMENDATION  
REGARDING  
MOTION TO SUPPRESS**

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## ***I. INTRODUCTION***

On the 1st day of April, 2008, this matter came on for hearing on the Motion to Suppress (docket number 14) filed by Defendant on March 18, 2008. The Government was represented by Special Assistant United States Attorney Chadwicke L. Groover. Defendant Thomas Ray Reinhart appeared personally and was represented by his attorney, John J. Bishop.

## ***II. ISSUES PRESENTED***

Defendant claims that law enforcement entered his residence without a search warrant on December 7, 2007, and discovered items associated with methamphetamine use and manufacturing, in violation of his Fourth Amendment right to be free from unreasonable search and seizure. Thus, Defendant contends that the evidence seized on December 7, 2007, must be suppressed.<sup>1</sup> Defendant also claims that a state court Search Warrant issued for a different residence on January 13, 2008, was not supported by probable cause; and therefore, the evidence seized from that search must also be suppressed.

The Government argues that on December 7, 2007, law enforcement lawfully entered Defendant's residence to execute an Arrest Warrant for an individual located at that residence, and thereafter properly obtained a Search Warrant for Defendant's residence. The Government maintains that the Search Warrant was supported by probable cause because officers observed contraband in plain view while performing a protective

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<sup>1</sup> On March 19, 2008, Defendant was charged by Second Superseding Indictment (docket number 16) in eight counts: Counts 1 and 5 charge Defendant with attempt to manufacture, and aiding and abetting the attempt to manufacture methamphetamine; Counts 2 and 6 charge Defendant with possession of pseudoephedrine with intent to manufacture methamphetamine; Counts 3 and 7 charge Defendant with carrying and possessing a firearm in furtherance of a drug trafficking offense; and Counts 4 and 8 charge Defendant with being a felon in possession of a firearm. Counts 1-4 correspond with events which took place on December 7, 2007, and Counts 5-8 correspond with events which took place on January 13, 2008.

sweep of the residence. The Government further argues that the state court Search Warrant issued on January 13, 2008, was supported by probable cause. In the alternative, the Government argues that the good faith exception found in *United States v. Leon*, 468 U.S. 897 (1984), is applicable with regard to the January 13, 2008 state court Search Warrant.

### ***III. RELEVANT FACTS***

#### ***A. Search on December 7, 2007***

Scotty Abram (“Abram”) was a fugitive parolee being sought by probation officers with the Iowa Department of Correctional Services, High Risk Unit. The probation officers received information from two confidential informants regarding Abram and where he could be found. One confidential informant (“CI”) informed the probation officers that Abram was associating with Defendant, and also cooking methamphetamine with Defendant. This CI also provided information that Abram was staying with Defendant at Defendant’s apartment on A Avenue NE, in Cedar Rapids, Iowa. The other CI informed the probation officers that Abram had been seen with a firearm.

On December 7, 2007, probation officers Steve Warner, Angie Attalig, Justin Wheatly, and Tracy Weems (“the officers”) went to Defendant’s apartment on A Avenue NE to search for Abram and execute a state Arrest Warrant. Upon arriving at Defendant’s apartment, the officers knocked on Defendant’s door. Defendant answered the door, and the officers asked him whether he knew Abram. While Defendant was at the door, Abram, who was lying on Defendant’s living room floor, raised up, and two of the officers positively identified him. Defendant unsuccessfully tried to shut the door on the officers, and the officers entered his apartment and arrested Abram.

After arresting Abram, the officers cleared the apartment for officer safety. In addition to Defendant and Abram, Lacey Maston and a fifteen-year old juvenile female were in the apartment. In clearing the apartment, the officers also discovered a loaded .40 caliber handgun under Defendant’s bed, a large plate of marijuana in plain sight next to

Defendant's bed, and other contraband. Based on their observations while clearing the apartment, the officers placed Defendant under arrest and secured the apartment until a search warrant could be obtained.

***B. Search on January 13, 2008***

On January 13, 2008, at approximately 5:45 p.m., Hiawatha Police Officer Trent MacTaggart observed a white 1991 Mitsubishi Montero stopped at a stop sign on North Towne Place NE, waiting to turn left onto Blairs Ferry Road NE. Instead of turning onto Blairs Ferry Road NE, the driver of the Mitsubishi turned off the turning signal, placed the vehicle in reverse, and parked the car in front of an apartment building on North Towne Place NE. At the hearing, Officer MacTaggart stated that he observed two white men exit the vehicle and jog to apartment number one of the apartment building and enter that apartment.

Officer MacTaggart walked around the Mitsubishi and observed what he believed to be burglary tools and possibly stolen stereo equipment inside the vehicle. Because the vehicle was parked in Cedar Rapids, Officer MacTaggart contacted the Cedar Rapids Police Department ("CRPD") and informed the CRPD of his observations. The CRPD dispatched a police officer to Officer MacTaggart's location, and both Officer MacTaggart and the CRPD officer looked inside the Mitsubishi. The CRPD officer saw two 2-liter bottles with holes drilled into the tops of the bottles, rubber tubing, and a red Igloo cooler with a frost line four inches from the bottom. The officers also noticed the smell of anhydrous ammonia coming from the front passenger window of the vehicle.

Officers knocked on the door to apartment number one, but no one answered the door. The officers also requested a CRPD canine officer. The canine was taken around the entire apartment building and only alerted on apartment number one. Additionally, Officer Daniel Myrom of the CRPD spoke with a man who was walking his dog in the area under investigation. Officer Myrom asked the man whether he knew who lived in

apartment number one and drove the white Mitsubishi parked in front of the apartment building. The man indicated that two white guys lived in the apartment and had a big dog.

Later that evening, Officer Chip Joecken of the CRPD submitted an Application for Search Warrant to a Linn County judicial officer.<sup>2</sup> In his Application, Officer Joecken requested authority to search apartment one (identified with specificity on the application) and a white 1991 Mitsubishi Montero located outside the apartment building. The Application for Search Warrant was supported by “Attachment A” prepared by Officer Joecken.<sup>3</sup>

The affidavit in support of the Application for Search Warrant, Attachment A, describes the events leading up to the Application for Search Warrant as follows:

On 1-13-08, Hiawatha Police Officer Trent MacTaggart witnessed . . . a white 1991 Mitsubishi Montero. He witnessed the vehicle from the intersection of Blairsferry [sic] Road Northeast and 2nd Avenue in Hiawatha, Iowa. . . .

Officer MacTaggart witnessed this vehicle on North Towne Place Northeast at the stop sign with the left hand turn signal on waiting to turn left on Blairsferry [sic] Road Northeast. Officer MacTaggart stated the driver of the vehicle witnessed his squad car and then shut off the turn signal. Officer MacTaggart then witnessed the vehicle back up and park in front of [an apartment building on] North Towne Place Northeast. . . . Officer MacTaggart witnessed at least one subject from this vehicle go into the apartment. He witnessed two subjects at the doorway area of the apartment. He went to make contact with these subjects, but as he called to them a person closed the door as he was asking to speak with them. . . .

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<sup>2</sup> The signature of the judicial officer on the Application and resulting Search Warrant are illegible, and the judicial officer is not otherwise identified.

<sup>3</sup> The Application for Search Warrant (including Attachments A and B), Search Warrant, and Endorsement on Search Warrant were introduced at the hearing as Government’s Exhibit 1.

Officer MacTaggart cannot identify the driver of the vehicle. He could not identify the two subjects at the door. Officer MacTaggart witnessed three subjects leave the apartment. He then witnessed three subjects come back and enter the apartment.

Cedar Rapids police officers responded to assist Officer MacTaggart. Officer MacTaggart and Sgt. Steve Keiller did look inside the vehicle using their flashlights. The officers witnessed in plain view a plastic thermos with the bottom being red in color and the top being white in color on the front passenger side floorboard that had a frost line approximated a quarter of the way up from the bottom of the thermos. The officers also witnessed an anhydrous ammonia chemical smell coming from the vehicle.

It is common for subjects to place anhydrous ammonia in a plastic thermos [sic] for storage and transport.

K-9 Officer Casey Bilden had his canine Danny perform a sniff of the entire . . . North Towne Place Northeast apartment building. His canine made a positive alert on apartment one. The canine Danny did not alert on any other apartment in the apartment building.

Officers did knock on the apartment door several times and no one has answered the door. Officers did speak with neighbors to this apartment. The neighbors did tell officers that someone staying at the apartment uses this vehicle . . . on a regular basis.

The registered [sic] owner of the vehicle John Franklin Castle has [a] criminal history[.] . . .

Based on the above mentioned reasons, this affiant is requesting that a search warrant be issued to search the residence and structures located at . . . North Towne Place Northeast, apartment one, Cedar Rapids, . . . along with persons known to reside at and all vehicles registered or

known to be operated by a person known to reside at this apartment for illegal narcotics and related items.

*See* Application for Search Warrant (Government's Exhibit 1), Attachment A.

Acting on the Application for Search Warrant provided by Officer Joecken, a Linn County judicial officer issued a Search Warrant on the residence located on North Towne Place NE in Cedar Rapids, along with persons known to reside at and all vehicles registered or known to be operated by a person known to reside at that residence.

#### **IV. ANALYSIS**

##### **A. Search at Apartment on A Avenue on December 7, 2007**

###### **1. Entry into the Apartment**

For purposes of the Fourth Amendment, “an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” *Payton v. New York*, 445 U.S. 573, 603 (1980); *see also United States v. Pruneda*, \_\_\_ F.3d \_\_\_, 2008 WL 341459, \*3 (8th Cir. 2008) (“A valid arrest warrant contains authority to enter the residence of the person named in the warrant if (1) the officers reasonably believe the person resides there, and (2) the officers reasonably believe the person is present when the warrant is executed.”); *United States v. Clayton*, 210 F.3d 841, 843 (8th Cir. 2000) (“A valid arrest warrant carries with it the authority to enter the residence of the person named in the warrant in order to execute the warrant so long as the police have a reasonable belief that the suspect resides at the place to be entered and that he is currently present in the dwelling.”). Absent exigent circumstance or consent, however, a valid arrest warrant does not carry with it the authority to enter the residence of a third party to search for the subject of the arrest warrant. *United States v. Risse*, 83 F.3d 212, 215 (8th Cir. 1996) (citing *Steagald v. United States*, 451 U.S. 204, 215-16 (1981); *see also United States v. Davis*, 288 F.3d 359, 362 (8th Cir. 2002) (“Absent exigent circumstances or consent, an arrest warrant does not justify entry into a third person’s home to search for the subject of the

arrest warrant.”). In comparing *Payton* and *Steagald*, the Eighth Circuit Court of Appeals observed:

Thus, “if the suspect is just a guest of the third party, then the police must obtain a search warrant for the third party’s dwelling in order to use evidence found against the third party.” *United States v. Litteral*, 910 F.2d 547, 553 (9th Cir. 1990). However, “if the suspect is a co-resident of the third party, then *Steagald* does not apply, and *Payton* allows both arrest of the subject of the arrest and use of evidence found against the third party.” *Id.*

*Risse*, 83 F.3d at 216; *see also Washington v. Simpson*, 806 F.2d 192, 196 (8th Cir. 1986) (police officers with a valid arrest warrant may enter the residence of a third party without a search warrant, when the subject of the arrest warrant resides with the third party). In summary, “[u]nder *Payton*, officers executing an arrest warrant must have a ‘reasonable belief that the suspect resides at the place to be entered . . . and have reason to believe that the suspect is present’ at the time the warrant is executed.” *Risse*, 83 F.3d at 216 (quoting *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995)). Stated otherwise, “*Steagald* does not prevent police entry if the arresting officers executing the arrest warrant at the third person’s home have a reasonable belief that the suspect resides at the place to be entered and have reason to believe that the suspect is present at the time the warrant is executed.” *United States v. Powell*, 379 F.3d 520, 523 (8th Cir. 2004) (citing *United States v. Boyd*, 180 F.3d 967, 977 (8th Cir. 1999)).

In this case, probation officers had information from a CI that Abram was both frequenting and staying at Defendant’s apartment on A Avenue NE in Cedar Rapids. At the hearing, Officer Warner also provided testimony that the officers were unsuccessful in locating Abram when they tried to find him at his last known residence. Based on this information, the Court finds that the officers could have reasonably believed that Abram was residing at Defendant’s apartment. *See Powell*, 379 F.3d at 523 (“The ‘officers’ assessment need not in fact be correct; rather, they need only reasonably believe that the suspect resides at the dwelling to be searched and is currently present at the dwelling.’

*Risse*, 83 F.3d at 216.”). It is unclear whether the officers believed Abram was present at Defendant’s apartment when they knocked on Defendant’s door. When Defendant opened his door, however, and before the officers entered Defendant’s apartment, the officers saw Abram in Defendant’s living room.

The facts in this case are similar to facts in *United States v. Davis*, 288 F.3d 359 (8th Cir. 2002). In *Davis*, police officers had a warrant for Davis, and when the officers could not locate him at the address listed on the warrant, they began looking for him at other places where they were told he might be. *Id.* at 361. At one of the places the officers were checking, a property with a house and a trailer, one of the officers went to the house to inquire about Davis. *Id.* A woman at the house told the officer that Davis might be in the trailer. *Id.* Before all of the officers went to the trailer, Davis came out of it. *Id.* The Eighth Circuit determined that:

Since Davis was living at the trailer property, the warrant for his arrest permitted officers to execute the warrant at that location. Even had he not lived there, the officers would have had authority to cross the property to arrest him based on the consensual conversation with the woman at the house and the fact that they saw him standing outside of the trailer.

*Id.* at 362.

Similarly, in this case, the officers had authority to enter Defendant’s apartment for the purpose of executing the arrest warrant for Abram because they believed Abram resided at Defendant’s apartment and they saw him in the apartment before they entered it. *See Davis*, 288 F.3d at 362; *see also Payton*, 445 U.S. at 603; *Pruneda*, \_\_\_ F.3d at \_\_\_, 2008 WL 341459 at \*3 (officers had authority to enter a defendant’s basement, when they had a valid arrest warrant, reports that the defendant resided at the address, and the defendant was identified at the scene by officers before the arrest warrant was executed). Accordingly, the Court finds that Defendant’s Fourth Amendment rights were not violated when probation officers entered his apartment to arrest Abram because the officers had a

valid arrest warrant for Abram, reasonably believed Abram resided at Defendant's apartment, and saw Abram in Defendant's apartment before they entered it.

## ***2. Protective Sweep***

“Upon legally entering a residence, officers have the authority to conduct a protective sweep of the residence if the officers reasonably believe, based on specific and articulable facts, that the residence harbors an individual who could be dangerous.” *Pruneda*, \_\_\_ F.3d at \_\_\_, 2008 WL 341459 at \*3 (citing *Maryland v. Buie*, 494 U.S. 325, 334 (1990), *United States v. Walsh*, 299 F.3d 729, 733 (8th Cir. 2002)). “A protective sweep is limited to a cursory inspection of spaces where a person may be found and may not last longer than is necessary to dispel the reasonable suspicion of danger.” *Pruneda*, \_\_\_ F.3d at \_\_\_, 2008 WL 341459 at \*3 (citation omitted). A protective sweep may be performed after an arrest “if there is a reasonable possibility that other persons may be present on the premises who pose a danger to the officers.” *United States v. Davis*, 471 F.3d 938, 944 (8th Cir. 2006) (citing *United States v. Jones*, 193 F.3d 948, 950 (8th Cir. 1999)). A protective sweep must also be a quick search which is limited to areas where a person may reasonably be found, such as a closet or other spaces adjoining to the place of the arrest. *Davis*, 471 F.3d at 944 (citations omitted).

Here, the officers had information from a second CI that Abram had recently been seen with a firearm. Upon entering the apartment, the officers also observed a woman in the living room with Defendant and Abram. Based on this information, the Court finds that it was reasonable for the officers to believe that other dangerous persons could be in the apartment and therefore a protective sweep was permissible. *See Id.* at 944-45.

At the hearing, Officer Warner testified that the protective sweep lasted about 60 seconds. Officer Wheatly testified that he performed the protective sweep of Defendant's bedroom. Officer Wheatly checked Defendant's closet and under Defendant's bed. While performing the protective sweep, Officer Wheatly found a fifteen year-old girl sleeping in Defendant's bed, a .40 caliber handgun underneath Defendant's bed, and a bag

of marijuana next to Defendant's bed in plain view. The officers did not perform a search of Defendant's apartment; instead, based on their observations, the officers obtained a search warrant for Defendant's apartment. The Court determines that Officer Wheatly's observation, during the protective sweep, of the handgun and bag of marijuana in plain view provided probable cause for obtaining a search warrant for Defendant's apartment. *See Pruneda*, \_\_\_ F.3d at \_\_\_, 2008 WL 341459 at \*\*3-4; *United States v. Walker*, \_\_\_ F.3d \_\_\_, 2008 WL 657841, \*2 (8th Cir. 2008) (officer had probable cause to obtain a search warrant after seeing a bag of marijuana on a kitchen table in plain view). In summary, the Court concludes that on December 7, 2007, the officers legally entered Defendant's apartment, had reason to perform a protective sweep of Defendant's apartment, and had probable cause to obtain a search warrant for Defendant's apartment based on contraband observed in plain view during the protective sweep.

***B. Search at Apartment on North Towne Place on January 13, 2008***

***1. Is Defendant entitled to a Franks Hearing?***

Defendant argues that the affidavit in support of the Application for Search Warrant, Attachment A, dated January 13, 2008, contains both false statements and omitted facts. Defendant further argues that the false statements were made knowingly or intentionally or in reckless disregard for the truth, and that facts were omitted intentionally or in reckless disregard of whether they made the affidavit misleading. Defendant maintains that if the false statements are stricken from the affidavit and the omitted facts are included in the affidavit, then the affidavit would be insufficient to support a finding of probable cause for the search warrant. Specifically, Defendant argues that Officer Joecken's assertion in his affidavit, Attachment A, that officers spoke with neighbors to Defendant's apartment and the neighbors informed the officers that "someone" staying at Defendant's apartment drove the white Mitsubishi Montero on a regular basis is false. Defendant also contends that Officer Joecken omitted that fact that the Mitsubishi was registered to an individual named John Franklin Castle who resided at 1st Avenue SE, not North Towne Place NE. In his

motion, while Defendant does not request a *Franks* hearing, his argument suggests that analysis under *Franks* is necessary for making a determination on his motion to suppress evidence.

In *Franks v. Delaware*, 438 U.S. 154 (1978), the United States Supreme Court concluded that if it is shown following a hearing 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 false statement is necessary to the finding of probable cause, then the search warrant must be voided and the fruits of the search excluded. *Id.* at 155-56. The same principle applies if material information is omitted from the application. *United States v. Ketzeback*, 358 F.3d 987, 990 (8th Cir. 2004) (“Omissions likewise can vitiate a warrant if the defendant proves ‘first that facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading, and, second, that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause.’ *United States v. Allen*, 297 F.3d 790, 795 (8th Cir. 2002).”). In *United States v. Snyder*, 511 F.3d 813 (8th Cir. 2008), the Eighth Circuit summarized the law regarding the circumstances under which a defendant is entitled to a hearing under *Franks*:

Under *Franks* and its progeny, a defendant may challenge a search warrant on the grounds that the probable cause determination relied on an affidavit containing false statements or omissions made knowingly and intentionally or with reckless disregard for the truth. To obtain a *Franks* hearing a defendant must make a substantial preliminary showing that there was an intentional or reckless false statement or omission which was necessary to the finding of probable cause, a requirement which is “not easily met.” Thus, to prevail on a *Franks* claim the defendant must first demonstrate that the law enforcement official deliberately or recklessly included a false statement in, or omitted a true statement from, his [or her] warrant affidavit. The defendant must then show that the affidavit would not establish probable cause if the allegedly false information is ignored or the omitted information is supplemented. Allegations of negligence or innocent mistake will not suffice to demonstrate reckless or deliberate falsehood.

*Id.* at 816 (internal citations omitted).

*a. False Statements*

In order to sustain his burden of proof on the first prong in *Franks*, Defendant must establish by a preponderance of the evidence that there are false statements in the search warrant application and supporting attachment. *United States v. Stropes*, 387 F.3d 766, 771 (8th Cir. 2004). Defendant claims that the following language in Attachment A is false:

Officers did speak with neighbors to this apartment. The neighbors did tell officers that someone staying at the apartment uses this vehicle . . . on a regular basis.

*See* Application for Search Warrant (Government's Exhibit 1), Attachment A. Defendant argues that "[n]one of the officers involved in this investigation indicate anywhere in their reports that they spoke with neighbors to the apartment and those neighbors advised that someone staying at Apartment 1 used the vehicle in question. This claim is a false statement made knowingly or intentionally or with reckless disregard for the truth."<sup>4</sup>

At the hearing, Officer Daniel Myrom of the CRPD testified that he spoke with a man walking his dog who lived in the area of Defendant's apartment. Officer Myrom asked the man whether he knew anything about the guys in apartment one who drove the white Mitsubishi Montero. Officer Myrom stated that the man told him the guys in apartment one had a big dog. Officer Myrom informed the other officers on the scene about the potential for a large dog being in apartment one. Officer Joecken testified that he was not at the scene and was called into the investigation to write the search warrant application. Officer Joecken explained that the information he put in Attachment A was provided to him by Lt. Minks, one of several officers at the scene at North Towne Place NE. Officer Joecken

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<sup>4</sup> *See* Defendant's Memorandum in Support of Motion to Suppress (docket number 14-2) at 5.

testified that he did not deliberately or recklessly include any false statements in his affidavit, Attachment A.

Although it appears from Officer Myrom's testimony that he offered the connection between the individuals living in the apartment and the Mitsubishi, and the man walking the dog did not explicitly make that connection, the man walking the dog did indicate that the individuals Officer Myrom was referring to owned a big dog. Because Officer Myrom informed the other officers on the scene that the individuals from the Mitsubishi who went into apartment one had a big dog, it is possible that Lt. Minks understood this information to mean that a neighbor corroborated that the individuals from the Mitsubishi lived in apartment one, and Lt. Minks relayed his understanding of that information to Officer Joecken. The Defendant offers no evidence, and the facts do not suggest, that Lt. Minks intentionally, deliberately, or recklessly provided false information to Officer Joecken, or that Officer Joecken intentionally, deliberately, or recklessly included false information in his affidavit, Attachment A. *See Snyder*, 511 F.3d at 816-17. Therefore, the Court finds that Defendant did not make the required showing of intentional or reckless falsehood to support a *Franks* hearing. *See Id.*

***b. Omitted Facts***

Again, in order to sustain his burden of proof on the first prong in *Franks*, Defendant must establish by a preponderance of the evidence that there are material omissions from the search warrant application and supporting attachments. *Stropes*, 387 F.3d at 771. To prevail on a *Franks* claim based on omissions of fact, a defendant must prove “‘that facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading. . . .’” *Id.* (quoting *Allen*, 297 F.3d at 795). Defendant claims that Officer Joecken omitted the following pertinent facts from his affidavit:

John Franklin Castle was the registered owner of the vehicle in question. Officer Joecken . . . omitted the fact that police records . . . showed that Mr. Castle resided at . . . 1st Ave., SE, . . . in Cedar Rapids (and therefore he did not reside at . . . North Towne Place NE, #1).

See Defendant's Memorandum in Support of Motion to Suppress at 5. Defendant maintains that "when the information is added that the owner of the vehicle lives at . . . 1st Ave., SE, #4, the car is linked to that residence, completely eliminating any link of the car to the North Towne address." *Id.* at 6.

At the hearing, Officer Joecken testified generally that he did not deliberately leave and factual information out of his affidavit, Attachment A. Specifically, Officer Joecken stated that he did not include Castle's address in Attachment A because he did not believe that information was relevant for the search warrant since Officer MacTaggart witnessed the individuals in the Mitsubishi exit the vehicle and enter apartment one. Even assuming the materiality of Castle's address, Defendant offers no evidence to suggest that the omission was intended to make the affidavit misleading, or was in reckless disregard of whether the omission made the affidavit misleading. *Allen*, 297 F.3d at 795. Accordingly, the Court finds that Defendant did not make the required showing to support a *Franks* hearing. See *Snyder*, 511 F.3d at 816-17.

*c. Probable Cause*

As set forth above, the Court has concluded that Defendant failed to prove by a preponderance of the evidence that Officer Joecken knowingly and intentionally, or with reckless disregard for the truth, included false information in or omitted material information from the search warrant affidavit. Accordingly, the first prong of *Franks* has not been met and it is unnecessary to consider the second prong. Nonetheless, to assist the District Court in the event that the District Court finds that the first prong of *Franks* has been satisfied, the Court will also address the second prong relating to probable cause.

In order to justify suppression of the evidence, the Court must determine that the affidavit, excluding the false information or including the missing material information, would not support a finding of probable cause. *Davis*, 471 F.3d at 946. In other words, Defendant must establish that if the false information were excluded, then probable cause would not exist; or if the material omissions were included, then it would have been

impossible to find probable cause. *Stropes*, 387 F.3d at 771 (citing *United States v. Mathison*, 157 F.3d 541, 548 (8th Cir. 1998)).

In making a probable cause determination, “[t]he task of the issuing magistrate [or judge] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her], including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Stated otherwise:

If an affidavit in support of a Search Warrant “sets forth sufficient facts to lead a prudent person to believe that there is a ‘fair probability that contraband or evidence of a crime will be found in a particular place,’” probable cause to issue the warrant has been established.

*United States v. Grant*, 490 F.3d 627, 631 (8th Cir. 2007) (quoting *United States v. Warford*, 439 F.3d 836, 841 (8th Cir. 2006)).

Here, even if the information Defendant claims is false<sup>5</sup> was excluded from the affidavit, and the information Defendant claims was omitted<sup>6</sup> from the affidavit was included, the issuing judge could nonetheless conclude that probable cause existed for the issuance of a warrant. Officer Joecken’s affidavit included information that: (1) Officer MacTaggart saw at least one individual exit the Mitsubishi and enter Defendant’s apartment; (2) officers saw several items in the Mitsubishi which could be used for making methamphetamine; (3) officers also noticed an anhydrous ammonia smell emanating from the Mitsubishi; and (4) the canine which performed a sniff of the entire apartment building

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<sup>5</sup> Defendant argues that Officer Joecken’s assertion in Attachment A, that officers spoke with Defendant’s neighbors and the neighbors informed the officers that “someone” staying at Defendant’s apartment drove the white Mitsubishi Montero, was false.

<sup>6</sup> Defendant argues that Officer Joecken omitted that fact that the Mitsubishi was registered to an individual named John Franklin Castle who resided at 1st Avenue SE, not North Towne Place NE.

made a positive alert only on Defendant's apartment. The Court finds that given all these circumstances, the issuing judge could determine that there was a fair probability that contraband or evidence of a crime would be discovered at Defendant's apartment and that probable cause existed for the issuance of a search warrant. *See Grant*, 490 F.3d at 631.

## ***2. Does the Leon Good faith Exception Apply?***

The Government also argues that the good faith exception enunciated in *United States v. Leon*, 468 U.S. 897 (1984), is applicable in this matter. For the reasons set forth above, the Court believes that it is unnecessary for the District Court to address the good faith exception, since there existed probable cause for the Search Warrant. Nonetheless, the Court will address the issue in case the district court disagrees with its analysis on probable cause.

The good faith exception provides that disputed evidence will be admitted if it was objectively reasonable for the officer executing a search warrant to have relied in good faith on the judge's determination that there was probable cause to issue the warrant. *Leon*, 468 U.S. at 922. The Government may not rely on the good faith exception, however, if one of four circumstances are present.

The Supreme Court has identified four circumstances in which an officer's reliance on a search warrant would be objectively unreasonable: (1) when the affidavit or testimony in support of the warrant included a false statement made knowingly and intentionally or with reckless disregard for its truth, thus misleading the issuing judge; (2) when the judge "wholly abandoned his judicial role" in issuing the warrant; (3) when the affidavit in support of the warrant was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" and (4) when the warrant is "so facially deficient" that the executing officer could not reasonably presume the warrant to be valid.

*Grant*, 490 F.3d at 632-633 (citing *Leon*, 468 U.S. at 923).

Defendant does not address the *Leon* good faith argument. The Government argues that it was objectively reasonable for the officers executing the search warrant to have relied

in good faith on the judge's determination that there was probable cause to issue the warrant. The Court will address the four circumstances in which the Government may not rely on the good faith exception in turn.

First, the Court has determined that Officer Joecken did not intentionally, deliberately, or recklessly include false information in his affidavit, Attachment A, in support of the Application for Search Warrant. *See IV.B.1.a* above. Second, Defendants do not allege, and the evidence would not support a finding, that the magistrate or judge who issued the state court search warrant "wholly abandoned his judicial role."<sup>7</sup> Third, as set forth above, the Court has concluded that there existed probable cause for the issuance of the state court Search Warrant. It necessarily follows that the Court believes that an officer could reasonably believe that the affidavit stated probable cause; and therefore, the Warrant was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Lastly, Defendant does not argue that the Search Warrant was "facially deficient." Accordingly, the fourth circumstance which would invalidate the good faith exception is not applicable here.

In summary, the Court concludes that even if the Search Warrant was not supported by probable cause, the evidence seized pursuant to the Warrant is nonetheless admissible pursuant to the good faith exception established by the Court in *Leon*.<sup>8</sup>

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<sup>7</sup> The judicial officer who issued the state court Search Warrant is not identified, but there is no indication that he or she had any animus toward the Defendants or other ulterior motive. Defendants are required to present some evidence that the magistrate was biased, or exhibited "a pattern of passive, automatic issuance of warrants." *United States v. Hallam*, 407 F.3d 942, 946 (8th Cir. 2005) (A magistrate who was "anxious to get back to bed," did not wholly abandon his judicial role.). There is no evidence that the issuing magistrate acted as a "rubber stamp for the police" or as "an adjunct law enforcement officer," rather than as a neutral and detached actor. *United States v. Carpenter*, 341 F.3d 666, 670 (8th Cir. 2003).

<sup>8</sup> If the district court concludes that the *Leon* good faith exception is applicable, then it need not address the issue of whether the Search Warrant is supported by probable  
(continued...)

## V. CONCLUSION

The Court concludes that on December 7, 2007, probation officers legally entered Defendant's apartment on A Avenue NE, had reason to perform a protective sweep of the apartment, and had probable cause to obtain a search warrant for the apartment based on contraband observed in plain view during the protective sweep. The Court further concludes that on January 14, 2008, there was probable cause to issue the Search Warrant for Defendant's apartment on North Towne Place. Even if probable cause was lacking for the issuance of the Search Warrant, the Court finds that the evidence seized is nonetheless admissible pursuant to the *Leon* good faith exception, as urged by the Government. Accordingly, Defendant's Motion to Suppress should be denied.

## VI. RECOMMENDATION

For the reasons set forth above, I respectfully recommend that the district court **DENY** the Motion to Suppress (docket number 14) filed by Defendant on March 18, 2008.

The parties are advised, pursuant to 18 U.S.C. § 636(b)(1)(B), that within ten (10) days after being served with a copy of these proposed findings and recommendations, any party may serve and file written objections with the district court.

DATED this 8th day of April, 2008.



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JON STUART SCOLES  
United States Magistrate Judge  
NORTHERN DISTRICT OF IOWA

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<sup>8</sup>(...continued)

cause. See, e.g., *United States v. Puckett*, 466 F.3d 626, 629 (8th Cir. 2006); *United States v. Ross*, 487 F.3d 1120, 1122 (8th Cir. 2007); *United States v. Pruett*, 501 F.3d 976, 979 (8th Cir. 2007) (“If the District Court was correct in concluding that the *Leon* good-faith exception to the exclusionary rule applies, it is unnecessary for us to engage in a probable-cause analysis.”).