UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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UNITED STATES OF AMERICA :
v. : Criminal No.3:02CR00072(AWT)
NEGUS THOMAS :
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RULING ON MOTION TO SUPPRESS EVIDENCE

Defendant Negus Thomas moved to suppress evidence seized from the first-floor apartment at 81-83 Edgewood Street, Hartford, Connecticut pursuant to a search warrant. He makes three arguments: (1) that the affidavit in support of the search warrant failed to establish probable cause because the information contained therein was stale; (2) that the searching officers failed to knock and announce their presence before entering the apartment; and (3) that the law enforcement officers' surveillance from a vantage point across the street from 81-83 Edgewood Street violated the defendant's Fourth Amendment rights. The defendant's motion was denied for the reasons set forth herein.

I. FINDINGS OF FACT

A. The Search Warrant Affidavit

On March 13, 2002, Special Agent Robert E. Bornstein of

the Federal Bureau of Investigation applied for a search warrant for 81-83 Edgewood Street, First Floor, Hartford, Connecticut. The facts to support the issuance of the search warrant were contained in an affidavit attached to the application. The enumerated items to be seized related to narcotics trafficking. A magistrate judge issued the search warrant on March 13, 2002 after finding that Agent Bornstein's affidavit established probable cause to believe that those items would be found in the apartment.

Agent Bornstein stated in the affidavit that, as of February 2002, he and others had received information both from confidential informants and cooperating witnesses that a number of persons, including Negus Thomas, were engaged in narcotics trafficking in front of 81-83 Edgewood Street. The affidavit informed the court that investigators had conducted video surveillance of that location "on February 7, 11, 19, 20, 22, 25, March 1 and March 5, 2002." (Bornstein Aff. ¶ 5). Agent Bornstein stated that he personally had observed defendant Negus Thomas participating in obvious narcotics transactions and had reviewed video surveillance conducted by other agents showing the same thing. The affidavit recited that "task force agents have been able to document, with great detail, more than 75 apparent drug transactions over

the part month that have occurred in front of and inside the porch area of the residence. The video surveillance also documents the storage and possession of suspected crack cocaine and money on the second floor balcony of the residence located in 83 Edgewood Street." (Bornstein Aff. ¶ 8). Agent Bornstein noted that the "video surveillance was conducted near, and with an unrestricted view of, the front porch and the second floor balcony of 81-83 Edgewood Street." Id.

Agent Bornstein's affidavit also informed the court that an undercover police officer had made a number of controlled purchases of crack cocaine from individuals who congregated at 81-83 Edgewood Street. In addition, the affidavit stated that on March 1, 2002, task force agents observed and videotaped an obvious drug transaction between Negus Thomas and two persons near the front porch of 81-83 Edgewood Street. It stated further that investigators followed those two persons and stopped them several blocks away, where the investigators recovered four grams of crack cocaine from one of them.

Acting pursuant to the search warrant, law enforcement officers searched the first-floor apartment at 81-83 Edgewood Street on the morning of March 14, 2002. They seized, among

other items, utility bills in the name of Negus Thomas, photographs of Negus Thomas with others, and a semi-automatic handgun.

B. Knock and Announce Statute

Over 20 law enforcement officers from the Hartford Police Department and other agencies were involved in the execution of the search warrant for 81-83 Edgewood Street, which covered not only the first-floor apartment, but the second- and third-floor apartments and common areas of the building as well. In that group was Officer Brian Salkeld of the Hartford Police Department. When they arrived at 81-83 Edgewood Street, they found a three-story building containing three apartments, one on each floor. The building had an enclosed front porch, and the porch had a foyer. Once one was on the porch, one went to the left to find the door for the first floor apartment, and to a stairway on the right to gain access to the second and third floors. Thus, the front porch was a common front porch.

Officer Salkeld, who was carrying the battering ram, entered the front porch foyer a few steps behind another officer from his department and a third officer, who was from a different law enforcement agency. As Salkeld was coming up the steps to the front porch foyer, he heard one of the

officers who preceded him onto the porch knock on the door to the first floor apartment, and as Salkeld entered the porch he announced that the police were there and had a search warrant. No officer knocked or announced before entering the front porch.

C. **Surveillance From Across the Street**

The first two days of surveillance by law enforcement officers were conducted from a van parked on Albany Avenue, at the end of Edgewood Street. Thereafter, surveillance was conducted from the second floor of an abandoned house situated across the street from 81-83 Edgewood Street; the first floor was occupied by squatters.[1]

Law enforcement officers saw and videotaped activity that took place on the steps and sidewalk and in the yard area in front of the front porch. There was nothing shielding the activities of a person in this area from anyone who happened to be walking or driving down Edgewood Street. Although there was a chain link fence, which appeared to be approximately four feet high, between the sidewalk running along Edgewood Street and the front yard of 81-83 Edgewood

[1] As discussed at a subsequent telephone conference, four videotapes of the surveillance were provided to the court post-hearing.

Street, it shielded from view nothing that occurred in the front yard, and someone looking through the fence would see right up to the front porch. The distance between the fence and the front porch appeared to be such that it could be covered in seven to ten steps.

Law enforcement officers also saw and videotaped activity that took place in certain areas on the common front porch. The front porch was a common point of entry for the occupants of all three apartments in the house. The door to the front porch opened inward and when it was open, law enforcement officers could see anyone who was standing in the doorway. There were four window frames along the front of the porch facing on Edgewood Street, one of which was boarded up, or otherwise covered, and three of which were completely open, having no windows, screens or any other form of covering. Law enforcement officers were able to look through the open window frames and see anyone who was standing on the porch in front of one of these open window frames. Anyone driving or walking down Edgewood Street would have had a similar view.

The second-floor balcony was enclosed and contained a series of four windows across the front, facing on Edgewood Street. It appears that the bottom half of certain of the

windows on the balcony was frequently raised when people on the balcony were right in front of or leaning out of that window.

II. DISCUSSION

A. The Search Warrant Affidavit

The defendant contends that because the last purchase of cocaine base referred to in Bornstein's affidavit occurred on March 1, 2002[2] and the warrant was not obtained until March 13, 2002, the information contained in the affidavit was too stale to support a finding of probable cause.

When the issue is whether a warrant was issued on less than probable cause, "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (quoting Jones v. United States, 362 U.S. 257, 271 (1960)). "[A]fter-the-fact

[2] Although the last drug transaction specifically referred to in Bornstein's affidavit occurred on March 1, 2002, the affidavit stated that video surveillance was conducted on March 5, 2002. The parties appear to disagree over whether the last observed narcotics sale at 81-83 Edgewood Street that was reported in Bornstein's affidavit occurred on March 1 or March 5. The court concludes that this issue is not material for purposes of this motion because there is no dispute that the time lapse between the last narcotics sale specifically referred to in Bornstein's affidavit and the submission of the affidavit was no more than 12 days.

scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts[]'" which should interpret affidavits in a common sense rather than hypertechnical manner. Gates, 462 U.S. at 236 (citation omitted); United States v. Rosa, 11 F.3d 315, 326 (2d Cir. 1993)("[a] search warrant issued by a neutral and detached magistrate is entitled to substantial deference, and 'doubts should be resolved in favor of upholding the warrant.'")(quoting United States v. Travisano, 724 F.2d 341, 345 (2d Cir. 1983)). Under the "totality of the circumstances" analysis which governs probable cause determinations, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238; United States v. Smith, 9 F.3d 1007, 1012 (2d Cir. 1993).

"Two critical factors in determining whether facts supporting a search warrant are stale are 'the age of those facts and the nature of the conduct alleged to have violated the law.'" United States v. Ortiz, 143 F.3d 728, 732 (2d Cir.

1998) (quoting United States v. Martino, 664 F.2d 860, 867 (2d Cir. 1981), cert. denied, 458 U.S. 1110 (1982)).

> [W]hen the supporting facts "present a picture of continuing conduct or an ongoing activity, . . . the passage of time between the last described act and the presentation of the application becomes less significant." Martino, 664 F.2d at 867. Thus, we have held that in investigations of ongoing narcotics operations, "intervals of weeks or months between the last described act and the application for a warrant did not necessarily make the information stale." Rivera v. United States, 928 F.2d 592, 602 (2d Cir. 1991). Indeed, "narcotics conspiracies are the very paradigm of the continuing enterprises for which the courts have relaxed the temporal requirements of non-staleness." United States v. Rowell, 903 F.2d 899, 903 (2d Cir. 1990) (quotation marks and citation omitted).

Ortiz, 143 F.3d at 722-23.

In this case, Bornstein's affidavit stated that, as a result of the video surveillance, agents had been able to document more than 75 apparent drug transaction at 81-83 Edgewood Street over the course of the preceding month. Further, it described five specific controlled purchases of drugs at 81-83 Edgewood Street by undercover police officers during the period from February 7 to February 22, 2002. Under the standards set forth in Ortiz, the Bornstein affidavit reported activities being conducted at 81-83 Edgewood Street that constituted a long-term, ongoing narcotics operation, and the magistrate judge had a substantial basis for concluding that probable cause existed.

B. <u>The "Knock-and-Announce" Statute</u>

Title 18, United States Code, Section 3109 is known as the "knock-and-announce" statute. It provides that:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C.A. § 3109 (West 2000). Evidence seized in violation of this statute must be excluded unless "the noncompliance was excused by exigent circumstance." United States v. Vozzella, 124 F.3d 389, 393 (2d Cir. 1997)(quoting United States v Spinelli, 848 F.2d 26, 28 (2d Cir. 1988)). "[W]arrant requirements must yield when exigent circumstances demand that police act speedily." United States v. Fields, 113 F.3d 313, 322 (2d Cir. 1997). The Supreme Court has identified six factors to be weighed in that determination: (1) the gravity of the offense charged; (2) whether the occupants are reasonably believed to be armed; (3) a clear showing of probable cause; (4) strong reasons to believe that suspects are on the premises; (5) the likelihood that suspects will escape; and (6) the nature of the entry. Fields, 113 F.2d at 322-23; United States v. MacDonald, 916 F.2d 766, 769-770 (2d Cir. 1990)(en banc).

Here, the record shows that the requirements of the statute were complied with as to defendant Negus Thomas because the officers knocked and announced themselves before entering the first-floor apartment at 81-83 Edgewood Street. They were not required to comply with the statute prior to entering the common front porch. See United States v. Holland, 755 F.2d 253, 256 (2d Cir. 1985)("[I]t is the established law of this Circuit that the common halls and lobbies of multi-tenant buildings are not within an individual tenant's zone of privacy even though they are guarded by locked doors."). Thus, the court need not reach the government's argument as to the presence of exigent circumstances.

C. Surveillance From Across the Street

Defendant Negus Thomas contends that the surveillance conducted from the house across the street from 81-83 Edgewood Street violated his Fourth Amendment rights because the surveillance position enabled the law enforcement officers to view inside the curtilage of 81-83 Edgewood Street. From across the street, the officers had an unrestricted view of the open areas of the front porch and second-floor balcony of 81-83 Edgewood Street. They were able to see alleged drug transactions that took place "in

front of and inside the porch area," as well as observe "the storage and possession of suspected crack cocaine and money on the second-floor balcony." (Bornstein Aff. ¶ 8). The officers videotaped the surveillance, but they also observed activity that is not shown on the videotapes.

The Fourth Amendment protects a person's privacy interest only in those areas where he or she has a "constitutionally protected reasonable expectation of privacy." United States v. Gori, 230 F.3d 44, 50 (2d Cir. 2000)(quoting Katz v. United States, 389 U.S. 347, 360 (1967)). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984). Thus, not every observation made by a police officer - even if it is intended to discover evidence of a crime - constitutes a "search" within the meaning of the Fourth Amendment. See Illinois v. Andreas, 463 U.S. 765, 771 (1983). "If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause." Id. Thus, Fourth Amendment analysis involves "a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society

willing to recognize that expectation as reasonable?" California v. Ciraolo, 476 U.S. 207, 211 (1986).

Although Fourth Amendment protection has been extended to the curtilage of a home, Oliver v. United States, 466 U.S. 170, 180 (1984), areas that a person knowingly exposes to the public, even in or surrounding his or her own home, are not protected by the Fourth Amendment. Ciraolo, 476 U.S. at 213. "The Fourth Amendment protects legitimate expectations of privacy rather than simply places." Andreas, 463 U.S. at 771.

> The history and genesis of the curtilage doctrine are instructive. "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" Oliver, supra, 466 U.S., at 180, 104 S.Ct., at 1742 (quoting Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886)). See 4 Blackstone, Commentaries *225. The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.

Ciraolo, 476 U.S. at 212-13.

Here, defendant Negus Thomas bases his argument that there was a Fourth Amendment violation on the fact that the law enforcement officers were able to view inside the curtilage of 81-83 Edgewood Street from their vantage point across the street. Thus, his argument is based on the faulty

premise that the Fourth Amendment protects places per se, as opposed to legitimate expectations of privacy. The court has viewed four videotapes of the surveillance, and it is apparent that defendant Negus Thomas did not manifest a subjective expectation of privacy with respect to any of the areas that were subjected to surveillance.

Law enforcement officers saw and videotaped activity that took place in the area in front of the porch. However, it is clear that the defendant manifested no subjective expectation of privacy in the area in front of the porch. Anyone who happened to be walking or driving down Edgewood Street would have been able to see everything that the law enforcement officers saw.

Law enforcement officers saw and videotaped activity that took place in certain areas on the common front porch. The videotapes show, with the respect to the activity occurring on the front porch, that the officers saw only what anyone walking or driving down Edgewood Street would have seen simply by looking in the direction of the front porch. This common front porch was not in defendant Thomas' zone of privacy, see Holland, 755 F.2d at 258, and his claim fails for that reason. But even if the front porch had been within Thomas' zone of privacy, it is clear that he manifested no

subjective expectation of privacy in the areas of the porch that were seen or videotaped by law enforcement officers.

Finally, law enforcement officers saw and videotaped activity that occurred on the second-floor balcony. Like the common front porch, this area was not in defendant Thomas' zone of privacy. Thomas' apartment was the first-floor apartment, and this balcony was located on the second floor. Assuming arguendo that Thomas had any interest at all in the second-floor balcony, it would have been an interest in a common area, and for that reason, not in his zone of privacy, see Holland, 755 F.2d at 258. Moreover, Thomas never manifested a subjective expectation of privacy with respect to the second-floor balcony.

III. CONCLUSION

For the reasons stated above, defendant Negus Thomas' Motion to Suppress Evidence (Doc. #168) is hereby DENIED.

It is so ordered.

Dated this 28th day of April, 2003, at Hartford, Connecticut.

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Alvin W. Thompson
United States District Judge