IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	**CRIMINAL ACTION**
	:	
vs.	**:**	
	:	
MARTIN FISHER	**:**	**NO. 01-715-01**
RONALD RAGGIO	**:**	**-02**

DuBois, J. **April 15, 2002**

MEMORANDUM

Defendants Ronald Raggio ("Raggio") and Martin Fisher ("Fisher" and together with Raggio, "defendants") are charged with manufacturing and possessing with intent to distribute 3,4 methylenedioxyamphetamine ("MDA") and aiding and abetting, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(C) and 18 U.S.C. § 2 (Count 1), manufacturing and possessing with intent to distribute MDA in a protected zone and aiding and abetting, in violation of 21 U.S.C. § 860 and 18 U.S.C. § 2 (Count 2), endangering human life while manufacturing MDA, in violation of 21 U.S.C. § 858 (Count 3), and possession of a three-neck round-bottom flask, in violation of 21 U.S.C. § 843(a)(6) (Count 4). Presently before the Court are Raggio's motion and amended motion to suppress evidence, joined by Fisher. In these motions, defendants seek to suppress the evidence seized pursuant to two search warrants, one for a silver Volkswagen Jetta VIN

#3VWSF29M6YM062582 ("Jetta"), and one for Fisher's apartment, located at 906 Emily Street, Philadelphia, Pennsylvania ("906 Emily"). Also before the Court is Fisher's motion to suppress evidence in which Fisher seeks to suppress the evidence seized pursuant to the search warrant for storage bin #1101, located at Devon Self-Storage, 501 Callowhill Street, Philadelphia, Pennsylvania ("storage bin").

In these motions, defendants argue that the search warrants are invalid because the affidavits of probable cause for the warrants contain material misstatements made with reckless disregard for the truth. Specifically, defendants allege that statements by the affiant that he and other agents smelled an odor consistent with methamphetamine manufacturing emanating from 906 Emily[1] are false because no substance that could have emitted such an odor was seized from 906 Emily. Defendants further allege that the information contained in the affidavits regarding the positive canine alerts at 906 Emily, the Jetta, and the storage bin does not support probable cause because the positive alerts did not result in the seizure of a controlled substance that the canine was trained to detect.[2] Finally, defendants argue that the affiant's description of the

[1] "Upon arrival [at the 2000 block of South Percy Street the agents [Agents Bradby, Mellor, and Supervisory Narcotics Agent Pendell] detected a very strong odor which they believed to be consistent with that of methamphetamine manufacturing ... [a]fter initial investigation the agents believed that the odor was consistent with that of methamphetamine manufacturing and was emanating from 906 Emily Street ... Upon closer examination of the boarded up hole, Supervisory Narcotic [sic] Agent Pendell again detected a very strong odor consistent with methamphetamine manufacturing emanating from 906 Emily Street ... Supervisory Narcotic [sic] Agent Pendell detected the same odor emanating from the door ... Supervisory Narcotic [sic] Agent Shiver also detected what he believed to be an odor consistent with that of methamphetamine manufacturing." Gov.'s Ex. 2; Gov.'s Ex. 3; Gov.'s Ex. 6.

[2] Defendants also assert that the government "is required to prove that the testimony regarding Haday's reaction and training passes muster pursuant to Daubert v. Merrell Dowd [sic] Pharmaceuticals, Inc., 509 U.S. 579." Def.'s Amended Mot'n, ¶ 10. The Court denies defendants' request for a Daubert hearing because "[a] Daubert hearing is the wrong procedural

individual who reported the odor to the agents as an "anonymous" citizen[3] is false because the affiant knew prior to preparing the affidavits that John Flowers, the building owner who leased the apartment at 906 Emily to Fisher, and not an "anonymous" citizen, reported the odor.

In response, the government argues that defendants have not made a preliminary showing to warrant a Franks hearing,[4] and, in the alternative, that the alleged misstatements are neither false nor material to a finding of probable cause. See United States v. Franks, 438 U.S. 154 (1978). The government also asserts that there is sufficient information within the four corners of the affidavits to establish that the canine inspection team was sufficiently trained and reliable for the positive canine alerts to provide probable cause.

The Court held an evidentiary hearing on April 3, 2002. Upon consideration of the evidence presented and the arguments of counsel, the Court denied the three motions from the bench. A written order denying the motions was issued on April 3, 2002. The Court now writes to supplement that ruling.

---

vehicle through which to challenge the reliability of a canine alert." United States v. Outlaw, 134 F. Supp. 2d 807, 810 (W.D. Tex. 2001).

[3] "[Y]our Affiant received information from an anonymous concerned citizen regarding the overwhelming smell of a chemical odor in the 2000 block of South Percy Street. The concerned citizen indicated that the odor was that of chemicals and not a smell which the citizen was familiar with. The concerned citizen indicated that the odor irritated his/her eyes, nose, and throat." Gov.'s Ex. 2; Gov's Ex. 3; Gov's Ex. 6.

[4] See infra discussion at 9-10.

I. AFFIDAVITS OF PROBABLE CAUSE

A. 906 Emily Street and the Jetta

The affidavits of probable cause prepared by Pennsylvania Office of Attorney General, Bureau of Narcotics Investigation and Drug Control ("BNI") Agent Michael A. Bradby ("Agent Bradby") in support of search warrants for 906 Emily and the Jetta contained the following information:

At approximately 2:30 p.m. on September 19, 2000, an anonymous concerned citizen informed the affiant of an unfamiliar and overwhelming chemical odor causing eye, nose, and throat irritation at the 2000 block of South Percy Street. Agent Bradby, BNI Supervisory Narcotics Agent John Pendell ("Agent Pendell"), and BNI Agent Charles Mellor ("Agent Mellor") arrived at the 2000 block of South Percy Street at approximately 3:30 p.m. and smelled an odor consistent with methamphetamine manufacturing (clandestine laboratory), emanating from a second floor apartment, 906 Emily. John Flowers told the agents that he owned the building in which 906 Emily was located and that the property is divided into three separate sections. The entire first floor is occupied by Flowers' Accu Tune Auto Repair, and the second floor is divided into two sections, one being a vacant room and the other 906 Emily. Flowers also told the agents that he had rented 906 Emily to an individual named Mark Fisher, who had paid his rent six months in advance with cash, and that after renting the property, Fisher changed the exterior door locks, covered the windows, and boarded up holes in walls of the property. The affiant explained that, based on his training and experience, these practices were consistent with tactics used by narcotics traffickers to avoid detection by law enforcement.

Flowers gave the affiant and Agent Pendell permission to enter the second floor vacant

room, or 2023 South Percy Street ("2023 South Percy"). Flowers told the agents that a hole in the common wall between the two apartments had recently been boarded up by plywood from inside 906 Emily. Agent Pendell smelled an odor consistent with methamphetamine manufacturing emanating from this boarded up hole and a boarded up double wooden door in the common wall. At approximately 4:00 p.m., Supervisory Narcotics Agent Robert Shiver ("Agent Shiver") arrived and also detected an odor consistent with methamphetamine manufacturing emanating from the boarded up holes in the wall. At this time, the agents initiated stationary surveillance of the property.

At approximately 4:45 p.m., Raggio and Fisher arrived in a silver Volkswagen Jetta bearing NJ registration JRV-58S and, using a key, opened a metal gate and the inside door of 906 Emily. At that time, the agents detained Raggio and Fisher and requested consent to search the property, which was refused. The agents then told defendants that a canine narcotics detection unit would be arriving shortly, and the agents would be applying for a search warrant pending the outcome of the canine alert.

At approximately 5:30 p.m., Investigator A.B. Deveney ("Deveney") and K-9 (Haday) from Peco Energy, Division of Security arrived and were taken to the second floor vacant room. Haday, without provocation, positively alerted for controlled substances on the boarded up hole and door at the south wall of 906 Emily, and after a short period of time, positively alerted for controlled substances again in the same locations. Deveney advised the agents of the positive canine alerts and that "the indication was positive and very strong for the presence of controlled substances." At approximately 6:10 p.m., Haday positively alerted for the presence of controlled substance on the exterior trunk area and right rear passenger door area of the Jetta. Deveney

advised the agents that Haday was recertified in the detection of marijuana, methamphetamine, heroin, and cocaine in June 2000, and had an accuracy rating of 96 percent consistently during the recertification.

Philadelphia Court of Common Pleas Judge Rayford Means issued search warrants for the Jetta and 906 Emily Street (Search Warrant Control No. 20151-00, 20151-00A) on September 19, 2000. In the search of 906 Emily the agents seized a clandestine MDA laboratory, including MDA in its finished form, a number of chemical compounds used as ingredients in the manufacture of MDA and MDMA, and glassware and flasks. The government offered no evidence of what the agents seized from the Jetta.

B. Storage Bin

The affidavits of probable cause prepared by Agent Bradby in support of a search warrant for the storage bin contained the following information:

On September 19, 2000, a search warrant for 906 Emily was obtained and executed. As a result of the search of 906 Emily, the agent seized a 3,4-methylenedioxymethamphetamine ("MDMA") manufacturing laboratory, including a substantial quantity of a substance testing positive for Amphetamine, precursor chemicals, glassware, and a pill press machine. Chemists John Evans and Clyde Liddick of the Pennsylvania State Police Laboratory opined that, based on the evidence recovered from 906 Emily, this apartment had been used to manufacture MDMA, a precursor drug used to manufacture Ecstacy. The chemists also stated that the odor associated with MDMA is consistent with the odor produced by the manufacture of methamphetamine.

As a result of the evidence seized from 906 Emily, Fisher and Raggio were arrested and charged with violations of the Control Substance Drug and Device and Cosmetic Act of 1972

and other related charges. While processing Fisher, a card for Devon Self-Storage, Unit #1101, located at 501 Callowhill Street, Philadelphia, Pennsylvania, was found in the wallet Fisher had on his person.

On September 20, 2000, Agents Bradby, Caraway, Rodriguez, and Mellor, and the canine inspection team of Deveney and Haday went to Devon Self-Storage. During a conversation with the manager on duty, Agent Caraway discovered that Fisher had used a false identification to rent the storage bin, a tactic, in the affiant's experience, employed by narcotics traffickers to avoid detection by law enforcement. Haday positively alerted for the strong presence of a controlled substance at storage bin #1101. Haday is a drug detection dog recertified in the detection of marijuana, methamphetamine, heroin, and cocaine in June 2000 and having an accuracy rating of 96 percent for detection of controlled substances. In the affiant's experience, methamphetamine and amphetamine manufacturers store additional quantities of finished product methamphetamine and amphetamine, precursor chemicals, and equipment used in the manufacture these products in storage facilities to avoid detection.

The search warrant for the storage bin was issued and executed on September 20, 2000. As a result of the search of the storage bin, the agents seized one white box containing unopened bottles of 6p-benzoquinone.

C. Hearing Evidence

The evidence presented at the hearing with respect to the points of the affidavits challenged by defendants is as follows:

1. Odor Produced By MDA and MDMA Manufacture: Jack Fasanello, a senior forensic chemist employed by the Northeast Laboratory of the Drug Enforcement Agency, testified that,

based on the chemical compounds, laboratory equipment, and notes seized from 906 Emily Street and the photographs taken of 906 Emily, MDA had been manufactured from Ocotea Cymbarum, the commercial name for Brazilian sassafras oil, at 906 Emily. It was also his opinion that there had been an attempt to manufacture MDMA at 906 Emily. Fasanello further testified that the chemicals used to manufacture the phenyl-2-propanone-based ("P-2-P-based") methamphetamine made in the Philadelphia-South Jersey area are the same as those used to manufacture MDA and MDMA except that safrole, which has a candy-like or root-beer like smell, is used as the starting compound in the manufacture of MDA and MDMA while allybenzene, which has a chemical smell, is used as the starting compound in the manufacture of P-2-P-based methamphetamine. According to Fasanello, the odor produced in manufacturing MDA and MDMA is the same as that emitted during the manufacture of P-2-P-based methamphetamine except that MDA and MDMA has an overtone that Fasanello described as candy-like or root beer-like.

2. Odor Smelled Emanating from 906 Emily on September 19, 2000: John Flowers testified that the odor emanating from 906 Emily on September 19, 2000 smelled like pine disinfectant with a more pungent underlying smell. Agent Pendell testified that he smelled the odor of P-2-P-based methamphetamine and anise, a licorice-like smell, emanating from 906 Emily on September 19, 2000.

3. Training and Reliability of Canine Inspection Team: Deveney testified that he and canine Haday, the canine inspection team, were initially certified in detection of methamphetamine, marijuana, cocaine, and heroin by the Global Training Academy ("Global") in August 1999, and that the team had an accuracy rating of 91.1 percent during certification.

Prior to this certification, Deveney completed Global's three-week initial training course, which involved a classroom component and field work component, and Haday was trained at Global in drug detection on a daily basis for three months. Deveney participated in the final two weeks of this training. The team was recertified in June 2000 with a 95.5 percent accuracy rate during recertification, and again in June 2001 with an accuracy rate of 95 percent. Between these certifications, Deveney worked with Haday monthly, if not more frequently, on drug detection, and also used demonstrations during school assemblies as secondary reinforcement.

4. Anonymity of Concerned Citizen: John Flowers testified that he was the individual who reported the odor emanating from 906 Emily Street on September 19, 2000. Agent Pendell testified that he instructed Agent Bradby to refer to Flowers as an anonymous concerned citizen in the affidavit because Flowers, as the building owner who leased the 906 Emily Street apartment to Fisher, wanted to remain anonymous and Agent Pendell wanted to protect Flowers.

II. DISCUSSION

A. The Affidavits Did Not Contain Material Misstatements

"The rule governing situations involving allegedly misleading search warrant affidavits was articulated by the Supreme Court in Franks ." United States v. Frost, 999 F.2d 737, 742 (3d Cir. 1993). In Franks, the Supreme Court ruled that:

> where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-56. If the court holds a Franks hearing and the defendant proves by a preponderance of

the evidence that the affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement necessary to a finding of probable cause in the affidavit, "the fruits of the search [must be] excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id. "Thus, in order to secure suppression of the fruits of the search, a defendant must show *both* that bad faith or reckless disregard existed on the part of the affiant, *and* that there would have been no probable cause but for the incorrect statement." Frost, 999 F.2d at 743.

The Court granted defendants a Franks hearing notwithstanding that, prior to the hearing, defendants did not present any evidence suggesting that the agents did not, in fact, smell an odor consistent with methamphetamine manufacturing or even raise the argument that the citizen who reported the odor was not anonymous.[5] The Court now considers each of the alleged misstatements.

1. Statements That Agents Smelled An Odor Consistent With Methamphetamine Manufacturing

Defendants challenge the veracity of Agent Bradby's statements in the affidavits that he and other agents smelled an odor consistent with methamphetamine manufacturing emanating from 906 Emily on September 19, 2000. Defendants contend that an odor consistent with methamphetamine manufacturing could not have emanated from 906 Emily at that time because: (1) no methamphetamine was recovered from 906 Emily Street and (2) MDA, the only controlled substance recovered from 906 Emily, does not emit an odor consistent with methamphetamine manufacturing either during its manufacture or in finished form.

Defendants did not offer any testimony or other evidence in support of their claim that there was no odor consistent with methamphetamine manufacturing emanating from 906 Emily

[5] Defendants raised this argument for the first time at the hearing.

on September 19, 2000. On the other hand, the government's first witness, Senior Forensic Chemist Fasanello, testified that MDA had been manufactured at 906 Emily and an attempt had been made to manufacture MDMA at 906 Emily Street, and that the odor produced by manufacturing MDA or MDMA is the same as that emitted during the manufacture of the P-2-P-based methamphetamine made in the Philadelphia-South Jersey area except that MDA and MDMA has a sassafras or candy-like overtone. The descriptions given by Agent Pendell and John Flowers of the odor they smelled emanating from 906 Emily on September 19, 2000 were consistent with Fasanello's testimony. Taken together, this testimony supports the statements in the affidavits of probable cause that there was an odor consistent with methamphetamine manufacturing emanating from 906 Emily on September 19, 2000. On the basis of this uncontroverted evidence, the Court concludes that defendants failed to demonstrate that these statements were false and thus did not carry their burden under the first prong of Franks.

2. Statements Describing John Flowers As An "Anonymous Concerned Citizen"

Defendants challenge the validity of the search warrants on the ground that Agent Bradby falsely described the individual who reported the odor as an "anonymous concerned citizen." The evidence shows that Agent Pendell instructed Agent Bradby to identify Flowers as an anonymous concerned citizen because Flowers, as the owner of the leased premises who leased the property to Fisher, wanted to remain anonymous and Agent Pendell wanted to protect Flowers from being identified as the individual who alerted law enforcement to the odor.

There is no doubt that the statements in the affidavits of probable cause in which Flowers was identified as an "anonymous concerned citizen" were false and that Agent Bradby included these statements in the affidavits knowing that they were false. The evidence establishes that

Flowers, not an anonymous concerned citizen, alerted the law enforcement agents to the odor which led to the seizures at issue in this case, and that Agent Bradby knew this information prior to preparing the affidavits.

As defendants have met their burden under the first prong of Franks, the Court "must excise the offending inaccurac[y] ... and then determine whether or not the 'corrected' warrant affidavit would establish probable cause." Wilson v. Russo, 212 F.3d 781, 789 (3d Cir. 2000) (citing Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997)). What must be removed from the affidavits is the identification of the caller as "anonymous." That would leave in the affidavits a statement that the caller was a concerned citizen. The "anonymous" description is not necessary to a finding of probable cause and thus, defendants have failed to meet their burden under the second prong of Franks. Accordingly the Court rejects defendants' challenge to the warrants on this ground.

B. The Canine Alerts Establish Probable Cause

It is well settled that the positive alert by a sufficiently trained and reliable "drug-sniffing dog, on its own, constitutes probable cause" for issuance of a search warrant. United States v. Burton, 193 F.R.D. 232, 242 (E.D. Pa. 2000) (citing Karnes v. Skrutski, 62 F.3d 485, 498 (3d Cir. 1995). "To establish the dog's reliability, the affidavit need only state the dog has been trained and certified to detect drugs." United States v. Sundby, 186 F.3d 873, 876 (8th Cir. 1999) (citing United States v. Kennedy, 131 F.3d 1371, 1377 (10th Cir. 1997); United States v. Berry, 90 F.3d 148,153 (6th Cir. 1996); United States v. Meyer, 536 F.2d 963, 966 (1st Cir. 1976)). "An affidavit need not give a detailed account of the dog's track record or education." Id. (citations omitted). In this case, based on the fact that the affidavits stated that the canine team was trained

and certified in narcotics detection, had a 96 percent accuracy rate during recertification, and strongly alerted to the presence of narcotics when exposed to the Jetta, 906 Emily, and the storage bin, the Court concludes that the affidavits were facially sufficient to support a reasonable belief that 906 Emily, the Jetta, and the storage bin contained drugs and thus, establish probable cause.

Defendants argue that the positive canine alerts do not provide probable cause because none of the alerts resulted in the seizure of a quantity of a controlled substance Haday was trained to detect. The Court disagrees. The validity of the search warrants is not undercut merely because a seizable quantity of a controlled substance Haday is trained to detect was not recovered, or because the search of 906 Emily turned out to contain MDA, a drug Haday was not trained to detect. United States v. Massac, 867 F.2d 174, 176 n. 2 (3d Cir. 1989) (the fact that a positive alert does not result in seizure of "a quantity of drugs does not negate the effect of the positive alert for probable cause purposes."). "[W]hether probable cause existed at the time of the search may not be determined by what the search actually yields." Outlaw, 134 F. Supp. 2d at 815. In this case, positive alerts by a trained canine detection dog gave probable cause at the time the warrants were issued that some kind of contraband was present.

While it is true that "'a court may look behind a search warrant when the affiant intentionally or recklessly misleads the magistrate judge by making an affirmatively false statement or [by omitting] material information that would alter the magistrate judge's probable cause determination,'" Sundby, 186 F.3d at 876 (quoting Kennedy, 131 F.3d at 1377), there is no evidence of any misstatement or omission regarding the reliability of the canine team in the warrant affidavits for 906 Emily and the Jetta that would call into question the validity of these

search warrants.

With respect the affidavit for the storage bin, Agent Bradby omitted to state that Haday's positive alerts of 906 Emily and the Jetta did not result in the recovery of a seizable amount of narcotics Haday was trained to detect. "[W]here an omission ... is the basis for the challenge to the affidavit, a court should ask whether the affidavit would have provided probable cause if it had contained a disclosure of the omitted information." Frost, 999 F.2d at 743 (citing United States v. Calisto, 838 F.2d 711 (3d Cir. 1988)).

The Court concludes that disclosure of the challenged alerts does not call into question the reliability of the canine team, and in turn the validity of the warrant. That no drugs Haday was trained to detect were found as a result of these alerts can be explained by the presence of a residual odor and the similarity of the odors emitted in the manufacture of MDA and MDMA to the odors produced in methamphetamine manufacture. As several courts have recognized and canine handler Deveney explained at the hearing, drug-sniffing canines "are trained to detect a narcotic's odor, not necessarily its physical presence in terms of seizable amount." Outlaw, 134 F. Supp. 2d at 815. Further, Deveney testified that, based on his conversation with Chemist Evans of the Pennsylvania State Police Laboratory, a canine cannot distinguish the odors produced in the manufacture of MDA or MDMA from those emitted by the manufacture of methamphetamine, a drug Haday is trained to detect.[6] Taken together with evidence that MDA was manufactured and an attempt was made to manufacture MDMA at 906 Emily, this evidence supports the position of the government that Haday's alerts at the common wall of 906 Emily

[6] Although Deveney's testimony on this point is hearsay, "[h]earsay may be considered in a suppression hearing in a federal court." Brosius v. Warden, 278 F.3d 229, 246 n. 4 (3d Cir. 2002) (citing United States v. Raddatz, 447 U.S. 667, 679 (1980)).

were not false, but in reaction to odors that he was trained to detect, those of methamphetamine. As such, they do not undermine the reliability of the canine team.

With respect to the Jetta, "the absence of a seizable amount of [drugs] for which [a drug detection dog] was trained to detect, does not conclusively indicate that [the Jetta was] not previously exposed to such drugs." Id.; see also Kennedy, 131 F.3d at 1375 n. 6 (observing that "a false alert does not mean necessarily that the dog alerted without detecting any odor of narcotics. Dogs are capable of detecting narcotics residue that may appear on money or clothing that has come in contact with drugs, even though no seizable quantity has been found."). Although there is no direct evidence that the Jetta was used to transport substances used in the manufacture of MDA or MDMA at 906 Emily, there is circumstantial evidence to support the position that the canine alerts to the Jetta were in reaction to residual odor–evidence that Fisher had been in 906 Emily before the alerts, that there was an MDA laboratory in 906 Emily, that an odor consistent with methamphetamine manufacturing emanated from 906 Emily, that such odor is transferred to clothing, hands, and other objects that come in contact with chemicals used in the manufacture of MDA and MDMA, that Fisher had been a passenger in the Jetta before the canine alerts, and that the location of one of the alerts, the front passenger door handle, indicated that someone who opened the door had transferred the residual odor to the door handle.

Even if the Jetta alerts were false, the Court is unpersuaded that disclosure of these alerts in the absence of any other evidence of past false alerts by Haday provides a basis to find Haday unreliable, and thus to invalidate the search warrant for the storage bin. See United States v. Chronister, 1995 WL 547815, *3 (10th Cir. Sept. 15, 1995) (unpublished) ("one false alert does not undermine [the drug detection dog's] reliability to the extent that it [is a] must for this court

to hold that his alerts did not continue to provide probable cause."). The Court concludes that, even with the disclosure of the September 19, 2000 alerts, the canine team was sufficiently reliable for the positive canine alert at the storage bin to provide probable cause, and accordingly, suppression of the evidence seized as a result of its execution is not appropriate under Franks.

III. CONCLUSION

For the foregoing reasons, the Court denied defendant Raggio's Motion and Amended Motion to Suppress, joined in by defendant Fisher, and defendant Fisher's Motion to Suppress Evidence *In Limine*, by Order dated April 3, 2002.

BY THE COURT:

_____

JAN E. DUBOIS, J.