UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. ÁNGEL MALDONADO-LAGO, Defendant.	CRIMINAL No. 15-403 (JAG)

REPORT AND RECOMMENDATION

I. PROCEDURAL BACKGROUND

On June 11, 2015, a federal grand jury issued an eight-count indictment against Ángel Maldonado Lago ("Maldonado" or "the defendant"), charging him with four counts of possession of controlled substances with intent to distribute in violation of 21 U.S.C. 841, two counts of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. 924(c)(1), one count of possession of a machinegun in violation of 18 U.S.C. 922(o), and one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. 922(g)(1). ECF No. 10. On August 12, 2015, Maldonado filed a motion to suppress ("first motion") alleging that the facts in the affidavit supporting the search warrant were insufficient to provide probable cause. ECF No. 24. On November 24, 2015, the court issued a Report and Recommendation finding, based on the allegations in defendant's first motion, that officers acted in good faith reliance on a facially valid warrant under United States v. Leon, 468 U.S. 897 (1984).

On December 17, 2015, defendant filed a second motion to suppress ("second motion"), this time under Franks v. Delaware, 438 U.S. 154 (1978). ECF No. 44. This motion alleged new

facts, not addressed in the first motion, that have the potential to cast doubt on the validity of the warrant upheld in the first Report and Recommendation. In the second motion defendant argues for the first time that the affidavit in support of that search warrant contained false statements. Accordingly, a Franks hearing was held on March 21, 2016. ECF No. 56. The defendant testified on his own behalf and also called Iris Violeta Ortiz ("Ortiz"). The government called Puerto Rico Police Officer ("PRPO") Carlos R. Torres Anaya ("Torres"). On rebuttal defendant testified again. Defendant then rested their rebuttal. The government recalled PRPO Torres in rebuttal.[1]

II. SUMMARY OF RELEVANT TESTIMONY

According to PRPO Torres, on May 19, 2015, he received a complaint ("the complaint") stating that on Quebrada Trinidad Street, off Road 747 in Ward Guamaní, Sector Culebra, there was a two story house with heavy equipment/machinery.[2] According to the complaint, the man who lived in this house worked during the day, but sold controlled substances and firearms in the afternoon. The man was described as dark-skinned, tall, and heavy-set with a small, white truck. The same day, PRPO Torres Anaya went to the end of Quebrada Trinidad road to locate the residence described in the complaint. After several rounds through the area, he observed what he believed to be the correct residence. His position was exposed, however, so he exited the area before he could be detected. On May 26, 2015, PRPO Torres and two other officers returned to conduct surveillance of the residence. In order to surveil without being detected, PRPO Torres

[1] The court allowed rebuttal into the issue of fencing surrounding defendant's residence. When defense counsel first requested permission to put on a rebuttal witness, the court allowed this rebuttal but made clear that defense had not shown sufficient reason why this material could not have been addressed in their case-in-chief. After defendant testified in rebuttal, defense counsel stated that she had no additional witnesses. When PRPO Torres was not able to give a precise distance between the fencing and the residence during government's rebuttal, defense counsel requested to call an additional rebuttal witness. According to defense counsel, this additional witness was her investigator Anthony Toro Zanabria, who would testify regarding additional fencing. The request to call this witness was denied as defense counsel provided no cause why this witness could not have been called in either her case-in-chief or first rebuttal.

[2] The government's response in opposition to the first motion to suppress identifies indicates that the source of the complaint was an anonymous call. ECF No. 29, 2.

decided to go through the woods surrounding the residence. They parked their vehicle on a street bordering the woods and walked thirty minutes until they were in a location where they could observe the residence. At this point PRPO Torres saw roosters and hens, heavy equipment, and a white truck. PRPO Torres wrote down the license plate number on the truck. PRPO Torres testified that he remembered the license number began with H57. Their surveillance lasted for an hour and a half, but PRPO Torres did not observe any illegal activity. PRPO Torres verified in the DAVID system that the truck was registered to an individual named Ángel Maldonado Lago. The license plate corresponds to a Ford F350 Super Duty truck. See Ex. 9.[3] He further verified that this individual did not have any type of weapons permit. PRPO Torres repeated the journey through the woods on May 27, 2015, but was unable to stay for long because it began raining heavily.

At approximately 2:00 pm on May 29, 2015, PRPO Torres returned to again conduct surveillance with fellow officer, PRPO Negrón. The journey through the woods occurred entirely along a dirt path. PRPO Torres testified that he did not cross any cyclone or barbed wire fences.[4] According to PRPO Torres, a small white truck arrived at approximately 2:45 pm. He admits that

[3] Attached is a photocopy of this exhibit that has been redacted to remove defendant's social security number. The government is reminded that, unless absolutely necessary for the issues at bar, identifying information ought to be redacted before an exhibit is entered into evidence.

[4] Defendant challenged this, attempting to show that PRPO Torres must have passed over a fence to reach his vantage point. Defendant made no arguments on this point in either motion or the objections to the first Report and Recommendation (despite incorporating new facts therein). Further, individuals have no reasonable expectation of privacy in "open fields." Oliver v. United States, 466 U.S. 170, 176 (1984). In determining whether property constitutes an open field, the court looks at "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation." United States v. Dunn, 480 U.S. 294, 301 (1987) (internal quotations omitted). No evidence was put forward here regarding the usage of this wooded area adjacent to defendant's residence. Defendant only alleged that there was fencing enclosing the area. The Supreme Court has "expressly rejected the argument that the erection of fences on an open field . . . creates a constitutionally protected privacy interest." Dunn, 480 U.S. at 302. It should also be highlighted that the area where PRPO Torres was allegedly standing was separated from the house by two additional fences. One fence immediately enclosed the residence and another fence was at the edge of the wooded area. According to the testimony, the first fence (that enclosed the residence) did have some sort of privacy slats. There was no similar evidence regarding the second fence or the fence at issue here. Ultimately, however, the court need not reach this issue.

he does not use a watch, but says that he continuously checked the time on his cell phone. He testified that he had checked the time "moments before." Hr'g, Mar. 21, at 12:27 PM. Through his binoculars, PRPO Torres saw an individual who matched the description given get out of the driver's seat of the truck. The individual then opened the gate attached to a fence enclosing the residence and parked in reverse. When the driver exited the truck again, he pulled a pistol from under the driver's seat. The individual then went into the residence. In court, PRPO Torres testified that the individual he observed that day was defendant. When PRPO Torres decided to leave at approximately 4:00 pm, the metal garage door opened and a four door jeep exited. PRPO Torres then left the wooded area. PRPO Torres indicated that PRPO Negrón did not see any of this because he was merely giving cover, not conducting the surveillance.

According to defendant, he was at work when PRPO Torres allegedly saw him arrive at home on May 29, 2015. At the time, defendant was employed at National Lumber and Hardware in Guayama. There defendant was in charge of the electrical department. His responsibilities included taking care of customers and ordering and organizing merchandise. At any one time, only two people work in that section of the store. At National Lumber, employees clock into and out of their shifts using a machine at the front of the store. See Ex. A. The machine requires the employee to stick their hand in the machine and input their assigned number. The machine then ensures that the assigned number matches the individual's handprint. According to defendant's supervisor, Ortiz, who is in charge of making sure employees comply with their schedules, this machine prevents an employee from clocking in or out on another employee's behalf. The records from this machine are then stored at the central offices. Defendant testified that he was scheduled to work from 7:00 am to 3:00 pm. These records indicate that on May 29, 2015, defendant clocked in at 7:14 am and then out at 11:10 am. Ex. I. He then clocked in again at

12:06 pm and did not clock out until 3:11 pm. Id. Ortiz testified that throughout the day she monitors the security camera feed, although admittedly not continuously. Further, she testified that guards positioned at the doors notify her if an employee leaves and does not come back.

Defendant testified that he drove his white truck to work that day. According to defendant his journey from work to home takes approximately fifteen to twenty minutes in a car. In his truck, however, it takes approximately forty minutes. Defendant testified that it takes longer in the truck because the roads are narrow, and he has to take extra precautions to avoid causing an accident with any parked vehicles. As noted above, this truck is a Ford 350 Super Duty, and defendant testified that he occasionally uses it to carry sand. Thus, it has a truck bed that is significantly larger than the average pick-up truck bed. See Ex. II (photo of defendant's truck). According to defendant he did not go straight home that day, but rather stopped first at the Walmart pharmacy. He testified that it took him an hour to get home from the pharmacy in the truck as the pharmacy is farther from his house than his work is.

III. ANALYSIS

The Fourth Amendment to the United States Constitution states that "[N]o Warrants shall issue, but upon probable cause, supported by Oath of affirmation . . . ." The Supreme Court in Franks v. Delaware interpreted this clause to require the requisite oath or affirmation be truthful, "in the sense that the information put forth is believed or appropriately accepted by the affiant as true." 438 U.S. at 164–165. "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant." Id. at 171. "In order for a warrant to be voided and the fruits of the search excluded, the defendant must meet an . . . exacting standard: he must (1) show that the affiant in fact made a false statement knowingly and intentionally, or with reckless disregard for the truth, (2) make this showing by a preponderance of the evidence, and

(3) show in addition that 'with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause.'" United States v. Tzannos, 460 F.3d 128, 136 (1st Cir. 2006) (quoting Franks, 438 U.S. at 156). "[R]ecklessness can be inferred 'from circumstances evincing obvious reasons to doubt the veracity of the allegations.'" United States v. Lanza-Vazquez, 799 F.3d 134, 141 (1st Cir. 2015), cert. denied sub nom. Galan-Olavarria v. United States, 136 S. Ct. 920, 193 L. Ed. 2d 807 (2016) (quoting United States v. Ranney, 298 F.3d 74, 78 (1st Cir. 2002)).

Defendant brought forward no reason to question the affiant's statements regarding investigations on May 19, May 26, or May 27 of 2015. Rather, his challenge was targeted at the observations reported to have occurred on May 29, 2015, which was the only day that defendant was allegedly observed at the residence. That was the day that, according to both PRPO Torres's testimony at the hearing and his affidavit accompanying the search warrant, an individual was observed at the residence, exiting a white truck and entering the residence. Specifically, PRPO Torres stated that he saw this individual retrieve a firearm from under the driver's seat. In the hearing, PRPO Torres affirmatively identified this person as defendant. This is not a case where he alleges to have seen a different individual, but who reasonably matched the same description. PRPO Torres unambiguously testified that he saw defendant arrive home at approximately 2:45 PM.

Third party testimony and documentary evidence, however, reveal that defendant was at his work until 3:11 PM that day. The records maintained by defendant's employer, National Lumber, indicate that was the time defendant clocked out of work on May 29th, 2015. This system verifies that the employee is the one recording the information by both requiring an identification code and confirming handprint recognition. Using this system, another employee

could not have clocked out on Defendant's behalf. Further, defendant's supervisor, Ortiz, testified that defendant could not have left the store without her noticing, for multiple reasons. First, she monitors the security camera feed. Although Ortiz admitted that she does not look at the video feed all the time, she testified that she would still have noticed if he left. Second, if defendant had left for any significant amount of time, the guard at the door would have noticed. Ortiz testified that if an employee leaves without returning, the guard would call and report that fact to her. Finally, the electricity department is a busy section with only two employees, and defendant is the one in charge. Ortiz testified that she depended on defendant in that section, and thus would have noticed his absence. There is no apparent motivation for Ortiz to be less than candid with the court and the government produced none. After having observed the demeanor of the witnesses and reviewed the documentary evidence, the court credits Ortiz's testimony that defendant was at work until 3:11 PM.

PRPO Torres stated that defendant arrived home at "approximately" 2:45 PM. Even allowing for the shortest possible journey to his residence, defendant would not have been home until 3:26 or 3:31 PM. This timeline would have defendant driving a car, as opposed to his truck, and going straight from work to his home without stopping. Defendant testified that the drive home takes fifteen to twenty minutes in a car. This timeline was not advanced by any of the witnesses and directly contradicts PRPO Torres's own statement that he saw defendant arrive in his white truck. Defendant testified that, when driving his truck, the trip would take at least forty minutes. This is due to the truck's width that requires him to drive with extra care. After having viewed a photograph of defendant's truck, it is reasonable to infer that the width of the truck would require the driver to proceed cautiously and thus more slowly. See Ex. II. Using defendant's timing estimate, had he gone straight from work to home in his truck, he would not

have arrived at the residence until 3:51 PM. This timeline, too, was not advanced by any of the witnesses. Rather, defendant testified that he drove the truck to Walmart before going home. He did not testify how long the journey from work to Walmart took, but he estimated that he spent ten to fifteen minutes inside. According to the uncontradicted testimony of defendant, the trip from Walmart to his residence in the truck takes an hour. Even excluding the time to get to the store, this would put defendant home at 4:21 PM at the earliest. This is twenty one minutes after PRPO Torres testified that he stopped observing the residence and left the area.

Given the specific facts of this case, none of these timelines can be considered approximate to the time averred by PRPO Torres which was 2:45 PM. In a car without stopping at the pharmacy, defendant's earliest arrival would have been more than thirty minutes later, at 3:26 PM; however, using the timeline advanced by the defendant, wherein he was driving his truck and stopped at the pharmacy, he would not have arrived until 4:21 PM, over an hour after his approximate arrival. This is particularly incompatible given PRPO Torres testified that he had checked the time on his cellular phone "moments before" he allegedly observed defendant. Hr'g, Mar. 21, at 12:27 PM. Thus, given these timelines, the testimony of Ortiz (a third party with no alleged motive to be less than truthful), and reliable documentary evidence, PRPO Torres cannot have seen defendant at his residence at the stated time on May 29, 2015.[5] PRPO Torres did not explain this inconsistency or explain any deviation in the time reported in the search warrant. The court therefore finds by a preponderance of the evidence that the statements in the affidavit

[5] At the hearing PRPO Torres also testified that he saw someone exit the residence in a Jeep at approximately 4:00 pm. Although the affidavit in the search warrant seems to imply that the driver of the Jeep was defendant, PRPO Torres did not identify the driver during his testimony. Given the timelines addressed above, it is possible under the first two scenarios that defendant could have been the one leaving in the Jeep. There was no testimony, nor allegation elsewhere in the pleadings, however, that any criminal activity, such as visual display of a firearm, was observed in relation to the Jeep. Thus, even if the defendant was leaving in the Jeep at 4:00 pm, this does not aid the probable cause determination.

supporting the search warrant regarding investigations on May 29, 2015 were made in intentional or reckless disregard of the truth.

Cleansed of the information from this second sighting, the affidavit, in relevant part, reads as follows:

> That on the 19th day of May of 2015, the agent initiated his duties at 9:00 AM at the Guyama Drugs Division, where Sergeant José Rosado 8-26423 gave him special complaint, # 2015-30, which indicates that on Road 747 in the Guamaní Ward, Culebra Sector, end of Quebrada Trinidad Road in the town of Guayama, there is a two story residence wherein a tall individual resides, olive-skinned, fat and he has a white-colored truck and heavy equipment at the residence and the same sells different types of controlled substances and has firearms and he works during the day and in the afternoons is when he does the transactions, and that after reading the information the agent verified on a map where the place is located. Sgt. Rosado, during afternoon hours, assigned him an unmarked motor vehicle, a portable radio and some binoculars he owns and he went to the location and that after several rounds at the location, the agent located a residence with the same characteristics of special complaint # 2015-30, and he decided to withdraw from the location because the location is very deserted and he could be detected. That on the 26th day of May of 2015, the agent initiated his duties at 4:00 AM because he had work in the town of Cayey and during afternoon hours Sgt. Rosado indicated to the agent to continue the investigation of special complaint # 2015-30, and the agent indicated that he had to go into the wooded area which is next to the residence, then he told him to go along with fellow officers Santiago #29295 and Veguilla # 27020 to the wooded area to continue the investigation which approximately at 2:00 PM he went to the location whereat they went into the forest area which then after a half hour walking they located the residence with the same description of special complaint # 2015-30 and the same one he had seen during the previous surveillance, and the agent observed with binoculars that there was a small white-colored truck with tag number H-57278 and a digger in the yard of the residence, along with some rooster and chicken pens, that after an hour and a half at the location the agent did not observe any criminal activity, he decided to withdraw from the location. That upon reaching the Division he verified the white truck's tag which was in the name of Mr. Angel S. Maldonado-Lago and he also verified whether this person had a weapons permit and the system if was indicated he did not have a weapons permit. That on the 27th of May of 2015, the agent went on duty at 8:00 AM at the Drugs Division and after performing official duties during the morning and afternoon hours he went out along with fellow officer Santiago # 29295 to continue the investigation of special complaint # 2015-30, but upon reaching the location they had to go back because it was raining copiously.

ECF No. 24-2. This affidavit contains only an anonymous tip, observations of the outside of a residence, and no observation of criminal activity or corroboration of key details of the tip, such as the presence of drugs or illegally possessed firearms.

To determine whether an anonymous tip is supported by sufficient indicia of reliability to be trusted in making a finding of probable cause, the court must look at the totality of the circumstances. "[I]f a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." Alabama v. White, 496 U.S. 325, 330 (1990). The reliability determination must relate to both the tip's tendency to identify a determinate person and its assertion of illegality. Florida v. J.L., 529 U.S. 266, 272 (2000). Where the tipster is truly unknown to law enforcement, in non-emergency situations such as this, the court looks to whether the tip predicts future activity. White, 496 U.S. at 327 (a tip that the suspected individual would be leaving a specific location, at a specific time, in a specific vehicle, and going to a specific motel was sufficiently predictive information to show that the informant had "inside information"). Corroboration of innocent activity can establish the reliability of a tip. United States v. Tiem Trinh, 665 F.3d 1, 12 (1st Cir. 2011). To be relevant, this innocent activity "must be at least marginally useful in establishing that criminal activity is afoot." United States v. Ramirez-Rivera, 800 F.3d 1, 29 (1st Cir. 2015), cert. denied, 136 S. Ct. 908 (2016), and cert. denied sub nom. Laureano-Salgado v. United States, 136 S. Ct. 917 (2016). Information "that is immediately visible to anyone who passes the house, is not—without more—useful information when it comes to making a probable cause determination." Id. at 28.

Excised of the statements regarding May 29, 2015, the search warrant affidavit contains only corroboration that there is a house that meets the description reported in the anonymous tip.

There is nothing more to shed an incriminating light on the tipster's mere description of the outside of a residence. Nor is there any predictive information regarding future activity. Absent such information or any further corroboration of the anonymous tip, the cleansed affidavit cannot establish probable cause.

The court's first Report and Recommendation (ECF No. 40), based on the challenges raised in the first motion, found that the officers relied in good faith on the search warrant. As established in that Report and Recommendation, officers cannot have a good faith reliance "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth" or where the warrant is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" United States v. Leon, 468 U.S. 897, 923 (1984). Therefore, the Leon good faith doctrine does not apply to this case. It is thus respectfully recommended that defendant's second motion to suppress be granted.

IV. CONCLUSION

As discussed previously, the procedural posture of this case is a bit unusual. The first Report and Recommendation, dated November 24, 2015, was issued based on the challenges raised in the first motion. After determining that the officers acted in good faith reliance on the search warrant, it was respectfully recommended that the first motion (ECF No. 24) be denied. Upon defendants showing (raised for the first time in the second motion) that the affiant intentionally or recklessly disregarded the truth in making a statement, without which the search warrant is not supported by probable cause, a different conclusion follows. The recommendations in both the first Report and Recommendation and herein depend on the actions of the same officers and the same search warrant. Thus, because of the newly acquired evidence

from the second motion and subsequent hearing, the conclusion reached in the first Report and Recommendation can no longer be maintained.

Therefore, it is respectfully recommended that defendant's second motion (ECF No. 44) be GRANTED and the evidence obtained from the search of defendant's residence and, under the fruit of the poisonous tree doctrine, the incriminating statements made subsequent thereto be suppressed. This would render MOOT the previous Report and Recommendation (ECF No. 40) as well as the pending objections (ECF No. 45).

The parties have fourteen (14) days to file any objections to this report and recommendation. Failure to object within the specified time waives the right to appeal this report and recommendation. Fed. R. Civ. P. 72(b)(2); Fed. R. Civ. P. 6(c)(1)(B); D.P.R. Civ. R. 72(d); see also 28 U.S.C. § 636(b)(1); Henley Drilling Co. v. McGee, 36 F.3d 143, 150–51 (1st Cir. 1994); United States v. Valencia, 792 F.2d 4 (1st Cir. 1986).

IT IS SO RECOMMENDED.

In San Juan, Puerto Rico, this 6th day of May, 2016.

s/Marcos E. López
United States Magistrate Judge