IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. CR 11 548971 E**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
JERRALL COLLIER	)	**JOURNAL ENTRY**
	)	
Defendant.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Defendant Jerrall Collier was indicted on April 14, 2011. He is charged with engaging in a pattern of corrupt activity in violation of Ohio Revised Code section 2923.32(A)(2) (count one) and conspiracy in violation of R.C. §2923.01(A)(1) (count two). He was arraigned on May 6 and entered pleas of not guilty.

On May 31 he filed a motion to suppress evidence. The prosecutor opposed that motion by a brief filed on September 29. This entry follows.

STATEMENT OF FACTS

Collier owns property at 7989 Sonny Drive, Walton Hills. On September 16, 2008, a common pleas judge authorized a search warrant for the house there. The search was done the next day and a number of items were seized, including documents and other things that the defendant expects the State of Ohio to use as evidence against him at trial.

The warrant was supported by an affidavit sworn to by Catherine Elliott, a Cleveland Heights police detective. The warrant is of record as an exhibit to both the defendant's motion , so its contents do not need to be reproduced here.

In summary, Elliott averred that she is a member of the inter-jurisdictional mortgage fraud task force and that Collier was brought to her attention by a Walton Hills police officer who, while investigating Collier, a convicted drug trafficker, for possible illegal drug activity, learned that Collier owned "a large amount of properties."

Elliott, through her own investigation, then found that Collier and another person, Dwone Hill, had been involved in at least 20 real estate transactions in Cuyahoga County during the preceding five years, many of them involving some of the same people. Elliott also located bank account records that showed that Collier misstated his assets on a loan application for at least one of the properties and other information suggesting that the transfers were fraudulent.

The defendant now asserts that the evidence seized on the warrant should be suppressed for four reasons. First, he claims that the warrant was invalid from the start because Elliott's affidavit contains material misstatements of facts. Second, he claims that probable cause did not exist to support the search warrant because "the search warrant affidavit wholly fails to detail any specific facts" to show that he kept the kind of records described in the warrant. Third, he argues that "information contained within the search warrant affidavit was stale at the time that the warrant was issued." Finally, he contends that he was selectively prosecuted by being singled out by law enforcement as the subject of this search warrant.

LAW AND ANALYSIS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

[1] Section 14 of Article 1 of the Ohio Constitution contains a nearly identical provision.

In the context of a search warrant, probable cause is defined as a reasonable belief that items that are believed to be contraband or other evidence of a crime are likely to be found on the premises to be searched. *State v. Weatherford*, 6th Dist. No. WD-87-67, 1988 WL128280, (1988). In this case, the judge who reviewed Elliott's affidavit in 2008 made a finding of probable cause and signed the search warrant. This court's duty is, therefore, limited simply to ensuring that the issuing judge had a "substantial basis for concluding that probable cause existed." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). However, this court should not substitute its judgment for that of the issuing judge by conducting a *de novo* determination as to whether the affidavit contains sufficient probable cause upon which this court would issue the search warrant. *State v. George*, 45 Ohio St.3d 325, at syllabus 2 (1989). In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, a court should accord great deference to the issuing judge or magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant. *Id*.

The defendant's first challenge to the issuing judge's probable cause determination is that it was based on a misstatement of fact. In his affidavit, attached as Exhibit B to the motion to suppress, he describes four alleged misstatements. His first complaint is that paragraph 3 of Elliott's affidavit, which describes Walton Hills police officer David Kwiatkowski's investigation of Collier for possible drug offenses, is a misstatement "because it fails to state a specific time period for the alleged involvement with drug activity" and it "fails to state whether is (*sic*) past or present alleged drug activity."

affidavit does not contain factual assertions or conclusions that he was involved in illegal drug activity. Instead, Elliott includes a reference to the Walton Hills investigation only as background to describe how it is that he was brought

to the attention of the mortgage fraud task force. Whether he had something to do with illegal drugs had nothing to do with a determination of whether probable cause existed to believe that evidence of the separate crime of mortgage fraud would be found at his home.

Collier also objects that paragraph 4 of Elliott's affidavit, which says "a large amount of properties were discovered in Collier's name" by the Walton Hills police, is false. Instead, he avers that he did not own a "large amount of properties." Once again, the information in paragraph 4 may or may not be true, but it was only cited to show why the mortgage fraud task force was alerted to Collier. Not only that, but whether he owned a "large" amount of properties or some other amount is entirely subjective. It is worth noting that, in his affidavit, Collier does not provide evidence of how many properties he did own, which, depending on the number, could have shown objectively that he did not own a "large" number of properties.

Collier's third alleged misstatement of fact is that "the allegations in paragraph 5 (of the affidavit) are misstatements . . . because the majority of the 20 property transactions alleged are not material transactions involving the sale of properties for the transfer of funds." Collier's affidavit does nothing to suggest that Elliott's affidavit on this subject contained a misstatement of fact. Indeed, Collier essentially confirms Elliott's averment that "Collier and Hill had participated in over 20 property transactions in Cuyahoga County."

Finally, Collier cites as a misstatement Elliott's assertion, repeated twice, in paragraphs 7a and 7b of the affidavit, that she has "10 years of experience conducting fraud cases." According to Collier, this is a misstatement because Elliott had been a detective for only three years when she signed the affidavit. It is true that in the introductory paragraph in the affidavit, Elliott describes having "over 10 years of experience as a police officer,

Collier concludes, without

evidence, that Elliott could not have had any experience with fraud cases before becoming a detective. An inference unsupported by direct evidence is insufficient to find that Elliott made a material false statement that invalidates the warrant. Not only that, but Collier, in his affidavit, offers no reason to believe that he has personal knowledge of whether Elliott did or did not participate in fraud cases before becoming a detective, rendering his affidavit itself defective.

But most important, there is no reason to believe that Elliott's recitation of her experience was essential to the finding of probable cause. In fact, the paragraph that describes her experience comes well before the statement, at the bottom of page A-5 of her affidavit, that "the facts upon which affiant bases" her belief that evidence of a crime will be found on the premises "are as follows." There is no reason to believe that the issuing judge would not have found probable cause if she had known that Elliott had only three years of experience with fraud cases, especially since it should take far less than three years to recognize that participants in mortgage fraud probably "keep mortgage documents, bank records, utility bills, payroll records and tax documents in their residence or their place of business."

For these reasons, the defendant's objections to the issuance of the search warrant based upon alleged misstatements of fact are overruled.

The defendant next seeks to invalidate the warrant for its alleged failure to "detail any

the warrant. This objection is unfounded. Elliott first asserts that Collier had participated in over 20 property transactions in the five-year period after he was released from prison. She then describes five particular properties for which she was able to locate relevant loan and transfer documents, including the Sonny Drive property. Moreover, as to each of those five

properties, she then details at least two false statements in connection with loan documents. She describes facts suggesting that Dwone Hill, whose own house was also an object of the search warrant, was using a fake address for his business and that the business might not even exist. She also describes in great detail the receipt and distribution of mortgage loan proceeds by Collier for two other properties. This evidence shows that several of the same people were getting distributions from the separate loans for no apparent reason.

All of these facts support the issuing judge's finding of probable cause and Collier's objections otherwise are overruled.

For his third reason to invalidate the warrant, Collier claims that the facts asserted were "stale." In particular, he claims that "the investigation of defendant began in January, 2008. Yet, it was not until 8 months later that the search warrant was applied for. Further, the affidavit itself references property transactions from 2004 and 2005. There was no recent information cited. The issuing judge simply relied upon stale information in granting the search warrant." To resolve this question in Collier's favor would require the court to find that a law enforcement agency may not investigate a crime when evidence does not come to its attention until three or four years after the crime was committed. The court would also have to conclude that, even if law enforcement were allowed to investigate a crime three or four years after its commission, the agency must collect evidence sufficient to support a finding of probable cause and present it to a magistrate for the issuance of a warrant before eight months elapses. This court does not believe that the law requires that conclusion and Collier has offered no authority to the contrary.

therefore overruled.

Finally, the defendant seeks to invalidate the warrant as a product of selective prosecution. In support of this claim, he asserts that: 1) he is an African-American and that Officer Kwiatkowski of the Walton Hills police is white; and 2) he lives in a community with a 2.1% black population in a home valued in excess of $200,000. Curiously, as another factor supporting his contention that he has been selectively prosecuted, he also states:

> Defendant has been involved in drug activity since completion of their (*sic*) federal sentences in 2003.[2]

While the grammatical error suggests that he meant to say he has *not* been involved in drug activity, it is noteworthy that Collier makes this assertion in his brief but does not support it with a similar assertion in his affidavit.

The Cuyahoga County Court of Appeals has said the following on the subject of selective prosecution:

> The decision whether to prosecute a criminal offense is generally within the prosecutor's discretion. *United States v. Armstrong* (1996), 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687. "There is * * * a 'strong presumption of regularity' in prosecutorial discretion." *State v. Norris,* 147 Ohio App.3d 224, 229, 2002 Ohio 1033, 769 N.E.2d 896. In order to establish a case of "selective prosecution," a criminal defendant must make a prima facie showing: "(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *State v. Flynt* (1980), 63 Ohio St.2d 132, 134, 407 N.E.2d 15.
>
> The defendant's burden of establishing discriminatory prosecution is a heavy one. *State v. Freeman* (1985), 20 Ohio St.3d 55, 58, 485 N.E.2d 1043. "The mere failure to prosecute other violators of the statute which appellants were charged with violating does not establish the defense of selective prosecution." *Id.* Selectivity in enforcement does not constitute a constitutional violation unless the discrimination is "intentional or purposeful." *Flynt* at 134, 407 N.E.2d 15, quoting *Snowden v. Hughes* (1944), 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497. Moreover, the mere existence of a potential discriminatory purpose does not, by itself, show

[2] Motion to suppress, page 6.

> that such purpose motivated a particular defendant's prosecution. *Freeman* at 58, 485 N.E.2d 1043.[3]

Collier has offered no facts to show that others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charges against him. There is no evidence at all that information suggesting mortgage fraud by white residents of Walton Hills has come to the attention of law enforcement and been ignored. Additionally, even assuming that Collier has been singled out for prosecution, there is no evidence, other than the mere fact that he is an African-American, that he has been selected for prosecution based upon an impermissible consideration. The most charitable inference to Collier that can be supported by the available evidence is that the Walton Hills police kept an eye on him only because he was a black convicted drug trafficker living in a white community. Even if the court were willing to accept such an inference, it does not come close to a *prima facie* showing of the elements of selective prosecution and the defendant's claim of selective prosecution is overruled.

For all of the foregoing reasons, the defendant's motion to suppress, filed May 31, 2011, is denied.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

[3] *Mayfield Heights v. Barry*, 8th Dist. No. 95771, 2011-Ohio-2665, 2011 WL 2175107, ¶67-68.

SERVICE

A copy of this Journal Entry was sent by e-mail, the 11th day of January, 2012, to the following:

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