

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 15-20252-JTF-tmp
)	
CHRISTOPHER CRAWFORD,)	
)	
Defendant.)	
)	

REPORT AND RECOMMENDATION

Before the court by order of reference is defendant Christopher Crawford's Motion to Suppress, filed on December 21, 2015. (ECF No. 58.) The government responded in opposition to Crawford's motion on January 19, 2016. (ECF No. 61.) On February 8, 2016, the court held a suppression hearing. (ECF No. 69.) The court heard testimony from Detective Mike Fry of the Collierville Police Department. The court also admitted into evidence the search warrant at issue in this case. At the hearing, Crawford raised new issues not addressed in his original motion. The court permitted the parties to file supplemental briefs for consideration in deciding the present motion. As a result, Crawford filed a supplement to his motion

on February 10, 2016, and the government filed a supplemental response in opposition on February 19, 2016. (ECF No. 71 & 72.)

The court has now considered the memoranda of law and supplemental memoranda of law filed in support of and in opposition to the motion to suppress, the testimony of Detective Fry, the search warrant presented at the suppression hearing, and the applicable law. The court hereby submits the following proposed findings of fact and conclusions of law, and recommends that the motion to suppress be denied.

I. PROPOSED FINDINGS OF FACT

On June 23, 2014, Detective Fry, who was assigned as a Task Force Officer to the United States Secret Service Electronic Crimes Task Force in its Memphis field office, applied for a state court search warrant for 9358 Threave Place, Apartment 303, in Memphis, Tennessee. That same day, Tennessee Criminal Court Judge Lee Coffee signed the warrant. According to the affidavit prepared by Detective Fry, on May 21, 2014, an off-duty Federal Express ("FedEx") security officer in New York City observed suspicious behavior that led him to believe FedEx shipments had been stolen or diverted. Specifically, the FedEx officer observed an individual discarding several empty boxes in a dumpster after delivering the contents of the boxes, which appeared to be cell phones, to another individual. The FedEx officer retrieved eight boxes from the dumpster and discovered

that the discarded boxes had been "over-labeled."¹ Further investigation revealed that the over-labeling was accomplished by using a "hijacked" or stolen FedEx customer account. During the investigation sparked by this discovery, investigators learned that thirty-nine labels were illegally created on FedEx's shipping software in the name of "Tyson Foods" and were addressed to 9358 Threave Place, Apartment 303, in Memphis, Tennessee. Based on utility records and driver's license information, investigators determined that this residence was being rented by Christopher Crawford, a former FedEx employee. Investigators also discovered that while employed at FedEx, Crawford worked in the "Northeast and Southeast inputs" where the over-labeling was taking place. Additionally, investigators learned that Crawford activated a cell phone in November of 2013 that was part of a shipment that was stolen through the over-labeling scheme.

On June 23, 2014, a search warrant for Crawford's residence was obtained. That same day, the Shelby County Sheriff's Office SWAT team executed the warrant and conducted a search of Crawford's residence. Among other items, officers seized an Apple desktop computer and an Apple iPad tablet. On August 12,

¹According to Detective Fry's affidavit and his testimony at the hearing, "over-labeling" involves placing a new shipping label over a package's original shipping label in order to divert a shipment from its original intended recipient.

2014, officers performed a forensic examination of these devices and found information allegedly connecting Crawford to the over-labeling scheme. Subsequently, on October 15, 2015, a federal grand jury returned a four-count indictment charging Crawford and various co-defendants with conspiracy, mail fraud, interstate shipping theft, and wire fraud. (ECF No. 1.)

In his original motion to suppress, Crawford argues that the affidavit in support of the search warrant fails to establish probable cause, because the information contained therein does not demonstrate a sufficient nexus to Crawford's residence. Additionally, Crawford alleges that the subsequent search of the iPad seized from his home was unconstitutional because agents did not obtain a search warrant before searching the device. In its response in opposition, the government argues that probable cause for the search warrant is clearly contained within the four corners of the affidavit, which stated that thirty-nine shipping labels containing Crawford's address were created using a stolen FedEx account. The government also argues that an additional search warrant for the iPad was not necessary because the search warrant for Crawford's residence specified that officers were permitted to seize "all computers and cellular phones which could have assisted in the preparation of this theft scheme so that a forensic examination can be performed and evidence preserved." The warrant further stated

that “[t]he forensic exam will retrieve data and other evidence related to the crime of theft.” Lastly, the government argues that even if Crawford’s Fourth Amendment rights were violated, the exclusionary rule should not apply in this case.

The court held a hearing on the motion on February 8, 2016. At that hearing, Detective Fry testified that he received the information contained in his affidavit in support of the search warrant from Special Agent Reginald Johnson. Detective Fry adopted the affidavit in its entirety during his testimony and testified that at least one over-labeled package was shipped to Crawford’s address. He further testified that during the investigation underlying this case, investigators discovered thirty-nine labels created on FedEx’s software that included Crawford’s address. On cross-examination, Detective Fry acknowledged that the thirty-nine labels with Crawford’s address were never actually printed, but were instead discovered by investigators when searching the “raw data” within the software.

In light of Detective Fry’s testimony, Crawford argued that he should be permitted to call Agent Johnson as a witness, based on Detective Fry’s lack of personal, first-hand knowledge of the information contained in the affidavit. Additionally, Crawford argued that the affidavit is misleading, because it suggests that the thirty-nine labels discovered by investigators were actually printed, as opposed to being found in FedEx’s computer

records. He further asserted that Detective Fry's testimony that an over-labeled package was actually shipped to Crawford's address was not factually correct. Crawford suggested that he might be entitled to a hearing under Franks v. Delaware, 438 U.S. 154 (1978), and that in order to make the requisite showing, he would want the opportunity to call Agent Johnson to testify at a second hearing. In response, the government argued that the four corners of the affidavit establish probable cause and provide a sufficient nexus to Crawford's residence. The government further argued that the fact the thirty-nine labels were not printed is immaterial, because they were still created on FedEx's software and addressed to Crawford. Additionally, the government asserted that the affidavit is not misleading, because it does not state that the labels were printed.

At the conclusion of the hearing, the undersigned indicated that Crawford and the government could file supplemental briefing addressing whether the court should hold a second hearing. Crawford filed a supplement to his motion on February 10, 2016. In addition to reiterating his previous arguments, Crawford argues that "absent the misleading statement concerning the existence of 39 shipments addressed to [Crawford's residence]," the affidavit in support of the warrant lacks a sufficient nexus between the suspected crime and the place to be searched. Crawford contends that if he were allowed to present

additional proof, he would elicit testimony from Agent Johnson confirming that "he never told Detective Fry that any over-labeled package was sent to the target address," meaning that Detective Fry "deliberately drafted this warrant to infer that there was a real likelihood that over-labeled packages would be found at this address, in order to obtain the signature of Honorable Lee Coffee." In the alternative, Crawford alleges that "[Agent] Johnson's testimony will show that Fry recklessly disregarded the truth, in order to obtain the judge's endorsement on this warrant." Crawford states that either way, he would then request a Franks hearing after offering Agent Johnson's testimony. Lastly, Crawford argues that if the court finds that the affidavit lacks probable cause, the good-faith exception under United States v. Leon, 468 U.S. 897 (1984), should not apply because the "affidavit contained knowing or reckless falsity," and "the officer's reliance on the warrant was neither in good faith, nor objectively reasonable." In its supplemental response in opposition, the government argues that the affidavit supporting the search warrant contained no false statements. Additionally, the government argues that the warrant establishes probable cause, and that even if probable cause did not exist for the issuance of the warrant, the Leon good-faith exception should apply.

II. PROPOSED CONCLUSIONS OF LAW

A. Franks Hearing

In Franks, the Supreme Court held that a search based on a warrant that contains deliberately or recklessly false allegations is invalid unless the remaining portions of the affidavit provide probable cause. "A Franks hearing is an evidentiary hearing during which defendants are allowed to present evidence concerning the veracity of the challenged statements in the search warrant affidavit." United States v. Kelley, 596 F. Supp. 2d 1132, 1149 (E.D. Tenn. 2009) (citing United States v. Keszthelyi, 308 F.3d 557, 566-68 (6th Cir. 2002)); see also United States v. Brooks, No. 11-cr-20137Ml/P, 2011 WL 7081072, at *3 (W.D. Tenn. Dec. 8, 2011) ("The purpose of a Franks hearing is to allow the defendant to challenge the truthfulness of statements in an affidavit in order to challenge the legality of a search warrant issued on the basis of the affidavit.") (internal quotation marks and citation omitted). As the Sixth Circuit has explained:

To obtain a Franks hearing, the movant must provide a substantial preliminary showing that a false statement was made either knowingly or intentionally, or with reckless disregard for the truth. The movant must also show that the allegedly false statements were necessary for the magistrate's determination of probable cause. Therefore, 'if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.'

United States v. Mastromatteo, 538 F.3d 535, 545 (6th Cir. 2008) (quoting Franks, 438 U.S. at 171-72) (emphasis in original).

At the suppression hearing and in his supplemental motion to suppress, Crawford argued that the affidavit in support of the warrant contains two false or misleading statements. First, Crawford contends that the statement, "[t]hirty-nine (39) over-labels created on FedEx software associated with the hijacked account were addressed to Crawford's home," is misleading because it suggests that the labels were actually printed, rather than found in FedEx's computer records. Second, Crawford alleges that the statement, "over-labeled shipments were addressed to five (5) separate addresses, four (4) of which were located in New York City; the final address is located in Memphis, Tennessee belonging to Christopher Crawford," is false because no over-labeled shipments were ever actually sent to Crawford's address. Crawford states that if he is allowed to elicit testimony from Agent Johnson, "Agent Johnson will confirm that he never told Detective Fry that any over-labeled package was sent to the target address." Crawford argues that both of these statements improperly suggest that labels or over-labeled packages would be found at his apartment during the search.

First, the court finds that Crawford has not made a substantial preliminary showing that the affidavit contained a false statement, much less one that was made knowingly or

intentionally, or with reckless disregard for the truth.² The court does not agree with Crawford that the statement, "[t]hirty-nine (39) over-labels created on FedEx software associated with the hijacked account were addressed to Crawford's home," is misleading. This statement does not suggest that the labels were ever printed, nor does it suggest that printed labels or shipments with these labels were delivered to Crawford's home or would be found there. The affidavit merely states that these over-labels were *created*, which could certainly include being generated within FedEx's software.

With regard to the statement, "shipments were addressed to five (5) separate addresses, four (4) of which were located in New York City; the final address is located in Memphis,

²Crawford acknowledges that he has not made a sufficient showing to obtain a Franks hearing. (ECF No. 110.) However, Crawford requests an additional evidentiary hearing so that he can present evidence demonstrating that the affidavit contains a false statement. The court originally scheduled an additional evidentiary hearing, but upon further review of the applicable case law under Franks, has decided that it would not be appropriate to hold another hearing. To allow Crawford to present additional evidence at another hearing would, in essence, be granting Crawford a Franks hearing. See United States v. Hudson, 325 F. App'x 423, 426 (6th Cir. 2009) (noting that district court "*de facto* held a Franks hearing" by allowing defendant to present evidence *in camera* to support his motion for a Franks hearing). Additionally, a second hearing is unnecessary for the disposition of the motion because, as will be explained in the remainder of this Report and Recommendation, Crawford has not met his burden as to the second prong of the Franks test.

Tennessee belonging to Christopher Crawford," the court acknowledges that the phrase "shipments were addressed" to Crawford could imply that a shipment was actually sent to him. However, even assuming that Detective Fry represented in his affidavit that an over-labeled shipment was actually sent to Crawford, Detective Fry testified at the suppression hearing that Crawford in fact had received such a shipment. Crawford has produced no evidence to make a substantial showing that Detective Fry's affidavit in this regard is false. "Such bare assertion of falsehood is insufficient to constitute a showing, let alone a substantial preliminary showing, either that the statement actually was false or that it was made intentionally or with a reckless disregard for the truth." United States v. Reynolds, 534 F. App'x 347, 358 (6th Cir. 2013); see also United States v. Bucio-Cabrales, No. 14-3991, 2016 WL 1018360, at *5 (6th Cir. Mar. 14, 2016) ("Where the defendant does no more than allege that an affiant made false statements, the defendant is not entitled to a hearing.").

Second, even assuming, *arguendo*, that Crawford could make a substantial showing that Detective Fry intentionally or recklessly included a false statement in his affidavit, the court finds that the remaining portions of the affidavit sufficiently establish probable cause. See Keszthelyi, 308 F.3d at 567. The Fourth Amendment provides that "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." U.S. Const. amend. IV. To determine if probable cause exists, the task of the issuing judicial officer is "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." Illinois v. Gates, 462 U.S. 213, 238 (1983); see also United States v. Franklin, 622 F. App'x 501, 509 (6th Cir. 2015). "The standard of review for the sufficiency of an affidavit 'is whether the magistrate had a substantial basis for finding that the affidavit established probable cause to believe that the evidence would be found at the place cited.'" United States v. Greene, 250 F.3d 471, 478 (6th Cir. 2001) (quoting United States v. Davidson, 936 F.2d 856, 859 (6th Cir. 1991)); see also United States v. Ugochukwu, 538 F. App'x 674, 678 (6th Cir. 2013). Search warrant affidavits must be judged based on the totality of the circumstances, rather than line-by-line scrutiny. United States v. Baechtle, No. 2:13-cr-20054-SHM, 2015 WL 893348, at *7 (W.D. Tenn. Mar. 2, 2015) (citing United States v. Johnson, 351 F.3d 254, 258 (6th Cir. 2003)). Review of the sufficiency of the evidence supporting probable cause is limited to the information presented in the four corners of the affidavit.

United States v. Brooks, 594 F.3d 488, 492 (6th Cir. 2010). In the investigation underlying this case, investigators learned that Crawford activated a cell phone that was stolen by way of the over-labeling scheme. Additionally, investigators discovered that Crawford used to work for FedEx, in the same department where the over-labeling of packages had occurred. Furthermore, investigators located thirty-nine labels addressed to Crawford's residence on FedEx's software. Investigators were able to confirm Crawford's address through utility records and driver's license information. Therefore, even without considering the "false" statements, the court finds that the remaining portions of the affidavit adequately establish probable cause.

B. Nexus to Residence

Crawford argues that the affidavit supporting the search warrant fails to establish probable cause because it does not demonstrate a sufficient nexus to Crawford's residence. "[T]o establish probable cause to support a search warrant, there must be some nexus between the suspected illegal activity and the property to be searched." United States v. Kinison, 710 F.3d 678, 683 (6th Cir. 2013) (citing United States v. McPhearson, 469 F.3d 518, 524 (6th Cir. 2006)). As explained above, the affidavit states that thirty-nine labels created on FedEx software were addressed to Crawford's apartment, as confirmed

through utility records and driver's license information. Additionally, investigators learned that Crawford activated a cell phone that was stolen by way of the over-labeling scheme and worked in the area where the over-labeling scheme had occurred. These statements provide a sufficient nexus between the suspected illegal activity in this case and Crawford's residence.

C. Search of iPad

Lastly, Crawford argues that the search of the iPad seized from his apartment was unconstitutional, because agents did not obtain a search warrant for the device. Crawford's argument is unpersuasive. In United States v. Evers, 669 F.3d 645 (6th Cir. 2012), the defendant similarly argued that although the search warrant for his home authorized the seizure of his computer, it did not authorize a search of the computer, and "the police therefore unlawfully exceeded the scope of the warrant when they searched the contents of the computer without obtaining a second warrant." Id. at 652. The Sixth Circuit disagreed, reasoning as follows:

The federal courts are in agreement that a warrant authorizing the seizure of a defendant's home computer equipment and digital media for a subsequent off-site electronic search is not unreasonable or overbroad, as long as the probable-cause showing in the warrant application and affidavit demonstrate a "sufficient chance of finding some needles in the computer haystack." . . . Moreover, a second warrant to search a properly seized computer is not necessary "where the

evidence obtained in the search did not exceed the probable cause articulated in the original warrant." . . . This is in keeping with the general principle that "even evidence not described in a search warrant may be seized if it is reasonably related to the offense which formed the basis for the search warrant."

Id. (internal citations omitted). Here, the search warrant for Crawford's residence specified that officers were permitted to seize "all computers and cellular phones which could have assisted in the preparation of this theft scheme so that a forensic examination can be performed and evidence preserved." The warrant further stated that "[t]he forensic exam will retrieve data and other evidence related to the crime of theft." The affidavit in support of the warrant explained that labels were being illegally created on a computer through the use of FedEx software and stolen customer accounts. The court finds that the affidavit demonstrated a "sufficient chance" of finding evidence of theft on Crawford's iPad. Furthermore, the court finds that the seizure and subsequent search of Crawford's iPad did not exceed the probable cause articulated in the search warrant for Crawford's home. Therefore, it is recommended that Crawford's motion be denied.³

³In support of his argument that the search of his iPad was unconstitutional, Crawford relies on Riley v. California, 134 S. Ct. 2473 (2014), which held that the warrantless search of a cell phone seized from an arrestee is unconstitutional. Here, Crawford's iPad was not seized during a search incident to arrest, but rather pursuant to a valid search warrant specifically permitting officers to seize electronic devices for

III. RECOMMENDATION

For the above reasons, the court recommends that Crawford's motion to suppress be denied.

Respectfully submitted,

s/ Tu M. Pham _____
TU M. PHAM
United States Magistrate Judge

May 16, 2016 _____
Date

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.

forensic examination. Therefore, Crawford's reliance on Riley is misplaced.