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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 02-20356 BV
	)	
WILLIAM HOLLAND,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
ON DEFENDANT'S MOTION TO SUPPRESS

The defendant in this case, William Holland, has been charged in a multiple-count indictment with two counts of possession with intent to distribute Oxycodone and two counts of possession with intent to distribute Xanex, both in violation of 21 U.S.C. § 841; three counts of conspiracy to distribute drugs in violation of 21 U.S.C. § 846; and violations of 18 U.S.C. § 1512(b)(2)(B) for attempting to move and dispose of the deceased body of Amanda Concklin.

Presently before the court is Holland's motion to suppress all evidence seized by law enforcement officials during a July 24, 2001 warrantless search of Holland's garage and a warrant search of Holland's residence conducted later that same evening. Both the home and garage are located at 260 South Fenwick in Memphis, Tennessee. Holland claims both searches were conducted in

violation of his rights under the Fourth Amendment. The motion was referred to the United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. 636(b)(1)(B)-(C).

An evidentiary hearing was held on Monday, June 23, 2003. At the hearing, the government presented four witnesses from the Memphis Police Department: Lieutenant Denny Smith and Officers Robert Vaughn, Alex McCollum, and Andrew Rouse. The defendant did not adduce any testimony. Twelve exhibits were also introduced, including a copy of a search warrant signed on June 23, 2001 (Ex. 1); photographs of the house, the garage, and a jeep inside the garage at 260 South Fenwick, (Exs. 2-4); photographs of the jeep interior including a camouflage sleeping bag, clothing, and human remains later identified as the body of Amanda Concklin, (Exs. 5-8); and photographs of the interiors of the home and garage at 260 South Fenwick, (Exs. 9-12). At the court's request, the parties also submitted supplemental briefs on the issues of whether exigent circumstances justified the officers' warrantless entry to Holland's garage and whether the warrant authorizing a search of the entire premises was invalid as a result of stale information.

After careful consideration of the statements of counsel, the testimony of the witnesses, the exhibits, and the entire record in this cause, this court submits the following findings of fact and conclusions of law and recommends that the motion to suppress be

denied.

PROPOSED FINDINGS OF FACT

The testimony of the four law enforcement officers is identical in all major details. This court finds the officers credible and adopts as fact their version of the events.

On or about June 8, 2001, Amanda Concklin was reported missing by her grandmother. The case initially was assigned to an Officer Wainscott in the Memphis Police Department's missing persons bureau, and on July 18, 2001 it was assigned to Officer Robert Vaughn in the homicide bureau. Officer Vaughn initiated an investigation, contacting Concklin's parents and meeting with two private investigators, John Billings and Judy Huckelberry, who brought to Vaughn two bags of trash they had retrieved from outside Holland's home at 260 South Fenwick. The private investigators expressed suspicion that Concklin was deceased and that her remains would be found at Holland's home. The investigators also gave to Officer Vaughn the name of Jason Keel, whom Officer Vaughn promptly contacted.

Keel indicated to Officer Vaughn that he had last seen Amanda Concklin on Sunday, June 3, when Keel, Concklin, and Michael Shelton were involved with a weekend party at the La Quinta Inn in Memphis. Keel indicated that Shelton left La Quinta with Concklin, heading for Holland's home at 260 South Fenwick. Shelton returned

to the La Quinta without Concklin. Shelton reported to Keel that he last saw Concklin asleep on the couch at 260 South Fenwick on early Sunday morning. It is unclear whether Keel was to pick up Concklin or whether Concklin would call to be picked up. When Concklin did not call or return to La Quinta Inn at the appointed time, Keel drove to 260 South Fenwick. There he talked to Holland, and he saw the body of Amanda Concklin on the carpeted floor inside a small office attached to Holland's garage. Keel reported that Holland said, "She's dead," and "stomped" on Concklin's remains so that Keel heard a gurgling sound. Keel memorialized this information in a written statement that he gave to Officer Vaughn. Officer Vaughn then contacted Michael Shelton by telephone on or about July 20, 2001. Shelton's statement was consistent with Keel's. Shelton confirmed last seeing Concklin on Sunday, June 3, 2001, asleep on the couch at Holland's house.

Officer Vaughn did not work on either of the following two days, which were Saturday and Sunday. On Monday, July 23, 2001, at 10:40 a.m., Officer Vaughn obtained a search warrant for Holland's residence at 260 South Fenwick. Officer Vaughn, who had applied for twenty to thirty warrants in his twenty years of law enforcement experience, represented when applying for the warrant that the "gurgling" sound reported by Keel would be consistent with the presence of bodily fluids that could have been released onto

the floor or carpet at 260 South Fenwick. Officer Vaughn testified to his belief that such evidence was "highly likely" to remain present at the place to be searched, based on his own experience and on a consultation with a fellow officer, Lieutenant Scott. The warrant was duly issued. The warrant authorized law enforcement officers to search 260 South Fenwick for Concklin's body; for forensic evidence including hair, blood, saliva, urine or bodily fluids; for evidence related to the means or instruments of Concklin's death; and for any personal property belonging to Concklin.

Officer Vaughn testified that search warrants, by policy and practice, usually were executed within five days of their issue date. This particular warrant also was executed within this time, although intervening circumstances caused a slight delay. On July 23, 2001, the day the warrant issued, Officer Vaughn was called to respond to a bank robbery and murder, which essentially occupied the entire police department for the remainder of the day. The following day, July 24, 2001, Officer Vaughn drove by 260 South Fenwick to inspect the home in preparation for executing the warrant, but again was called back to the station to attend to matters related to the bank robbery and murder. That evening, with the warrant still in his possession, Vaughn was at the police station interviewing a bank robbery suspect when he was called out

of the interview room and informed that uniformed patrol officers had discovered a body at 260 South Fenwick.

Officers Rouse and McCollum, as well as Field Lieutenant Denny Smith, all testified to the events that led to the discovery of Concklin's body by the uniformed patrol. Officers Rouse and McCollum, in separate cars, were on routine patrol when they heard over the dispatch radio that a CrimeStoppers tipster had reported that a female body, wrapped in a camouflage sleeping bag was in the back of a jeep parked inside a garage at 260 South Fenwick. Officers Rouse and McCollum responded to the call. They did not know of Officer Vaughn's ongoing investigation, nor that Officer Vaughn already had sought and obtained a search warrant for 260 South Fenwick.

Upon arriving at 260 South Fenwick at about 6:15 p.m., both officers pulled into the residence driveway and exited their patrol cars. Both immediately noticed a smell on the property they characterized as a "strong, terrible odor," or a "foul stench." Both officers, from their experience, identified the smell as consistent with decomposing human remains. It was strong enough to be detected up to thirty feet away, and the officers testified that closer to the garage it was "strong enough to gag you." Officer McCollum put Vick salve in his nose to block the smell.

Officer McCollum walked to the front of the garage and looked

in a window that faced the street. Inside the garage, he saw a dark jeep. He then walked to the rear of the house, checking the doors and windows and knocking at both the back and front doors to determine whether the house was occupied. Through the rear patio door, which was glass, Officer McCollum saw the house in disarray, with empty food and drink containers and other trash on the furniture and floor. Officer Rouse checked neighboring houses to see if he could gather any information about the residents of 260 South Fenwick but learned only that there were "a lot of parties," many people coming and going from the home, and that neighbors thought a white male lived there but were not completely sure.

Shortly thereafter, Field Lieutenant Denny Smith arrived. He determined that the officers' observations so far had corroborated the CrimeStoppers tip and decided that entry to the garage was justified. As a specific basis for his decision, he and the other officers testified that they were concerned that another victim in the garage could be hurt and in need of assistance. The small garage window was forced open and Officer Smith, the only officer on the scene who could fit through the garage window, crawled through the window and opened the garage door. The officers entered the garage, and Officer McCollum opened the jeep's rear hatchback. The other officers looked into the jeep and noted a camouflage sleeping bag on the floorboards. Lieutenant Denny Smith

pulled back a corner of the sleeping bag just enough to verify that human remains were underneath.

At this point, the officers left the garage. Lieutenant Denny Smith called the Memphis Police Department felony bureau and was told to "hold what you've got" and conduct no further search. The officers on the scene surrounded the house and conducted no further search of the jeep, the garage, or the house interior.

Officer Vaughn then arrived at 260 South Fenwick with the previously-issued search warrant. He was accompanied by Officers Hoing and Coyne. Officer Vaughn confirmed that no one had searched any part of the residence other than the jeep and the garage. Officer Vaughn then executed the search warrant for the entire residence at 260 South Fenwick. Upon entry, the officers found the house in the same disarray that they had observed through the glass patio doors. They discovered and seized assorted evidence including the Jeep Cherokee, the remains later identified as body of Amanda Concklin, a shotgun with shells, assorted needles and syringes, FedEx shipping waybills (which were, in the officers' experience, commonly associated with drug shipments), and documents indicating ownership of the residence and the names of people who received mail at the residence. Neither Holland nor any person associated with the residence returned to the house during the search.

PROPOSED CONCLUSIONS OF LAW

Holland's motion to suppress raises three issues: 1) whether the officers' warrantless search of the garage was justified by probable cause coupled with exigency; 2) whether the warrant search was invalid because the warrant was based on stale information or because the officers' search exceeded the warrant's scope; and 3) if either search was invalid, whether the evidence inevitably would have been discovered pursuant to a lawful search.

A. Validity of the Warrantless Search

The Fourth Amendment prohibits warrantless searches, unless an exception to the warrant requirement applies. U.S. CONST. amend. IV; *United States v. Roarke*, 36 F.3d 14, 17 (6th Cir. 1994)(quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). "A police officer's warrantless entry into a home is presumptively unconstitutional under the Fourth Amendment." *Ewolski v. City of Brunswick*, 287 F.3d 492, 501 (6th Cir. 2002)(citing *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 996 (6th Cir. 1992)). A defendant bears the burden of making a prima facie showing of illegal entry, after which the burden shifts to the government to prove that the entry was justified. *United States v. Murrie*, 534 F.2d 695, 697-98 (6th Cir. 1976) (citing *United States v. Thompson*, 409 F.2d 113 (6th Cir. 1969) and discussing burdens of proof in the context of knock-and-announce entries).

In the present case, no one let the officers into the garage, which is attached to the residence at 260 South Fenwick. Indeed, the officers testified that they entered the garage because no one was present to let them in. Accordingly, the burden shifts to the government to show the reasonableness of the search of the garage.

A warrantless search may be reasonable under the Fourth Amendment when probable cause to search is coupled with exigent circumstances justifying immediate entry and search of the home. *See, e.g., United States v. Ukomadu*, 236 F.3d 333, 337 (6th Cir. 2001). Probable cause to search exists when the facts and circumstances indicate "a fair probability that evidence of a crime will be located on the premises of the proposed search." *United States v. Bowling*, 900 F.2d 926, 930 (6th Cir. 1990)(quoting *United States v. Algie*, 721 F.2d 1039, 1041 (6th Cir. 1983)).

In this case, the uniformed patrol officers testified that they received word of a CrimeStoppers tip that human remains could be found in a jeep, in a garage, at a specific address. An anonymous tip may contribute to the existence of probable cause. *Alabama v. White*, 496 U.S. 325, 328-330 (1990) (discussing *Illinois v. Gates*, 462 U.S. 213 (1983) in the context of reasonable suspicion); *United States v. Elkins*, 300 F.3d 638, 659 (6th Cir. 2002). Upon arrival at the given address, officers found the garage and jeep as described and smelled a "strong and terrible"

odor that the officers, in their experience, immediately associated with decomposition of human remains. A recognizable odor known to law enforcement officers associated with contraband or evidence of a crime contributes to the existence of probable cause. *Elkins*, 300 F.3d at 659. A detailed tip corroborated by a readily identifiable odor is particularly persuasive. *Id.* (finding that an anonymous tip that homeowners were growing marijuana, coupled with three officers' smelling and recognizing marijuana odor inside the home, constituted probable cause for a warrant to issue). It is submitted that the uniformed patrol had probable cause to search the garage at 260 South Fenwick.

In addition to probable cause, however, reasonableness requires exigent circumstances that excuse the officers' failure to obtain a warrant. Fear for the safety of officers or third parties may constitute such an exigency.[1] *United States v. Johnson*, 22 F.3d 674, 679-80 (6th Cir. 1994) (citing *Minnesota v. Olson*, 495

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[1] **Exigent circumstances traditionally exist in one of four situations: (1) when evidence is in immediate danger of destruction, *Schmerber v. California*, 384 U.S. 757, 770-71 (1966); (2) when the safety of law enforcement officers or the general public is immediately threatened, *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); (3) when the police are in hot pursuit of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976); or (4) when the suspect may flee before an officer can obtain a warrant, *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). *See also United States v. Saari*, 272 F.3d 804, 811-12 (6th Cir. 2001) (summarizing exigent circumstances).**

U.S. 91 (1990)). In *Johnson*, for example, the Sixth Circuit found a warrantless entry through a locked gate, with officers cutting through a padlock, "justified by the need to free a victim who has been held against her will and sexually assaulted." *Id.*

The officers in Holland's case testified to concern that there might be other victims in the garage at 260 South Fenwick. The CrimeStoppers tip, however, made no mention of other victims. The officers did not testify to any sounds or other indicia of living people inside the garage. It is also unclear why the officers if they were concerned about the presence of other victims would search the garage and the jeep without searching the entire residence.

For the foregoing reasons, it is submitted that probable cause to search existed, but that a lack of exigency made the officers' warrantless entry into the garage unreasonable.

B. <u>Staleness of Probable Cause and Scope of the Warrant Search</u>

The parties do not dispute that Officer Vaughn obtained, on July 23, 2001, a warrant for the search of 260 South Fenwick. Holland claims, however, that the warrant was not based on probable cause because it was based on stale information, and that in any event the officers' search exceeded the scope of the warrant. When officers have obtained a warrant, the burden of proving an illegal search rests on the defendant, who must make his proof by the

preponderance of the evidence. *United States v. Moore*, 742 F. Supp. 727, 733 (N.D.N.Y. 1990) (citing 4 LaFave, Search and Seizure § 11.2(b)(1987)); *United States v. Koerth*, 312 F.3d 862, 868 (7th Cir. 2002). *See also United States v. Richardson*, 943 F.2d 547, 548-49 (5th Cir. 1991)(noting that a defendant challenging a warrant bears the burden of persuasion "at all times"); *Nix v. Williams*, 467 U.S. 431, 444, n. 5 (1984)(noting that the quantum of proof at a suppression hearing is a preponderance of the evidence).

As to the staleness issue, Holland relies on *United States v. Czuprynski*, 46 F.3d 560, 563-64 (6th Cir. 1995), to argue that the last information linking 's body to the Holland home was forty-four days old and that such information therefore was too stale to support probable cause for a warrant to issue, because evidence of any crime against Concklin's person would have long since been removed. (Def.'s Mem. in Supp. of Mot. to Suppress Evid. at 3-4.)

Under the totality of the circumstances, however, this argument is insufficient to meet Holland's burden of proving the warrant issued without probable cause to believe that items properly subject to search could be found at 260 South Fenwick. A staleness test is not designed to "create an arbitrary time limitation within which discovered facts must be presented to a magistrate." *United States v. Spikes*, 158 F.3d 913, 923 (6th Cir. 1998). Rather, when the challenger asserts that probable cause

that once existed had grown stale before the warrant was issued, a court must look to facts and circumstances of each case. *Id.*

In this case, Officer Vaughn, an officer with twenty years' law enforcement experience, believed that forensic evidence related to Concklin's presence was "highly likely" to be present at the house, even after that period of time and even if Concklin's body had been moved. Officer Vaughn also consulted a fellow officer, Lieutenant Scott, who came to the same conclusion. Holland advanced no argument and presented no proof that all this evidence would have been erased from the premises, even if Concklin's remains were moved. Second, the two witnesses named in the affidavit - Jason Keel and Michael Shelton - were not anonymous tipsters.[2] They were identified to the police; each identified the other as persons who had seen Concklin just before her

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[2] **At the hearing and again in his supplemental brief, Holland also questioned whether Officer Vaughn should have relied on the statements of Jason Keel and Michael Shelton when applying for the warrant. However, as discussed at the hearing, this line of argument had not been fully briefed and properly was the subject of a separate *Franks* hearing, which had not been requested. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978). The court notes, however, that even if the *Franks* issue properly was before the court, Holland must show by a preponderance of the evidence deliberate falsehood or reckless disregard for the truth on the part of the affiant. *See United States v. Charles*, 138 F.3d 257, 263-64 (6th Cir. 1998); *United States v. Zimmer*, 14 F.3d 286, 288 (6th Cir. 1994) (citing *Franks,* 438 U.S. at 156). Because Holland made no allegations of actual falsity in his motion or brief, the probable cause analysis is limited to issues surrounding staleness of the evidence.**

disappearance; and their two statements substantially corroborated each other. Both were willing to be named as witnesses, and accordingly either of them could have been subject to sanctions for providing false information. *See United States v. Pelham*, 801 F.2d 875 (6th Cir. 1986)(finding a 'substantial basis' for search when a witness saw evidence at a given location within the previous twenty-four hours and was named in the affidavit); *United States v. Spikes*, 158 F.3d 913, 923 (6th Cir. 1998) (discussing variables that may contribute to the relative staleness of probable cause and concluding that "even if a significant period [of time] has elapsed . . . depending on the nature of the crime, a magistrate may still properly infer that evidence of wrongdoing is still to be found on the premises"). Accordingly, it is submitted that the staleness argument is without merit.

Even if the search warrant lacked probable cause to issue, the evidence still would be admissible under the good faith exception set forth in *United States vs. Leon*, 468 U.S. 897, 926 (1986). When an officer, acting with objective good faith, has obtained a search warrant from a detached and neutral magistrate and has acted within its scope, the results of the search are not excludable even if the affidavit is later found to be insufficient to establish probable cause. *Leon*, 468 U.S. at 926. This "good faith exception" attaches as long as an executing officer could have

harbored an objectively reasonable belief in the existence of probable cause. *See, e.g., United States v. Helton*, 314 F.3d 812, 823-24 (6th Cir. 2003) (discussing *Leon*, 468 U.S. at 923).[3] The inquiry is whether a there were "reasonable grounds for believing that the warrant was properly issued," *id.* (quoting *Leon*, 468 U.S. at 923). For the same reasons submitted above in support of the recommendation that probable cause existed for the warrant to issue, it is submitted that a reasonably well-trained officer could have believed that the items named in the warrant could be found in the place to be searched, and therefore that the officers acting upon the warrant in this case acted in good faith. Moreover, private investigators previously had indicated to Vaughn their belief that Concklin was deceased and was last seen at the Holland residence. Although Vaughn testified he did not rely on this particular information when preparing the warrant application, this does support the reasonableness of Vaughn's decision to execute the warrant with a good faith belief in its underlying legality.

The final question is whether the actual search exceeded the

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[3] **Holland's motion implicates none of the other three exceptions to the "good faith" rule: 1) that the warrant underlying the affidavit contained false information; 2) that the issuing magistrate lacked neutrality or detachment; or 3) that the warrant was facially deficient. *See Helton*, 314 F.3d at 823-24 (discussing *Leon*, 468 U.S. at 923); *United States v. Czuprynski*, 46 F.3d 560, 563-64 (6th Cir. 1995).**

scope of the warrant. Holland cites to *United States v. Beal*, 810 F.2d 574 (6th Cir. 1986) and *United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984), both of which discuss the scope of a search in association with the plain view doctrine, arguing that "the search by officers of the [d]efendant's entire house clearly exceeded" the warrant's authority. (Mot. to Suppress Evid. and Statements and Mem. in Support of Mot. at 5.) It is not clear, however, how the cited cases apply. The warrant authorized a search of the entire property at 260 South Fenwick. The items authorized for seizure reasonably could have been found anywhere on the property. Accordingly, it is submitted that the search of the entire house was within the scope of the warrant.

C. Inevitable Discovery

Although the warrantless entry into the garage was improper, it is submitted that the evidence seized from the garage at 260 South Fenwick should not be suppressed because it inevitably would have been discovered. "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . the deterrence rationale has so little basis that the evidence should be received." *Nix*, 467 U.S. at 444. In the Sixth Circuit, this "inevitable discovery" doctrine applies when the government demonstrates "*either* the existence of an independent, untainted

investigation that inevitably would have uncovered the same evidence *or* other compelling facts establishing that the disputed evidence inevitably would have been discovered." *United States v. Leake*, 95 F.3d 409, 412 (6th Cir. 1996) (quoting *United States v. Kennedy*, 61 F.3d 494, 499 (6th Cir. 1995) (emphasis in original)).

Both tests are met in this case. First, Officer Vaughn had launched an independent and untainted investigation and obtained a properly issued search warrant for 260 South Fenwick at the time the warrantless search occurred. Officer Vaughn testified that he intended to execute the warrant. He drove by the house to ascertain the best methods of entry. But for the bank robbery that preoccupied the police department's operations, there is every reason to believe officers would have executed the warrant and discovered Concklin's remains, as well as the other seized evidence, within five days in accordance with department policy and custom. *See United States v. Kennedy*, 61 F.3d 494, 500 (6th Cir. 1995) (finding that the existence of a routine procedure – in that case, an airline's routine policy of searching misdirected luggage - satisfied the requisite showing of "compelling facts").

For the foregoing reasons, it is submitted that an existing untainted investigation inevitably would have uncovered the same evidence, that compelling facts establish the inevitable discovery of the evidence, and accordingly that the uniformed patrol's

warrantless entry into the garage does not require the exclusion of the evidence discovered in the garage.

RECOMMENDATION

It is submitted that the uniformed patrol's warrantless entry on July 24, 2001 to Holland's garage at 260 South Fenwick was illegal in the absence of exigent circumstances. However, it is also submitted that the evidence at issue inevitably would have been discovered in a short time as the result of an independent and untainted investigation. The government has not benefitted from the improper search. Testimony adduced at the hearing indicates that the search of the house was conducted pursuant to a valid warrant and was within the scope of that warrant. Accordingly, it is recommended that the defendant's motion to suppress should be denied.

Respectfully submitted this 23rd day of July, 2003.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE