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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF AN APPLICATION FOR THE ISSUANCE OF A WARRANT TO SEARCH [AN APARTMENT TERMED BY THE LAW ENFORCEMENT AFFIANT AS "THE TARGET LOCATION"]	No. 19-sw-127 DAR

MEMORANDUM OPINION AND ORDER[1]

On April 7, 2019, officers of the Metropolitan Police Department arrested an individual on a warrant issued by a judge of this Court for the offense of possession of a firearm by an individual previously convicted of a felony offense in violation of 18 U.S.C. § 922(g)(1). That warrant was issued based upon a finding of probable cause by a grand jury that the individual, on March 17, 2019, possessed a firearm recovered from a vehicle which was registered to him and parked on a District of Columbia street. In a search of the vehicle which the individual occupied at the time of his arrest on April 7, officers recovered another firearm. Both the vehicle from which a firearm was recovered on March 17, and the vehicle from which a firearm was recovered on April 7, bore Virginia tags. The affiant states that the individual is "the registered owner" of the vehicle from which a firearm was recovered on March 17.

On April 8, 2019, the date on which the individual appeared before the undersigned for arraignment on the indictment by which he is charged with possession of the firearm recovered on March 17, the United States Attorney filed an application for a warrant to search an apartment in the District of

[1] The application and accompanying affidavit were filed under seal in accordance with this Court's filing protocols, and remain under seal. The undersigned, for ease of future reference, has intentionally omitted from the instant Memorandum Opinion and Order all identifying information -- including names, addresses, vehicle tag numbers and firearms serial numbers – included in the documents which remain sealed.

Columbia which, according to the law enforcement affiant, is the location at which the individual resides. The basis of the affiant's representation that the apartment – to which the affiant refers as "the Target Location" – is in fact the individual's residence is "a check of [the individual] through [an] MPD [database] which showed that [the individual] resides [at that address][,]" and "has a historical criminal record with the same listed address."[2]

The affiant states that he relies upon his "instruction and participation in investigations," as well as his "knowledge, training, and experience[,]" in support of the government's application. On that basis, he asserts, among other things, that

> I have become familiar with persons who keep or carry guns illegally commonly retain [sic] items associated with their firearms long after they bought or got the guns, including the original manufacture's packaging, gun-cleaning equipment, and additional parts such as ammunition, gun sights, slings, extra magazines, gun cleaning equipment; and, that these items are not carried on the person, but almost always stored in the gun-possessor's home; to be used periodically to keep a gun "in shape" or good working order; which is evidence of illegal gun possession[;] . . . they keep such additional ammunition in their homes . . . [because the] smallest packaged amount [of] ammunition that commonly can be bought from a gun shop is a 20-round box . . . thus requiring most persons who have guns with[in] the District of Columbia, to then keep or store the extra ammunition beyond what is being personally carried[;] [t]hat, it is quite common for a person who possesses a firearm to own or possess additional firearms, and, that it is common for a person who is found carrying a firearm on his person to have stored at home one or more additional firearms, along with additional ammunition, and papers related to the acquisition of that firearm[;] . . . many persons who illegally possess guns often have pictures taken of themselves individually or of themselves with friends in which they display their gun or guns, and that these pictures themselves are excellent

[2] The affiant omits any reference to how recent – or remote – the database and criminal record entries are. The affiant does not indicate that he, or another officer of the Metropolitan Police Department, made any effort to verify that entries on which he relies reflect the individual's *current* address; nor does the affiant explain the obvious discrepancy between the affiant's proffer – for purposes of probable cause with respect to the indicted offense – that the individual is "the registered owner" of a vehicle registered in Virginia (presumably, because that individual presented indicia of residence in Virginia to the Virginia Department of Motor Vehicles), and the proffer that MPD "database" and criminal record entries show that the individual resides in the District of Columbia at "the Target Address." The undersigned observes that the Pretrial Services Agency, in a report filed by the Agency on April 8, provides a District of Columbia address *different* from "the Target Address" as the individual's current address.

> evidence of illegal gun possession, commonly these photos are kept at the gun possessor's home, on digital devices such as cell phones, on in their room at their homes, along with gun paraphernalia[,] . . . and [t]hat, even after an individual's arrest for gun-related charges, the person's family and associates commonly do not dispose of other firearms or ammunition.

Affidavit at 2-3.

The affiant includes on his list of "Property to be Seized":

> [w]eapons[;] . . . bulletproof vests, and firearms-related paraphernalia[;] . . . [d]ocuments related to or memorializing the ordering, purchasing, storage, transportation and sale of revolvers, semi-automatic pistols, rifles and ammunition, [and] receipts and documentation for the purchased [sic] of same[;] . . . [b]ooks, records, receipts, notes and other papers relating to the transportation, ordering, purchase . . . and transfer of firearms and ammunition[;] . . . [a]ddress and/or telephone books and papers reflecting names, addresses and/or telephone numbers, which constitute evidence, and potential witnesses of violations of the TARGET OFFENSE[;] . . . United States currency, precious metals, jewelry and financial instruments, stocks and bonds, which constitute proceeds of the TARGET OFFENSE[;] [p]hotographs, in particular photographs of coconspirators, assets, firearms, and controlled substances, which constitute evidence of the TARGET OFFENSE[;] [c]ellular telephones, cameras, computers, laptops, iPads, DVDs hard drives, and electronic store devices, and receipts reflecting their ownership and use, which contain records of the commission of the TARGET OFFENSE[.]

Affidavit, Attachment B.

The affiant's proffer of facts with respect to probable cause to search "the Target Location" is limited to a scant three references: (1) the so-called "database" and criminal record entries;[3] (2) the individual does not have a license to carry a firearm in the District of Columbia, and (3) the individual "is not even eligible to possess a firearm in the District of Columbia or to own a firearm, or register a firearm in the District."[4]

[3] *See supra* n.2.

[4] The undersigned observes that the second and third of the three proffers of facts are elements of the offense charged, and accordingly, are not germane to probable cause for the issuance of a warrant to search "the Target Location."

DISCUSSION

Probable Cause

A judicial officer is authorized to issue a search warrant only upon a showing of probable cause. A concise definition of probable cause often proves elusive, illustrating the fundamental proposition that probable cause is contextual. Indeed, another judge of this Court recently noted that "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *United States v. Manafort*, 313 F. Supp. 3d 213, 228 (D.D.C. 2018) (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d (1983)).

The United States Court of Appeals for the District of Columbia Circuit, in its most recent discussion of this proposition, stated that "[w]hen assessing whether a search warrant is supported by probable cause, we ask whether the issuing judge had a 'substantial basis' for concluding that 'a search would uncover evidence of wrongdoing.'" *United States v. Griffith*, 867 F.3d 1265, 1271 (D.C. Cir. 2017) (citing *Gates*, 462 U.S. at 236, 103 S.Ct. 2317) (internal quotation omitted). The Circuit, expanding upon its discussion of this proposition, stated that "a warrant application cannot rely merely on 'conclusory statement[s].'" *Id.* (citing *Gates*, 462 U.S. at 239, 103 S.Ct. 2317) (internal quotation omitted).

Most germane to the undersigned's consideration of the pending application and affidavit, the Circuit noted that "to obtain a warrant to search for and seize a suspect's possessions or property, the government must do more than show probable cause to arrest him." *Id.* Rather,

> [r]egardless of whether an individual is validly suspected of committing a crime, an application for a search warrant concerning his property or possessions must demonstrate cause to believe that "evidence is likely to be found at the place to be searched."

Id. (citation omitted).

The undersigned now finds that a wholly conclusory proffer of a law enforcement affiant's "training and experience[,]" in a vacuum, cannot be a basis of a finding of probable cause for the issuance

of a search warrant. Another judge of this Court, while recognizing that pre-*Griffith*, the Circuit may have sanctioned "training-and-experience warrants for the search of suspected drug dealers' homes on the ground that there was probable cause to believe that contraband or evidence may be found there," *Davis v. District of Columbia*, 156 F. Supp. 3d 194, 201 (citation omitted), noted that

> [a] sworn statement of an affiant that he has cause to suspect and does believe that [contraband or evidence] is located on certain premises will not do. . . . Sufficient information must be presented to the magistrate [judge] to allow that official to determine probable cause; [the magistrate judge's] action cannot be a mere ratification of the bare conclusions of others.

Id. (quoting *Gates*, 462 U.S. at 239, 103 S.Ct. 2317); *see also Lane v. District of Columbia*, 211 F. Supp. 3d 150, 175-76 (D.D.C. 2016) ("actual experience is properly considered as part of the 'totality of circumstances' that inform the probable cause determination. That experience, moreover, must bear a logical connection to the circumstances facing the officers in any given case.").

At least one other judge of this Court has characterized the proposition that a law enforcement affiant's "training and experience" is a sufficient showing of probable cause for the issuance of a warrant to search the home of an individual arrested on a city street for unlawful possession of a firearm as illogical:

> [I]t seems implausible that people illegally possessing handguns typically "maintain books, records, documentation and other papers relating to the ordering, sales and servicing of their firearms[.] . . . [It is not] self-evident that those who illegally possess guns on the street keep additional ammunition in their homes.

Lane, 211 F. Supp. 3d at 176. The undersigned now concurs in that assessment.

Even were the undersigned prepared to overlook these deficiencies, the absence of any nexus between the individual, the charged offense, and "the Target Location" would foreclose the issuance of

the requested search warrant: the affiant omits any proffer that "the Target Location" is indeed the individual's *current* address.[5]

Breadth

Next, turning from the illogical proposition that an individual charged with unlawful possession of a firearm maintains records with respect to its acquisition, the undersigned finds that the list of "Property to be Seized" far exceeds the affiant's enumeration of items commonly found in his "training and experience." For example, included on the list of "Property to be Seized" are "currency, precious metals, jewelry, and financial instruments . . . which constitute proceeds of the TARGET OFFENSE[,]" and "[photographs] . . . of coconspirators, assets . . . and controlled substances, which constitute evidence of the TARGET OFFENSE." The affiant has made no reference to "proceeds" of the offense of unlawful possession of a firearm; nor has he sought to explain how photographs of "assets" and "controlled substances" could constitute evidence of unlawful possession of a firearm. No facts have been proffered with respect to the identities of "coconspirators[.]"

A literal reading of the list of "Property to be Seized" would permit the law enforcement officers to seize virtually anything in the apartment which appeared to be of interest. The requirement that a search warrant not be overbroad is – like a showing of probable cause – a predicate to the issuance of a search warrant. "Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *Manafort*, 313 F. Supp. 3d at 234-35 (citations and internal quotation marks omitted). As the undersigned has found probable cause lacking, consideration of the concept of "overbreadth" is an impossibility. Even were the undersigned to assume the existence of probable cause, the startling array of the items included on the list of "Property to be Seized" defies

[5] *See supra* n. 2 and accompanying text.

meaningful review in accordance with the applicable standard; indeed, the list appears to be an unfortunate amalgam of attachments to search warrant applications with respect to wholly unrelated investigations.

CONCLUSION

For all of the foregoing reasons, it is, this 2nd day of May, 2019,

ORDERED that the pending application for the issuance of a warrant to search "The Target Location" is **DENIED.**

Deborah A. Robinson
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Date: 2019.05.03 11:07:45 -04'00'

DEBORAH A. ROBINSON
United States Magistrate Judge