

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL ACTION NO.
	:	1:07-CR-237-CC-CCH
DANIEL MAURICE ROBITAILLE	:	
	:	

REPORT AND RECOMMENDATION

Defendant is charged in the first count of a two count indictment with possessing machine guns¹ in violation of 18 U.S.C. § 922(o) and with receiving or possessing such machine guns and other firearms without having them registered to him in the National Firearms Registration and Transfer Record in violation of 26 U.S.C. §§ 5841 and 5861(d). In count two of the indictment Defendant is charged with defrauding a gun dealer, Arizona Gun Runners, in order to obtain a FN-Herstal, P-90 machine gun. This action is before the Court is Defendant's Motion to Suppress [13] and his Amended Motion to Suppress [15] (both of which are herein referred to as the "Motion").

¹While the relevant statutes speak to "machineguns," 18 U.S.C. § 922(o) and 26 U.S.C. § 5845(b), the indictment and the parties, for the most part, refer to these firearms as "machine guns" and the Court will follow their lead.

In his Motion, Defendant seeks to suppress weapons and related evidence seized at his house on or about June 7, 2006, on the ground that the search warrants authorizing the searches that led to the seizure of this evidence were not supported by probable cause. In “Defendant’s Reply To Government’s Response To Defendant’s Motion To Suppress Evidence” [17] (hereinafter “Defendant’s Brief”) he also argues that the affidavits used to obtain the search warrants contained false and misleading statements or omissions requiring a hearing under Franks v. Delaware, 438 U.S. 154 (1978).

For the reasons set forth below, the undersigned finds that each search warrant was supported by probable cause, that in conducting their searches and seizing evidence the agents relied on facially valid warrants in good faith, and that there is no evidence that the search warrants were obtained on the basis of deliberate falsehoods or reckless disregard for the truth such as would require a Franks hearing. Accordingly, the undersigned **RECOMMENDS** that the Motion [13][15] be **DENIED**.

FINDINGS OF FACT

With one major exception, discussed below, the parties have not expressed any material difference in what they contend are the relevant facts.

Agreed Facts. (1) On June 2, 2006, the Honorable Linda J. Walker, United States Magistrate Judge for the Northern District of Georgia executed a search warrant authorizing the search of Defendant's residence, 90 Abington Court , N.W., Atlanta, Georgia, 30327. That search warrant was issued on the basis of an application alleging that there was probable cause to believe that evidence of the unlawful possession of a firearm – that is, a FN-Herstal P-90 machine gun, associated parts for the P-90, and documentation relating to the ordering and purchase of that firearm and those parts – would be found on the property to be searched. See Government's Response to Defendant's Motion [16], Attachment A (hereinafter the "June 2, 2006 Search Warrant").

(2) As recited in the affidavit (hereinafter the "First Affidavit") supporting the application for the June 2, 2006 Search Warrant, Defendant had been employed as a Federal Police Officer with the Federal Protective Service ("FPS"), Department of Homeland Security ("DHS") in the Atlanta Field Office from July 13, 2003 to October

26, 2005. During that period, and specifically on or about August 6, 2005, Defendant submitted a United States Government form purchase order and other Government forms to Arizona Gun Runners seeking to purchase a FN-Herstal P-90 machine gun. Those documents listed the issuing office as FPS, 77 Forsyth Street, Atlanta, Georgia and requested that the firearm be shipped to Defendant at that same address. Additional “law enforcement items” had been sold in May and June of 2005 by Arizona Gun Runners under purchase documents which showed the “ship to” address as FPS, Daniel M. Robitaille, at his residence on 90 Abington Court, Atlanta, Georgia. First Affidavit at ¶ 5.

(3) According to allegations made on December 30, 2005 by Curtis Huston, Supervisory Special Agent at FPS, Defendant may have improperly or illegally acquired several items, including the FN-Herstal P-90 machine gun, from Arizona Gun Runners. Huston also alleged that the FN-Herstal P-90 machine gun was shipped to Defendant at the FPS Atlanta Field Office in December of 2005, more than a month following his resignation. First Affidavit at ¶ 3.

(4) An investigation followed, and on February 6, 2006, Gary Lovetro, a sales representative for Arizona Gun Runners, told the investigating agents that Defendant had placed the order for the FN-Herstal P-90 machine gun and that Lovetro believed

it was being purchased for DHS. Lovetro also advised that Arizona Gun Runners processed the order but that it was shipped by the manufacturer, FNH-USA. First Affidavit at ¶ 4. This information was confirmed the next day when copies of the purchase order documents were obtained from FNH-USA. Those documents showed that Defendant had placed the order and that the machine gun was to be shipped to him at the FPS Atlanta Field Office. First Affidavit at ¶ 5.

(5) On May 19, 2006, a package was delivered to FPS, Atlanta, from FNH-USA. The packing list for this package indicated that it was to be shipped to Defendant at FPS, Atlanta, and the First Affidavit states that the packing list stated that the package contained “components for a FN Herstal P-90 sub-machine gun.”² Upon inquiry to the ATF liaison for FNH-USA, investigating agents were advised that

² The Government has submitted copies of the “packing list,” “sales list” and photos of the boxes containing the parts to support the First Affidavit. Because this Court’s initial inquiry is whether there was probable cause to support the issuance of the June 2, 2006 search warrant, it is reviewing only the affidavit presented to Judge Walker. There is no indication that these additional materials (Attachments C, D, E and F to the Government’s Response to Defendant’s Motion [16]) were before her when she issued the relevant search warrants, so they will not be considered by the undersigned. The Court notes, however, that while Attachments C and D generally corroborate the assertions in the First Affidavit that the parts delivered in May of 2006 had been ordered with the machine gun in August of 2005 (and the Defendant does not dispute that assertion), it is unable to find on the packing list, as is asserted in paragraph 7 of the First Affidavit, a statement that “the contents were components for a FN-Herstal P-90 sub-machine gun.”

these parts were back-ordered items that had been part of the original order for the FN-Herstal P-90 machine gun; that they were manufactured specifically for that machine gun, and that they could not be used on any other weapons system. First Affidavit at ¶¶ 7, 8.

(6) On May 31, 2006, Defendant was contacted by FPS personnel and told that a package had arrived at FPS, Atlanta, addressed to him. Defendant indicated that he would have a former co-worker pick up the package and deliver it to him. Surveillance on June 1, 2006 revealed that the package was picked up on that date by Bobby Crews, a FPS officer, and delivered to Defendant at the United States Post Office at the intersection of Collier Road and Howell Mill Road in Atlanta. Approximately two hours later Defendant was observed exiting his vehicle at his residence and taking the package into his home. First Affidavit at ¶¶ 9-12.

(7) On the basis of the above information Judge Walker found probable cause that the machine gun was in Defendant's residence and issued the June 2, 2006 Search Warrant authorizing the search for that weapon, associated parts and related documents used to order and purchase those items. On June 7, 2006, when the agents conducted the search authorized by the June 2, 2006 Search Warrant, they observed

an “auto sear”³ on a shelf next to the machine gun they were searching for together with other firearms which appeared to be machine guns. They also observed what appeared to be counterfeit government (DHS) letterhead. On the basis of these observations they supplemented the First Affidavit and returned to Judge Walker seeking a new search warrant that would authorize the search of Defendant’s home for machine guns in addition to the FN-Herstal P-90, as well as for parts, auto sears, counterfeit DHS letterhead, documents related to the purchase of machine guns and computers, printers and related systems used to produce the DHS letterhead and other documents. Judge Walker issued that search warrant (hereinafter the “June 7 Search Warrant”) on the basis of the same facts recited above found in the First Affidavit (and repeated in Attachment B, the “Second Affidavit,” to Government’s Response to Defendant’s Motion [16]) as well as on the basis of the observations referred to above that were made on June 7, 2006 during the search authorized by the June 2, 2006 Search Warrant.

Disputed Fact. (8) As noted above, the Government contends that the parts delivered to Defendant and taken by him into his house on June 1, 2006, were

³ An auto sear is apparently a device used to convert semi-automatic weapons into machine guns. This device by itself is considered to be a “machinegun” under 26 U.S.C. § 5845(b).

manufactured specifically for the FN-Herstal P-90 machine gun. Defendant does not contest that the Government was told that by the manufacturer of that weapon and believed that those parts were components of the illegal machine gun (see Defendant's Amended Motion to Suppress [15] at page 3, ¶ 8), but asserts that this belief was erroneous, that the agents should have known that it was not true, and that this misstatement of fact was material to the finding of probable cause supporting the issuance of the June 2, 2006 Search Warrant. Defendant supports its contention with the affidavit of a recognized expert in firearms who swears that: (a) "[i]f a P90 machine gun is equipped with a TriRail" then one of the parts Defendant took into his house on June 1, 2006 "could not be used for a P90, but could be installed on a PS90 semi-automatic carbine" (presumably a legal weapon), and (b) the other part (the "optical sight tool") "could not be used for the P90," but "could be used on a PS90 semi-automatic carbine."

DISCUSSION

I. Probable cause supported the issuance of both search warrants.

In his first Motion to Suppress [13] Defendant argues that there was no evidence that Defendant had an unlawful weapon in his house in June of 2006, and therefore,

that the June 2, 2006 Search Warrant was not supported by probable cause. If that search warrant is found to be invalid for lack of probable cause, then there was no lawful reason for government agents to be in Defendant's house on June 7, 2006. As a consequence, Defendant argues, what they observed on that date could not support the June 7, 2006 search warrant. Defendant then argues that, since neither search warrant was supported by probable cause, all evidence seized in reliance on them should be suppressed.

Probable cause to search "exists when, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be discovered in a particular place." United States v. Mikell, 102 F.3d 470, 475 (11th Cir. 1996). "[T]he nexus between the objects to be seized and the premises searched can be established from the particular circumstances involved and need not rest on direct observation." United States v. Lockett, 674 F.2d 843, 846 (11th Cir.1982). Thus, it is not determinative, as Defendant suggests, that the agents had no direct evidence that he had ever picked up or possessed the FN-Herstal P-90 machine gun, much less ever had it in his residence. Probable cause may be found to search a particular area when law enforcement officers seek to search that location based on their common sense and experience as to where evidence of an illegal act may be found. See, e.g., Illinois v.

Gates, 462 U.S. 213, 230-231 (1983); United States v. Jenkins, 901 F. 2d 1075, 1081 (11th Cir. 1990). “The principal components of a determination of . . . probable cause will be the events which occurred leading up to the . . . search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount . . . to probable cause.” Ornelas v. United States, 517 U.S. 690, 696 (1996).

The Government does not deny that it had no direct evidence that Defendant ever picked up or possessed the machine gun allegedly delivered to the FPS Atlanta field office in December of 2005. Thus, it had no direct evidence that the weapon was ever in Defendant’s house, much less remained in his house some six months after it was allegedly delivered to FPS. On the other hand, as described in the First Affidavit, the Government had corroborated with the sales agent, Arizona Gun Runners, and the gun manufacturer, FNH-USA, the allegations that Defendant had ordered the weapon for delivery to the FPS Atlanta field office. Further, on investigation the agents had learned that, during his employ with FPS, Defendant had previously purchased law enforcement items from FPS and had them shipped direct to his home. See Findings of Fact above (hereinafter “FOF”) 2 and 4.

Most importantly, however, in May of 2006 the manufacturer of the machine gun shipped parts to Defendant at the FPS Atlanta Field Office. On inquiry to the manufacturer, the investigating agents were told that those parts were ordered in August 2005 as part of the order for items that included the subject FN-Herstal P-90 machine gun, that the parts shipped to Defendant in May of 2006 were back-ordered at the time the original order had been placed, and that those parts were specially manufactured for the P-90 weapons system and could not be used for any other weapons system. FOF 5. The agents then arranged for the delivery of the package with those parts to Defendant and observed him pick that package up and take it into his house. Based on that information and those observations, and given the information previously learned, at that time common sense would indicate that there was a fair probability that the machine gun for which the parts were intended would be found where the parts were taken, that is, in Defendant's residence. The very next day, with those facts establishing probable cause before her, Judge Walker properly issued the June 2 Search Warrant. As that warrant was based on probable cause, the observations made by the officers of items in plain view during the execution of that warrant on June 7, 2006 were made at a time and place when they were lawfully in Defendant's residence, and therefore, properly provided probable cause supporting the

June 7 Search Warrant. Because the Court finds that probable cause supported both search warrants, Defendant's Motion should be **DENIED**.

II. Assuming misinformation in the search warrants, the evidence seized need not be suppressed because the officers relied in good faith on facially valid warrants.

While, as found above, the warrants were supported by affidavits providing probable cause for their issuance, that finding is dependent on the information provided to the agents by the manufacturer of the parts delivered to the Atlanta Field Office of FPS in May of 2006. According to the First and Second Affidavits, the manufacturer informed the agents that: those parts were ordered at the same time Defendant ordered the FN-Herstal P-90 machine gun; they were specially manufactured for that weapon, and they could not be used with any other weapon. This information, coupled with surveillance of Defendant resulting in visual evidence that he took the parts into his home, made it objectively reasonable through the application of common sense and experience to expect that there was a fair probability that the parts were going to be used with the FN-Herstal P-90 machine gun, and accordingly, that the gun would be located where Defendant took the parts, that is, in his residence.

Defendant, however, contests the assertion that the parts were made for the FN-Herstal P-90 machine gun and has provided an affidavit from an expert putting that assertion into question. Defendant, however, does not argue that the Government knew that the parts were not components of the subject machine gun; to the contrary, he has admitted that the contents of the package shipped to Defendant at the FPS office in May of 2006 “were believed to be components for the gun that had earlier been shipped.” Amended Motion to Suppress [15] at page 3, ¶ 8.

Assuming Defendant is correct and that the parts shipped in May were not related to the machine gun that was the primary object of the June 2 Search Warrant, that does not require the suppression of the evidence seized if the agents, in good faith, believed that the warrant was valid. See, United States v. Leon, 468 U.S. 897 (1984). Under the Leon “good-faith exception,” when officers rely in good faith on a facially valid warrant, evidence seized should not be excluded even if the warrant ultimately turns out to be defective. “Good faith” is an objective standard judged by what a reasonable police officer under the circumstances would perceive, not the expert standard of a legally trained judge or magistrate. United States v. Taxacher, 902 F.2d 867, 872 (11th Cir. 1990).

Only in four specific situations is the good-faith exception inapplicable: (1) when the issuing magistrate or judge was misled by information in an affidavit that the affiant knew was false or, except for reckless disregard for the truth, should have known was false; (2) when the judicial officer that issued the warrant “wholly abandoned his judicial role;” (3) when the warrant is based on an affidavit “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;” and (4) when the warrant issued is “so facially deficient . . . that the executing officers cannot reasonably presume it to be valid.” Leon, 468 U.S. at 923.

In this case none of the exceptions to the Leon good faith exception applies. There is no evidence that the affiant knew that the parts delivered in May of 2006 were not related to the FN-Herstal P-90 machine gun. Not only would the fact that they were ordered at the same time as the machine gun lead to such an inference, but the agents were told by the manufacturer of the machine gun that those parts were manufactured specifically for that weapon.⁴ Thus, even assuming that the machine

⁴ At paragraph 7 to the First Affidavit and the Second Affidavit it is represented that the packing list for the parts delivered in May of 2006 stated that “the contents were component parts for a FN-Herstal P-90 sub-machinegun.” As noted in footnote 2, *supra*, the Court has been unable to find that statement on the “packing list.” That assumed misstatement, however, is not relevant to the determination that the Leon good faith exception applies. The search warrants in question support a finding of probable cause without reference to the packing list. It is the information reported from the manufacturer as to the relationship of the parts shipped in May of 2006 and

gun and parts were not related, not only is there a lack of evidence that the agents knew that to be a fact, but it is also undisputed that the agents asked the manufacturer of both the machine gun and parts and were told that they were related. Accordingly, they can not be said to have acted with reckless disregard for the truth. Further, given its finding of probable cause the Court cannot find that the First and Second Affidavits were in any way lacking in indicia of probable cause or that the resulting warrants were to any degree facially deficient so that the agents could not presume them to be valid. Finally, there is no contention that the issuing magistrate judge abandoned her judicial role in issuing the search warrant. Thus, none of the exceptions to Leon applies and, even assuming material factual error in the First and Second Affidavits without which probable cause would not have been established, the Leon good faith exception would apply, the evidence seized in executing the June 2 and June 7 Search Warrants would not need to be suppressed, and Defendant's Motion should be **DENIED**.

the machine gun shipped earlier that establishes probable cause. No one has called into question the affiant's statement regarding what the agents were told by the manufacturer and that information, without the representation about the packing list, establishes that the agents did not act with disregard for the truth, but in good faith reliance on the facts presented to the magistrate judge.

III. Defendant is not entitled to a Franks hearing.

Based on the affidavit of its expert calling into question the representation in the First and Second Search Warrants that the parts delivered in May of 2006 were components of the FN-Herstal machine gun, Defendant seeks a hearing under Franks v. Delaware, 438 U.S. 154 (1978).

Under Franks, a Defendant must make a particularized showing in order to be entitled to a hearing on the sufficiency of the affidavit that supported a challenged search. Specifically, Franks requires that:

There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted . . . is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and 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.

Franks, 438 U.S. at 171, 172 (footnote omitted).

In this case, Defendant has not made any allegation that the affidavits supporting the search warrants contained any deliberate falsehood or any information that would constitute a reckless disregard for the truth. Instead, Defendant proffers the affidavit of his expert to demonstrate that the conclusion reached by the agents – that the parts shipped in May of 2006 were components for the machine gun shipped earlier – was in error. But the agents reached that conclusion based on information provided to them by a representative of the manufacturer of the parts and the machine gun. FOF 5. There is no allegation or inference by the Defendant that the agents were not so informed by the manufacturer or that they should have known that the manufacturer gave them false information. Without evidence of a false or reckless representation by the affiant in the affidavit supporting the search warrant, there is no reason for a Franks hearing because, as noted above in discussing the good faith exception under Leon, the issue is the agent's good faith, not whether they made a mistake based on false but reasonable information. Since Defendant has only contended that the agents received misinformation, and not that they intentionally misrepresented anything to the magistrate judge who issued the search warrants, his request for a Franks hearing should be denied.⁵

⁵While there is no contention that the affiant intentionally misrepresented what was stated on the packing list (*see* footnotes 2 and 4 *supra*), unlike his statement as to what the manufacturer told him, his statement as to what the packing list said may

RECOMMENDATION

For all the above reasons, the undersigned **RECOMMENDS** that Defendant's Motion [13][15] be **DENIED**.

IT IS SO RECOMMENDED this 31st day of October, 2007.



C. CHRISTOPHER HAGY
UNITED STATES MAGISTRATE JUDGE

be demonstrably incorrect. But that would not require a Franks hearing. For, if one “set[s] that statement to one side [and] there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.” Franks at 172.

Similarly, Defendant's argument that omissions in the First and Second Affidavits require a Franks hearing fails. Those alleged omissions: the failure to indicate that FNH thought the purchase of the machine gun had been approved because it had seen a signature of a FPS supervisor on the requisition form, and the fact that Defendant had a pending lawsuit against Huston (see FOF 3), if fully disclosed and considered, would not affect the conclusion that probable cause was established. Accordingly, a Franks hearing is not required.