

him that he could supply the informant, but that it would take a period of time to get the drugs. Eventually, an individual identified as "Paul" arrived with the drugs. The individual was witnessed leaving the apartment in a rust colored Ford Bronco with Virginia license plates BJO-932. No identification could be made of "Paul," except that he was a black male. Detective George B. Wade¹ testified that he believes there was also a black female passenger. Through the records of the Department of Motor Vehicles, it was determined that the Bronco was registered to Joseph Wright of 3357 Dill Avenue.

On July 12, 1991, Detectives Redford and Wade spotted the Bronco. They called a marked car to have it stop the Bronco and identify the driver. The driver was identified as the defendant, Paul Kearney.² State Police Special Agent Blanton was informed of the driver's identity. Agent Blanton informed Detective Wade that Paul Kearney was actively involved with drugs in the Norfolk area.

On October 1, 1991, the Bronco was spotted again. It had been repainted a creme color, but the officers were able to identify it by its license plates. The officers were not able, however, to identify the driver.

On October 2, 1991, Richmond Police Detectives met with the informant at approximately 1:30 p.m. to plan the purchase of

¹ Detective Wade was the sole witness at the hearing on the motion to suppress.

² The officers, however, make no claim that they identified or recognized the driver as the "Paul" who had delivered the cocaine on June 26, 1991.

cocaine from Joe Wright. The informant was wired with a body transmitter, which permitted the recording and monitoring of his conversations while inside Joe Wright's apartment at 3357 Dill Avenue. The avowed aim of the purchase was to arrest the individual delivering the drugs.

The informant met Joe Wright at 3357 Dill Avenue to set up the purchase. Wright indicated that he would have to contact his source to arrange for delivery. At approximately 2:30 p.m., Wright paged his source. He indicated to the informant that the delivery would be in 15-20 minutes. Who would be making the delivery or how it would arrive was never clearly established.

At approximately 2:45 surveillance officers observed a creme colored Ford Bronco with Virginia plates BJO-932 approaching the vicinity of 3357 Dill Avenue. There was a female driving the Bronco and a male passenger in the front seat.

The Bronco stopped at a stop sign at the corner of 3rd and Milton streets. The defendant (passenger) got out of the Bronco. As he exited the passenger side of the Bronco, a police officer observed him reach back into the vehicle, remove something from behind the passenger seat, and place that thing in his pocket. The officer could not, however, identify what had been removed.

The defendant was, at this point, approximately one and one-half to two blocks from the entrance to Joe Wright's apartment complex. The defendant began walking in the direction of the apartment. Before he could get to the sidewalk, however, a detective approached him. At the same time, Detective Wade stopped

the vehicle. The defendant was brought back to the vehicle and searched. Detective Wade, who ordered the defendant stopped and searched, did not identify the defendant as Paul Kearney until after the search.

DISCUSSION

As a general rule, a search is per se unreasonable if there is no search warrant, unless the search fits into a recognized exception to the warrant requirement. Mincey v. Arizona, 437 U.S. 385 (1978). The parties agree that this was a search incident to an arrest. See United States v. Robinson, 414 U.S. 218 (1973). As such, the Court's inquiry focuses on whether or not the original seizure was lawful. A police officer must have probable cause to make a warrantless arrest.³ Probable cause exists if "at that moment the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing the offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). Probable cause is to be determined on a practical assessment of the totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 230-31 (1983).

The defendant argues that the police lacked probable cause to believe that the defendant was engaged in criminal activity. Encapsulated, the defendant argues that the only relevant

³ There is no warrant requirement for an arrest made in a public place. United States v. Watson, 423 U.S. 411 (1976)

information relied on by the police was "stale" in that it was based on events occurring on June 26, and July 12, 1991. The defendant further argues that the only other information the police had was not specifically relate to the defendant. They merely knew that some unidentified individual was to delivery drugs by some unidentified means. And with regard to this information, the defendant argues, there was no basis for crediting its reliability. Even if there was reason to credit the informers reliability, the information regarding the delivery and its timing was derived from Joe Wright, and he had never been established to be reliable.

The key to the defendant's argument is his assertion that much of the preexisting information was stale. The Fourth Circuit has stated in the context of a search warrant "that time is a crucial element of probable cause. A valid search warrant may issue only upon allegations of 'facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case.'" United States v. McCall, 740 F.2d 1331, 1335-36 (4th Cir. 1984) (citing Sgro v. United States, 287 U.S. 206, 210-11 (1932)). In McCall, the magistrate issued a warrant on December 2, 1982, which was based on information from July of 1980, and the spring of 1982. Id. at 1334. As the court pointed out, "[m]any courts have found probable cause to exist despite substantial gaps between the observation . . . and the issuance of a search warrant." Id. at 1336. All that is required is that the evidence not be so old that there can no longer be a

legitimate inference that the evidence remains at the same location. Id. at 1336-37. Placed in the context of an arrest, the information relied on must be current enough that it is reasonable to infer that this defendant is engaging in or has engaged in criminal activity. Under the particular circumstances of this case, the Court finds that the evidence clearly was not stale.

To begin with, the period of time between the first buy and the defendant's arrest was simply not that great. Moreover, the police had indisputable evidence that the individual to whom the vehicle was registered, Joseph Wright, was still involved in drug trafficking. Since the owner of record was still involved in the same criminal activity, it was reasonable to believe that his vehicle was also still involved. That reasonable inference was only supported by the police officers' knowledge that the vehicle had been repainted shortly after an encounter with the police.⁴

The defendant's claim that the information concerning when the delivery would occur was unreliable is also unavailing. While the information was from a third party, it was directly related to the sale that was occurring. Joe Wright had every reason to be truthful in telling the informant when the drugs would be delivered

⁴ The defendant's argument on brief seems to focus on the identity of the defendant; i.e., that the information was too old to infer that it would be Paul Kearney making the delivery. The identity of Paul Kearney, however, was not relevant to the arrest, except to the extent that his use of the vehicle and his reputation among the police as being involved in drugs tended to show that the Bronco was still being used in drug activities in mid-July. Detective Wade admitted at the hearing that he did not recognize the defendant as Paul Kearney prior to his decision to seize him and the search incident to that seizure.

since the informant was waiting to purchase those drugs. Under the circumstances, the police officers had sufficient indicia of reliability and credibility. See Illinois v. Gates, 462 U.S. 213, 238 (1983) ("The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.").

Based on the totality of the circumstances, the Court finds that probable cause existed at the moment the officers seized the defendant. The police were aware that Joe Wright was still engaged in the distribution of drugs, that drugs were to be delivered to him at that time, that this Ford Bronco was directly tied to Joe Wright, and that the Bronco was known to have been used to deliver drugs. As such, there was probable cause to believe that the individual getting out of the vehicle, a vehicle connected to previous drug deliveries to Joe Wright, at a time and a place where the delivery was to occur, was in all probability the individual delivering the drugs.

Let the clerk send a copy of this Memorandum Opinion and the accompanying Order to the defendant and all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE