

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 04-118-P-S
)	
JERRY HUBBARD,)	
)	
Defendant)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

The defendant, Jerry Hubbard, has filed a motion to suppress evidence seized during a search of a residence located at 104 Somerset Street in Rumford, Maine on November 9, 2003. Defendant’s Motion to Suppress Evidence, etc. (“Motion”) (Docket No. 16) at 1. He contends that the warrant authorizing the search was deficient in that it was based on information that failed to establish probable cause to believe that he was a convicted felon or that firearms would be present at the residence. *Id.* Counsel for the parties have agreed that the question of probable cause may be decided on the pleadings, without oral argument or an evidentiary hearing. The defendant is charged with possession of a firearm by a felon, a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Indictment (Docket No. 1).

The affidavit submitted to the justice of the peace who issued the warrant in question was that of Patrolman Daniel Garbarini of the Rumford police. Government’s Objection to Defendant’s Motion to Suppress, etc. (“Objection”) (Docket No. 20), Exh. A (“Affidavit”). With respect to the presence of firearms at the premises to be searched, the affidavit includes the following information: (i) on November 8, 2003 Mary Hubbard reported to Garbarini that her husband, the defendant, from whom she had been

separated “for a few months,” had showed up at the residence where she was staying and made sexual advances toward her, which she rejected, *id.* ¶¶ 2-4; (ii) the defendant then took a knife out of his pocket, held it out and told her “Remember when we married you said til death do us part and you’re not leaving,” *id.* ¶ 5; and (iii) that she was very afraid of the defendant and the defendant “has approximately seven firearms that are located in the basement in a gun cabinet at his residence,” *id.* With respect to the status of the defendant as a felon, the affidavit includes the following information:

9. I have caused a criminal record check to be run on JERRY HUBBARD and have learned the following:

a. In 1995, the New Jersey State Police arrested JERRY HUBBARD and charged him with Possession of Marijuana/Hashish and Felony Possession of a Handgun. He was subsequently found guilty of the felony firearm charge.

b. JERRY HUBBARD has also been arrested in Vermont in 1998 for Driving While Impaired and in Florida in 1983 for Disturbing the Peace and Disorderly Conduct. He was convicted on all of these charges.

Id.

Courts reviewing the propriety of a decision to issue a search warrant must grant “great deference” to the issuing authority’s assessment of the supporting affidavit, *United States v. Jewell*, 60 F.3d 20, 22 (1st Cir. 1995), reversing only if there is no “substantial basis for . . . concluding’ that probable cause existed.” *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). In effect, the court must ask whether, viewing the affidavit in a “practical, ‘common sense’ fashion,” the information supporting the warrant is recent enough to be considered reliable evidence of whether the items sought may be found at the location to be searched. *United States v. Bucuvalas*, 970 F.2d 937, 940 (1st Cir. 1992).

It is well established that the temporal proximity or remoteness of the events observed has a bearing on the validity of a warrant. But no hard and fast rule can be formulated as to what constitutes excessive remoteness, because each case must be judged in its circumstantial context. Factors like the nature of the criminal activity under investigation and the nature of what is being sought have a

bearing on where the line between stale and fresh information should be drawn in a particular case.

United States v. Dauphinee, 538 F.2d 1, 5 (1st Cir. 1976) (citations omitted). Generally, “[a]n affidavit must be based on facts so closely related to the time of the warrant as to justify a finding of probable cause at that time.” *United States v. Lacy*, 119 F.3d 742, 745 (9th Cir. 1997). While the mere lapse of time is not controlling, it is a factor to be evaluated in the light of the particular facts of the case. “Where the information points to illegal activity of a continuous nature, the passage of several months between the observations in the affidavit and the issuance of the warrant will not render the information stale.” *United States v. Hershenow*, 680 F.2d 847, 853 (1st Cir. 1982). The First Circuit has required trial courts to consider the relative staleness of information in relation to:

(1) the nature of the suspected criminal activity (discrete crime or “regenerating conspiracy”), (2) the habits of the suspected criminal (“nomadic” or “entrenched”), (3) the character of the items to be seized (“perishable” or “of enduring utility”), and (4) the nature and function of the premises to be searched (“mere criminal forum” or “secure operational base”).

Id. The nature of the offense is the most determinative of these factors. Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 3.7(a) at 80.

In this case, the defendant contends that the information provided to Garbarini by Mary Hubbard was stale because “[t]here is no information present in Patrolman Garbarini’s affidavit that indicates when Ms. Hubbard was last present at Defendant’s residence or when she last saw said firearms.” Motion at 2. The affidavit does say that Mary Hubbard and the defendant had been separated for “a few months.” It is reasonable to conclude that Mary Hubbard had not seen the guns in the past “few months.” The defendant cites no authority in support of his suggestion that the information must be presumed to be stale because the last date on which the informant saw the guns is not specified. Case law does not require such specific

information. *See, e.g., United States v. Curtis*, 2001 WL 987453 (D. Me. Aug. 28, 2001), at *3 (information that defendant owned gun in question, that it was kept in defendant's residence and that he possessed it for at least the preceding two years sufficient to overcome staleness objection). Here, the informant had lived in the defendant's residence until a few months before the warrant issued. Possession of firearms, particularly where the guns are kept in a gun cabinet in the basement of a defendant's residence, is likely to be an ongoing activity. *See United States v. Schaefer*, 87 F.3d 562, 568 (1st Cir. 1996) ("The longer the expected duration of the criminal activity and the longer the expected life of the items attendant to it, the more likely that a datum from the seemingly distant past will be relevant to a current investigation.") The defendant's residence is a secure operational base for the conduct of the crime of possession of a firearm by a felon, which makes the passage of time less significant, *United States v. Greene*, 250 F.3d 471, 481 (6th Cir. 2001), and there is no suggestion that the defendant was "nomadic." The information provided by Mary Hubbard in this case was not stale. *See United States v. Pritchett*, 40 Fed.Appx. 901, 2002 WL 1478584 (6th Cir. July 9, 2002), at **3 (when informant saw firearms in crates and ammunition at defendant's residence more than four months before affidavit submitted in support of application for search warrant, information was not stale); *United States v. Grandstaff*, 813 F.2d 1353, 1357 (9th Cir. 1987) (5 month lapse not sufficient to negate probable cause on charge of interstate transportation of stolen property).

With respect to the contention that probable cause to believe that the defendant was a convicted felon did not exist, the defendant contends that the material in Garbarini's affidavit was insufficient because the affidavit does not "indicate[] where and how he obtained the information that the Defendant was a convicted felon. Nor does the affidavit contain any information as to the reliability of his source." Motion at 2. In addition, the defendant contends that the affidavit should have provided information "that would

indicate that any steps were taken to confirm Defendant's felony status or that Defendant's felony status was in fact confirmed." *Id.* The defendant again offers no citation to authority in support of his argument. The government's response is similarly unhelpful. Objection at 5.

Contrary to the defendant's assertion, the affidavit does describe the means by which Garbarini obtained the information that the defendant had been found guilty of a felony in New Jersey. He "caused a criminal record check to be run" on the defendant and learned this information as a result of that check. Affidavit ¶ 9. It is reasonable to infer from this statement that, as a law enforcement officer, Garbarini employed a method of checking criminal records that is common in the field of law enforcement. The sworn statement that a criminal record check was run and the fact that Garbarini was a law enforcement officer, who would have access to official records in the course of his conduct of his job, are sufficient to render the information reliable for purposes of a determination of probable cause in connection with an application for a search warrant. While the presence of any of the elements listed by the defendant as missing from this portion of the affidavit would strengthen the case for a finding of probable cause, none of them is necessary to such a finding under the circumstances present here. *See generally United States v. Spinosa*, 982 F.2d 620, 625-26 (1st Cir. 1992) (affidavit must be given common-sense and realistic rather than hypertechnical interpretation, giving determination of issuing judicial officer great deference).

Because I conclude that the justice of the peace had probable cause to issue the search warrant at issue, there is no need to reach the government's argument concerning the good faith exception to the exclusionary rule.

Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress evidence be **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 9th day of February 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Defendant

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