

CLERKS OFFICE U.S. DIST. COURT
AT CHARLOTTESVILLE, VA
FILED

August 14, 2024
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA

v.

RAEKWON DEMITRIUS BURNETTE,

Defendant.

Case No. 3:24-cr-10

ORDER

JUDGE NORMAN K. MOON

In the early hours of May 28, 2023, a shooting occurred in downtown Charlottesville, Virginia. It was captured on blurry, black-and-white security footage (the “Shooting Video”). There are no known victims. One of the shooters—referred to as “Shooter-2” in briefing—has shoulder-length hair. A member of the Charlottesville Police Department sought a search warrant for the home of Defendant Raekwon Burnette, based on a “match” between Defendant and the appearance of one of the shooters in the video. Defendant was subsequently indicted on one count of possession of a firearm by an unauthorized person, in violation of 18 U.S.C. 18 §§ 922(g)(1) and 924(a)(8). Dkt. 20. Defendant sought immediate suppression or a *Franks* hearing; he argued that the fruits of the search should be suppressed due to a discrepancy in security footage from that evening. While color footage from other businesses showed Defendant in Downtown Charlottesville that night, in those videos he wore a black shirt, while the shirt of the suspect in the Shooting Video appeared light-colored or white. The Government filed a brief in opposition to Defendant’s Motion. Dkt. 31.

The Court granted a *Franks* hearing. Dkts. 48, 55. At that hearing, further infirmities of the search warrant became apparent. *See* Dkt. 60. Both Defendant and the Government filed

supplemental material after the evidentiary hearing. Dkts. 58, 59. On July 22, the Court granted Defendant's Supplemental Motion to Suppress. Dkt. 60.

The Government filed a Motion to Reconsider, Dkt. 63, which Defendant opposes, Dkt. 64. Having heard from both parties, reviewed the Shooting Video, considered the evidence from the *Franks* hearing, and revisited the affidavit, the Court will deny the Motion to Reconsider.

1. Legal Framework

The Federal Rules of Criminal Procedure do not themselves provide for motions for reconsideration. However, district courts may nevertheless entertain such motions in criminal cases, guided by Rule 59(e) of the Federal Rules of Civil Procedure. *See United States v. Dickerson*, 166 F.3d 667, 678–79 (4th Cir. 1999), *rev'd on other grounds*, 530 U.S. 428 (2000). Reconsideration may be granted: “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *Collison v. International Chemical Workers Union*, 34 F.3d 233, 236 (4th Cir.1994) (internal quotation marks omitted). “Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance.” *Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).

The Government makes no representation that there has been a change in law or new evidence; rather, it contends that the Court's analysis, in deciding the Motion to Suppress, was a clear error of law. Dkt. 63 at 5.

2. *Probable cause*¹

At the evidentiary hearing, the Court raised the question of whether, considering omissions or misstatements, the affidavit would support probable cause. Transcript 116–17. The Court suggested that both parties address this in their post-hearing briefing. *Id.* at 117. While the Government’s supplemental brief discussed the color of Shooter-2’s shirt, beliefs about the shirt, and the production of the affidavit, its discussion of probable cause does not address the analytical impact of the infirmities in the affidavit that emerged at the evidentiary hearing, i.e. that Smith identified Burnette from the Downtown Mall footage rather than the Shooting Video; that Detective Maney could not make an affirmative identification of Burnette; and that the affidavit’s statement that Shooter-2 “matched” Burnette would be properly omitted from the probable cause determination. *See* Dkt. 60. The Government did not propose, as it does now, specific alterations to the affidavit.² The Government now argues that instead of striking misleading statements from the affidavit, the Court should have inserted omitted information—and that the affidavit establishes probable cause when amended in this way. Dkt. 63.

To the extent that this issue should have been addressed in its prior briefing on the matter of suppression—and noting that Court explicitly raised the question of the effect of omissions and misstatements on the probable cause determination—the Government falls afoul of Rule 59’s bar on using a reconsideration motion to litigate arguments that could have been raised before the challenged judgment. *See Pac. Ins. Co.* 148 F.3d at 403. In the interests of clarity, however, the

¹ In its probable cause analysis, the Court considers only the information presented to the magistrate. *See Owens ex rel. Owens v. Lott*, 372 F.3d 267, 277 (4th Cir. 2004).

² Defendant’s Supplemental Motion to Suppress included a list of challenged affidavit statements and omissions and their proposed treatment, Dkt. 58 at 28–29, some of which the Court found appropriate.

Court will address the Government's argument as to probable cause. Even assuming that the Government is correct as to the proper form of amendment, and adopting its proposed changes, the Court finds that probable cause is lacking.

First, the Court considers Probation Officer Shawn Smith's identification. Here is the affidavit paragraph as to the identification by Smith, in full, reflecting the Government's one-word proposed change:

Your affiant knows from prior investigations that Burnette is actively on probation. On June 12, 2023, your affiant contacted District 9 Probation and spoke with Shawn Smith who supervises Burnette. Your affiant advised Smith that Burnette was a person of interest in a shooting that your affiant is investigating and if he would review footage to see if the shooter is Burnette. On June 12, 2023, your affiant met with Smith and showed him multiple videos and screenshots of the suspect. Smith stated that, based, on the walk, the position of the keys, the physical appearance, and the item hanging out of the back right pocket that the male in the [Hamilton's]³ video is Burnette. Smith has supervised Burnette since July 2022 and is familiar with his mannerisms. Smith also stated that Burnette drove a Jeep and a Dodge Charger which both vehicles are registered in his girlfriend's name. Smith provided Virginia Registration of UDF-9347 for the Jeep that Burnette drives. Based off of the above facts it is reasonable to believe that the male in the camera footage from the Downtown Mall and the male in the Hanckel Citizens insurance video firing a firearm is Burnette.

Dkt. 34-14, at 7 (bracketed word inserted).

With a single word inserted, as the Government contends it should be, this paragraph fails to articulate an identification of Burnette *as Shooter-2*. This paragraph, as modified, only explains why Smith identified Burnette *as someone walking on the Downtown Mall*, not as someone committing a crime. Certainly, Smith's identification mentions an item hanging from the back pocket. And TFO Raines, in his description of Shooter-2, includes "something hanging out of his back right pocket." *Id.* at 6. But a single accessory choice is not enough to tie Shooter-2 to Burnette through Smith's identification.

³ Hamiltons' Restaurant is on the Charlottesville Downtown Mall.

The Court turns next to the portion of the affidavit which includes the identification by Detective Maney. The Government proposes adding two words to this paragraph. Dkt. 63 at 9. The Government's addition is included in brackets.

Detective Maney also reviewed the footage and stated the male with the shoulder length dreads appeared to be [**consistent with**] Raekwon Burnette. Detective Maney has assisted in prior investigation with Burnette and is familiar with Burnette which led to his above statement. Your affiant searched Burnette through a Law Enforcement Database and noticed he is [a]pproximately 6'1, 170 pounds, black male, and his last booking photo showed shoulder length dreads.

Id. at 6.

As amended, the Court takes Detective Maney's statement to mean that Burnette's physical characteristics do not *disqualify* him from being Shooter-2. Detective Maney, as his words are relayed in the affidavit, does not offer any particular grounds for his statement. Nor does he say that Shooter-2 *is* Raekwon Burnette. At risk of belaboring the point, stating that Shooter-2 "appeared to be consistent with" Raekwon Burnette merely establishes that, in Detective Maney's view, Shooter-2 *could be* Burnette.

The Government asserts that these qualified identifications by Maney and Smith, combined with other material in the affidavit, establish probable cause. The Government points particularly to the affidavit's statements that Burnette has a felony conviction; that, in 2021, Burnette was shot (a "victim/suspect in an [a]ggravated [a]ssault[,] in the affidavit's phrasing); and that he may have had control of up to two guns at that time, one of which came into law enforcement possession when it was recovered from the site where Burnette was shot. Dkt. 34-14 at 7. This all happened a full two years before the date of the Shooting Video.

To focus, briefly, on the Shooting Video: as the Court discussed in its prior Order, from reviewing the Shooting Video it could not perceive support for the Government's theory that the light-colored appearance of Shooter-2's shirt was an "optical illusion." Dkt. 60 at note 5. To the

extent that any elaboration on the Court's prior ruling is necessary, the Court now finds that the Shooting Video does not by itself suggest that Shooter-2 was wearing a black shirt. The shirt may not be white, but it certainly appears to be considerably lighter than Shooter-2's pants. The pants remain dark under the streetlamp where, according to the Government's theory, the brightness of the light causes the "black" shirt to flash white. The Government has offered no explanation or evidence as to why this visual effect would selectively apply to some articles of clothing and not others. In the absence of such explanation, the Court cannot overlook this discrepancy between Burnette, as identified in the Downtown Mall videos, and the appearance of Shooter-2.⁴ Nor did testimony at the evidentiary hearing explain the discrepancy. *See* Transcript, p. 16.

So, to summarize the statements in the affidavit: Shooter-2, in the video, appears to have shoulder-length hair and a *light-colored* shirt. Shooter-1 wears a baseball cap. Detective Maney stated that it was possible that Shooter-2 was Raekwon Burnette, a man with shoulder-length dreadlocks. Probation Officer Shawn Smith identified Raekwon Burnette, a man with shoulder-length dreadlocks and a *black* shirt, in a video taken several blocks away,⁵ in the company of a

⁴ The video footage from Holy Comforter Catholic Church (Government's Evidentiary Hearing Exhibit CC), which appears to capture lower-body footage of the shooters after the shooting, is unfortunately unhelpful. *See* Transcript at 38:

Question: And what did you observe about what the two individuals are wearing in this video?

Raines: The video was kind of grainy. It was hard to tell. It appeared to be darker clothing, but I wasn't able to determine exactly.

Question: It doesn't appear to be white, right?

Raines: Correct.

⁵ The Government characterizes Burnette's direction of travel, in the Downtown Mall video approximately ten minutes before the shooting, as "towards the scene of the crime[.]" Dkt. 63 at 10. This is somewhat true; Burnette appears to be walking roughly east along the Downtown Mall, and the shooting took place toward the east, as well as roughly north by about a block and a half.

man in a hat. Two years earlier, Raekwon Burnette, a felon, used an unlawful firearm and may have possessed another.

This is not enough for the affidavit to support probable cause. Probable cause analysis requires “a magistrate to ‘make a practical, common-sense decision whether’” there is a “fair probability that contraband or evidence of a crime will be found in a particular place” based on the circumstances set forth in the warrant affidavit. *United States v. Davis*, 94 F.4th 310, 316 (4th Cir. 2024) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Here, the only positive identification of Burnette places him in the area but has him wearing a different colored shirt than Shooter-2. For Burnette to simply have a criminal record and be nearby, in a popular pedestrian area, *apparently dressed differently from Shooter-2*, with a man in a hat, does not lend itself to “fair probability” that Burnette’s home would contain evidence of a crime. *Davis*, *id.*

3. *The Government has not raised a persuasive argument that the Court should revisit its ruling as to intent*

The Government contends that the Court erred when it concluded that the affiant acted with reckless disregard as to whether the magistrate would be misled. Dkt. 63 at 14. The Government points especially to the affirmative identification of Burnette as Shooter-2, made by Probation Officer Rachel Rossman. Despite the affidavit’s mention of Rossman as a supervising officer for Burnette (Dkt. 34-14 at 7), this identification—the *only* affirmative identification of Burnette from the Shooting Video—is entirely absent from the affidavit. But the Government argues that this additional identification negates any recklessness as to whether the affidavit might be misleading. Dkt. 63 at 12. “Regrettably,” the Government states, “TFO Raines did not include his best evidence in the Affidavit.” *Id.* at 1.

At the evidentiary hearing, Rossman stated that she has been familiar with Burnette for some seven years, seeing him at least quarterly. Transcript at 84. She testified that she could not

identify Burnette in still images taken from the Downton Mall color videos. *Id.* at 87. However, she maintained that she could identify him in the Shooting Video, with one hundred-percent certainty, based on his dreadlocks and “the way he was moving his body[,]” “specifically when he sort of bends down and stands back up and continues to run[.]” *Id.* at 87, 91. She stated that she had “been around Mr. Burnette in an office setting, in a field setting, in a community setting” and had “seen him sitting, walking, standing, running.” *Id.* at 91. She conceded that the Shooting Video did not allow her to see Shooter-2’s face or to determine his race. *Id.* at 90.

The Government has not offered any persuasive explanation as for why “best evidence” would be left out of the affidavit. The Court, at the evidentiary hearing, did not find Rossman’s identification from the pixelated movements of Shooter-2 in the video to be an objectively credible identification (though it is of course possible that Rossman was subjectively certain). The Court concludes that TFO Raines must likewise have been unconvinced by the identification—otherwise, it would have been prime material for the affidavit.⁶

While the omission of material does not *by itself* give rise to an inference that the omission was made in reckless disregard of whether it might mislead, *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008), here the Court analyzes the omission in the context of the Rossman identification’s objective unreliability and the qualified identification statements that *were* included in the affidavit. Consequently, the Court finds that the Government’s arguments do not offer sufficient reason to reconsider the suppression order.⁷

⁶ At the evidentiary hearing, TFO Raines stated that he did not include Rossman’s identification because he “believed that [he] had probable cause[.]” (Hearing Transcript, at 28–29). The Court does not find this persuasive in light of the testimony that no other person could affirmatively match Burnette with Shooter-2. *Id.*

⁷ The Government argues that the fact that a black shirt sought in the search warrant shows that the affidavit was submitted with appropriate intent. The Court does not find this reasoning persuasive.

In conclusion, the matters raised by the Government do not persuade the Court that reversing its prior Order is called for. The Motion to Reconsider, Dkt. 63, is therefore **DENIED**.

It is so **ORDERED**.

The Clerk of Court is directed to send this Order to all counsel of record.

Entered this 14th day of August, 2024.



NORMAN K. MOON
SENIOR UNITED STATES DISTRICT JUDGE