

DISTRICT COURT OF OTERO COUNTY STATE OF COLORADO 13 West 3 rd Street, Rm. 207 La Junta, CO 81050	DATE FILED: May 8, 2015 11:36 PM
Plaintiff: PEOPLE OF THE STATE OF COLORADO v. Defendant: JAMES ADAM PATRICK ASHBY	▲ COURT USE ONLY ▲
Attorneys for Defendant: BRUNO, COLIN & LOWE, P.C. Michael T. Lowe, #33489; mlope@brunolawyers.com Carrie L. Slinkard, #40288; cslinkard@brunolawyers.com 1999 Broadway, Suite 4300 Denver, Colorado 80202 Telephone: (303) 831-1099 Facsimile: (303) 831-1088	Case No. 2014CR217 Division: A Courtroom 206
MOTION TO SUPPRESS THE FRUITS OF AN UNLAWFUL SEARCH AND SEIZURE D-7	

COMES NOW, the Defendant, James Adam Ashby, by and through undersigned counsel, and moves this Court pursuant to Rule 12 of the Colorado Rules of Criminal Procedure for an Order suppressing and declaring inadmissible any and all evidence seized by the government, its agents, or agents of its agents, in violation of the constitutional and statutory rights of the Defendant, as set forth below. In support thereof, the Defendant states following:

On December 4, 2014, four Search Warrant Applications drafted and signed by District Attorney James Bullock were submitted to a judge of a court of record in Otero County for review, in accordance with C.R.S. § 16-3-301(1),(2). Attached to each Search Warrant Application and labeled as "Exhibit A," was an Affidavit for Search Warrant drafted by C.B.I. Agent Gregg Slater and sworn to and signed by him. All four Affidavits submitted in connection with the four Search Warrant Applications were identical, both in form and in content.

REDACTED

REDACTED

This Motion challenges the sufficiency of the Affidavits associated with the above described warrants. The Defendant contends the searches conducted pursuant to these warrants are invalid, for two reasons: (1) because the search warrant affidavits contained false material statements that were included in reckless disregard for the truth, and (2) because the search warrant affidavits omitted material information that made otherwise factual statements misleading to the court reviewing the warrant for accuracy and legal sufficiency. The Affidavits drafted and submitted by Agent Slater - in duplicative form - and attached to the warrants in the above captioned case, failed to "establish the grounds for issuance of the warrant or probable cause to believe that such grounds existed," in violation of C.R.S. § 16-3-303(c). Furthermore, the Affidavits failed to establish any nexus or relationship at all between the sought-after records described in the warrants and their relationship to C.B.I.'s investigation of the purported crime described therein.

REDACTED

Though the Defendant contends the search warrants were invalid for failing to establish probable cause within the four-corners of the documents themselves anyway; additionally, the Defendant further contends that suppression of the records received is also warranted for public policy reasons set forth by the courts with respect to the exclusionary rule. Specifically, the Defendant argues that the State should not be allowed to benefit from a third party's violation of Mr. Ashby's constitutional rights;

the Defendant's constitutional rights to privacy and procedural due process under the First, Fifth, and Fourteenth Amendments of the State and federal constitutions. After all, police officers possess a constitutionally protected privacy interest in their own personnel records, which the Colorado Supreme Court describes as the "right to confidentiality." *Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980). That right "encompasses the power to control what we shall reveal about our intimate selves, to whom, and for what purpose." *Id.*

The constitutional violations at issue occurred at the behest of State agents and actors, all of whom were operating on behalf of the State in reference to the pending criminal allegations at the time.

REDACTED

REDACTED

REDACTED

RELEVANT AUTHORITY

As such, the Affiant who obtained the search warrants here acted, at best, with reckless disregard for the truth under the standards as outlined in *Franks v. Delaware*, 438 U.S. 154 (1978). The Affidavits at issue here fail to establish probable cause for the issuance of the search warrants, and though the judicial officer appears to have abandoned her detached and neutral role when approving and signing off on the issuance of the warrants under these circumstances, even in the absence of that allegation, suppression is appropriate where the officers were “dishonest or reckless in preparing their affidavit or simply could not have harbored an objectively reasonable belief in the existence of probable cause.” See *United States v. Leon*, 468 U.S. 897, 926 (1984). Furthermore, an officer’s reliance on a magistrate’s determination of probable cause is only objectively reasonable when reasonable minds could differ, under which the sanction of exclusion might be inappropriate. *Id.* But here, the affidavit is wholly insufficient with respect to the nexus between the crime stated in the underlying investigation and the bases under which the records in the warrant were being sought. When coupled with the material omissions in the Affidavits drafted by Agent Slater, along with the intentionally misleading statements included within the four corners of the warrant, any application by this Court of the good faith exception under these circumstances is inappropriate and should not apply to allow the prosecution the ability the information in their case in chief at trial. *Id.*

Pursuant to *Franks*, where a defendant makes a substantial preliminary showing that a false statement “knowingly and intentionally,” or “with reckless disregard for the truth,” was included

by the affiant in the warrant affidavit, "and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Franks* at 155-156. Under *Franks*, when a statement is held to be made with reckless disregard for the truth, the affidavit's false material is set to one side, and the remaining content is tested for probable cause. *Id* at 156. This procedure is unworkable for an omission, however, so instead of setting the material to the side, the omitted truths are inserted, and probable cause is then tested. *Stewart v. Donges*, 915 F.2d 572, 583. "The omission of facts material to a magistrate's determination of probable cause constitutes a misrepresentation or a misstatement because it interferes with the ability of the magistrate to consider the totality of the circumstances," as required by *Illinois v. Gates*, 462 U.S. 213 (1983).

If, at that hearing, the allegation of false statements or reckless disregard "is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Franks* at 156. At the time defendant submitted his affidavit and arrested plaintiff, it was a clearly established violation of plaintiff's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause.

CONCLUSION

The classic admonition in *Boyd v. United States*, 116 U.S. 616, 635 (1886) is worth repeating here:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Mr. Ashby has made a sufficient preliminary showing in this case that the false and misleading statements coupled with Agent Slater's material omissions, establish a reckless disregard for the truth of the contents of the Affidavit, entitling him to a hearing on the matter.

WHEREFORE, the Defendant asks that this Motion be set for hearing at the earliest convenient time, at which hearing the Defendant may be permitted to present evidence to make a substantial preliminary showing that the Affidavit for Search Warrant contains either false statements or statements made with reckless disregard for the truth, and that the Government be

required to establish the legality of the searches, such that any tangible or intangible evidence determined to be the fruit of an unlawful search concerning the Defendant be suppressed.

DATED this 8th day of May, 2015.

Respectfully Submitted,

BRUNO, COLIN & LOWE, P.C.

By: s/Michael T. Lowe
Michael T. Lowe
Carrie L. Slinkard
Attorneys for Defendant

In accordance with C.R.Crim.P. 49.5(g), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by the other parties, or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2015, a true and correct copy of the foregoing **MOTION TO SUPPRESS THE FRUITS OF AN UNLAWFUL SEARCH AND SEIZURE** was e-filed and e-served via ICCES E-System, addressed to the following:

James R. Bullock
District Attorney
Sixteenth Judicial District
jbullock@dal6co.gov

s/Marla A. Brock
Marla A. Brock, Paralegal
Mbrock@brunolawyers.com

District Court, Otero County, Colorado Court Address: 13 West Third Street La Junta, CO. 81050	FILED IN COMBINED COURT OTERO COUNTY, COLO. DATE FILED: May 8, 2015 11:36 PM DEC 04 2014
PEOPLE OF THE STATE OF COLORADO vs.	
Defendant: JAMES ADAM PATRICK ASHBY	
	▲ COURT USE ONLY ▲ Case Number: 14CR217
	Div.:
SEARCH WARRANT APPLICATION	

COMES NOW the District Attorney for the 16th Judicial District of Colorado and requests that this Court issue a Search Warrant for the WHEAT RIDGE POLICE DEPARTMENT located at 7500 WEST 29TH STREET, in the City of WHEAT RIDGE, County of JEFFERSON, and State of Colorado, 80033 pursuant to Colorado Rule of Criminal Procedure 41 and shows the Court as follows:

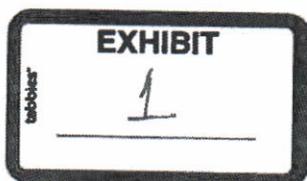
1. Rule 41(c) provides that upon the request of the District Attorney's Office the Court may issue a Search Warrant provided probable cause, in writing, is shown.
2. Attached hereto is an Affidavit for Search Warrant setting forth written probable cause as concerns this Defendant and the commission of the offense(s) in question. This affidavit is marked as "Exhibit A".

WHEREFORE, the undersigned requests that the appropriate Search Warrant as concerns this matter be issued.

Respectfully submitted this 4th day of December, 2014.

JAMES BULLOCK
 DISTRICT ATTORNEY

BY: *James B. Bullock*
 JAMES BULLOCK
 DISTRICT ATTORNEY



District Court, Otero County, Colorado Court Address: 13 West Third Street La Junta, CO. 81050	FILED IN COMBINED COURT OTERO COUNTY, COLO.
PEOPLE OF THE STATE OF COLORADO vs.	DEC 04 2014
Defendant: JAMES ADAM PATRICK ASHBY	▲ COURT USE ONLY ▲
	Case Number:
	Div.:
AFFIDAVIT FOR SEARCH WARRANT	

EXHIBIT "A"

Your affiant is an Agent with the Colorado Bureau of Investigation and is responsible for investigating violent crimes as well as Officer Involved Shootings. Your affiant has gained personal knowledge of this incident through the review of official police records/reports, interviews with witnesses, review of evidence and an interview with Officer James Adam Patrick Ashby.

On October 12, 2014 at approximately 0200 hrs, Rocky Ford Police Officer James Adam Patrick Ashby (hereinafter referred to as "Officer Ashby") shot and killed Jack J. "Jacquez" (hereinafter referred to as "Jacquez") inside "Jacquez's" home at 400 North 3rd Street located in the City of Rocky Ford, County of Otero and State of Colorado. Due to the fact "Officer Ashby" was on duty at the time of the shooting, the Otero County Critical Incident Team, with the assistance of Investigative Agents and Crime Scene Agents with the Colorado Bureau of Investigations (hereinafter referred to as CBI), was activated for the purpose of investigation the circumstances leading up to, during and after the shooting of "Jacquez". As a result of the shoot teams' investigation, sufficient evidence was obtained to believe probable cause existed in criminally charging Officer James Adam Patrick Ashby with the murder of Jack J. "Jacquez". On November 14, 2014 an arrest warrant affidavit for "Officer Ashby" was presented to Otero County District Court Judge Michael McDonald. After reviewing the affidavit, Judge McDonald signed the affidavit authorizing the arrest of "Officer Ashby" on the charge of Second Degree Murder. Later that same day and subsequent to the issuance of that arrest warrant, "Officer Ashby" was arrested.

REDACTED

REDACTED

Therefore, based on the information contained in this affidavit, your affiant is requesting the Court issue a warrant for "Officer Ashby's" complete application/background file from the following agencies:

Canon City Police Department
161 Justice Center Road
Canon City, CO 81212

Golden Police Department
911 10th Street
Golden, CO 80401

Wheat Ridge Police Department
7500 West 29th Avenue
Wheat Ridge, CO 80033

Sheridan Police Department
4101 South Federal Boulevard
Sheridan, CO 80110

002130

Furthermore, due to the nature of this case and the ongoing investigation, your affiant respectfully requests the Court seal this affidavit and subsequent search warrants.

James Stettin (31)
Affiant

Sworn to before me this 4th day of December, 2014.

Michael Seligson
JUDGE



REDACTED

DATE FILED: May 14, 2015 3:13 PM

**IN THE DISTRICT COURT
FOR THE SIXTEENTH JUDICIAL DISTRICT**

CASE No. 2014CR217

PEOPLE OF THE STATE OF COLORADO
Plaintiff,

v.

JAMES ADAM PATRICK ASHBY
Defendant.

AFFIDAVIT OF MARLA A. BROCK

I, Marla A. Brock, being over the age of 18 years and being first duly sworn, swear or affirm:

1. That I am employed by the law firm of Bruno, Colin and Lowe P.C.
2. That I am the paralegal assigned to assist attorneys Michael T. Lowe and Carrie L. Slinkard with the criminal proceedings in *People v. James Adam Patrick Ashby*, Case No. 2014CR217, currently pending in the District Court for the Sixteenth Judicial District in the County of Otero, State of Colorado.
3. That my responsibilities as a paralegal are to provide assistance with substantive legal work to attorneys and in various legal capacities, including: conducting factual and legal research, establishing a chronology of facts, performing initial case assessments, creating legal documents, ensuring copies of documentation are properly filed and distributed, creating indexes and appendices, sorting and organizing discovery, creating indexes and appendices, preparing binders and exhibits for trial, communicating with clients and witnesses, and managing cases.
4. That I have performed and continue to perform the above-listed tasks with respect to *People v. James Adam Patrick Ashby*, Otero County Case No. 2014CR217.
5. That I have received, reviewed, and logged all discovery provided by the District Attorney's Office to attorneys Michael T. Lowe and Carrie L. Slinkard, in both paper and media form, to date.
6. That this discovery did include Affidavits for Search Warrants ("Affidavits") that were authored and signed by C.B.I. Agent Gregg Slater and filed with the Otero County Combined Courts on December 4, 2014.



10. That the following information was omitted from the Affidavits and is material to the finding of probable cause:

- a) Officer Ashby was declared a "Fully Acceptable Candidate" according to the psychological evaluation prepared for the Walsenburg Police Department, and scored as an "Above Average Applicant" according to the psychological evaluation prepared for the Rocky Ford Police Department.
- b) The final findings reported in the psychological evaluation prepared by Dr. Oliver Gysin of Psychological Resources, Inc., for the Walsenburg Police Department on October 21, 2008, contains the following additional information about the manner in which Officer Ashby acts:
 - The section entitled "*Employment Recommendations from Psychometric Data*" provides the following "accurate picture of [the applicant's] functioning:"
 - (i) "INTELLIGENCE: High average for a public safety position"
 - (ii) "INTERPERSONAL STYLE: Warm, outgoing, adventurous, outspoken; understanding, permissive"
 - (iii) "BEHAVIOR CONTROL: Stable, confident"
 - (iv) "STRESS TOLERANCE: Placid, secure; relaxed"
 - (v) "PROBLEMS OF SELF CONCEPT: None evident"
 - (vi) "PROBLEMS OF REALITY PERCEPTION: None evident"
 - (vii) "CAREER ORIENTATION: Seeks personal contact on the job; shows leadership potential"
 - (viii) "SCORE LOGIC: Adequate mental ability to learn and understand public safety procedures well; no indicated problems of emotional fitness"
 - (ix) "On a standard ten-point scale where '10' is extremely community oriented and '1' is extremely oriented toward 'hard-nosed' enforcement, Mr. Ashby shows a score of 6."

7. That the Affidavits have been reviewed by me in their entirety, along with all the extrinsic data and documentation referenced in the body of the Affidavits by Agent Slater therein.
8. That based on my review of the discovery in the above captioned case, as well as the extrinsic data and documentation referenced in the body of the Affidavits, Agent Slater omitted material information that I believe would have prevented the signing judicial officer from harboring an objectively reasonable belief in the existence of probable cause.
9. That Agent Slater included the following statements of fact in the Affidavits as support for his contention that probable cause existed for the issuance of search warrants for Officer Ashby's "complete application/background file":
 - a) "Although found to be an acceptable candidate for hire, both psychological evaluations indicate 'moderate' areas of concern with regard to 'Officer Ashby's' personality."
 - b) "[I]n 'Officer Ashby's' Walsenburg psychological evaluation, Dr. Oliver Gysin of Psychological Resources, Inc. reports in his October 21, 2008, evaluation of 'Officer Ashby' that 'Officer Ashby' has 'Character Flaws: stretches limits, seeks excitement, becomes bored easily.'"
 - c) "[I]n 'Officer Ashby's' Rocky Ford psychological evaluation, Kenyon P. Jordan, PhD of Police Consulting Psychologists reported on June 20, 2014 that he has 'moderate concerns' with 'Officer Ashby's' 'self-control' as well as 'moderate concerns' with 'Officer Ashby's' overall adjustment to his (Ashby's) 'ability to adapt to life, work, social and personal relationships, challenges and problems in a socially acceptable and effective way.'"
 - d) "'Officer Ashby' was disqualified as a candidate for the Aurora Police Department as a lateral police officer because he failed to meet the minimum requirements as a lateral police officer."
 - e) "'Officer Ashby' was disqualified as a candidate with the Colorado Springs Police Department for failing to provide appropriate paperwork necessary to complete his application."
 - f) "Your affiant contends the psychological examinations previously mentioned indicate that 'Officer Ashby' acted in a manner consistent with the findings contained in the examinations."

- (x) Officer Ashby was categorized by the psychological as an “above average applicant,” was “recommended for hire,” and was further described as possessing “important strengths” with “no serious concerns noted.”
- The section entitled “*Stress Management Suggestions from Psychometric Data*” states the following:
 - (i) “Mental health status seems normal.”
 - (ii) “FAVORABLE BEHAVIOR PATTERNS: Able to take effective action to meet problems... exercises appropriate control over his behavior, takes normal responsibility for independent action, and maintains an objective outlook.”
 - (iii) “UNFAVORABLE BEHAVIOR PATTERNS: No specific items”
 - (iv) “SUGGESTIONS FOR BACKGROUND REVIEW OR INTERVIEW: Mr. Ashby’s emotional life is apparently healthy and normally effective. He seems comfortable in his life situation and able to maintain his behavior within acceptable limits.”
 - (v) “TEMPERAMENT AND HABITS: Mr. Ashby... takes his responsibilities more seriously than the average person, but without apparent excessive moralizing. Mr. Ashby is neither particularly active nor passive, responding mildly as the situation predisposes, with little or no personal push or reluctance.”
- c) The final findings reported in the psychological evaluation prepared Dr. Kenyon P. Jordan of Police Consulting Psychologists reported on June 20, 2014, for the Rocky Ford Police Departments contain the following information about Officer Ashby’s demeanor:
 - The information specific to this psychological test “can be considered an accurate reflection of his current psychological status and the way in which he is likely to interact with others.” The paragraphs that follow represent the final determinations made by the evaluator with respect to Officer Ashby.
 - The section entitled “*Personality and Basic Functioning*” reports the following information with respect to each category, all of which describe Officer Ashby as falling “within acceptable limits, with little or no concern:”

(i) "INTEGRITY: adherence to ethical standards, and complete information...with no substantive omissions or variations noted during interview and no apparent misstatements or contradictions noted."

(ii) "EMPLOYMENT HISTORY: no evidence of work related problems, turnovers, terminations, or disciplinary action."

(iii) "PERSONAL RESPONSIBILITY: No history of irresponsible behavior."

(iv) "LEGAL HISTORY: No history of arrests or involvement with criminal activity."

(v) "EMPATHY & TOLERANCE: Understands others' feelings and ideas; listens to others, shows appropriate concern, is nonjudgmental."

(vi) "COMPLIANCE & CONFORMITY: Conforms to societal expectations; follows rules easily, cooperative attitude."

- The section entitled "*Mental and Emotional Adjustment*" reports the following information with respect to each category, all of which describe Officer Ashby as falling "within acceptable limits, with little or no concern:"

(i) "AGGRESSIVE BEHAVIOR: Capable of using physical force or restraint when necessary, but never uses physical force unnecessarily or inappropriately. Maintains self-discipline and composure, and uses good judgment in emotional or chaotic situations."

(ii) "MATURITY: Behaves in an adult manner; displays attitudes and behavior reflecting responsibility and concern about performing well on the job."

- The "moderate concerns" described by Agent Slater regarding Officer Ashby's "ability to adapt to life, work, social and personal relationships, challenges and problems in a socially acceptable and effective way," were clarified further in the very next sentence of the psychological report, which states as follows: "evidence of adjustment concerns in the candidate's

past... appear to be resolved or inconsequential with respect to current functioning.”

- With respect to the “*Testing Results*” reported in the evaluation, Officer Ashby’s results indicate an “emphasis on the traits of responsibility, conformity, and self-control.” Further, “[t]here was no indication of any serious characterological concerns,” and the “clinical scales fall within normal limits and there are no indications of emotional or psychological disorder.”
- With respect to the “*Formulation and Overall Rating*,” a review of “his developmental period was not suggestive of any obvious behavior problems... Results from the psychological testing indicated an adequate level of cognitive ability and a number of favorable personality traits. The interview and data were not suggestive of any psychological impairments... and suggests that Mr. Ashby is emotionally stable and psychologically fit for employment as a police officer. He appears to be an above-average applicant... Mr. Ashby is recommended for the position of police officer.”

FURTHER AFFIANT SAYETH NAUGHT.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

Markell Brooks

STATE OF COLORADO)
)ss.
COUNTY OF Denver)

SUBSCRIBED AND SWORN to me before this 8th day of May, 2015 by.

[Signature]
Notary Public

My Commission expires: 5/23/18



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REDACTED

EXHIBIT 3