

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

FEB 06 2009

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANA EDWARD CRUIKSHANK, aka  
Robert Rush,

Defendant - Appellant.

No. 08-50101

D.C. No. 2:04-cr-00836-GHK-1

MEMORANDUM\*

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PRINCE KENDRICK BYRD,

Defendant - Appellant.

No. 08-50103

D.C. No. 2:04-cr-00836-GHK-2

Appeal from the United States District Court  
for the Central District of California  
George H. King, District Judge, Presiding

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Submitted February 3, 2009\*\*  
Pasadena, California

Before: SILVERMAN and CALLAHAN, Circuit Judges, and MILLS\*\*\*, District Judge.

Dana Cruikshank and Prince Byrd appeal the district court's denial of their respective motions to suppress. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the denial of motions to suppress de novo, *United States v. Miranda-Guerena*, 445 F.3d 1233, 1236 (9th Cir. 2006), and the district court's underlying factual findings for clear error. *United States v. Mayer*, 530 F.3d 1099, 1103 (9th Cir. 2008). Because the parties are aware of the facts in this case, we recount them only as necessary, and we affirm.

Cruikshank's warrantless arrest was supported by probable cause. Probable cause exists when "under the totality of circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that the defendant had committed a crime." *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (internal quotation and formatting omitted). Probable cause may be premised on "the collective knowledge of all the officers involved in the

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\*\* On January 14, 2009, the panel granted appellants' unopposed joint motion to submit this case without oral argument. *See* Fed. R. App. P. 34(a)(2).

\*\*\* The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

criminal investigation.” *United States v. Ramirez*, 473 F.3d 1026, 1032 (9th Cir. 2007).

Here, the officers involved with the investigation knew that large quantities of phenylmagnesium bromide (“PMB”), an industrial chemical solvent, was being delivered to Captivator. They knew that Captivator had no apparent legitimate use for PMB, and that PMB was a precursor chemical used in manufacturing phencyclidine (“PCP”).<sup>1</sup> Officers previously recovered PMB linked to Captivator in a PCP laboratory. They also learned that Captivator paid for the PMB with cashier’s checks, and used false names when signing for the delivery. In the officers’ experience, these circumstances indicated an effort to evade detection by law enforcement. Further, in response to subpoenas, the company that manufactured and shipped the PMB to Captivator advised the officers that more PMB was to be delivered to Captivator the day of Cruikshank’s arrest.

The officers went to Captivator, observed Cruikshank loading objects that appeared to be five-gallon containers of PMB into his car, and followed him to a roadside meeting with Byrd. They observed what appeared to be a cash transaction between the two men, and saw Cruikshank put two containers into the boat being

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<sup>1</sup> PCP is a Schedule III controlled substance. *See* 21 U.S.C. § 812. PMB can be made or purchased in finished form, and may be legitimately used to manufacture pharmaceuticals, insecticides and hydrocarbons.

towed by Byrd's truck. They observed Cruikshank return to Captivator, and load more containers of PMB into his car. They followed him and arrested him near his home.

These facts, collectively known by the officers at the time of Cruikshank's arrest, support the reasonable inference that there was "a fair probability" that Cruikshank was committing a crime. *Lopez*, 482 F.3d at 1072. Specifically, the officers could reasonably infer that Cruikshank, who had no apparent legitimate use for large quantities of PMB, who had received PMB from a company linked to PCP laboratory operators, and who sold some of it to Byrd on the street for cash, knowingly possessed the PMB with reason to believe it would be used to make PCP. *See* 21 U.S.C. § 843(a)(6). That Cruikshank was arrested for violating California Health & Safety Code § 11383(b) – possession of PMB with the intent to manufacture PCP – does not change the analysis. *See Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) ("subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause"). Accordingly, we affirm the district court's determination that probable cause supported Cruikshank's warrantless arrest.

Following Cruikshank's arrest, he signed a consent form to have his house searched. Cruikshank's assertion that the consent was involuntary is unavailing

given his failure to point to evidence establishing that the district court's factual findings regarding "voluntariness" were clearly erroneous.

Voluntariness is "to be determined from the totality of all the circumstances." *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). We generally consider five factors in assessing voluntariness:

(1) whether defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the defendant was notified that she had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained.

*United States v. Soriano*, 361 F.3d 494, 502 (9th Cir. 2004) (quoting *United States v. Jones*, 286 F.3d 1146, 1152 (9th Cir. 2002)). These factors "are only guideposts, not a mechanized formula to resolve the voluntariness inquiry," *Soriano*, 361 F.3d at 502, and "it is not necessary for all five factors to be satisfied in order to sustain a consensual search." *United States v. Cormier*, 220 F.3d 1103, 1113 (9th Cir. 2000).

Here, the district court found that although Cruikshank was in custody when he signed the form, and had not yet been given *Miranda* warnings, the arresting officers did not have their guns drawn, and did not tell Cruikshank that a warrant could be obtained. The court resolved the conflicting testimony on these latter two

points, in part, based on the witnesses' demeanor at the evidentiary hearing. Thus, the district court's findings are entitled to substantial deference. *See Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). Contrary to the district court's findings, the record shows that Cruikshank testified that he was told he did not have to consent to the search. Despite the district court's error on this point, this fact weighs in favor of the conclusion that Cruikshank's consent was voluntary. Based on the foregoing, we affirm the district court's determination that the consent was voluntary.

We also affirm the district court's findings regarding the scope of Cruikshank's consent. *See United States v. Cannon*, 29 F.3d 472, 477 (9th Cir. 1994) (trial court's findings about the scope of consent are reviewed for clear error). Here, the issue of scope hinges on Cruikshank's assertion that the consent form did not authorize a search for firearms, and that the phrase "any firearms" was added after he signed the form. Noting that any firearms discovered during the search for PMB would have likely been discoverable under the "plain view" doctrine, and finding Detective Fahey's testimony about the form credible, the district court found that the phrase "any firearms" was included on the form when Cruikshank signed it. Cruikshank fails to demonstrate that these findings were clearly erroneous.

Finally, we affirm the district court's determination that probable cause supported the affidavit underlying the search warrant for Byrd's house. A search warrant is supported by probable cause if, in light of all the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). An affidavit supporting a search warrant "need only enable the magistrate to conclude that it would be reasonable to seek the evidence in the place indicated by the affidavit." *United States v. Taylor*, 716 F.2d 701, 706 (9th Cir. 1983) (internal quotation omitted). Here, the affidavit supporting the search warrant explained the connection between known PCP laboratory operators and Captivator. It noted Captivator's lack of any apparent, legitimate use for PMB, and described what appeared to be a cash purchase of PMB by Byrd from Cruikshank earlier that day. The affidavit also described the officers' continuous surveillance of Byrd and his return home, where they observed vehicles coming and going, some of which appeared to have been loaded with PMB. These facts establish a fair probability that evidence of a crime would be discovered at Byrd's home.

**AFFIRMED.**