

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
Plaintiff: RUBY JOHNSON, v. Defendant: GARY STAAB, an officer of the Denver Police Department, in his individual capacity, and GREGORY BUSCHY, an officer of the Denver Police Department, in his individual capacity.	▲ COURT USE ONLY ▲
David Murphy, #20928 Ashley Kelliher, #40220 Assistant City Attorneys Denver City Attorney's Office, Litigation Section 201 West Colfax Ave., Dept. No. 1108 Denver, CO 80202-5332 David.Murphy@denvergov.org Ashley.Kelliher@denvergov.org Telephone: (720) 913-3100 Facsimile: (720) 913-3155 <i>Attorneys for Defendant Gregory Buschy</i>	Case Number: 2022CV33434 Courtroom: 269
DEFENDANT GREGORY BUSCHY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	

Defendant, Sergeant Gregory Buschy ("Defendant Buschy"), through undersigned counsel, pursuant to C.R.C.P. 56(c), respectfully submits this Reply In Support of his Motion For Summary Judgment.

**I.
LEGAL ARGUMENT**

**PLAINTIFF'S UNLAWFUL SEARCH CLAIM SHOULD BE
DISMISSED, AS A MATTER OF LAW, BECAUSE THE**

**WARRANT WAS SUPPORTED BY PROBABLE CAUSE,
AND SINCE PLAINTIFF CANNOT DEMONSTRATE IT
CONTAINED ANY FALSE STATEMENTS OR MATERIAL
OMISSIONS MADE KNOWINGLY OR WITH RECKLESS
DISREGARD FOR THE TRUTH.**

Plaintiff urges the Court to deny the Motion because “credibility questions” exist in terms of whether to believe the sworn testimony of the Defendants and other witnesses. The Plaintiff also urges the Court not to examine each allegedly deficient statement separately and, instead, asks the Court to examine the totality of all such statements together. Plaintiff’s arguments lack merit.

The Court is duty-bound to review the Affidavit and first determine whether it contains any erroneous statements. *Johnson v. Staab*, 571 P.3d 939, 944 (Colo.App.2025). Statements made negligently or due to a good faith mistake do not require excision from the affidavit. *Id.* If the Court finds any erroneous statements, it must then determine the source of the error for each statement. *Id.* It is imperative that the Court make specific findings why the false statements are in the Affidavit, meaning determining whether the error was intentional or made with reckless disregard for the truth. *Id.* Plaintiff must prove by a preponderance of the evidence that any errors were made knowingly or with reckless disregard for the truth. *Id.* A false statement is made with reckless disregard for the truth if the person “entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity.” *Id.* at 946. With respect to a material omission, recklessness may be inferred from the omission of facts which are “clearly critical” to a finding of probable cause. *DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990). When applying this legal framework, Sgt. Buschy is entitled to summary judgment, as a matter of law.

The record is devoid of evidence that Det. Staab knowingly placed any false statements in the Affidavit or that Sgt. Buschy approved it knowing it contained false information. Lacking any

evidence of knowing falsehoods, Plaintiff instead urges the Court to adopt a watered-down definition of “reckless disregard” to mean simply any facts “the judge would wish to know.” Response at p.24. From there, Plaintiff argues every fact she ascribes importance to is a fact which a court or jury “would wish to know.” The path urged by Plaintiff continues to be erroneous.

The case which Plaintiff relies on for the “wish to know” argument is *United States v. Jacobs*, 986 F.2d 1231(8th Cir. 1993), which involved officers who obtained a search warrant to search the defendant’s Fed Ex package after their drug sniffing dog showed an “interest” in the package but failed to respond with a formal “alert” which it was trained to do when it smelled drugs. A second dog was brought in and likewise failed to “alert” to the package. Nonetheless, the officer prepared a search warrant which only mentioned the first dog and stated that dog showed an “interest” in the package. The officer omitted the fact the dog failed to alert and did not mention the second dog’s failure to “alert.” The 8th Circuit noted the officer “knew that the dog had failed to alert to the box before he submitted the affidavit to the magistrate judge, yet he did not include this information. Any reasonable person would have known that this was the kind of thing the judge would wish to know.” *Id.* at 1235.

The present case is not at all factually similar. In *Jacobs*, the entire premises for searching the package was because of the response of a drug sniffing dog. But the officer swearing out the affidavit knew the dog didn’t alert to the package and yet elected to withhold that critical information from the magistrate. The information was critical to the entire basis for the search and the officer possessed it, and thus the concept that the judge, too, “would wish to know” about it. Conversely, in the present case there is no evidence either Defendant possessed information that the Find My App was inaccurate or that the phone hadn’t been pinging at Plaintiff’s home and yet

withheld that information from the reviewing magistrate judge in order to purposefully and wrongfully obtain the search warrant anyway.

Beard v. City of Northglenn, 24 F.3d 110 (10th Cir. 1994), cited by Plaintiff, supports granting summary judgment. In *Beard*, a police officer investigating a bank fraud enlisted the aid of a handwriting expert and incorrectly informed the expert the plaintiff's signatures appeared on multiple bank documents, causing the expert to mistakenly conclude all documents contained plaintiff's handwriting. The officer used that conclusion to swear out an arrest warrant and arrest the plaintiff. Five months later, after discovering the plaintiff's innocence, the charges were dropped. Plaintiff sued, alleging the affidavit used to secure his arrest contained false information and omitted material facts. The trial court granted the officers summary judgment, finding none of the errors were made knowingly or with reckless disregard for the truth.

While noting the plaintiff was "the innocent victim of an extraordinary case of mistaken identity," the 10th Circuit affirmed, finding no constitutional violation. Despite the officers' errors, the Court concluded the plaintiff failed to present evidence that the officers "knowingly or recklessly prevaricated." *Id.* at 115. It was beyond cavil that the officer made a mistake which had an impact on the issuance of the warrant, but the Court noted under its Fourth Amendment analysis the inquiry "is focused neither on the existence nor the consequence of [the officer's] error but on the intention behind it." *Id.* But there was "no direct evidence in the record suggesting [the officer] entertained any doubt about the veracity of his statement concerning the signatures when he made it." *Id.* at 116. In rejecting the testimony of plaintiff's expert that the officer had no factual basis for making the erroneous statement about the signatures, the Court noted that testimony did nothing to illuminate the officer's intentions and provided no basis to conclude the

“mistake was the result of any invidious animus.” *Id.*

Beard further argued that his constitutional rights were violated because the officers failed to conduct a more thorough investigation. In rejecting that argument, the 10th Circuit held “**no Fourth Amendment violation accrues simply because an officer failed to delve into the case before him as fully as we, viewing the matter at a comfortable remove, might have hoped.**” *Id.* at 117. (Emphasis added).

In the case at bar, Plaintiff makes all of these same unavailing arguments. She points to testimony from her police practices witness that there was purportedly no urgency with the investigation, and that the Defendants should have performed an internet search, should have called technicians familiar with the Find My App, or should have demanded more screenshots from Mr. McDaniel. But none of these arguments address the inquiry at issue in the Motion. None is evidence of either Defendant prevaricating and none is evidence of the Defendants having doubts about the veracity of any of the statements in the Affidavit. As such, Plaintiff’s arguments completely miss the target.

A. Erroneous narrative of there being an 11:30 am ping away from plaintiff’s home.

Plaintiff argues that the stolen phone had pinged at Falcon Park at 11:30 am; argues that Sgt. Buschy was aware of that ping; and, argues that by signing the Affidavit which states the phone arrived at Plaintiff’s home at 11:24 am and did not move thereafter, he knowingly allowed a false statement in the Affidavit. Plaintiff also argues Sgt. Buschy admitted this falsity in his appellate brief. Plaintiff argues that while the Defendants disagree with this narrative, she is entitled to all reasonable inferences drawn in her favor and, thereby creates a factual question. Ironically, in this case of alleged falsehoods Plaintiff’s narrative is precisely that – patently false.

Initially in her Response Plaintiff correctly notes that the evidence about the stolen phone pinging at Falcon Park was NOT the time of the actual pinging, but rather merely the time in which the information about that pinging “**was conveyed to dispatch**” by Officer Rop Monthathong. Response at p.9, para.10. However, there is absolutely no evidence anywhere in the record, and Plaintiff points to none, which states that the 11:30 reference is the time when the stolen phone was **actually pinging at that park**. On the contrary, even Plaintiff’s own Exhibit F makes clear that the 11:30 time reference is not the time when the phone was pinging at that location but only the time it was reported to dispatch by Officer Monthathong. It is a physical impossibility that he would have been able to report anything to dispatch until he first had a conversation with Mr. McDaniel in which to learn the information. *See* Plaintiff’s Exhibit F, 145:22-25, 146:1-16.

Completely absent from the record is the time when Mr. McDaniel actually saw the phone pinging at Falcon Park, or even the time of his subsequent call with Officer Monthathong after he learned about that pinging. Despite a complete lack of evidence in the record of what time the phone was actually pinging at Falcon Park, Plaintiff perpetuates the false narrative that the time entry in the dispatch report is synonymous with when the phone was actually pinging at that park. Here, where Plaintiff must prove this alleged falsehood by a preponderance of the evidence, i.e., that the phone pinged at a new location after arriving at Plaintiff’s home, she cannot do so by pointing to the time this ping was typed into the computer by DPD dispatch, particularly where that information had to first be relayed to dispatch by Officer Monthathong, and where Officer Monthathong could only discover that information by first having a telephone call with Mr. McDaniel and the record is devoid of when either of those things actually occurred. Moreover, the undisputed testimony is that when Det. Staab prepared the Affidavit and when Sgt. Buschy

reviewed it, neither had even seen the dispatch report from the prior day involving Officer Monthathong.

Similarly specious is Plaintiff's argument that Sgt. Buschy admitted in his appellate brief that the phone had pinged at Falcon Park at 11:30 am. The sentence referring to the Falcon Park pinging is situated directly under the paragraph heading entitled "claimed misstatements," because it is precisely that – an unsubstantiated theory of Plaintiff's.

B. Exemplary damage award is meaningless

Plaintiff recycles her argument made on appeal that the previous jury's verdict awarding punitive damages should somehow relieve her of her obligation to prove knowing or reckless disregard. Aside from the fact that the verdict has been nullified, the Court of Appeals expressly rejected this argument, *Johnson*, at 946-47, and it's ruling is the law of the case.

II.

ALLEGEDLY FALSE/OMITTED STATEMENTS

Where Plaintiff's Response devotes in excess of 20 pages to unresponsive record citations, contains numerous statements without record cites, and includes additional record citations in the legal argument section, page limitations do not permit a line-by-line response to each citation and/or unsupported assertion. Fortunately, however, very few citations warrant any response for purposes of the Motion or this Reply. Where germane, those citations are addressed below.

ALLEGEDLY FALSE STATEMENTS

A. The Affidavit reported the "first" ping as occurring at 11:24 am and the "last" ping at 3:55 pm.

These were not false statements. The Motion explicitly notes that these were statements in the Affidavit which Det. Staab reported he was told by Mr. McDaniel. To prove they were false

Plaintiff must prove by a preponderance that they were never actually made, or that Mr. McDaniel said something different than what Det. Staab reported. Plaintiff has not presented evidence of either. Instead, Plaintiff criticizes Det. Staab for not recording the entire conversation with Mr. McDaniel and claims his failure to record the entire conversation creates “a credibility question” such that the jury could simply reject his testimony. Plaintiff’s failure to affirmatively present evidence that what was reported was false is fatal. Moreover, Det. Staab explained that his reference to the pings as being the “first” or “last” ping was merely because he was referring to the times the phone pinged at Plaintiff’s home, which was the subject of the warrant. It cannot be seriously argued that such statements, even if allegedly false, were made with invidious animus. That is particularly true where there is objectively reasonable evidence of Mr. McDaniel expressly stating in his phone call with Det. Staab that the phone pinged “from” 11:24 am until the “last” ping at 3:55 pm.

B. The phone did not move between the first and last pings.

As with the above arguments, Plaintiff has not presented any evidence, much less credible evidence, that this was a false statement. As noted above, Plaintiff’s stubborn reliance upon the false narrative that the phone pinged at Falcon Park at 11:30 am is unsupported by the record. The evidence in the record, as Plaintiff concedes, establishes nothing more than that being the time when dispatch entered the notation into the computer. The record is devoid of any evidence of when Mr. McDaniel received information about the phone pinging at Falcon Park and devoid of what time Mr. McDaniel thereafter spoke with Officer Monthathong to relay that information. Nor is there any information as to the time when Officer Monthathong first called dispatch. So, Plaintiff’s reliance on the dispatch time is misplaced, and is not evidence by a preponderance of

when the phone pinged at Falcon Park. Since that is the only basis for this statement being allegedly false, Plaintiff's argument must fail, as a matter of law. Moreover, no evidence exists to show the statements were made knowing they were false or made while the Defendants had serious doubts as to their truthfulness.

C. The truck could have been in the garage.

Again, Det. Staab reported in the Affidavit that this was a statement made to him by Mr. McDaniel, and again Plaintiff offers no evidence of its falsity. Rather, Plaintiff's only response is to criticize Det. Staab for not capturing that statement on his audio recording. But there is no requirement that every statement from a witness be recorded before it can be placed into an affidavit. Nor does Plaintiff's criticism suffice as affirmative evidence the statement was never made. Where Plaintiff fails to present any evidence, much less a preponderance of evidence, that this statement was false, it must remain in the Affidavit.

D. Mr. McDaniel had used the Find My App previously.

Plaintiff points out that Mr. McDaniel informed Sgt. Buschy that he had used the Find My App previously to locate his phone on a job site, and separately informed Det. Staab that he had used the App to locate his wife's phone in a field. Response at p18, para.36. Thus, based on Plaintiff's own argument there was evidence that Mr. McDaniel used the App on more than one occasion previously. If so, stating in the Affidavit that Mr. McDaniel had used the App on prior "occasions" would be entirely accurate, and Plaintiff's argument must fail. But even assuming Mr. McDaniel had only recounted one prior use of the App, Plaintiff offers absolutely no evidence that Det. Staab's use of the plural "occasions" was anything other than a typographical error, and certainly there is no evidence his use of the word "occasions" was made knowingly it to be false

or while having a high degree of awareness of its probable falsity. The best Plaintiff can do is point to the trial testimony of Det. Staab wherein he stated that he did not know why he used the plural of the word “occasions.” Plaintiff apparently urges the Court to “infer” from that testimony that the reason for the mistake must have been to purposefully mislead the reviewing court. However, drawing reasonable inferences from the testimony does not cloak the Court with the authority to completely rewrite the testimony. Moreover, even assuming the typographical error were corrected to only say Mr. McDaniel had used the Find My App on a single prior “occasion” to successfully locate a missing cellphone, that change would have no impact whatsoever on the existence of probable cause. As such, Plaintiff’s argument must be rejected.

E. The photo of the red dot signified the phone was in the home.

Plaintiff’s response to this assertion is to point to testimony from her cellphone witness at trial about what he believes both the dot on Plaintiff’s home and the adjacent blue circle on the screenshot meant. Even assuming, for purposes of argument, that his testimony was accurate, which Det. Buschy denies, it is not evidence of the precise thing this case was remanded for – a showing that Det. Staab made the statement knowing it to be false, or while having serious doubts about its truthfulness. Plaintiff presents no evidence that either Defendant knew the red dot signified one thing and yet informed the Court of something different. Indeed, Plaintiff asserts neither Defendant knew what the screenshot signified in the first place. Response at p.14, para.20. So, Plaintiff cannot establish the statement was knowingly false. Nor does Plaintiff present ANY evidence that either Defendant had serious doubts about what the red dot signified. Instead, Plaintiff’s entire argument is that the Defendants should have conducted a more thorough investigation into the App and its uses and limitations. But as observed by the 10th Circuit, no

Fourth Amendment violation accrues simply because an officer failed to delve into the case before him as fully as Plaintiff, viewing the matter in hindsight, might have hoped. And even if Det. Staab mistakenly reported what the red dot signified, as Plaintiff argues, the record is devoid of evidence the mistake was the result of any invidious animus. As such, this statement should not be excised from the Affidavit.

ALLEGED OMISSIONS

A. The Defendants had concerns about probable cause when investigating and drafting the warrant and thought the DA would not find probable cause.

Plaintiff falsely paints this issue as Defendants having generalized “doubts” and “concerns” about probable cause when they submitted the Affidavit to the reviewing court and thus, they should have alerted the reviewing judge. A cursory review of Plaintiff’s record cites demonstrates that the only concern expressed by either Defendant was the question of whether the pinging had become “stale” since it last occurred the afternoon before the search. The record further undisputedly demonstrates that both Defendants specifically shared that concern with DA Beck, who assured both of them that the pinging had not become stale. Where their exact concern had been addressed by DA Beck, as well as her supervisor, they were both satisfied they had probable cause to proceed. It would be nonsensical to hold that police officers preparing search warrant affidavits are required to share with the reviewing judge any preliminary questions or concerns they possessed, where they were subsequently able to have their concerns addressed to their satisfaction. Such preliminary questions cannot seriously be deemed “clearly critical” to probable cause.

Again, Plaintiff has wholly failed to present evidence, much less a preponderance of evidence, that either Defendant entertained serious doubts about the truth of Affidavit stating there

was probable cause to search the home by the time their investigation had concluded and the Affidavit had been finalized. In fact, they even obtained approval by the DA, further buttressing their reasonable belief that probable cause existed for the search. As such, statements about their preliminary doubts or concerns are not statements which should have been placed in the Affidavit.

B. The phone had pinged elsewhere prior to reaching Plaintiff's home.

Plaintiff offers no explanation for the materiality of this assertion apart from the conclusory statement that evidence of the earlier ping was a "significant omission." Response at p.26. Plaintiff fails to, and cannot, explain how the fact that phone had pinged a various location as it made its way to Plaintiff's home was "clearly critical" to probable cause. At best, that added information would simply bolster probable cause because it would confirm that the phone had traveled its way to Plaintiff's home before stopping there. Perhaps such information would be relevant if it had showed the phone was pinged somewhere in west Denver whereas the Defendants sought to search a home across town in east Denver. But the undisputed evidence is that the prior ping simply showed the phone continuously moving toward Plaintiff's home. More importantly, evidence that the phone had pinged along a pathway to Plaintiff's home would not provide probable cause to search her home. What provided probable cause to search her home was the fact that the phone arrived at her home and then remained there for several hours without moving thereafter.

C. Neither Defendant had experience with the App.

Plaintiff erroneously argues the Defendants were required to advise the reviewing court of their prior experience using the App when the Affidavit itself explained that the information being provided concerning the use of the App, and its prior accuracy, were provided by Mr. McDaniel.

Neither Defendant ever represented to the reviewing court that the information being provided by the Find My App came from either of them personally. Instead, Det. Staab explicitly set forth in the Affidavit that it was Mr. McDaniel who had used the App to track down his stolen phone and further explained that he had successfully used the App previously to locate a lost phone. Mr. McDaniel also provided a screenshot from the App verifying what he was saying, and further informed Det. Staab that the phone had continued to ping at that location for several hours and never moved throughout the entirety of time that the phone continued to ping its location. More importantly, omitting statements about Defendants' App experience would not have given either Defendant "obvious reasons to doubt the veracity" of the information otherwise contained in the Affidavit, so would fail the test for reckless disregard for the truth. And, even if these statements were added into the Affidavit, it would not negate probable cause since the Affidavit was based upon information from Mr. McDaniel's tracking of his stolen property.

D. The truck was not at the home, no suspicious activity was observed and Plaintiff was not considered a suspect.

Plaintiff argues that Det. Staab should have included a statement in the Affidavit to say the surveillance officers did not observe the truck outside the home nor suspicious activity there. Plaintiff also argues Det. Staab should have included in the Affidavit a statement that Plaintiff was not a suspect. However, the Affidavit already stated that Mr. McDaniel drove by the home and did not see the truck outside and offered the belief that it could be parked inside the garage. Det. Staab explicitly included that information in the Affidavit, which would have clearly alerted the reviewing judge that the stolen truck had not been observed parked outside the home. Therefore, stating a second time that the surveillance officers also did not observe the truck would not add anything material to the Affidavit. Nowhere in the Affidavit did Det. Staab ever represent that the

stolen truck had been observed outside the home. Thus, stating it a second time would be redundant, and would not negate probable cause.

Similarly, stating that there was no suspicious activity observed at the home or that the Plaintiff was not suspected of the theft would do nothing to address the question of probable cause, which is what the Affidavit was focused upon. It would be absurd, and erroneous, to suggest that a location cannot be searched unless and until officers first observed “suspicious” activity at the location and only if they suspected the owner of that location in the crime. Persons engaging in criminal activity frequently avoid conducting suspicious acts in public specifically so as to hide their criminal activity. Also, it is not a foreign concept that criminals may hide stolen property at an unsuspecting location, to avoid being discovered. Thus, the proper inquiry when attempting to search for the stolen property is not whether the owner of the location was the suspect, but rather where there is reasonable suspicion of evidence of a crime being discovered there. Thus, the addition of these statements would be improper, and would not affect probable cause.

E. Attempt to use Mr. McDaniel’s wife’s debit card the morning after the theft.

Plaintiff offers no explanation for the relevance of this fact to probable cause to search Plaintiff’s home. Instead, Plaintiff merely claims its omission was “important” to probable cause. On the contrary, it would be entirely immaterial. The fact the attempted purchase occurred online meant that it could have occurred from any location whatsoever, including from Plaintiff’s home. Including such a statement would not have made it any more or less likely to find stolen property at Plaintiff’s home. As such, it is immaterial to the Affidavit. Moreover, it would not provide evidence, much less a preponderance of evidence, that either Defendant doubted the veracity of the contents of the Affidavit. Thus, Plaintiff’s argument should be rejected.

III. **CONCLUSION**

Because Plaintiff has failed to carry her burden of proof to establish that the Affidavit contains any false statements, or that any such alleged statements were made knowingly or with reckless disregard for the truth, there should not be any statements excised from the Affidavit. Similarly, since there were no material omissions made, and certainly none made knowingly or with reckless disregard for the truth, there should not be any statements added to the Affidavit. Rather, since the Affidavit was supported by probable cause, there can be no Fourth Amendment violation. As such, Sgt. Buschy's Motion should be granted, and Plaintiff's claim dismissed, as a matter of law.

Dated this 8th day of September 2026.

Respectfully submitted by,

s/David Murphy
David Murphy, #20928
Assistant City Attorneys
Denver City Attorney's Office
Attorney for Defendant Gregory Buschy

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September 2026, the foregoing **DEFENDANT GREGORY BUSCHY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was filed with the Clerk of the Court via the CCE system which will send a notification of such filing to the following:

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s/ Sarah Peasley
Denver City Attorney's Office