APPENDIX A

United States v. Sarli,

913 F.3d 491 (5th Cir. 2019)

913 F.3d 491
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.
Arturo SARLI, also known as Jose B. Sanchez, also known as Billy Sarli, also known as Arturo Sarly, also known as Armadillo Sarly, Defendant-Appellant

No.
17
-
50294
|
FILED January 16, 2019

Synopsis

Background: Defendant was convicted in the United States District Court for the Western District of Texas, Orlando L. Garcia, J., of possession with intent to distribute methamphetamine. Defendant appealed.

Holdings: The Court of Appeals, James C. Ho, Circuit Judge, held that:

[1] consent to search truck did not reach its natural end;

[2] any violation of Confrontation Clause by small number of fleeting references to out-of-court statements by confidential informant was harmless beyond a reasonable doubt;

[3] defendant's explanation for possession of methamphetamine was dubious, and therefore affirmative evidence that he knew he was in possession of it; and

[4] large quantity of methamphetamine in box that was worth at least 40 thousand dollars was indicative of intent to distribute.

Affirmed.

Stuart Kyle Duncan, Circuit Judge, filed opinion dissenting in part.

West Headnotes (12)

[1] **Criminal Law**
Review De Novo
Criminal Law
Evidence wrongfully obtained

When reviewing a denial of a motion to suppress evidence, the Court of Appeals reviews factual findings for clear error and the ultimate constitutionality of law enforcement action de novo. U.S. Const. Amend. 4.

Cases that cite this headnote

[2] **Criminal Law**
Evidence wrongfully obtained

A district court's denial of a motion to suppress should be upheld if there is any reasonable view of the evidence to support it. U.S. Const. Amend. 4.

Cases that cite this headnote

[3] **Criminal Law**
Reception of evidence

On appeal from the district's court's denial of a motion to suppress evidence, Court of Appeals must view the evidence in the light most favorable to the party that prevailed below.

Cases that cite this headnote

[4] **Searches and Seizures**
Scope and duration of consent; withdrawal

The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness, i.e., what a reasonable person would have understood by the exchange between the officer and the suspect. U.S. Const. Amend. 4.

Cases that cite this headnote

[5] **Searches and Seizures**

Words or conduct expressing consent; acquiescence

An affirmative response to a general request is evidence of general consent to search. U.S. Const. Amend. 4.

Cases that cite this headnote

[6] **Searches and Seizures**

Scope and duration of consent; withdrawal

Where there is ambiguity regarding the scope of a consent, the defendant has the responsibility to affirmatively limit its scope. U.S. Const. Amend. 4.

Cases that cite this headnote

[7] **Searches and Seizures**

Scope and duration of consent; withdrawal

Consent to search truck had not reached its natural end prior to discovery of methamphetamine, and therefore suppression of methamphetamine found in truck was not warranted, where entire search lasted less than one hour and police maintained continuous control over truck to allow various police officers and sniffing dogs to conduct overlapping searches during that time. U.S. Const. Amend. 4; Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1), (b)(1)(A).

Cases that cite this headnote

[8] **Criminal Law**

Reception of evidence

Any violation of Confrontation Clause by small number of fleeting references to out-of-court statements by confidential informant, such as prosecutor asking detective how drug investigation of defendant had "come about" and prosecutor referencing in closing argument that police department investigation "started" with tip from confidential source, was harmless beyond reasonable doubt, since prosecution's case turned on statements made by in-court witnesses and not on any out-of-court statement. U.S. Const. Amend. 6; Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1), (b)(1)(A).

Cases that cite this headnote

[9] **Criminal Law**

Reception of evidence

For a verdict to survive a Confrontation Clause violation, there must be no reasonable possibility that the evidence complained of might have contributed to the conviction. U.S. Const. Amend. 6.

Cases that cite this headnote

[10] **Criminal Law**

Controlled substances

Defendant's explanation for possession of methamphetamine was dubious and, therefore, was affirmative evidence of his knowledge that he possessed methamphetamine, in trial on charge of possession with intent to distribute methamphetamine, where methamphetamine was found in box of cat litter in truck he was operating and he confessed that he agreed to be paid for admittedly unusual task of transporting box of cat litter from one person in retailer's parking lot to another person at restaurant. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1), (b)(1)(A).

Cases that cite this headnote

[11] **Criminal Law**

Failure to explain incriminating circumstances

A rational jury may infer from an implausible account of exculpatory events that the defendant desires to obscure his criminal responsibility.

Cases that cite this headnote

[12] **Controlled Substances**
Substance and quantity in general

Defendant's possession of large quantity of methamphetamine that was worth at least 40 thousand dollars was indicative of intent to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(a)(1), (b)(1)(A).

Cases that cite this headnote

*492 Appeals from the United States District Court for the Western District of Texas, Orlando L. Garcia, U.S. District Judge

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Philip J. Lynch, San Antonio, TX, for Defendant-Appellant.

Before HAYNES, HO, and DUNCAN, Circuit Judges.

Opinion

JAMES C. HO, Circuit Judge:

*493 Following a tip from a confidential source, Arturo Sarli was arrested and convicted for possession with intent to distribute methamphetamine. He challenges his conviction under the Fourth and Sixth Amendments. We unanimously deny Sarli's Fourth Amendment claim, on the ground that he consented to the search of his vehicle. But we are divided with respect to Sarli's claim that, due to certain statements made at trial in violation of the Confrontation Clause, he is entitled to a new trial.

During trial, both the prosecutor and a prosecution witness referred to certain out-of-court statements by a confidential source. Sarli contends these references violated the Confrontation Clause because he did not get to cross-examine the source. By a divided vote, we hold that these references were harmless.

To be sure, the confidential source placed Sarli at the scene of the crime—providing Sarli's name, identifying his vehicle, and alleging he would be transporting methamphetamine to a particular location on a particular date. But so did the officers who pursued the tip and caught Sarli red-handed. They testified in court that they personally saw Sarli at that very location, on that very day, transporting methamphetamine in that very vehicle. So any references to out-of-court statements from the confidential source were entirely redundant of the testimony of the officers who caught Sarli at the scene.

Moreover, Sarli's defense at trial wasn't that he didn't do it—it was that he didn't *know* what he was doing. Sarli admitted he agreed to be paid to transport a box of cat litter from a Walmart parking lot to a restaurant parking lot. He simply denied knowing that the cat litter contained methamphetamine. Naturally, the prosecution ridiculed Sarli's dubious story as implausible in the extreme (and as evidence of guilt, as our precedents permit). The officers at the scene also testified that, once they found the drugs, Sarli cried about not wanting to go to prison, and protested his wife's innocence.

In sum, the prosecution proved that Sarli knew he was carrying drugs, based not on statements from the confidential source, but on statements from Sarli himself and the various in-court witnesses who testified at trial. So any reference to the confidential source was harmless. There is no reasonable possibility that those references contributed to the conviction. We affirm.

I.

In June 2014, a confidential source told Detective Steven Contreras of the San Antonio Police Department that a man named Arturo was using a white Avalanche pickup truck to transport methamphetamine around San Antonio. About a month later, that same confidential source told Detective Contreras that Arturo would be transporting about two kilograms of methamphetamine that very day, to the parking lot of Bill Miller's restaurant in San Antonio.

Officers established surveillance and saw a white Avalanche pickup truck. They checked the license plate of the truck and found it was registered to Arturo Sarli, who had a pending municipal arrest warrant. When a marked police unit entered the parking lot, Sarli appeared nervous and drove away. Other officers, including Officer Juan Torres, followed Sarli and initiated a stop after witnessing a traffic violation. Sarli appeared shaky in the presence of the officers.

Officer Torres asked if Sarli would consent to a search of the truck. Sarli agreed. Officer Torres then waited until other officers were free to assist him, before again requesting and obtaining consent to ***494** search. Before beginning the search, officers told Sarli that he was under arrest on the outstanding warrant, handcuffed him, and placed him in the back of a police car.

Officer Torres and others then began the search. The initial search was unsuccessful. About 15 minutes after the stop, the first of two police dogs arrived to conduct a "sniff" of the truck. Neither dog alerted. Within five minutes of the second dog beginning to sniff, Detectives Contreras and Robert Tamez arrived at the scene. Soon thereafter, Detective Tamez looked inside of a box of cat litter in the back of the truck and found several small bundles that were later determined to contain methamphetamine. From beginning to end, the entire search lasted roughly 51 minutes.

Upon discovery of the drugs, Sarli began to cry. He told the officers that he was scared of going to prison. He also told them that his wife was innocent.

After he was advised of his rights, Sarli confessed that he drove to a Wal-Mart parking lot to meet an unknown man who gave him the box of cat litter—and that he agreed to be paid for transporting that box of cat litter to another unknown man he would meet at the restaurant.

Sarli was indicted for possession with intent to distribute 50 grams or more of methamphetamine under 21 U.S.C. § 841(a)(1) and 21 U.S.C. § (b)(1)(A). He moved to suppress the methamphetamine and his statements to police as the products of an unlawful search. After a suppression hearing, the magistrate judge recommended that the motion to suppress be denied. The magistrate judge found that the officers had probable cause to search Sarli's vehicle at the time of the traffic stop, but that the probable cause had dissipated by the time of Detective Tamez's search. The magistrate judge nevertheless found that Sarli had validly consented to the search, that he had not limited the scope of his consent, and that Detective Tamez's search of the cat litter box was valid.

Both parties filed objections to the magistrate judge's report. The district court agreed that the stop of Sarli's vehicle was supported by reasonable suspicion, that the outstanding warrant justified his arrest, and that the truck was subject to impoundment under police policy. It also found that the officers initially had probable cause to search the truck, but that the probable cause had dissipated by the time Detectives Contreras and Tamez arrived. However, the district court agreed that Sarli validly consented to the search, that Detective Tamez's search did not exceed the scope of his consent, and that Sarli had not objected to the continued search or tried to revoke his consent.

Sarli proceeded to trial. At trial, Detective Contreras testified that, when a marked police unit first entered the parking lot, Sarli behaved nervously and quickly drove away. Officer Torres testified that, following his traffic stop, Sarli appeared shaky. Detective Contreras presented unchallenged testimony that Sarli confessed that he agreed to be paid to deliver the package of cat litter from one person to another. Furthermore, Detective Contreras testified that the methamphetamine seized from Sarli's truck was the second largest quantity of methamphetamine he had ever handled.

When Detective Contreras was asked to describe how the investigation "came about"—namely, the tip from the confidential source—Sarli objected on Confrontation Clause grounds. The prosecutor rephrased the question, and Sarli again objected but was overruled. Detective Contreras testified that he received information from the confidential source that a ***495** "Hispanic man by the name of Arturo [was] driving a white Avalanche that's going to be delivering narcotics."

During closing arguments, Sarli's counsel argued that Sarli was unaware of the methamphetamine, and that police made various mistakes. The government stated that Sarli was not randomly stopped, that the investigation originated with the tip from the confidential source, and that the allegations in the tip were corroborated by the evidence obtained from the stop and search of Sarli's

vehicle. Sarli objected to the prosecutor's reference to the confidential source but was again overruled.

The jury convicted Sarli, and he received a prison sentence of 324 months.

II.

Sarli raises two issues on appeal. First, he challenges the denial of his motion to suppress the evidence seized from Detective Tamez's search of his vehicle. Second, he challenges the denial of his objections that the two references during trial to the tip from the confidential source violated the Confrontation Clause. We address each in turn.

A.

[1] [2] [3] "When reviewing a denial of a motion to suppress evidence, this Court reviews factual findings for clear error and the ultimate constitutionality of law enforcement action *de novo*." *United States v. Robinson*, 741 F.3d 588, 594 (5th Cir.2014). A district court's denial of a motion to suppress should be upheld "if there is any reasonable view of the evidence to support it." *United States v. Michelletti*, 13 F.3d 838, 841 (5th Cir.1994) (en banc). This Court must "view the evidence in the light most favorable to the party that prevailed below." *United States v. Pack*, 612 F.3d 341, 347 (5th Cir.2010).

[4] [5] [6] "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness"—what a reasonable person would have understood by the exchange between the officer and the suspect. *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991) (collecting cases). Officer Torres did not qualify or limit his request for Sarli's consent, and "an affirmative response to a general request is evidence of general consent to search." *United States v. Garcia*, 604 F.3d 186, 190 (5th Cir.2010). Where there is ambiguity regarding the scope of a consent, the defendant has the responsibility to affirmatively limit its scope. *See United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667 (5th Cir.2003). Sarli placed no such limits.

For his part, Sarli claims that he was unable to observe the search as it was being executed, because he was physically placed in a patrol car shortly after he gave consent. But we have rejected the notion that a consensual search ceases to be valid simply because the accused is unable to observe the conduct of the search. *See, e.g.*, *United States v. Rich*, 992 F.2d 502, 507 (5th Cir.1993) ("Even if Rich was unable to see what was going on, ... we are unwilling to ... hold ... that enforcement officials must conduct all searches in plain view of the suspect"); *id.* ("The fact that the search was not conducted in a manner that made it conducive or even possible for Rich to later withdraw or limit his consent does not automatically make that search violative of the Fourth Amendment.").

[7] In addition, Sarli claims that his consent reached its "natural end" before Detective Tamez's search, citing *United States v. Escamilla*, 852 F.3d 474, 485 (5th Cir.2017). But in *Escamilla*, there was a four-hour delay between two disparate ***496** searches. *Id.* Here, by contrast, the entire search lasted less than an hour, and the police maintained continuous control over the truck to allow various officers and sniffing dogs to conduct overlapping searches during that time. In short, there was no identifiable "natural end" to Sarli's consent. *Id.*

Accordingly, the district court properly denied Sarli's motion to suppress the evidence seized from Detective Tamez's search of Sarli's vehicle.

B.

[8] At trial, Sarli objected on Confrontation Clause grounds at two different junctures: (1) when the prosecutor asked Detective Contreras how the investigation of Sarli had "come about," and (2) when the prosecutor referenced in closing argument that the San Antonio Police Department investigation "started" with the tip from the confidential source. Both objections were overruled.

We assume without deciding that the references to the confidential source's tip violated the Confrontation Clause. We nevertheless affirm because we are convinced that the error was "harmless beyond a reasonable doubt." *United States v. Jimenez*, 464 F.3d 555, 562 (5th Cir.2006) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

[9] For a verdict to survive a Confrontation Clause violation, there must be " '[no] reasonable possibility that the evidence complained of might have contributed to the conviction.' " *United States v. Alvarado-Valdez*, 521 F.3d 337, 341 (5th Cir.2008) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). This is a demanding but not insurmountable burden. *See, e.g.*, *United States v. Bedoy*, 827 F.3d 495, 512 (5th Cir.2016) (concluding that the error was harmless beyond a reasonable doubt); *United States v. Akins*, 746 F.3d 590, 600 (5th Cir.2014) (finding the testimony cumulative and therefore harmless); *United States v. Ogba*, 526 F.3d 214, 229–30 (5th Cir.2008) (finding the error harmless in light of the non-hearsay evidence presented at trial); *United States v. Pryor*, 483 F.3d 309, 312 (5th Cir.2007) (observing that the admitted statement did not undercut Pryor's only defense).

We conclude that there is no reasonable possibility that the information from the confidential informant contributed to Sarli's conviction. That is for one simple reason: The prosecution's case turned on statements made by in-court witnesses and not on any out-of-court statement.

1.

To begin with, the government did not need any out-of-court statement to connect Sarli to the crime scene or to his illicit cargo. The police caught him at the scene, driving the vehicle while the methamphetamine was stored inside. And they testified at trial accordingly. Officers observed Sarli operate a white Avalanche, pull into the Bill Miller's parking lot, act nervously, flee at the sight of a marked patrol car, and then consent to a search of his vehicle, which is where the drugs were discovered. The information provided by the confidential source—the driver's name, vehicle description, location, and the vehicle's content—was entirely redundant in light of the officers' testimony. Indeed, Sarli did not dispute that he drove a white Avalanche to Bill Miller while carrying methamphetamine.

By contrast, in cases where we've granted relief, the defendant's involvement was hotly contested, and the prosecution depended on out-of-court testimony to identify the defendant as a participant in the ***497** crime. For example, in *United States v. Kizzee*, 877 F.3d 650 (5th Cir.2017), a police search of the defendant's house and person yielded less than a gram of crack cocaine. *Id.* at 654–56. It was only thanks to out-of-court statements from Carl Brown that the Government could establish Kizzee as a drug dealer, rather than a mere possessor. "No other testimony was presented to connect Kizzee to Brown as the source of Brown's drugs." *Id.* at 662. In *United States v. Jackson*, 636 F.3d 687 (5th Cir.2011), the prosecution relied on a set of notebooks, deemed to be out-of-court statements, which the Government candidly contended "amount[ed] to 'proof beyond a reasonable doubt' that Jackson participated in the conspiracy." *Id.* at 697. In *Alvarado-Valdez*, 521 F.3d at 342, the government relied heavily on out-of-court testimony to link the defendant to a cocaine delivery that law enforcement had intercepted one year earlier. The defendant was only arrested after being named by a coconspirator.

2.

[10] Sarli did not dispute that he carried drugs—but he did dispute that he *knew* he was carrying drugs. But here again, the government did not need any out-of-court statement to establish its case.

[11] Sarli confessed that he agreed to be paid for the admittedly unusual task of transporting a box of cat litter from one person in a Walmart parking lot to another person at a restaurant. He simply claims that he had no idea he was being paid to transport methamphetamine, rather than cat litter. As we have repeatedly stated, an " 'implausible account provides persuasive circumstantial evidence of the defendant's consciousness of guilt.' " *United States v. Lopez-Monzon*, 850 F.3d 202, 208 (5th Cir.2017) (quoting *United States v. Diaz-Carreon*, 915 F.2d 951, 953–54 (5th Cir.1990)). A rational jury may infer from " '[a]n implausible account of exculpatory events ... that the defendant desires to obscure his criminal responsibility.' " *Id.*

[12] So the dubiousness of Sarli's explanation is affirmative evidence of his knowledge under our precedents. And the fact that the box contained a large quantity of methamphetamine, worth at least forty thousand dollars, is further "indicative of intent to distribute." *United States v. Villarreal*, 324 F.3d 319, 325 (5th Cir.2003).

In sum, the prosecution furnished the jury with ample, compelling evidence that Sarli in fact knew he was carrying drugs—all of it independent of the confidential source. The prosecution essentially pointed to Sarli's own account of what happened and asked the jury to draw the only reasonable inference available.

What's more, the prosecution also called multiple in-court witnesses who testified about Sarli's demeanor and conduct during the investigation. For example, when a marked police unit first entered the parking lot, Sarli behaved nervously and quickly drove away. Following his traffic stop, Sarli appeared shaky. We have held that such "[n]ervous behavior ... frequently constitutes persuasive evidence of guilty knowledge." *Lopez-Monzon*, 850 F.3d at 209. Sarli also began to openly weep after police uncovered the methamphetamine, telling officers that he was scared about the prospect of going to prison. He also told them that his wife was innocent.

Sarli's knowledge is thus amply established by his own statements as well as his behavior at the scene of the crime, as described by various in-court witnesses. By contrast, nothing in the information provided by the confidential source established that Sarli *knew* he was transporting methamphetamine. The confidential source ***498** stated that police would find drugs in a particular car driven by a particular person—he did not convey whether or not the driver was actually aware he was transporting drugs. *See, e.g.*, *United States v. Wilson*, 657 F.2d 755, 760 (5th Cir.Unit A Sept. 1981) ("That an informant had given a tip that people in the area were in possession of heroin does not add significantly to the evidence of possession."). Unless the government attempts to insinuate more at trial —and it did not do so here—the information from the confidential source was therefore harmless.

This case thus stands in stark contrast to other cases in which we've granted relief after the prosecution used out-of-court statements to rebut denials of knowledge and other defense theories. For example, in *United States v. Tirado-Tirado*, 563 F.3d 117 (5th Cir.2009), Customs and Border Protection apprehended the defendant while helping a foreign national enter the United States illegally. The defendant claimed he had no knowledge of his passenger's unlawful status. *Id.* at 120. To prove otherwise, the government argued that the defendant lied to border patrol agents and met his passenger at a designated location. A challenged deposition was the lone piece of evidence backing each point. *Id.* at 126. In *United States v. Foster*, 910 F.3d 813 (5th Cir.2018), the government presented out-of-court statements during its case-in-chief and its closing argument for the very purpose of proving that the defendant knew he was transporting aliens in his tractor trailer across the border. *Id.* at 816. The jury submitted questions to the court during its deliberations about the out-of-court statements. *Id.* at 822. The court knew with near certainty that the information had at least some impact. In *United States v. Duron-Caldera*, 737 F.3d 988 (5th Cir.2013), the government introduced into evidence a 40-year-old affidavit from the defendant's maternal grandmother, which it used to disprove the defendant's claim that he had derived U.S. citizenship through his mother. The defendant was being prosecuted for illegal reentry after deportation. *Id.* at 996. His claim of derived citizenship was his sole defense.

3.

This case involves only a small number of fleeting references to out-of-court statements by the confidential informant.

The prosecution mentioned the confidential source's tip only briefly in its opening statement. The entire reference takes up a single sentence. And it is used merely to construct a timeline of events. The dissenting opinion belabors the fact that "the prosecutor featured [the informant's tip] as the *first* point in her opening statement." Dis. Op. at 501. But that is simply because the tip from the confidential source triggered the investigation. Any chronology of events naturally starts at the beginning, with the event that prompted the police to set up surveillance. Notably though, the prosecution never drew a connection between the confidential information and Sarli's knowledge that he was carrying drugs.

It should be telling, then, that Sarli himself did not object to the prosecution's opening statement at trial. Nor did he bother to brief it on appeal.

Likewise, Detective Contreras never tried to use the confidential informant to prove Sarli's knowledge. He mentioned the confidential informant only when asked how the investigation came about, and what he and the other officers were looking for when they arrived at the restaurant.

Finally, the prosecution mentioned the informant's tip briefly during closing argument. ***499** And once again, when it came to the core dispute over Sarli's knowledge, the prosecution focused on Sarli's own statements: "when we come to the end, what he's telling you is that he had that box to deliver to someone at Bill Millers. How can one not knowingly know what that is. And to be financially compensated for it. Who is going to be financially compensated for delivering a Tidy Cats box. Of course you're going to be compensated because you know there's drugs in there. He's part of it."

To overturn a conviction based on mere fleeting references to out-of-court statements would be tantamount to establishing a rule of *per se* harm. Our precedents, by contrast, require not just speculation, but a "reasonable possibility" that the error contributed to the conviction. Meeting that standard requires far more than this case involves. *See, e.g.*, *United States v. London*, 746 F. App'x 317, 323, 2018 WL 3933753, at *5 (5th Cir. Aug. 15, 2018) (evidence underscored multiple times throughout trial); *Alvarado-Valdez*, 521 F.3d at 342 ("insistent reliance" during closing argument).

4.

Understandably, the dissenting opinion resists the notion that it is applying a standard of *per se* harm. But consider the proposed theory of harm.

At bottom, the dissenting opinion focuses on a single sentence from the prosecution's rebuttal closing argument to establish a connection between the confidential informant and proving Sarli knew he was carrying drugs: "[t]hose factors all go to knowledge and the intent to distribute." Based on this one sentence, the dissenting opinion makes this observation: "Evidently, the prosecutor believed the tip's implicating Sarli was one 'factor' proving his knowledge and invited the jury to draw that inference." Dis. Op. at 502.

But not once did the prosecutor ever explain to the jury how the tip could possibly help to prove knowledge. To the contrary, the prosecution made clear that it was Sarli's own statements—namely, his dubious cat litter defense—that proved his knowledge. By contrast, nothing in the confidential tip established whether Sarli was a knowing participant or an ignorant, gullible mule—and the prosecutor did not once suggest otherwise.

If we are going to undertake the dramatic step of setting aside a jury verdict and ordering a new trial, we should require more than speculation about what the prosecution might have privately believed. We should require, for example, an actual statement to the jury, explaining how one could reasonably conclude that the tip tends to prove Sarli's knowledge and thereby contributes to his conviction. It is undisputed that no such statement was ever made here.

Our harmless error precedents require a "reasonable possibility" of taint—not worst case scenarios about what an irrational runaway jury might have done on its own, notwithstanding the arguments actually made by the prosecution. The judgment is affirmed.

STUART KYLE DUNCAN, Circuit Judge, dissenting in part:

I join Part II.A of the majority opinion, which correctly affirms the denial of Sarli's motion to suppress on Fourth Amendment grounds. I respectfully dissent from Part II.B, however, because I would find that admission of the detective's testimony about the confidential informant's tip (1) violated the Confrontation Clause and (2) was not harmless error.

***500** I.

Because I disagree with the majority opinion's harmless error analysis, *see infra*, I must first address the prior question of whether admission of the challenged testimony violated the Confrontation Clause. It did.

As the majority recounts, Detective Contreras was allowed to testify he received a tip from a confidential informant that "there was a male Hispanic man by the name of Arturo driving a white Avalanche that's [*sic*] going to be delivering narcotics." Contreras further explained that, according to the tip, "Arturo" would deliver the drugs to a specific location ("a Bill Millers" in "the area of Probandt and Highway 90"). Based on that tip, surveillance was established that led to Sarli's arrest. Sarli's attorney objected repeatedly to Contreras's

testimony on Confrontation Clause grounds but was overruled.

Admission of Contreras's testimony violated the Confrontation Clause because it allowed a police officer to recount an inculpatory testimonial statement by a non-testifying witness whom Sarli never had the chance to cross-examine. *See Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *see also, e.g., United States v. Kizzee*, 877 F.3d 650 (5th Cir.2017) (explaining that "police testimony about the content of statements given to them by witnesses are testimonial under *Crawford*," and that "officers cannot refer to the substance of statements made by a nontestifying witness when they inculpate the defendant") (and collecting decisions). Several sister circuits have correctly held that admission of a confidential informant's inculpatory statement under these circumstances implicates the Confrontation Clause. *See, e.g., United States v. Shores*, 700 F.3d 366, 374 (8th Cir.2012) (explaining that "[a] [confidential informant's] statement clearly falls within the type of out-of-court statement categorized as 'testimonial' " for Confrontation Clause purposes); *United States v. Lopez-Medina*, 596 F.3d 716, 730 (10th Cir.2010) (same); *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir.2004) (explaining that "statements of a confidential informant are testimonial" for Confrontation Clause purposes because "[t]ips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial"); *see also* 2A WRIGHT, MILLER & MARCUS, FED. PRAC. & PROC. § 412 ("[S]tatements by a confidential informant ... are 'testimonial' and therefore subject to exclusion under the Confrontation Clause.").

To be sure, the Confrontation Clause is not implicated when out-of-court statements are offered, not for the truth they assert, but for other purposes—such as to "provide context for [an] investigation or explain 'background' facts," especially "where a defendant challenges the adequacy of an investigation." *Kizzee*, 877 F.3d at 659 (citing *United States v. Smith*, 822 F.3d 755, 761 (5th Cir.2016); *United States v. Carrillo*, 20 F.3d 617, 619 (5th Cir.1994); *United States v. Castro–Fonseca*, 423 F. App'x 351, 353 (5th Cir.2011)). The government invokes that exception here, claiming testimony about the tip was needed to rebut Sarli's argument that the officers made "rookie mistakes." But Contreras could have explained the circumstances leading to Sarli's arrest without divulging the details from the tip (*i.e.*, Sarli's first name, his ethnicity, his sex, the car he was driving, and the fact that he would be "delivering narcotics" to a specific location). What we have previously said about such statements applies here: "Statements exceeding the limited need to explain an officer's actions can violate the Sixth Amendment," particularly "where a nontestifying witness specifically links a defendant ***501** to the crime[.]" *Kizzee*, 877 F.3d at 659–60 (citations omitted).

In sum, I would find that admission of Detective Contreras's testimony about the confidential informant's out-of-court statements violated the Confrontation Clause.

II.

The majority opinion recites the correct harmless error standard for cases where evidence is introduced in violation of the Confrontation Clause: "[T]here must be '[no] reasonable possibility that the evidence complained of might have contributed to the conviction.' " Maj. Op. at 496 (quoting *United States v. Alvarado-Valdez*, 521 F.3d 337, 341 (5th Cir.2008)).[1] But the majority concludes the government has met this admittedly "demanding" burden "[f]or one simple reason: The prosecution's case turned on statements made by in-court witnesses and not on any out-of-court statement." Maj. Op. at 496. I respectfully disagree.

First, the majority opinion underestimates how important the inadmissible testimony was to the government's case. The majority states there was "only a small number of fleeting references to out-of-court statements by the confidential informant." *Id.* at 498. That is mistaken. Far from making "fleeting references" to the tip, the prosecutor featured it as the *first* point in her opening statement. Immediately after greeting the jury, the prosecutor stated:

> This is a very simple case. *It occurs when Detective Contreras received information that an individual named*

> *Sarli, driving a white Avalanche, was distributing methamphetamine.*

And the prosecutor returned to the tip in her rebuttal closing:

> The case started as a narcotics investigation. *Detective Contreras received information from a confidential informant. Based on that information*, what he did was look for an Avalanche, a white Avalanche, which is a vehicle that the person transporting to deliver [*sic*] the drugs was operating. He identified the person as Arturo.

It is no answer that these references merely established a "chronology of events." Maj. Op. at 498. As already explained, the prosecutor could have easily established what triggered the investigation in purely generic terms (*i.e.*, "This all started because of a tip that led the police to surveil and arrest Sarli."). But the prosecutor did far more: she divulged details from "a nontestifying witness [that] specifically link[ed] [Sarli] to the crime," *Kizzee*, 877 F.3d at 659–60 (brackets added), in both opening and closing statements.

We have consistently refused to find harmless error where the prosecutor emphasized the inadmissible testimony in closing argument. *See Alvarado-Valdez*, 521 F.3d at 342 (given "government's insistent reliance on the [challenged] testimony in its closing argument, ... we cannot say the [Confrontation Clause] error was harmless"); *Tirado-Tirado*, 563 F.3d at 126 (in light of government's "emphasis" in closing argument on tainted testimony, finding "reasonable possibility that [testimony] might have contributed to [defendant's ***502**] conviction"); *Jackson*, 636 F.3d at 697 (government put "great importance" on tainted evidence "[i]n both its case in chief and its closing argument" and therefore cannot "conclusively show" evidence did not contribute to conviction); *see also, e.g.*, *Foster*, 910 F.3d at 821–22 (explaining that "*Alvarado-Valdez* ... concluded that the government's significant reliance on inadmissible testimony during closing argument made it impossible for the court to determine if the jury would have convicted based on other testimony or evidence") (citing *Alvarado-Valdez*, 521 F.3d at 342–43); *Kizzee*, 877 F.3d at 662 ("The importance of [challenged] testimony to the prosecution's case can be underscored if it is referenced in closing statements."). This case falls squarely in line with those precedents: indeed, here the government emphasized the inadmissible testimony in opening *and* closing.[2] As a result, I "cannot see how the government can conclusively show that the tainted evidence did not contribute to [Sarli's] conviction, because the government's [opening and] closing argument[s] relied on that very evidence." *Alvarado-Valdez*, 521 F.3d at 342–43.

Second, the majority opinion incorrectly asserts that "the prosecution never drew a connection between the confidential information and Sarli's knowledge that he was carrying drugs." Maj. Op. at 498. To the contrary, in her rebuttal closing the prosecutor (1) brought up the tip ("Detective Contreras received information from a confidential informant."); (2) recounted the inculpatory details ("He identified the person as Arturo. It was to happen on Probandt at the Bill Millers ... a place ... notorious for drug dealers"); (3) described Sarli's stop as "consistent with what's been told to the detective before"; and (4) concluded that "[t]hose factors *all go to knowledge* and the intent to distribute[.]" (emphasis added). Evidently, the prosecutor believed the tip's implicating Sarli was one "factor" proving his knowledge and invited the jury to draw that inference. That explains why she raised the point in rebutting the defense's closing argument that "Sarli didn't know that was drugs, and they didn't show it." I thus disagree with the majority that the prosecutor did not "attempt[ ] to insinuate" that the tip established Sarli's knowledge. Maj. Op. at 498. Moreover, it is speculative to assert, as the majority opinion does, that "nothing in the information provided by the confidential source established that Sarli *knew* he was transporting methamphetamine." *Id.* at 497. The detective testified the informant told him about "a male Hispanic man by the name of Arturo driving a white Avalanche that's [*sic*] going to be delivering narcotics." From that testimony, the jury could have readily inferred Sarli knew he was carrying narcotics. At a minimum, there is a "reasonable possibility" that the out-of-court statement "might have contributed" to Sarli's conviction, meaning the government cannot show harmless error. *Alvarado-Valdez*, 521 F.3d at 341.

Third, the majority opinion points to in-court testimony separate from the inadmissible testimony from which the jury could have inferred Sarli's knowledge. *See* Maj. Op. at 497–98 (discussing (1) Sarli's admission he was paid "for the admittedly unusual task of transporting a box of cat litter"; (2) the large quantity of meth; (3) testimony about Sarli's nervous behavior; and (4) testimony that Sarli began "weeping," said he was afraid of going to prison, and claimed his wife was "innocent"). But ***503** the majority asks the wrong question. The question is not whether there was sufficient *untainted* evidence to convict Sarli, but whether the government "demonstrate[d] beyond a reasonable doubt that the *tainted* evidence did not contribute to [Sarli's] conviction." *Alvarado-Valdez*, 521 F.3d at 342 (emphasis and brackets added).[3] Our precedents have rejected this "mere sufficiency-of-the-*untainted*-evidence analysis" in Confrontation Clause cases. *Lowery v. Collins*, 988 F.2d 1364, 1373 (5th Cir.1993). For instance, in *Alvarado-Valdez*—after noting that the prosecution relied on the tainted evidence in its closing—we explained that "[t]here is no way to determine whether the jury would have convicted [the defendant] purely on the basis of [someone else's] testimony or of any of the other evidence," because doing so "would require retrying the case on appeal, at best, or engaging in pure speculation, at worst." *Id.* at 343.[4]

The majority opinion insists that the prosecution "did not need" the substance of the confidential informant's tip to connect Sarli to the crime and that the jury had ample evidence to convict Sarli "independent of" the detective's illicit testimony about the tip. Maj. Op. at 496, 497, 498. Whether or not that is true, it is precisely the kind of analysis our precedents instruct us *not* to undertake in assessing harm from introduction of testimony in violation of the Confrontation Clause. Instead, "the reviewing court must concentrate on the evidence that violated [the defendant's] confrontation right, not the sufficiency of the evidence remaining after excision of the tainted evidence." *Lowery*, 988 F.2d at 1373.

In sum, I would find that the Confrontation Clause violation was not harmless and that Sarli is therefore entitled to a new trial.

I respectfully dissent.

All Citations

913 F.3d 491

Footnotes

1 *See also, e.g.*, *United States v. Tirado-Tirado*, 563 F.3d 117, 126 (5th Cir.2009) (asking whether government can prove "there is no reasonable possibility that the improperly admitted evidence might have contributed to the conviction"); *United States v. Jackson*, 636 F.3d 687, 697 (5th Cir.2011) (asking whether " 'the government can conclusively show that the tainted evidence did not contribute to the conviction' ") (quoting *Alvarado-Valdez*, 521 F.3d at 342–43); *Kizzee*, 877 F.3d at 661 (same); *United States v. Foster*, 910 F.3d 813, 821 (5th Cir.2018) (same) (citing *Alvarado-Valdez*, *supra*).

2 That is why finding harm here would not "establish[ ] a rule of *per se* harm," as the majority opinion claims. Maj. Op. at 499. Had the prosecutor avoided mentioning the tainted testimony in her opening and closing arguments, the government would have an easier time meeting its harmless error burden.

3 *See, e.g.*, *Rhodes v. Dittmann*, 903 F.3d 646, 665–66 (7th Cir.2018), *reh'g denied* (Oct. 10, 2018) (explaining that harmless error review "is not the same as a review for whether there was sufficient evidence at trial to support a verdict"); *see also Foster*, 910 F.3d at 821 (explaining that, in the Confrontation Clause context, " '[o]ur focus is on the possibility of harm arising from [the tainted testimony] and not necessarily on the possibility of its relationship to other evidence' ") (quoting *Alvarado-Valdez*, 521 F.3d at 342) (brackets added).

4 *See also Foster*, 910 F.3d at 821–22 (rejecting government's argument "that it meets it[s] [harmless error] burden by pointing to other evidence in the record to support conviction"); *Kizzee*, 877 F.3d at 662 ("While other circumstantial evidence implicated [defendant] and corroborated [the inadmissible] out-of-court statements, we find this evidence is insufficient to show harmless error beyond a reasonable doubt."); *Jackson*, 636 F.3d at 697 (concluding government cannot show harmless error "[i]n light of [its] reliance on tainted evidence, and notwithstanding the other evidence implicating [defendant] in the conspiracy").

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APPENDIX B

District Court's Ruling

On Motion to Suppress

October 12, 2016

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 5:14-CR-515-OLG
	)	
ARTURO SARLI,	)	
	)	
Defendant.	)	

ORDER

This case is before the Court on Defendant's Motion to Disclose Identity of Confidential Informant (docket no. 71), Defendant's motions to suppress evidence (docket nos. 70, 81), and Defendant's Motion to Compel Production of Evidence (docket no. 89). Magistrate Judge Bemporad has recommended that the motions to suppress be denied (docket no. 94), and the United States and Defendant have both objected to the magistrate judge's recommendation (docket nos. 95, 100).

The Court has reviewed Defendant's motions, the parties' responses and replies, the magistrate's recommendation, and the parties' objections, and concludes that Defendant's Motion to Disclose Identity of Confidential Informant (docket no. 71) should be DENIED; Magistrate Judge Bemporad's Recommendation (docket no. 94) should be ADOPTED and Defendant's motions to suppress evidence (docket nos. 70, 81) should be DENIED; and Defendant's Motion to Compel Production of Evidence (docket no. 89) should be GRANTED IN PART and DENIED IN PART.

Background

Defendant was arrested and charged with possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), based in part on

information that San Antonio Police Department (SAPD) Detective Steven Contraras received from a confidential informant (CI). The parties do not appear to substantially dispute the role of the CI in this case: In late June 2014, the CI contacted the San Antonio Police Department and provided a description of an individual named "Arturo" delivering high quantities of methamphetamine in San Antonio. Docket no. 88 at 16, 24-25. On July 2 or 3, 2014, the CI again contacted SAPD and told them that "Arturo" would be in possession of a large quantity of methamphetamines and would be making a delivery in the area of Probandt and Highway 90 while driving a white Avalanche. Docket nos. 71 at 1-2; 76 at 1-2; 88 at 16, 18, 47. Based on this description, on July 3, 2014, Detectives Contreras and Robert Tamez established surveillance in the area, and observed Defendant seated in a white Chevy Avalanche with a female passenger (later revealed to be his wife) in the parking lot of a Bill Miller's restaurant located near Probandt and Highway 90. Docket no. 88 at 19-20. The detectives, observing from unmarked vehicles, monitored Defendant as he drove from the Bill Miller's parking lot to a nearby Habitat for Humanity Restore furniture store, dropped off his wife, drove back to the Bill Miller's parking lot, and placed a call from his mobile phone without going inside. Docket no. 88 at 19, 29, 93, 97-99. The detectives followed Defendant as he drove out of the parking lot and back toward the Habitat for Humanity store, and with the assistance of uniformed SAPD Officers Juan Torres and "Flores," who were in a marked vehicle, stopped Defendant for failing to maintain a single lane of travel in violation of Tex. Transp. Code § 545.060(a). Docket no. 88 at 60, 62, 70.

During a hearing on Defendant's motions to suppress, Officer Torres testified that immediately after stopping in the Habitat for Humanity store parking lot, Defendant exited his vehicle, that Officer Torres approached him and asked for his driver's license and insurance, and that Defendant responded that he did not have them. Docket no. 88 at 62. Officer Torres testified that Defendant then granted him consent to search the Avalanche, that Officer Flores then

informed Officer Torres that that a "be on the lookout" alert had been issued in connection with both Defendant and the vehicle because of another detective's suspicion of Defendant's involvement in weapons trafficking using the vehicle, that Officer Torres then again asked Defendant for consent to search the Avalanche in the presence of Officer Flores and a third officer on the scene, and that Defendant again agreed. Docket no. 88 at 63-64. Officer Torres testified that they then learned of an outstanding municipal warrant for Defendant, advised Defendant of the warrants and placed him in custody in the back of the patrol car, and began searching some areas of the Avalanche, but not the bed. Docket no. 88 at 64, 87.

Defendant disputes this account and testified during the suppression hearing that after he stopped in the Habitat for Humanity store parking lot, he exited his vehicle and observed an officer exit the driver's side of the marked patrol vehicle (where Officer Torres testified that Officer Flores had been seated, docket no. 88 at 60-61), draw his gun and point it at Defendant, and then, after "about two seconds," return the gun to its holster. Docket no. 88 at 115. Defendant testified that Officer Flores then asked to search the Avalanche, that Defendant refused, and that Officer Flores handcuffed him, placed him in the patrol car, told Defendant that he had warrants, again asked to search the Avalanche, and that Defendant again said no. Docket no. 88 at 117. Defendant also testified that during this interaction, Officer Flores asked him for his driver's license and insurance, and that he answered that his wife was inside the store and that she had his driver's license. Docket no. 88 at 118-19.

After Defendant had been arrested, Officer Flores began searching his vehicle, but did not find any contraband. Docket no. 88 at 64-65. Detective Tamez called for a K-9 unit to conduct a search of the vehicle, and two K-9 units searched the vehicle, including the bed of the truck, in succession, and neither found any contraband. Docket no. 88 at 32, 44, 55-56, 106-08. Detectives Contreras and Tamez testified that, after the officers unsuccessfully searched for

contraband, they arrived on the scene and, within "two or three minutes" Detective Tamez found more than two kilograms of methamphetamine in the bed of the Avalanche, packaged into Tupperware containers and concealed within a cardboard box. Docket no. 88 at 20, 48-49. In their testimony during the motion to suppress, Detective Torres testified that he observed the box during his initial partial search of the Avalanche, but could not remember whether it was open or closed, docket no. 88 at 87, 88, and Detective Tamez testified that he "saw a box and grabbed it, picked it up, opened it, and found the narcotics inside of it." Docket no. 88 at 93.

During testimony related to Defendant's motions to suppress, Detective Contreras testified that the CI who provided the information that led to Defendant's arrest was a reliable informant whose information had led to three prosecutions and convictions at the time of Defendant's arrest. Docket no. 88 at 15, 26-27. Detective Contreras also testified that he and Detective Tamez decided to search the vehicle after the two fruitless K-9 searches in part because of confidence in the CI's information, and in part because they lacked confidence in the K-9 units' effectiveness, stating that the dogs are "roughly 50/50[,]" meaning that they are about fifty percent accurate and about fifty percent inaccurate. Docket no. 88 at 44.

Legal Standards & Analysis

A. Motion to Disclose the Identity of the CI (docket no. 71)

The "informant privilege" allows the Government to "withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *United States v. Alaniz*, 726 F.3d 586, 609 (5th Cir. 2013) (quoting *Roviaro v. United States*, 353 U.S. 53, 59 (1957)). However, a confidential informant's identity must be disclosed notwithstanding the informant privilege where "the disclosure of an [informant's] identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause[.]" *Alaniz*, 726 F.3d at

609. Courts apply the informant privilege, and balance the Government's interest in protecting the informant's confidentiality against the Defendant's right to prepare his defense, by considering a non-exhaustive list of factors that includes "(i) the crime charged; (ii) the possible defenses; and (iii) the possible significance of the [informant's] testimony." *Id.* (internal quotation marks omitted). The Fifth Circuit has articulated a three-pronged test to determine when disclosure is warranted, which considers whether the informant participated in the criminal activity, the relationship between an asserted defense and the probable testimony of the informant, and the Government's interest in non-disclosure. *United States v. Cooper*, 949 F.2d 737, 749 (5th Cir. 1991). "A defendant seeking to compel disclosure must make a sufficient showing that the informer's testimony would significantly aid the defendant in establishing the asserted defense[,]" and "[i]f the defendant fails to meet this burden, disclosure will not be required." *United States v. Diaz*, 655 F.2d 580, 588 (5th Cir. Unit B Sept. 1981).

The Court agrees with the Government that Defendant has failed to make a sufficient showing of how the CI's identity or testimony would aid in establishing any defense. Defendant makes a vague reference to "evidence" that supposedly shows the CI's involvement in criminal activity, but does not produce or describe that evidence or explain any nexus between the CI's supposed involvement in criminal activity and a defense that Defendant might raise. Docket no. 71 at 1. The parties do not appear to dispute that the CI was not present at the time of Defendant's arrest. Docket nos. 71 at 1-2; 76 at 2. Rather, Defendant speculates, without providing any basis, that "it appears the CI is either an active drug trafficker with connections to other serious drug dealers, is a paid informant, or both." Docket no. 71 at 2-3. Meanwhile, the Government has represented to the Court that the CI "was merely [a] tipster and was not an active participant in the indicted offense." Docket no. 76 at 5. The Fifth Circuit has held that "*Roviaro* does not require the disclosure of the identities of 'mere tipsters[,]'" *United States v.*

Cooper, 949 F.2d 737, 749 (5th Cir. 1991), and the identification of CIs is not required where the only basis for disclosure was a speculative challenge to a probable cause determination. *United States v. Edwards*, 133 F. App'x 960, 963 (5th Cir. 2005) (unpublished).

Defendant speculates that "[t]he CI . . . was likely arrested and charged with an unrelated drug-trafficking offense and started cooperating with authorities so the CI's charges can either be reduced or dismissed" and that "the CI may also be getting paid to provide information to the Government[,]" but does not relate that speculation to any defense that Defendant might raise aside from a vague reference to "fertile ground for cross-examination against both the CI and the SAPD officers who used the CI's information to arrest Defendant." Docket no. 71 at 3. The possibility that Defendant may impeach the CI on the basis that he or she "may . . . be getting paid to provide information to the Government" or is "likely a criminal who is actively committing felony offenses" is not sufficient to outweigh the Government's interest in the CI's safety and usefulness. *Alaniz*, 726 F.3d at 610; *Edwards*, 133 F. App'x at 963. Defendant does not claim that the CI was involved in the search on the day of his arrest and has had an opportunity to directly challenge the probable cause determination that led to that search and arrest by questioning the officers who carried it out. *Edwards*, 133 F. App'x at 963. Defendant has failed to show that the non-disclosure of the CI's identity will hamper his ability to prepare his defense. *Alaniz*, 726 F.3d at 610; *United States v. Mills*, 710 F.3d 5, 14 (1st Cir. 2013) ("The burden is squarely on the defendant to show that disclosure is essential for an adequate defense—and it is a heavy one; it is not met by speculating about how useful an informant's testimony might be[.]") (internal quotation marks omitted).

Since Defendant has not argued that CI's involvement went beyond acting as a "mere tipster," *Cooper*, 949 F.2d at 749, the Court finds that Defendant's motion to disclose the CI's identity should be denied without need for an *in camera* hearing. *Diaz*, 655 F.2d at 588 ("[w]e do

not think that it was necessary for the district court to interview the informant in camera for we conclude that the informant's testimony could not have been significantly helpful to the appellant's defense."); *United States v. Sierra-Villegas*, 774 F.3d 1093, 1099 (6th Cir. 2014) ("an in camera hearing is not required when the defendant fails to identify how the informant's testimony could be relevant or helpful.").

B. Motions to Suppress Evidence (docket nos. 70, 81)

Defendant argues that the search the led to the discovery of the methamphetamines in the cat litter box in the bed of the vehicle he was driving at the time of his arrest and seeks suppression of the fruits of the search. Defendant's initial and supplemental motions to suppress argued that police lacked reasonable suspicion to detain Defendant for drug trafficking; police lacked probable cause to search the vehicle Defendant was driving at the time of his arrest; Defendant did not consent to the search of the vehicle; and the scope and duration of the searches of the vehicle were unreasonable. Docket nos. 75, 81. Magistrate Judge Bemporad found that it is undisputed that Defendant committed a traffic violation that justified the stop of his vehicle, was subject to warrants that justified his arrest, and that his vehicle was uninsured, which justified impoundment of the vehicle. Docket no. 94 at 5. The magistrate judge analyzed the permissibility of the search in light of the Government's claims that the search was supported by probable cause, that Defendant consented to the search, and that the contraband would have been inevitably discovered. *Id.* at 5-6. The magistrate judge found that probable cause to search existed at the beginning of the search but had dissipated by the time Detectives Contreras and Tamez arrived on the scene, and that their search of the box in the bed of the vehicle was not supported by probable cause. *Id.* at 8. The magistrate judge further found that the inevitable discovery doctrine did not apply because the Government failed to show by preponderant evidence that the cat litter box was open and therefore would have been discovered an in

inventory search of the vehicle. *Id.* at 12. However, the magistrate judge credited Officer Torres's testimony that Defendant consented to the search of the vehicle over Defendant's testimony that he did not, and therefore concluded that the suppression motions should be denied because Defendant gave voluntary consent to the search of the vehicle. *Id.* at 8-11.

In his objections to the magistrate judge's recommendation, Defendant argues that the recommendation failed to address his arguments regarding the scope and duration of the search, docket no. 95 at 3, and reasserts his arguments that the search was not supported by probable cause or voluntary consent, *id.* at 7. In its objections to the magistrate judge's recommendation, the Government argues that the magistrate incorrectly found that the probable cause to search Defendant's vehicle dissipated by the time the contraband was discovered, docket no. 100 at 5; and that the record shows that the cat litter box "was not sealed and the narcotics would have been found during the impoundment inventory search[,]" *id.* at 7. When a party objects to a magistrate judge's recommendation, the Court must make a de novo determination of those portions of the recommendation to which objection is made. *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 646 (5th Cir. 1994); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

The Court has conducted a de novo review and agrees with Magistrate Judge Bemporad's analysis. First, the Court finds that Magistrate Judge Bemporad correctly found that the stop of Defendant's vehicle was supported by reasonable suspicion because undisputed evidence showed that the officers observed Defendant commit a misdemeanor traffic infraction; that the outstanding municipal warrant justified his arrest; and that the vehicle was subject to impoundment under SAPD policy based upon the undisputed evidence that it was not insured. Docket no. 94 at 5; *United States v. Shabazz*, 993 F.2d 431, 435 & n.3 (5th Cir. 1993) ("Although some courts have held that a lawful traffic stop may nonetheless violate the Fourth

Amendment if the stop was merely a pretext to allow officers to search for contraband . . . this Court has rejected that position [and] . . . most circuits agree[.]").

Furthermore, the Court agrees with the magistrate judge that, although the traffic infraction and arrest did not establish the Fourth Amendment reasonableness of a search of Defendant's vehicle because he was handcuffed and placed in a patrol car, *Arizona v. Gant*, 556 U.S. 332, 351 (2009), other circumstances did provide probable cause to justify a search of Defendant's vehicle. Specifically, the information provided by the CI, a reliable informant, that a man named "Arturo" would be transporting drugs in the area where Defendant was stopped while operating a vehicle matching the CI's description, particularly combined with the officer's observations of Defendant's furtive and nervous behavior, supplied the officers with probable cause to search the vehicle for drugs. *United States v. Edwards*, 577 F.2d 883, 895 (5th Cir. 1978) (en banc) (probable cause established where "a reasonably prudent man [would] believe that the vehicle contains contraband"); *United States v. Clark*, 559 F.2d 420, 424 (5th Cir. 1977) (where officers have communicated, "we look to the collective knowledge of the police officers, rather than the sole knowledge of [the officer] who performed the search"); *United States v. Hearn*, 563 F.3d 95, 103 (5th Cir. 2009) (existence of probable cause may be established by "inferences that might well elude an untrained person.").

The Court also agrees with Magistrate Judge Bemporad that the probable cause had dissipated by the time Detectives Contreras and Tamez conducted the search that actually discovered the contraband. Police are not free to "disregard facts tending to dissipate probable cause." *Evett v. DETNTFF*, 330 F.3d 681, 688 (5th Cir. 2003) (quoting *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988)). The Fifth Circuit has observed that probable cause may dissipate where "[m]inimal further investigation . . . would . . . reduce[] any suspicion created by the facts the police had discovered" in their initial probable cause determination. *Bigford*, 834

F.2d at 1219. That is the case here. The probable cause to believe that the vehicle might contain drugs established by the CI's tip—and any suspicion that it might contain guns based upon the "be on the lookout" alert that the officers discovered—was dissipated when multiple searches of the vehicle yielded no contraband of any kind.

In its objections to the magistrate's recommendation, the Government relies upon a Fifth Circuit holding that "whether an initial unsuccessful consent search dissipates probable cause depends on the scope and intricacy compared to the subsequent search[.]" *United States v. Hernandez*, 518 F. App'x 270, 271 (5th Cir. 2013) (unpublished) (citing *United States v. Bowling*, 900 F.2d 926, 934 (6th Cir. 1990)). It is notable that the court in Hernandez focused its analysis on the success and intensity of the successive searches, not the time that elapsed between them. In that case, after a police dog alerted to the vehicle in question during an initial search, it was "moved to another location so that it could be x-rayed and searched by someone more qualified in finding hidden compartments in tractor-trailers." *Hernandez*, 518 F. App'x at 271. Thus, the initial search in that case partially validated the suspicion that contraband might be in the vehicle, supporting the reasonableness of a second search using different, more intensive methods. In this case, the most intensive searches of the vehicle—the two searches during which the police dogs got into the bed of the vehicle, sniffed at the cat litter box—detected nothing. Rather than validating suspicions about contraband, they weighed against the reasonableness of an additional, less intensive search.

However, the Court also agrees with Magistrate Judge Bemporad that the search of Defendant's vehicle was a valid consent search. The magistrate's finding that Defendant consented to the search was based in part on a finding that Officer Torres's testimony that no officer pointed a gun at Defendant and that Defendant repeatedly consented to the search of the vehicle was more credible than Defendant's testimony that Officer Flores briefly pointed a gun at

him and that Officer Torres ignored him when he refused consent to search the vehicle. In his objections, Defendant argues that "the record as a whole supports Defendant's version of events." Docket no. 95 at 8. The Court does not agree. Defendant claims that police testimony should be discredited because Detective Contreras's testimony and Sergeant Perez's testimony conflict regarding whether Defendant was initially observed in the Bill Miller's parking lot with his wife or alone. Docket no. 8-9. However, Defendant does not explain what bearing this supposed inconsistency has on the credibility of Officer Flores's testimony that Defendant consented to the search. Moreover, Detective Contreras does not testify that Defendant never went to the Bill Miller's parking lot with his wife, only that he did not initially observe Defendant until after Defendant and his wife had left the Bill Miller's and were on their way down Probandt toward the Habitat for Humanity store. Docket no. 88 at 18-20.

Next, Defendant argues that Officer Torres's testimony was consistent with Defendant's claim that Officer Flores pointed his gun at Defendant. Docket no. 95 at 9. The Court does not agree. Although Officer Torres acknowledged that it was possible that Officer Flores drew his weapon when Officer Torres was not watching him, he nonetheless testified that he was not aware of Officer Flores's weapon being drawn, and that he would have been aware because the policy of the police department is to issue instructions to a perceived threat upon drawing a weapon. Docket no. 88 at 61, 75.[1]

Defendant also argues that his testimony should be credited over those of the officers because his testimony is consistent with video evidence of the arrest. However, Defendant does not show that this video evidence is inconsistent with Officer Flores's testimony that he

[1] Moreover, the Court finds it doubtful that the momentary brandishment of a gun would invalidate Defendant's consent. *See, e.g., United States v. Crisolis-Gonzalez*, 742 F.3d 830, 837 (8th Cir. 2014) (circumstances surrounding consent to search were "completely void of even the slightest evidence of coercion" where agents initially encountered the defendant with guns drawn but "at the time the agents requested consent, the agents had already . . . holstered their guns").

consented to the search of his vehicle. Accordingly, the Court joins Magistrate Judge Bemporad in crediting Officer Flores's testimony that Defendant consented to the search of his vehicle over Defendant's contrary testimony. *United States v. Fry*, 622 F.2d 1218, 1221 (5th Cir. 1980) (de novo determination does not require district judge "to rehear the contested testimony" when accepting the magistrate's credibility determinations) (quoting *United States v. Raddatz*, 447 U.S. 667, 681 (1980)).

The weight of credible testimony shows that, at the time he gave consent, Defendant was not in handcuffs, was not in the presence of any drawn weapons, and was expressly told that he had the right to refuse consent. Docket no. 88 at 63-64. In his objections, Defendant argues that consent was not voluntary because Defendant and his wife were later handcuffed and placed in the back of patrol cars, and police cruisers and K-9 unit vehicles prevented Defendant's vehicle from leaving. However, the record indicates that Defendant consented to the search before he or his wife were placed in handcuffs. The Court agrees with the magistrate judge that Defendant's consent was voluntary.

Next, the Court considers Defendant's contentions that the successive searches exceeded the scope of his consent. The standard for measuring the scope of a suspect's consent is one of 'objective' reasonableness, based not on the subjective understandings of the officer and suspect, but on the understanding of a typical reasonable person based on the exchange in which consent was given. *United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667 (5th Cir. 2003) (citing *Florida v. Jimeno*, 500 U.S. 248, 249 (1991)). The scope of a consent may be limited either by the suspect or by "the stated object of the search." *Mendoza-Gonzalez*, 318 F.3d at 667. Where this is ambiguity regarding the scope of a consent, the defendant has the responsibility to clarify the ambiguity by limiting the scope of the consent. *Mendoza-Gonzalez*, 318 F.3d at 667. "[A] failure to object to the breadth of the search is properly considered 'an indication that the search was

within the scope of the initial consent.'" *United States v. McSween*, 53 F.3d 684, 688 (5th Cir. 1995) (citing *United States v. Cannon*, 29 F.3d 472, 477 (9th Cir. 1994)); *see also Mendoza-Gonzalez*, 318 F.3d at 668 ("The fact that [the suspect] did not object when [the officer] actually began to open the box provides additional evidence that the agent's actions were within the scope of initial consent.").

Defendant argues that the search that discovered the methamphetamines exceeded a grant of general consent to search because it took place nearly an hour after the consent was given and after one officer and two K-9 units had fruitlessly searched the vehicle. Defendant primarily relies upon the Fifth Circuit's decision in *United States v. Ponce*, 8 F.3d 989, 998 (5th Cir. 1993). Docket no. 95 at 4 (also citing Wayne R. LaFave, 4 Search and Seizure § 8.1(c) 53-54 (5th ed.)). In *Ponce*, the Fifth Circuit reviewed the Fourth Amendment reasonableness of police conduct where the defendant consented to a search of his person for weapons and, after the search had been completed, police searched the defendant's pants pockets (which had been overlooked during the first search) and discovered a packet of heroin. The Fifth Circuit's analysis in that case is unavailing both because the court rejected that defendant's scope argument and because the scope question that presented a "close call" in that case had to do with the object of the search, not their successive nature or the time that elapsed between them. *Ponce*, 8 F.3d at 998 (rejecting argument that, after consent to search for weapons, second search was unreasonable because it "exceeded the scope of his consent and was actually a search for contraband.").

Defendant also relies upon a treatise observation that:

> Except in unusual circumstances or when the consent expressly indicates otherwise, it would seem that a consent to search may be said to be given upon the understanding that the search will be conducted forthwith and that only a single search will be made. If, for example, a defendant were to consent to a search of his nearby

> car, this could hardly be viewed as authorizing the police to wait and search that car some weeks later if they were then to see it parked on the street. Nor should it be viewed as authorizing a second search at some future time if the first search is not fruitful.

4 Search & Seizure § 8.1(c). In this case, slightly less than an hour transpired between the time that the first search of Defendant's vehicle was underway and the time that the drugs were discovered—a far shorter period than the weeks-long attenuation referred to in the treatise. The treatise relies upon a case in which the passage of 20 hours between consent and search was deemed reasonable where both the defendant and the property to be searched were in police custody. 4 Search & Seizure § 8.1(c) n.155 (5th ed.) (discussing *Gray v. State*, 441 A.2d 209 (Del. 1981)).

In this case, Defendant testified that he could see the searches being conducted, docket no. 88 at 121, and there is no indication in the record that he objected to the successive searches of the vehicle. The Court finds that this lack of objection is "an indication that the search was within the scope of the initial consent." *McSween*, 53 F.3d at 688; *see also United States v. Gonzalez-Basulto*, 898 F.2d 1011, 1013 (5th Cir. 1990) (finding that search procedure involving use of multiple drug-sniffing dogs in succession did not exceed consent in part because "[Defendant] made no protest at any point during the entire search procedures."). Accordingly, the Court finds that the officers did not exceed the scope of Defendant's voluntarily given consent to search his vehicle. Because the Court finds that the search of Defendant's vehicle was a valid consent search, it is not necessary for the Court to review the magistrate judge's findings on inevitable discovery or the government's objections to those findings. Docket no. 94 at 11 n.11. The Court finds that the magistrate's recommendations regarding Defendant's motions to suppress should be accepted, and that Defendant's motions to suppress should be denied.

C. Motion to Compel Production of Evidence (docket no. 89)

Rule 16 of the Federal Rules of Criminal Procedure provides that, upon a defendant's request, the Government must permit inspection and copying of books, papers, documents, data, photographs, tangible objects, buildings, or places if, *inter alia*, the item is within the government's possession, custody, or control and was obtained from or belongs to the defendant. Fed. R. Crim. P. 16(a)(1)(E); *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015). In addition, the due process clause requires the Government to disclose evidence that is favorable to the defendant where the evidence is material to either guilt or punishment. *Canales v. Stephens*, 765 F.3d 551, 574 (5th Cir. 2014) (discussing *Brady v. Maryland*, 373 U.S. 83 (1963)). Courts determine the materiality of evidence for *Brady* purposes by assessing the "value of the evidence relative to the other evidence mustered by the state." *Canales*, 765 F.3d at 575. Doubts as to materiality should be resolved in favor of disclosure. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995).

Defendant seeks an order to compel production of cell phone data, text messages, call logs, and other information found in the cell phone that police seized from Defendant following Defendant's arrest. Docket no. 89 at 2. Defendant argues that data contained within the phone and accessible through it are material to establishing Defendant's guilt or innocence because they will show who Defendant was communicating with before his arrest. Docket nos. 88 at 18-19, 29 (testimony of officers that Defendant was using a phone and "looking around like he was looking for somebody to meet" before his arrest); 89 at 2. Defendant notes that, in addition to phone records—i.e., call or text message logs—the phone may contain material social media data from services such as Facebook, Twitter, Snapchat, and others. *Id.* Defendant's motion to compel represents that the Government has agreed to provide the cell phone information requested in Defendant's motion. Docket no. 89 at 2. However, in its response to Defendant's motion, the Government contends that it "did not submit a search warrant to search the cell phone(s) [and] . .

. is not in possession of any cell phone data from the Defendant's telephone" and that "the Government has provided the defendant with all evidence that he is entitled to receive." Docket no. 93 at 2-3. The Government further argues that, because Defendant or his attorney can submit a subpoena to the cell phone carrier for Defendant's phone records, the Government is not obligated to provide cell phone records to Defendant. Docket no. 93 at 3.

The Court agrees with the Government that Rule 16 does not require the Government to extract data from the seized phone(s) and provide that data to Defendant if the Government has not searched the phone and does not intend to use data from it at trial. However, Rule 16 imposes an obligation on the Government to permit Defendant to inspect and copy data and tangible objects that it seized from Defendants, and does not condition that obligation on materiality or the Defendant's ability to obtain the data through other means. Fed. R. Crim. P. 16(a)(1)(E). Furthermore, since it is not disputed that the phone(s) in question were seized from Defendant and are in the Government's control, the Government's obligation under Rule 16 is not conditioned on the Government's intent to use the phone data at trial. *Id.* Accordingly, the Court finds that Defendant's motion to compel should be granted in part and that, to the extent it has not already done so, the Government must permit Defendant to inspect and copy the data contained within or accessible through the cell phone(s) and any other devices that it seized from him at the time of his arrest and is in possession of.[2]

Defendant also seeks an order to compel production of training and certification records of the K-9 units that were used during the search of Defendant's vehicle. Docket no. 89 at 2. Citing *Kyles v. Whitley*, 514 U.S. 419, 446 (1995), Defendant argues that the favorability and

[2] Of course, the obligation to disclose this material—which Defendant claims is exculpatory—also obligates the Government to preserve it. *United States v. McNealy*, 625 F.3d 858, 868 (5th Cir. 2010) ("Failure to preserve material exculpatory evidence violates due process rights irrespective of whether the government acted in good or bad faith.") (citing *Illinois v. Fisher*, 540 U.S. 544, 547 (2004)).

materiality of this evidence for *Brady* purposes is established because Defendant may use it "to discredit the caliber of the investigation or the decision to charge" by using that evidence to question "why police continued to suspect Defendant of drug trafficking even after trained and certified K-9 units failed to alert or detect narcotics in Defendant's vehicle." Docket no. 89 at 3. The Government argues that the K-9 training and certification records are immaterial, irrelevant, and not subject to disclosure because "the canines' non-alerting conduct does not exonerate the Defendant." Docket no. 93 at 3.

The K-9 certification and training records are not covered by the discovery obligations set forth in Rule 16, so the Court analyzes Defendant's request under *Brady*. To be subject to *Brady*, the evidence must be both favorable to the Defendant and material, and materiality for *Brady* purposes "depends almost entirely on the value of the evidence relative to the other evidence mustered by the state." *Canales*, 765 F.3d at 575. In other cases, courts have found that *Brady* required disclosure of evidence regarding the reliability of K-9 units where a challenged scent identification linked a defendant to a crime. *See, e.g.*, *Aguilar v. Woodford*, 725 F.3d 970, 982 (9th Cir. 2013) (Where a challenged scent identification linked the defendant with a vehicle used in the crime, undisclosed evidence regarding a record of erroneous scent identifications "is unquestionably 'favorable for *Brady* purposes.'"). In this case, however, Defendant does not appear to dispute that the K-9 units failed to detect contraband that actually was present in the vehicle that Defendant was driving immediately before his arrest. Docket nos. 89 at 1; 93 at 2. Thus, Defendant seeks evidence of the unreliability of the K-9 units not to impeach evidence linking him to the crime, but to discredit the Government by highlighting its initial failure to detect the contraband that he was in possession of at the time of his arrest. In this context, the Court finds that the K-9 training and certification records are neither exculpatory nor material, and are therefore not subject to disclosure under *Brady*. Moreover, Defendant has already

elicited testimony regarding the unreliability of the K-9 units and the Government's initial failure to identify the contraband in his possession at the time of his arrest. Docket no. 88 at 44-45; *Rocha v. Thaler*, 619 F.3d 387, 396 (5th Cir.), clarified on denial of reconsideration, 626 F.3d 815 (5th Cir. 2010) ("Undisclosed evidence that is merely cumulative of other evidence is not material"). Accordingly, the Court finds that disclosure of the K-9 training and certification records in this case is not required, and that Defendant's motion to compel should be denied as to that evidence.

Conclusion

It is therefore ORDERED that Defendant's Motion to Disclose Identity of Confidential Informant (docket no. 71) is DENIED;

Defendant's motions to suppress evidence (docket nos. 70, 81) are DENIED; and

Defendant's Motion to Compel Production of Evidence (docket no. 89) is GRANTED as to his request for cell phone data and DENIED as to his request for K-9 training and certification records. The Government shall preserve any and all cell phones or mobile devices within its control that were seized from Defendant at the time of his arrest, as well as all data contained therein or accessible through those devices, and shall permit Defendant to inspect and copy the data contained within or accessible through those devices. The parties shall confer regarding the time, location, duration, and other arrangements for such inspection.

IT IS SO ORDERED.

SIGNED this 12 day of ~~September~~ Oct, 2016.

ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

Magistrate Judge's Report and Recommendation

On Motion to Suppress

September 7, 2016

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	SA-14-CR-515-OLG
	§	
ARTURO SARLI,	§	
	§	
Defendant.	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

To the Honorable Orlando L. Garcia, Chief United States District Judge:

This Report and Recommendation concerns Defendant's Motion to Suppress with Memorandum of Law in Support (Docket Entry 70), and Supplemental Motion to Suppress (Docket Entry 81). The suppression issue was referred to the undersigned for review and recommendation. (Docket Entry 73.) A hearing on these matters was held on August 8, 2016. For the reasons that follow, I recommend that the Motion and Supplemental Motion (Docket Entries 70 and 81) be **DENIED.**

I. Jurisdiction.

Defendant is charged by indictment with possession of 50 grams or more of methamphetamine with intent to distribute. (Docket Entry 9.) The Court exercises jurisdiction over such charges pursuant to 18 U.S.C. § 3231. I have authority to make this recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

II. Facts.

In late June of 2014, San Antonio Police Department ("SAPD") Detective Steven Contreras received information from a confidential informant that someone known as "Arturo" was trafficking in large quantities of methamphetamine in the San Antonio area. (Docket Entry 88, at 16, 24–25.) Contreras had found the informant reliable in the past, as the informant had provided information leading to the arrest and conviction of three other individuals. (*Id.* at 15, 26–27.)

On the morning of July 3, 2014, Detective Contreras learned from the informant that "Arturo" would be in possession of approximately two kilograms of methamphetamine and making drug deliveries. (Docket Entry 88, at 16, 20–21, 27, 45.) The informant told Contreras that "Arturo" would be found at the Bill Miller's Barbecue restaurant near the corner of Probandt and Highway 90, driving a white Chevrolet Avalanche SUV. (*Id.* at 16, 18, 30–31.) Contreras proceeded to the restaurant, where he established surveillance along with another Detective, Robert Tamez. (*Id.* at 17, 29.) Other officers also established surveillance in the area. (*Id.* at 18.)

The officers saw Arturo Sarli sitting in a white Avalanche at the restaurant parking lot; his wife was a passenger. (Docket Entry 88, at 93, 97–98.) Sarli left the restaurant parking lot and drove north on Probandt to the Habitat for Humanity Restore furniture store, where he dropped off his wife. (Docket Entry 88, at 18–19, 93, 99.) He then returned to the restaurant parking lot, and made a call from a mobile telephone. (Docket Entry 88, at 19, 29.) Following Sarli as he returned to the restaurant, officers ran a check on the license plate; they learned that Sarli's name was associated with the Avalanche, and that there was an outstanding municipal court warrant for his arrest. (Docket Entry 88, at 40, 47.)

Detectives Contreras and Tamez called a marked patrol car to the scene (*id.* at 19, 30); when the vehicle arrived, Sarli appeared to become nervous and he left the parking lot, heading back north on Probandt, towards the Habitat for Humanity store. (Docket Entry 88, at 19–20, 99.) As he drove, he was followed by SAPD Officer Juan Torres and another officer named Flores, who observed him failing to maintain a single lane. (Docket Entry 88, at 60, 62.) Based on this traffic violation, the officers signaled for Sarli to stop; he pulled into the Habitat for Humanity parking lot and parked. (*Id.* at 60–61.)

Sarli got out of the vehicle, with his hands in his pockets. (Docket Entry 88, at 61.) When Sarli pulled his hands out of his pockets, they were shaking. (*Id.*) Sarli informed the officers that he did not have either vehicle liability insurance, or a driver's license or other government identification. (Docket Entry 88, at 62.) Officer Torres then asked for consent to search the vehicle; he testified that Sarli twice consented to a search of the vehicle, the second time in the presence of other officers. (*Id.* at 34–35, 63–64.) The consents were verbal; Torres did not have a consent form in his vehicle. (*Id.* at 80–81). Torres testified that, the first time he asked for consent, he advised Sarli that he had the right to refuse (*id.* at 81–82); for his part, Sarli testified that he never consented (*id.* at 117–18.)[1] Torres learned from Officer Flores that there was a "be on the lookout" (BOLO) alert for the vehicle and Sarli, on suspicion of weapons trafficking. (*Id.* at 50–52, 63, 73.) Torres then took Sarli into custody. (*Id.* at 64.) No weapons or drugs were found on his person. (*Id.* at 61.)

The officers began searching the vehicle, but did not find any contraband. (Docket Entry 88, at 64, 93.) Eventually, two narcotics-detecting dogs were brought out to search the vehicle; neither

[1] Defense counsel questioned Officer Torres about the availability of an audiovisual recording of the encounter; Torres indicated that his vehicle is equipped with a recording device, but the prosecutor indicated that the recording had not been preserved. (Docket Entry 88, at 83–86.)

alerted to the presence of drugs. (*Id.* at 32, 44, 55–56, 106–08.) The officers went in search of Sarli's wife, and they detained her on the belief that she might have secreted the contraband somewhere in the store. (*Id.* at 38–39, 94.) Finding nothing, Officer Torres contacted Detective Contreras. (Docket Entry 65.)

Detectives Tamez and Contreras subsequently arrived. Soon afterwards Tamez discovered approximately two kilograms of methamphetamine. The methamphetamine was in a box of kitty litter that was sitting in the bed of Sarli's vehicle. (Docket Entry 88, at 20–21, 48, 87, 93; *see* Gov't Exs. 2, 3, 4, and 5.)

After the drugs were discovered, Detective Contreras approached Sarli to question him. (Docket Entry 88, at 21, 23, 128.) Sarli was crying hysterically; Contreras gave him some time to compose himself, and then read him his *Miranda* rights.[2] (*Id.* at 21, 124, 128.) Sarli told Contreras that he had met an unknown man at a Wal-Mart parking lot, who gave him the box of kitty litter and instructed him to deliver it to another man at the Bill Miller's Restaurant. (*Id.* at 21, 23, 128.)

The Government witnesses testified that, because Sarli had no license and no proof that the Avalanche was insured, the vehicle was required to be towed away and impounded. (Docket Entry 88, at 21, 62–63, 67, 102.) The Government introduced the written SAPD policy for impounding vehicles which indicated that, when a vehicle is impounded, an inventory must be made of all personal property in the vehicle, including any property in the passenger compartment, trunk, or "any open container." (Gov't Ex. 6, at 8.) It is unclear from the record whether the box of kitty litter was open at the time the methamphetamine was discovered. Detective Tamez testified that he "opened" the box, suggesting it was closed when he first saw it. (Docket Entry 88, at 93.) Officer Torres

[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

testified that he did not remember whether the box was open or closed. (*Id.* at 87.) And the photographic and video recorded evidence presented by the Government was inconclusive.[3]

III. Analysis

Sarli argues that the stop and search of his vehicle and his detention and arrest violated the Fourth Amendment, and accordingly that the drugs found in his vehicle and any subsequent statements he made must be suppressed as fruits of the poisonous tree. (Docket Entries 70, 81; Docket Entry 88, at 129–36.)[4] The Government responds that Sarli's stop and the search of his vehicle was supported by probable cause to believe a drug violation had occurred; that his stop and arrest was independently supported by his traffic violation and the outstanding warrants he faced; and that the search of the vehicle, including the box of kitty litter containing the methamphetamine, was further justified by consent and the SAPD towing and impoundment procedures. (Docket Entries 75, 84; Docket Entry 88, at 136–41.)

In this case, it is undisputed that Sarli committed a traffic violation, which justified the traffic stop, *see United States v. Shabazz*, 993 F.2d 431, 435 (5th Cir. 1993); that he was subject to outstanding warrants, which justified his arrest (*see* Def. Ex. 1); and that his vehicle was uninsured, which authorized his vehicle's impoundment under SAPD policy (*see* Gov't Ex. 6, at 1). The remaining issues are whether the search of Sarli's vehicle—particularly the search of the box of kitty

[3] In the photograph of the box taken on the day of the search and arrest, the box appears open (Gov't Ex. 2); it is not clear, however, if the photograph was taken before or after the box was searched (*see* Docket Entry 88, at 48–49). The video recording introduced at the hearing provides only a partial view of the truck bed and the search of the box; although it is difficult to see, the box appears to be closed at the start of the video, and then appears in a different condition before and after Detective Tamez handled it. (*See* Gov't Ex. 7.)

[4] Sarli does not seek to have his statement suppressed under the Fifth Amendment, but only as the fruit of a Fourth Amendment violation. (*See* Docket Entry 88, at 134.)

litter in the vehicle's truck bed—was permissible under the Fourth Amendment, or instead requires suppression. Neither Sarli's stop for a traffic violation, nor his arrest on a municipal warrant, can justify such a search. *See Arizona v. Gant*, 556 U.S. 332 (2009).

The Government offers three bases upon which to justify the search and deny Sarli's motion to suppress its fruits. First, it argues that the search of the car and the box of kitty litter was supported by probable cause. Second, it asserts that Sarli consented to the search. Third, the Government contends that the drugs would have been inevitably discovered after the vehicle was impounded. This report and recommendation addresses each of these arguments in turn.

A. *Probable Cause.*

Law enforcement may conduct a warrantless search of an automobile if: "(1) the officer conducting the search had 'probable cause to believe that the vehicle in question contain[ed] property that the government may properly seize'; and (2) exigent circumstances justified the search." *United States v. Castelo*, 415 F.3d 407, 412 (5th Cir. 2005) (quoting *United States v. Reyes*, 792 F.2d 536, 538 (5th Cir. 1986). In a vehicle stop on a roadway, "the fact of the automobile's potential mobility" supplies the requisite exigency. *United States v. Sinisterra*, 77 F.3d 101, 104 (5th Cir. 1996); *see also Mack v. City of Abilene*, 461 F.3d 547, 553 n.2 (5th Cir. 2006) (discussing the automobile exception to the warrant requirement). "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle . . . that may conceal the object of the search," including containers. *United States v. Ross*, 456 U.S. 798, 825 (1982).

"[P]robable cause to search an automobile exists when trustworthy facts and circumstances within the officer's personal knowledge would cause a reasonably prudent man to believe that the vehicle contains contraband." *United States v. Edwards*, 577 F.2d 883, 895 (5th Cir. 1978) (en banc)

(per curiam). "Probable cause determinations are not to be made on the basis of factors considered in isolation, but rather on the totality of the circumstances." *United States v. Reed*, 882 F.2d 147, 149 (5th Cir. 1989). "Proof of probable cause requires less evidence than . . . proof beyond a reasonable doubt—but more than 'bare suspicion.' " *United States v. Raborn*, 872 F.2d 589, 593 (5th Cir. 1989) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

A police officer may draw inferences based on his own experience in deciding whether probable cause exists, including inferences that might well elude an untrained person. *United States v. Hearn*, 563 F.3d 95, 103 (5th Cir. 2009). Probable cause may be supported by the collective knowledge of law enforcement personnel who communicate with each other prior to the arrest. *United States v. Clark*, 559 F.2d 420, 424 (5th Cir. 1977). However, while law enforcement personnel "may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause." *Evett v. DETNFF*, 330 F.3d 681, 688 (5th Cir. 2003) (quoting *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988)).

In determining whether there is probable cause, an officer may rely on information provided by a confidential informant when, based on the totality of the circumstances, he determines that the information is sufficient to establish probable cause based upon the informant's veracity, reliability, and basis of knowledge. *Illinois v. Gates*, 462 U.S. 213, 230 (1983). The reliability of an informant may be established by showing that the informant previously provided information that proved to be correct. *United States v. Jackson*, 818 F.2d 345, 348 (5th Cir. 1987); *United States v. Phillips*, 727 F.2d 392, 396 (5th Cir. 1984).

In this case, the SAPD officers clearly had probable cause to search Sarli's vehicle at the time he was stopped. A reliable confidential informant, who had given information in the past that led

to multiple drug arrests and convictions, had told the officers about Sarli and potential drug trafficking. On the morning of the stop, the informant gave the officers very specific information as to Sarli's location and illegal activities. Sarli's timely appearance at the designated location, and his furtive and nervous behavior in response to police presence, corroborated the information that the officers had received. The totality of these circumstances certainly provided grounds for the officers initial decision to stop Sarli and search his vehicle.

Circumstances changed, however, as the search was conducted. The officers found no contraband of any sort. Two drug-detecting dogs were summoned to the scene; neither alerted to the presence of narcotics, despite being allowed into the truck bed where the box of kitty litter was located. And no additional incriminating information was obtained by the officers to justify a further probable-cause search for drugs: Sarli made no statements at that time; a BOLO for Sarli mentioned firearms, but not drugs; and no evidence was presented that the officers received additional information, from the informant or otherwise, as to the presumed location of the contraband. In these circumstances, the grounds for the search initially established by the officers had dissipated by the time they searched the box. "Considering the contradictory set of facts available to the officers at the time," the search of the box was not justified by probable cause. *Bigford*, 834 F.2d at 1220.

B. *Consent.*

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *United States v. Jenkins*, 46 F.3d 447, 451 (5th Cir. 1995) (citing *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968)). Whether consent is voluntary is a question of fact. *United States v. Guzman*, 739 F.3d 241,

248 (2014); *see generally Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Six factors are considered: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *Jenkins*, 46 F.3d at 451; *Schneckloth*, 412 U.S. at 227. "[A]lthough all of the above factors are highly relevant, no one of the six factors is dispositive or controlling of the voluntariness issue." *Jenkins*, 46 F.3d at 451 (quoting *United States v. Olivier-Becerril*, 861 F.2d 424, 426 (5th Cir. 1988)).

In this case, Officer Torres testified that Sarli voluntarily consented to the search of his vehicle. He consented initially when speaking privately with Torres, and then repeated his consent in the presence of other officers. Sarli was not in handcuffs at the time, and he was expressly told by Torres that he had the right to refuse to consent. These circumstances support a finding that Sarli's consent was voluntary, and thus justified the officers' search of his vehicle. Moreover, Sarli did not limit the scope of his intent, and so his consent would reasonably be understood to extend to the containers within the vehicle. *See Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (when defendant puts no "explicit limitation" on scope of search,"if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization"). Accordingly, if Officer Torres's testimony is credited, Sarli's consent justified the search of the box of kitty litter.

Sarli argues that Officer Torres's testimony should not be credited. He points out that the consent was verbal, not written, and that the audiovisual recording of the interaction between Torres and Sarli was not preserved. Sarli also testified at the suppression hearing that he never consented

to the search, but instead answered "no" each time he was asked for consent. (Docket Entry 88, at 117–18.)

Sarli's arguments fail. While "prudence would have dictated" that the officers preserve a recording of a defendant's verbal consent, or secure the consent in writing, these failures do not preclude the Court from finding an officer credible when he testifies as to the defendant's consent. *Cf. United States v. Sanchez*, No. SA-13-CR-276-XR, 2013 WL 4000753, at *3 (W.D. Tex. Aug. 2, 2013) (court finds officer to be credible even though he did not "include the verbal consent in his report or he secure the consent in writing"). In this case, Officer Torres's testimony on the issue was credible—indeed, far more credible than Sarli's contrary testimony. Sarli provided doubtful testimony contradicting the officers on a number of issues. He claimed that he did not go to the Bill Miller's Restaurant before driving his wife to Habitat for Humanity,[5] despite multiple officers seeing him at the restaurant first[6]; he implausibly asserted that one of the officers who stopped him drew a weapon,[7] even though this would have placed another officer in the line of fire[8]; and he made the uncorroborated and unlikely claim that his wife had his driver's license during the stop,[9] even though she was questioned at the scene[10] and, according to the other testimony presented, never produced any license or insurance. Given all these circumstances, Officer Torres' testimony is more credible

[5] Docket Entry 88, at 113.

[6] *See id.* at 18, 93, 99.

[7] *Id.* at 115–16.

[8] *See id.* at 91.

[9] *Id.* at 118.

[10] *Id.* at 67, 88–89.

than Sarli's. That testimony establishes that Sarli did in fact consent to the search, and that his consent was voluntary. In light of Sarli's consent, the search of the box of kitty litter did not violate the Fourth Amendment.

C. ***Inevitable Discovery.***[11]

Under the inevitable-discovery doctrine, evidence that is initially seized improperly should not be suppressed if it would have been discovered pursuant to normal police practices. *United States v. Ochoa*, 667 F.3d 643, 650 (5th Cir. 2012); *United States v. Seals*, 987 F.2d 1102, 1108 (5th Cir. 1993); *United States v. Castro*, 166 F.3d 728, 734 (5th Cir. 1999). "The inevitable discovery doctrine applies if the Government demonstrates by a preponderance of the evidence that (1) there is a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of police misconduct, and (2) the Government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation." *United States v. Zavala*, 541 F.3d 562, 579 (5th Cir. 2008).

In this case, the Government argues that the methamphetamine in the box of kitty litter would have been found as part of an inventory search of Sarli's vehicle when it was impounded. When conducted in accordance with proper procedure, an inventory search can be a lawful means of discovering contraband. *See United States v. Hope*, 102 F.3d 114, 116 (5th Cir. 1996). In this case, the Government witnesses credibly testified that, because Sarli had no license and no proof of

[11] A finding that the searches of the vehicle and the kitty litter box were authorized by consent ends the Fourth Amendment inquiry; however, in the event that the District Court rejects this report's recommendation regarding consent, the Government's inevitable-discovery argument is addressed below.

liability insurance, SAPD policy required that his vehicle be towed away and impounded. (Docket Entry 88, at 21, 62–63, 67, 102.)

The question remains whether the drugs would have been discovered as part of the inventory search. The Government introduced the written SAPD policy for impounding vehicles, which indicates that, when the vehicle was impounded, an inventory would be made of all personal property, including any property in the passenger compartment, trunk, and "any open container." (Gov't Ex. 6, at 8.) Whether the box of kitty litter was an "open container" at the time of the search is unclear. Detective Tamez, who found the contraband, testified that he "opened" the box, suggesting that it was closed at the time. (Docket Entry 88, at 93.) Officer Torres did not remember whether or not it was closed. (*Id.* at 87.) The photographic and video recorded evidence presented by the Government (Gov't Exs. 2, 7) does not show whether or not the box was an "open container" at the time of the search. Finally, it seems implausible that two narcotics-detecting dogs would fail to alert to drugs in an open container. In these circumstances, the Government has not carried its burden of showing, by a preponderance of the evidence, that the drugs would inevitably have been discovered during a post-impoundment inventory search.

IV. Conclusion and Recommendation.

Because the search that led to discovery of the contraband was justified by consent, I find no violation of the Fourth Amendment occurred. Accordingly, I recommend that Defendant's Motion to Suppress with Memorandum of Law in Support (Docket Entry 70), and Supplemental Motion to Suppress (Docket Entry 81) be **DENIED**.

V. Instructions for Service and Notice of Right to Object/Appeal.

V. Instructions for Service and Notice of Right to Object/Appeal.

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1). Such party shall file the objections with the clerk of the court, and serve the objections on all other parties and the magistrate judge. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this memorandum and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED on September 7, 2016.

Henry J. Bemporad
United States Magistrate Judge