

Docket number

Supreme Court of the United States

Edward Bishop
Petitioner,

vs

United States of America,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

Petition for Certiorari

William J. Stevens
Counsel of Record for
Petitioner Edward Bishop
Post Office Box 747
Bridgman, Michigan 49106
Telephone (269)469-1469

Question Presented

1. Does a search warrant which described the place to be searched and the things to be seized as “any evidence (including, all photos, videos, and/or other digital files, including, removable memory cards) of suspect identity, motive, scheme/plan along with DNA evidence of the crime of Criminal Recklessness with a deadly weapon which is hidden or secreted [in the cell phone or] related to the offense of Dealing illegal drugs” fail the particularity requirement of the Fourth Amendment to the Constitution?

Parties

1. Petitioner, Edward Bishop
2. Respondent, United States of America.

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Citations Below

The opinion of the United States Court of Appeals for the Seventh Circuit was decided December 7, 2018 in case No. 18-2019 and is reported 910 F3d 335 (C.A.7 2018 (Ind.) . A copy is reproduced in the Appendix.

Jurisdiction

The judgment and opinion of the Court of Appeals sought to be reviewed was entered December 7, 2018. No extension of time to file this petition for writ of certiorari was sought. Petitioner seeks to invoke this Court's certiorari jurisdiction under 28 USC § 1254 by filing this petition by first class mail within 90 days of the December 7, 2018 judgment of the Seventh Circuit and on or before March 7, 2019.

Fourth Amendment Constitutional Provisions Involved

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

Petitioner Edward Bishop was charged with discharging a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States in violation of 18 USC § 924(c) (indictment [doc 1]). A white female, latter identified as Marilyn, had a gunshot wound to her left forearm. (trial transcript p.116). She was on the ground near a Cooper Tire/ Smith Tire shop in Warsaw Indiana (trial trans. Pp 114-115) A blue Pontiac was near her (trial trans. P117) The window in the driver's side door was broken (trial trans. P119) Officer Sam Weaver left the tire shop and went to the Warsaw Walmart parking lot where he found broken automobile glass and a spent silver bullet casing. (trial transcript p125). A Walmart surveillance video Exhibit 4 (trial transcript 128) A blue Pontiac was parked in the lot. (trial trans 140) A red Dodge Intrepid was located right next to the Pontiac. The vehicles were taken to the Warsaw police department. Detective Ticknor recovered a shell

casing for a Hornaday Lugar 9-milimeter bullet from the windshield.

(trial trans. P147) The police obtained a search warrant from the Kosciusko Circuit judge (document 45-1): You are authorized and ordered, in the name of the State of Indiana, with the necessary and proper assistance, to enter into or upon two vehicles and two cellphones which are all currently in the possession of the Warsaw Police and secured at the Warsaw Police Department. Two vehicles are described as a red four door Dodge Intrepid, VIN 2B3HD46R0311549980. Indiana plate 985MHB, which is registered to Edward Bishop, and a four door 2008 Black Pontiac G6 VIN 1G2ZG57N984266403, Indiana temporary license plat H001277, which is registered to Marilyn Ratliff. The two cellphones are described as a blackLG cell phone with a black case formerly in the possession of Edward Bishop and a pink Samsung cell phone with a pink case formerly in possession of Marilyn Ratliff. You are further authorized and ordered to diligently search for and seize any

evidence (including all photos, videos, and/or other digital files including removable memory cards) of suspect identity, motive, scheme/plan along with DNA evidence of the crime of Criminal Recklessness with a deadly weapon which is hidden or secreted on or in vehicles and/or cell phones, along with any monies or other property subject to seizure under IC 34-4-30-1.1 and I.C. 35-48-4-6, which related to the offense of Dealing illegal drugs.

The search of the console of the red car revealed coins, a pen, receipts, a digital scale, plastic baggies, and a magazine for a Taurus handgun with gold 9-millimeter bullets in it (trial trans. 151) The content of the baggie was tested for ecstasy on the day of the search (trial trans. p154)

Marilyn consented to the search of her phone and provided the police with her phone password. (trial trans. 191) The phone contains 116 text messages between Edward and Marilyn (trial trans. P204). The oldest is dated 4/14/2017 and the last one is dated 5/13/2017. (trial trans 204)

Message 108 says, "I'll give u a blunt of moon rock roo so u can try thant out." (trial trans. P 209)

Message 63 says, "Can u get pain pills." Message 62 replies , " No I got xpills." (trial trans 210)

Line 33 reads, "Yea I got it how many u need I got all types of [gas emoji] (trial trans. 210)

Line 16 reads, "So 425 right for warlock." (trial transcript 211)

Line 9 reads, "Yea I need the address to the Wal-Mart n I gotta get gas to bro." (trial transcript 211)

Pursuant to the warrant the police extracted two videos from Edward's phone In one Edward is holding a gun. In the other video Edward has a gun in his waistband. (trial transcript 235)

The search of Bishop's phone showed a call log which was a mirror image of the log on Marilyn's phone (trial transcript 228)

There were no text messages between Marilyn and Edward on Edward's phone. (trial transcript 229) The government contended that Bishop deleted the text messages on his phone.

The district court denied defendant's motion to suppress.

The jury found Bishop guilty (trial transcript p294).

The Seventh Circuit held that the warrant authorized the police to rummage through every application and file on the phone and permitted the police to decide which files satisfy the warrant description but held that the description did not offend the Fourth Amendment requirement that the place to be searched be described with particularity.

Reasons for granting the writ

In *United States v Griffith* 867 F3d 1265 (D.C. Cir 2017) the D.C. Circuit held that a general description of all electronic devices in an apartment was an impermissible general search. In *United States v Galpin* 720 F3d 436, 445 (2nd Cir 2013) the 2nd Circuit condemned descriptions broader than the description supported by specific probable cause. The Seventh Circuit in the present case held that the warrant authorizing the search of every file in Bishops phone did not violate the particularity requirement of the Fourth Amendment. 910 F3d 335 (7th Cir 2019). The writ should be

granted to resolve the conflict.

Edward Bishop was charged with discharging a firearm during the commission of a drug trafficking crime 18 U.S.C. § 924(c). Evidence of the relationship between the discharge of the firearm and any drug trafficking crime was very weak. With a search warrant the government rummaged through Edward Bishop's cell phone and found two videos of Bishop displaying a Taurus 9 mm pistol. The search was challenged in a pre-trial motion to suppress (doc 45) and the videos were admitted in evidence over objection (trial transcript p. 235).

This court has stated Fourth Amendment requirement that warrants must describe the things to be seized with particularity. *Kentucky v King* 563 U.S. 452, 131 S. Cr 1849, 179 L ed 2d 865 (2011) and *Maryland v Garrison* 480 U.S. 79, 107 S. Ct. 1013, 94 L ed 2d 72 (1987).

Cell phones and computers store a vast amount of personal and

private data. As the Tenth Circuit observed in *United States v Christie* 717 F3d 1156 1164 (10th Cir 2013) “They[computers] can contain (or at least permit access to) our diaries, calendars, files, and correspondence—the very essence of the “papers and effects” the Fourth Amendment was designed to protect. U.S. Const. amend. IV. In today's world, if any place or thing is especially vulnerable to a worrisome exploratory rummaging by the government, it may be our personal computers.” Orin Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 569 (2005) observes Computers “are postal services, playgrounds, *447 jukeboxes, dating services, movie theaters, daily planners, shopping malls, personal secretaries, virtual diaries, and more.” The potential for privacy violations occasioned by an unbridled, exploratory search of a hard drive or cell phone is enormous.

The Second Circuit’s discussion of the particularity requirement in *United States v Galpin* 720 F3d 436, 445 (2nd Cir 2013) is instructive

The D.C Circuit's holding in *United States v Griffith* 867 F3d 1268 (DC Cir 2017) reinforces the rule.

A careful review of the warrant to search Bishop's phone shows that the executing officer has unlimited discretion as to which files to seize. In fact he dredged up videos of Bishop with a 9 mm pistol which may or may not have been the pistol discharged in the Walmart parking lot. If the data to be seized were described as texts with Marilyn, videos of the Taurus 9 mm pistol or of pictures of naked children the executing officer would be limited in what he could seize. Here he is not limited. He can search all digital files and has discretion to determine if the data has anything to do with suspect identity, motive, scheme/plan of Criminal recklessness with a deadly weapon. It is up to the officer to decide if images of drugs on the phone fall within the description of other digital files which are evidence of motive of criminal recklessness. Cell phones and computers are like file drawers. The content of the information to be seized should be specified.

The Seventh Circuit relied on *Anderson v Maryland* 427 U.S. 463, 96 S.Ct.2737, 49L.Ed.2d 627 (1976) to justify looking in every file and application on Bishop's phone without limitation. *United States v Bishop* 910 F.3d 335 (7th Cir 2018).

But such general rummaging through data and record are expressly prohibited by the 4th Amendment *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971). Thus the requirement plainly appearing on the face of the Fourth Amendment that a warrant specify with particularity the place to be searched and the things to be seized is imposed to the end that "unauthorized invasions of 'the sanctity of a man's home and the privacies of life' " be prevented. *Berger v. New York*, 388 U.S. 41, 58, 87 S.Ct. 1873, 1883, 18 L.Ed.2d 1040 (1967). " 'As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' " *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 512, 13 L.Ed.2d 431 (1965) (quoting *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927)).

The motion to suppress should have been granted. The holding of the Seventh Circuit should be reversed

Conclusion

For the foregoing reasons This court should grant certiorari.

Respectfully Submitted,

/s/William J Stevens
William J. Stevens

William J. Stevens
Counsel of Record for
Petitioner, Edward Bishop
P.O. Box 747
Bridgman MI 49106
(269) 469-1469

Appendix

Court of Appeals Opinion