

APPENDIX

755 Fed.Appx. 689 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Roland KAILIHIWA, Defendant-Appellant.

No. 17-10479

|
Argued and Submitted February
13, 2019 Honolulu, Hawaii

|
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Attorneys and Law Firms

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Appeal from the United States District Court for the District of Hawaii, J. Michael Seabright, Chief Judge, Presiding, D.C. No. 1:16-cr-00583-JMS-1

Before: TALLMAN, BYBEE, and N.R. SMITH, Circuit Judges.

MEMORANDUM *

Roland Kailihiwa appeals the district court's denial of his motion to suppress evidence from a dog sniff. He argues that a magistrate judge erroneously issued a search warrant authorizing agents to open a parcel addressed to him on which a narcotics detection dog had alerted. Below, Kailihiwa asserted that agents had misrepresented facts about the dog's training and certification in an affidavit in support of the search warrant and argued that the warrant thus issued in violation of *Franks v. Delaware*,

438 U.S. 154, 159, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The district court held a three-day *Franks* hearing at which it heard testimony from the dog's handler and trainer. It found this testimony to be credible. Accordingly, the district court found that the affidavit contained neither intentionally nor recklessly false or misleading statements and denied Kailihiwa's motion to suppress.

To prevail on a *Franks* challenge, a defendant must satisfy a "two-step" test. *United States v. Martinez-Garcia*, 397 F.3d 1205, 1214 (9th Cir. 2005). First, he must prove by a preponderance of the evidence that an affidavit in support of the search warrant contained intentionally or recklessly false or misleading statements or omissions. *Id.* at 1215. Second, he must satisfy the district court that, with the false material set aside, "the affidavit's remaining content is insufficient to establish probable cause." *Id.* (quoting *Franks*, 438 U.S. at 156, 98 S.Ct. 2674).

We review for clear error the district court's finding on the first step of the *Franks* test, that an affidavit did not contain purposefully or recklessly false or misleading statements or omissions. *Id.* at 1215 n.5. However, Kailihiwa affirmatively waived this argument in his brief, accepting the district court's credibility determinations and acknowledging that it would be "improbable" to persuade us to revisit them. We agree with his assessment of his odds, because "the district court's credibility determinations ... are afforded great deference." *United States v. Sarkisian*, 197 F.3d 966, 991 n.9 (9th Cir. 1999). However, *690 because this argument was waived, we need not further address it. And because Kailihiwa has declined to make an argument on the first step of the *Franks* test, we need not reach his argument on the second step, that is, whether the affidavit was still sufficient to establish probable cause absent the challenged provisions.

Kailihiwa asks us to consider directly the question of whether the dog was sufficiently reliable for its sniff evidence to establish probable cause, irrespective of the constraints of the *Franks* framework. We decline to so construe his appeal. This case reaches us on post-judgment review of Kailihiwa's *Franks* motion to suppress, and the district court heard Kailihiwa's argument about the dog's reliability within the context of its *Franks* hearing. On appeal, Kailihiwa contests only the evidence from the dog and not any of the other factors the magistrate judge relied upon in issuing the search warrant. He does not raise arguments about the dog's reliability appreciably

distinct from those he raised at the *Franks* hearing. Thus, our conclusion that the district court properly applied the *Franks* framework and denied Kailihiwa's motion is sufficient to resolve all issues presented.

AFFIRMED.

All Citations

755 Fed.Appx. 689 (Mem)

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3 UNITED STATES OF AMERICA,) CRIMINAL NO. 16-00583JMS
 4)
 5 Plaintiff,) Honolulu, Hawaii
 6 vs.) May 11, 2017
 7 (1) ROLAND KAILIHIWA,) [32] CONTINUED MOTION TO
 8 Defendant.) SUPPRESS AND REQUEST FOR A
) FRANKS (AND/OR HARRIS)
) HEARING

9
 10 TRANSCRIPT OF PROCEEDINGS
 11 BEFORE THE HONORABLE J. MICHAEL SEABRIGHT
 12 CHIEF UNITED STATES DISTRICT JUDGE

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26 Proceedings recorded by machine shorthand, transcript produced
 27 with computer-aided transcription (CAT).

1 these packages being profiled, it's curious to think that, you
2 know, Mr. Sloan testified, Well, you know, how you do these is
3 normally you put these boxes in with all these other boxes.
4 And presumably that's what happened at the postal service that
5 day. The two parcels that law enforcement was most curious
6 about that they had profiled, Mervin alerted on. He didn't
7 just show interest in Parcel 1, he alerted on that.

8 THE COURT: Well, yeah, the second parcel is
9 irrelevant to me -- or the first parcel, I guess is what it is.

10 MS. ALTHOF: Well, I mean -- no, I understand for the
11 Franks analysis, but it's relevant in this way: It's relevant
12 in that Steve Sloan testified, Look, if you're not doing this
13 proofing in the face of these non-seizure alerts, if you're not
14 doing that, if that's not reflected in your training, it's
15 going to be an ongoing problem, it is going to get worse. And
16 Parcel 1 is evidence of Mr. Sloan's testimony on that point,
17 and that's how it's relevant.

18 I don't have anything further unless the Court has
19 questions for me.

20 THE COURT: No. Thank you.

21 MS. ALTHOF: Thank you.

22 THE COURT: All right. I am prepared to rule on this
23 matter.

24 So let me first start -- cover some background and
25 some law. I think we've covered this already, but I'll sort of

1 repeat myself a little bit on some of this.

2 As you all know, I previously found that the defendant
3 had made the requisite preliminary showing necessary for a
4 Franks hearing, and I limited it to two issues: Whether there
5 were false statements or omissions regarding the
6 certifications; and second, whether there were omissions
7 regarding -- I'll call it false positives, but really I think
8 it's broadened into Mervin's reliability is essentially what
9 we've been discussing here, that flows from the certifications
10 from the training, from the non-productive log. I mean that
11 whole -- that whole picture.

12 I made it clear that I wasn't going to consider a
13 Franks challenge beyond that, and I think the law is clear
14 that, you know, you need to make that preliminary showing, and
15 the Court will authorize a Franks hearing if appropriate, but
16 then the Franks hearing is limited to that substantial showing
17 that has to be made preliminary. So to the extent there are
18 some arguments here that may be viewed as beyond the scope of
19 Franks hearing I allowed, they're not properly before me.

20 And also, and I stated this several times, I just want
21 the record to be clear -- because I don't know, Ms. Althof, how
22 you view this at this point -- but Florida versus Harris, 133
23 Supreme Court 1050, does not create some new rule unique to
24 canine sniffs that is sort of sui generis, stands outside the
25 normal ways to challenge whether it be a warrantless search or

1 warranted search.

2 The opposite is true. Harris made clear that dog
3 sniffs are to be treated the same as other issues for finding
4 of probable cause, and rejected the Florida Supreme Court's
5 view as to the sort of information that had to be set forth for
6 a finding of probable cause by a court. That was an automobile
7 exception, so it was a warrantless search by a canine.

8 So, Harris addresses how courts should review a
9 probable cause determination when there is no ensuing warrant
10 after a dog or canine sniff.

11 In other words, you know, is there probable cause for
12 a search in a case without a warrant. And it was a
13 straightforward application of probable cause standard and the
14 rejection of rigid rules in favor of a totality of
15 circumstances or a totality of the evidence.

16 But if you have a search warrant, as we did here, that
17 sets forth probable cause, then all the defendant is left with
18 is Franks and not some new rule created by Harris.

19 And I want to make clear what I'm saying about that.
20 This is not a case where the defense has challenged whether or
21 not the warrant as written within the four corners establishes
22 probable cause. They're challenging whether or not there are
23 false statements in it and/or material omissions in it.
24 Clearly and squarely following within Franks.

25 And I'm not stating that Harris isn't relevant. It

1 is. It is helpful in its discussion in determining the sort of
2 information that is relevant to determine if a dog sniff
3 results in probable cause. So in the context of a Franks
4 hearing, it is particularly relevant to the second issue, the
5 second part of the Franks test, which is, you know, if there
6 are false statements or material omissions that are reckless or
7 intentional, and you fix it, so to speak, is there probable
8 cause. And Harris speaks to that. But it does not create a
9 new standalone test that lessens the standards of Franks.

10 All right. In United States versus Perkins, a recent
11 Ninth Circuit case, 850 F.3d 1109, the court stated the test,
12 which is not in dispute, to prevail on a Franks challenge, the
13 defendant must establish two things by a preponderance of the
14 evidence: First, that the affiant officer intentionally or
15 recklessly made false or misleading statements or omissions in
16 support of the warrant; and second, that the false or
17 misleading statement or omission is material; i.e., necessary
18 to a finding of probable cause. If both requirements are met,
19 the search warrant must be voided and the fruits of the search
20 excluded.

21 So, under the first step, the defendant must show by a
22 preponderance of the evidence that the affiant knowingly and
23 intentionally or with reckless disregard for the truth made
24 false or misleading statements or omissions in support of the
25 warrant application.

1 And as both parties recognize, a negligent or innocent
2 mistake is insufficient and does not warrant suppression.

3 And I did look at one issue, and partly just maybe I
4 was more interested in it than it's relevant to this case, but
5 I noticed that a lot of Ninth Circuit cases talk about the
6 "affiant knowingly or intentionally" making statements. There
7 is an earlier Ninth Circuit case, DeLeon -- United States
8 versus D-E, capital L-E-O-N, 979 F.2d 761, where there were
9 sort of two investigators. One investigator had some
10 exculpatory evidence, didn't tell it to the other, and it got
11 into the warrant that the second officer put together. And the
12 question became whether he sort of -- that the government can
13 say, Well, the officer didn't -- the affidavit didn't know
14 about this exculpatory information, or you can't stick your
15 head in the sand like that, you can't sort of sandbag in that
16 regard. So the police can't insulate one officer's deliberate
17 misstatements merely by relaying it through an officer who was
18 ignorant, and that's actually a footnote in Franks.

19 So, misstatements or omissions which are incorporated
20 into an affidavit for a search warrant may be grounds for
21 Franks, a Franks hearing or finding, even if the official at
22 fault was not the affiant. So you do broaden that just beyond
23 the affiant.

24 All right. So, our case. On September 21 of 2016, we
25 know that Inspector Cha along with two DEA agents, who were at

1 the postal facility near the airport, inspecting incoming
2 parcels of Express Mail, they look for sort of suspicious
3 signs. These parcels, as I understand it, came from the
4 Mainland and were transported, as I think would be obvious, in
5 sort of large containers by plane.

6 HPD Corporal Mertens was present with his canine
7 Mervin. First, Mertens had Mervin proof an area at the mail
8 facility, meaning made sure the dog wasn't alerting to anything
9 within that area.

10 And then two different parcels ultimately were pulled
11 by Cha. First Parcel 1, which is not the subject parcel in
12 this case, although it was part of the search warrant that went
13 to the magistrate judge. And then Parcel 2, which is the
14 parcel at issue in this case.

15 Mervin alerted on both, but as we know, there were no
16 drugs in Parcel 1. But as I've said before, of course, there
17 could have been no information regarding that in the affidavit
18 presented to the magistrate judge because that wasn't known
19 until after the affidavit was presented and the warrant was
20 signed. That is it wasn't known that that was a false
21 positive.

22 All right. So this led then to the affidavit at issue
23 here, which contains Mr. -- Corporal Mertens' certification.
24 It's listed as Attachment C. And then, of course, that led to
25 the motion and where we are today.

1 So, first, I want to talk about the certifications.

2 Ms. Althof has appropriately set forth sort of the
3 four paragraphs in the affidavit that discussed this. It says,
4 and I'm going to read each one: "An HPD trainer conducts
5 certification of narcotics detector dogs annually in order to
6 assure the canine's ability to detect controlled substances.
7 Mervin was first certified as a narcotics detector canine in
8 March 2016 by the California Narcotics Canine Association,
9 CNCA, certifying official Herbert Nakamura. Mervin was
10 certified as a narcotics detector canine in March 2016 by
11 American Working Dog, AWD, Association, certifying official
12 Herbert Nakamura. Mervin was certified as a narcotics detector
13 canine in May 2016 by Honolulu Police Department trainer Wayne
14 Silva."

15 So, we have these exhibits, 219 and 221, which are
16 these certifications. And there has been a fair amount of
17 discussion as to whether these certifications in fact certified
18 for parcel searches or only for vehicle and buildings.

19 Now, the CNCA is certification, 219, says "Narcotic
20 Certification" at the top with the date and the name of the
21 canine and the handler, location and so forth. And then it
22 shows for vehicles, marijuana and methamphetamine pass.
23 Building, marijuana, methamphetamine, cocaine, heroin pass.
24 And then signed by Mr. Nakamura, and says the certification is
25 new.

1 The AWD is different in that it has -- you could check
2 boxes for buildings, vehicles, boxes or lockers. Only
3 buildings and vehicles are checked on that one, and showed
4 passing for buildings, for marijuana, cocaine, methamphetamine
5 and heroin. Vehicles for marijuana and methamphetamine.

6 So there is a question as to sort of ambiguity in this
7 and whether it means the dog is certified for those -- you
8 know, those odors or whether the dog is only certified but
9 limited to searching vehicles and buildings.

10 And I do find that Steve Sloan, the government expert
11 in this case, at least as to the CNCA certificate, credibly
12 testified that the canine is certified in odors, that is the
13 intent to certify the dog in odors, and not specific locations
14 where an odor may be found.

15 Steve Sloan, I do believe was credible. I base that
16 on his background, his experience, his manner of testifying,
17 his memory. And it's also important to note that he was a
18 founding member of CNCA back in the early '90s and is still on
19 the board, and so has a lot of personal knowledge as to CNCA
20 and how it works.

21 Now, Mr. Jimenez, the defense expert, criticized these
22 certifications as relevant to a search -- or for parcel, that
23 is that Mervin was not tested on parcels but only vehicles and
24 buildings. And that that is a problem.

25 You know, as I said, as to the nature of the

1 certifications, certainly as to the CNCA, I simply find
2 Mr. Sloan more credible in this regard.

3 That said, I do have some problems with the way the
4 certification affidavit is written. You know, it says Mervin
5 was first certified by CNCA. And then the next paragraph says
6 Mervin was certified by AWD. That is certainly suggestive that
7 there are two separate times in which the dog was certified.
8 Not once. At least it could lead to that impression by having
9 "first certified."

10 The certification was the same day. And the same
11 test. Now, it does make it clear it's the same -- I'm sorry,
12 the same certifying official, but it doesn't make it clear
13 it's -- it's the same test. So I think there are some issues
14 there as to the way it is written and whether it certainly
15 could be interpreted to say something other than what it does
16 say.

17 There's also an issue that was testified to, including
18 by Mr. Jimenez, that I think as -- as to the standards not
19 being met during the test. It's not a hundred percent clear to
20 me based on the totality of the evidence that the standards
21 were or weren't met as to, again, CNCA. Mr. Sloan testified,
22 again credibly, that they have standards, but, you know, when
23 they go out and teach, they say there's some things, you know,
24 you have to have some leeway on.

25 That said, you know, a dorm room is pretty small. Not

1 like, you know -- I mean my recollection of dorm rooms are
2 really tiny places. So I don't know where that leaves us with,
3 you know, the exact size because no one seemed to have the
4 exact size of these rooms. But certainly they're under a
5 thousand square feet.

6 So, I do find there's an issue regarding the
7 suggestion in the affidavit that the two, CNCA and AWD, were
8 obtained separately. As I say, they weren't. And I agree, for
9 instance, that the size of the room that Nakamura used may well
10 have been below the suggested 1,000 feet and possibly below
11 what should have been used under -- under any circumstances.
12 So there is some issue I find as to the reliability of the --
13 particularly the AWD, but also, to a certain extent, the CNCA
14 certification.

15 Now, as to the HPD certification. First of all, as I
16 discussed with Ms. Althof, from the face of it, it's clear that
17 it was an HPD officer who certified Mervin from -- for the HPD
18 certification. And it was in May of 2016. This certification
19 based on the testimony of Mr. -- or Corporal Silva?

20 MR. MUEHLECK: Corporal.

21 THE COURT: -- Silva was clearly more extensive than
22 the other two. I don't have any evidence before me there's a
23 problem that it occurred over a period of time. I see nothing
24 wrong with that facially. Nothing at all.

25 Wayne Silva, who is an HPD officer, certified Mervin,

1 and there were eight different test areas. I won't go through
2 all of them, but included things like vehicles and rooms and
3 including parcels. And the test was a blind test.

4 He explained that he used the VLK, Vohne Liche Kennel,
5 standards that had sort of been passed down, if you will, and
6 that HPD used it, although HPD's testing standard was even
7 stricter than the VLK standards. In other words, the HPD
8 certification he explained was more difficult than what the VLK
9 laid out.

10 I found and find Wayne Silva fully credible in this
11 regard. Again, based on his manner of testifying, his memory,
12 he just seemed to me like he was telling the truth. He
13 explained that although a team can fail a specific test and be
14 allowed to retest, this didn't happen with the Mertens/Mervin
15 team. That is, they passed each part of the test the first
16 time. And to pass requires a hit on every find.

17 He said if there's a false positive, the dog has to
18 retake the test. And here, again, as Wayne Silva credibly
19 testified, Mervin did not have to retake the test at all as he
20 passed each test the first time.

21 You know, we sort of talked about Mervin being
22 certified. I just want to be clear, there's always a team
23 here, right? It's Mertens and Mervin as a team. So when I say
24 Mervin, it's part of that Mertens/Mervin team.

25 Now, I understand there was some criticism by

1 Mr. Jimenez regarding the HPD certification process. And
2 Ms. Althof has discussed some of -- many of these things here
3 today. In part, based on a lack of recordkeeping, lack of
4 written standards, based on a conflict of interest, not knowing
5 the purity of the drugs, or the size, the amount of the drugs
6 involved and so forth.

7 And, you know, as -- for example, as to recordkeeping,
8 I agree with Mr. Jimenez certainly that it makes it more
9 difficult for an outside expert like him to review what tests
10 were given and opine as to the validity or the results of those
11 tests. I understand that. But it doesn't necessarily flow
12 from that that the test was flawed. It just means he didn't
13 have the resources he needed to give the kind of opinion he
14 might otherwise be able to give.

15 And Wayne Silva explained that Mervin passed all eight
16 tests, again, blind tests. And did so the first time using VLK
17 standards and more.

18 So, you know, in my view, would it be better if HPD
19 adopted their own standards and they were written and there was
20 more recordkeeping? Yeah, it would be. Again, the perfect
21 world is always better than the one we live in, but it's what
22 we have before us. And I do believe that Wayne Silva explained
23 credibly, and I do find that he did use the VLK standards as a
24 base and demanded more. And as I say, I think he was credible
25 in that regard.

1 I understand it may have been better if the quantity
2 of drugs and, you know, the purity and so forth was real clear.
3 May result in Mervin or any dog having more hits on residue. I
4 could understand that. But based on the totality of the
5 evidence, I don't believe the defense has shown that the HPD
6 certification is unreliable.

7 So based on the totality of the evidence, including
8 Mr. Sloan's credible testimony regarding this and Wayne Silva's
9 testimony, I find the HPD certification is meaningful and
10 provides critical proof of Mervin's reliability. And the
11 statement in the affidavit is not misleading in any way.

12 Now, there is this issue of the conflict of interest
13 that Mr. Jimenez talks -- talked about and Mr. Sloan talked
14 about in having HPD certify its own dogs.

15 First, as we already laid out, that's clear in the --
16 in the declaration that that was the case.

17 And second, I -- I do have concerns about what Harris
18 says. Harris teaches, quote: Law enforcement units have their
19 own strong incentive to use effective training and
20 certification programs, because only accurate drug-detection
21 dogs enable officers to locate contraband without incurring
22 unnecessary risks or wasting limited time and resources.

23 Finally, as a general matter, I want to say I found
24 the testimony of the government's expert overall more credible
25 than the defense. As I said, I'm not -- I'm not suggesting

1 that Mr. Jimenez intended to lie. I don't want the record to
2 reflect that. I'm not saying he's a bad person, I'm not
3 suggesting that in any way. But his focus at times appeared to
4 me to be sort of off center from what we were here to
5 determine. In some aspects of his testimony, it appeared he
6 was focused on what a perfect certification program would look
7 like, and then measured that perfect program, for instance,
8 against the HPD program.

9 But the fact that HPD may not have the perfect
10 program, again, doesn't necessarily mean that it's unreliable
11 or that there should have been more information set forth in
12 this affidavit. It simply means there's room for improvement,
13 and that is almost always true in matters of life.

14 So, in relying on the credible testimony of HPD
15 employees Mertens and Silva and Sloan, I find the HPD
16 certification was in fact reliable and accurate. That leads me
17 to the conclusion that there was no reason whatsoever for
18 Mertens to question the truthfulness of his statement regarding
19 the HPD certification in his affidavit.

20 I also find, at least as to the CNCA certification,
21 that it is meant to cover odors and not, for instance, simply
22 vehicles or buildings, as Mr. Sloan explained.

23 But there are certain aspects of this, as I've already
24 explained, that I do believe can be read as misleading as to
25 whether there was one or two tests, for instance. It certainly

1 suggests a sequence of tests as to CNCA and AWD, which is not
2 true. And there is some evidence that the test themselves may
3 not have been fully to standard.

4 But I've heard no evidence to suggest that Mertens was
5 reckless in the language he used or that he intentionally
6 misled. I know Mr. Jimenez testified otherwise. I don't find
7 that credible. It was conclusory and without any real -- other
8 than Mertens has been around a long time.

9 I think it was negligent, and is, to say that Mertens
10 was first certified by CNCA, and then in the next paragraph say
11 he was certified by AWD. Both say March 2016. So it's not a
12 huge deal, but it does suggest two different tests. To me. At
13 least I think a fair reading of that could lead you to that.
14 But I don't find that this is reckless or rises to the level of
15 recklessness or intentional conduct.

16 But I'll go a step further and say, even if the
17 reference to these certifications was reckless -- and to be
18 clear, I'm not making that finding -- defendant would fail on
19 step 2, given my finding as to the HPD certification language
20 in the affidavit.

21 So even if the CNCA and the AWD both were omitted
22 altogether or if there was clarification as to both of those
23 more fully explained, it would not impact the finding of
24 probable cause. The valid reference to the HPD certification
25 and the valid reference to training, as I'm about to discuss,

1 was more than sufficient to establish probable cause. And
2 Mervin's reliability.

3 All right. Now I'm going to move to this issue of the
4 lack of information about -- we've been calling it false
5 positives, proofing, however we want to kind of word it.

6 Exhibit 204 reflects Mervin's training log. Make sure
7 I have that number right.

8 MR. MUEHLECK: 204.

9 THE COURT: Yes. Yes. Beginning March 2nd of 2016.
10 As we know, Mervin came to Honolulu, I believe it was December
11 of 2015, was sort of in training up until he went into service
12 in March. There were training records, but those weren't kept.
13 That's my recollection of the testimony from -- from Corporal
14 Mertens. So we have a training log effective March 2nd of
15 2016, which coincides with the date of the certifications of
16 CNCA and AWD. Assuming sort of that those time periods all
17 fell in together.

18 So, Exhibit 204 reflects the training logs. There was
19 one -- one, as I recall the testimony, one only false positive
20 in the training log in early March, I think March 3rd, well
21 before Mervin was deployed. Now, this log, just to be clear,
22 goes past the date of the search warrant. I allowed all of it
23 in, but what's relevant is obviously from before the search
24 warrant was signed and backwards --

25 MR. MUEHLECK: We understand the Court's ruling.

1 THE COURT: -- is what's relevant in that regard. I
2 just want to make that clear.

3 The log reflects the number of times the aid was
4 hitting -- an aid was hidden and the number of hits. Mertens
5 did not recall that Mervin ever missed any deep hides during
6 this training. There is a fair amount of information on here.

7 Again, Mr. Jimenez is critical because the log is not
8 sufficient in and of itself to show reliability because it
9 lacks some information. And this may be true, again, for an
10 outside expert like Mr. Jimenez, but that doesn't mean that the
11 training was defective and therefore the dog was unreliable.
12 It reflects recordkeeping that could be better for an outside
13 expert to look at it and draw some conclusion.

14 But Mertens testified, and he testified as to Mervin's
15 success in training, and I found his testimony credible that
16 the training was appropriate. You know, there are some times
17 when he wasn't being trained, other times when he was. There's
18 no testimony before me that that is an issue that should cause
19 a concern. But Mertens overall testified credibly, as I said,
20 as to Mervin's success during the training, and I find this
21 credible.

22 Mervin had undergone appropriate training and overall
23 did quite well in that training. And there is a lot of
24 information set forth -- it's sort of in code, but set forth in
25 the training log. So I do find that Mertens' credible

1 testimony and his explanation of Exhibit 204 and his
2 explanation of Mertens' training -- I'm sorry, Mervin's
3 training, including Mertens' manner of testifying, his memory
4 and the detailed nature of his testimony fully supports this
5 finding.

6 And Mr. Sloan, likewise, credibly testified as an
7 outside expert that this log contains the sort of relevant and
8 complete information that is necessary for a handler to explain
9 the training.

10 Again, my interest isn't whether an outside expert can
11 explain it, but whether the handler can explain it. And
12 whether in fact Mervin was undergoing appropriate training and
13 was doing well in that training. That's the issue.

14 So, again, although the log could have contained more
15 information, it, nonetheless, details and reflects Mervin's
16 successes and training.

17 Now, Exhibit 206 -- I just want to make sure I have
18 the right exhibit number.

19 MR. MUEHLECK: Nonproductive, Exhibit 206.

20 THE COURT: It's the non -- right, the non-seizure or
21 nonproductive log --

22 MR. MUEHLECK: Yes.

23 THE COURT: -- shows that after being deployed and
24 before the magistrate judge signed the warrant in this case,
25 Mervin had five alerts on parcels that, after the execution of

1 a search warrant, were found not to have drugs. Three of those
2 were on the same date, that is August 4th of 2016, and two of
3 those appear to be very similar packages. There was no clear
4 explanation as to that or memory, as I recall, from Mertens,
5 but that seems to be the case.

6 But as Mertens and Sloan both explained, this does not
7 mean that Mervin was wrong in all of these instances. Although
8 he could have been wrong, Mertens found it more likely that
9 Mervin was alerting to parcels that were contaminated. And I
10 understand that he should be trained to not alert on those sort
11 of parcels, but again, it's the -- there's not evidence here
12 from which I can find one way or the other as to exactly what
13 happened. I mean nobody knows the reality of it.

14 And both Mr. Sloan and Mertens testified that at times
15 drug dealers will send test packages to see if they're able to
16 get to their intended destinations.

17 And in fact, Mr. Jimenez himself testified that he
18 would not have included this information in the search warrant
19 affidavit.

20 Exhibit 205 reflects all the times that Mervin was
21 correct, that is there was an alert and drugs were found, which
22 greatly outweighed these five times limited -- I'm sorry, set
23 forth in Exhibit 206. And Mr. Sloan credibly testified that
24 the number of false positives reflected on 206 is not a concern
25 in relation to the number of positive hits as reflected in 205.

1 So both experts seem to agree on this point.

2 Now, Ms. Althof, understanding that, makes an
3 argument, Well, the problem is the proofing didn't occur
4 afterwards and the lack of proofing should have been set forth
5 and supplied to the magistrate judge.

6 I just don't buy that. I don't think there's evidence
7 to support that. I think there's some evidence that that would
8 have been maybe a better way to go, but not that it's the sort
9 of thing that is necessary at a granular level to set forth in
10 an affidavit.

11 I understand that -- that there is testimony as to
12 what can be done and should be done after a false positive.
13 But I also note that -- that Mervin kept undergoing training
14 and did well in training. So it might be a different matter
15 if, you know, he was having these false positives and going
16 into training and failing, and that didn't make its way into an
17 affidavit. That might be a different matter, but that's not
18 the matter we have here.

19 But even if some information about the lack of
20 corrective measures, the proofing should have been included in
21 the Mertens affidavit, again, I believe that this omission at
22 best was negligent. And not reckless or intentional. I heard
23 nothing to suggest that this raises to such a level of
24 importance that its omission could be characterized as reckless
25 or intentional.

1 And all of this is supported by the Supreme Court
2 again in Harris stating, and I'll read three different quotes:

3 First, quote, field data thus may markedly overstate a
4 dog's false positives.

5 Two, the best measure of a dog's reliability thus
6 comes away from the field in a controlled testing environment.

7 And three, evidence of a dog's satisfactory
8 performance in a certification or training program can itself
9 provide sufficient reason to trust his alert.

10 So, even if there was an omission that was reckless in
11 some way, or intentional, and if more information had been
12 included in the affidavit, the affidavit would still establish
13 probable cause. There's more than sufficient evidence as to
14 Mervin's reliability based on his certification and training,
15 areas the Supreme Court says are particularly relevant to
16 reliability.

17 And even if you step back and I accept all of the
18 defendant's arguments, as Ms. Althof put it, if the entire
19 truth was known, I still think there's probable cause because I
20 see nothing to undermine the reliability of the certification
21 and training process.

22 So as to the claim that the affidavit omitted
23 information concerning or undermined Mervin's reliability, I
24 disagree. In conclusion, even if more information could have
25 been provided, the lack to include it at best was negligent.

1 And in any event, its inclusion could not have or would not
2 have impacted a probable cause finding. And that is based
3 largely on a -- my view that the HPD certification and Mervin's
4 training fully established reliability.

5 And as to the actual certifications, I discussed my
6 issues with them. I don't find, however, that there was
7 reckless or intentional conduct such that I would normally get
8 to step 2 in Franks. But even if I did, it would have no
9 impact whatsoever on the probable cause finding.

10 So I'm denying the motion.

11 All right. Anything else, Counsel?

12 MS. ALTHOF: Nothing further.

13 MR. MUEHLECK: Not by the government. Thank you.

14 THE COURT: All right. Court's in recess.

15 (The proceedings concluded at 10:16 a.m.,
16 May 11, 2017.)

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1 COURT REPORTER'S CERTIFICATE

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3 I, CYNTHIA FAZIO, Official Court Reporter, United
4 States District Court, District of Hawaii, do hereby certify
5 that pursuant to 28 U.S.C. §753 the foregoing pages is a
6 complete, true, and correct transcript of the stenographically
7 reported proceedings held in the above-entitled matter and that
8 the transcript page format is in conformance with the
9 regulations of the Judicial Conference of the United States.

10

DATED at Honolulu, Hawaii, May 24, 2017.

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/s/ Cynthia Fazio
CYNTHIA FAZIO, RMR, CRR, CRC

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