Eleventh Circuit Court of Appeals Case
No. 17-12510

In the
Supreme Court of the United States

JAVIER MARTIN VILLAR,

Petitioner,

v.

UNITED STATES OF AMERICA.,

Respondent.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Whether the District Court and the Court of Appeals erred in denying the Defendant's motion to suppress evidence located in the Appellant's residence when there was a lack of probable cause to believe that contraband would be located in his home.

(2) Whether the District Court and subsequently the Circuit Court erred in denying the Appellant's motion to strike sentencing enhancement pursuant to U.S.S.G. 2D1.1(b)1 when the Defendant was not in possession of a firearm as intended by the Sentencing Guidelines.

(3) Whether the District Court, and subsequently the Circuit Court erred in attaching a sentencing enhancement pursuant to U.S.S.G. 3B1.1(b), when the Defendant did not have a "managerial role in the offense" when looking at the factors set forth by the Sentencing Commission.

LIST OF PARTIES

The petitioner in this Court is Javier Martin Villar, who was the appellant and Defendant below.

The respondent in this Court is the United States of America, who was the appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Javier Martin Villar respectfully petitions for a writ of certiorari to review the judgment of United States District Court for the Middle District of Florida (Fort Myers Division) and the Eleventh Circuit Court of Appeal.

OPINIONS BELOW

On or about October 22, 2019 the Eleventh Circuit Court of Appeals rendered their unpublished Opinion in this matter denying Appellants appeal from the United States District Court for the Middle District of Florida (Fort Myers Division).

JURISDICTION

This Court has certiorari jurisdiction under 28 U.S.C. § 1257(a) to review the United State Court of Appeal for the Eleventh Circuit's decision.

Jurisdiction is timely invoked. The Eleventh Circuit entered its unpublished opinion on October 22, 2019. (Pet. App. 1a). A Motion for Rehearing *en banc* was timely filed, and subsequently denied on or about January 27, 2020.

STATEMENT OF THE CASE

A. Factual Background

In 2014, the Lee County Sheriff's Office (LCSO) received information that a heroin distribution ring was allegedly operating in Fort Myers, Florida, and Cape Coral, Florida, run by a person by the name of "Tonka". "Tonka" was later identified as co-defendant Gorge Vargas, who was renting a house at 4958 Dean Street, Fort Myers, Florida. While conducting surveillance at that address in 2014, a LCSO deputy made contact with Mr. Villar who was present at the home, with no apparent drug activity occurring.

On May 21, 2015, the LSCO used a confidential informant to arrange a purchase of heroin from Mr. Villar. Once arrangements were made, Mr. Villar left his business in Cape Coral, stopped briefly at his home, returned to his business, and then drove to a gas station where the transaction was completed. A second controlled purchase occurred at the same gas station on May 26, 2015.

Lee County Court Judge James Adams signed search warrants for Mr. Villar's home and business, which were executed on June 11, 2015. Heroin and a firearm were located inside Mr. Villar's bedroom in his home. Mr.

Villar possessed a valid Concealed Weapons Permit from the State of Florida at the time.

During this time the LCSO was conducting surveillance at the Dean Street "trap house" rented by Gorge Vargas. Mr. Villar was never seen at the Dean Street "trap house" by LCSO deputies.

Deputies served a search warrant on the Dean Street property and Mr. Villar was not found there. Further, a search warrant was served on Jorge Vargas' safety deposit box at Wells Fargo Bank where approximately $32,000 in cash were recovered including some marked bills used in an undercover purchase from the Dean Street "trap house".

B. Proceedings in the Trial Court

On or about September 2, 2015, a Grand Jury handed down an indictment against Appellant Javier Villar and five co-defendants.

Mr. Villar, the Appellant, was charged with (I) Conspiracy to Transport over a Kilogram of Heroin, in violation of Title 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(i) and 846, and (IV) Possession of Heroin with Intent to Distribute, in violation of Title 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C).

On or about December 2, 2015, previous counsel for the Appellant filed a Motion to Suppress Evidence found during a search of the Appellant's home located at 4151 Garden

Boulevard, Cape Coral, Florida. Doc. 116. The District Court denied this motion on or about January 5, 2016. Doc. 134.

On or about November 15, 2016, Mr. Villar entered a guilty plea to Count IV before United States Magistrate Judge Carol Mirando (ret.). On November 16, 2016, the trial Court entered an order accepting the Appellant's plea as to Count IV only.

Between January 20, 2017 and February 1, 2017, trial was held before the Honorable Sheri Polster Chappell, District Court Judge as to Count I (Conspiracy). The jury returned a guilty verdict as to Count I as to all defendants.

Appellant was sentenced on May 30, 2017, to a term of two hundred (200) months of imprisonment, with ten years of this as a minimum mandatory sentence. Doc. 160.

A timely notice of appeal was filed on June 2, 2017 and this appeal followed. Appellant is currently incarcerated at the Federal Bureau of Prisons (Butner FCI).

C. The Court of Appeal's Decision

On appeal, Villar challenged the district court's denial of his motion to suppress. The Court of Appeal's stated that all the issues lacked merit. Stating that the search of Villar's home was supported by probable cause, and if not, any error was harmless.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit departed from the prevailing case law.

When deciding whether an alleged error was harmless, "a court of appeals must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors." William v. United States, 503 U.S. 193, 203, 112 S. Ct. 1112. This court has previously granted certiorari to review an affirmance of a state court conviction based on the admission of unconstitutionally obtained evidence and decided the error was not harmless. Fahy v. State of Connecticut, 375 U.S. 85 (1963).

I. The District Court erred when it denied the Appellant's motion to suppress evidence seized from his home.

On June 11, 2015, the Lee County Sheriff's Office search of the Appellant's home based on a search warrant that had been signed by the Honorable James Adams on June 5, 2015, Doc. 116, Exhibits. 1.a and 1.b the probable cause alleged by the Sheriff's Office was predicated on the following facts:

(I) A confidential informant notified LCSO that the Appellant was selling heroin in Cape Coral and Fort Myers, Florida.

(II) A controlled buy was arranged at a local gas station with Appellant. After the buy was arranged, the Appellant left his

business, stopped briefly at his home, went back to his business, and then drove to the Speedway gas station, where the transaction was consummated.

(III) A second controlled buy was arranged at the Appellant's place of business, and the Appellant drove directly to the Speedway, where the transaction was consummated.

(IV) A trash pull was conducted at the Appellant's home, and "loose marijuana" and a piece of burnt tinfoil were located in the trash.

It is well-established that before a search warrant is issued, the reviewing magistrate must determine that "there is a

fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 238 (1983). Particularly, an affidavit in request of a search warrant "should establish a connection between the defendant and the residence to be searched and a link between the residence and any criminal activity." United States v. Martin, 297 F.3d 1308, 1314 (11th Cir. 2002). The affidavit must contain "sufficient information to conclude that a fair probability existed that seizable evidence would be found in the place sought to be searched." United States v. Pigrum, 922 F. 2d 249, 253 (5th Cir. 1991). This element of probable cause is commonly referred to as the "nexus element."

In looking at the facts that served as the basis of the search warrant, it is clear that there was virtually no evidence that there was a nexus between the sale of heroin and the Appellant's residence. During the first controlled buy, the sale was arranged at his place of business, and the Appellant returned to his place of business after stopping at his home, but before going to the Speedway. Although he stopped briefly at his home before returning to his business, any assertion by the Government that any contraband was retrieved from his home at that time is speculative, as there was no evidence presented to this effect. During the second controlled buy, the Defendant never stopped at his home but proceeded directly

from his business to the Speedway. The small amount of marijuana located in the trash outside the Appellant's house certainly does not provide a nexus between his home and the sale of heroin. Essentially, the only piece of evidence at all that linked the Appellant's home to the suspected criminal activity was the quick stop at his house before the first controlled buy. This hardly establishes a "fair probability" that seizable evidence would be located in the Appellant's home.

Because there was an insufficient nexus between the Appellant's home and the suspected criminal activity, the search warrant for his home was not based on

adequate probable cause. The motion to suppress should properly have been granted, and all evidence located in the Appellant's home should properly have been suppressed. Although suppression of this evidence would not have been dispositive, it certainly would have impacted the weight of the Government's evidence against the Appellant.

II. Whether the District Court erred in denying the Appellant's motion to strike sentencing enhancement pursuant to U.S.S.G. 2D1.1(b)1 when the Defendant was not in possession of a firearm as intended by the Sentencing Guidelines.

The Court erred in denying the Appellant's motion to strike the sentencing enhancement requested by the Government. The undisputed evidence at trial was that the Appellant possessed no firearm during any of his activities, or during any activities of his organization. Appellant lawfully owned a firearm that was found in his bedroom drawer; however, that is not possession as required by the sentencing guidelines. The Court's finding that the Appellant "possessed" a firearm for purposes of the sentencing enhancement was clearly erroneous.

Commentary (11A) of U.S.S.G 2D1.1(b)1 states the following:

Definitions of "firearm" and "dangerous weapon" are found in the commentary to §1D1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger for violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present unless it is clearly improbable that the weapon was connected to the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in his closet.

The commentary's example could not be closer to Mr. Villar's circumstances, in which he was arrested at his home and a pistol was found in a closed bedroom drawer. The clear intent of the Sentencing Commission was to enhance the sentences of defendants who actually possess firearms; not those of persons who simply own firearms.

There were other firearm(s) found during the course of the investigation; however, no evidence was presented that the Appellant had knowledge of, control over, access to, or possession of those firearms. It is "clearly improbable" that the weapons found were connected to the offenses with which Appellant was charged, and therefore, this proposed enhancement should properly have been struck.

III. Whether the District Court erred in attaching a sentencing enhancement pursuant to U.S.S.G. 3B1.1(b), when the Defendant did not have a "managerial role in the offense" when looking at the factors set forth by the Sentencing Commission.

The Appellant requested and was denied a downward departure as to the enhancement for the "managerial role in the offense" given pursuant to U.S.S.G 3B1.1(b). The record was void of any evidence that the Appellant owned or had any influence over any other participant, place, or thing(s), other than his own home.

In the Commentary under U.S.S.G. 3B1.1, the Sentencing Commission set forth factors to be considered by the court in evaluating one's role in a conspiracy. This Commentary states:

Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others."

In looking at these factors, the Court's finding that Appellant had a "managerial role" in the offenses was clearly erroneous.

A. The Appellant did not exercise decision making authority.

The evidence presented at trial showed that the Appellant did not have a large degree of control or authority over others or over the locations involved in this case. For instance, he had no access or knowledge of the safety deposit box maintained by Mr. Vargas at Wells Fargo, which contained cash allegedly procured during the sales of heroin. He did not own or lease the storage unit involved; this was controlled by Mr. Vargas and Ms. Smith, who also owned the Chevy Tahoe that was used in various transactions.

Appellant did not own or lease the Dean Street residence involved in this case; nor did he exert any control over it; nor were any of the Dean Street utilities in his name. Nor did he own or lease the 3936 Palm Tree Boulevard address, or Tony's Towing, which was an alleged front for the heroin operations.

Furthermore, Appellant did not have authority over the other alleged members of the operation. Appellant did not do any hiring or firing of personnel at the Dean Street residence; the testimony at trial established that this was done by Mr. Vargas and Ms. Smith.

Under this factor, the evidence shows that the decisions were made by Jorge Vargas and Kathleen Smith, not the Appellant. Therefore, Mr. Villar was merely an average participant under this factor.

B. Appellant's participation was that of a seller, not as a manager.

According to the testimony, Appellant's role in the operation was that as someone who merely helped bag heroin and then sold it. Under this factor, Appellant was an average participant.

C. The Appellant never recruited anyone to join the conspiracy.

There was no evidence presented at trial to prove the Appellant had served any kind of recruiting function during the course of the conspiracy. In fact, the evidence showed that Ms. Smith recruited her half-sister, Britiny Ward, into the conspiracy, and that she hired others as well.

D. Appellant never claimed a right to the larger of the fruits of the crime.

No evidence was presented at trial, nor did the government allege, that the Appellant received larger fruits of the crime. In fact, the undisputed evidence was that Mr. Vargas and Ms. Smith enjoyed the larger share of the proceeds- Ms. Smith was the one who made massive improvements to her home and drive a luxury vehicle. Ms. Smith clearly shared in a larger fruit of the crime than the Appellant.

E. The Appellant played no role in planning or organizing the offense.

There was no evidence presented at trial that Appellant planned or organized the offense. Rather, he was a "street dealer" with no authority to plan or organize operations.

F. Appellant was an average participant in a small, family-organized drug operation.

While the government has characterized this as a drug conspiracy, it is more of a family organization in scope.

G. Appellant had no control or authority over the other conspirators.

The evidence at trial was that Mr. Gorge Vargas, not the Appellant, was the leader of this conspiracy. In fact, there was evidence presented that the Appellant did not even know at least one other member of the conspiracy (Zacharias Aguedo), making it impossible for the Appellant to exert influence over him. The Appellant did not exercise control over any of the co-conspirators; in fact, the evidence showed that Ms. Smith and Mr. Gorge Vargas were the only members with the power to hire and fire other conspiracy members.

Looking at the factors set forth by the Sentencing Commission that should be considered as to the Appellant's role in the offense, the court's finding that he was a "manager" in the conspiracy was clearly erroneous. This court ruled in U.S. v. Martinez, 584 So.3d 1022 at 1028 (11th Cir. 2009) and reaffirmed its holding in U.S. v. Abney, 2017 WL 4329714 (11th Cir. 2017) that "merely distributing drugs and making arrangements for the delivery and sale of drugs….is not enough to demonstrate a leadership role." Here, this was the extent of Mr. Villar's involvement.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted this 1st day of April, 2020,

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Appointed Pursuant to the Criminal Justice Act

Certificate of Service

I hereby Certify that a true and accurate copy of the forgoing has been furnished to the United States by electronic filing this 31st day of March, 2020.

Certificate of Compliance

I hereby certify that this Petition for Writ of Certiorari comports with Rule 33.1(g) and contains 3,244 words.

/s/ James W. Chandler
James W. Chandler, Esq.