

IN THE SUPREME COURT OF THE UNITED STATES

HERMAN ROSARIO,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari from the United States
Court of Appeals for the Third Circuit at Appeal Number 19-2163

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the district court erred in denying defendant's motion to suppress physical evidence seized at 1611 S. 28th Street, Philadelphia, where the application failed to provide a substantial basis for the issuing judge to make an independent determination of probable cause?
2. Whether the district court erred in denying defendant's motion to suppress physical evidence seized at 1611 S. 28th Street, Philadelphia, in finding that the Leon Good Faith Exception was applicable?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully prays for a writ of certiorari to review the judgment of the Court of Appeal for the Third Circuit. This Court's Non-Precedential Opinions are attached hereto to as part of Appendix A-1.¹

JURISDICTION

This litigation began as a criminal prosecution against HERMAN ROSARIO, Petitioner, for violations of laws of the United States. The United States District Courts have jurisdiction over such prosecutions under 18 U. S. C. § 3231. This is an appeal from the Order of the Third Circuit, entered on December 10, 2020. A-1 The Petitioner filed the Notice of Appeal on May 21, 2019. A-1 The Third Circuit

¹References to "A" and a number refer to the Appendix and page number within Appendix created for this Petition.

Affirmed the Lower Court on December 10, 2020. A-1 This Court has Jurisdiction under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

By indictment filed in the U.S. District Court for the Eastern District of Pennsylvania, Herman Rosario was charged with one count of conspiracy to knowingly and intentionally possessing with intent to distribute, 1 Kilogram or more of a mixture and substance containing a detectable amount of heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A), (b)(1)(B) and (b)(1)(c) (Count One); one count of knowingly and intentionally possessing with intent to distribute, 1 Kilogram or more of a mixture and substance containing a detectable amount of heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A), (b)(1)(B) and (b)(1)(c) (Count Two); one count of knowingly and intentionally possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (Count 3); and one count of having been convicted of a crime punishable by more than one year, knowingly possessing in and affecting interstate commerce a firearm, in violation of 18 U.S.C. § 922(g)(1). B-45-53. Prior to trial, defendant's counsel was notified that the Government intended to introduce inculpatory evidence seized at 1611 South 28th Street in Philadelphia

pursuant to Search Warrant 203263. The Defendant filed a Motion to Suppress Evidence on December 26, 2017. B-54-70 The Government filed its Response to Defense Motions to Suppress Evidence on January 10, 2018. B-93-108 The defendant is appealing The district court's order and opinion denying the motion to suppress that was entered on February 13, 2018. B-11-27 This is an appeal from the Order of the Third Circuit, entered on December 10, 2020 affirming the denial of Herman Rosarios motion to Suppress Evidence. A-1

1. *Factual overview of issue one and Two— the affidavit for search warrant 203263 at 1611 S. 28th Street failed to provide a substantial basis for the issuing judge to make an independent determination of probable cause and the Leon Good Faith exception does not apply.*

The charges in this case stem from an investigation of drug sales in the area of 1908 E Wishart Street in North Philadelphia and the subsequent search of 1611 South 28th Street in Southwest Philadelphia. In his affidavit for Search Warrant 203263, Philadelphia police officer Neil Carr, badge number 3297, states that he began investigating the illegal packaging and distribution of heroin in the area of Jasper and Wishart Streets in June of 2017. B-201-203 According to officer Carr's one page affidavit, On June 14th, June 21st and June 26th purchases of heroin were made by a confidential informant in the target area of Jasper and Wishart Streets.

Officer Carr states that his ongoing investigation established that Herman

Rosario was supplying narcotics to a Hispanic female, specifically at 1908 E. Wishart Street, of the aforementioned targeted area. These narcotics were then provided to unnamed street dealers to be distributed in the area. On several occasions during the investigation, Herman Rosario is said to have received sums of cash from the Hispanic female on Wishart Street. After obtaining the sums of cash from this female, Herman Rosario was followed to 2863 N 4th Street.

Herman Rosario is alleged to have used several vehicles to transport the cash to 2863 N 4th Street. Herman Rosario was also seen on various occasions leaving 2863 N 4th Street and handing a bag believed to contain narcotics to the Hispanic female at 1908 E. Wishart Street. In other words, officer Carr surmised that Herman Rosario was supplying Wishart Street with drugs and returning the cash proceeds to 2863 N 4th Street.

On June 28, 2017, the above observations, led to search warrant 203250 being executed at 1908 E Wishart Street. Twenty-four (24) capsules of Heroin and \$79.00 in U.S. currency were seized from the Wishart Street location. On June 28, 2017, the above noted observations, led to search warrant 20351 also being executed at 2863 N 4th Street. Two hundred fifty-one (251) packets of cocaine, 699 grams of marijuana, \$18,999 in United States Currency and a .45 caliber handgun were recovered in the 4th Street property. B-201-203 Herman Rosario was not at

either location during the searches and was not arrested.

Following the execution of the warrants at 1908 E. Wishart Street and 2863 N 4th Street, information was received that Herman Rosario was operating a gray Mazda and was staying at 1611 South 28th Street in Southwest Philadelphia. On Wednesday July 5th, 2017 surveillance was conducted by police officer Torres, DEA Task Force, badge number 1791, of the 1600 block of South 28th Street. Herman Rosario was seen in a Gray Mazda. Herman Rosario's activities consisted of parking in front of and then entering 1611 South 28th Street. No other nefarious activity was observed, and Herman Rosario was not arrested.

On July 7th, 2017 Police officer Carr, and Police officer Werner, badge number 1731, set up a second surveillance of 1611 South 28th Street. The gray Mazda was parked in front of 1611 South 28th Street. Herman Rosario was observed coming out of this property and talking on a cell phone twice during the surveillance. Nobody was observed visiting or exchanging anything with Herman Rosario, and once again he was not arrested.

From July 10, 2017 to July 12, 2017 Senior Agent Mangold, badge number 767 was tasked with the surveillance of 1611 South 28th Street. Herman Rosario was seen operating the same gray Mazda and once again no illegal activity was noted in the affidavit on these dates. Herman Rosario was not arrested.

Based on the aforementioned observations of Herman Rosario, officer Carr requested permission to Search 1611 South 28th Street in Search Warrant 203263. on July 13, 2017, a magistrate judge found probable cause to search 1611 South 28th Street. On July 14, 2017 police executed search warrant 203263. According to property receipts, the police seized a 9 mm handgun, ammunition, bulk quantities of heroin, two cell phones, and assorted materials used to package narcotics. B-204-210

Herman Rosario contends that the affidavit supporting the search warrant for 1611 South 28th Street lacked the requisite probable cause to justify the search of that particular property. Specifically, the affidavit fails to inform the issuing authority of any criminal activity associated with 1611 South 28th Street. The affidavit submitted by officer Carr does not sufficiently corroborate his assertion that Herman Rosario or that anybody was using 1611 South 28th Street for any illegal activity. Consequently, the information submitted to the magistrate was insufficient to support an objectively reasonable belief that narcotics, firearms, and drug proceeds would be found inside the residence.

The search warrant for the residence at 1611 South 28th Street was executed in violation of Herman Rosario's constitutional rights against unreasonable searches and seizures. A week of surveillance by multiple officers yielded no

evidence of illegal drug activity. Omitted from the affidavit, is that 1611 South 28th Street is on the opposite side of a congested city, and not in close proximity to the drug activity observed at 1908 E Wishart Street and 2863 North Fourth Street weeks before. *See* Yatska Melendez Motion and Google Maps B-71-92, at 90 to 92

REASONS FOR GRANTING PETITION

Argument One

The district court erred in denying defendant's motion where the application failed to provide a substantial basis for the issuing judge to make an independent determination of probable cause.

INTRODUCTION

The Fourth Amendment provides,

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.

United States Constitution, Amend. IV. Any evidence obtained from an unreasonable search or seizure is deemed "fruit of the poisonous tree," and consequently must be excluded from trial. *Wong Sun v. United States*, 371 U.S. 471 (1963).

The search of a Private dwelling by government agents is justified only

where officers have probable cause to believe that the identified items of contraband will be found on the premises. The affidavit supporting the search warrant for 1611 South 28th Street did not contain sufficient facts to support a reasonable belief that contraband, namely the instrumentalities and proceeds of drug trafficking, would be found there. Therefore, the searches were conducted in violation of Herman Rosario's rights under the Fourth Amendment. All evidence recovered as a result of this search should have been suppressed and deemed inadmissible.

DISCUSSION

I. No Probable Cause to Support Search Warrant Affidavit

It is well settled that, "One's home is sacrosanct, and unreasonable government intrusion into the home is 'the chief evil against which the wording of the Fourth Amendment is directed.'" *United States v. Zimmerman*, 277 F.3d 426, 431-32 (3d Cir. 2002)(quoting *Payton v. New York*, 445 U.S. 573, 585 (1980))(internal quotations omitted). The Third Circuit has recognized that, "[i]t is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. ... Hence, the Fourth Amendment has drawn a firm line at the entrance to the house." *United States v. White*, 748 F.3d 507, 510-11 (3d Cir. 2014)(quoting *Welsh v. Wisconsin*, 466 U.S. 740, 748

(1984); *Payton*, 445 U.S. at 590)(internal quotations omitted). Consequently, “[w]arrantless searches of the home are presumptively unreasonable unless the occupants consent or probable cause and exigent circumstances exist to justify the intrusion.” *United States v. Mallory*, 765 F.3d 373, 383 (3d Cir. 2014)(quoting *United States v. Coles*, 437 F.3d 361, 365 (3d Cir. 2006)(internal quotations omitted). In either instance, probable cause to search is the requisite factor.

Probable cause to support a search warrant exists when “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *United States v. DeCruz*, 644 Fed.Appx. 189, 191 (3d Cir., Mar. 16, 2016), pet. for cert. docketed, Oct 3, 2016 (No. 16-6298) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). While the term “probable cause” has been described as a “fluid concept,” the Third Circuit has recognized that:

the fluidity of the concept has not translated into diverse application. A close reading of the case law shows that the Supreme Court uses the ‘probable cause’ standard almost exclusively to assess the basis and strength of an officer or magistrate’s belief that a particular person has committed a particular crime or that an article subject to seizure can be found at a particular location - in short, whether criminal activity is afoot.

United States v. Vasquez-Algarin, 821 F.3d 467 (3d Cir. 2016)(citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

Essentially, the information included in the affidavit must provide the magistrate with a substantial basis to determine that there is a connection between the object sought, the premises to be search, and criminal activity. *See United States v. Conley*, 4 F.3d 1200, 1205 (3d Cir. 1993)(citing *Gates*, 462 U.S. at 236, 239). Further, the search warrant must describe the items to be seized with sufficient particularity. It may not be broader than the probable cause on which it is based. *See Zimmerman*, 277 F.3d at 432. In *United States v Stearn*, 597 F.3d 540 (3d Cir. 2010) The Third Circuit explained that a magistrate judge may not infer probable cause to search a defendants residence or property solely because there is some evidence that he has committed a crime involving drugs. *Id* at 559. Rather there must be “some evidence that the home contains contraband linking it to the drug dealers activities”. *Id* at 559 (quoting *United States v Burton*, 288 F.3d 91, at 104 (3d Cir. 2002)).

When reviewing the magistrate’s decision, the reviewing court must consider the totality of the circumstances. *See DeCruz*, 644 Fed.Appx. at 191 (citing *Gates*, 462 U.S. at 238). Probable cause may be inferred from “the type of crime, the nature of the items sought, the suspect's opportunity for concealment and normal inferences about where a criminal might hide [evidence].” *United States v. Stearn*, 597 F.3d 540, 554 (3d Cir. 2010)(quoting *Jones*, 994 F.2d at

1056). Within this “totality of circumstances” is a consideration of the source and timeliness of the information. *See United States v. Hicks*, 460 Fed.Appx. 98, 102 (3d Cir., Jan. 17, 2012) (quoting *Gates*, 462 U.S. at 238). The magistrate also “is entitled to ‘give considerable weight to the conclusions of experienced law enforcement officers.’” *United States v. Townsend*, 638 Fed.Appx. 172, 176 (3d Cir., Dec. 23, 2015 (quoting *United States v. Whitner*, 219 F.3d 289, 296 (3d Cir. 2000))). However, the officer’s conclusions may not be based solely on a hunch, “gut feeling” or mere suspicion that contraband will be found in a particular place. *See, e.g., Poolaw v. Marcantel*, 565 F.3d 721, 729 (10th Cir. 2009)(quoting *United States v. Valenzuela*, 365 F.3d 892, 897 (10th Cir. 2004); *Doe v. Broderick*, 225 F.3d 440, 452 (4th Cir. 2000); *United States v. Hogan*, 25 F.3d 690, 693 (8th Cir. 1994).

It is well settled that, “[t]he supporting affidavit to a search warrant is to be read in its entirety and in a common sense, nontechnical manner.” *United States v. Miknevich*, 638 F.3d 178, 182 (3d Cir. 2011)(citing *United States v. Williams*, 124 F.3d 411, 420 (3d Cir. 1997)). Thus, when determining whether the affidavit provided a substantial basis for finding probable cause, the reviewing court may only consider the information presented to the magistrate, i.e., the “four corners” of

the affidavit itself. The court may not review other information from the record.

See Miknevich, 638 F.3d at 182 (citing *Jones*, 994 F.2d at 1055).

Further, while the reviewing court should pay great deference to the magistrate judge when making this determination, the court must not simply rubber stamp the magistrate's decision. *See Miknevich*, 638 F.3d at 182 (citing *United States v. Tehfe*, 722 F.2d 1114, 1117 (3d Cir. 1983), cert. denied sub nom., *Sanchez v. United States*, 466 U.S. 904 (1984)).

The evidence presented to the magistrate judge was insufficient to support a reasonable belief that any instrumentalities or proceeds from alleged illegal activity would be found at 1611South 28th Street. To the contrary, the mere hunch contained in the affidavit simply indicates that an individual, Herman Rosario, was believed to be physically staying at 1611South 28th Street and driving a gray Mazda. Herman Rosario was never observed engaging in drug transactions or activity at 1611South 28th Street. Moreover, there is no nexus in the affidavit connecting the purported activities that occurred miles away and weeks before at 1908 Wishart Street and 2863 N 4th Street with 1611South 28th Street.

Officer Carr notes in the affidavit his years of experience, and presumably his familiarity with drug trafficking operations. However, the affiant fails to explain the specific factors which prompted him to identify the residence at 1611

South 28th Street as the location of a drug operation. While police certainly conducted extensive surveillance of 1611South 28th Street, their observations failed to yield any evidence that illegal activity occurred at this location. There is no indication that law enforcement officials observed a high level of traffic from 1611South 28th Street, the exchange of bags, or suspicious activity. To the contrary, the officer's observations of Herman Rosario at 1611South 28th Street seem to be those of an average person residing at a home in Philadelphia.

In sum, there is no indication that police obtained any information from a confidential informant or through surveillance, that Herman Rosario or any other individual was engaged in any illegal activity whatsoever at 1611 South 28th Street. The search of the residence located at 1611South 28th Street was unlawful. The affidavit submitted to support the search warrant lacked the requisite probable cause to search to search the premises. The facts included in the affidavit were insufficient to support a reasonable belief that any proceeds or instrumentalities of drug trafficking or any other criminal activity would be found inside this residence. Consequently, the items discovered during the search, namely United States Currency narcotics, a firearm, and packaging, constitute the fruit of this illegal search. "Under the 'fruit of the poisonous tree' doctrine, evidence gathered as a result of an unlawful search or seizure must be suppressed at trial." *United States v.*

Coggins, 986 F.2d 651 (3d Cir. 1993)(quoting *Wong Sun v. United States*, 371 U.S. 471 (1963)). As a result, the narcotics, as well as any and all physical evidence seized at 1611 South 28th Street should be suppressed.

Argument Two

The district court erred in denying defendant's motion to suppress physical evidence seized at 1611 S. 28th Street, Philadelphia, in finding that the Leon Good Faith Exception was applicable

Although a warrant is facially invalid, evidence seized pursuant to it will not be suppressed if the “good faith exception” to the exclusionary rule applies. *United States v Katzin*, 769 F.3d 163 at 169-70 (3d Cir. 2014). The good faith exception requires the court to determine whether a law enforcement officers reliance on the warrant was objectively reasonable. *United States v Leon*, 468 U.S. 897, 922 (1984). In *Leon*, this Court announced a “good faith” exception to the application of the exclusionary rule. *Id* at 922-23. Working from the premise that the exclusionary rule is a judicially created, as opposed to constitutionally required remedy for Fourth Amendment violations, the Court reasoned that where police conduct is “pursued in complete good faith” the rule’s deterrent function “loses much of its force” *Id* at 919. As such, the Court concluded that the exclusionary rule should not bar the government’s introduction of evidence obtained by officers

acting in objectively reasonable reliance on a search warrant that is subsequently invalidated *Id* at 918-21.

In *Leon* This Court stressed that the Good faith test is an objective one. The question is not what the executing officer believed, or could have believed, but “whether a reasonably trained officer would have known that the search was illegal despite the magistrate’s authorization” *Id* at 622. The Supreme Court has identified at least four situations in which reliance on a warrant cannot be considered objectively reasonable, and therefore the good faith exception cannot apply: (1) when the affiant knowingly and recklessly misleads the judge with false information; (2) when the judge wholly abandons his or her neutral role; (3) when the affidavit is so lacking in indicia of probable cause that official belief in its existence is objectively unreasonable; and (4) when the warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid. See *Leon*, 468 U.S. at 914, at 923 (1984). The third and fourth situations are the ones at issue in this case.

Because “police conduct must be sufficiently deliberate that the exclusion can meaningfully deter it,” the Supreme Court recently modified the level of police culpability described in *Leon* to reflect that “the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances

recurring or systematic negligence.” *Herring v. United States* 555 U.S. 135, 144 (2009). As discussed in detail above, The affidavit for 1611 S. 28th Street did not provide any facts that would reasonably convey to any officer that drug activity was occurring in the premises. In fact, the days of undercover observations in this case served only to reaffirm that Herman Rosario was objectively not selling drugs from 1611 S. 28th Street. When the officers failed to obtain any objective evidence of drug dealing, they simply sought approval from a magistrate in order to enter 1611 S. 28th Street rather than arrest Herman Rosario outside the premises for crimes they believed he had committed weeks earlier in another part of the city. The affiant’s actions were deliberate, negligent, and reckless. The affidavit for 1611 S. 28th Street was so lacking in indicia of probable cause and so facially deficient that the executing officers could not reasonably presume it to be valid. Therefore, the good faith exception to the exclusionary rule is not applicable in Herman Rosarios case

Conclusion

WHEREFORE, for the foregoing reasons, Petitioner prays that a writ of certiorari be granted and the United States Supreme Court reviews the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Date: March 10, 2021

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PROOF OF SERVICE

I, Luis A Ortiz Esquire, Esquire, do swear or declare that on this date, March 10, 2021, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's Counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid: The names of those served are as follows:

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I declare under the penalty of perjury that the foregoing is true and correct.

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Executed on March 10, 2021