Number ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

DANY L. BRANDAO,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

1. Should certiorari be granted where the police violated the Fourth Amendment to the United States constitution when, in a narcotics prosecution, they searched Petitioner's home, even though all his drug sales were made miles away, in his vehicle?

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OPINION BELOW

There were two decisions below, which are attached to this petition. The First Circuit's ruling is unreported; the District Court's is reported at *United States v. Brandao*, 270 F. Supp. 3d 485 (D. Mass. 2017).

JURISDICTION

The judgment of the Court of Appeals was decided on May 21, 2021, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States constitution.

STATEMENT OF THE CASE

Petitioner was convicted of Possession with Intent to Distribute and Distribution of Fentanyl, in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(C), and Possession with Intent to Distribute 40 grams or More of Fentanyl, in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(B)((vi), and was sentenced to 120 months' imprisonment.

In an unreported decision, the First Circuit Court of Appeals granted the Government's motion for summary disposition on May 21, 2021.

STATEMENT OF FACTS

In 2016, Detective Jeffrey Costello, of the Brockton, Massachusetts Police Department, filed an application for a search warrant of 134 North Leyden Street, Brockton, Massachusetts. The search warrant was issued by a clerk magistrate of the Brockton District Court. In support of his application, Detective Costello alleged that, in September 2016, a confidential informant ("CI") told a detective at the East Bridgewater Police Department, David Perrault, that a Cape Verdean male named "Dany," who drove a white Infiniti sedan, bearing Massachusetts license plate number 323FX6, "was dealing heroin/fentanyl in the City of Brockton." A search on that license plate number revealed Clara Darosa, of 134 North Leyden Street, Brockton, MA, owned the vehicle. She was Dany L. Brandao's mother. The CI positively identified Brandao as the individual he spoke of as "Dany."

In response to a police request, Federal Probation Officer Jessica Turkington informed the police that Brandao was on federal supervised release in federal district court, following a sentence for possession with intent to distribute over one kilogram of heroin. She "confirmed that

Brandao lives at 134 N. Leyden Street, Brockton, MA," and also provided his contact telephone number.

The affidavit then described four separate controlled buys the police made from the defendant, all of which occurred miles away from Petitioner's home.

The first sale occurred on October 7, 2016. Perrault, acting in an undercover capacity, arranged to meet with Brandao to purchase 2.5 grams of heroin for $150.00. Brandao directed Perrault to meet him at Hamilton Street in Brockton, Massachusetts.

The second sale occurred four days later, on October 11, 2016. Shortly after 11:00 a.m., the police established surveillance of 134 North Leyden Street and again observed the Infiniti sedan, bearing license plate number 323FX6, parked outside the residence. At approximately 2:15 p.m., Brandao responded to Perrault, who arranged to purchase five grams of heroin/fentanyl from Brandao. They agreed to meet at the same spot, on Hamilton Street, as they did on October 7. Around 2:40 p.m., an undercover agent observed Brandao leave 134 North Leyden Street and enter the Infiniti sedan. Brandao drove directly from 134 North Leyden Street to the meeting spot on Hamilton Street and arrived at 2:47 p.m.

Perrault exited his vehicle and entered Brandao's Infiniti to make the buy. In exchange for $300.00, Brandao gave Perrault two clear plastic bags, each containing white powder, which he believed was fentanyl.

The third sale occurred about two weeks later, on October 25, 2016. Around 11:00 a.m., officers began surveilling 134 North Leyden Street. At 11:37 a.m., Perrault made contact with Brandao and agreed to meet in twenty-five minutes on Hamilton Street. Around 12:12 p.m., agents observed Brandao leave 134 North Leyden Street and enter a white Ford Fusion that had been parked across the street from the house. Officers ran a search of the vehicle's license plate and found that it had been rented to Brandao's girlfriend. Brandao then drove directly from 134 North Leyden Street to Hamilton Street and arrived around 12:21 p.m. There, Brandao gave Perrault two plastic bags, each of which contained 2.5 grams of white powder, which Perrault again believed to be fentanyl, in exchange for $300.00.

The fourth sale occurred on November 1, 2016. Around 11:00 a.m., Perrault contacted Brandao to purchase ten grams of heroin for $550.00. At 1:10 p.m., Brandao responded to Perrault and they agreed to meet at the same spot on Hamilton Street in twenty-five minutes. At 2:00

p.m., officers observed Brandao exit 134 North Leyden Street, enter a Jeep Grand Cherokee, and drive directly to Hamilton Street. He arrived at 2:07 p.m. Perrault entered the Jeep Grand Cherokee and handed Brandao $550.00. After counting the cash, Brandao removed a piece of the trim on the dashboard and removed a large clear plastic bag, which contained four smaller bags, which he handed to Perrault. Officers later confirmed the bags contained fentanyl.

Three days after the fourth controlled buy, a Brockton District Court clerk magistrate issued a warrant to search 134 North Leyden Street for drug paraphernalia and related materials, including documents, records, and sums of money. On November 8, 2016, officers executed the search of 134 N. Leyden Street and seized several bags of fentanyl, related drug paraphernalia, a handgun, and several rounds of ammunition.

SUMMARY OF ARGUMENT

Petitioners' Fourth Amendment motion to suppress the Government's seizure of contraband in his home should have been granted, because he made his drug sales miles away, in his car.

ARGUMENT

POINT I

THE DISTRICT COURT SHOULD HAVE SUPPRESSED THE ITEMS SEIZED AT 134 NORTH LEYDEN STREET, IN BROCKTON MASSACHUSETTS, BECAUSE THE AFFIDAVIT IN SUPPORT OF THE WARRANT DID NOT PROVIDE SUFFICIENT INFORMATION TO FIND PROBABLE CAUSE THAT UNLAWFUL ACTIVITY HAD OCCURRED THERE, IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The First Circuit Court of Appeals ruled that " ... Brandao has entirely failed to demonstrate that the district court erred in denying his motion to suppress the fruits of the warranted search ...." (Judgment: 1). It is incorrect. Where, as here, the search warrant affidavit failed to demonstrate a nexus between the four controlled buys, that occurred miles away from 134 North Leyden Street, and the house itself, the search violated the Fourth Amendment to the United States constitution. Certiorari should now be granted because, absent proof of unlawful activity in the house, all the items seized there, including the fentanyl, drug paraphernalia, handgun, and rounds of ammunition, should have been suppressed.

In the search warrant affidavit, the police never alleged there was suspicious activity at the residence. Nor did they make any observations of drugs within or near the residence. None of the four sales were made in the house. Neither the informant nor the police ever saw any drugs in or near the house, and the police never seized any trash to determine if there were illicit narcotics in, or emanating from, the house. Nor did they see any accoutrements of the trade, in or near the house, such as bagging material, large sums of cash, weapons or scales.

Before the planned narcotics transactions, the police never saw Petitioner carrying drugs from the home to his car. While the District Court said they saw him with a "tiny little bag," and, on another, they saw him take a "big bag" from the car, they never knew what was in the bags. This, therefore, was speculation.

All the sales were, in fact, consummated approximately two miles away from the house. The only drugs the police ever saw were hidden under dashboard trim in a Jeep, and they did not know whether Petitioner stored the narcotics in one of the three vehicles he drove. Even defense counsel argued the drugs " ... could have ... been in the car."

Probable cause to believe that drugs would be present in the home is not established by the fact that the defendant lived there. Even if the police had probable cause to search Petitioner's vehicles, in which he made drug sales, they did not have probable cause to search his home.

When the police sought the warrant, the affiant never drew from his training and experience, namely, that drug traffickers frequently use their homes for storing cash and records associated with their business. *Compare United States v. Ribeiro*, 397 F.3d 43, 46 (1st Cir. 2005). *See also United States v. Thompson*, 630 F. Supp. 2d 138, 143 (D. Mass. 2009)("In upholding searches of a drug suspect's residence, the First Circuit has relied on a number of considerations including: 1) the affiant's statement, drawn from his or her training and experience, that drug traffickers frequently use their homes for storing cash and records associated with their business ....").

But even if the Officer had included this information in the affidavit, it would still not substitute for a sufficient evidentiary nexus, which was lacking here.

Of course, when a defendant sells drugs immediately outside his home, it may be reasonable to conclude there is evidence of his drug

dealing activity inside the home, particularly when the defendant is observed leaving the home prior to selling the drugs. But that inference does not apply when no police or confidential informant have ever been in the home, and thus never saw drugs there. Nor does it apply when the police have never found traces of heroin or fentanyl anyplace in or around the home. Finally, it does not apply when the search warrant affidavit does not contain details on how the officer's experience leads them to believe that the Petitioner has used his home to store drugs, drug proceeds, drug records, telephone numbers of suppliers and customers or drug trafficking paraphernalia.

The lack of a nexus between the house and drug sales is magnified by the District Court's misapprehension of the facts regarding the November 1, 2016 transaction. When Detective Perrault arranged to buy a larger quantity of drugs than the previous three controlled buys, law enforcement observed a man make a quick visit in a gray minivan to Brandao's residence. Shortly after this visit, Brandao made contact with Perrault to sell the drugs. This evidence, according to the District Court, gave " ... rise to a reasonable inference that Brandao used his residence to receive drugs for distribution." It is wrong. The Court could only draw

the inference that Brandao used the residence as a stash house by finding that he lived there alone, and there was no other purpose for the heavyset man's visit. The District Court thus explicitly found "[t]here's no evidence that anybody else lived there ...." In fact, Petitioner lived in the house with another man as well as two children. Hence, while the Court may have believed the only purpose of the heavyset man was to deliver narcotics, he just as easily may have been there for a myriad of innocent reasons, ranging from the delivery of amoxicillin to a young child with a throat infection to the delivery of an invitation to the adult about an upcoming party.

Even if Petitioner's residential status did not enter into the District Court's Fourth Amendment calculus, the police never saw the heavyset man have anything to do with the drug trade, and never saw him carrying anything into the home. On these facts, there is not even a fair probability that contraband would be found in the home. Under the totality of the circumstances set forth in the affidavit, these events simply do not establish the requisite nexus between the home and the criminality.

Certiorari should thus be granted to find that, were the District Court's rationale accepted, every time a defendant sells drugs from his

car, miles from his home, it could still be automatically searched, even though there is no probable cause to believe there were drugs or evidence of criminality in the home. Yet probable cause to search a home is not furnished simply because a defendant, who has committed a crime, lives there. To find otherwise would be to invite general warrants authorizing searches of any property owned, rented, or otherwise used by a criminal suspect--the very type of broad warrant the Fourth Amendment was designed to foreclose. *See, e.g., United States v. Bain*, 874 F.3d 1, 23-24 (1st Cir. 2017)("We have expressed skepticism that probable cause can be established by the combination of the fact that a defendant sells drugs and general information from police officers that drug dealers tend to store evidence in their homes.").

Because there was insufficient probable cause to issue a warrant to search the house at 134 North Leyden Street, in Brockton, Massachusetts, all items seized during the search should have been suppressed.

Although neither the Circuit nor District Courts addressed the *Leon* good faith exception, even if they did, it would be inapplicable here. *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct.

3405 (1984). While the police had probable cause to believe Petitioner committed a crime in three vehicles, the affidavit was lacking because there was no evidence, of any kind, that any sales, or any illegal activity had occurred in his home. The police essentially sought the warrant to search the house solely on the basis of their own conclusory assertions that, no matter where a defendant sells drugs, his home could also be searched, on the dubious and unsupportable proposition that drug dealers always store drugs, or evidence or the narcotics trade, in their homes.

In relying on this warrant, the police acted unreasonably. Here, no law enforcement officer could manifest objective good faith in relying on this warrant because the affidavit to search the house was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. The *Leon* good-faith exception thus does not apply. Accordingly, the items seized at 134 North Leyden Street, in Brockton, Massachusetts, should have been suppressed as an illegal search and seizure under the Fourth Amendment to the United States constitution.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: May 26, 2021
Manhasset, New York

Respectfully Submitted,

Arza Feldman
Arza Feldman

UNITED STATES
SUPREME COURT

DANY L. BRANDAO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on May 26, 2021, we served a copy of this petition for writ of certiorari, by first class United States mail, on the United States Attorney, District of Massachusetts, John Joseph Moakley United States Federal Courthouse, 1 Courthouse Way, Suite 9200, Boston, MA 02210, on the Office of the Solicitor General, 950 Pennsylvania Avenue, NW, Washington, D.C. 20530, and on Dany L. Brandao, 93601-038, FCI McDowell, 101 Federal Drive, Welch, WV 24801. Contemporaneous with this filing, we have also transmitted a digital copy to the United States Supreme Court and are filing one copy of the petition, instead of 10, with this Court, pursuant to its April 15, 2020 order regarding the Covid-19 pandemic.

Arza Feldman
Arza Feldman