
No. 21-5228

in the
Supreme Court
of the
United States

Term,

DWAYNE SHECKLES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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1. This case is a good candidate for certiorari review

Claiming that this case is a poor candidate for review by this Court, the Government first contends that the Sixth Circuit's decision is "fact bound", and thus did not set precedent. This is erroneous, but more importantly misses the point of the request for certiorari review. Whatever the Government may make of the facts, the Sixth Circuit's decision does change the Fourth Amendment landscape. The Sixth Circuit's decision is published, and therefore, binding precedent. The Sixth Circuit specifically held: "When we have used a drug dealer's drug activities alone to find probable cause to search the dealer's home, the dealer was engaged in 'continual and ongoing operations' typically involving large amounts of drugs." (Appendix 1, p.11) Thus, the Sixth Circuit has determined that where a citizen is accused of drug dealing that is "ongoing" and "continual", those facts alone provide probable cause to search the citizen's home.

Further, the Sixth Circuit's decision does create a circuit split. In the petition for certiorari, Petitioner Sheckles set forth a list of cases from the other circuits, in which every circuit (except one) has held that a defendant's status as a drug dealer is not a sufficient nexus to obtain a search warrant for their residence. Petitioner Sheckles notes that one circuit, the D.C. Circuit, has held similar to the Sixth in this regard. In *United States v. Cardoza*, 713 F.3d 656, 661 (D.C. Cir. 2013)(then Judge Kavanaugh authoring,) the court held "[w]hen there is probable cause that a defendant is dealing drugs, there often tends to be probable cause that evidence of

that drug dealing will be found in the defendant's residence.” Thus, there is a clear circuit split, with the Sixth Circuit and the D.C. Circuit on one side, and every other circuit on the other, for this Court to resolve.

The Sixth Circuit’s decision further upends consistent precedent by this Court and every other circuit which holds that “[a] warrant application must demonstrate probable cause to believe that (1) a crime has been committed -- the ‘commission’ element, and (2) enumerated evidence of the offense will be found at the place searched -- the ... ‘nexus’ element.” *United States v. Lindsey*, 3 F.4th 32, 39 (1st Cir. 2021). The nexus required is between the place to be searched and criminal activity – not merely a tie to a criminal. *United States v. Clark*, 638 F.3d 89, 94 (2d Cir. 2011); *United States v. Hopkins*, 220 F. App’x 155, 157 (3d Cir. 2007)(“ a search is directed at a place and not a person”); *United States v. Doyle*, 650 F.3d 460, 471 (4th Cir. 2011)(“The critical element in a reasonable search is ... that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought.”); *United States v. Bevely*, 157 F.3d 900 (5th Cir. 1998); *United States v. Garey*, 329 F.3d 573, 578 (7th Cir. 2003)(“A search warrant may issue even in the absence of direct evidence linking criminal objects to a particular site”); *United States v. Petruk*, 929 F.3d 952, 961 (8th Cir. 2019); *United States v. Boyston*, 274 F. App’x 566 (9th Cir. 2008); *United States v. Cotto*, 995 F.3d 786, 796 (10th Cir. 2021)(“In the context of a warrant authorizing the search of a house, an affidavit must establish a substantial nexus between the crime and the

place to be searched.”); *United States v. McCown*, 762 F. App'x 732, 733 (11th Cir. 2019). The circuit split, and the Sixth Circuit's deviation from the requirement of a nexus to the property, warrant certiorari review.

1. The Sixth Circuit's mention of searching for a cell phone was not the basis of their decision

While it is accurate that the Sixth Circuit discussed the fact that a cell phone related to drug activity “pinged” at Sheckles’ residence several days before the warrant application, this fact has no bearing on the issue raised in this petition, for several reasons.¹ First, the Sixth Circuit held that the “most notable” basis for finding probable cause was not the ping of the phone, but “Sheckles’s work with an international drug-trafficking operation.” (Appendix 1, p.12) Second, the fact that a cell phone used in drug trafficking was located at Sheckles residence says nothing about whether the residence was used for drug trafficking purposes. As this Court has noted: “cell phones and the services they provide are ‘such a pervasive and insistent part of daily life’ that carrying one is indispensable to participation in modern society.” *Carpenter v. United States*, 138 S. Ct. 2206, 2220, 201 L. Ed. 2d 507 (2018). During the time in question, Sheckles’ cell phone would have pinged any location he visited: a restaurant, his church, a movie theater, or a sports

¹ Petitioner would note that although the Sixth Circuit discussed this fact, the Government did not argue or otherwise rely on this fact as a basis to uphold the warrant in their brief to the Sixth Circuit.

stadium. The presence of the phone at those locations, coupled with their theories about Sheckles himself, would not have given rise to probable cause to search those locations for evidence of drug trafficking. Again, this impermissibly shifts the focus of the Fourth Amendment equation from a place to a person.

Finally, prior to executing the warrant, officers had already located and detained Sheckles and his cell phone. Therefore, there would have been no basis for officers to believe that they would locate his cell phone at the residence. “[P]robable cause may cease to exist after a warrant is issued. The police may learn, for instance, that contraband is no longer located at the place to be searched.” *United States v. Grubbs*, 547 U.S. 90, 96, 126 S. Ct. 1494, 1499, 164 L. Ed. 2d 195 (2006)(Souter, concurring). The cell phone could not have been an independent basis to provide probable cause for the warrant under these facts.

3. The good faith exception argument raised by the Government here was neither argued by them below, nor ruled upon by the Sixth Circuit

Finally, the Government suggests that this Court need not resolve this issue, as the good faith exception to the exclusionary rule applies. However, contrary to the Government’s claim, that issue was never developed in the court below², and therefore, should not be considered by this Court in determining the merits of

² The Government in its brief to the Sixth Circuit authored one sentence stating that all of the warrants were covered by the good faith exception, without developing any argument in support of this claim.

certiorari review. *Jenkins v. Anderson*, 447 U.S. 231, 234, 100 S. Ct. 2124, 2127, 65 L. Ed. 2d 86 (1980)(“Ordinarily, we will not consider a claim that was not presented to the courts below.”) In any event, such an alternative basis would be for the Sixth Circuit to decide in the first instance. See *Shaw v. United States*, 137 S. Ct. 462, 470, 196 L. Ed. 2d 373 (2016)(“We leave to the Ninth Circuit to determine whether that question was fairly presented to that court and, if so, whether the instruction is lawful, and, if not, whether any error was harmless in this case.”)

The Sixth Circuit’s decision finding probable cause for the search of a residence, based solely upon Sheckles’ status as a drug dealer, is in violation of the Fourth Amendment’s requirement that probable cause be tied to the place to be searched. Searches made pursuant to a warrant “are ‘reasonable’ in Fourth Amendment terms only on a showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found in the place to be searched.” *New Jersey v. T.L.O.*, 469 U.S. 325, 355, 105 S. Ct. 733, 750, 83 L. Ed. 2d 720 (1985). The Sixth Circuit’s decision omits from the equation the requirement of proof that evidence of the crime would have been found at Sheckles’ residence. For this reason, certiorari should issue, and the Sixth Circuit’s decision reversed.

CONCLUSION

Sheckles requests this Court grant certiorari, reverse the Sixth Circuit's decision, and vacate the convictions.

Respectfully submitted,

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A handwritten signature in dark ink, appearing to read 'K. Schad', is written over the printed name of Kevin M. Schad.

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