

No. _____

In the Supreme Court of the United States

Yarlin Garcia,

Petitioner

v.

United States of America,

Respondent

**On Petition for Writ of Certiorari to the United States Court of Appeals for
the First Circuit**

Appendix

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United States Court of Appeals For the First Circuit

No. 19-1816

UNITED STATES,

Appellee,

v.

YARLIN GARCIA,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. D. Brock Hornby, U.S. District Judge]

Before

Kayatta, Boudin, and Barron,
Circuit Judges.

William L. Welch, III on brief for appellant.
Halsey B. Frank, United States Attorney, and Noah Falk,
Assistant United States Attorney, on brief for appellee.

December 16, 2020

BOUDIN, Circuit Judge. The defendant, Yarlin Garcia, pled guilty to a drug offense, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), [Add. 16] but reserved his right to appeal the district court's denial of his motion to suppress the drug evidence as having resulted from a search unlawful under the Fourth Amendment.

The drug evidence was obtained from under the hood of a truck in which Garcia was the passenger. Law enforcement officers identified and searched the truck using information supplied by a cooperator they had seized before searching the truck. On appeal, Garcia makes two claims. First, he argues that the government lacked probable cause to seize him--officers removed Garcia from the truck and handcuffed him during the search of the vehicle--and to search the truck. Second, he argues that the officers also lacked reasonable suspicion to support their activities. Our review of these legal claims is *de novo*. United States v. Dion, 859 F.3d 114, 122 (1st Cir. 2017).

Garcia says that the key source that led law enforcement to Garcia was unreliable. The government's source was a drug dealer whom officers apprehended while executing a search warrant on a house in Sanford, Maine, shortly before interacting with Garcia. The dealer ("Cooperating Defendant" or "CD") quickly agreed to cooperate with the officers.

Working with the officers, CD provided information that led to the search of Garcia and the truck. CD called his drug supplier, who told CD he would arrive at the house in ten minutes. Within ten minutes, CD received a call from the supplier telling CD that the supplier was outside the house and asking CD to move a red car parked in the driveway. Law enforcement officials saw a silver Dodge truck stop briefly outside the Nason Street house and then drive away. The truck returned a few minutes later and stopped directly in front of the house on the public street.

Although the officers suspected the truck was the supplier's truck, they were hesitant because CD had told them that the supplier had driven a dark colored SUV or Jeep in the past. CD then told law enforcement that the supplier had on occasion used a Dodge truck or silver truck to deliver drugs.

Ten officers, with their guns drawn, then surrounded the truck, removed Garcia and the driver from the vehicle, and placed them both in handcuffs. A single officer subsequently conducted a K-9 inspection of the vehicle and the K-9 alerted, indicating there were drugs inside the hood. Officers then searched the hood and found substantial quantities of a heroin/fentanyl mixture and cocaine.

The information CD supplied to law enforcement was consistently corroborated; he told officers that his source was roughly ten minutes away, and then roughly ten minutes later the

Dodge pulled in front of the house. The officers knew that CD was involved in drug trafficking because they found drugs in CD's Nason Street residence and consensually read his text messages with his supplier.

Probable cause only requires "a fair probability that contraband or evidence of a crime will be found." United States v. Simpkins, 978 F.3d 1, 7 (1st Cir. 2020) (quoting United States v. Almonte-Báez, 857 F.3d 27, 31-32 (1st Cir. 2017)). By the time they surrounded the truck, the officers had a tip from a reliable informant that individuals in the truck were about to complete a drug sale and that they had drugs in the truck. No more was needed to justify the seizure of Garcia and the driver and the subsequent K-9 inspection. See United States v. Vongkaysone, 434 F.3d 68, 73-75 (1st Cir. 2006).

Garcia finally argues that the officers lacked reasonable suspicion to seize him and search the truck, so the officers' actions cannot be upheld as a valid Terry stop. See Terry v. Ohio, 392 U.S. 1, 27 (1968). Reasonable suspicion is a "less demanding standard than probable cause." Illinois v. Wardlow, 528 U.S. 119, 123 (2000). In fact, the officers had even more: probable cause to seize Garcia and conduct a brief investigatory search of the truck, so there can be no doubt they also had reasonable suspicion.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
)
)
)
v.) CRIMINAL No. 2:17-CR-100-DBH
)
YARLIN GARCIA AND)
LUIS ROSARIO-DIAZ,)
)
DEFENDANTS)

DECISION AND ORDER ON MOTION TO SUPPRESS

On March 14, 2018, I conducted an evidentiary hearing on the defendants' motion to suppress. On March 27, 2018, I heard oral argument on the motion. There is really no dispute about the underlying facts, although the parties disagree over their significance and what conclusions I should draw. Based on the hearing and the arguments, I make the following factual findings, and **DENY** the motion to suppress.

FACTS

In June of 2017, MDEA Special Agent Carleton had been surveilling a target—someone he had arrested a year earlier for drug trafficking who was released on bail and was under suspicion of additional trafficking. Carleton tailed the target to Nason Street in Sanford, Maine on June 8 for what Carleton believed to be a drug pickup.

On June 19, Carleton arrested him. The target had in his possession 4 fingers (c. 40 grams) of heroin.¹ After consulting his lawyer, the target agreed to cooperate. I shall call him CD1 (for “cooperating defendant”). CD1 gave Carleton a physical description of his source for drugs, told him where the source lived, the source’s first name, and a description of his vehicle. CD1 confirmed that the June 8 trip Carleton had observed was in fact to pick up 200 grams of heroin from the source on Nason Street, Sanford. He told Carleton that within the previous months he had observed substantial quantities of heroin and cocaine at the Nason Street address. He consented to Carleton viewing his cellphone and identified his source as “Connect” on the cellphone. He also told Carleton that he believed Connect’s source of supply was a Hispanic male from Massachusetts. Carleton photographed the cellphone screen showing text messages between CD1 and Connect on June 19, admitted as Exhibit 1A. In one message, Connect said “Ya only hv like 5 could spare right now hopefully tomorrow be good.” CD1 said that meant Connect had 5 fingers of heroin or about 50 grams, but was hopeful he would have more the next day that he could sell to CD1.

Agents obtained a search warrant for the source’s Nason Street premises from a state judge. On June 20, surveillance of the Nason Street residence started around lunchtime. Task Force Officer Lapierre was part of that surveillance team. Meanwhile, Carleton instructed CD1 to try to arrange a transaction with Connect. (CD1 was in custody at Cumberland County Jail, and

¹ Agent Carleton used the term “heroin fentanyl.” I am aware that heroin is sometimes or often laced or mixed with fentanyl, and apparently the substance the defendants seek to suppress here is such a mixture. However, I will generally refer to the substances in this case as heroin.

Carleton worked with him in the Sheriff's Office.) Carleton listened to CD1's phone calls and photographed the texts between CD1 and Connect. The texts were admitted into evidence as Exhibits 1B through 1I. In response to a text from CD1 inquiring whether Connect was "good For 25 instead," followed by another text "If not 20 is cool. Just going through shit quick," Connect responded "Ya if he gets here in time," Ex. 1F, 1G, and later, "Only hv couple fing[ers] if he don't show up." Ex. 1H. Another text said that Connect's source was "on way from Connecticut." Ex. 1E. During one of the phone calls, Connect referred to the transaction between Connect and his source as for "30 grand."

Seeing a vehicle with Massachusetts plates arrive at Connect's residence in Sanford late in the evening of June 20 and an individual go inside the residence, agents executed the state warrant, believing that Connect's source had arrived. They quickly learned that it was only a teenager who had come to play video games with another teenager on the premises. But they detained Connect and he in turn agreed to cooperate. I shall refer to him as CD2. Law enforcement had no previous dealings with CD2. CD2 told Task Force Officer Lapierre that he had placed a large order that was going to be delivered to his house from an out of state source, that the source was close by, arriving in 10 minutes, that CD2 had the money for the transaction, that his source's vehicle would pull into the driveway or park immediately in front of the house, that the drugs would be concealed in the engine compartment, usually in an air vent or air intake, and that previously his source used a "a dark colored SUV possibly a

Jeep.”² There was no evidence that CD2 identified the state of registration for the vehicle his source had driven in the past.

Realizing that CD2’s source had not arrived but that his arrival was imminent, law enforcement did not have time to search or even secure the premises, but Maine State Trooper Adam Schmidt did observe heroin fingers in plain view. Law enforcement then promptly removed their marked vehicles and left the premises or hid. It was now around 11 p.m. Lapierre stayed in the basement with CD2. Much of their interaction was recorded and admitted in evidence as Exhibit 2. CD2 also gave Lapierre access to his cellphone and gave him the password, and Lapierre accessed previous texts between CD2 and his source, whom CD2 identified as “B Man” in the texts. The texts were admitted into evidence as Exhibit 3. The last text message, which CD2 received within 15-20 minutes before Lapierre saw it, referred to 30,850, *i.e.*, a number consistent with the “30 grand” Carleton had heard Connect mention as the size of the impending transaction in a phone call between CD1 and Connect/CD2. At Lapierre’s instructions, CD2 phoned his source using the speakerphone function. Lapierre saw that CD2’s source’s cellphone area code was New Hampshire, but CD2 told him that the source was not from New Hampshire but from somewhere around Lawrence, Massachusetts. Lapierre listened to the call on the speakerphone. The source said that he was on the “long road”—which

² On his direct examination, Lapierre testified that CD2 said his source used a gray or silver Jeep. But on cross-examination he agreed that CD2 had described the vehicle as a dark colored SUV or Jeep. MDEA Special Agent McDonald testified that agents were told it was a black SUV.

CD2 identified as Route 202, a back route from Massachusetts through New Hampshire that avoided the interstate—and that he was 10 minutes away.³

Soon and within the 10 minutes, B Man called CD2 to say that he was right outside and that CD2 needed to move the red car at the end of the driveway. Lapierre had observed previously that a red car was parked at the end of the driveway. CD2 told Lapierre “They’re here. They right f***in’ out front.” Ex. 2. At the time, law enforcement observed a silver Dodge pickup, which had come down Nason Street from the direction of Route 202, stop briefly in front of the house, and then proceed in the direction of Main Street. A few minutes later, it returned in the opposite direction and stopped directly in front of the house, but still on the public street, adjacent to the curb. During this short sequence of events, CD2 told Lapierre that his source had on occasion used a Dodge truck or silver truck to deliver the drugs, and that this was he.

Lapierre proceeded to order the seizure of the vehicle and its occupants.

Maine State Trooper Adam Schmidt was part of the surveillance team. He was present both to conduct any necessary traffic stop and, as a qualified K9 handler with his dog Ibo, to conduct a sniff for drugs. After leaving the house upon discovering that the source had not yet arrived when the state search warrant was initially executed, Schmidt stationed his marked cruiser on a side street, out of sight. When he received word to conduct the stop, he activated his dash camera. The first 30 minutes or so of the resulting video, introduced into evidence as Exhibit 8, show the takedown and the dog sniff.

³ The recording shows that Lapierre reported to the other agents waiting for the takedown “Ten minutes. He says he’s on the long road, so he’s thinking Route 202 . . . he’s saying it’s gonna be, under the, under the hood.” Ex. 2.

There were about 10 agents, all armed with guns drawn. The agents were shouting as the stop occurred.

Trooper Schmidt approached the driver's side, ordered the driver (the defendant Rosario-Diaz) out of the vehicle and, when he did not immediately get out, pulled him out and in Schmidt's words "guided him to the ground." The defendant's lawyer had argued in his legal memorandum that the defendant was "forcibly removed and thrown to the ground," but there was no testimony to that effect, only the Trooper's testimony just quoted. The video shows that Schmidt did forcibly pull Rosario-Diaz out and onto the ground, but it does not show violence or excessive force. It shows Schmidt cuffing Rosario-Diaz, patting him for weapons while he was on the ground, telling him to relax, and finally helping Rosario-Diaz get to his feet. Schmidt told Rosario-Diaz that he was detained but did not give him Miranda warnings.

MDEA Special Agent McDonald detained the passenger in the front seat (the defendant Garcia), told him he was detained and gave him Miranda warnings. Garcia declined to talk. McDonald then turned his attention to Rosario-Diaz,⁴ gave him Miranda warnings, and Rosario-Diaz agreed to talk. The interview was recorded and introduced into evidence as Exhibit 7.

About 17 minutes after Trooper Schmidt's dash cam was activated,⁵ and while Agent McDonald was interviewing the defendant Rosario-Diaz, Trooper

⁴ There was a passenger in the back seat of the vehicle, but he/she was not identified to the court and he/she was not charged.

⁵ By my reckoning, the trooper's car starts moving at about 35 seconds into the video; the stop occurs at about 1 minute; and the dog sniff begins at about 17 minutes and 20 seconds into the video.

Schmidt had his K9 Ibo execute a drug sniff of the vehicle exterior. Ibo alerted to the presence of drugs near the front of the vehicle, consistent with CD2's statement that they were usually hidden under the hood near the air intake.⁶ Agents raised the hood and discovered large quantities of a heroin/fentanyl mixture and cocaine.

The vehicle containing the drugs was a rental car from Massachusetts, but had Maine registration plates. The hearing did not reveal when law enforcement noticed the Maine plates, but I assume it was immediately (just as they noticed the Massachusetts plates of the vehicle when the innocent teenager arrived earlier).⁷ The rental agreement and bill were admitted as Exhibit 10. Neither defendant was the renter (there was no evidence of the identity of the renter aside from the agreement itself), neither defendant was an authorized driver under the rental contract, and the rental contract was only for June 12-13, not extending to June 20. The bill shows that the rental was returned on June 27.

The defendants have moved to suppress the drugs, a cellphone discovered in the vehicle, and Rosario-Diaz's statements to Agent McDonald.

The government responds that the defendants have no standing, that the agents had probable cause to seize the vehicle and search its contents, that the state search warrant separately gave them that authority, that at the very least they had authority to conduct a Terry stop and a dog sniff, that Rosario-Diaz was properly Mirandized, and that therefore nothing should be suppressed.

⁶ There was no challenge to the dog and handler's training, credentials, or procedures.

⁷ Lapierre who was orchestrating events from the basement with CD2 did not learn of the Maine plates until "after everything had been taken down." It is not clear what he meant by that.

ANALYSIS

Search Warrant

First, I reject the government's argument that the state search warrant granted authority to stop and search this vehicle and its occupants. That warrant granted authority to search:

Any/all persons present *on the premises* of [address] Nason Street in Sanford, ME 04073 at the time of execution of this search warrant *or arriving at the residence or premises during the execution of this search warrant* activities [sic] or unrelated residents of that building. Including if necessary strip searches of those individuals except persons present or arriving in the course o[f] their regular legitimate business.

Ex. 5 (emphasis added). The government maintains that the Dodge pickup and its occupants “arriv[ed] at the residence or premises during the execution of this search warrant” within the scope of the authorized search. That is an unreasonable reading of the warrant. That reading would justify search of the occupants of any vehicle on the public road that stopped in front of the house.⁸ The search warrant application given to the state judge did not provide probable cause for such a wide scope.

I observe that the warrant was directed first at “persons present on the premises.” The addition of those “arriving at” is reasonably interpreted as meaning those persons who came onto the premises during the execution of the warrant. That never happened here. These defendants remained inside their

⁸ The warrant's carve-out for persons “present or arriving in the course o[f] their regular legitimate business” is not a meaningful check on this overbreadth. Anyone not obviously a mail carrier or delivery person would likely end up detained and searched before law enforcement could determine whether that person's business at the scene was legitimate. It is also not clear from the warrant's language that the carve-out applies to all searches under this warrant provision or just to strip searches.

vehicle on a public street until the agents forcibly removed them. Moreover, the warrant's quoted language on which the government relies as permitting a search does not even extend to the vehicle, only the persons of those arriving.⁹

Standing

The Supreme Court has under review a circuit split over standing to object to a search of a rental car by a driver not named in the rental agreement. United States v. Byrd, 679 F. App'x 146 (3d Cir.), cert. granted, 138 S. Ct. 54 (2017). But I need not decide that issue. It is clear that both a driver and passenger have standing to object to a *seizure*, *i.e.*, the stop of the car and their persons, as occurred here. Brendlin v. California, 551 U.S. 249 (2007). The defendants are arguing that the drugs discovered under the hood should be suppressed because they are "fruit of the poisonous tree" of the allegedly unconstitutional seizure of the vehicle and their persons during the takedown. In that respect, standing is needed as to the constitutional violation, not as to the evidence derived from that violation, United States v. Olivares-Rangel, 458 F.3d 1104, 1117 (10th Cir. 2006), and these defendants have that standing.

Probable Cause

I am satisfied, however, that law enforcement had probable cause to stop and search the vehicle and to arrest¹⁰ the two defendants once it parked in front of the house. "Probable cause exists when the facts and circumstances as to

⁹ I need not decide whether the rule announced in Michigan v. Summers, 452 U.S. 692 (1981), permitting law enforcement to *detain* an occupant of premises for which they have a search warrant while the warrant is executed, extends to these two defendants who were *not* occupants of the premises. As appears below, I conclude that there was probable cause to stop and search the vehicle and arrest its driver and passengers.

¹⁰ Even though the officers referred to it as detention rather than arrest until the dog sniff alerted them to the presence of narcotics.

which police have reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that evidence of a crime will be found. . . . [A]ll that is required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act." United States v. Dion, 859 F.3d 114, 131-32 (1st Cir. 2017) (citations and quotations omitted). That "fair probability" was present here. Law enforcement officers were observing a major drug distribution transaction as it unfolded in real time, seeing and hearing the messages of the out of state source as he traveled to and arrived at Nason Street in Sanford Maine.

The defendants nevertheless challenge probable cause, pointing to the following:

1. Law enforcement showed no evidence of the reliability of the two cooperating defendants or knowledge of their criminal history. They had never previously worked with CD2.

2. As events unfolded, the agents first were told that the source probably came from Connecticut, then saw a New Hampshire area code for cellphone calls made to him, then were told he was from Massachusetts, but ultimately stopped a vehicle with Maine plates.

3. They were told to expect a dark-colored SUV, but this was a silver pickup.

I deal with the challenges in the same sequence.

The use of informant information to support probable cause depends upon the "totality-of-the circumstances approach." Illinois v. Gates, 462 U.S. 213, 230 (1983). I will therefore look at all the circumstances surrounding the information

provided by CD1 and CD2. I observe first, however, that this is not the conventional informant case where someone, perhaps anonymously, alerts law enforcement to illegal activity. Here, Agent Carleton was familiar with CD1's involvement in drug trafficking. More important, Carleton caught CD1 in the midst of a crime and CD1 was striving for favorable treatment through cooperation and was making statements against his penal interest. What CD1 did thereafter, he did at Carleton's instruction. As a result, Carleton himself heard and observed CD2's willingness to engage in a substantial drug transaction with CD1. Carleton did not need any other past experience with CD1 or knowledge of his criminal history to assess the veracity and reliability of what was being said and happening before him in real time.¹¹ As the court recognized in United States v. Vongkaysone, 434 F.3d 68, 74-75 (1st Cir. 2006), statements against interest, the desire for leniency (which will occur only with accuracy), and corroboration, all can bolster credibility.

The same is true for CD2. Executing a state search warrant, law enforcement detained him in a house already identified by CD1 as his source. Law enforcement had observed CD1 go to that house previously for drugs. Heroin was in plain view in the house. CD2 agreed to cooperate, hoping for leniency, and made statements against interest and statements that unfolding events corroborated. He showed Lapierre the texts between him and his source and let Lapierre listen to the calls; identified where the source typically hid the drugs in the source's vehicle; and told Lapierre that the source liked to park in

¹¹ I would have to indulge an assumption of an elaborate, pre-arranged setup to discount the significance of what Carleton saw and heard.

his driveway or out front. Agent Lapierre listened to a speakerphone phone call with CD2's source, observed texts between them and listened to one end of a nonspeakerphone call. He learned from the texts that a very large transaction (at least \$30,000 according to what Lapierre viewed in CD2's texts and confirmed with him orally, Ex. 2; more precisely, \$30,850 according to a text from B Man to CD2 at 10:32 pm, Ex. 3), with an out of state source was imminent. The timing of the defendants' arrival was entirely consistent with the information law enforcement had obtained. There were no other eligible vehicles in the vicinity. The source's request over the phone when he arrived that a red car at the end of the driveway be moved corroborated previous information. Under any reasonable view, law enforcement had every ground to believe that a large shipment of drugs had just arrived outside the house on Nason Street in Sanford when the silver pickup pulled up and stopped directly in front of the house and the phone call came in to move the red car at the end of the driveway. The fact that law enforcement had never previously worked with CD2 does not eliminate probable cause given the specificity of CD2's information, his incentives to be accurate, and the corroboration of events.¹²

Any confusion over where the source lived or obtained his drugs does not diminish the probable cause. CD1 had given only a very vague reference to

¹² Analogously, in United States v. Favreau, __ F.3d __, 2018 WL 1444328, at *1 n.1 (1st Cir. 2018), in dealing with reliability of information from a tipster and the reasonableness of crediting the tip, Justice Souter said for the court:

[O]wing to the synergy of the content of the tip and the facts that unfolded prior to and during the stop of [the defendant's] car, reliability *ex ante* is not a significant question here. The content of the tip was significant in making sense of the other facts recited below, which themselves suggested that the tip might well be true; all, together, had a degree of coherence that raised a reasonable suspicion of wrongdoing, which in turn justified the dog sniff that provided the further fact sufficient for probable cause to search the car.

Connecticut and CD2's text said only that the source was "on way from Connecticut" in the context of arrival time, not that he lived there; a New Hampshire area code on a cellphone does not establish residency in today's world; CD2 was firm in attributing his source to the Lawrence, Massachusetts area. The source's reference to the "long road" and his direction of travel were also consistent. Given the arrival of the vehicle as predicted, and the request to move the red car, the presence of Maine registration plates on the vehicle does not diminish probable cause.¹³

The model and color of the vehicle that arrived were not consistent with CD2's original description of the vehicle his source had used in the past. But CD2 never said what vehicle would arrive on June 20, and when he learned what vehicle had in fact arrived, CD2 said that in the past his source had used a silver pickup. Under the pressure of the circumstances there was no reason for him to prevaricate. In other words, if law enforcement stopped and searched this vehicle upon his advice only to determine that it was the wrong vehicle, that would hardly help CD2. In any case, "an informant's statements need not be fully corroborated for an officer to conclude that they are generally reliable." Vongkaysone, 434 F.3d at 74 (first-time informant operating at behest of law enforcement provided mostly accurate details about how the drug deal would unfold, corroborated in real time by law enforcement, but was wrong about the make and color of the supplier's car; probable cause existed nevertheless to

¹³ As I said earlier, the evidence does not reveal when the agents noticed the Maine registration plates. I assume they did not know at the time that this was a rental vehicle. If they had known that, it would be an additional reason to ignore the state shown on the registration plates.

arrest the supplier). The model and color of the arriving vehicle do not undermine probable cause here.¹⁴

I conclude that at the time of the takedown, law enforcement had probable cause to stop the vehicle, search it, and arrest the occupants even without the subsequent dog sniff. See Dion, 859 F.3d at 131 (probable cause needed for automobile exception to warrant requirement); United States v. Figueroa, 818 F.2d 1020, 1023 (1st Cir. 1987) (probable cause needed for warrantless arrest). There is therefore no “fruit of the poisonous tree” to suppress.

Terry Stop

If I am incorrect on probable cause, there was certainly enough for a Terry stop on the reasonable and articulable suspicion standard. United States v. Chhien, 266 F.3d 1, 5-6 (1st Cir. 2001). Dog sniffs during a lawful stop do not implicate legitimate privacy interests. Illinois v. Caballes, 543 U.S. 405, 409 (2005). Police cannot *extend* a completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff, Rodriguez v. United States, 135 S. Ct. 1609, 1614-15 (2015), but here they did have reasonable suspicion and the dog was on the scene and part of the processing of the stop. Suppression of the drugs discovered in the vehicle is therefore denied for this alternative reason.

¹⁴ Based on the cross-examination of Lapierre, I thought initially that the defendants were also challenging probable cause because Lapierre did not identify either defendant's voice as the voice he heard earlier on the speakerphone call. As it turns out, they did not make that argument in their legal memoranda or at the oral argument. In any event, Lapierre testified that although he heard the source's voice during one call over the speaker function of the cellphone with CD2, he did not feel comfortable enough to compare the voices that he heard later from the detained defendants. Moreover, his hearing of their voices occurred after the stop and is therefore not relevant to my probable cause determination. Finally, Lapierre did not testify that the voices were inconsistent, only that he could not be comfortable making an identification given the limited circumstances of the cell phone call, which the recording shows to have lasted less than thirty seconds.

Rosario-Diaz's Statements

Because there was probable cause to arrest Rosario-Diaz and because he received Miranda warnings, there is no basis to suppress his statements to Agent McDonald. The circumstances of his forcible removal from the car and to the ground are not enough to exclude them, although perhaps a jury will consider those circumstances in assessing what he said. See United States v. Feliz, 794 F.3d 123, 130-31 (1st Cir. 2015) (“[T]he defendant generally retains the freedom to ‘familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness.’ That is so because the jury is empowered to ‘assess the truthfulness of confessions’—their credibility—as part of their decision on ‘the ultimate factual issue of the defendant’s guilt or innocence.’”) (citations omitted).

CONCLUSION

For these reasons, the defendants’ motion to suppress is **DENIED**.

So ORDERED.

DATED THIS 28TH DAY OF MARCH, 2018

/s/D. BROCK HORNBY

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

United States Court of Appeals For the First Circuit

No. 19-1816

UNITED STATES,

Appellee,

v.

YARLIN GARCIA,

Defendant - Appellant.

Before

Howard, Chief Judge,
Boudin, Lynch, Thompson, Kayatta and Barron,
Circuit Judges.

ORDER OF COURT

Entered: March 16, 2021

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

William L. Welch III
Yarlin Garcia
Jamie R. Guerrette
Julia M. Lipez
Benjamin M. Block
Noah Falk

United States District Court
District of Maine

UNITED STATES OF AMERICA

v.

YARLIN GARCIA

JUDGMENT IN A CRIMINAL CASE

2019 JUL 29 P 4:11

Case Number: 2:17-cr-00100-001

USM Number: 13077-036 ~~DEFENDANT CLERK~~

PHILIP R. HOROWITZ, ESQ.

ADAM C. RUSSELL, ESQ.

JOHN SCOTT WEBB, ESQ.

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count 1 of the Superseding Indictment.
 pleaded nolo contendere to count(s) _____ which was accepted by the court.
 was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. §§ 841(a)(1) and (b)(1)(B)	Possession with Intent to Distribute 100 Grams or More of Heroin, Fentanyl, and Cocaine	6/20/2017	1s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____.
 Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

July 29, 2019
Date of Imposition of Judgment

Signature of Judge

D. Brock Hornby, U.S. District Judge
Name and Title of Judge

July 29, 2019
Date Signed

DEFENDANT: YARLIN GARCIA
CASE NUMBER: 2:17-cr-00100-001**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of 87 months.

The court makes the following recommendations to the Bureau of Prisons:
The defendant for enrollment in the 500 Hour Comprehensive Drug Treatment Program.
The Court recommends the Defendant be placed at Fort Dix FCI.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

- at _____ a.m. p.m. on _____.
- as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

- before 2 p.m. on _____.
- as notified by the United States Marshal.
- as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: YARLIN GARCIA
CASE NUMBER: 2:17-cr-00100-001**SUPERVISED RELEASE**Upon release from imprisonment, you will be on supervised release for a term of: 4 years.**MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two additional drug tests during the term of supervision, but not more than 120 drug tests per year thereafter, as directed by the probation officer.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
7. You must participate in an approved program for domestic violence. (check if applicable)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments of this judgment.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: YARLIN GARCIA
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As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

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- 1) Defendant shall participate in workforce development programs and services as directed by the supervising officer, and, if not employed, shall perform up to 20 hours of community service per week. Workforce development programming may include assessment and testing; educational instructions; training classes; career guidance; and job search and retention services;
- 2) Defendant shall not use or possess any controlled substance, alcohol or other intoxicant; and shall participate in a program of drug and alcohol abuse therapy to the supervising officer's satisfaction. This shall include testing to determine if Defendant has used drugs or intoxicants. Defendant shall pay/co-pay for services during such treatment to the supervising officer's satisfaction. Defendant shall not obstruct or tamper, or try to obstruct or tamper, in any way, with any tests; and,
- 3) A United States probation officer may conduct a search of the defendant and of anything the defendant owns, uses, or possesses if the officer reasonably suspects that the defendant has violated a condition of supervised release and reasonably suspects that evidence of the violation will be found in the areas to be searched. Searches must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation of release.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>Count</u>	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
1	\$ 100		\$ 0	\$ 0

The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ _____	\$ _____	

TOTALS **66** **66**

Priority or Percentage

TOTALS

§

\$

- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A Lump sum payment of \$100 due immediately, balance due
 - Any amount that the defendant is unable to pay now is due and payable during the term of incarceration. Upon release from incarceration, any remaining balance shall be paid in monthly installments, to be initially determined in amount by the supervising officer. Said payments are to be made during the period of supervised release, subject always to review by the sentencing judge on request, by either the defendant or the government.
 - not later than _____, or
 - in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal *(e.g., weekly, monthly, quarterly)* installments of \$ _____ over a period of *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or
- D Payment in equal *(e.g., weekly, monthly, quarterly)* installments of \$ _____ over a period of *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.