No. 21-5679

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

TOYE TUTIS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THIRD CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

TOYE TUTIS #67059-050
(Your Name)

FCI - Gilmer
P.O. Box 6000
(Address)

Glenville, WV 26351
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

WHETHER EMPLOYMENT OF A "CELL-SITE SIMULATOR", IN ORDER TO DETERMINE IF THE PETITIONER POSSESSED ANOTHER CELLPHONE, OR CELLPHONES, CONSTITUTED AN INFRINGEMENT OF HIS FOURTH AMENDMENT ENTITLEMENT TO PRIVACY WHEN THE WIRETAP ORDER DID NOT AUTHORIZED ITS USE?

WHETHER AN INTEGRATED PLEA AGREEMENT, WHICH DEPARTS FROM PRIOR ORAL AGREEMENTS ON AN IMPORTANT ISSUE, AND WITHOUT NOTIFY THE DEFENDANT OF THE DELETED PROVISION, RENDERED A GUILTY PLEA THA WAS MADE IN RELIANCE ON THE PROSECUTOR'S PRIOR ORAL REPRESENTATIONS, NULL AND VOID BECAUSE THE PLEA WAS NOT MADE VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF CONTENTS

INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[X] reported at 845 Fed.Appx. 122 (3rd Cir.2021); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 21, 2021.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 13, 2021, and a copy of the order denying rehearing appears at Appendix "B".

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTH, FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

WIRETAP STATUTE (18 U.S.C § 2518)

STATEMENT OF THE CASE

A detective employed by the county prosecutor's office applied for a wiretap order from a state judge for the State of New Jersey. The application was approved. The wiretap was limited to a telephone that was used by one Jewell Tutis, a brother of petitioner Toye Tutis. Subsequently, the detective recorded a telephone call between Toye Tutis and his brother, Jewell Tutis. The two brothers discussed the subject of fraudulent drivers' licenses. The detective made a subjective interpretation that the purpose of obtaining fraudulent documents was to further their drug conspiracy. That conclusion was reached by the detective because he had, previously, been in contact with someone who made false allegations about the petitioner - Toye Tutis. The unnamed informant falsely made an uncorroborated allegation that Toye Tutis offered to sell him controlled substances. Despite fitting the foregoing informant with recording devices, no illegal drug transactions, or discussions concerning controlled substances, were recorded between the informant and the petitioner - Toye Tutis. However, drug transactions were recorded between the informant and Jewell Tutis, the petitioner's brother.

Following the recorded telephone conversation between Toye Tutis and Jewell Tutis, the detective applied for a second wiretap order from the state judge. The detective re-

quested permission to record conversations on the telephone of the petitioner - Toye Tutis. In the detective's aforesaid wiretap application, it was falsely asserted that the informant identified Toye Tutis as being "Santana", with whom he had, allegedly, spoken to about selling controlled substances. Later, it was revealed that "Santana" was, actually, Jewell Tutis, and not Toye Tutis. This mistake occurred because no independent investigation was conducted by the detective before seeking a wiretap order for the telephone used by Toye Tutis. In fact, the record shows that no effort was made by the detective, or other officers, to demonstrate that the informant could identify Toye Tutis as someone with whom he was acquainted, or had previously associated in any manner. It would have been a simple matter for the informant to stage a meeting with Toye Tutis, and engage in some conversation establishing that they had previously discussed the subject of possible drug deals. However, the detective elected to bypass normal investigative techniques. Instead of providing facts in support of his application for a wiretap on the telephone of Toye Tutis, the detective submitted only surmise, speculation, and subjective beliefs that a wiretap order will produce evidence of unlawful drug transactions occurring be-

tween Toye Tutis, and unknown others. A state judge simply "rubber stamped" the detective's wiretap application.

When the wiretap of the petitioner's telephone failed to produce the desired results, the detective contacted federal agents about employing a new device to determine whether the petitioner was using other cellphones as a means of committing drug related crimes. The new device was a "Cell Site Simulator", also known as a "Stingray". Its purpose was to falsely send radio signals into the petitioner's residence, which signals would activate any and all cellphones physically located in the petitioner's residence. Once activated, the cellphones would then reveal their respective number, thereby allowing the detective to intercept any and all conversations being engaged in by Toye Tutis, or anyone else using the cellphone or cellphones. That is what occurred. The detective, with assistance from federal agents, employed a Cell Site Simulator ("Stingray") to obtain the numbers of other cellphones that were located in the residence of Toye Tutis. Based on the subsequent interception of telephone calls between Toye Tutis, and others, a federal indictment was returned against him.

Following arraignment, defense counsel filed a motion to suppress the telephone conversations recorded between Toye

Tutis, and others, in which law enforcement authorities subjectively formed a belief that unlawful drug transactions were discussed or planned. In addition, the motion included a challenge to the employment of the "Cell-Site Simulator" ("Stingray") in order to penetrate the walls of petitioner's private residence and obtain electronic information from the other cellphones located in the residence. Both of those motions were denied.

Failing to obtain a favorable ruling on the suppression motions, defense counsel for Toye Tutis engaged in negotiations with federal prosecutors about a possible plea deal. Since the petitioner's spouse had been charged with money laundering conspiracy in a superseding indictment, Toye Tutis insisted that any plea agreement include his spouse, since she was not involved, whatsoever, in the alleged controlled substance conspiracy offense, or his money laundering conspiracy charge.

The aforesaid plea negotiations resulted in federal prosecutors tendering a proposed plea agreement to defense counsel. It included a provision protecting petitioner's spouse from a lengthy term of imprisonment. In addition, the proposed agreement included a clause preserving petitioner's

right to appeal from the denial of his suppression motions. Following an exchange of telephone calls and e-mails, Toye Tutis signed a second proposed plea agreement. Defense counsel represented to Toye Tutis that the plea agreement was a "package deal", which included his spouse (protecting her from a lengthy term of imprisonment). Defense counsel further assured Toye Tutis that the Fourth Amendment claim was preserved for appeal.

Following entry of a guilty plea, Toye Tutis discovered that his attorney had misrepresented the contents of the Plea Agreement. It did not include, or protect, his spouse. Thus, there was no "package deal", as promised by defense counsel and federal prosecutors. Consequently, this forced petitioner's spouse to engage in her own plea negotiations. That resulted in the imposition of a lengthy term of imprisonment for her when she entered a guilty plea to the money laundering conspiracy charge.

Upon discovering the error, defense counsel filed a motion seeking to withdraw petitioner's guilty plea. The court granted a hearing on the motion in which defense counsel candidly admitted a failure to read the second proposed plea agreement prior to advising Toye Tutis to sign

the agreement. However, the district court ruled against the petitioner's motion by concluding that he did not believe defense counsel's testimony.

An appeal was timely taken by Toye Tutis in which the both the wiretap orders, and the ineffectiveness of defense counsel, were litigated. The appeals court determined that the employment of a "Cell-Site Simulator" was not unlawful because the wiretap order could be interpreted as authorizing its use. Likewise, petitioner's claim of ineffectiveness of his trial counsel was denied because of the credibility decision made by the district judge. However, Judge McKee dissented. He would have granted the suppression motion because the detective's application for a wiretap failed to state sufficient facts demonstrating probable cause existed for the wiretap order.

REASONS FOR GRANTING THE PETITION

(a) WHETHER EMPLOYMENT OF A "CELL-SITE SIMULATOR", IN ORDER TO DETERMINE IF THE PETITIONER POSSESSED ANOTHER CELLPHONE, OR CELLPHONES, CONSTITUTED AN INFRINGEMENT OF HIS FOURTH AMENDMENT ENTITLEMENT TO PRIVACY WHEN THE WIRETAP ORDER DID NOT AUTHORIZE ITS USE?

Although the Supreme Court has ruled on the validity of installing a GPS on a suspect's motor vehicle, without prior judicial approval, Carpenter v. United States, 138 S.Ct. 2206 (2018), there has been no ruling on the legality of using a "Cell-Site Simulator" to obtain confidential information about a citizen's location, movements, and if he possesses or uses a cellphone, or a number of cellphones.

The Fourth Amendment protects not only property interests but certain expectations of privacy as well. Katz v. United States, 389 U.S. 347, 351 (1967). When a citizen "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. Smith v. Maryland, 442 U.S. 735, 740 (1972). See also, Carroll v. United States, 267 U.S. 132, 149 (1925); and Kyllo v. United States, 533 U.S. 27 (2001).

The Supreme Court has already that individuals have a reasonable expectation of privacy in the whole of their

physical movements. Riley v. California, 573 U.S. _____ (2014)(allowing government access to cell-site records-which "hold for many Americans the 'privacies of life,'" contravenes that expectation). In Kyllo, supra, the Court adopted, as part of a rule, that it "must take account of more sophisticated systems that are already in use or in development". Id. 533 U.S., at 36.

In Carpenter, supra, the Court rejected an attempt by the Government to bypass the Fourth Amendment's requirements by contending that "third-party doctrine" permits agents to acquire cell-site records without prior judicial approval. That doctrine partly stemed from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. However, the Court found that the Government was merely mechanically applying the third-party doctrine without appreciating the lack of comparable limitations on the revealing nature of the information sought. It further found that cellphone location information is not truly "shared", as the term is normally understood. First, cellphones and the services tey provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to partici-

pation in modern society. Id. (quoting Riley, 573 U.S., at ____, 134 S.Ct. 2473). Second, a cellphone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up. Id.

Thus, Government officials are not allowed to obtain cellphone information which an individual does not "knowingly" reveal, unless prior judicial approval is obtained. Instantly, petitioner Toye Tutis, was not shown to have revealed to anyone whether he possessed a cellphone, or its number. State officers, acting without prior judicial approval, invaded the privacy of petitioner's residence by sending electronic signals through its exterior walls, that tricked whatever cellphones which were physically present, therein, to activate and send a signal revealing their respective identity. The officers then utilized that information in order to subsequently track Toye Tutis's movements and determine the identity of whatever cellphone he may have elected to use for private conversations.

Although the lower courts found that the detective who applied for a state wiretap order failed to include or alert the state judge of his intention to utilize a cell-site simulator to discover whether Toye Tutis was using other cell

phones, the lower courts determined that the wiretap order permitted officers to do so. That was patently incorrect because the wiretap order makes no reference, whatsoever, to a "cell-site simulator", or "Stingray". This was a maverich operation by the county detective, who totally disregarded wiretap rules and statutes. Significantly, Judge McKee dissented from the Third Circuit's aforesaid ruling: "Judge McKee would hold that the affidavit in support of the September 26, 2014 roving wiretap order lacked probable cause and that the evidence derived from that wiretap should therefore be suppressed as the 'fruit of the poisonous tree.'" United States v. Tutis, Nos. 19-2106 and 19-2380, 845 Fed. Appx. 122 (3rd Cir.2021).

"The Fourth Amendment requires that a warrant 'particularly describe the place to be searched, and the persons or things to be seized.'" United States v. Scurry, 821 F.3d 1, 15 (D.C.Cir.2016)(quoting United States v. Johnson, 437 F.3d 69, 73 (D.C.Cir.2006)). "'In the wiretap context,' the Fourth Amendment's particularity requirement is 'satisfied by identification of the telephone line to be tapped and the particular conversations to be seized.'" Id.(quoting United States v. Donovan, 429 U.S. 413, 427 n.15 (1977)). "Surely a Title III wiretap application or order could not satisfy

the Fourth Amendment's particularity requirement if it failed to identify the individual phone to be tapped." Id. "[W]iretaps on cell phones [are not to be treated] differently from wiretaps on land-line phones." Id. Thus, in Scurry, supra, "each application and order specified the telephone number of the targeted cell phone, a serial number identifying the physical device associated with the target phone number, the identity of the service provider, and the name and address of the subscriber." Id. Instantly, the state's wiretap order failed to include the foregoing information, as required by 18 U.S.C. § 2518(11). Id., at 16.

The affidavit submitted by the detective investigating the petitioner's suspected activity failed to state probable cause. The affidavit merely stated that there was probable cause to believe that "Toye Tutis frequently changes his cell phone number as part of a deliberate effort to thwart detection by law enforcement . . . , and that roving authorization is needed to intercept Toye Tutis' communications from the Target Cell phone, and other wireless telephone numbers used by Toye Tutis . . ." (Application of Detective Dorn, at ¶ 11). The state judge then simply rubber stamped the detective's application for a wiretap order. There was no showing, other

than the detective's suspicions, that Toye Tutis even engaged in the act of changing his cell phone. The affidavit always referred to a single cell phone number (424) 646-1761, and cited to no evidence that Toye Tutis had changed cell phones even once. Therefore, the allegation was without any factual support, and most likely intentionally false. Thus, the subsequent employment of a "cell-site simulator" was lacking in any support or basis (even if the wiretap had authorized its use by the detective).

An affidavit based upon "mere affirmation of suspicion and belief without any statement of adequate supporting facts" is insufficient. Aguilar v. Texas, 378 U.S. 108 (1964). "The inferences from the facts which lead to the complaint 'must be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" Id.(quoting Johnson v. United States, 333 U.S. 10, 14 (1942)).

(b) WHETHER AN INTEGRATED PLEA AGREEMENT, WHICH DEPARTS FROM PRIOR ORAL AGREEMENTS ON AN IMPORTANT ISSUE, AND WITHOUT NOTIFYING THE DEFENDANT OF THE DELETED PROVISION, RENDERED A GUILTY PLEA THAT WAS MADE IN RELIANCE ON THE PROSECUTOR'S PRIOR ORAL REPRESENTATIONS, NULL AND VOID BECAUSE THE PLEA WAS NOT MADE VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY?

During an evidentiary hearing granted by the district court on petitioner's motion to withdraw his guilty plea, his defense attorney took the witness stand and candidly admitted to falsely representing to Toye Tutis that the proposed Plea Agreement was a "package" deal, which included his spouse and co-defendant, Jaxmine Vega. Defense counsel testified to not having read or reviewed the Plea Agreement prior to advising Toye Tutis of its terms and conditions. Toye Tutis relied on defense counsel's advice since he was untrained in the law. However, the district court found defense counsel not to have been a credible witness, and denied the motion.

Numerous judicial decision have found similar conduct by a defense attorney to constitute ineffective assistance of counsel, contrary to the Sixth Amendment. "The fact that a defendant enters a plea of guilty and states at the time of the plea that the plea is being given freely and voluntarily does not necessarily preclude that defendant from

subsequently challenging the voluntariness of the plea." Martin v. Kemp, 760 F.2d 1244, 1247 (11th Cir.1985). A defense attorney's representations fell below an objective standard of reasonableness by representing to petitioner that the court had agreed to a later sentence reduction, in Betancourt v. Willis, 814 F.2d 1546 (11th Cir.1987).

"An attorney's ignorance of a point of law that is fundamental to his case, combined with his failure to perform basic research on that point is a quinessential example of unreasonable performance." Hinton v. Alabama, 571 U.S. 263, 274 (2014). Just as an attorney's failure to raise a "plainly meritorious objection could constitute deficient performance, if proven", the facts in this proceeding were clearly established when petitioner's defense counsel took the witness stand and admitted to not having read the plea agreement before advising Toye Tutis to sign it. Brock-Miller v. United States, 887 F.3d 298, 310 (7th Cir.2018). This point was made in Houston v. Lockhart, 982 F.2d 1246 (8th Cir.1992), when the court ruled defense counsel provided incompetent representation by failing to have his oral agreement, with prosecutors, to allow admission into evidence the defendant's favorable polygraph results, reduced to writing "betrayed a startling ignorance of the law"

that was contrary to prevailing professional norms, and constituted ineffective assistance of counsel. Id.

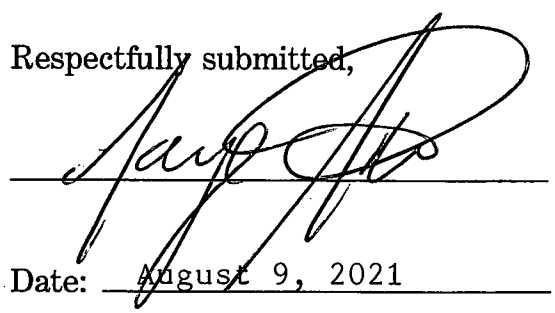
"The fact that a defendant enters a plea of guilty and states at the time of the plea that the plea is being given freely and voluntarily does not necessarily preclude that defendant from subsequently challenging the voluntariness of the plea." Martin v. Kemp, 760 F.2d 1244, 1247 (11th Cir.1985). Ineffective assistance of counsel renders a guilty plea involuntary. Betancourt v. Willis, 814 F.2d 1546, 1548 (11th Cir.1987)(citing Hill v. Lockhart, 474 U.S. 52 (1985), finding ineffective assistance of counsel when attorney failed to memorialize sentence reduction agreement in writing and neglected to enter it upon record). See also United States v. Scurry, 987 F.3d 1144 (D.C.Cir. 2021)("It was the responsibility of the court and the government to take initiative to protect appellant's right to counsel.")

Toye Tutis's plea was entered involuntarily and cannot be considered to be a valid plea, rendering him actually innocent, and entitled to plea anew. The lower courts' ruling to the contrary is not supported by the record. United States v. Samaniego, 532 Fed.Appx. 531, 535 (5th Cir. 2013).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: August 9, 2021

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19-2106 and 19-2380

UNITED STATES OF AMERICA, Appellant in 19-2380

v.

TOYE TUTIS, a/k/a "AHMAD",
a/k/a "MAHD", a/k/a "SANTANA", Appellant in 19-2106

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1-14-cr-00699-001)
District Judge: Honorable Jerome B. Simandle

Argued on December 9, 2020

Before: MCKEE, PORTER and FISHER, *Circuit Judges*.

(Filed: February 11, 2021)

Stanley O. King *[ARGUED]*
King & King
231 South Broad Street
Woodbury, NJ 08096
Counsel for Appellant/Cross-Appellee

Craig Carpenito, United States Attorney
Sabrina G. Comizzoli, Assistant U.S. Attorney *[ARGUED]*
Mark E. Coyne
Office of United States Attorney
970 Broad Street, Room 700
Newark, NJ 07102
Counsel for Appellee/Cross-Appellant

OPINION*

FISHER, *Circuit Judge.*

Toye Tutis pleaded guilty to drug possession and distribution and money laundering, but reserved his right to appeal two issues. He now exercises that right, arguing that the District Court erred in denying his motions to suppress evidence and to withdraw his guilty plea. We will affirm.[1]

Tutis first argues that the District Court erred in denying his motions to suppress evidence from a roving wiretap because the affidavit supporting the wiretap order did not provide probable cause. He contends that the affidavit contained only barebones,

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291. For the denial of a motion to suppress evidence, we review factual determinations for clear error and exercise plenary review over the application of the law to those facts. *United States v. Murray*, 821 F. 3d 386, 390-91 (3d Cir. 2016). For the denial of a motion to withdraw a guilty plea, we review for abuse of discretion. *United States v. Siddons*, 660 F.3d 699, 703 (3d Cir. 2011).

conclusory, and deliberately misleading information.[2]

"When faced with a challenge to a . . . probable cause determination, a reviewing court must remember that its role is limited"[3] and afford "great deference"[4] to the issuing court's findings. Thus, we "confine our review to . . . the affidavit" and look to see if there was a "'substantial basis' for finding probable cause" from its contents.[5] The test is met if, taking "a practical, common-sense" view of the facts, "there is a fair probability that . . . evidence of a crime will be found in a particular place."[6] Additionally, a roving wiretap, which allows the government to "intercept[] any and all identified telephones used" by an individual,[7] may be authorized if the affidavit includes evidence of that person "thwarting interception" by law enforcement.[8]

Here, the District Court concluded that the affidavit contained sufficient facts to establish probable cause for a roving wiretap. We agree. The affidavit indicated that Tutis, his wife, and his brother were subjects of a long-term, state and federal

---

[2] Tutis argues that the affidavit also fails because it does not meet New Jersey's stricter standard for roving wiretaps. *See State v. Feliciano*, 132 A.3d 1245, 1256 (N.J. 2016) (explaining that New Jersey's standard is "stricter" than the federal one because the government must "show the target has a 'purpose . . . to thwart interception'" (citing N.J.S.A. 2A:156A-9(g)(2)(b))). We have, however, held that federal law governs admissibility of communications intercepted by state agents in federal cases. *United States v. Williams*, 124 F.3d 411, 426-28 (3d Cir. 1997).

[3] *United States v. Jones*, 994 F.2d 1051, 1055 (3d Cir. 1993).

[4] *United States v. Hodge*, 246 F.3d 301, 305 (3d Cir. 2001).

[5] *Jones*, 994 F.2d at 1054, 1055.

[6] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

[7] *United States v. Shannon*, 766 F.3d 346, 349 n.4 (3d Cir. 2014).

[8] 18 U.S.C. § 2518(11)(b)(ii).

investigation into multiple drug trafficking rings in New Jersey. It also recounted tips from a confidential informant such as instructions, that were provided by Tutis, to use code words to refer to specific drugs. The affidavit further described a subsequent investigation based on those tips, including multiple controlled drug purchases, one of which occurred in Tutis's presence.[9] The affidavit also averred that Tutis obtained fraudulent state-issued identifications and used multiple phones to avoid interception by the police. While it is true that the affidavit was later found to have included some false information, the District Court found that it was not knowingly and deliberately included.[10] Even excluding the affidavit's incorrect assertion that "Santana" was Tutis's nickname, the remaining facts in the affidavit still established probable cause.[11]

Next, Tutis argues that the District Court wrongly denied his motion to suppress evidence obtained through a cell-site simulator, arguing it exceeded the warrant's scope because the affidavit referred to the simulator only as "equipment" instead of specifically listing it. A search warrant complies with the Fourth Amendment when a neutral

---

[9] *See United States v. Stearn*, 597 F.3d 540, 555 (3d Cir. 2010) (finding that "[a] magistrate may issue a warrant relying primarily . . . upon the statements of a confidential informant, so long as" there is "independent '[police] corroboration of details of an informant's tip'" (quoting *Gates*, 462 U.S. at 241) (alteration in original)).

[10] *See Franks v. Delaware,* 438 U.S. 154, 171 (1978) (to obtain an evidentiary hearing and ultimately exclude evidence obtained under a warrant issued based on a false affidavit, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth").

[11] *See United States v. Yusuf*, 461 F.3d 374, 384 (3d Cir. 2006) ("When faced with an affirmative misrepresentation, the court is required to excise the false statement from the affidavit" and then assess probable cause.).

magistrate finds in the affiant's application: (1) "probable cause to believe that the evidence sought will aid in a particular apprehension" and particular descriptions of "the things to be seized, as well as the place to be searched."[12] The affidavit here did just that. It described where the equipment would search and what it would obtain. Based on physical surveillance of Tutis, the officers would use the equipment in "close proximity" to Tutis "at different geographical locations."[13] It would then obtain "Electronic Serial Number (ESN), Mobile Telephone Number (MSISSDN), and International Mobile Subscriber Identification (IMSI)" to "ascertain the [additional cellular telephone] facility or facilities" utilized by Tutis.[14] Indeed, it described the equipment in detail despite not actually naming it, stating that it "is capable of retrieving wireless instrument identification information" and would be used "to identify additional telephone facility numbers being utilized by" Tutis.[15] Therefore, the government's search did not exceed the scope of the warrant.

Furthermore, Tutis disputes the legitimacy of his own guilty plea, which he tried to withdraw twice. A defendant may withdraw a plea if he can demonstrate a "fair and just reason for . . . withdrawal,"[16] which is a "substantial burden."[17] In determining if a

---

[12] *Dalia v. United States*, 441 U.S. 238, 255 (1979) (internal quotation marks omitted).

[13] Appellant's Brief at 38.

[14] *Id.* at 37.

[15] *Id.* at 38-39.

[16] Fed. R. Crim. P. 11(d)(2)(B).

[17] *Siddons*, 660 F.3d at 703.

fair and just reason exists, "a district court must consider whether: (1) the defendant asserts his innocence; (2) the defendant proffered strong reasons justifying the withdrawal; and (3) the government would be prejudiced by the withdrawal."[18]

In his first motion, Tutis contended that his plea was involuntary because he only agreed to it "based on pressure stemming from the packaged nature of his and his wife's plea offers."[19] For the first factor of the test for withdrawing a plea, asserting innocence, Tutis provided no facts to support his general statement that he continued to maintain his innocence. A "[b]ald assertion of innocence is . . . insufficient to permit [a defendant] to withdraw his guilty plea."[20]

For the second factor, Tutis argues there are strong reasons to withdraw his plea because he did not know it was uncoupled from his wife's plea deal. He contends that initial plea negotiations involved a packaged deal and his attorney did not inform him that, in the end, the pleas were not packaged. Additionally, Tutis argues that the District Court failed to conduct the special colloquy that is required for packaged pleas.[21] However, the District Court found that Tutis's and his wife's agreements had no

[18] *Id.* (internal quotation marks and citations omitted).

[19] Appellant's Brief at 42-43.

[20] *United States v. Wilson*, 429 F.3d 455, 458 (3d Cir. 2005).

[21] We require that package deals be disclosed to the district court, and that the district court conduct a special colloquy, because package deals "pose special risks, particularly when a trial court is unaware that defendants' pleas are tied together." *United States v. Hodge*, 412 F.3d 479, 489-90 (3d Cir. 2005).

"coupling language," were "entered independently," and "were indeed uncoupled."[22] Our review of the plea agreement confirms that the District Court did not err on this point. Tutis also "affirm[ed] . . . that his decision to accept the government's plea bargain was voluntary, entered of his own free will, and not coerced," and the District Court confirmed him to be "an intelligent, articulate, and self-directed person" who was actively involved in negotiating plea offers.[23]

Nor does our decision change because Tutis's lawyer subsequently testified that he decided not to inform the District Court about the packaged deal in order "to inject . . . error in the Court's plea hearing so that it could serve as a basis for setting his plea aside."[24] The District Court found the lawyer to be incredible, "uneasy" on the witness stand, and trying hard "to keep his 'story' straight."[25] Additionally, Tutis's wife's attorney testified that he knew that the pleas were ultimately uncoupled and that Tutis's lawyer should have known as well.

As for the final factor for withdrawing a plea, the District Court did not find the Government would have been prejudiced by withdrawal. However, this third factor does not outweigh the first two, which Tutis failed to demonstrate. Thus, the District Court did

---

[22] JA 83-84. Moreover, even if Tutis's plea deal had been packaged together with his wife's, a packaged-plea colloquy was never triggered because neither party informed the District Court there was a package deal. *See Hodge*, 412 F.3d at 489-90.

[23] JA 85, 102.

[24] JA 109, 986.

[25] JA 111.

not abuse its discretion when it concluded that Tutis did not establish a fair and just reason to withdraw his plea.

In his second motion to withdraw his plea, Tutis argued the plea was involuntary due to ineffective assistance of counsel. Although we typically do not evaluate claims of ineffective assistance of counsel on direct appeal, "a narrow exception to the rule . . . exists '[w]here the record is sufficient to allow'" it.[26] Because the District Court held a hearing and "created an adequate record," we will proceed.[27] Accordingly, Tutis must demonstrate that (1) "his attorney's advice was under all the circumstances unreasonable under prevailing professional norms; and (2) . . . he suffered sufficient prejudice from his counsel's errors."[28] He satisfies the latter by proving that "he would not have pleaded guilty and would have insisted on going to trial" but for his attorney's errors.[29]

As with his first motion to withdraw, Tutis maintains that he entered his plea involuntarily because his counsel misled him into believing that he had a packaged deal with his wife. The District Court, however, found that Tutis's lawyer "attempted to manufacture an ineffective assistance of counsel claim in a corrupt post-plea attempt to help his former client"[30] and that Tutis's contention that he falsely admitted to his guilt

---

[26] *United States v. Jones*, 336 F.3d 245, 254 (3d Cir. 2003) (quoting *United States v. Headley*, 923 F.2d 1079, 1083 (3d Cir. 1991)).

[27] *Id.*

[28] *Id.* at 253-54 (internal quotation marks and citations omitted).

[29] *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

[30] JA 143.

was unbelievable. There was no indication that Tutis would have gone to trial if he had not pleaded guilty, much less that he was prejudiced by his lawyer's alleged errors.

Lastly, Tutis indicated his intention to file a pro se appellate brief, and in response, the Government filed a cross-appeal. Apparently, the Government was attempting to prepare for the possibility that Tutis would raise issues on appeal other than the ones reserved in his plea agreement, and thus would violate the agreement. However, the Government should not have cross-appealed.[31] To put it succinctly, the Government was not aggrieved by the judgment and is not permitted to appeal it.[32] Therefore, we dismiss the cross-appeal.

[31] *United States v. Erwin*, 765 F.3d 219, 234-35 (3d Cir. 2014) (where defendant violates terms of plea agreement by raising issues not reserved in the agreement, no cross-appeal is permitted or needed and this Court has the power to order appropriate remedies, including de novo resentencing).

[32] *Id.* at 232.

For these reasons, we will affirm.[33]

[33] Judge McKee does not agree that the affidavit contained sufficient assertions to establish probable cause for a roving wiretap. The assertions that would establish probable cause in the affidavit all stem from the informant, but they establish probable cause only if the informant is shown to be reliable under *Gates*. 462 U.S. at 239. Judge McKee does not believe that the affidavit establishes that the informant is reliable as to Tutis. In his view, the affiant merely asserts that the informant is reliable without establishing what that conclusion is based upon. It alleges only that physical surveillance has been conducted, primarily of the narcotics transactions conducted with the reliable confidential informant. The language about the informant's reliability is conclusory and similar to the language that was held inadequate in *Gates*. There, the affidavit stated only that the affiant "[has] received reliable information from a credible person . . . " *Gates*, 462 U.S. at 239. Here, as in *Gates*, such an assertion is a "mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. *Id.*

Judge McKee notes that the affiant does state that he had relied upon the informant in a prior investigation of Tutis. However, that investigation was fruitless. In this investigation, the informant's tips about drug activity were corroborated only as to Tutis's brother, but not as to the appellant himself. Accordingly, Judge McKee would hold that the affidavit in support of the September 26, 2014 roving wiretap order lacked probable cause and that evidence derived from that wiretap should therefore be suppressed as the "fruit of the poisonous tree." *Wong Sun. v. United States*, 371 U.S. 471 (1963).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19-2106 and 19-2380

UNITED STATES OF AMERICA, Appellant in 19-2380

v.

TOYE TUTIS, a/k/a "AHMAD",
a/k/a "MAHD", a/k/a "SANTANA", Appellant in 19-2106

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1-14-cr-00699-001)
District Judge: Honorable Jerome B. Simandle

Argued on December 9, 2020

Before: MCKEE, PORTER and FISHER, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on December 9, 2020. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered May 6, 2019, be and the same is hereby AFFIRMED. All of the above in accordance with the Opinion of this Court.

Costs shall not be taxed.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: 11 February 2021

TRULINCS 67059050 - TUTIS, TOY_ Jnit: GIL-B-A

FROM: G, Jaz
TO: 67059050
SUBJECT: From King
DATE: 05/13/2021 10:48:02 AM

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT _____
Nos.. 19-2106 & 19-2380 _____
UNITED STATES OF AMERICA v.
TOYE TUTIS, a/k/a "AHMAD",
a/k/a "MAHD", a/k/a "SANTANA", Appellant/Cross-Appellee _____
(D.C. No. 1-14-cr-00699-001) _____
Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS and FISHER1, Circuit Judges

_____
SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC _____
The petition for rehearing filed by Appellant/Cross-Appellee Toye Titus in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service; and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.
1 Judge Fisher's vote is limited to panel rehearing only.

This isn't good news but I just received it today.
Stan King

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19-2106 & 19-2380

UNITED STATES OF AMERICA

v.

TOYE TUTIS, a/k/a "AHMAD",
a/k/a "MAHD", a/k/a "SANTANA", Appellant/Cross-Appellee

(D.C. No. 1-14-cr-00699-001)

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS and FISHER[1], Circuit Judges

---

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant/Cross-Appellee Toye Titus in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

---

[1] Judge Fisher's vote is limited to panel rehearing only.

BY THE COURT:

s/ D. Michael Fisher
Circuit Judge

Dated: 12 May 2021
AWI/CC: SGC
MEC
SOK