APPENDIX

APPENDIX

A-1

987 F.3d 966
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Jose Antonio MORALES, Defendant - Appellant.

No. 19-11934
|
(February 5, 2021)

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Florida, No. 2:18-cr-14056, Robin L. Rosenberg, J., of narcotics and firearms offenses, and he appealed,

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

[1] evidence discovered during warranted search of defendant's residence did not have to be suppressed, even assuming that magistrate judge erred in finding that small amount of marijuana discovered during successive trash pulls established probable cause, and

[2] while indictment charging defendant with being a felon in unlawful possession of firearm and ammunition omitted an element of his offense, in failing to allege that defendant knew that he was a convicted felon, this deficiency was not jurisdictional.

Affirmed.

Jordan, Circuit Judge, filed opinion concurring in part and concurring in the judgment.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (20)

[1] **Criminal Law** Searches, seizures, and arrests

Evidence seized as result of illegal search may not be used by government in subsequent criminal prosecution.

1 Cases that cite this headnote

[2] **Criminal Law** Purpose of Exclusionary Rule

Exclusionary rule is not a personal right, but rather a prudential doctrine, whose sole purpose is to deter future Fourth Amendment violations. U.S. Const. Amend. 4.

[3] **Criminal Law** Operation and extent of, and exceptions to, the exclusionary rule in general

Exclusionary rule applies only where its application will, in fact, deter unreasonable searches and seizures. U.S. Const. Amend. 4.

[4] **Criminal Law** Good Faith or Objectively Reasonable Conduct Doctrine

That exclusionary rule should not apply, because suppression of evidence will not deter future Fourth Amendment violations, is especially clear when officer acting with objective good faith has obtained a search warrant from judge or magistrate and acted within its scope. U.S. Const. Amend. 4.

[5] **Searches and Seizures** Probable or Reasonable Cause

On application for search warrant, it is magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. U.S. Const. Amend. 4.

[6] **Criminal Law** Good Faith or Objectively Reasonable Conduct Doctrine

Paradigmatic application of "good faith" exception to exclusionary rule is to evidence

obtained in objectively reasonable reliance on warrant, even if a court later invalidates the warrant for lack of probable cause. U.S. Const. Amend. 4.

[7] **Criminal Law** Particular cases

Evidence discovered during warranted search of defendant's residence did not have to be suppressed, even assuming that magistrate judge erred in finding that small amount of marijuana discovered during successive trash pulls from defendant's residence established probable cause for search warrant; officers executing the warrant did everything that they should have done in applying for warrant from a neutral magistrate without attempting to mislead magistrate or to withhold material information, and thus the suppression of evidence would not deter future unreasonable searches and seizures. U.S. Const. Amend. 4.

[8] **Criminal Law** Presumptions and burden of proof

Government bears burden of demonstrating that "good faith" exception to the exclusionary rule applies.

[9] **Criminal Law** Review De Novo

Criminal Law Evidence wrongfully obtained

Court of Appeals reviews de novo whether "good faith" exception to the exclusionary rule applies, but underlying facts upon which that determination is based are binding on appeal unless clearly erroneous.

[10] **Criminal Law** Exceptions Relating to Defects in Warrant

"Good faith" exception to exclusionary rule applies in all but four limited sets of circumstances: (1) where magistrate issuing the warrant was misled by information in affidavit which affiant knew was false, or would have known was false but for his reckless disregard of truth; (2) where issuing magistrate wholly abandoned his judicial role; (3) where affidavit supporting warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where, depending upon circumstances of particular case, warrant is so facially deficient, in failing to particularize the place to be searched or things to be seized, that executing officers cannot reasonably presume it to be valid. U.S. Const. Amend. 4.

[11] **Criminal Law** Good Faith or Objectively Reasonable Conduct Doctrine

If there are no special circumstances precluding application of "good faith" exception to the exclusionary rule, court, in deciding whether to suppress evidence obtained in a warranted search, proceeds to determine whether the executing officer reasonably relied upon the search warrant. U.S. Const. Amend. 4.

[12] **Criminal Law** Good Faith or Objectively Reasonable Conduct Doctrine

Court must determine application of "good faith" exception to the exclusionary rule on a case-by-case basis. U.S. Const. Amend. 4.

[13] **Searches and Seizures** Probable or Reasonable Cause

Search warrant affidavit should state facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises to be searched and should establish a connection between the defendant and the residence to be searched and a link between the residence and any criminal activity. U.S. Const. Amend. 4.

1 Cases that cite this headnote

[14] **Criminal Law** Necessity of Objections in General

There can be no plain error where the explicit language of statute or rule does not specifically resolve an issue, and where there is no precedent from the Supreme Court or the Court of Appeals directly resolving it.

[15] **Criminal Law** Exceptions Relating to Defects in Warrant

"Good faith" exception to exclusionary rule requires court to consider whether a reasonably well-trained officer would know that search was illegal despite magistrate's authorization. U.S. Const. Amend. 4.

[16] **Criminal Law** Determinative process; matters or issues considered

When deciding whether an executing officer's reliance on a search warrant was objectively reasonable, as required for application of "good faith" exception to the exclusionary rule, courts review the entire record, including information known to the executing officers that was not presented in the initial search warrant or application or affidavit. U.S. Const. Amend. 4.

[17] **Weapons** Possession after conviction of crime

While indictment charging defendant with being a felon in unlawful possession of firearm and ammunition omitted an element of his offense, in failing to allege that defendant knew that he was a convicted felon, this deficiency was not jurisdictional and did not require dismissal of the felon-in-possession charge. 18 U.S.C.A. § 922(g)(1).

1 Cases that cite this headnote

[18] **Criminal Law** Review De Novo

Court of Appeals reviews questions of subject matter jurisdiction de novo.

[19] **Indictments and Charging Instruments** Defects in charging instrument

Defect in indictment affects court's jurisdiction only when it fails to allege an offense against the United States.

2 Cases that cite this headnote

[20] **Indictments and Charging Instruments** Defects in charging instrument

As long as the conduct described in indictment is a criminal offense, the mere omission of element of the crime charged does not vitiate court's jurisdiction.

1 Cases that cite this headnote

Attorneys and Law Firms

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Michael Caruso, Federal Public Defender, Federal Public Defender's Office, West Palm Beach, FL, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 2:18-cr-14056-RLR-1

Before JORDAN, MARCUS, and GINSBURG, * Circuit Judges.

Opinion

MARCUS, Circuit Judge

Based on evidence seized during a search of his home, Jose Antonio Morales was convicted of possession of marijuana with intent to distribute and of unlawful possession of a firearm and ammunition. On appeal, Morales claims that the affidavit supporting the search warrant -- which reported that police had found a small amount of marijuana and related items in trash outside Morales's house on two separate

occasions three days apart -- did not establish probable cause to justify the search. We need not decide whether Morales is correct, for even if he is (and this matter is hotly contested), suppression of the fruits of the search would be inappropriate under the good faith exception to the exclusionary rule. See United States v. Leon, 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The exclusionary rule exists to deter unreasonable searches, but the police here did exactly what the Fourth Amendment required of them: they obtained a warrant in good faith from a neutral magistrate and reasonably relied on it. They had no reason to believe that probable cause was absent despite the magistrate's authorization. There is no evidence in this record that the affidavit supporting the warrant misled the magistrate or that it contained false information. The affidavit was not lacking in indicia of probable cause so as to render the executing officers' belief in its existence unreasonable. Nor, finally, was the warrant facially deficient because it failed to particularize the place to be searched or the things to be seized. All of that makes this case a clear application of the good faith exception.

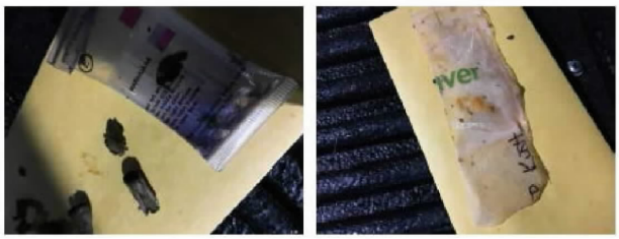
Morales also claims that the district court lacked subject matter jurisdiction over the unlawful possession of a firearm and ammunition charge because his indictment failed to allege that he knew he was a convicted felon. But in United States v. Moore, we held that such an omission is not a jurisdictional defect. 954 F.3d 1322, 1336–37 (11th Cir. 2020). We therefore affirm Morales's convictions.

I.

A.

Around May 15, 2018, the St. Lucie County Sherriff's Office received an anonymous tip that Jose Antonio Morales was selling narcotics out of his Fort Pierce, ***970** Florida home. That day -- trash pick-up day for the neighborhood -- Detective Bryan Saliba and Detective Dietrich searched trash cans located at the end of the driveway at Morales's single-family home. They found a plastic bag containing small amounts of raw marijuana, and took these pictures:

Just three days later (the next trash pick-up day), Saliba and another detective conducted another trash pull at Morales's residence, which yielded "multiple burnt marijuana blunts" and "multiple cut vacuum sealed plastic bags," one of which was labeled "Kush":



Two weeks passed. Then, on June 1, Saliba applied for a warrant to search Morales's home for evidence of illegal marijuana possession or distribution. Saliba's supporting affidavit recounted the trash-pull evidence, save for one important detail: the affidavit made no mention of the tip that Morales was selling drugs from his house. The affidavit further explained that Saliba had been a Sheriff's Deputy for three years and was then assigned as a detective. Saliba averred that he had participated in 50 narcotics investigations, worked drug cases at the street level, and attended approximately 100 hours of narcotics investigation training. He explained that based on his training and experience, "the word 'Kush' is commonly used as a slang word to describe marijuana/cannabis." A St. Lucie County Circuit Court judge granted the application that day and issued a warrant to search Morales's home.

Another week passed before Saliba and other officers executed the search warrant, on June 8. Though the trash pulls had revealed just a handful of marijuana evidence, the search of Morales's home turned up considerably more evidence of illegal activity. Most significantly, the officers found a loaded .45 caliber Kahr CW pistol, two boxes of ammunition, and 972 grams of marijuana in a bedroom safe. In the kitchen, they found five grams of marijuana, two marijuana pipes, two marijuana grinders, plastic baggies, and a digital scale. The officers discovered 86 grams of marijuana in the laundry room and less than one gram of cocaine in a bedroom dresser. Morales's girlfriend, who was present for the search (Morales

arrived on the scene later), claimed that the gun belonged to her. Morales told the police that all the marijuana belonged to him, that he used it only for personal consumption, and that he possessed a medical marijuana card.

***971** B.

A federal grand jury in the Southern District of Florida returned an indictment charging Morales with: (1) knowingly possessing a firearm and ammunition after having been convicted of a crime punishable by more than one year in prison, in violation of 18 U.S.C. § 922(g)(1); and (2) possession with intent to distribute a mixture and substance containing a detectable amount of marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D). Morales pled not guilty.

Before trial, Morales moved to suppress the evidence recovered during the search of his home. He argued that Saliba's affidavit did not establish probable cause because it did not explain the reason for the trash pulls, reported only minimal amounts of marijuana, and made no mention of items linking the trash to Morales's residence. Morales also claimed that the affidavit deliberately or recklessly contained false information. Specifically, he alleged that the affidavit's description of the evidence was false because not all the evidence described appeared in the photographs submitted with the affidavit, and that the affidavit improperly omitted the fact that Morales's residence abutted an open lot where neighborhood youth routinely used marijuana.

The magistrate judge presiding over the suppression motion allowed limited testimony on the allegation that the affidavit omitted the fact that the trash stood next to an open lot. Detective Saliba testified that he did not know the field next to Morales's home was a frequent venue for drug use. Saliba also clarified that he found the trash cans at the end of Morales's driveway on days scheduled for trash pick-up and that he found the marijuana evidence within sealed trash bags, not loose in the can.

Based on this testimony, the magistrate judge concluded in her Report and Recommendation that the omission of facts about the neighboring field had not been intentional or reckless; nor did any inconsistency between the photographs and the affidavit's description of the evidence show that the description was false. The magistrate judge next observed that the Eleventh Circuit had not decided "whether [a] small amount[ ] of drugs found during a trash pull is sufficient [to establish probable cause] without any other evidence." Still, since the affidavit recounted the discovery of evidence from trash pulls on two separate days, she held that the affidavit established probable cause that some items connected with unlawful marijuana activity would be found in Morales's home. Finally, the magistrate judge concluded that even if there was not probable cause, the good faith exception to the exclusionary rule applied to preclude suppression of the fruits of the search. Morales filed objections to the Report and Recommendation, but the district court adopted the Report in full.

Morales proceeded to trial, where he stipulated that he had been convicted of a felony offense before the date of his charged firearm and ammunition possession. He called his girlfriend as a witness, who testified that the pistol belonged to her and that Morales had never held the gun because he knew he was prohibited from doing so. Nevertheless, the jury found Morales guilty on both counts.

The district court sentenced Morales to concurrent 84-month sentences on each count and four years' supervised release. Morales's effective Sentencing Guidelines range was 120 months due to prior felony convictions for aggravated assault and possession of marijuana with intent to distribute, but the district court granted a downward variance. Morales's presentence ***972** investigation report ("PSI") noted that the police conducted the trash pulls based on an anonymous tip -- the first time any information about this tip appeared in the record. Morales did not object to this PSI fact. He timely appealed the district court's judgment.

II.

We reject Morales's first claim on appeal -- that the district court erred in denying his motion to suppress the evidence found during the search of his home. Even if we assume Saliba's affidavit did not establish probable cause, Saliba and the other searching officers relied in good faith on the warrant.

In the typical trash-pull case, trash-pull findings either corroborate or draw corroboration from other evidence of illegal activity in the home to be searched, such as reports of drug activity in the home or maybe a resident's history of criminal drug activity. See, e.g., United States v. Jones, 471 F.3d 868, 873 (8th Cir. 2006) (drug residue found in two successive trash pulls combined with anonymous tip reporting drug sales at the target address). Morales's case

falls within a rarer set: warrant applications whose case for probable cause rises or falls on trash-pull evidence standing alone. This species of affidavit is rare enough that we have not passed upon its sufficiency. Our sister circuits have generally held that an affidavit reporting a single trash pull that yielded only a small amount of drug evidence does not establish probable cause. See United States v. Lyles, 910 F.3d 787, 790, 794 (4th Cir. 2018); United States v. Abernathy, 843 F.3d 243, 246–47, 254–57 (6th Cir. 2016). Moreover, trash evidence that does establish probable cause often includes documents linking the trash to the target residence -- evidence that is absent here. See, e.g., United States v. Montieth, 662 F.3d 660, 664–65 (4th Cir. 2011) (trash pull yielded bills addressed to the defendant at the target residence).

On the other hand, some courts have concluded that trash pull evidence can on its own support probable cause when a single pull yields a great volume of evidence that clearly indicates illegal drug activity or when police find a smaller quantity of (perhaps less inculpatory) evidence over the course of two successive trash pulls, thereby establishing a trend. See United States v. Briscoe, 317 F.3d 906, 907–09 (8th Cir. 2003) (single trash pull found "forty marijuana seeds and twenty-five marijuana stems"); United States v. Leonard, 884 F.3d 730, 734–35 (7th Cir. 2018) ("two trash pulls taken a week apart, both testing positive for cannabis, [were] sufficient standing alone to establish probable cause" where the trash contained "sufficient indicia of residency").

Morales's case lies somewhere in between. But we need not decide the question of probable cause in order to resolve this case. Even in the absence of probable cause, Morales is not entitled to suppression because the officers reasonably relied in good faith on a facially valid warrant.

[1] **[2]** **[3]** The Fourth Amendment prohibits unreasonable searches but makes no mention of a remedy. U.S. Const. amend. IV. The "judicially created" exclusionary rule fills this gap by providing that generally, "[e]vidence seized as the result of an illegal search may not be used by the government in a subsequent criminal prosecution." United States v. Martin, 297 F.3d 1308, 1312 (11th Cir. 2002) (internal quotation marks and citation omitted). The exclusionary rule is not a personal right but rather a "prudential doctrine" whose "sole purpose ... is to deter future Fourth Amendment violations." Davis v. United States, 564 U.S. 229, 236–37, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (internal quotation ***973** marks and citations omitted). The rule therefore applies only where its application will in fact deter "unreasonable searches and seizures." U.S. Const. amend. IV; Davis, 564 U.S. at 237, 131 S.Ct. 2419. A rule requiring suppression of evidence seized in an unreasonable manner cannot -- and should not -- deter an officer from "acting as a reasonable officer would and should act in similar circumstances." Leon, 468 U.S. at 920, 104 S.Ct. 3405 (internal quotation marks and citation omitted). In such a case, "excluding the evidence will not further the ends of the exclusionary rule in any appreciable way." Id. (internal quotation marks and citation omitted). Thus, under the good faith exception to the exclusionary rule, courts decline to suppress evidence when suppression would not further the rule's deterrent purpose. See United States v. Taylor, 935 F.3d 1279, 1289 (11th Cir. 2019), as corrected (Sept. 4, 2019), cert. denied, —— U.S. ——, 140 S. Ct. 1548, 206 L.Ed.2d 384 (2020) ("To date, the Supreme Court has applied the good-faith exception when, among other things, officers reasonably relied on a warrant that was later deemed invalid for lack of probable cause, on a warrant that erroneously appeared outstanding due to an error in a court or police database, on a statute that was later deemed unconstitutional, and on a judicial decision that was later overruled") (citations omitted); see also United States v. Green, 981 F.3d 945, 957 (11th Cir. 2020) (good faith exception applied where officers reasonably relied on state-court orders to conduct warrantless searches of historical cell-site and real-time tracking data five years before the Supreme Court held such searches violated the Fourth Amendment in Carpenter v. United States, —— U.S. ——, 138 S. Ct. 2206, 2217–19, 2221, 201 L.Ed.2d 507 (2018)); Taylor, 935 F.3d at 1279–88, 1291–93 (good faith exception applied to reasonable reliance on a warrant that was "void at issuance" due to the issuing magistrate's lack of jurisdiction where there was "no indication that the ... officers sought to deceive the magistrate judge or otherwise acted culpably or in a way that necessitate[d] deterrence").

[4] **[5]** **[6]** That suppression will not deter future Fourth Amendment violations is especially clear "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." Leon, 468 U.S. at 920, 104 S.Ct. 3405. After all, "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." Id. at 921, 104 S.Ct. 3405. It is beyond dispute that the law should encourage officers to procure warrants before conducting searches of the home, not discourage them from doing so. "Penalizing the officer for the magistrate's error, rather than

his own, cannot logically contribute to the deterrence of Fourth Amendment violations." Id. For these reasons, the paradigmatic application of the good faith exception is to "evidence obtained in objectively reasonable reliance" on a warrant, even if a court later invalidates the warrant for lack of probable cause. See id. at 922, 104 S.Ct. 3405; United States v. Robinson, 336 F.3d 1293, 1295, 1297 (11th Cir. 2003) (good faith exception applied where there was "nothing in the record to suggest [the officer's] reliance on the warrant was objectively unreasonable," even though the affidavit did not establish probable cause because, among other things, it included stale information and relied on trash pulls from a "multi-family trash receptacle"); Martin, 297 F.3d at 1320 (good faith exception applied where issuing magistrate was to blame for incorrectly finding probable cause based on an affidavit that did ***974** not include specific dates to establish that the information was not stale, and the affiant officer relied on the warrant in good faith and did not omit facts relevant to probable cause).

[7] This case sits at the core of the good faith exception. The officers did everything they should have. They obtained and relied on a warrant from a neutral magistrate and had no reason to think that probable cause was absent despite the magistrate's authorization. They did not mislead the magistrate or withhold material information. Therefore, even if we assume that the magistrate erred in finding probable cause, suppressing the evidence found during the search of Morales's home would do nothing to deter future police misconduct. All that it would do is prevent a factfinder from considering competent and probative evidence of criminal wrongdoing. The district court was correct to hold that the good faith exception barred suppression of the seized evidence.

A.

[8] **[9]** The government bears the burden of demonstrating that the good faith exception applies.[2] See Robinson, 336 F.3d at 1297. We review de novo whether the good faith exception applies, "but the underlying facts upon which that determination is based are binding on appeal unless clearly erroneous." Id. at 1295 (internal quotation marks and citation omitted).

[10] **[11]** The good faith exception "applies in all but four limited sets of circumstances": "(1) where the magistrate ... issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) where the issuing magistrate wholly abandoned his judicial role ...; (3) where the affidavit supporting the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where, depending upon the circumstances of the particular case, a warrant is so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid." Martin, 297 F.3d at 1313 (internal quotation marks and citations omitted). If none of these four circumstances exists, we proceed to determine whether the executing officer "reasonably relied upon the search warrant." Id. at 1318.

This case does not implicate any of these four scenarios. There is no indication that the affidavit contained any falsehoods that misled the issuing magistrate. In fact, the district court held that Saliba did not intentionally or recklessly include false or misleading information or omit relevant facts, and Morales does not argue otherwise on appeal. Nothing in the record suggests the magistrate wholly abandoned his judicial role by, for example, accompanying the officers executing the search, failing to read the warrant, or neglecting to independently assess probable cause. See id. at 1316–17. Nor was the warrant facially deficient: it particularized the place to be searched (Morales's precise address) and listed the things to be seized (controlled substances and related materials).

***975** **[12]** **[13]** Indeed, the only exception to the good faith rule that Morales argues about is the third one: "where the affidavit supporting the warrant is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " Id. at 1313 (citation omitted). But this case is not an iteration of that circumstance. While we must determine this exception's application "on a case-by-case basis," "we have guidelines which help us determine what critical information should be included in a search warrant affidavit to establish a finding of probable cause": the affidavit should "state facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises to be searched" and should "establish a connection between the defendant and the residence to be searched and a link between the residence and any criminal activity." Id. at 1313–14 (internal quotation marks and citations omitted); see also Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place").

As for a probability of finding evidence or contraband, the affidavit recounted two trash pulls that yielded evidence of illegal drug possession in the residence. To be sure, the affidavit did not list especially voluminous evidence: a plastic bag containing raw marijuana, multiple burnt blunts, and multiple cut vacuum sealed plastic bags, one of which bore the label "Kush." The affidavit did not specify how many vacuum bags there were or how much marijuana was in the plastic bag; if the photographs included in the affidavit depicted the full extent of the evidence, there were only a few vacuum sealed bags and a few marijuana stems. Even so, the warrant cited Fla. Stat. § 893.13, which criminalizes the mere possession of marijuana (in addition to possession with intent to distribute, sale of marijuana, etc.). Thus, the affidavit did not need to establish a fair probability that Morales's residence housed a marijuana distribution operation, rather merely that some marijuana would be found there.

Critically, the affidavit recounted that Detective Saliba found marijuana evidence in Morales's trash on two separate occasions. As the Seventh Circuit has observed, "[w]hile one search turning up marijuana in the trash might be a fluke, two indicate a trend." Leonard, 884 F.3d at 734; compare State v. Jacobs, 437 So. 2d 166, 168 (Fla. Dist. Ct. App. 1983) ("The fact that marijuana and cannabis seeds were found on two separate occasions within one month's time suggests a continuing violation of the drug laws and indicates a fair probability that marijuana or cannabis would be found in the house.") (internal quotation marks omitted) with Raulerson v. State, 714 So. 2d 536, 537 (Fla. Dist. Ct. App. 1998) (single trash pull yielding a small volume of marijuana evidence did "not suggest a pattern of continuous drug activity"). The affidavit reported that the trash pulls occurred three days apart. While this timeframe might suggest the marijuana came from an isolated incident within the three-day period, it also could indicate a recurring frequency of marijuana use. The warrant further disclosed that the affiant was "familiar with the manner in which drugs are packaged, stored, and distributed," having worked 50 narcotics investigations, attended approximately 100 hours of narcotics training courses, and worked drug cases at the street level. Thus, the affidavit was not so bare that the executing officers' belief that Morales's home contained evidence of illegal drug activity was "entirely unreasonable." Martin, 297 F.3d at 1313 (internal quotation marks and citation omitted).

***976** **[14]** Morales objects that the trash pulls described in the affidavit were two weeks old by the time the magistrate issued the warrant. Since Morales did not raise this staleness challenge in his motion to suppress, our review on this point is for plain error. United States v. Young, 350 F.3d 1302, 1305 (11th Cir. 2003). "It is the law of this circuit that, at least where the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it." United States v. Lejarde-Rada, 319 F.3d 1288, 1291 (11th Cir. 2003). There is no Supreme Court or Eleventh Circuit case holding that marijuana evidence found in two trash pulls conducted three days apart becomes stale after two weeks. On plain error review, the elapse of two weeks between the trash pulls and the warrant application did not render the executing officers' belief in probable cause unreasonable.

The affidavit also contained at least some evidence linking Morales, his home, and the evidence of illegal drug activity. It averred that Morales resided at the target residence, described the searched trash cans as "the trash container of [the] target residential unit," and stated that the officers found the cans to be "specific to the target unit- located at the northwest portion of the property" "next to the roadway." Thus, the affidavit explained that the searched cans were associated with Morales's house. The affidavit also contained a photograph of the home, which appears to portray a single-family unit (though the affidavit did not expressly describe it as such). While this evidence may or may not have been enough to tie the trash to the residence for probable cause purposes, the executing officers could reasonably have believed there was a "fair probability" that the trash in a can placed at the edge of a single-family home's property came from that home. Gates, 462 U.S. at 238, 103 S.Ct. 2317.

All told, setting aside whether the affidavit actually established probable cause, it was not so lacking in indicia of probable cause that it provided "no hint" as to why the police believed they would find incriminating evidence in the residence. Martin, 297 F.3d at 1314 (internal quotation marks and citation omitted).

B.

Since none of the exceptions to the Leon good faith rule apply, we proceed to determine whether Detective Saliba's reliance on the warrant was objectively reasonable. It was.

[15] **[16]** "The good faith exception requires the court to consider whether a reasonably well-trained officer would know that the [search] was illegal despite the magistrate's authorization." Id. at 1318. In reviewing whether an officer's reliance on a warrant was objectively reasonable, we review the entire record, including information known to the executing officers "that was not presented in the initial search warrant or application or affidavit." Id.

As just described, the affidavit linked the trash to Morales's residence and provided some evidence of repeated drug activity in the home. Two other sets of facts not listed in the affidavit, but known to Saliba at the time of the warrant's execution, bolster the reasonableness of Saliba's reliance on the warrant. The first set concerns the link between the evidence and the home. Detective Saliba testified at the suppression hearing that he found the trash cans "in front of the residence at the end of the driveway" on "trash day for the neighborhood." He further testified that the cans "were at the end of the driveway, to the northwest of the driveway directly ***977** in front of the residence," which he clarified was "a single family home." The cans were "[c]onnected to the driveway in front of the residence." Saliba explained that the neighborhood layout was "standard, I guess, houses next door to each other." Other houses had their own trash cans placed in front of the homes. This testimony fairly confirms the inference, already evident from the affidavit, that the searched cans were for the use of the Morales home only. Trash cans set out in front of single-family homes on trash day typically contain trash drawn from those homes.

Moreover, and equally significant, Detective Saliba testified that he found the marijuana evidence within tied-up trash bags in the cans; the evidence was not loose in the can. This sharply minimized the chance that some passerby (like teenagers in the nearby vacant lot), rather than a resident of Morales's home, tossed the incriminating material into the trash.

The second set speaks to the likelihood of ongoing drug activity within Morales's home. Saliba's testimony that both trash pulls were conducted on trash pick-up day suggests that the marijuana found on the two days reflected separate instances of marijuana use rather than a single outlier event, such as discarding of refuse from a house party. Additionally, Morales's PSI states that the St. Lucie County Sheriff's Office conducted the trash pulls based on an anonymous tip that Morales was selling narcotics from his home. [3] Morales did not object to this fact, so he has admitted it. Cf. United States v. Beckles, 565 F.3d 832, 844 (11th Cir. 2009) ("Facts contained in a PSI are undisputed and deemed to have been admitted unless a party objects to them before the sentencing court with specificity and clarity.") (internal quotation marks and citation omitted). Rather than disputing the existence of the tip, Morales suggests that there is no evidence Saliba knew about this tip. However, the PSI relates that the Sheriff's Office conducted the trash pulls "[b]ased on" the tip. Since Detective Saliba conducted the trash pulls as an agent of the Sheriff's Office, he likely knew the reason for the pulls. And while Morales is right that there is nothing to suggest this tip was reliable, Saliba's likely awareness of the tip combined with the other facts he knew strengthens the conclusion that he executed the warrant in good faith.

Far from suggesting that a well-trained officer "would have known that the search was illegal despite the judge's authorization," Martin, 297 F.3d at 1320, the entire record establishes that Saliba's reliance on the warrant was objectively reasonable. The district court therefore properly denied Morales's motion to suppress the fruits of the search of his home.

III.

[17] Morales next claims Count One of his indictment (the felon-in-possession count) must be dismissed in light of Rehaif v. United States, —— U.S. ——, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019). In Rehaif, the Supreme Court recently held that to secure a felon-in-possession conviction under 18 U.S.C. §§ 922(g) and 924(a)(2), the government must prove not only that the defendant knew he possessed a firearm or ammunition, but also that he knew "of his status as a person barred from possessing ***978** a firearm" or ammunition. [4] 139 S. Ct. at 2195. [5] Morales's indictment did not allege that he knew of his status as a member of a class of persons prohibited from possessing firearms and ammunition (that is, that he knew he had been convicted of a crime punishable by imprisonment for a term greater than one year). [6] See 18 U.S.C. § 922(g)(1).

[18] Morales claims that the omission of the knowledge-of-status element caused the indictment to fail to charge a federal criminal offense, thereby depriving the district court of subject matter jurisdiction under 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."). While an

indictment's omission of an element of an offense does not strip the district court of jurisdiction, United States v. Brown, 752 F.3d 1344, 1353–54 (11th Cir. 2014), the district court would lack subject matter jurisdiction if the indictment failed to charge conduct that amounts to an offense against the laws of the United States, United States v. Moore, 954 F.3d 1322, 1333 (11th Cir. 2020). Morales argues that after Rehaif, an indictment charging a violation of § 922(g) that does not allege knowledge of prohibited status does not charge an offense against the United States. He contends that Rehaif rendered § 922(g) a non-self-executing provision that does not by itself define a criminal offense. Section 924(a)(2), he reasons, adds the knowledge element that makes prohibited firearm possession a federal crime. We review questions of subject matter jurisdiction de novo. United States v. Iguaran, 821 F.3d 1335, 1336 (11th Cir. 2016) (per curiam).

Three recent decisions of this Court foreclose Morales's argument. In United States v. Moore, we rejected the defendants' argument that "because their indictments failed to allege their knowledge of their felon status, the indictment failed to allege a crime, depriving the district court of jurisdiction." 954 F.3d at 1332. Like Morales's indictment, the defendants' indictments cited and tracked the text of § 922(g)(1) but did not cite § 924(a)(2) or mention the knowledge-of-status element. ***979** Id. at 1332–33 ("DERRICK MILLER and BERNARD MOORE, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Section 922(g)(1)."") We read Rehaif to have interpreted § 922(g) itself as including a knowledge-of-status element, not as having held that § 922(g) is a non-criminal provision that § 924(a)(2) incorporates to create a criminal offense. Id. at 1333.

[19] **[20]** After reviewing the case law on indictment defects, we identified a distinction between cases in which the indictment affirmatively alleges conduct that is not a crime and cases in which the indictment merely omits an element of a valid offense. "Ultimately," we concluded, "the law is clear: the omission of an element in an indictment does not deprive the district court of subject matter jurisdiction. A defective indictment only affects jurisdiction when it fails to allege an offense against the United States. So long as the conduct described in the indictment is a criminal offense, the mere omission of an element does not vitiate jurisdiction." Id. at 1336.

Since the text of § 922(g) implies a knowledge-of-status element, an indictment that tracks this text sufficiently states a crime against the United States. Id. at 1333, 1336–37. The Moore indictment alleged violations of § 922(g), a criminal offense, so it was sufficient to confer subject matter jurisdiction. "Reading this knowledge requirement into the statute while also holding that indictments tracking the statute's text are insufficient would be incongruous. Although the government may be well advised to include such mens rea allegations in future indictments, that language is not required to establish jurisdiction." Id. at 1333.

Our holding in Moore that an indictment materially similar to Morales's was not jurisdictionally deficient after Rehaif forecloses any holding that the district court lacked jurisdiction over Morales's case. See also United States v. McLellan, 958 F.3d 1110, 1118 (11th Cir. 2020) (relying on Moore to reject an argument that a § 922(g)(1) indictment was jurisdictionally defective because it failed to include a knowledge-of-status element and holding that "there is no jurisdictional defect if an indictment merely fails to include that the defendant *knowingly* committed the crime but otherwise clearly alleges the unlawful conduct that the defendant is accused of committing"); United States v. Innocent, 977 F.3d 1077, 1084 (11th Cir. 2020) (relying on Moore and McClellan to reject an identical argument).

For all these reasons, we **AFFIRM** the judgment of the district court.

JORDAN, Circuit Judge, concurring in part and concurring in the judgment.

I join the court's opinion as to all but Part II.B. As to Part II. B, I concur only in the judgment because I would not consider the anonymous tip purportedly received by law enforcement prior to the trash pulls. First, the police officers did not mention the tip in the affidavit they submitted to obtain the search warrant. Second, the government did not disclose the tip in arguing the good-faith exception in its response to Mr. Morales' motion to suppress, even though Mr. Morales had argued that the officers should have provided more information to establish probable cause. *See* D.E. 29 at 14-18. Third, neither the magistrate judge nor the district court relied on the tip in ruling on the motion to suppress. *See* D.E. 37 at 11-13; D.E. 42 at 3-4. Fourth, the existence of the tip only became known when the probation ***980** office prepared the pre-sentence investigation report.

Given that the government bore the burden of establishing the good-faith exception, it had the responsibility to bring the tip to the attention of the magistrate judge and the district court when the motion to suppress was being litigated. It did not do so, and now should not benefit from its failure. But even without the tip, the officers' reliance was objectively reasonable, and so I concur in the application of the good-faith exception.

All Citations

987 F.3d 966, 28 Fla. L. Weekly Fed. C 2406

Footnotes

* Honorable Douglas H. Ginsburg, United States Circuit Judge for the District of Columbia Circuit, sitting by designation.

2 Morales correctly complains that the magistrate judge improperly assigned the burden on this issue to the defense, though it is less clear that the district court made the same error during its de novo review of the Report and Recommendation. While Morales did object to the Report and Recommendation's good faith conclusion, he did not specifically note the magistrate's burden shifting as a ground for his objection, and therefore forfeited this argument. See Fed. R. Crim. P. 59(a); 11th Cir. R. 3-1. In any event, our own review is de novo, and we affirm that the burden lies with the government.

3 Specifically, the PSI reads:

> On or before, May 15, 2018, law enforcement received information from an anonymous source who stated the defendant, Jose Antonio Morales, was selling narcotics from his residence located at [Morales's address].... Based on the anonymous information, the St. Lucie County Sheriff's Office (SLCSO) conducted two trash pulls.

4 Section 922(g)(1) provides that it "shall be unlawful for any person ... who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ... possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1). Section 924(a)(2) provides that "[w]hoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. § 924(a)(2). In Rehaif, which dealt with a prosecution for possessing a firearm as an alien illegally or unlawfully present in the United States under 18 U.S.C. § 922(g)(5), the Supreme Court relied on the text of §§ 922(g) and 924(a)(2) and on the interpretive presumption in favor of scienter to hold that the government must prove that the defendant knew of his status as a member of a group which § 922(g) prohibits from possessing firearms and ammunition. 139 S. Ct. at 2194–97.

5 The Supreme Court decided Rehaif while Morales's direct appeal was pending, so it applies to his case. Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

6 The relevant count, Count One, reads this way:

> On or about June 7, 2018, in St. Lucie County, in the Southern District of Florida, the defendant, JOSE ANTONIO MORALES, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and one or more rounds of ammunition, to wit, one (1) Kahr CW, .45 caliber pistol, and .45 caliber ammunition, in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Section 922(g)(1).

A-2

UNITED STATES DISTRICT COURT

Southern District of Florida
Fort Pierce Division

UNITED STATES OF AMERICA
v.
JOSE ANTONIO MORALES

JUDGMENT IN A CRIMINAL CASE

Case Number: **2:18-CR-14056-001**
USM Number: **595-32-7620**

Counsel For Defendant: **James Stewart Lewis, Jr.**
Counsel For The United States: **Marton Gyires**
Court Reporter: **Pauline Stipes**

The defendant was found guilty on count(s) 1-2 of the Information of the indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18:922(g)(1) and 924 (a)(2)	Possession of a firearm and ammunition by a convicted felon	09/13/2018	1
21:841(a)(1), (b)(1)(D) and 851	Possession with intent to distribute marijuana	09/13/2018	2

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

All remaining counts are dismissed on the motion of the government.

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 must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **4/30/2019**

Robin L. Rosenberg

Robin L. Rosenberg
United States District Judge

Date: 4/30/2019

DEFENDANT: **JOSE ANTONIO MORALES**
CASE NUMBER: **2:18-CR-14056-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **84 months as to counts one and two to run concurrently with each other and concurrently with any sentence yet to be imposed in case 18-1556CF.**

The court makes the following recommendations to the Bureau of Prisons: that the defendant be incarcerated in Coleman, Florida, or, in a facility in or as close to South Florida as possible. The Court further recommends that the defendant be permitted to participate in

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **JOSE ANTONIO MORALES**
CASE NUMBER: **2:18-CR-14056-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **4 years as to counts one and two to run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

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 sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **JOSE ANTONIO MORALES**
CASE NUMBER: **2:18-CR-14056-001**

SPECIAL CONDITIONS OF SUPERVISION

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **JOSE ANTONIO MORALES**
CASE NUMBER: **2:18-CR-14056-001**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$200.00	$0.00	$0.00

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.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED

* 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.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **JOSE ANTONIO MORALES**
CASE NUMBER: **2:18-CR-14056-001**

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of $200.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

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

CASE NUMBER **DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)**	**TOTAL AMOUNT**	**JOINT AND SEVERAL AMOUNT**

The Government shall file a preliminary order of forfeiture within 3 days.

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) penalties, and (8) costs, including cost of prosecution and court costs.