

No. 23-_____

SUPREME COURT OF THE UNITED STATES

Elvins Sylvestre,

Petitioner,

vs.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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* Appointed by the United States Court of Appeals for the First Circuit
pursuant to the Criminal Justice Act, 18 U.S.C. 3006A

I. Question Presented

Was there sufficient probable cause for the issuance of the search warrant where law enforcement officers failed to fully supervise a series of controlled purchases by an informant whose reliability had not been established?

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IV. Petition for Writ Of Certiorari

Elvins Sylvestre, an inmate currently incarcerated FCI Gilmer in Gilmer, West Virginia, by and through Attorney William J. O’Neil, respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

V. Opinions Below

The United States Court of Appeals for the First Circuit affirmed the judgment of the district court on August 15, 2023, said judgment and opinion are attached at Appendix (“App”) at 1-21. United States v. Sylvestre, No. 22-1057 (1st Cir. Aug. 15, 2023) The opinion of the district court denying petitioner’s motion to suppress is attached at Appendix 22- (App., infra, 36a-37a) is unreported.

VI. Jurisdiction

The United States Court of Appeals for the First Circuit issued its judgment on August 15, 2023. Mr. Sylvestre invokes this Court’s jurisdiction under 28 U.S.C. § 1254 (1), having timely filed this petition for a writ of certiorari within ninety days of the Court of Appeals’ judgment.

VII. Constitutional Provisions Involved

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

VIII. Statement of the Case

A search by Government agents is presumptively unreasonable under the Fourth Amendment unless conducted pursuant to a warrant issued by a judicial officer upon a finding of probable cause. See Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). Probable cause exists where the facts and circumstances within a law enforcement officer's knowledge and of which it had reasonable trustworthy information are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162 (1925).

In a case involving an informant whose reliability had not been established and where law enforcement officers did not fully supervise a series of controlled purchases from a location inhabited by Mr. Sylvestre, was his right against unreasonable searches and seizures under the Fourth Amendment violated due to a lack of probable cause for the issuance of the search warrant?

1. The Search Warrant Application

On November 22, 2019, members of the Berkshire County Drug Task Force executed a search warrant at 140 Wahconah Street, Pittsfield, Massachusetts. The search warrant was issued by a clerk magistrate of the Pittsfield District Court. On the date above, Pittsfield Police Officer Thomas Bowler applied to the court for a warrant to search 140 Wahconah Street, Pittsfield. The search warrant, which authorized a search for evidence related to the purchase and sale of narcotics, was issued the same day. The warrant authorized not only the search of the Wahconah Street premises but any person present at the time of search.

The affidavit in support of the application for warrant was 26 pages in length. The first ten pages provided general information regarding the drug trade in general and in Berkshire County

with nothing specific to Mr. Sylvestre or to the location in question. The next two and one-half pages describe Mr. Sylvestre's criminal history as well as incidents from 2015 through 2019 which contain anonymous allegations, speculation, and uncorroborated conjecture.

The affidavit attempted to establish probable cause by the use of a confidential informant ("CI") who purportedly made seven controlled buys linked to telephone number 347-843-1427. The affidavit conceded that the CI is a heroin and cocaine user who is "considered a member of the narcotic subculture" and has been purchasing and possessing narcotics for itself, while at the same time working for the police in the instant investigation. Bowler's belief in the CI, up to that point, was based upon the CI providing "[i]nformation on the specific location of at least one (1) individual who had an outstanding arrest warrant."

The application goes on to describe seven controlled buys of crack cocaine, all purported to have occurred within the thirty days leading up to the application. The first five alleged controlled buys were to have taken place at undisclosed locations after the CI called the telephone number referenced above. The last two buys are alleged to have occurred at 140 Wahconah Street. In each of the five buys at the undisclosed location[s] officers provided the CI "with a pre-recorded amount of U.S. currency for the transaction" in advance.

The affidavit was bereft of information as to whether law enforcement provided the CI with funds by which to make the purchases alleged to have taken place inside the Wahconah Street address. The application indicated that Mr. Sylvestre appeared in the vicinity of five of the transactions, while others, a man and a woman, appeared in the remaining two. Notably, however, on only one of the seven instances did police allegedly observe defendant the CI and defendant actually "meet." With respect to this single instance, the application failed to indicate how officers were able to positively identify the person observed as Sylvestre.

The warrant application indicated that the substances provided by the CI were “field tested as crack cocaine,” but did not indicate the method used to test, or any records verifying the purportedly positive result. Moreover, the application did not describe any efforts to verify that the cellphone number alleged to be used during the buys was registered to, or otherwise controlled by, Mr. Sylvestre. The warrant did not indicate whether officers monitored the CI’s phone calls purportedly made to Sylvestre by, for example, recording them or requiring that they be made on speakerphone.

In each description of the controlled buys, the affidavit indicated that the CI was observed travelling to the predetermined location to make a purchase but is silent as to whether police officers actually observe the CI travel from the location where the purchase took place to the area where officers debriefed the CI.

After executing the search, officers seized, firearms, ammunition, a quantity of cocaine and heroin, packaging materials and personal papers belonging to Mr. Sylvestre and a female who was located in the subject premises at the time of the search warrant execution.

2. Lower Court Proceedings

Mr. Sylvestre moved to suppress the seizure of the evidence described above. The district court judge denied the motion, finding that the issue of probable cause was “not a close call.” The Court of Appeals affirmed the judgment. The court cited a number of factors in upholding the probable cause determination such as the CI’s admissions against penal interest supporting the CI’s credibility and the officers’ own knowledge corroborating CI’s claim that Sylvestre was operating out of 140 Wahconah Street.

IX. REASONS FOR GRANTING THE WRIT

To avoid erroneous deprivations of the right to be free from unlawful searches and seizures, this Court should clarify the level of law enforcement supervision required in controlled purchases of narcotics in establishing probable cause for the issuance of a search warrant

The Fourth Amendment to the Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; see also Fed.R.Crim.P. 41. A search by government agents is presumptively unreasonable under the Fourth Amendment unless conducted pursuant to a warrant issued by a judicial officer upon a finding of probable cause. See Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). The standard for issuing a search warrant is probable cause. Probable cause exists where the facts and circumstances within a law enforcement officer's knowledge and of which it had reasonable trustworthy information are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162 (1925). Brinegar v. United States, 338 U.S. 160, 175 (1949).

The determination of probable cause calls for a "practical, commonsense" inquiry. Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). A judicial officer who is considering an application for a search warrant must decide "whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id.; On review, the appellate court inquires only whether the magistrate had a "substantial basis for concluding that probable cause existed." Gates, 462 U.S. at 238-39, 103 S.Ct. at 2332 (internal quotations and alteration omitted). The Supreme Court indicated that the probable cause standard focuses on "the factual and practical considerations of everyday life

on which reasonable and prudent men, not legal technicians, act." Gates, 462 U.S. at 231, 103 S.Ct. at 2328 (internal quotations omitted).

In determining what constitutes probable cause to support a search warrant when the warrant is based upon information obtained through the use of a confidential informant, courts assess the information by examining the "totality of the circumstances" bearing upon its reliability. See Gates, 462 U.S. at 230-31, 103 S.Ct. at 2328. As the Court observed in Gates, this approach envisions probable cause as a "fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules." 462 U.S. at 232, 103 S.Ct. at 2329.

The affidavit in this case does not establish the CI's veracity and basis of knowledge. As described above the sole basis for Bowler's faith in the CI is that it provided "[i]nformation on the specific location of at least one (1) individual who had an outstanding arrest warrant." This bald assertion of reliability, with no allegations regarding the basis for the officer's belief that the informant is reliable — such as convictions obtained as a result of information supplied in the past by the informant — is "entitled to only slight weight." United States v. Khousavanh, 113 F.3d 279, 286 (1st Cir. 1997) quoting United States v. Foree, 43 F. 3d. 1572, 1576 (11th Cir. 1995). Bowler described the CI as providing information about where Sylvestre conducts his narcotics sales, his general appearance, the telephone number used to conduct narcotics sales, and some of Sylvestre's customers. There is nothing in the affidavit about when the CI obtained this information and none of this information was corroborated by law enforcement. Bowler did not indicate whether he assessed the significance of the CI's information.

The first six controlled buys were initiated by the CI calling the same number allegedly belonging to Mr. Sylvestre. The police did nothing to confirm that the number belonged to Mr. Sylvestre. Nor did the officers corroborate that the CI actually spoke with Sylvestre on these six

occasions. On only one of the seven instances did police allegedly observe the CI and Mr. Sylvestre actually “meet.” For this one instance, the application fails to explain how officers were able to positively identify the person observed as Mr. Sylvestre. The application is bereft of any indication of efforts to verify that the cellphone number alleged to be used during the buys was registered to, or otherwise controlled by, Mr. Sylvestre. Nor did the officers monitor the CI’s phone calls purportedly made to Mr. Sylvestre by, for example, recording them or requiring that they be made on speakerphone.

Unable to establish both veracity and basis of knowledge, the affidavit seeks to bolster the CI’s credibility through the use of “controlled buys” performed by the CI. However, these transactions were not totally controlled. The first five alleged controlled buys are said to have taken place at undisclosed locations after the CI called the telephone number. The last two buys are alleged to have occurred at 140 Wahconah Street. In each of the five buys at the undisclosed location[s] officers provided the CI “with a pre-recorded amount of U.S. currency for the transaction” in advance. For reasons undisclosed in the affidavit, the officers apparently elected not to supply the CI funds to make the purchases alleged to have taken place inside Wahconah Street. For all seven buys, police officers observed the CI travel to the sale location. However, it does not appear that the police officers observed the CI return to the debriefing area. The affidavit only indicates that the “CI made ITS way back to . . .” The affidavit did not fully describe the controlled buy.

The lack of detail in the affidavit is fatal to establishing probable cause for the issuance of the search warrant. For the reasons above, the district court should have allowed Mr. Sylvestre’s motion to suppress. The court of appeal should have reversed the denial of the motion to suppress.

X. CONCLUSION

For the foregoing reasons, Mr. Sylvestre respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

DATED this 26th day of September, 2023.

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