

PETITIONER'S APPENDIX

United States v. Sessions

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN 18 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TOYRIEON SESSIONS, AKA Phat, AKA
PhatStax,

Defendant-Appellant.

No. 21-50125

D.C. No. 2:17-cr-00767-AB-3

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Andre Birotte, Jr., District Judge, Presiding

Argued and Submitted July 18, 2023
Pasadena, California

Before: TASHIMA and FORREST, Circuit Judges, and CARDONE, ** District Judge.

Defendant Toyrieon Sessions appeals his convictions following a jury trial resulting from a 2017 bank robbery. He presents three issues for decision: (1) whether the district court erred by not suppressing evidence obtained from his

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

iPhone 7 on the basis that both its initial seizure when he was arrested and its “prolonged seizure” while held in the Los Angeles Police Department’s (LAPD) evidence locker were unlawful, (2) whether the district court erred by refusing to give his requested cautionary jury instruction related to co-conspirator testimony, and (3) whether the district court committed reversible cumulative error.¹ We have jurisdiction under 28 U.S.C. § 1291, and we affirm. As the parties are familiar with the factual and procedural background of this case, we do not recount it here.

1. ***Suppression Issues.*** When reviewing the denial of a motion to suppress, we review the district court’s factual findings for clear error and its legal conclusions de novo. *United States v. Rosenow*, 50 F.4th 715, 728 (9th Cir. 2022). The district court concluded that the iPhone 7 at issue was initially obtained incident to Sessions’s arrest. While Sessions disputes that the cell phone was on his person when he was arrested, he did not present any evidence on this point and declined the opportunity to have an evidentiary hearing in the district court in favor of “just going . . . on the pleadings.” Based on the record presented, the district court did not clearly err in finding that the cell phone was on Sessions’s person when he was arrested and, therefore, was lawfully seized incident to arrest. *See Chimel v. California*, 395 U.S. 752, 764 (1969). Moreover, the officers did not exceed the scope of their authority

¹In his Opening Brief, Sessions also argued that the district court erred in “allowing the Government’s expert to conclusively decide a disputed question,” but he withdrew this issue in his Reply Brief.

under the incident-to-arrest exception. *See Riley v. California*, 573 U.S. 373, 401 (2014) (holding “that a warrant is generally required before [a cell phone may be searched], even when a cell phone is seized incident to arrest”). The officers only seized Sessions’s cell phone when he was arrested; they did not *search* his phone at that time.²

Sessions also argues that the seizure of his cell phone was “unreasonable as a result of its duration.” While Sessions is correct that a “seizure reasonable at its inception . . . may become unreasonable as a result of its duration,” *Segura v. United States*, 468 U.S. 796, 812 (1984), the district court did not err in concluding that the interference with Sessions’s possessory interest was reasonable where he never sought to obtain his cell phone after he was released following his arrest and where he was in custody for unrelated reasons during the time his phone was retained. *See United States v. Johns*, 469 U.S. 478, 487 (1985) (rejecting challenge where defendants did “not even allege[], much less prove[]” that a delay in searching property unreasonably affected their possessory interest and “never sought return of the property”); *United States v. Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015) (“Where

²On appeal, the Government argues that Sessions lacks standing to challenge the seizure of the iPhone 7 because he did not establish it was his. We reject this argument because below the Government presented evidence indicating and argued that this cell phone did belong to Sessions. Cf. *United States v. Reyes-Bosque*, 596 F.3d 1017, 1026 n.3 (“So long as the government did not rely on facts contrary to its standing argument before the district court, the standing issue is properly before us on appeal.”).

individuals are incarcerated and cannot make use of seized property, their possessory interest in that property is reduced.”).

Finally, even if the prolonged retention of Sessions’s cell phone was unreasonable, exclusion of the evidence obtained from it was unwarranted where entirely different officers from those who initially seized the phone (and who were investigating a different crime) sought and obtained a valid warrant to search the phone after discovering it was in LAPD custody. *See United States v. Medina*, 181 F.3d 1078, 1082 (9th Cir. 1999) (concluding there can be no appreciable deterrent purpose in suppressing evidence where the investigators who brought the case did not collude with earlier investigators who may have engaged in unreasonable conduct while acquiring material evidence). Sessions points to *United States v. Song Ja Cha*, 597 F.3d 995 (9th Cir. 2010), which held that the exclusionary rule is applicable to unreasonably long seizures. However, *Song Ja Cha* is not analogous to this case because it involved a single group of officers engaging in “deliberate, culpable, and systemic” conduct to bar a defendant from his home, while that defendant made active efforts to return to his home. *Id.* at 1004–06.

2. *Jury Instructions.* “[W]e review the ‘language and formulation’ of a jury instruction for abuse of discretion.” *United States v. Rodriguez*, 971 F.3d 1005, 1017 (9th Cir. 2020) (quoting *United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2014)). Sessions argues that the district court erred by not giving his requested

cautionary instruction advising the jury that a co-conspirator in the bank robbery who testified against him “[r]eceived benefits or favored treatment from the government in connection with this case.” The district court gave an alternative model cautionary instruction that informed the jury that the witness “[a]dmitted being an accomplice to the crime charged” and had “[p]leaded guilty.” This was not an abuse of discretion. As the district court explained in declining to give Sessions’s requested instruction, the witness had not actually “received benefits or favored treatment from the government,” but had only “receive[d] a potential benefit by her testimony.” Indeed, Sessions’s counsel acknowledged that the witness had “anticipated receiv[ing] benefits” when she testified. Moreover, “there is no significant [difference] between a cautionary instruction on the testimony of an accomplice and a cautionary instruction on one granted immunity. In both instances, the jury is instructed that the testimony ‘be received with caution and weighed with care.’” *United States v. Bernard*, 625 F.2d 854, 858 (9th Cir. 1980) (quoting *United States v. Morgan*, 555 F.2d 238, 243 (9th Cir. 1977)).

3. ***Cumulative Error.*** Where we conclude that Sessions has not shown any individual error, we necessarily reject his contention that the district court committed reversible cumulative error. *See United States v. Audette*, 923 F.3d 1227, 1241 (9th Cir. 2019).

AFFIRMED.

13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

14 MONDAY, JUNE 17, 2019

2:05 P.M.

16 LOS ANGELES, CALIFORNIA

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UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

PET. APPX 8

ER 0082

1 LOS ANGELES, CALIFORNIA; MONDAY, JUNE 17, 2019

2 2:05 P.M.

3 - - -

4 THE CLERK: Calling CR 17-0767-AB, United States
5 of America versus Toyrieon Sessions.

6 Counsel, please step forward and state your
7 appearances.

8 MR. CHEMERINSKY: Good afternoon, Your Honor.

9 Jeffrey Chemerinsky and Bruce Riordan on behalf of the
10 United States. And with us is FBI Special Agent Paul
11 Sanchez.

12 THE COURT: Good afternoon to you all.

13 MR. McCURRY: Your Honor, good afternoon. Fred
14 McCurry. My assumption is the marshals will be bringing out
15 Mr. Sessions.

16 THE COURT: We'll wait for Mr. Sessions to come
17 out.

18 (Brief pause in the proceedings.)

19 THE COURT: All right. So Mr. Sessions is here.
20 So let me just pull up my notes again. So we've got a
21 couple of issues we need to discuss this afternoon. Forgive
22 me one second. We're just in the middle of a jury trial. I
23 just want to handle this matter.

24 (Brief pause in the proceedings.)

25 THE COURT: Okay. So we're here on the Sessions

1 matter to discuss a suppression motion as well as the
2 defendant's -- or I should say the government's motion to
3 introduce evidence of Mr. Sessions' prior convictions and
4 other evidence going towards his credibility. And then
5 there is a motion in limine to exclude evidence of an alibi
6 defense.

7 All right. So why don't we -- let's deal with the
8 meatier issue first, which is the suppression motion. I
9 think, Mr. McCurry, when we talked last week, you indicated
10 that you did not intend to have an evidentiary hearing. Has
11 that changed, or is that still the status quo?

12 MR. McCURRY: No. That's still the status quo,
13 Your Honor. We were just going to argue on the pleadings.

14 THE COURT: Okay. So I had some questions that I
15 did want to ask you, but I want you -- do you wish to be
16 heard first?

17 MR. McCURRY: Your Honor, I would be highlighting
18 points of the motion, but potentially your questions might
19 actually lead me in that direction. So I don't know if
20 that's how you prefer to handle it.

21 THE COURT: Let me pull it up here.

22 If I understand your position -- and, I guess,
23 this is a question. So tell me why you believe there was
24 not probable cause to believe that Mr. Sessions was involved
25 in this 7-Eleven robbery.

1 MR. McCURRY: Correct.

2 So in looking at the Hobbs portion of the sealed
3 affidavit, the information regarding Mr. Sessions was simply
4 that an officer had looked at a target video and made the
5 decision that the person in the target video who had been
6 identified as Mr. Sessions was the same person that was
7 involved in the 7-Eleven robbery. So really what we have is
8 an opinion by this officer. The --

9 THE COURT: Counsel, it's not just an opinion.

10 It's an opinion based on the officer says he knew him, he's
11 dealt with him before, recognized him. Isn't that a little
12 bit more than just an opinion?

13 MR. McCURRY: Well, what he said is that he
14 recognized him from the target video. He's not saying that
15 he recognized him from the 7-Eleven video.

16 So what he was saying regarding the 7-Eleven video
17 was that there was a similarity in gait, similarity in size;
18 but there was not a definitive identification by the officer
19 that the person in the 7-Eleven video was Mr. Sessions,
20 which then leads him to do a follow-up to the clerk, showing
21 a six-pack lineup, and then the wording was that the
22 photograph of Mr. Sessions in the six-pack lineup looked
23 most like the person who had committed --

24 THE COURT: Robbed the 7-Eleven?

25 MR. McCURRY: -- 7-Eleven. But it doesn't

1 concretely say this is the same guy as "this looks like the
2 guy."

3 THE COURT: Is the standard whether or not it can
4 concretely identify someone? It seems to me, isn't this
5 more about putting pieces together?

6 First, the officer says, "I see someone I think
7 looks like Mr. Sessions from my prior dealings with him."
8 He says, "Let's put him in a six-pack, give it to the
9 7-Eleven person," that person says, "I think that person
10 looks -- he looks most like him." Okay? So -- and then
11 they just start stacking up the evidence from there.

12 I'm having difficulty understanding where you
13 believe there is some illegality in that.

14 MR. McCURRY: I believe the shortcoming is not in
15 the search itself because law enforcement does have the
16 right to definitely go and investigate further if they have
17 somebody they believe that's involved, but I think the
18 actual arrest warrant itself was lacking in probable cause.

19 Because the search warrant itself had two
20 components: There was the arrest warrant and then the
21 search warrant. While I believe the affidavit, not
22 disputing that the affidavit as written was enough to
23 support a search, it was not enough to support an arrest.

24 And then, when officers arrived at the location,
25 they found nothing at that address on Locust that related to

1 the robbery. They were looking for firearms and clothing.

2 And nothing they found at the address had any
3 connection or provided any evidence regarding the 7-Eleven
4 robbery. I think which is further bolstered by the fact
5 that Mr. Sessions was never charged in that robbery.

6 THE COURT: That's interesting. If we could
7 talk -- I mean why -- the fact that he wasn't charged with
8 the robbery, other than good fortune for Mr. Sessions, what
9 difference does that make in the analysis in this case?

10 Are you saying you believe he wasn't charged
11 because he wasn't the person, therefore, there was no
12 probable cause and, sort of, the cards fall from there?

13 MR. McCURRY: Well, not quite that. But what I am
14 saying is that the fact, number one, that he was not charged
15 is that we get, hey, he was not the guy from my defense
16 perspective, at least definitely from a prosecutorial
17 perspective, there was no evidence to charge him with the
18 robbery.

19 And now that what we have is he has not been
20 charged -- and now this is the second part of the motion.
21 They've maintained custody of cell phones that were taken at
22 the time of the arrest, and essentially nothing forensic was
23 done with those cell phones in relation to 7-Eleven.

24 I mean, figuratively they probably just sat in a
25 box collecting dust until a year later when law enforcement

1 decides now to go and get warrants to go after the
2 telephones for the Northrop Grumman robbery.

3 But I am saying what we have then was a lack of
4 probable cause for the original arrest warrant, a lack of
5 any intervening cause to arrest Mr. Sessions at the time of
6 the search, and no subsequent filing. Also tying into that
7 the fact that these phones were never considered part of the
8 7-Eleven robbery, not part of the warrant, nothing forensic
9 done in relation to that robbery that at a certain point
10 LAPD -- yes, I think that ultimately they unlawfully
11 arrested Mr. Sessions and they unlawfully now have
12 maintained possession of his property.

13 THE COURT: When you say "unlawfully maintained
14 possession of the property," is there some evidence that
15 Mr. Sessions tried to get that property back and was told
16 they wouldn't give that to him?

17 MR. McCURRY: Well, no, I can't represent that to
18 the Court, at the time Mr. Sessions subsequently went into
19 custody on an unrelated case. But the fact that because he
20 is in custody and cannot go and retrieve his property does
21 not mean that law enforcement can hold onto it and now
22 present it to other cases for some type of analysis.

23 THE COURT: If we could -- in looking at the
24 papers, I just want to make sure I understand. Are you
25 suggesting that there are portions of the affidavit that are

1 false or misleading in any way?

2 MR. McCURRY: So when we're talking about the
3 subsequent warrants?

4 THE COURT: Right.

5 MR. McCURRY: No, not misleading. But it was --
6 the fact that he was never charged with the 7-Eleven robbery
7 was omitted, now, I don't believe that is enough to say that
8 there was not other probable cause based on the affidavit to
9 get those subsequent warrants. So I am not quibbling with
10 that. But that goes towards good faith because one of the
11 counter-arguments by the government is that, even if you
12 want to say there was something wrong with the search
13 warrants, the officers relied in good faith -- and I would
14 question relying on good faith when you kind of leave that
15 piece of information out.

16 Again, I don't think it would have made a
17 difference as far as being able to still have the magistrate
18 sign it for probable cause, but I think that really goes
19 towards good faith reliance.

20 THE COURT: All right. Let me hear from the
21 government. I'd like to hear the government's response as
22 relates to the defense motion in this case.

23 MR. CHEMERINSKY: Yes, Your Honor. I am happy to
24 answer any questions the Court has. I guess seems that the
25 Court's first line of questioning was about the initial

1 warrant -- both the search and arrest warrant. I'd note a
2 couple things in response to that.

3 First is that it's the exact same standard for a
4 search and arrest warrant. And defense counsel's
5 concessions that there was sufficient probable cause for a
6 search warrant would seem to also necessitate that there was
7 sufficient probable cause for an arrest warrant.

8 I would also note in reference to that warrant
9 that this Court doesn't do a de novo review of the warrant
10 that was issued by the state court. It's a standard of
11 great deference to the state court.

12 In addition, at the very least all the officers
13 that followed from that initial warrant had good faith
14 reliance on the issuance of that initial warrant that was
15 issued.

16 I'm happy to address any other questions the Court
17 has --

18 THE COURT: Why don't you do me -- one of the big
19 issues that Mr. McCurry raised is this issue about the
20 phones just sitting there collecting dust for a period of
21 time. A, does that matter; and, B, why -- I'm -- if it does
22 matter, why were the phones remaining in custody for that
23 period of time?

24 MR. CHEMERINSKY: In terms of the first question
25 does it matter, I think that it's a factor the Court can

1 consider, but here there is a number of reasons why it
2 doesn't pose any difficulty for the search.

3 First, the fact that the defendant never took any
4 affirmative steps to get his cell phone back.

5 Second, the fact the defendant was in custody and
6 had no -- while you are in custody you have no interest in a
7 cell phone, and we cite cases that say exactly that.

8 We also cite cases on page 25 of our opposition
9 saying that the fact the defendant never made any attempt to
10 retrieve the property is a strong factor showing that he had
11 no possessory interest in it.

12 Third, I think that it is significant for purposes
13 now that it was two different investigative teams, that
14 the second investigative team essentially had nothing to do
15 with the initial search. The second investigative team did
16 exactly what they were supposed to do, exactly what the
17 Supreme Court in Riley told them to do, which is they went
18 and got warrants, they disclosed the facts to the magistrate
19 judge and two separate judges issued warrants to search
20 those phones.

21 And so I think at that point the second
22 investigative team certainly did exactly what they were
23 supposed to do in accordance with the law.

24 THE COURT: And what is your response to
25 Mr. McCurry's point that, look. Mr. Sessions never got

1 charged in the 7-Eleven robbery. Does that leave room for
2 the argument, hey, if he wasn't charged, there wasn't enough
3 evidence to charge him so there wasn't enough probable
4 cause, and so everything sort of falls from there?

5 MR. CHEMERINSKY: The response, I think, is
6 exactly how the Court responded when Mr. McCurry made the
7 argument, which is the fact that someone isn't charged or
8 they decide -- the DA's office decides not to bring the case
9 or that the case isn't immediately pursued isn't indicative
10 that there wasn't probable cause in the first place.

11 And I think that is, sort of, there can be
12 probable cause and then a case could not be filed on or
13 there could be probable cause and a case could be dismissed
14 or another deal could be reached for any number of reasons,
15 the fact -- a subsequent filing decision doesn't negate an
16 initial determination of probable cause.

17 THE COURT: This is the larger question. If you
18 could, walk me through the investigative steps that
19 ultimately led to the arrest of Mr. Sessions.

20 MR. CHEMERINSKY: Yes, Your Honor. Do you want me
21 to start with the 7-Eleven robbery and give you the best
22 timeline I possibly can?

23 THE COURT: Yes, please.

24 MR. CHEMERINSKY: So the 7-Eleven robbery occurs
25 in 2016.

1 In 2017, on April 21st, 2017, there is the robbery
2 of the Northrop Grumman Federal Credit Union, which is the
3 charges we're here for. On -- immediately the FBI and LAPD
4 begin that investigation.

5 That investigation early on focuses on two
6 suspects -- Iris Lester and Daronnie Thompkins who are the
7 insider -- and her boyfriend, the organizer.

8 On May 3rd, 2017, LAPD, independent of the joint
9 federal and state investigation into the bank robbery,
10 obtains a state warrant for the defendant's residence as
11 well as an arrest warrant based on the 7-Eleven robbery.

12 The next day on May 4th, 2017, they execute both
13 warrants, and the defendant's cell phones are seized at that
14 time.

15 The investigation into the Northrop Grumman
16 robbery continues for some time --

17 THE COURT: Let me stop you there.

18 The investigation -- the incidents that occurred
19 on May 4th of 2017, separate and wholly independent of the
20 Northrop Grumman investigation?

21 MR. CHEMERINSKY: Correct, Your Honor.

22 THE COURT: So, in other words, the federal
23 authorities have no idea that there is this ongoing
24 investigation involving 7-Eleven robbery.

25 MR. CHEMERINSKY: Correct. They learned

1 approximately a little less than one year later as the
2 investigation starts to focus on the defendant as the
3 gunman.

4 THE COURT: May 4th the warrants --

5 MR. CHEMERINSKY: Were executed.

6 THE COURT: Are executed, right.

7 MR. CHEMERINSKY: On the defendant. He's taken
8 into custody.

9 Subsequent to that, the Northrop Grumman
10 investigation accelerates. Iris Lester and Daronnie
11 Thompkins are arrested just after Thanksgiving in 2017.

12 They appear before this Court. That
13 investigation -- the, sort of, at that point all -- there
14 is -- sort of the focus is on those two, on handling those
15 two.

16 THE COURT: But, obviously, there is a focus
17 also -- because those two -- well, let me rephrase it.

18 Miss Lester was the bank employee. You knew what
19 her role was. The government was trying to figure out who
20 was the gunman, if you will, the person who walked into the
21 bank.

22 So when you arrest Thompkins -- or at the time
23 Thompkins was arrested, was there a belief he was the actual
24 gunman, or was it known at that time that he was not the
25 gunman?

1 MR. CHEMERINSKY: There is -- the lead suspect as
2 the gunman was at that time the defendant, but there wasn't
3 enough evidence to charge him at that stage. It was still
4 an ongoing open investigation.

5 THE COURT: At that time where Thompkins and
6 Lester are brought before the Court, the government knew
7 there was a third person involved?

8 MR. CHEMERINSKY: Correct and had identified the
9 defendant as the likely gunman through his connection to
10 Daronnie Thompkins and through phone records and working
11 backwards from those.

12 But he wasn't charged until October or November of
13 2018. So the investigation unfolds for some time after
14 that.

19 We get a cooperating witness who is identified who
20 is another inmate at MDC with Daronnie Thompkins who
21 Daronnie Thompkins confesses to and tries to use to pass a
22 note to the defendant.

23 THE COURT: And this -- is the cooperating witness
24 going to testify in this trial?

25 MR. CHEMERINSKY: He will not.

1 THE COURT: Okay. I assume that conversation
2 wasn't recorded.

3 MR. CHEMERINSKY: It was not.

4 THE COURT: Okay.

5 MR. CHEMERINSKY: Although --

6 THE COURT: Go ahead.

7 MR. CHEMERINSKY: In corroboration, he provided
8 certain facts. All those facts are laid out in the search
9 warrant -- the federal search warrant affidavit including --
10 he was able to identify the defendant's mother and so forth
11 that --

12 THE COURT: The cooperating witness was?

13 MR. CHEMERINSKY: Correct.

14 THE COURT: Okay.

15 MR. CHEMERINSKY: And monikers and other things
16 that corroborated information he was providing.

17 THE COURT: Okay.

18 MR. CHEMERINSKY: The testifying cooperating
19 witness I am reluctant to identify here in open court begins
20 cooperating in July 2018 and provides a photograph to law
21 enforcement of the defendant and says, "That's the gunman."

22 THE COURT: The witness him or herself provided a
23 photo, or was given a photo and the witness identified?

24 MR. CHEMERINSKY: Provided a photo. Before she
25 ever entered into any cooperation at the very early stages

1 through her counsel she was wavering on whether to be a
2 cooperator. But the first step she took was e-mailed a
3 photograph and said, "This is the gunman."

4 THE COURT: Got it. Please continue.

5 MR. CHEMERINSKY: In August of 2018, Daronne
6 Thompkins is convicted in a bench trial, stipulated
7 testimony bench trial before the Court; the cooperating
8 witness in about a few weeks before that enters a guilty --
9 cooperation guilty plea before the Court. At that point the
10 focus sort of was really ongoing -- identifying and charging
11 the defendant.

12 We did a federal search warrant for the three cell
13 phones that were obtained as part of the 7-Eleven search.
14 Those were signed by the magistrate judge and --
15 Judge Abrams, and at that stage we did the phone dump, and
16 we moved forward with our charging. The defendant was
17 indicted in November of 2018 and has been before the Court
18 ever since.

19 THE COURT: Okay. Great. Thank you, Counsel. I
20 appreciate it.

21 Mr. McCurry, anything further you wish to add or
22 respond to with respect to the suppression motion?

23 MR. McCURRY: Yes, Your Honor, if I may.

24 So true probable cause required for an arrest or
25 for a search, but that does not mean that the probable cause

1 you may have to get a search warrant is sufficient probable
2 cause to arrest somebody.

3 Search warrants are issued all the time as part of
4 an investigation. Ultimately, things that are taken from
5 that search warrant do lead to an arrest, but it doesn't
6 mean because you have one you have the other.

7 And talking about two separate agencies, what we
8 had for 7-Eleven was LAPD. What we had for this matter was
9 a combined LAPD, FBI task force. So there still is, in
10 essence, the same agency to an aspect overseeing both of the
11 investigations.

12 THE COURT: But is there any evidence to suggest
13 that the task force was in communication with LAPD early on
14 in either of those investigations? Because my understanding
15 was the 7-Eleven was in San Pedro; so that's
16 Harbor Division. I assume it was investigation done by
17 harbor robbery homicide.

18 That -- is there evidence to suggest at that time
19 there was some connection, communication between those LAPD
20 officers and the LAPD officers involved in this task force?

21 MR. McCURRY: Not that I am aware of as far as the
22 task force. However, I think it is the same lines of they
23 would ultimately have access to the same database.

24 Again, I am making some assumptions here because I
25 am not a firsthand expert on LAPD operations or procedures.

1 But I think you can safely say that, having the same
2 department, part of both cases, is different than having
3 let's say it being Riverside PD and LAPD or somebody totally
4 unrelated.

5 Now, kind of going back to the -- kind of how this
6 for the defense fits is that we're saying the initial arrest
7 of Mr. Sessions was without probable cause.

8 At the time that the search was conducted, the
9 things that were taken from Mr. Sessions were outside of the
10 search warrant and were not in and of themselves contraband.
11 So simply having cell phones is not contraband. So it is
12 not as if there can be an intervening cause --

13 THE COURT: Couldn't the argument be made that
14 those cell phones might be evidence of a crime, talking
15 about robberies, communication with other co-conspirators?
16 Couldn't the argument be made those cell phones might be
17 evidence of a conspiracy to commit that crime or other
18 robberies?

19 MR. McCURRY: Not in the 7-Eleven case, in my
20 opinion, because it was not listed in the warrant. They
21 were really looking for clothing and for firearms.

22 THE COURT: If that's the case, are you -- well,
23 go ahead. I'm sorry. I will let you finish first.

24 MR. McCURRY: And then going from that point, if
25 they believed it was contraband, they would have done

1 something with them, and they did not. No forensic --
2 nothing was done of those phones until the warrants the
3 following year.

4 So there is also -- so definitely there was the
5 issue we have raised about the length of time they had the
6 phones, but we're also making the argument that they should
7 never have had them in the first place because there was not
8 a DOD arrest which would have allowed them to take those
9 into their possession.

10 THE COURT: Anything further, Mr. McCurry?

11 MR. McCURRY: No, Your Honor.

12 THE COURT: I'm curious from the government's
13 perspective what about the phones and what about the
14 authority to hold those phones at that warrant when they
15 served the warrant for the 7-Eleven? What's the
16 government's view for the authority to hold those phones?

17 MR. CHEMERINSKY: Yes, Your Honor. In -- we cited
18 a number of cases on page 20 of our brief about the
19 authority under search incident to arrest to seize cell
20 phones that are in plain sight.

21 THE COURT: All right. All right.

22 Anything you want to say in response, Mr. McCurry?

23 MR. McCURRY: Your Honor, one final thing just
24 going back to the LAPD agency issue. I believe both cases
25 were investigated by officers from Harbor Division. So

1 maybe not within the same section, but I believe they were
2 both part of Harbor Division. The government might correct
3 me on that. So I don't want to --

4 THE COURT: Right. And that may be the case, but
5 I guess the point I am still struggling with is why does
6 that matter?

7 Look. You have got a timeline of events that
8 wrong or right, sort of, all point to one individual --
9 starting from the 7-Eleven arrest, officers saying looks
10 like the guy I saw on another video, they give a photo to
11 the 7-Eleven individual, say looks kind of like the guy or
12 looks similar. You know, that may be enough in and of
13 itself to do an arrest warrant.

14 They do an arrest. A search incident to an arrest
15 as you know is pretty broad. There is case law that talks
16 about doing just that -- cell phones, because of their
17 connection or their ability to establish a nexus with other
18 crimes, they get that information, you know.

19 Wrong or right -- I shouldn't say -- not wrong or
20 right -- the feds, to their credit, they don't just take the
21 phones, they go and get their own warrant based on other
22 information that they seem to have gathered that drew a
23 connection to Mr. Sessions.

24 It strikes me that your request one might comment
25 is, sort of, no good deed goes unpunished because, had the

1 task force just grabbed the phone, you would have said, no,
2 they shouldn't have done that. They should have gotten a
3 warrant. But they did get a warrant based on information
4 they received, based on information that was separate and
5 apart from the 7-Eleven robbery that, wrong or right, seemed
6 to connect Mr. Sessions or connect Mr. Sessions to this
7 existing robbery that we are going to trial on tomorrow.

8 And I think the case law is also very clear --
9 it's not my job to look at each and every warrant anew to
10 see did they do everything perfect. We all know, I mean,
11 nothing is done perfectly.

12 But based on I think -- how many warrants did we
13 have? Three in total, if not more? I don't see any
14 evidence here to suggest that the Court should go outside
15 their authority and their approvals of those warrants. So
16 it's difficult for me to see where there is a legitimate
17 basis to grant your motion. But go ahead.

18 MR. McCURRY: No. So just closing out the final
19 point of both the Harbor Division being the agency involved
20 with the first one or even LAPD in general. It just goes
21 to, kind of, an argument that they can't say, hey, you know,
22 we really didn't know about these phones until a year after
23 the fact.

24 Somebody within their agency had investigated the
25 case and knew about the phone. So this kind of goes to --

1 THE COURT: Right. But it's interesting. Let's
2 assume that were the case. I mean, the part that I am
3 struggling with is, Mr. Sessions was in custody. So I am
4 not faulting him per se for not trying to get the phones,
5 but the phones were remained in custody for a year.

6 Are you suggesting that -- what should the LAPD
7 have done? If they put him out on the street and said,
8 "Here, this is abandoned property," then Mr. Sessions or the
9 family would have made a claim for conversion of the
10 property.

11 So they have it. It's in their possession. I
12 don't think there is any legal authority to suggest they
13 couldn't keep it for that period of time; and, unfortunately
14 for Mr. Sessions, circumstances were such that the task
15 force realized there might be some evidence that might
16 connect Mr. Sessions to the crime.

17 Again, I am struggling with what authority is
18 there to suggest that LAPD should have done something
19 differently with those phones.

20 MR. McCURRY: I understand what -- the Court's
21 position on that. And, again, I think, like I said, I
22 cannot speak to what their internal procedures are.

23 I can tell you that on more than one occasion
24 within the federal courts here I have signed for property
25 for a client at the time of arrest, whatever it be.

1 Sometimes it was phones or other personal effects.

2 So the kind of assumption would be that there is
3 some type of process for either returning or disposing of
4 the property, especially property that is not being seen as,
5 until the subsequent warrant, any evidentiary value.

6 THE COURT: All right. Well, thank you,
7 Mr. McCurry.

8 Look, I have heard all the arguments. I am going
9 to deny the motion. I think the -- what I articulated just
10 a few moments ago outline and lay a clear picture for why
11 law enforcement had the basis not only for the warrants as
12 to the 7-Eleven robbery but also the cell phones that
13 ultimately led to the nexus to Mr. Sessions. So
14 respectfully the motion to suppress is denied.

15 The next motion I wanted to discuss, if we could,
16 is the motion to introduce evidence of Mr. Sessions's prior
17 convictions and other evidence.

18 I think, based upon my review of the pleadings
19 last week, I seem to recall that the government may have
20 actually listened to some of the words from the Court and
21 have revised their position with respect to some of the
22 evidence that they intend to introduce in their case in
23 chief.

24 Mr. Riordan, have you drawn the short straw on
25 this issue?

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 25 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TOYRIEON SESSIONS, AKA Phat, AKA
PhatStax,

Defendant-Appellant.

No. 21-50125

D.C. No. 2:17-cr-00767-AB-3
Central District of California,
Los Angeles

ORDER

Before: TASHIMA and FORREST, Circuit Judges, and CARDONE,* District Judge.

The panel has unanimously voted to deny Appellant's Petition for Panel Rehearing. Judge Tashima and Judge Cardone recommend denying the Petition for Rehearing En Banc and Judge Forrest votes to deny. The full court has been advised of the Petition for Rehearing En Banc, and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The Petition for Panel Rehearing and Rehearing En Banc is DENIED.

* The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.