A P P E N D I X

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United States v. James Robert Bailey
2024 U.S. App. LEXIS 15210 (10th Cir. 2024)

FILED
United States Court of Appeals
Tenth Circuit

June 24, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES ROBERT BAILEY,

Defendant - Appellant.

No. 23-5044
(D.C. No. 4:20-CR-00188-CVE-1)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **EID**, and **ROSSMAN**, Circuit Judges.

This appeal arises from the complications caused by the Supreme Court's recent decisions involving Indian Country reservation status in Oklahoma. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Our recent decision in *United States v. Pemberton*, 94 F.4th 1130 (10th Cir. 2024), effectively resolves the question presented here: whether the good-faith exception to the Fourth Amendment's exclusionary rule applies to searches conducted within Indian territory under

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

warrants issued by Oklahoma state court judges who mistakenly presumed that the location of the search was within state jurisdiction. We therefore affirm.

I. Background

On May 13, 2020, the wife of James Bailey reported to Oklahoma state law enforcement that she had discovered nude photographs of her daughter on Mr. Bailey's cell phone. Aple. Br. at 2 (citing R. Vol. I at 79). Two days later, a Tulsa Police detective obtained a state warrant to seize Mr. Bailey's phone. *Id.* The detective executed the warrant on the same day and seized Mr. Bailey's cell phone, Aplt. Br. at 1 (citing R. Vol. I at 71), which contained at least nineteen sexually explicit images depicting Mr. Bailey sexually abusing his 14-year-old stepdaughter. R. Vol. 3 at 19; PSR at ¶ 6–7.

Subsequently, several months after *McGirt*, federal authorities indicted Mr. Bailey on multiple child sex offenses, including sexual abuse of a minor in Indian Country. Aple. Br. at 2-3 (citing R. Vol. I at 14, 65). Mr. Bailey moved to suppress the evidence, arguing that the search warrant was "improper" because "the court lacked subject matter jurisdiction" when it issued the warrant, and the detective was aware of Mr. Bailey's tribal affiliation before he obtained the warrant. Aple. Br. at 3 (citing Vol. 1 at 65). Although Mr. Bailey—an enrolled member of the Cherokee Nation—is not a member of the Creek Nation[1], the conduct for which Mr. Bailey was charged occurred within the Creek Nation "portion of Tulsa County." *See* Change of

[1] *See McGirt*, 140 S. Ct. at 2479 ("Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek.").

Plea Hearing Transcript (DN 64) at 27:15–25 (confirming that the charged conduct occurred within the Creek Nation portion of Tulsa County).[2] As a result, the crime fell under federal jurisdiction because it happened in Creek Nation territory, regardless of Mr. Bailey's specific tribal affiliation.

The government countered that the detective had relied in good faith on a warrant issued by a neutral state magistrate judge. Aple. Br. at 3 (citing Vol. 1 at 74–75); Aplt. Br. at 2-3 (citing *United States v. Leon*, 468 U.S. 897, 906 (1984)). The district court agreed with the government, concluding that "the good-faith exception applie[d] to state-issued search warrants issued and executed pre-*McGirt* within tribal jurisdiction against property of Native Americans." Aple. Br. at 3 (citing R. Vol. I at 84). Suppression, therefore, was not warranted. Aplt. Br. at 3 (citing R. Vol. I at 76).

Mr. Bailey pleaded guilty to Coercion and Enticement of a Minor but reserved his right to appeal the denial of his motion to suppress. Aple. Br. at 3 (citing R. Vol. I at 96). The district court sentenced Mr. Bailey to ten years of imprisonment and imposed lifetime supervision with strict "Special Sex Offender Conditions." Aple. Br. at 3 (citing R. Vol. I at 128–32).[3]

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[2] This transcript was not included in the original record. We therefore sua sponte supplement the appellate record with the transcript of Mr. Bailey's Change of Plea Hearing, which is in the district court record for Mr. Bailey's case. *United States v. James Robert Bailey*, No. 4:20-cr-00188-CVE (N.D. Okla).

[3] Mr. Bailey challenged these conditions, along with the denial of his motion to suppress, in his initial direct appeal. Aple. Br. at 3–4 (citing *United States of America v. James Robert Bailey*, No. 21-5085, (10th Cir. Aug. 2, 2022)

Following remand for resentencing, Mr. Bailey returns to this Court, seeking reversal of the denial of his motion to suppress. He challenges the application of the good-faith exception to the pre-*McGirt* search and seizure of his cell phone. Aple. Br. at 3 (citing Vol. I at 198).

II. Discussion

A. Standard of Review

We review de novo the denial of a motion to suppress and the applicability of the *Leon* good-faith exception. *See, e.g.*, *United States v. Pemberton*, 94 F.4th 1130, 1136–40 (10th Cir. 2024).

B. Legal Framework—Good faith

We have concluded that courts should not exclude evidence as a remedy for a Fourth Amendment violation when an officer conducting "objectively reasonable law enforcement activity" relies in an "objectively reasonable manner" on others' mistakes. *See id.* at 1137 (internal citations omitted). So when a warrant is later found invalid because of a neutral magistrate judge's legal error, we generally presume that the executing officers acted in good faith reliance on the warrant's legal validity. *See id.* But this presumption fails when law enforcement officers' reliance on that search warrant is deemed "wholly unwarranted." *Id.* at 1138 (quoting *United*

(unpublished)). Both parties agreed, however, that the Special Sex Offender Conditions implicated Mr. Bailey's First Amendment rights and lacked necessary judicial determinations. So they jointly moved this Court to remand for resentencing. Aple. Br. at 4. This Court granted that motion and remanded the case for resentencing. *Id.*

States v. Cardall, 773 F.2d 1128, 1133 (10th Cir. 1985)). So evidence should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Illinois v. Krull*, 480 U.S. 340, 348–49 (1987).

Therefore, the good-faith inquiry here is confined to the "objectively ascertainable question" of whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate judge's authorization. *Leon*, 468 U.S. at 923 n.23. The Supreme Court has already established that the exclusionary rule should not be applied to deter "objectively reasonable law enforcement activity." *id.* at 919. Objectively reasonable law enforcement activity encompasses situations "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate[.]" *Id.* at 920. At the same time, this principle encompasses "objectively reasonable reliance on a subsequently invalidated search warrant." *Id.* at 922. Thus, the sole question here is whether the Tulsa County detective "acted with an objectively reasonable good-faith belief" that obtaining a warrant from the state judge "was lawful." *Pemberton*, 94 F.4th at 1138 (brackets omitted).

C. Application

Pemberton answers this question. In *Pemberton*, we detailed the objective historical circumstances confronting law enforcement officers in McIntosh County, Oklahoma, as described by both the majority in *McGirt* and Chief Justice Roberts in dissent. 94 F.4th at 1135–38 (citing *McGirt*, 140 S. Ct. at 2464, 2496). Given that

established legal landscape and those prevailing practices, we rejected the conclusion that reasonably well-trained officers in McIntosh County, Oklahoma "could not have harbored an objectively reasonable belief" in either their lawful ability to obtain a warrant or the jurisdictional validity of the warrant. *Id.* at 1138 (citing *Leon*, 468 U.S. at 926).

We equally determined that the officers' decision to obtain and execute a state court warrant was an "objectively reasonable choice" given the "objective circumstances" confronting them. *Id. See also Leon*, 468 U.S. at 919 (obtaining search warrant from a neutral judge is an objectively reasonable law enforcement activity). "Because officers acted with an 'objectively reasonable good-faith belief' in their 'objectively reasonable law enforcement activity,'" they could "reasonably rely on the judge's authority to issue the warrant." *Id.* (quoting *Leon*, 468 U.S. at 919). We therefore concluded that the McIntosh County officers "acted with an objectively reasonable good-faith belief that their conduct was lawful." *Id.* (quoting *United States v. Workman*, 863 F.3d 1313, 1317 (10th Cir. 2017)). Since no other evidence showed deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, moreover, the deterrence rationale of the exclusionary rule did not apply. *Id.* 1139. Thus, we attributed the extra-jurisdictional search "solely" to the state court judge's (pre-*McGirt*) "legal error." *Id.* at 1137.

Those objective circumstances operate identically in Tulsa County, Oklahoma. Given the objective historical circumstances, legal landscape, and prevailing practices, we cannot conclude that the record establishes that a well-trained officer in

Tulsa County "'could not have harbored an objectively reasonable belief in [their] ability to seek a warrant, or "could not have harbored an objectively reasonable belief" in the warrant's jurisdictional validity.'" *Id.* at 1138 (quoting *Leon*, 468 U.S. at 926). Indeed, the Tulsa County detective's "choice to apply for a warrant issued by a state court judge"—which was grounded in the prevailing legal landscape and consistent with a state's traditional exercise of jurisdictional authority—was "objectively reasonable." *Id.* at 1138 (citation omitted). Therefore, the Tulsa County detective could "reasonably rely on the judge's authority to issue the warrant." *Id.* at 1138. Thus, we conclude that Tulsa County detective "acted with an objectively reasonable good-faith belief that [his] conduct was lawful," *id.* (citation omitted), justifying the application of the good-faith exception.

Resisting this conclusion, Mr. Bailey contends that the Tenth Circuit's decision in *Murphy v. Royal* should have clearly informed state law enforcement officers that Oklahoma lacked jurisdiction.[4] To be sure, the Tulsa County detective investigating Mr. Bailey obtained and executed a warrant to search Mr. Bailey's phone after this Court in *Murphy* announced its conclusion on the disestablishment question. But at the time the state court judge issued the warrant, the Supreme Court

[4] Aplt. Br. at 14 (citing *Murphy v. Royal*, 866 F.3d 1164, 1172 (10th Cir. 2017) (concluding that Congress had not disestablished the Muscogee (Creek) Nation's Reservation), *opinion amended and superseded on denial of rehearing en banc*, 875. F.3d 896 (Nov. 9, 2017).

had not yet issued its decision in *McGirt*—settling the legal uncertainty[5] over Indian country in the Creek Nation portion of Tulsa County.[6] Prior to the Supreme Court's definitive decision in *McGirt*, therefore, we cannot conclude from the fact of *Murphy* alone that a reasonably well-trained *law enforcement officer* "would have known," *Leon*, 468 U.S. at 923 n.23, or "may properly be charged with knowledge," *Krull*, 480 U.S. at 348–49, that the warrant would be jurisdictionally invalid. *See United States v. Herrera*, 444 F.3d 1238, 1253 n.16 (10th Cir. 2006) (noting that a reasonably well-trained officer is not required to "resolve unsettled law" or "anticipate future legal rulings.").[7] Thus—following *Pemberton*—we attribute the search solely to the state court judge's (pre-*McGirt*) legal error and not to the Tulsa County detective's lack of good faith.

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[5] *See* Ben Gibson, *Lessons from McGirt v. Oklahoma's Habeas Aftermath*, 99 DENV. L. REV. 253 (2022) (documenting the surge in state and federal habeas petitions in Oklahoma following *Murphy*, but before *McGirt*, and discussing the legal ambiguity and procedural challenges faced, with records showing dismissals for various procedural reasons).

[6] In May 2018, the Supreme Court granted certiorari in *Murphy*. 584 U.S. 992 (2018). In July 2020, on the day the Court decided *McGirt*, it affirmed *Murphy*. *Sharp v. Murphy*, 140 S. Ct. 2412 (2020).

[7] The Supreme Court ultimately concluded that Congress had not disestablished the Creek Nation Reservation and affirmed that the reservation's historical boundaries in eastern Oklahoma still constituted "Indian country," as defined under 18 U.S.C. § 1151(a). *McGirt*, 140 S. Ct. 2452.

III. Conclusion

In sum, the district court properly applied the good-faith exception to the evidence obtained in Mr. Bailey's case and did not err in denying Mr. Bailey's motion to suppress the evidence.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

A P P E N D I X

B

United States v. James Robert Bailey, 4:20-cr-00188-CVE-1
2021 U.S. Dist. LEXIS 138557 (N. D. Okla. July 26, 2021)

UNITED STATES OF AMERICA, Plaintiff, v. JAMES BAILEY, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
2021 U.S. Dist. LEXIS 138557
Case No. 20-CR-0188-CVE
July 26, 2021, Decided
July 26, 2021, Filed

Counsel **{2021 U.S. Dist. LEXIS 1}**For James Robert Bailey, Defendant: Shannon Michelle McMurray, LEAD ATTORNEY, McMurray Keesling, TULSA, OK.

For USA, Plaintiff: Christopher Jordon Nassar, Douglas Edward Snow, Reagan Vincent Reininger, LEAD ATTORNEY, United States Attorney's Office (Tulsa), TULSA, OK.

Judges: CLAIRE V. EAGAN, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: CLAIRE V. EAGAN

Opinion

OPINION AND ORDER

Now before the Court is defendant's motion to suppress (Dkt. # 33) evidence recovered from a search of his cell phone executed on May 15, 2020, by a state law enforcement officer acting pursuant to a state-issued search warrant.1

I.

On May 13, 2020, defendant's wife contacted state law enforcement to report that her daughter, a minor, sent nude photographs to defendant's cell phone. Defendant's wife stated she discovered those photographs on defendant's phone on or about May 6, 2020. Dkt. # 33, at 1-2. Defendant's wife asserted she photographed defendant's phone while it was displaying the photographs of the minor. Id. at 2. A state detective reviewed the photographs taken by defendant's wife, but was unable to confirm whether they were of the minor. Id.

On May 15, 2020, a Tulsa County judge issued a warrant authorizing a search of defendant's**{2021 U.S. Dist. LEXIS 2}** cell phone. On that day, the detective who had reviewed the photographs, seized defendant's phone pursuant to the state-issued warrant. Id. at 2-3. Defendant alleges that the detective knew of defendant's Native American status prior to petitioning the state court judge for a warrant. Id. at 3.

On July 9, 2020, well after the execution of the warrant, the Supreme Court ruled that the Muscogee (Creek) Nation in Oklahoma had never been disestablished. McGirt v. Oklahoma, ___ U.S. ___, 140 S. Ct. 2452, 2482, 207 L. Ed. 2d 985 (2020). This ruling called into question many aspects of Oklahoma's exercise of criminal jurisdiction over Native Americans within the boundaries of that reservation. It also established federal jurisdiction over Native Americans for certain criminal offenses committed in the Muscogee (Creek) Nation. 18 U.S.C. § 1153; McGirt, 140 S. Ct. at 2478.2

evidence] fails to yield 'appreciable deterrence,' exclusion is 'clearly . . . unwarranted.'" Davis v. United States, 564 U.S. 229, 237, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011) (quoting United States v. Janis, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976)); see also United States v. Patterson, No. CR-20-71-RAW, 2021 U.S. Dist. LEXIS 29906, 2021 WL 633022, at *3 (E.D. Okla. Feb. 18, 2021).

In light of the above rule, when law enforcement officials act in good faith with the reasonable belief that their actions do not violate the Fourth Amendment, the exclusionary rule does not apply. That is because "the exclusionary rule 'cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.'" United States v. McCane, 573 F.3d 1037, 1042 (10th Cir. 2009) (quoting Leon, 468 U.S. at 919). In Leon, the Court specifically held that "the exclusionary rule does not apply when the police conduct a search in 'objectively reasonable reliance' on a warrant later held invalid." Davis, 564 U.S. at 238-39 (quoting Leon, 468 U.S. at 922). This is because "[t]he error in such a case rests with the issuing magistrate, not the police officer, and 'punish[ing] the errors of judges' is not the office of the exclusionary rule." Id. at 239.

In this case, the detective**{2021 U.S. Dist. LEXIS 6}** was acting pursuant to an order issued by a state judge. Defendant has not alleged that the execution of the warrant was objectively unreasonable in any way, and the Court finds no evidence of such unreasonableness. Because the Court finds that the detective was executing his search in "objectively reasonable reliance" on a warrant that is potentially invalid under McGirt3 it finds the exclusionary rule should not apply. Leon, 468 U.S. at 922.

A similar conclusion was reached in Patterson, 2021 U.S. Dist. LEXIS 29906, 2021 WL 633022, at *4. In that case, the court assessed whether a state law enforcement officer's pre-McGirt execution of a state-issued warrant as to the property of a Native American was reasonable, given the lack of jurisdiction brought to light by the Supreme Court's decision. Therein, the court first noted that it could not blindly "pretend the last century of state court prosecutions did not happen." 2021 U.S. Dist. LEXIS 29906, 2021 WL 633022, at *4. Oklahoma "maintained unquestioned jurisdiction for more than 100 years" over land now-recognized as "Indian country" under both federal and tribal jurisdiction. McGirt, 140 S. Ct. at 2485 (Roberts, C.J., dissenting). As a result, the court found the law enforcement officer "certainly has every right to rely on the regular and consistent practices of not**{2021 U.S. Dist. LEXIS 7}** just his own agency, or even other agencies, but the practices of courts throughout the region in exercising jurisdiction in the form of search warrants, arrest warrants, and criminal proceedings." Patterson, 2021 U.S. Dist. LEXIS 29906, 2021 WL 633022, at *4.

The Patterson court further noted that the officer executing the warrant was "not an attorney. Indeed, even nine of this country's pre-eminent jurists were sharply divided on the question of whether Congress disestablished the Muscogee (Creek) Nation Reservation." Id. The court found "[i]t is absurd to say that [the law enforcement officer], his superiors, or his trainers, should have known better than four of this nation's Supreme Court Justices, particularly where they had a century of precedent and practice buttressing their belief that they had jurisdiction to investigate and perform arrests of Native Americans on these lands." Id.4

In United States v. Hamett, No. 18-CR-0002-CVE, 2021 U.S. Dist. LEXIS 74207, 2021 WL 1534529, at *6 (N.D. Okla. Apr. 18, 2021), this Court agreed with the Patterson court and adopted the reasoning in that decision to the extent it found that the good-faith exception applies to state-issued search warrants issued and executed pre-McGirt within tribal jurisdiction against property of Native Americans.**{2021 U.S. Dist. LEXIS 8}** This Court continues to find the logic in those decisions persuasive and applicable to defendant's case. Defendant has raised no new issues relating to why the good-faith exception should not apply-and, in fact, failed to raise certain arguments. Accordingly,

this Court again finds that the good-faith exception applies to pre-McGirt warrants executed by state law enforcement against the property of Native American defendants.5

IT IS THEREFORE ORDERED that defendant's motion to suppress (Dkt. # 33) and request for a hearing are **denied**.

DATED this 26th day of July, 2021.

/s/ Claire V. Eagan

CLAIRE V. EAGAN

UNITED STATES DISTRICT JUDGE

Footnotes

1

Defendant also requests to quash the indictment (incorrectly referred to as an "information"), but cites no law and makes no argument in support of that request. Accordingly, the unsupported request is denied. F.D.I.C. v. Schuchmann, 235 F.3d 1217, 1230 (10th Cir. 2000) (finding that where a party "fails to cite a single legal authority supporting its contention," his argument fails); Phillips v. Calhoun, 956 F.2d 949, 953 (10th Cir.1992); see also United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim." (citing United States v. Giovannetti, 919 F.2d 1223, 1230 (7th Cir.1990))).

2

The McGirt ruling has been extended to the boundaries of four other tribes, including the Cherokee Nation.

3

The Court need not determine at this time the issue of whether a state-court search warrant issued to authorize the search of a cell phone belonging to a Native American is presumptively invalid under McGirt. In this case, it is enough to note that, in light of the state of Oklahoma's pre-McGirt de facto jurisdiction over the law enforcement of all citizens within its boundaries, the officer had a good-faith belief that he had the obligation to execute the warrant. The question as to whether state-court issued warrants are valid as against the property of Native Americans, post-McGirt, is not before this Court.

4

Additionally, in Patterson, defendant argued that the Tenth Circuit's decision in Murphy v. Royal, 866 F.3d 1164 (10th Cir. 2017), amended and superseded on reh'g (November 9, 2017) (en banc), should have put the officer on notice as to the fact that there might be a jurisdictional issue raised when executing warrants on tribal lands. 2021 U.S. Dist. LEXIS 29906, 2021 WL 633022, at *5. Defendant here makes no such argument.

5

Defendant spends a considerable portion of his brief arguing that McGirt should apply to defendant retroactively pursuant to Teague v. Lane, 489 U.S. 288, 300, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). The Court notes that the good-faith exception applies to warrants issued without proper jurisdiction, as long as plaintiff had a good-faith belief jurisdiction was proper. As a result, the argument is immaterial to the issue here.