Appendix A

Judgment and Opinion of the Fifth Circuit Affirming the Conviction

United States Court of Appeals for the Fifth Circuit

No. 23-10480

United States Court of Appeals
Fifth Circuit
FILED
July 22, 2024
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DAVID DEVANEY, JR.,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CR-213-2

Before SMITH, ENGELHARDT, and RAMIREZ, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion

for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.

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UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DAVID DEVANEY, JR.,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CR-213-2

Before SMITH, ENGELHARDT, and RAMIREZ, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

David Devaney, Jr., was convicted of participating in a drug trafficking conspiracy. On appeal, he challenges the denial of his motions to suppress evidence obtained from his car and his two cell phones and incriminating statements he made during a post-arrest interrogation. Additionally, he contests the court's calculation of his Guidelines offense level. We affirm.

I.

David was charged with, *inter alia*, conspiracy to possess fifty grams or more of methamphetamine ("meth") with intent to distribute (count

one), arising from his providing security for a drug trafficking scheme executed by his father, David Devaney, Sr., ("Senior"). The drug deal went awry when Hernandez and Mejia—the parties on the opposite side of the transaction (collectively, "buyers")—declined Senior's request for them to travel to a nearby hotel room. The buyers then left—which prompted David, Senior, and a third co-conspirator to give chase in three vehicles.

David eventually caught up to the buyers' vehicle, forcing it to stop. He and his co-conspirators began shooting at the buyers, injuring Mejia and killing an innocent bystander. Later that day, officers apprehended and arrested Mejia and Hernandez. Sometime afterward, Mejia positively identified David from a photo array as one of the shooters.

The next day, officers spotted David driving a Chevrolet Corvette and attempted to initiate a traffic stop. David led the officers on a high-speed chase covering approximately two miles. He then parked the Corvette, fled on foot, and was ultimately arrested. In his post-arrest interview, David admitted that he had provided security for the drug transaction and chased the buyers' car. But he claimed that he did not fire a gun.

Officers obtained warrants to search the Corvette and the two cell phones. A search of the Corvette revealed various drugs and drug paraphernalia, including roughly 108 grams of meth. The phones contained text messages with Senior discussing distribution of meth and marihuana.

II.

David filed motions to suppress (1) the evidence discovered in the Corvette, (2) the evidence in his two cell phones, and (3) the incriminating statements he made in his post-arrest interview. The district court heard oral argument on the motions and denied all three.

The parties then entered a joint stipulation of facts that established

David's guilt as to his conspiring to possess fifty grams or more of meth with intent to distribute (count one). The joint stipulation, however, expressly reserved David's right to appeal the suppression rulings.

In a bench trial, the district court found David guilty of violating 21 U.S.C. § 841(a)(1) and (b)(1)(A). The presentence report assigned him a final offense level of 43. Based on David's criminal history category, the presentence report recommended life imprisonment, which was reduced to the statutory maximum of 40 years. The district court sentenced David to 480 months of imprisonment and four years of supervised release.

III.

David contends that the district court erred in denying David's motions to suppress the evidence located in (A) the Corvette and the two cell phones, as well as (B) the incriminating statements he made in his post-arrest interview.

For denials of motions to suppress, we review "factual findings for clear error and the ultimate constitutionality of law enforcement action *de novo*." *United States v. Scroggins*, 599 F.3d 433, 440 (5th Cir. 2010). Evidence is viewed in the light most favorable to the prevailing party (here, the government). *Id.* A ruling on a motion to suppress "should be upheld if there is any reasonable view of the evidence to support it." *Id.* (internal quotation marks and citation omitted).

A. The Corvette and the Cell Phones

Warrants are reviewed under a two-part test. In the first step, we determine whether the good-faith exception to the exclusionary rule applies. Under that exception, "evidence obtained from [a] search will not be excluded" even if "probable cause for a search warrant is founded on incorrect information," so long as "the officer's reliance upon the information's truth

was objectively reasonable." *United States v. Cavazos*, 288 F.3d 706, 709 (5th Cir. 2024) (citations omitted).

We move to the second step only if the good-faith exception is inapplicable. There, we address "whether the magistrate had a substantial basis for finding probable cause." *Id.* "Probable cause does not require proof beyond a reasonable doubt, but only a showing of the probability of criminal activity." *United States v. Froman*, 355 F.3d 882, 889 (5th Cir. 2004) (quotation omitted).

David complains that "Detective Martin's warrant affidavit was 'bare bones' as it pertains to [his] blue Corvette." Same too with the warrant affidavit for his two cell phones.

Specifically, he observes that the former (1) did not describe a Corvette as one of the vehicles involved in the shooting incident and (2) lacked the requisite nexus to drug-related crimes. As to the latter affidavit, he avers (1) that it lacked detail on the manner of his communications and (2) that the affiant did not expressly invoke his "training and experience" with the behavior of drug dealers.

In response, the government (a) emphasizes the affidavits' length, (b) highlights their extensive detailing of the crimes committed, the participants, and the location and timing of the events, and (c) observes that both were evaluated by a neutral magistrate who independently determined that the probable cause standard had been satisfied.

The government has the better position with regard to both motions to suppress. As a general matter, David's averments are more germane to attacking "the probable-cause determination itself" than to showing the applicability of the bare-bones cutout. *United States v. Morton*, 46 F.4th 331, 338 (5th Cir. 2022) (en banc). In other words, his contentions—even if taken at face value—would not show that the affidavits were "bare bones."

That's because an affidavit *is not* bare bones merely because it fails to establish probable cause.[1] Rather, the term describes only those affidavits that "contain *wholly conclusory* statements"—*i.e.*, those that are completely devoid of "the facts and circumstances from which a magistrate can independently determine probable cause." *Id.* at 336 (quotation omitted) (emphasis added).

"Bare bones" does not describe the affidavits at issue. Unlike true bare-bones affidavits, which "do not detail any facts" and "allege only conclusions," *id.* at 337, those used to search David's Corvette and cell phones detailed the "crimes committed, the participants, as well as the location and time of the events." Thus, both affidavits "put all the relevant 'facts and circumstances' before the state judge, allowing him to 'independently determine' if the . . . probable-cause standard had been met."[2]

Furthermore, both affidavits include sufficient detail regarding (1) the Corvette and (2) the cell phones, thereby making it reasonable for the officers to rely on the warrants.

(1) David was "positively identified . . . as a subject who discharged a firearm" in the aftermath of an illegal narcotics transaction.[3] The day before, he shot at a moving vehicle while driving. Moreover, he "attempted to evade officers with the [Corvette]." Given his involvement in the shooting, his use

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[1] Indeed, an affidavit—though presenting an impartial magistrate with a "close call" on probable cause—may nonetheless be "far from bare bones." *Morton*, 46 F.4th at 338.

[2] *Morton*, 46 F.4th at 337–38; *see also United States v. Huerra*, 884 F.3d 511, 515–16 (5th Cir. 2018).

[3] *United States v. Tovar*, 719 F.3d 376, 385–86 (5th Cir.2013) (concluding affidavit was "not bare bones" where it included, *inter alia*, a "positive identification of [the suspect] in a photo lineup").

of a firearm while driving, and his evading arrest, a magistrate could reasonably infer that the guns used in the shooting were inside the vehicle.

(2) David had two phones when he was arrested. Per *Morton*, the presence of "multiple phones . . . can indicate that [they] are being used for criminal activity." 46 F.4th at 338.[4] Further, he admitted that he was involved in a scheme to sell illegal narcotics. A magistrate could thus infer that the phones were used in furtherance of that scheme. *See id.* at 338 & n.3.

Additionally, the affiant stated that, "based on [his] training and experience," "illegal narcotic transactions involving fraudulent, counterfeit[,] or prop money . . . may escalate to shootings or homicides." Given that the magistrate could infer that the phones were used in the drug scheme, he could also reasonably infer that they would contain evidence of the shootings and homicides that followed immediately afterwards.

The affidavits were not "bare bones," so the good-faith exception applies. *See Cavazos*, 288 F.3d at 709. The district court correctly denied David's motions to suppress evidence seized from the Corvette and the two cell phones.

B. Incriminating Statements

Miranda created a prophylactic right, based on the Fifth and Fourteenth Amendments, for an accused "to have counsel present during custodial interrogation." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). Upon invoking his right to counsel, an accused "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the

[4] *Accord United States v. Campos-Ayala*, 105 F.4th 235, 245 (5th Cir. 2024) (en banc) (stating that for sufficiency of the evidence in a drug-possession case, "the jury was entitled to give any amount of weight or credence" to the fact that a defendant possessed two phones).

accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484–85.

But an accused's invocation of his right to counsel must be unequivocal and unambiguous. *See Berghuis v. Thompkins*, 560 U.S. 370, 380–82 (2010). Further communication is "initiated" if the accused "evince[s] a willingness and a desire for a generalized discussion about the investigation." *Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46 (1983).

David contends that officers continued interrogating him despite his four requests for counsel:

(1) David mentioned an attorney when officers began asking about the drug deal. But, when officers then asked whether he was invoking his right to counsel, he answered "[n]ot yet . . . I'm not asking for an attorney yet."

(2) David asked whether the officers would call Brian Poe, stating that he wanted Poe's advice. David then clarified that he wanted merely to call Poe "as a friend"—without hiring him as his attorney—and without ending the interview.

(3) David asked again whether there was "a way to talk to my attorney without ending the interview." The officers answered in the negative.

(4) David asked a third time whether he could call Poe as a friend. The officer responded that he would not allow David to make phone calls at that time. David then indicated that he wanted to continue providing information and consented to searches and forensic testing.

The government responds that none of those requests was sufficiently unequivocal and unambiguous. We agree. David did not invoke his right to

counsel.

In (1) and (2), David affirmatively disclaimed his intent to invoke counsel and his intent to retain Poe as counsel, respectively. Thus, neither statement articulated a desire to have counsel present. *Edwards*, 451 U.S. at 484–85.

Same with (3). Though David mentioned his "attorney," he did so only in the context of asking *whether* there was any way he could invoke his right to counsel without terminating the interview. Such a procedural inquiry is "too equivocal to constitute a clear invocation of the right to counsel." *Soffar v. Cockrell*, 300 F.3d 588, 595 (5th Cir. 2002).

Furthermore, immediately after his query, David explicitly stated that he did not want to end the interview. That countervailing desire to continue speaking with the officers renders ambiguous any invocation of his right to counsel. *United States v. Carrillo*, 660 F.3d 914, 922–24 (5th Cir. 2011).

Lastly, in (4), David zeroes in on the officer's stating "I'm not letting you make no phone calls right now"—characterizing it as "[t]he most blatant violation of [his] right to counsel." Per the transcript, however, the officer's statement was made immediately after David asked whether he could call "his attorney" "as a friend." Context from (2) therefore indicates that David wanted to make a personal phone call to Poe.[5] So David did not express a desire to have counsel present. *See Edwards*, 451 U.S. at 484–85.

Consequently, David failed properly to invoke his right to counsel. The district court did not err in denying his motion to suppress the statements he made during his post-arrest interrogation.

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[5] In determining whether the right to counsel was invoked, we consider statements in the context in which they were made. *See Carrillo*, 660 F.3d at 921–22.

IV.

We review *de novo* the district court's interpretation and application of the Guidelines; factual findings are reviewed for clear error. *See United States v. Juarez-Duarte*, 513 F.3d 204, 208 (5th Cir. 2008).

Under U.S. SENT'G GUIDELINES MANUAL ("U.S.S.G.") § 2D1.1, David's base offense level was set at 36. Various enhancements raised his offense level to 47, which was then reduced to 43. *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A, cmt. n.2. The district court therefore imposed the statutory maximum of 40 years. Additionally, it found that § 2D1.1's cross-reference to U.S.S.G. § 2A1.1 applied.

David contests (a) the quantity of drugs used in calculating his base offense level under § 2D1.1 and (b) the three-level "aggravating role" adjustment. He additionally contends that (c) the district court erred in failing to apply a two-level reduction for acceptance of responsibility.

But none of his challenges matters if § 2D1.1's cross-reference to § 2A1.1 applies. That's because the cross-reference sets the offense level to 43 whenever it is greater than the offense level calculated under § 2D1.1.[6] Any error external to the cross-reference would thus be harmless, as the district court would have "(1) imposed the same sentence had it not made the error, and (2) done so for the same reasons it gave at the prior sentencing." *United States v. Stanford*, 823 F.3d 814, 845 (5th Cir. 2016) (cleaned up).

Section 2D1.1(d)(1) cross-references § 2A1.1. As relevant here, courts are instructed to apply § 2A1.1 if "a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111." Thus, the

[6] *See* § 2D1.1(d)(1) ("the resulting offense level [would be] greater than that determined under [§ 2D1.1 itself]").

cross-reference's applicability turns on whether the conduct is "relevant conduct" under U.S.S.G. § 1B1.3. *See Appellant 1*, 56 F.4th at 392–94.[7]

For David's crime of conviction, § 1B1.3 defines relevant conduct as "all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction." "Conduct is part of a common scheme or plan if it is substantially connected to the offense of conviction by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." *Appellant 1*, 56 F.4th at 394 (quotation omitted). All those commonalities describe co-conspirators' chasing after and shooting at the buyers. So, plainly, those acts are part of the same drug scheme.

Section 1B1.3(a)(1)(B) covers "the conduct . . . of others that was: (i) within the scope of the jointly undertaken criminal activity; (ii) in furtherance of that criminal activity; and (iii) reasonably foreseeable in connection with that criminal activity." All three prongs are met here.

(i)–(ii) During his post-arrest interrogation, David admitted that he participated in the drug scheme by providing armed security. He further admitted that he chased after the buyers' car after the drug deal fell apart.

Though the identity of the shooter who fired the shot that killed the innocent bystander is unknown, ample evidence shows that it was David or his co-conspirators, as all shot at the buyers' vehicle. Indeed, gunshot residue was found in each of the vehicles driven by David and his co-conspirators. And both his co-conspirators and Mejia advised that David discharged his firearm at the buyers' vehicle.

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[7] Since "acts outside those underlying the offense of conviction" can be considered "only when those acts constitute 'relevant conduct.'" *Appellant 1*, 56 F.4th at 392.

Moreover, the pursuit and shooting are consistent with the purposes of the drug transaction. Senior stated that they gave chase "to talk to [the buyers]"—*i.e.*, allegedly salvage the transaction. The motive for the shooting also comports with that underlying the transaction—to get payback from the buyers for paying with "counterfeit currency" in a prior drug transaction.[8]

(iii) Our circuit has "repeatedly observed" that "firearms are tools of the trade of those engaged in illegal drug activities." *United States v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990) (cleaned up). Given the nature of drug trafficking, it would have been reasonably foreseeable that a weapon would be used.

Thus, the district court could permissibly find, by a preponderance of the evidence,[9] that the "murder . . . was reasonably foreseeable" and that David "aided and abetted in that murder." So it did not err in finding that the § 2A1.1 cross-reference applied.

David responds with two objections in his opening brief.[10] (1) He asserts that "the facts do not suggest [that the death of the innocent bystander] was an unlawful killing with malice aforethought." (2) He also asseverates that "there is no evidence to suggest that [he] planned or committed a robbery." Neither objection has merit.

(1) First-degree murder, as defined in 18 U.S.C. § 1111(a), includes "murder . . . perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed."

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[8] *See* ROA.912 ("'get [the buyers] back' and make sure they never did it again").

[9] "The burden of proof in this respect is on the government under a preponderance of the evidence standard." *Aguilera-Zapata*, 901 F.2d at 1215.

[10] Neither objection is mentioned in his reply brief.

David does not raise any points of error regarding the government's theory that he and his co-conspirators "intended to effect the murder or the death of another human being"—*i.e.*, the buyers—when they blocked off and shot up their vehicle.

(2) The cross-reference applies to any "relevant conduct"—not just "robberies." *See* § 1B1.3(a)(2). Consequently, § 2D1.1's cross-reference to § 2A1.1 applies.[11]

That cross-reference fixes David's offense level at 43. Any higher offense level would be reduced automatically to 43, *see* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A, cmt. n.2, and any lower offense level would rise back to 43, *see* § 2D1.1(d)(1). Any other sentencing error would have *no* effect on David's offense level and is thus, definitionally, harmless error. *See Stanford*, 823 F.3d at 845.

AFFIRMED.

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[11] Moreover, David's reply brief never responds to the government's contentions on this issue. Accordingly, he has waived any issue on appeal with respect to the cross-reference's applicability. *See Duncan v. Wal-Mart La., L.L.C.*, 863 F.3d 406, 408 n.2 (5th Cir. 2017) (stating that failing to address appellees' responsive contentions in reply briefing is tantamount to abandonment).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 22, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 23-10480 USA v. Devaney
USDC No. 4:22-CR-213-2

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa B. Courseault, Deputy Clerk

Enclosure(s)

Mr. Francisco Besosa-Martinez
Mr. Brian W. McKay
Mr. Matthew Joseph Smid

Appendix B

Judgment and Sentence of the United States District Court for the Northern District of Texas

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

v.

DAVID DEVANEY, JR

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:22-CR-00213-P(02)
U.S. Marshal's No.: 56294-177
Laura Montes, Assistant U.S. Attorney
Matthew Smid, Attorney for the Defendant

On November 1, 2022 the defendant, DAVID DEVANEY, JR, entered a plea of guilty as to Count One of the Superseding Indictment filed on September 27, 2022. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C § 846	Conspiracy to Possess with Intent to Distribute a Controlled Substance	6/25/2022	One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of $100.00 as to Count One of the Superseding Indictment filed on September 27, 2022.

Upon motion of the Government, all remaining Counts are dismissed, as to this defendant only.

The defendant shall notify the United States Attorney for this district within thirty 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.

Sentence imposed May 4, 2023.

Mark T. Pittman

MARK T. PITTMAN
U.S. DISTRICT JUDGE

Signed May 8, 2023.

IMPRISONMENT

The defendant, DAVID DEVANEY, JR, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Four Hundred Eighty (480) months** as to Count One of the Superseding Indictment filed on September 27, 2022. This sentence shall run consecutively to any revocation of the defendant's parole which may be imposed in Case Nos. 1336506D, 1336507D, 1336782D, and 1335025D in the 297th Judicial District Court, Tarrant County, Texas.This sentence shall run concurrently with any future sentence which may be imposed in Case Nos. DC-F202200674 and DC-F202200778 in the 413th Judicial District Court, Johnson County and with Case No. 4:17-CR-187-P in the U.S. District Court, Fort Worth Division.

The Court Orders the Bureau of Prisons to not allow the defendant to ever be held in the same facility as his father, David Devaney, Sr. The Court recommends to the BOP that the defendant be incarcerated at a facility within the state of Florida, if possible.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **Four (4) years** as to Count One of the Superseding Indictment filed on September 27, 2022.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame;

2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed;

3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer;

4) The defendant shall answer truthfully the questions asked by the probation officer;

5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change;

6) The defendant shall allow the probation officer to visit the defendant at any time at his or her

home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observed in plain view;

7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her employment (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change;

8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer;

9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours;

10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed , or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers);

11) The defendant shall not act or make an agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court;

12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk; and,

13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the U.S. probation officer;

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;

make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664;

pay the assessment imposed in accordance with 18 U.S.C. § 3013;

participate in an outpatient program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least $25 per month; and,

participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least $25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because the estate of the victim has not requested any restitution to date.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

BY _____
Deputy Marshal

Appendix C

Opinion and Order of the United States District Court for the Northern District of Texas Denying Motion to Suppress

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v. **No. 4:22-cr-0213-P (02)**

DAVID DEVANEY JR.

OMNIBUS ORDER

Before the Court are Defendant David Devaney Jr.'s ("Defendant's") Motions in Limine (ECF No. 43), Motion to Suppress the Search of his Vehicle ("Vehicle Suppression Motion") (ECF No. 46), Motion to Suppress the Search of his Cell Phones ("Cell-Phone Suppression Motion") (ECF No. 47), and Motion to Suppress his Custodial Interrogation (ECF No. 48) (collectively, "Motions to Suppress").

MOTIONS IN LIMINE

Having considered the Motions in Limine, the Government's reply, and the trial date extension, the Court holds the Motions in Limine in **ABEYANCE**, deferring ruling on them until closer to the trial date. *See* ECF Nos. 43, 44, and 65.

MOTIONS TO SUPPRESS

Having considered the Motions to Suppress and the responses and replies, the Court **DENIES** them for the reasons explained below. *See* ECF Nos. 46–48, 52–54, 56, 59, 62–63.

A. Vehicle Suppression Motion

In his Vehicle Suppression Motion, Defendant seeks to suppress all evidence seized from the search of his car. ECF No. 46. He contends that no probable cause supported the warrant and that the affidavit is conclusory. *Id.* at 5–8. The affidavit is nine pages long and detailed. ECF No. 46-2. Because the good-faith exception justifies the search even if no probable cause existed—which the Court does not hold—the Court rejects Defendant's contention.

The good-faith exception provides that "evidence obtained by officers in objectively reasonable good faith reliance upon a search warrant is admissible, even though the affidavit on which the warrant was based was insufficient to establish probable cause." *United States v. Satterwhite*, 980 F.2d 317, 320 (5th Cir. 1992). As long as the affidavit is more than a "'bare bones affidavit,'" an officer's reliance on the search warrant is in good faith. *United States v. Alix*, 86 F.3d 429, 435 (5th Cir. 1996). If the good-faith exception applies, then the court does not need to address whether probable cause supports the warrant. *United States v. Mays*, 466 F.3d 335, 343 (5th Cir. 2006). The detailed, nine-page affidavit supporting the search of the car provides:

(1) Defendant was involved in a drug-deal shooting in Burleson, Texas that resulted in a death.

(2) The day after the shooting, Defendant's father and another suspect with him were arrested with drugs and guns.

(3) Defendant was arrested that same day in a separate location pursuant to an arrest warrant.

(4) Defendant was driving a blue Corvette when the police initiated the arrest.

(5) He exited the car after a "brief pursuit" before the police arrested him.

(6) Defendant told the police that he had acted as security for the drug deal and was present at the shooting but did not fire a weapon.

(7) Others involved in the drug-deal shooting implicated Defendant as an active participant in the shooting.

(8) No evidence indicated that the car was present during the drug-deal shooting.

ECF No. 46-2. Defendant's post-arrest statements implicated him in the drug deal, the shooting, and related offenses. Those statements and the timing and circumstances of his arrest are all discussed in the affidavit. Even if the affidavit supporting the warrant lacked sufficient probable cause, any evidence seized from the car would be admissible under the good-faith exception. *United States v. Leon*, 468 U.S. 897, 922 (1984);

Satterwhite, 980 F.2d at 320; *see also Morton*, No. 19-10842, 2022 WL 3591841, at *3–4 (5th Cir. Aug. 22, 2022) (defining "bare bones affidavits" and distinguishing them from affidavits like those in this case). The Court **DENIES** Defendant's Vehicle Suppression Motion.

CELL-PHONE SUPPRESSION MOTION

Defendant also seeks to suppress evidence from the search of the cell phones found on his person when he was arrested. ECF No. 47. Like Defendant's arrest, the cell-phone search was pursuant to a warrant. ECF No. 47-1. In addition to repeating the same essential facts listed above, the ten-page cell-phone affidavit indicates that one of the men who attempted to buy drugs and who was shot in the leg communicated with the sellers via his cell phone. ECF No. 47-2. Similar to his argument in his Vehicle Suppression Motion, Defendant argues in this Motion that the ten-page, detailed affidavit supporting the cell-phone warrant does not allege probable cause and that the good-faith exception does not apply. ECF No. 47 at 4–12, *see also* No. 47-1. However, based on the law and the Court's review of the affidavit, the Court holds that the good-faith exception does apply. For the same reasons that the Court denied the Vehicle Suppression Motion, the Court **DENIES** Defendant's Cell-Phone Suppression Motion. *See Leon*, 468 U.S. at 922; *Satterwhite*, 980 F.2d at 320; *see also Morton*, 2022 WL 3591841, at*3–5.

MOTION TO SUPPRESS HIS CUSTODIAL INTERROGATION

Finally, Defendant seeks to suppress post-*Miranda* custodial statements he made to police, contending that his Fifth Amendment right to counsel was violated when he asked for counsel during the interview. ECF No. 48 at 7–9. Because Defendant did not unequivocally request counsel, the Court rejects his contention.

When a suspect invokes his right to counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981). But to trigger the prohibition on further questioning, a suspect must do more than make an "ambiguous or equivocal" reference to an attorney that would cause "a

reasonable officer in light of the circumstances" to understand "only that the suspect *might* be invoking the right to counsel." *Davis v. United States*, 512 U.S. 452, 459 (1994) (emphasis added). Instead, a suspect must make an unambiguous request for counsel in dealing with the police interview. *Id.*; *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). A court must objectively view the circumstances to determine whether the suspect made a request "sufficiently clearly that a reasonable police officer" would "understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 458–59. If the suspect's request is not sufficiently clear, the police officer is not required to stop the interview or to ask clarifying questions to determine whether the suspect does or does not want an attorney. *Id.* at 459, 461.

The Court reviewed the transcript of the interview. *See* ECF No. 59-1. Although it contains several equivocal requests for counsel and still other statements that Defendant did not want counsel, the transcript does not reveal any unambiguous requests for counsel. *See* ECF No. 59-1 at 12–13, 14, 20–21, 50. The Court therefore **DENIES** Defendant's Motion to Suppress his Custodial Interrogation. *See id.*; *see also United States v. Carrillo*, 660 F.3d 914, 921–24 (5th Cir. 2011).

SO ORDERED on this **8th day** of **September 2022.**

Mark T. Pittman

MARK T. PITTMAN
UNITED STATES DISTRICT JUDGE

Appendix D

Petitioner's Motion to Suppress and Attached Exhibits

IN THE UNITED STATES DISTRICT COURT OF FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
VS.	§	**No. 4:22-CR-00213-P**
	§	**JUDGE PITTMAN**
DAVID DEVANEY JR. (02)	§	

DEFENDANT'S MOTION TO SUPPRESS HIS CUSTODIAL INTERROGATION

For the reasons that follow, defendant David Devaney Jr. respectfully moves to suppress his custodial interrogation and any and all evidence obtained from the interrogation because his Fifth Amendment rights were violated.

Factual Background

On June 25, 2022, the defendant was arrested on aggravated assault with a deadly weapon warrants by the Burleson Police Department. Upon being arrested, the defendant was placed in an interview room at the Burleson Police Department and interrogated by law enforcement, which was audio and video recorded.

During the defendant's custodial interrogation, there were three different investigators present: Burleson Police Commander Sparks, Burleson Police Detective Morrison, and HSI Special Agent McCurdy. Below are the relevant excerpts from the defendant's interrogation:[1]

[1] The excerpts are not an exact verbatim transcription of the interview.

Time:	**Event:**
14:28:30	The defendant is brought into the interview room

14:30:24 Detective Morrison reads the following *Miranda* warnings to the defendant after Commander Sparks informed the defendant he was under arrest for evading arrest:

> *You have the right to remain silent and not make any statement at all. Any statement you make can be used against you at your trial. Any statement you make can be used as evidence against you in court. You have the right to have a lawyer present to advise you prior to and during any questioning. If you are unable to employ a lawyer, you have the right to have a lawyer appointed to advise you prior to and during any questioning. You have the right to terminate the interview at any time.*

14:30:47 *Morrison:* Do you understand those rights I just read you?

14:30:48 *Defendant:* Yes sir. Can I ask….

14:30:52 *Sparks:* Having those rights in mind, do you want to talk with us right now?

14:30:57 *Defendant:* I do….I would like to talk whatever but I would at least like to notify my wife.

14:31:06 *Sparks:* When we get done with this interview, as long as you don't jump up and beat our ass or anything like that and you're cooperative with us…I'll make sure you get a phone call…

***

14:34:49 *Sparks:* You realize we have a warrant for your arrest to right?

14:34:50 *Defendant:* For what?

14:34:51 *Sparks:* For agg assault.

14:34:52 *Defendant:* Yeah, that is what the officer told me.

14:34:53 *Sparks:* So, why do you think we have a warrant for agg assault if you haven't been named the one in it. So I want you to understand if you were the one that was shooting, then…I'm just saying…if you were the one that was shooting then you also need to be honest with us about…

14:35:09 *Defendant:* Is anyone in a position right to make any kind of…if I can prove and give you the full layout…bam, bam, bam, bam, bam, bam, bam right? Give you the full layout, right? If I can do that or whatever. Obviously that will prove my innocence. My dad had done nothing but fucking suck me in with his bullshit. That stuff yesterday had me so God damn mad. I just kept driving. I was like what the fuck.

14:35:45 *Sparks:* So we need to go through that whole story…

14:35:47 *Defendant:* Well before I do that, I want some assurances. So if I'm going to give you…

14:35:52 *Sparks:* Let me tell you something…right now…David, I'm not trying to be an asshole. I have an agg assault on you. They are writing a murder warrant. The lady died last night. The lady that was shot. And everyone is pointing the finger at you [HSI Special Agent McCurdy walks in]. This is Special Agent McCurdy, he is with Homeland Security. We are looking at federal charges, murder with federal charges because this was a drug deal gone bad, right? Correct? Is that what you were doing?

14:36:25 *Defendant:* What? I don't know about drugs. That is what I'm saying, I don't know about all that extra shit.

14:36:33 *Sparks:* You already said he called you and asked you to come up there. I need the whole story from you because I'm not playing. You ain't in a position to say that someone can assure you. No one can assure you shit. Here is what they can assure you. I can assure you that if you don't give us enough evidence to prove that you're not then you got what you got. Obviously we ain't joking. I've got a damn felony warrant for your arrest for agg assault. That was just for one

person that was shot. I've got another person that was shot and that was killed that was a totally innocent bystander. From everything that we can tell she was shot. That is why the highway was shut down. Not for some damn thug that got shot because there was another woman that go murdered. That was a murder.

14:37:15 *Defendant:* I know…I didn't kill anybody. I didn't murder anybody. I wasn't in a vehicle that had anyone who had guns….

14:37:22 *Sparks:* So tell me the whole story…

14:37:24 *Defendant:* But at this point….but at this point….

14:37:31 *Sparks:* I'm not giving you any assurances of anything because the burden of proof is on you

14:37:32 *Defendant* Then I need to get a lawyer then. I need a lawyer. I've got to shut the interview down. I don't want to but….

14:37:36 *Sparks:* The interview is on you. I can't give you any proof that you're not going to jail today.

14:37:40 *Defendant:* No, I'm going to jail today. I understand that. I'm not saying I'm not going to jail. That is not my goal

14:37:46 *Morrison:* What he is trying to say is….you're saying you weren't in the car right?

14:37:49 *Defendant:* Neither car

14:37:50 *Morrison:* You weren't around a gun?

14:37:51 *Defendant:* No

14:37:51 *Morrison:* Then why do you need to make a deal?

14:37:54 *Defendant:* Because if you watch…people end up getting tied in….

14:37:59 *Morrison:* If you prove that you weren't there….

14:38:00 *Defendant:* I'm saying, this is all I'm saying….I'm saying I know I'm going to jail today, there is not going around that. I understand that.

14:38:10 *Sparks:* Before we go forward anymore, are you asking for an attorney or not?

14:38:12 *Defendant:* Not yet….I'm not asking for an attorney yet.

***

14:42:36 *Defendant:* Do you have a problem calling Mr. Poe? Brian? Do you know Brian?

14:42:40 *McCurdy:* I do.

14:42:43 *Defendant:* Do you have a problem calling him so I can ask his advice?

14:42:48 *McCurdy:* Um….that is up to you. I'm not going to call him. I can't put myself in between…

14:42:55 *Defendant:* Would y'all allow me to call him in front of you?

14:43:03 *McCurdy:* Um….

14:43:07 *Defendant:* I don't want to….calling him as a friend….not hiring him yet.

14:43:11 *Morrison:* That puts us in an awkward spot.

14:43:12 *Defendant:* I don't want to end the interview but I don't….I could give you so much shit.

***

15:07:59 *Defendant:* Is there a way to talk to my attorney without ending the interview?

15:08:03 *Sparks:* No.

15:08:05 *Defendant:* There is not at all? I can't call him? What about as a friend?

15:08:09 *Sparks:* No.

15:08:10 *Defendant:* What about…can I call…

15:08:12 *Sparks:* I'm not letting you make no phone calls while we are in the middle of the interview. We would have to stop the interview and we are done at that point. I'm just being honest with you man. Number 2, if I wasn't working a murder I would let you…

Attachment A (Video Recorded Interview of the defendant) (emphasis added).[2]

The defendant now moves to suppress this custodial interrogation and any evidence obtained from the interrogation because his Fifth Amendment rights were violated.

Legal Argument

The Fifth Amendment provides that "no person…shall be compelled in any criminal case to be a witness against himself. U.S. Conts., Amdt. 5. In an effort to protect a suspect's Fifth Amendment rights, the U.S. Supreme Court held that law enforcement must warn a suspect prior to questioning that he has a right to remain silent and the right to the presence of an attorney. *Miranda v. Arizona*, 384 U.S.

[2] Due to the fact that Pacer does not allow video/audio files to be uploaded as attachment to filings, counsel will deliver a separate disk to the Clerk of the Court and the government that will contain Attachment A.

436, 444 (1966). "After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease." *Maryland v. Shatzer*, 559 U.S. 98, 104 (2010). "Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.*

Once a defendant has asserted his Fifth Amendment rights, all interrogation must cease, and may only began after the defendant has consulted with an attorney, or the defendant initiated the further communication. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). "*Edwards* set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel." *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (internal citation omitted).

Prior to any questioning, Detective Morrison reads the defendant his *Miranda* warning, which informs him of two basic rights. First, that he has the right to remain silent. Second, that he has the right to "have a lawyer present to advise [him] *prior to and during any questioning*." Attachment A at 14:30:24 (emphasis added). The purpose behind the *Miranda* warning is to ensure that any statements a person makes during a custodial interrogation is voluntarily given; however, if investigators fail to honor the warnings they provide, then why bother giving the warnings in the first place. "Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Davis v. United States*,

512 U.S. 452, 459 (1994) (internal quotations omitted). A defendant must "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.*

The defendant was clear and unambiguous when he stated that he needed to speak with an attorney at 14:37:32 mark in his interview. Instead of stopping the interview, as required by *Edwards*, investigators spent the next minute or so questioning him on why he needed any assurances before continuing to speak with them. Through this additional interrogation of the defendant, investigators were successful in convincing the defendant to withdraw his previous request for counsel and to terminate the interview.

Fast-forward five minutes and the defendant requests to call attorney Brian Poe. Again, this request was clear and unambiguous; however, the defendant was denied his right to counsel with attorney Brian Poe because it put investigators in "an awkward spot." *See* Attachment A at 14:43. The defendant desperately wanted to consult with his attorney, which is why he responds to investigators denial with "can I call him in front of you" and "could I call him as a friend." *Id.*

The most blatant violation of the defendant's right to counsel comes at the 15:07:59 mark, when Commander Sparks quickly tells the defendant that he isn't allowed to call anyone during the interview when the defendant asked again if he

could consult with *his* attorney. Other courts have held lessor statements to be sufficient to justify invoking one's right to counsel. *See Abela v. Martin*, 380 F.3d 915, 919, 926-27 (6th Cir. 2004) (holding that the defendant's statement of "maybe I should talk to an attorney by the name of William Evans" and proffering the attorney's business card was sufficient); *Alvarez v. Gomez*, 185 F.3d 995, 998 (9th Cir. 1999) (holding that the defendant's question "Can I get an attorney right now, man?" sufficient).

Even more troubling, the investigators, not the defendant, re-initiated the interview process after each time the defendant was denied an opportunity to speak with his attorney. If investigators had no intention of honoring the warnings they read to the defendant at the onset of the interrogation, then why bother reading the warnings in the first place? Under *Edwards*, investigators should have immediately stopped the interview and allowed the defendant to call *his* attorney. Instead, investigators trampled all over the defendant's Fifth Amendment rights and plowed forward and got the answers to the questions they wanted.

[NOTHING FURTHER ON THIS PAGE]

Conclusion

For the foregoing reasons, the defendant requests that his custodial interrogation be suppressed.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that on August 26, 2022, I conferenced with AUSA Shawn Smith via email regarding this motion and Mr. Smith stated the government was opposed.

/s/ *Matthew J. Smid*
Matthew J. Smid

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2022, a true and correct copy of the foregoing document was filed with the Clerk of the Court for the United States District Court, Northern District of Texas using the electronic case filing system, which provides for service upon all counsel of record.

/s/ *Matthew J. Smid*
Matthew J. Smid