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In the

Supreme Court of the United States

Charles Derryberry,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of
Certiorari from the United States
Court of Appeals for the Fifth
Circuit

Fifth Circuit Case No. 23-60338

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Illinois v. Gates, 462 U.S. 213 (1983) established the “totality of the circumstances analysis” for determining if an informant’s tip provided sufficient probable cause for a traffic stop. Here, the informant provided *untrue* information as to the criminal activity occurring in the vehicle (shipment of drugs) because she, in part, wanted to put Charles Derryberry in jail and away from her daughter. No drugs were found, but a gun was found in the vehicle in proximity to Derryberry – a convicted felon – resulting in his conviction for possession of a weapon by a prohibited person. Should the Court require that the purpose of the informant’s tip be true before it can be used to prosecute someone arising out of a stop?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Charles Derryberry was the defendant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff in the district court, the appellee in the court below, and is the Respondent here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Derryberry (hereinafter “Derryberry”) asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On July 11, 2024, the Fifth Circuit entered a *per curiam* opinion affirming Derryberry’s conviction for federal crimes that has not been published in the Federal Reporter. It is currently reported at 2024 WL 3372684 (5th Cir. July 11, 2024). (App. 1-6). Similarly, the district court’s opinion as to the suppression hearing is not published in the Federal Reporter, and is currently reported at 2023 WL 1930748 (N.D. Miss. Feb. 10, 2023). (App. 7-18).

JURISDICTION

The decision under review was entered on July 11, 2024. (App. 1). The Mandate issued seven days later pursuant to Fed. R. App. P. 41(b). This Court has jurisdiction to review the Fifth Circuit’s judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment IV to the United States Constitution:

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

INTRODUCTION

For the last forty years, the Court has struggled with the establishment of solid guidelines for evaluation of probable cause for a traffic stop based upon an informant's tip. Currently, the Court applies a totality of the circumstances test established by *Illinois v. Gates* and its progeny. This standard is unevenly applied, and has been criticized for leading to uncertainty in outcomes. There not only exists discontinuity with the circuits, there is discontinuity within the circuits amongst individual judges as to the quantum and weight of evidence that establishes probably cause.

The Court has an opportunity to add some certainty by finding that the criminal activity that the informant describes must be true before there can be a prosecution arising out of the stop. Such a ruling would prevent circumstances like that present in the instant case where an informant provides untrue information for a ulterior purpose – here, the desire to get somebody away from her daughter.

STATEMENT OF THE CASE

I. Jurisdiction of the courts below

This case arose from the prosecution of an offense against the laws of the United States of America. The United States District Court for the Northern District of Mississippi had jurisdiction over this case under 18 U.S.C. §3231.

Derryberry directly appealed his conviction in the district court to the Fifth Circuit, which had appellate jurisdiction under 28 U.S.C. §1291 and 18 U.S.C. §3742.

II. Proceedings below

Charles Derryberry (“Derryberry”) was indicted for the offense of felon in possession of a firearm as an Armed Career Criminal (ACC) pursuant to 18 U.S.C. §§ 922(g)(1) & 924(e). The conviction ultimately stemmed from a traffic stop that occurred around 8:45 pm on Sunday, February 27, 2022 near Harmontown, Lafayette County, Mississippi where a gun was found in a vehicle occupied by Derryberry. (App. 7).

Derryberry filed a motion to suppress evidence derived from the stop citing lack of probable cause. The district court conducted a hearing on Derryberry’s Motion to Suppress on February 6, 2023 and February 9, 2023, and eventually denied the motion to suppress on February 10, 2023. (App. 7-18). Derryberry was tried by jury on February 13, 14, and 15, 2023, found guilty at trial, and sentenced to 327 months of confinement. (App. 2).

Derryberry timely appealed his conviction to the United States Court of Appeals for the Fifth Circuit, which affirmed the district court, *per curiam*. (App. 1-6).

III. Underlying facts

A. A drug tip

On February 27, 2022, the Lafayette County Sheriff’s Office (“LCSO”) received what was later determined to be untrue information from a confidential

informant, Mary Smith,¹ that there was methamphetamine and fentanyl in the vehicle she was in at the time of the stop. (App. 1). Also in the vehicle was Mary's daughter Jane Smith, and Derryberry, who was romantically involved with Jane against Mary's wishes. (App. 7).

Although there is no written documentation of what was said in the phone calls, Mary and the officers testified that the gist of the calls was that drugs were coming into Harmontown in a white Chevrolet truck Mary was driving, and that there was an ounce of methamphetamine and an ounce of fentanyl in the vehicle. (App. 13-14). Between the text messages and phone calls, as well as Mary's past role as an informant, officers determined there was reasonable suspicion to stop the vehicle.

B. The stop

LCSO deputy Jack Theobald initiated the stop. He initially stated that the vehicle was pulled over for speeding, but later admitted that he did not have a device for capturing the speed of vehicles and did not really know if it was speeding; therefore, the district court rejected that as a valid basis for the stop. (App. 10-11) Thus, the information provided by Mary was the sole reason for the stop. (App. 11)

After a search of the truck and the persons involved, no narcotics were found, but a firearm was located under the passenger seat, close to where Derryberry was

¹ In an effort to protect the informant's identity in public filings, the district court used pseudonyms. Mary Smith is the informant, and Jane Smith is her daughter. (App. 18, n. 1). The Fifth Circuit maintained this practice (App. 5, n. 1), and Derryberry will do the same herein.

allegedly lying. (App. 8) Derryberry was eventually arrested for possession of the firearm.

C. First suppression hearing

Derryberry filed a Motion to Suppress contending that the stop violated the Fourth Amendment of the United States Constitution and *Terry v. Ohio*, 392 U.S. 1 (1968).

Derryberry raised several issues in favor of suppression: (1) he was never *Mirandized*, (2) the stop was pretextual, (3) Jane's consent to search the truck was involuntary, (4) the confidential informant's information was not reliable or credible and (5) officers lacked reasonable suspicion to stop the truck. (App. 8). The essential issues coalesced around the pretextual nature of the stop and the reliability of Mary's tip.

Primarily due to serious credibility issues with Mary's testimony, the district court conducted two hearings on the motion to suppress. The first hearing occurred on February 6, 2023. The first government witness was LCSO Chief Deputy Scott Mills. He testified that Mary had been a "source of information" for the LCSO for at least 20 years. (App. 11). He testified generally and without much elaboration that information given by her in the past "tended to be reliable." (App. 11).

He testified that on the day in question, she advised him via phone call that her daughter Jane and Derryberry were in possession of methamphetamine *and* fentanyl in Lafayette County. (App. 11). This testimony was later called into question when another LCSO Deputy, Brad McDonald, who testified that Mary only

said fentanyl was in the vehicle (App. 12), but Deputy Theobald testified that he did not use rubber gloves to search the truck as he would have done had he suspected fentanyl was in the truck – meaning that he thought only methamphetamine was in the truck. (App. 14).

Mills testified that Mary's motivation for providing the information was to get help for Jane (by having her arrested), whom she thought was using drugs. (App. 12-13). When asked if Mary's motive for providing information was to “work off” a criminal charge (i.e. to receive a sentencing benefit on her for personal criminal charges),² Mills testified that she had a charge with another agency (the City of Oxford Police Department or Lafayette County Metro Narcotics), but that her primary purpose for providing the tip was to get help for her daughter. (App. 12-13). He assigned LCSO Deputy Theobald to make the stop. (App. 14).

Mary testified last. She agreed that she had felony convictions for larceny, counterfeit forgery (multiple), false pretense and prescription fraud. (App. 12). She also had a felony conviction where she burglarized a car parked at the hospital in Oxford. (App. 12). She had in fact just pled to that charge (but had not been sentenced) two days before she told the police that there was methamphetamine

² Throughout this brief, the appellant will generally use the terminology “work off charges” to describe the commonplace circumstance in both the state and federal systems where a person facing or convicted of criminal charges cooperates and/or provides information to the government in consideration of a reduced penalty. In common parlance, such an informant is often known as a “snitch.” See <https://www.merriam-webster.com/dictionary/snitch>. As will be shown further below, Mary’s decades-long cooperation with law enforcement was likely the result of (and necessitated by) her own repetitive criminal activities throughout that period.

and/or fentanyl in the vehicle on February 27, 2022. (App. 12). She testified clearly and unequivocally: "I was not working off charges. [The LCSO] was doing a favor for me and my daughter." (App. 12). She testified clearly and unequivocally that she was not getting a lighter sentence on her burglary charge in exchange for her assistance. (App. 12-13).

She admitted that she did not like Jane and Derryberry dating, that she thought he was a bad influence on Jane. (App. 12). She testified that she believed the vehicle contained an ounce of methamphetamine and an ounce of fentanyl. (App. 15). However, she further admitted under cross-examination that she never saw the drugs nor did Jane even tell her she had drugs before she contacted the LCSO. (App. 14-15). She allegedly heard this information from her (Mary's) sister. (App. 14-15).

D. Second suppression hearing

Following the first suppression hearing, attorneys for Derryberry discovered some additional information that called into serious question Mary's veracity at the first hearing. Therefore, the district court conducted a second suppression hearing on February 9, 2023.

Mickey Mallette, former state prosecutor for Lafayette County, Mississippi, testified that on February 25, 2022 (two days before the traffic stop at issue), Mary pled guilty to felony auto burglary (discussed above). (App. 12-13). He testified that at that time, Mary's sentence for this crime was deferred. (App. 12-13). He testified that it was customary in state court to sentence the defendant at the time of the

plea of guilty, but Mary's sentencing was deferred to give her the opportunity to mitigate her sentence in some way. (App. 2). Also, he testified that on February 25, 2022, a drug indictment against Mary was "retired to the file" (meaning she would not be prosecuted for that crime at that time and maybe ever). Mallette testified that it was his understanding that Mary was cooperating with the LCSO for the purpose of mitigating her sentence on the burglary charge. (App. 2).

Mills returned to the stand and testified that Mary was not working with the LCSO but instead with the Lafayette County Metro Narcotics Unit for the purpose of "working off cases" at the time of this stop. (App. 2).

Mary returned to the stand and admitted that she had attempted to call Caleb East of Metro Narcotics on the night of the stop, but was unable to get in touch with him. (App. 1, n. 2). She admitted that she had been working for Metro Narcotics for ten years as a confidential informant to, in some cases, but not every time, work off charges. (App. 13). More specifically, she testified:

Q. . . . What was the reason for you to be working for Metro Narcotics in February of 2022?

A. It was to get a lighter sentence.

E. Trial, sentencing and appeal

Though admitting it was "a close call," the district court denied the motion to suppress. Derryberry went to trial, lost, and was sentenced to 327 months of confinement as an ACC. The Fifth Circuit affirmed this conviction.

REASONS FOR GRANTING THE PETITION

I. Standards regarding traffic stops based upon information provided by a known informant are uncertain and unevenly applied throughout the circuits, and within the circuits

Aguilar v. Texas, 378 U.S. 108 (1964) established a two-part test for determining if information provided by an informant supplied probable cause needed for a traffic stop: (1) the underlying circumstances showed the informant was a credible person; and (2) the underlying circumstances showed the basis for the informant's conclusions. *Aguilar*, 378 U.S. 114-116. But *Illinois v. Gates*, 462 U.S. 213 (1983) abandoned that test in favor of a much more ambiguous "totality of the circumstances analysis." The Court has further endorsed a sliding scale analysis, holding that "if a tip has a relatively lower degree of reliability, more information will be required to establish the requisite 'quantum of suspicion.'" *Alabama v. White*, 496 U.S. 325 (1990).³

This Court has conceded that *Gates* created greater uncertainty on the issue of probable cause based upon informant tips, and resolution of the issue has devolved to being most dependent on the vagaries of the judge hearing the case. *See United States v. Leon*, 468 U.S. 897, 914 (1984) (stating "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause."). Others have criticized the standard's flexibility and have called for its further definition. *See e.g. United States v. Ventresca*, 380 U.S. 102, 117

³ Notably, the Court deemed *White* a "close case" because there was scant evidence that the tipster saw cocaine in the vehicle, but the information was ultimately determined to be true, and the Court upheld the stop. *White*, 496 U.S. at 331

(1965) (Douglas, J., dissenting); Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 Miss. L.J. 279, 339-40 (2004); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 Ohio St. L.J. 99, 121-24 (1999).

Courts have applied the *Gates* test unevenly. Some courts permit a stop as long as the suspicious circumstances are reported in a non-conclusory fashion. *See e.g. United States v. Kehoe*, 893 F. 3d 232 (4th Cir. 2018) (Caller provided first name and phone number and advised defendant was carrying a weapon and drinking at a bar.). Other cases overlook the reliability element totally – finding probable cause based only upon the nature of the information provided. *See e.g. United States v. McBride*, 801 F. 2d 1045 (8th Cir. 1986) (anonymous tip that defendant had left a premises with drugs in a certain car with a certain license plate sufficient for probable cause to stop).

II. The totality of the circumstances must necessarily include that the information concerning illegal activity be true

Though not explicitly stated, in every case but one that this Court has decided regarding informant's tips since *Aguilar*, the information regarding illegal activity was true. In *United States v. Harris*, 403 U.S. 573 (1971), the informant correctly stated that he had been purchasing illegal liquor from the defendant. In *Adams v. Williams*, 407 U.S. 143 (1972), the officer was given a tip that a person sitting in a car had a weapon. This was found to be true. In *Florida v. J.L.*, 529 U.S. 271 (2000), the police got an anonymous tip that a black man in a plaid shirt had a

gun at the bus station. Though this was found to not satisfy the probable cause requirement, and the evidence was ultimately suppressed, the tip was at least true.

Navarette v. California, 572 U.S. 393 (2014) had slightly different facts. There a person that identified herself by name in a 911 call, but was treated as an anonymous informant, identified the make, model and license plate of a vehicle that she alleged ran her off the road. *Navarette*, 572 U.S. at 396 n.1. When officers approached the vehicle, they smelled marijuana, searched the vehicle and recovered 30 pounds of marijuana. *Id.* at 395-96. However, *Navarette* is distinguishable from the instant situation because, the reckless driver in *Navarette* *could have been prosecuted* for reckless driving based upon the testimony of the identified 911 caller – that was a crime that was at least provable. Here, it was undisputed that there were no drugs in the truck occupied by Derryberry – and that was the purpose for the stop. That was not a provable crime.

III. A tip that is untrue as to the illegal activity at issue is by definition unreliable under the totality of the circumstances analysis

Gates states that the informant's veracity, reliability and basis of knowledge are all “highly relevant in determining the value” of the informant's report. *Gates*, 462 U.S. at 430. But if the information provided by the informant is proven untrue, there can be no finding that the informant was credible.

Here, Mary provide three bases for telling the sheriff's office that there were drugs in the vehicle: (1) she thought Derryberry was a bad influence on her daughter and wanted to have him arrested to get him away from her; (2) she wanted to get her daughter into drug treatment (by having her arrested for drug

possession); and (3) she wanted to “work off” some of her own charges (and she lied about this under oath at the first suppression hearing). At least one of these factors provides a reason for her to lie about criminal activity – a lie that was proven by the stop.

The Court has a golden opportunity to create more certainty in an area of the law fraught with uncertainty and discontinuity between the circuits, and specific judges within the circuits. The Court should decide that the illegal activity that is the subject of the tip must ultimately be true.

CONCLUSION

Petitioner respectfully asks that this Court grant certiorari and set the case for a decision on the merits.

Respectfully submitted,



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