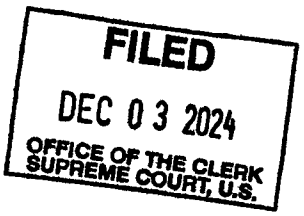
24-6259

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



KENNETH WAYNE GILMORE

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Kenneth Wayne Gilmore
Reg. No. 32915-009
USP Victorville
PO Box 3900
Adelanto, CA 92301

Pro Se

QUESTIONS PRESENTED

1. Whether the isolated smell of marijuana--a drug that is legal for recreational use in many states and legal for medicinal use in the state of Arkansas--is sufficient probable cause for the issuance of a warrant to search one's residence.

2. Whether Petitioner's conviction for 922(g)(1) should be reversed since, even if a search warrant truly was sought by Arkansas police offices and issued by a judge (the evidence on this point is from from certain), the police officers actions violated Petitioner's 5th and 14th Amendment rights to Due Process of Law

3. Whether, in light of this Court's recent precedent (i.e., Erlinger v. United States, 2024 U.S. Lexis 2715 (2024)(holding that the Fifth and Sixth Amendment requires a unanimous jury to make the determination beyond a reasonable doubt that a defendant's past offenses were committed on separate occasions), Petitioner must be resentenced without the Armed Career Criminal Act (ACCA) enhancement since his judge rather than his jury made the finding that Petitioner's three priors were committed on separate occasions.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner is Kenneth Wayne Gilmore

Respondent is the United States of America

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

United States v. Gilmore, NO. 4:19-cr-529-DPM. U.S. District Court for the Eastern District of Arkansas (Central). Judgment entered August 30, 2024

United States v. Gilmore, NO. 23-3002, U.S. Court of Appeals for the Eighth Circuit. Judgment entered August 9, 2024.

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INTRODUCTION

On September 20, 2018, officers with the Jonesboro Police Department Street Crime Unit went to Petitioner's home based on a tip from an unknown confidential informant of possible drug use and drug sales at Petitioner's home. While speaking with Petitioner at the front door, they smelled the odor of marijuana. The officers then did a protective sweep of the house, allegedly got a search warrant and searched Petitioner's home.

Inside Petitioner's home they found a rifle and a pistole that form the basis of Petitioner's one-count indictment. Because marijuana is legal in many states for recreational use and legal in the state of Arkansas for medicinal purposes, the mere smell of marijuana, without more, is insufficient probable cause to justify the issuance of a search warrant by a judge (if a search warrant really was obtained in Petitioner's case?). Therefore, this court should vacate the 8th Circuit's order affirming the District Court's order denying Petitioner's motion to suppress the evidence obtained by officers in violation of Petitioner's 4th Amendment right against unreasonable search and seizures.

This should be the case even if a warrant really was issued by a judge (the evidence is flimsy on this point), since the officers violated Petitioner's 5th and 14th Amendment rights to Due Process of law in the process of obtaining the search warrant.

In Erlinger v. United States, 2024 U.S. Lexis 2715 (2024), this Court held that the Fifth and Sixth Amendments requires a unanimous jury to make the determination beyond a reasonable doubt that a defendant's past offenses were committed on separate occasions for ACCA purposes. On September 5, 2019 Petitioner, Kenneth Wayne Gilmore (Petitioner), was charged in a single count indictment in the Eastern District of Arkansas with being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1). Following a three day trial Petitioner was sentenced on August 28, 2023, to 180 months due to the fact that he was deemed by his sentencing judge to be an armed career criminal under 18 U.S.C. §924(e).

In making a finding based on the preponderance of the evidence standard, that Petitioner was an armed career criminal--specifically, that Petitioner had three previous convictions for a violent felony or serious drug offense, that were committed on occasions different from one another--Petitioner's sentencing judge did exactly what this Honorable Court said the Constitution forbade him from doing.

Because Petitioner's judge rather than a jury made the finding that Petitioner's three prior convictions happened on three separate occasions, Petitioner prays this Honorable Court to vacate his sentence and remand his case back to the District Court for retrial or resentencing.

OPINIONS BELOW

The Eighth Circuit's opinion is not reported but is reproduced in Appendix A. The District Court's denial of Petitioner's motion to suppress evidence is reported at U.S. GIlmore, 2020 U.S. Dist. Lexis 180099 (E.D. Arkansas, September 30, 2020), and is reproduced in Appendix B.

JURISDICTION

The Eigth Circuit entered judgment dismissing Petitioner's appeal on August 9, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §922(g)(1) provides as follows:

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year...to ship or transport in interstate or foreign commerce, or possess in or effecting commerce, any firearm or ammunition which has been shipped or transported in interstate or foreign commerc.

18 U.S.C. §924(e) provides in relevant part as follows:

(e)(1) In the case of a person who violates section 922(g) of this title...and has three previous convictions by any court referred to in section 922(g)(1) of this title...for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such a person shall be forced under this title and imprisoned not less than 15 years...

PROCEDURAL HISTORY

The final judgment was filed on record on August 30, 2023. Gilmore filed a timely notice of appeal on September 4, 2023. The matter was docketed in the Court of Appeals and the brief was filed on/around October 11, 2023 and assigned case No. 23-3002.

The charges in the indictment and the evidence intrroduced at trial resulted from the search of a residence connected to Gilmore in Jonesboro, Arkansas where a pistol, ammunition, drugs and assorted paraphernalia had been seized by the Jonesoboro, Arkansas Police Department's Crime Unit on September 20, 2018.

During the pre-trial phase of the case, Petitioner Gilmore filed 3 separate motions to suppress and motions for reconsideration. The motions were denied without hearing. A motion for reconsideration was filed by Petitioner. The motion for reconsideration was set for a suppression hearing, which also was denied, after the court heared testimony and received exhibits and arguments.

The Court of Appeals for the Eigth Circuit affirmed the District Court's denial of Petitioner's motion for suppression of the evidence on August 9, 2024. It is from this Court of Appeals affirmation that Petitioner now appeals to this Court.

STATEMENT OF THE FACTS

On September 20, 2018, officers with the Joneboro Police Department Street Cris Unit arrived at a residence located at 600 Freeman Street in Jonesboro, Arkansas, shortly before noon, to attempt to contact Kenneth Wayne Gilmore. Officers had received hearsay information of the possible use and sale of illegal narcotics at the residence from an unknown source. The officers did not have a warrant and were proceeding with a "knock and talk" as the basis for their contact with the residence. The officers had previously observed Gilmore in the front yard of the premise on multiple occasions, had observed his vehicle parked in the driveway and believed he resided there alone. Upon officers' arrival at the residence, Mr. Gilmore came to the door and spoke with the officers.

The officers claimed they detected the odor of marijuana coming from inside the residence while speaking with Mr. Gilmore. As a result, Mr. Gilmore was directed to exit the residence and was detained. Officers entered the residence to clear it of any other occupants asserting it was a necessary "protective sweep".

While clearing the residence, the officers located and spoke with a female present at the scene. Monica Ivy, who also exited the residence and was detained.

Petitioner, Gilmore, and Ms. Ivy were subsequently arrested on outstanding warrants, which were pending in unrelated state matters.

Officers claimed after clearing the residence of all occupants, they obtained a search warrant to search the premises and conducted a search pursuant to the warrant according to the initial incident report. The mechanics of which officer obtained the warrant or the mode of obtaining the warrant was not specified in the initial report. The specific time the warrant was issued reflects 120 O'clockpm" on the face of the warrant. Officers entered the premises to commence a search at 12:02 pm as detered by body camera footage obtained by Petitioner via freedom of information request.

Officers searched the residence and located the following in Petitioner's room: a .380 caliber pistol, a.22 caliber rifle, and a .50 caliber black powder rifle. The pistol was located inside the pocket a robe hanging on the bedroom door and was loaded with four .380 caliber rounds with one round chambered. Officers also located two metal ammunition cans that were full of miscellaneus ammunition. Officers further located two glass methampheta-- mine pipes with residue in the bedroom. Additional loose boxes of ammunition were found in the bedroom, and some of the ammunition from the boxes was compatible with the firearms located in the residence. Further, an ammuntion box was located in the kitchen, and an ammunition box was located in the attic where the Tupperware container of drugs was found.

In an attic access in the hallway officers located a pklastic container which contained two glass methampheta- mine pipes, suspected methaphetamine, suspected marijuana, one oxycodone pill, and five tramadol pills. The suspected methamphetamine was lab confirmed as .3270 grams of methamphetamine.

Without the search of the premises and seizure of the weapons and contraband found in the residence on September 20, 2018, there was no other evidence in support of the indictment, as charged, thus the constitutionality of the search is a pivotal question.

After Gimore filed his first motion to suppress, the United States respondeed asserting the search was pursuant to an affidavit and search warrant attached to their reply obtained by officers on the day of the search. Neither the affidavit or search warrant were file marked or certified as true and correct by the court clerk. The Court denied Gilmore's motion without a hearing.

Later in the case, Gilmore's defense counsel obtained body camera footage from the day of the search in response to a freedom of information request searved upon the the City of Jonesboro. The footage had not been provided to the Defendant in discovery.

Upon reviewing the footage, it became clear that the officvers did not have time to leave the scene, present a judge with an affidavit for a search warrant and return to the scene to commence searching between their first contact with Gilmore and when entry was made to the premises under the authority of any warrant. As some of the officers involved had body camera footage from the day of the contact and search, the chronology of events could be determined in reference to time of day, the time stamps on the videos and the sound of the "noon" sirens heard on the audio. The videos established the time that the officers arrived, that none of them left to obtain a warrant and the time the search commenced. As the validity of the search was being questioned, proof of a properly issued and executed warrant and return was a critical relevant inquiry by the defense. It is undisputed the video showed officers made entry into the home at 12:02pm.

The original incident report summarily indicates a warrant was obtained after Gilmore was detained, but does not mention how it was obtained; leaving the reader of the report to assume it was by the standard practice of submitting the affidavit to a judge in person. In an initial responsive pleading the United States plead that the warrant affidavit and warrant were obtained by Officer Christopher Jefferson who was at the scene.

Once the video footage was received and reviewed it was clear none of the oficers had left the scene, did not have the time to leave and obtain a warrant and return, and it was obvious that Christopher Jefferson stood outside the residence and was no part of obtaining a warrant, leading to further inquiry by the Defense about the matter. Only then did the United States assert a different officer had obtained the warrant via electronic request via cell Ophone and email over the email server run by the City of Jonesboro using a city owned computer in the lead officers' vehicle at the residence and by phone call from the officers city owned cell phone from the vehicle. The purported warrant request was to Judge David Boling, a Municipal Court judge for the city of Jonesboro, who did not have felony jurisdiction. The warrant attached as Government's Exhibit 3 to the response shows the exact time the warrant was issued "at 120" O'clock pm."

This new revelation prompted Gil more's counsel to request further proof from the United States related to cell phone records, email records and print records related to the search from the United States and was advised that Gilmore had been provided with all available materials.

Gilmore's trial counsel moved to continue the trial date and for additional time to issue subpoenas to attempt to obtain any additional information related to the issuance of the search warrant by email and cell phone which could shed light on whether the assertions made by the officers were true. The United States was ordered to provide additional information to the Defense stating: "The United States must either provide all existing responsive electronic records (including email) from the Jonesboro Police Department or identify the third-party custodian of those records by name and address by noon on 2/23/2022" as a suppression hearing had been set for February 28, 2022.

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS AND THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION AS THE ISOLATED SMELL OF MARIJUANA IS NOT SUFFICIENT PROBABLE CAUSE FOR THE ISSUANCE OF A WARRANT

United States Constitution, Amendment IV
United States v. Toney, 4:20-cre-00271-02KGB (E.D. Ark. Jul. 8, 2022)
United States v. Johnson, 848 F.3d 872, 876 (8th Cir. 2017)

APPLICABLE LAW

"Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place." United States v. Gater, 868 F.3d. 657, 660 (8th Cir. 2017). The review of a finding of probable cause with deference to the warrant-issuing judge, requires only that there was "a substantial basis for concluding that probable cause existed." United States v. Johnson, 848 F.3d 872 876 (8th Cir. 2017). The Court will affirm the trial court's ruling unless the denial of the motion is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake was made." United States v. Douglass, 744 F.3d. 1065, 1068 (8th Cir. 2014).

A warrant is supported by probable cause if the totality of the circumstances demonstrates "a fair probability that contraband or evidence of a crime will be found in the place to be searched." United States v. Seidel, 677 F.3d. 3345, 337 (8th Cir. 2012)(quotation omitted); see Illinois v. Gates, 462 U.S. 213, 230 (1983).

The apellate court's task was to "determine whether the warrant's issuing court had a substantial basis fo finding probable cause." United States v. Green, 954 F.3d 1119, 1123 (8th Cir. 2020), "When the issuing judge relies soley upon a supporting affidavit to issue the search warrant;" "only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause." United States v. Etheridge, 165 F.3d. 655, 656 (8th Cir. (1999). "The determination of whether or not probable cause exists to issue a search warrant is to be based on a common-sense reading of the entire affidavit." United States v. Seidel, 677 F.3d 344 at 338 (8th Cir. 2012).

Whether a warrant is supported by probable cause is a legal determination and is based on whether the warrant is supported by facts that would "justify a prudent person in the belief that there is a fair probability that contraband or evidence of a crime will be found in a particular place." United States v. Riedesel, 987 F.2d 1383, 1390 (8th Cir. 1993).

Examining the sufficiency of the supporting affidavit is to be based upon a "common sense" and not a "hypertechnical approach." United States v. Grant, 490 F.3d 627 631-32 (8th Cir. 2007).

"The ordinary sanction for police violation of Fourth Amendment limitations has long been suppression of the evidentiary fruits of the transgression." United States v. Fiorito, 640 F.3d 338, 345 (8th Cir. 2011), citing Mapp v. Ohio, 367 U.S. 643 (1961). The exclusionary rule does not apply "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." United States v. Leon, 468 U.S. 897, 920 (1984).

"Th[e] court [of appeals] will affirm the district court's denial of a motion to suppress evidence unless it is unsupported by substantial evidence, based on an erroneous interpretation of applicable law, or based on the entire record, it is clear a mistake was made." United States v. Hogan, 539 F.3d 916, 921 (8th Cir. 2008) (internal quotation marks omitted).

The Fourth Amendment of the United States Constitution provides:

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.

The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" See United States v. Ameling, 328 F.3d. 443, 447 (8th Cir. 2003)(noting that the Fourth Amendment applies to the states through the FOurteenth Amendment).

The default rule for entering a home to search and retrieve evidence is to get a warrant first. See Brighton Cityv. Stuart, 547 U.S. 3987, 403 (2006). A warrantless search is presumptively unreasonable with the burden on the government to attempt to demonstrate an exception to the warrant requirement. The facts of the case do not support any legitimate argument for approving the search of the premises as a warrant exception case.

"Probable cause to issue a search warrant exists if, in light of the totality of the circumstances, there is 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" Z.J. ex rel Jones v. Kan. City Bd. of Police Comm'rs, 931 F.3d. 672, 686 (8th Cir. 2019)(quoting United States v. Shockley, 816 F.3d 1058, 1061 (8th Cir. 2016)).

Probable cause "exists when[ever]...a reasonable person could believe [that] there is a fair probability that...evidence of a crime w[ill] be found" in the place to be searched. Kleinholz v. United States, 339 F.3d 674, 676 (8th Cir. 2003)(per curiam) quotation marks ommitted).

"The Supreme Court has recognized that the odor of an illegal drug can be highly probabitive in establishing probable cause for a search." United States v. Caves, 890 F.2d 87, 90 (8th Cir. 1989)(citing Johnson v. United States, 333 U.S. 10, 13 (1948)).

In numerous cases, the Eighth Circuit has held that the smell of marijuana coming from a vehicle supports probable cause to search for drugs. See United States v. Williams, 955 F.3d 734, 737 (8th Cir. 2020)("the odor of marijuana provides probable cause for a warrantless search of a vehicle under the automobile exception"); United States v. Smith, 789 F.3d 923, 929 (8th Cir. 2015); United States v. Winters, 221 F.3d 1039, 1042 (8th Cir. 2000); United Statres Peltier, 217 F.3d 608 (8th Cir. 2000); United States v. McCoy, 200 F.3d 582, 584 (8th Cir. 2000). The Eighth Circuit has also permitted the search of residences based on law enforcement's reported smell of marijuana, among other facjtors, to establish probable cause. See United States v. McIntyre, 646 F.3d 1115 (8th Cir. 2011)(describing the "strong odor of marijuana outside the garage" of the residence as a factor in establishing probable cause).

In United States v. Toney, the federal court recognized the isolated smell of marijuana may not be a sufficient basis for probable cause stating: "Moreover, this case does not present a circumstwancfe where law enforcement reports in isolation the smell of marijuana coming from a residence in Arkansas as a basis to seek a search warrant for the residence. United States v. Toney, 4:20-cr-00271-02KGB(EA.d. Ark. Jul. 8, 2022). This case presents just such an issue.

The government is expected to cite controlling Eigth Circuit Court of Appeals cases that recognize the "plain smell" doctrine as providing a basis for probable cause to search a residence during an attempted knock-and-talk. See United States v. Smith, 990 F.3d 607, 612 (8th Cir. 2021): United States v. White, 928 F.3d 734 (8th Cir. 2019).

However, given the recent change in 16 states legalizing medical or recreational marijuana, the "plain smell" doctrine as it relates to the isolated smell of marijuana should be reconsidered. The court should consider whether the smell of marijuana in isolation should be grounds for

the issuance of a search warrant of a home given that medical marijuana use is now legal in the state without addiitonal facts. The Arkansas Supreme Court has noted that the smell of something legal, is not grounds for a search. Bennett v. State, 345 Ark. 48, 53, 44 S.W. 3d 310, 313 (2001)(the State has not furnished us with any prcedent which has sanctioned the issuance of a search warrant based solely on a trained officer's smell of a legal substance).

Gilmore asserts the isolated smell of marijuana did not establish probable cause to search the residence. Medical marijuana is legal in Arkansas. Thus the smell of marijuana, in isolation, does not suggest a violation of law as such smell may merely be evidence of innocent legal conduct. The only other claim by officers for conducting a knock and talk in this matter was that they had received "information" of suspected drug trafficking from the residence but even they made no attempt to claim it was from a reliable source or of such veracity to support a finding of probable cause. See Ark. Rule Crim. Proc. 13.1 (If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practible, the means by which the information was obtained).

Thus the singular asserted reason for the issuance of the warrant was the claimed isolated smell of marijuana at the scene. Gilmore argues the court should find that thge isolated smell of marijuana is insufficient probable cause to search a residence under the circumstances of this particular case, as noted by the court in Toney, supra.

The government is expected to argue that marijuana remains contraband under federal law. While that is true, the issue of whether the simple isolated smell may be nothing more than the existence or proof of merely lawful activity. See People v. McKnight, 446 P.3d 397 (Colo. 2019). To grant a warrant based upon nothing more than the possibility of legal use intrudes upon a person's right of privacy related to that legal conduct. One alternative conclusion that the smell of marijuana may be legal pitted against another conclusion that the smell is from illegal possesion, requires a reconsideration of the plain smell doctrine, when no other evidence is present because most cases analyzing "plain smell" occurred against a backdrop of marijuana being illegal under all circumstances. Id. That marijuana may remain illegal across the board under the federal law is not the end of the inquiry for search anmd seizure analysis.

II.

THE DISTRICT COURT ERRED IN DENYING GILMORE'S MOTION TO SUPPRESS ABSENT PROOF OF OATH OR AFFIRMATION AS REQUIRED BY STATE LAW, RULES OF PROCEDURE, AND SUPREME COURT ADMINISTRATIVE RULES

For his second argument Gilmore asserts the United States did not establish that a warrant wsa properly obtained "on oath or affirmation" in the matter given the lack of proof of a projperly issued and recorded affidavit, warrant, return, inventory and filing.

On October 3, 2019, the Court entered a standard discovery order. (R. Doc. 11) At some point, the United States provided a copy of the incident report and case file materials to Gilmore's counsel. On August 13, 2020 Gilmore's first motion to suppress was filed. Defendant challenged both the warrantless search and detention (prior to the issuance of any warrant) as well as the search warrant issued on the basis of illegal conduct mentioned and the lack of probable cause in the "four corners" of the affidavit. The incident report, affidavit, search warrant and return were attached to the motion.

In response the United States filed a reply attaching an affidavit for a search warrant and the purported search warrant, as exhibits to their response to the motion to suppress. The response of the United States asserts "Investigator Christopher Jefferson prepared the search warrant affidavit, and a search warrant was signed by Judge David Boling." The warrant indicates it was authorized by the Judge Boling at 120 O'clock pm on September 20, 2018.

Neither the affidavit or warrant are file marked or certified as true and correct by either the Municipal Court Clerk (Judge Boling's Court clerk) or the Craighead County Circuit Clerk (The Clerk of the court with felony jurisdiction). No mention was made that the warrant was obtained electronically or by the taking of testimony over the phone in either the incident reports, affidavit, or warrant.

The United States asserted that once the search warrant was signed, investigators searched the residence." No other information was provided or statements made regarding how the warrant was obtained. It is apparent at this juncture, that everyone believed officers had appeared in front of a magistrate to obtain a warrant.

Gilmore then filed a second suppression motion on January 29, 2021. Gilmore filed a third motion to suppress after obt6aining body camera video from the scene on the day in question pursuant to a fredom of information request to the Jonesboro police department which showed officers entering his home at 12:02pm. The video had not been provided to Gilmore in discovery. The timing of the entry was questioned given previous claims that the request for the warrant had been made at approximately 12:00pm. But the warrant reflects it was issued at 1:20pm.

The video demonstrates that officers never left the scene to obtain a warrant nor did they have time to leave, obtain one and come back in the short time frame between the asserted application and execution time. Given their previous assertion that they did not have a warrant at the time they arrived at the residence but shortly thereafter entered the residence with a warrant the question arose as to how that was accomplished in such a short period of time. Only after questions were raised about how officers applied for and obtained a search warrant from the judge (assumptively by meeting with the judge) and were able to return to the residence to execute same, in the span of 2 minutes, for the first time it was disclosed that the warrant had been aplied for telephonically/electronically and documents transmitted via email to and from officer Bailey's car parked at the scene, and the warrant was issued and returned to officers electronically after the judge took testimony from the office by cell phone. This of course contradicts the previous filing stating it was officer Jefferson who had applied for the warrant.

This new revelation prompted defense counsel to request the United States provide proof related to any such electronica request for the issuance of the warrant and proof related to the return of the warrant electronically to Officer Bailey and a print log from the printer showing the warrant had been printed. The government responded they were not in possession of any such documents.

Gilmore's counsel further attempted to obtain cell phone records and records from documents custodians and to identify who, if anyone, had records related to the purported issuance of the warrant, none of which would be necessary if the warrant materials had been filed with the court clerk as required by law. Gilmore asserts that the United States failed to produce substantial evidence that a valid warrant was actually issued on the day in question and as a result his motion to suppress should have been granted.

Officer Bailey specifically indicated the "oath of affirmation" for this particular warrant was accomplished over the phone. not only was no recording or transcription of the call ever produced, or hte lack of suych recording explained, but the "duplicate warrant" procedure was apparently disregarded as well because the Officer Bailey said he is the one that filled out the "time" the warrant was issued (prior to sending it to the court) and the duplicate copy should have had the time filled out by the judge, which they is supposed to be filed with the clerk.

Although officers appeared at the suppression hearing and testified about how the warrant in this case was purportedly issued, at every turn, the very system set up to record, verify, document, return and maintain proof related to the warrant fails to establish that any such warrant was actually issued and returned to them in accordance with the rules. And the court who issued the warrant has apparently never filed the affidavit, warrant, inventory, verified return, recording or verbatim record with the clerk. Two separate felony cases were filed in the Craighead County Circuit Court resulting from the search (and subsequently dismissed) and neither one contains the required filings, or an indication that they were filed under seal, a point raised by Gilmore both at the suppression hearing and as indicated by the letter from both court clerks attached to the status report filed with the trial court.

Although the officers were equipped with body cameras on the day of the search, Officer Bailey did not record any video, and Officer Jefferson "mistakenly" didn't activate his body camera till the search was under way.

The judge, who is supposed to either record or transcribe the hearing verbatim, did not. Emails which would have supported the officers' testimonial claims were deleted or non-existent both from the officers email, but also from the Judge's email. The officer claims he deleted his because his mailbox was full and there was no explanation for the absence on the judicial officer's end who is required to keep and file the documents with the court clerk. No cell phone records were ever introduced to prove any call related to the issuance of the warrant was made by the officer to the court, the call length or to which number it was directed. The court made no recording, transcript, or verbatim record of the matter, or if he did, it was not filed of record, as required, and no explanation for the failure to file same was ever given.

No evidence was introduced showing the warrant was returned with a verified account of the search and inventory and filed with the clerk of the issuing judge's clerk as required by the rules. No transcript of the call was madew or verified by the court. The complete lack of compliance violated the Rules of Criminal Procedure, the Administrative Orders of the Supreme Court and Arkasas Code all of which are designed to protect a Defendant and ensure public access, review and oversight of the process to ensure Constitutional Rights are not violated to provide proof that a warrant was in fact issued on a specific date and time all of which is relevant to suppression issues as all of these requirements are predicates and proof that a warrant was based upon "oath or affirmation" of probable cause as required by the Fourth Amendment.

When a "phone" warrant is issued, the officer is actually supposed to send one copy to the judge who fills it out on his end (which should then be maintained by the judge) and the officer is supposed to sign the judge's name to the duplicate copy. Supra. That was not done here.

Gilmore alleges the officers complete disregard for the warrant application protocols so undermine their credibility that the court should not have found a warrant was properly issued, District and Appellate, or at least required additional supporting proof before proceeding to rule on whether the claimed warrant was supported by probable cause. Taken in tandem with their withholding of the body camera footage, their late disclosure or claim that the warrant was obtained telephonically, and the absolute disregard for virtually every requirement related to Arkansas Code, the Arkansas Rules of Criminal Procedure and the Administrative orders of the Supreme Court, his motion should have been granted.

Gilmore asserts his motion to suppress in the District Court should have been granted and the evidence obtained should have been suppressed, and the Court of Appeals fort the Eigth Circuit should have vacated Petitioner's conviction and remanded his case back to the District Court for dismissal or retrial based on evidence other than that which was obtained by the officers in question in violation of Petitioner, Gilmore's, Fourth Amendment right against unreasonable search and seizures, and Fifth and Fourteenth Amendment right to Due Process of law.

III.

THE PETITIONER SIXTH AMENDMENT RIGHT TO A JURY TRIAL WAS VIOLATED WHEN HIS JUDGE MADE A FINDING THAT PETITIONER'S THREE PRIOR FELONY CONVICTIONS, HAPPENED ON THREE SEPARATE OCCASIONS

In Erlinger v. United States, 2024 U.S. Lexus 2715 (2014), this Honorable Court recently held that the Fifth and Sixth Amendment requires a unanimous jury to make the determination beyond a reasonable doubt that a defendant's past offenses were committed on separate occasions. In Petitioner's case, this did not happen. As a matter of fact, it wasn't even clear to Petitioner that, at his sentencing hearing, a finding would be made that he was an armed career criminal pursuant to title 18 U.S.C. 924(e). But that is what happened.

Specifically, at Petitioner's sentencing hearing, the District Court, relying on three prior felony convictions in Petitioner's record (i.e., Aggravated Asasault, Aggravated Battery, and Battery 2nd), made a finding based on the preponderance of the evidence standard, that Petitioner's convictions happened on three separate occasions. This finding on his part violated Petitioner's Fifth and Sixth Amendment rights under the constitution, and thus warrant a reversal of Petitioner's sentence, among other things.

CONCLUSION

For the above mentioned reasons, Petitioner prays this Honorable Court to grant Petitioner the following relief:

For ground one, vacate the District Court's order denying Petitioner's motion to suppress evidence, since the mere smell of marijuana is not sufficient probable cause to justify a search of Petitioner's home.

For ground two, vacate Petitioner's conviction, since either no warrant whatsoever was issued in Petitioner's case by a judge, authorizing officers to search Petitioner's home and seize evidence against Petitioner, or the officers did not follow proper procedures and laws in relation to their request for a warrant.

For ground three, vacate Petitioner's sentence and remand for a new sentencing hearing, since the District Court violated Petitioner's Fifth and Sixth Amendment rights under the Constitution by making a finding that Petitioner's prior felonies happnened on three separate occasions, rather than allowing a jury to make that determination.

Respectfully submitted,

Kenneth Wayne Gilmore

Kenneth Wayne Gilmore

Nov 30, 2024