

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 23-3002

United States of America

Plaintiff - Appellee

v.

Kenneth Wayne Gilmore

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Arkansas - Central

Submitted: February 14, 2024

Filed: August 9, 2024

[Published]

Before LOKEN, COLLOTON,¹ and KELLY, Circuit Judges.

PER CURIAM.

Officers from the Jonesboro, Arkansas, Police Department went to Kenneth Wayne Gilmore's home because they received a tip about the possible use and sale of illegal drugs there. As they spoke with Gilmore at his front door, they smelled

¹Judge Colloton became chief judge of the circuit on March 11, 2024. See 28 U.S.C. § 45(a)(1).

marijuana coming from inside the home. They asked him to step outside, Gilmore complied, and the officers detained him. The officers then requested a warrant to search the home. The affidavit in support of the search warrant stated that the officers “responded to [Gilmore’s residence] in reference to illegal narcotics use and sells,” and upon arrival, they “could smell a strong odor of marijuana coming from the residence.” The warrant was issued, and during the search that followed, officers found two firearms.

Before trial, Gilmore filed several motions challenging the validity of the search warrant. As relevant to this appeal, he argued that the warrant lacked probable cause and that procedural irregularities in how the warrant was obtained required suppression of all evidence seized in the resulting search. The district court² held an evidentiary hearing and denied Gilmore’s motions. After a three-day jury trial, Gilmore was convicted of possession of a firearm as a felon. He appeals, challenging the denial of his motions.

When reviewing the “denial of a motion to suppress, we review the district court’s factual findings for clear error and its legal conclusions de novo.” United States v. Allen, 43 F.4th 901, 907 (8th Cir. 2022) (citation omitted); see also United States v. Norey, 31 F.4th 631, 635 (8th Cir. 2022) (“The determination of probable cause is reviewed de novo.” (citation omitted)). “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. Mayo, 97 F.4th 552, 555 (8th Cir. 2024) (quoting United States v. Juneau, 73 F.4th 607, 614 (8th Cir. 2023)).

Gilmore first argues that the warrant for his residence lacked probable cause because the Arkansas Constitution was amended “to legalize medical marijuana.” See Ark. Const. amend. 98 (2016); Ark. Dep’t of Fin. & Admin. v. Naturalis Health, LLC, 549 S.W.3d 901, 904 (Ark. 2018). He asserts that “the smell of marijuana, in

²The Honorable D.P. Marshall Jr., then Chief Judge, now District Judge, United States District Court for the Eastern District of Arkansas.

isolation, does not suggest a violation of law,” because in Arkansas, the odor may be a result of “innocent legal conduct.” But contrary to Gilmore’s argument, the odor of marijuana here was not “in isolation.” The affidavit in support of the warrant also included information regarding the suspected use and sale of controlled substances from Gilmore’s home. On appeal, Gilmore neither challenges the sufficiency of this additional information nor argues that the smell of marijuana in combination with it is insufficient to establish probable cause. Thus, his challenge to the district court’s probable cause finding is unavailing. We need not address whether the odor of marijuana in isolation would establish probable cause to search the residence.

Next, Gilmore argues that the government failed to establish that the officers obtained a warrant at all. He points out that the officers never left the scene before the search began, giving them no opportunity to request and receive a warrant. In the alternative, he argues that any warrant they obtained was not issued and filed in accordance with Arkansas law. At the evidentiary hearing, the district court heard directly from Investigator Bailey, one of the officers at the scene. Bailey explained that he called a state court judge from his patrol car, emailed the search warrant affidavit to the judge, and was “put under oath on the telephone.” Relying on this testimony, the district court found that the officers obtained a valid warrant. Based on the bodycam footage, the court also found that Bailey had the warrant in his hands when he got out of the car to approach Gilmore, and that Gilmore received a copy of it. We find no clear error in these factual findings.

In the alternative, Gilmore argues that suppression is warranted because the judicial officer did not file the warrant with the clerk of court or file a recording or transcript of any oral testimony Bailey gave over the phone. See Ark. R. Crim. P. 13.4(c); Ark. Code Ann. § 16-82-201(d)(2) (2018). Under the good-faith exception, see United States v. Leon, 468 U.S. 897 (1984), “disputed evidence will be admitted if it was objectively reasonable for the officer executing a search warrant to have relied in good faith on the judge’s determination that there was probable cause to issue the warrant.” United States v. Mayweather, 993 F.3d 1035, 1041 (8th Cir. 2021) (quoting United States v. Moya, 690 F.3d 944, 948 (8th Cir. 2012)).

Suppression is warranted only in the following scenarios: (1) when the affiant misled the issuing judge by way of “a knowing or reckless false statement”; (2) when “the issuing judge wholly abandoned [their] judicial role;” (3) when “the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,” or (4) when the warrant is “so facially deficient” that no police officer could reasonably presume it valid. United States v. Hay, 46 F.4th 746, 751 (8th Cir. 2022) (quoting United States v. Notman, 831 F.3d 1084, 1089 (8th Cir. 2016) (internal quotation marks omitted)).

None of these circumstances are at issue here. Instead, the procedural missteps Gilmore alleges are precisely the type of factual scenarios contemplated by Leon and its progeny. See Arizona v. Evans, 514 U.S. 1, 15–16 (1995) (holding that record keeping errors by court employees do not trigger the exclusionary rule so long as police reasonably relied on them); Herring v. United States, 555 U.S. 135, 146 (2009) (distinguishing reckless warrant-maintenance practices from those that are merely negligent for purposes of justifiable exclusion). Gilmore does not meaningfully challenge the district court’s conclusion that the officers acted in good faith. Leon, 468 U.S. 897, 922–25 (1984).

We affirm the judgment of the district court.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-3002

United States of America

Appellee

v.

Kenneth Wayne Gilmore

Appellant

Appeal from U.S. District Court for the Eastern District of Arkansas - Central
(4:19-cr-00529-DPM-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 26, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

APPENDIX B

23-3002

UNITED STATES OF AMERICA, PLAINTIFF v. KENNETH WAYNE GILMORE, DEFENDANT
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, CENTRAL
DIVISION

2020 U.S. Dist. LEXIS 180099

No. 4:19-cr-529-DPM

September 30, 2020, Decided

September 30, 2020, Filed

Counsel

{2020 U.S. Dist. LEXIS 1} For Kenneth Wayne Gilmore, Defendant:

Theodis N Thompson, Jr, LEAD ATTORNEY, Thompson Law Firm, PLLC, Little Rock, AR.

For USA, Plaintiff: Erin Siobhan O'Leary, LEAD ATTORNEY, U.

S. Attorney's Office, Eastern District of Arkansas, Little Rock, AR USA.

Judges: D.P. Marshall Jr., United States District Judge.

Opinion

Opinion by:

D.P. Marshall Jr.

Opinion

ORDER

1. Gilmore moves to suppress evidence from a search of his home. The material facts are not in dispute; so no hearing is needed.

2. Officers went to Gilmore's home in Jonesboro because of a report of possible drug use and drug sales there. While speaking with Gilmore at the front door, they smelled the odor of marijuana. They then did a protective sweep of the house, got a search warrant, and searched the home. They found the rifle and the pistol that form the basis of the Indictment in this case. Gilmore argues that both the sweep and the later warrant-based search violated the Constitution.

3. The protective sweep was lawful. Before leaving to get a search warrant, officers may check a home to ensure that no one else is present and to prevent destruction of evidence. *United States v. Jansen*, 470 F.3d 762, 765 (8th Cir. 2006). Gilmore hasn't argued or shown that the officers' actions during the first entry exceeded the scope of {2020 U.S. Dist. LEXIS 2} a lawful protective sweep.

Next, the warrant-based search. Gilmore argues that the smell of marijuana indicated only "that someone had smoked it, not that it was still there[.]" *Doc. 27 at 4*. And he suggests that the plain smell of marijuana doesn't support probable cause when state law allows for the use of medical marijuana. *Ibid*. He therefore believes that the warrant issued on less than probable cause.

This argument fails, too. The warrant here issued based on the report about possible drug use and sales at Gilmore's home, plus the odor of marijuana that the officers smelled while following up on that report. *Doc. 27-2 at 1*. Simple possession of marijuana remains illegal under federal law; and the sale of marijuana by a private person is illegal under both state and federal law. Further, probable cause doesn't require officers to rule out every possible innocent explanation. *United States v. Perry*, 908 F.3d 1126, 1129-30 (8th Cir. 2018). Instead, "only the probability, not a prima facie showing, of criminal activity is the standard of probable cause." *Illinois v. Gates*, 462 U.S. 213, 235, 103 S. Ct.

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2317, 76 L. Ed. 2d 527 (1983). The facts in the warrant affidavit were, at the very least, sufficient to justify officers' good-faith reliance on the warrant. *United States v. Leon*, 468 U.S. 897, 920-21, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

* * *

Neither the protective sweep of Gilmore's home nor the later{2020 U.S. Dist. LEXIS 3}
warrant-based search violated the Constitution. The motion to suppress, *Doc. 26*, is therefore denied.

So Ordered.

/s/ D.P. Marshall Jr.

D.P. Marshall Jr.

United States District Judge

September 30, 2020

1.)

Kenneth Wayne Gilmore
23-3002

Affidavit

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

"II Facts"

The COURT ERRED in denying Gilmore Motion to suppress Absent proof of oath or Affirmation as Required by State Law, Rules of Procedure And Supreme Court Administrative Order.

After Gilmore Filed his First motion to suppress the United States Responded Asserting the search was pursuant to an Affidavit and Search Warrant Attached to their Reply obtained by officers on the day of the search. (R. Doc 26.30 w/ Government's Ex 1 (A) And 2 (B) Neither the Affidavit or Search Warrant were Filed marked or certified as true and correct by the court clerk (R. Doc 30-1 And 30-2 (Government's Ex 1. (A) And 2 (B) The Court denied Gilmore Motion without a hearing (R. Doc. 31) Only then did the United States assert a different officer had obtained the warrant via Electronic Request via cell phone and email over the email server run by the City of Jonesboro using a city owned computer in the lead officer's vehicle at the residence and by phone call from the officer's city owned cell phone from the vehicle. (R. Doc 57 At p. 2, with Government's Ex 1, 2 And 3.) The purport warrant request was to Judge David Boling, a Municipal Court Judge for the City of Jonesboro, who did not have felony jurisdiction.

2.) (See style of the WARRANT. GOVERNMENT'S ex. 3 at p. 1

This new REVELATION prompted GILMORE'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 the GILMORE had BEEN provided with ALL AVAILABLE MATERIAL. (R. Doc 64, DEFENSE ex. 1 at p. 1-2) 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 OFFICER 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 2/28/2022. (R Doc. 65) JASON RATLIFF testified he WAS the IT DIRECTOR for JONESBORO, ARKANSAS, RATLIFF SEARCHED the CITY'S system SERVER for AND COULD NOT find ANY email FROM BAILEY to BOLING OR FROM BOLING back to BAILEY on September 20, 2018 (Supp. Tr., Vol. 1, p. 63-65). Two SEPARATE FELONY CASES WERE filed in the CRAIGHEAD County Circuit Court Resulting from the SEARCH AND subsequently dismissed AND neither one CONTAINS

3)

the Required Filings, OR An indication that they were Filed under Seal, A point raised by Wilmore 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 (R Doc. 106-1 Defendants Ex. 1 to status Report.) based on the entire Record, it is Clear A mistake was made. United States V. Hogan 539 F.3d 916, 921 Cir. 2008 internal quotation mark omitted.)

The Fourth Amendment of the United States Constitution provides

The Right of the people to be SECURE in their person, house, paper, And effects, Against UNREASONABLE SEARCH And SEIZURES, shall not be violated, And no WARRANTS shall issue, but upon probable CAUSE, supported by Oath Affirmation. And particularly describing the place to be searched, And the PERSONS OR things to be seized.

The SEARCH WARRANT dont HAVE A NAME ON it because these OFFICERS dont know who stay at the Residence, AS YOU CAN SEE the SEARCH WARRANT HAVE Font letter, No docket number, Not Filed with the Clerk of the court. September 20, 2018 Thursday Jonesboro ARKANSAS dont EVEN hold court, The Judge was located the city of lake city, Ark did not brake for lunch to AFTER NOON, See Exh R Doc. 106-1 Defendants ex. 1 to status Report) (Would shed light on Corruption)

I declare under penalty of perjury

Kenneth Wayne Shure
11/30/24 20-3802