United States District Court

For The Central District of California

UNITED STATES OF AMERICA

Plaintiff,

v.

TAC TRAN,

Defendants-Appellant.

CR-2:12-01016-ODW-1
CV-2:19-04025-ODW

ORDER FOLLOWING ORDER FROM NINTH CIRCUIT VACATING DENIAL OF DEFENDANTS' AND APPELLANTS' 2255 MOTION AND REMAND TO FURTHER DEVELOP EVIDENCE OF LEGALITY OF SEARCH OF RESIDENCE

I. BACKGROUND

On July 12, 2012 law enforcement had reason to suspect that Tran, a parolee, was engaged in narcotics trafficking. Tran came to the attention of the authorities via court authorized wire taps while investigating similar activity of an individual by the name of Tang who resided in San Diego. Tang and Tran discussed brokering large quantities of ecstasy, heroin, cocaine and methamphetamine. During the communications between Tang and Tran, including SMS messages, intercepted calls and surveillance, it was confirmed that Tran, while on parole for Attempted Extortion would drive his motorcycle between the Los Angeles area and San Diego to deliver methamphetamine to Tang. Those wire taps also alerted the authorities to a possible stash house located at 2514 Abonado Place in Rowland Heights. Surveillance of the stash house revealed Tran coming and going from the stash house and using a key to gain entry, sometimes late into the evening. They came to believe Tran was actually living at the location. The authorities also learned that one of the conditions of Tran's parole was a restriction on

his movements which limited his travel to no more than 50 miles from Los Angeles. Prior to the initiation of a parole compliance search of the stash house location, members of the Los Angeles County Sheriff's Operation Safe Streets Bureau - Asian Gang Task Force staked-out the stash house to confirm that Tran was likely residing there. Following one communication between Tang and Tran during which Tran gave Tang directions to the 2514 Abonado Place location, GPS pings of Tang's phone shortly thereafter, confirmed Tang's arrival at the stash house. This caused the officers to believe that Tran was holding himself out to be a resident of the location.

It was also apparent to the officers that several other individuals also resided at the location. On July 12, 2012 the officers decided to execute a parole compliance search of the stash house. After Tran was seen entering the house around 9:00 p.m., the officers approached the house with the intention of ascertaining if Tran was in violation of conditions of his parole. While standing in the driveway of the house next to the open garage door, officers observed Tran and two others standing around a table in the middle of the garage. When Tran observed one of the officers, he showed surprise and tossed a clear plastic baggie onto the table which was later confirmed to contain methamphetamine.

A. THE CURTILAGE ISSUE

On remand from the Ninth Circuit, the District Court was instructed to "determine where the deputies were standing when they saw Tran with the baggie of methamphetamine, [and further]the district court should consider precisely how far from the house and garage the LASD officers were standing, particularly the officer who saw Tran throw the baggie, among any other inquiries that the court deems appropriate." (Memorandum of Decision, at p.5.) That evidentiary hearing took place on January 10 and 19th.

As can be seen from the photographs taken of the front of the residence from the street, (12-cr-1016, DE-79-15) it appears that the driveway leading to the two-car

garage of the 2514 Abonado Place location is barely 1-1/2 car lengths from the sidewalk. There is but a slight elevation, probably no more than 1-foot between the floor of the garage and the sidewalk such that the interior of the garage is plainly visible from the sidewalk, and likely the street, when the overhead garage door is open, as it was when the officers approached. There was no fencing, vegetation or other visual obstruction or barrier between the sidewalk and the garage entrance. The deputy who observed Tran throw the baggie was standing directly to the left of the open garage door and approximately 12" from the threshold.

In *United States vs. Dunn*, the Supreme Court reaffirmed its holding in *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735 (1984) where the Court recognized that the Fourth Amendment protects the curtilage of a house and that the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. 466 U.S., at 180, 104 S.Ct., at 1742. In *Oliver* the Court identified "the central component of this inquiry as whether the area harbors the 'intimate activity associated with the sanctity of a man's home and the privacies of life.' " *Ibid*. (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886)).

"Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage, we

believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. See *California v. Ciraolo*, 476 U.S. 207, 221, 106 S.Ct. 1809, 1817, 90 L.Ed.2d 210 (1986) (POWELL, J., dissenting) (citing *Care v. United States*, 231 F.2d 22, 25 (CA10), cert. denied, 351 U.S. 932, 76 S.Ct. 788, 100 L.Ed. 1461 (1956);

United States v. Van Dyke, 643 F.2d 992, 993-994 (CA4 1981)). We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration-whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Dunn,* 104 S.Ct at 1140.

Applying those factors here, the driveway and garage were reasonably close to the home itself. The driveway and garage were not included within an enclosure surrounding the home; the nature of the uses to which the area is put would appear to provide an access to the garage and to the pathway leading to the front door; and the steps taken by the resident to protect the area from observation by people passing by weighs against finding the area to be curtilage. No steps were taken to protect the area from either public view or public access.

There clearly could be no reasonable expectation of privacy with respect to the interior of the garage or the driveway leading to the garage, when the garage doors were open. There was no effort to shield either the driveway where the officer was standing or the garage from view of passers-by or for that matter, motorists. The area could not be more open to public view. Indeed, as can be seen from Document 79-15 in case 12-cr-1016, the entire front of the house, not just the driveway, was paved. It would appear that the area was used to park vehicles. It also appears that a portion of the area which could be characterized as "driveway" was also used as access to the front door. There is no fencing to limit access from the sidewalk to the property known as 2514 Abonado Place. See also DE-6-2 filed in Case 19-CV-4025, the government's opposition to the suppression motion. It is difficult to imagine a way in which the area in question, which would be used by members of the public to access the front door,

is not open to the public. Absolutely no steps were taken by the homeowner to shield the area from public view.

While the Supreme Court cautions against establishing a check-list to determine the extent of curtilage, here no check list or formula is required. By any reasonable measurement, the area of and adjacent to the driveway are not within the ambit of constitutional protection afforded residential structures and could not reasonably be expected to fall within 4th Amendment protection.

While there could have been no expectation of privacy by those in the garage, and it is difficult to develop a bright line rule as to what does or does not constitute curtilage, the question, from a fourth amendment perspective is whether the officers where standing in a place they had a legal right to be. The answer to that question is yes.

B. THE PAROLE COMPLIANCE SEARCH DOES NOT IMPLICATE THE 4TH AMENDMENT

This argument was not raised at trial and therefore not raised on appeal. However, it alone provided sufficient justification for the officers' presence at the location. As an initial matter, it is undisputed that at the time of the arrests, Tran was a parolee. Under California law, as a condition of his state-court parole, Tran agreed to the warrantless and suspicion less search of his residence. *People v. Bravo*, 43 Cal.3d 600 (1987) (holding that a search pursuant to probation also permits a search without a warrant or reasonable suspicion, as the former includes the latter. "The condition of appellant's probation by which he consented to warrantless search at any time justified the search of his home undertaken by the officers who suspected that he was engaged in narcotics activity." *Id.* at 611. That is precisely the situation here, with one notable exception. Tran was not on probation, but on parole, which carries even a lesser expectation of privacy.

The Supreme Court in *United States v. Knights*, 534 U.S. 112, 119-120, (2001); explained that a probationer's reasonable expectation of privacy is "significantly diminished" when the defendant's probation order "clearly expressed the search condition" of which the probationer "was unambiguously informed." But the search term in *Knights* expressly authorized searches of the probationer's "place of residence," which was precisely what the officers searched. See *Knights*, 534 U.S. at 114–15.

The Supreme Court in addressing California law as it applies to warrantless searches of parolees observed: every prisoner eligible for release on state parole "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Cal.Penal Code Ann. § 3067(a) (West 2000). In *Samson v. California,* (2006) 547 U.S. 843, the United States Supreme Court "granted certiorari to decide whether a suspicionless search, conducted under the authority of [California Penal Code section 3067(a)] violates the Constitution. [It held that] it does not." *Id* at 846.

The High Court went on to emphasize "[a]s we noted in *Knights*, parolees are on the 'continuum' of state-imposed punishments. *Id*. at 119 (internal quotation marks omitted). On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is. *Samson* 547 U.S. at 843. As the Supreme Court has pointed out, "parole is an established variation on imprisonment of convicted criminals . . . . The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *(Citation)*. "In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements." *Pennsylvania Bd. of Probation and Parole v. Scott,* 524 U.S. 357 (1998). See also *United States v. Reyes*, 283 F.3d 446, 461 (C.A.2

2002) . . . ("[O]n the Court's continuum of possible punishments, parole is the stronger medicine; ergo, parolees enjoy even less of the average citizen's absolute liberty than do probationers" (citations and internal quotation marks omitted) *Id*. at 850. As the Supreme Court succinctly stated: "a probationer's privacy interest is greater than a parolee's." *Samson*, 547 U.S. 843 at 850.

Consequently, it is not a close question that the parole compliance search in this case was not only consistent with California law, but viewed in its totality, was performed to further a legitimate governmental interest that the parolee has not reverted to involvement in criminal activity, e.g. drug sales, and is complying with his conditions of release. (*Samson, supra*, 547 U.S. at 848. There can be little question that the law enforcement officers in this case had reason to hold a good faith belief that Tran resided at the location searched and was in violation of multiple conditions of his parole and a parole compliance search was warranted.

No credible argument can be made that a parolee, who is engaged in criminal activity should be allowed to continue engaging in such activity through the simple expedient of using someone else's dwelling in order to escape monitoring by law enforcement. The parolee agreed that in exchange for his early release from custody he would permit warrantless searches of his dwelling. When he holds out, to the world, that he resides at a place different that the dwelling on file with the parole authority, and there is evidence that he is using this other dwelling place to conduct his criminal activity, he cannot expect that the other dwelling should be shielded from search. To conclude otherwise merely nullifies the government's legitimate interest in assuring that he has not reverted to involvement in criminal activity, *Samson,* supra at 848 and elevates form over substance.

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II. CONCLUSION

In summary, in a context other than a parole compliance search of the residence

of a parolee, discussion of the propriety of government officers observing criminal activity while on the curtilage of a defendant's residence might raise 4th Amendment concerns. When, as here, the search is neither capricious nor harassing, the officers' intrusion onto the area surrounding a home is in furtherance of a legitimate governmental purpose and does not violate a parolee's constitutional rights. Parolees like Tran , for all intents and purposes, are still serving their custodial term, but outside the prison walls. There is a significantly diminished expectation of privacy in light of his expressed waiver of those rights as a condition of his early release from custody. Under California law, parolees receive and acknowledge receipt of "(3) An advisement that he or she is subject to search or seizure by a probation or parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause." Cal. Pen. C. section 3067(b)(3). (Emphasis added.) There was nothing improper in the search in this case and the evidence observed and seized prior to the issuance of the search warrant was appropriately admitted into evidence. The conviction should be affirmed..

IT IS SO ORDERED

Dated: February 6, 2023

OTIS D. WRIGHT, II
UNITED STATES DISTRICT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

TAC TRAN,

Petitioner-Defendant,

v.

UNITED STATES OF AMERICA,

Respondent-Plaintiff.

Civil Case No. 2:19-cv-4025-ODW

(Captioned as United States v. Tac Tran (1), No. 2:12-cr-1016-ODW-1, in related criminal case.)

ORDER GRANTING CERTIFICATE OF APPEALABILITY

Consistent with the Ninth Circuit's order dated April 20, 2021, Tac Tran's request for a certificate of appealability is hereby granted with respect to the following questions: (1) whether counsel for Tran were ineffective for failing to submit evidence to establish Tran's standing to challenge the legality of the search of Harson Chong's home; and (2) whether counsel for Tran were ineffective for failing to assert that officers had unlawfully entered the curtilage of Harson Chong's home, in violation of the Fourth Amendment, as a basis to suppress the evidence. To be clear, the bases for the Court's denying relief in its February 6, 2023 order are encompassed within this certificate of appealability.

SO ORDERED.

February 14, 2023

HON. OTIS D. WRIGHT
United States District Judge