No. 22-

IN THE

Supreme Court of the United States

MONTA OLANDER JORDAN, A/K/A GHOST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL G. BEERS
Counsel of Record
GLENN, FELDMANN, DARBY
& GOODLATTE
37 Campbell Avenue, S.W.
P. O. Box 2887
Roanoke, Virginia 24001-2887
(540) 224-8000
pbeers@glennfeldmann.com

Counsel for Petitioner

319767

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Whether The Court Of Appeals Misapplied United States v. Leon, 468 U.S. 897 (1984) When It Affirmed The District Court's Refusal To Suppress All Evidence Collected As A Result Of Search Warrants Authorizing Agents To Affix GPS Tracking Devices To Vehicles Owned Or Operated By Petitioner Monta Olander Jordan?

STATEMENT OF RELATED CASES

United States v. Jordan, No. 7:17-cr-00056, U.S. District Court for the Western District of Virginia. Judgment entered March 9, 2021.

United States v. Jordan, No. 21-4129, U.S. Court of Appeals for the Fourth Circuit. Judgment entered February 2, 2023.

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CITATION TO OPINION BELOW

Filed with this Petition is the unpublished Opinion of the United States Court of Appeals for the Fourth Circuit on February 2, 2023 (Fourth Cir. Document 53) ("Opinion") (Pet. App., 1a-6a) affirming the convictions of Petitioner Monta Orlander Jordan ("Jordan" or "Petitioner") and the Order denying Jordan's pro se Petition for Panel Rehearing and Rehearing En Banc dated March 7, 2023 (Fourth Cir. Document 58). (Pet. App. 17a.).

JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Virginia asserted subject matter jurisdiction pursuant to 18 U.S.C.S. § 3231 (Lawyers Edition 2013). The district court entered a final Judgment on March 11, 2021.

Jordan filed a timely Notice of Appeal to the United States Court of Appeals for the Fourth Circuit. The appellate court had jurisdiction to hear Jordan's appeal pursuant to 28 U.S.C.S. § 1291 (Lawyers Edition 2017). On February 2, 2023, the United States Court of Appeals for the Fourth Circuit affirmed Jordan's conviction. (Pet. App. 1a-6a.) Jordan then filed a pro se Petition for Panel Rehearing and Rehearing En Banc. In an Order dated March 7, 2023, the Fourth Circuit denied Jordan's Petition for Panel Rehearing and Rehearing En Banc. (Pet. App. 17a.)

The United States Supreme Court has jurisdiction pursuant to 28 U.S.C.S. § 1254(1) (Lawyers Edition 2017).

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

U.S. Constit., Fourth Amend.

> 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.

STATEMENT OF THE CASE

In 2017 federal and state law enforcement agencies within the Roanoke Valley of Virginia launched an investigation of reported drug trafficking by Jordan and several confederates. Agents' surveillance methods included GPS tracking on cars owned by Jordan between February and June 2017 and a wiretap on his telephone between July 5 and August 11, 2017. They also trained pole cameras on two residences and one business operation associated with Jordan. (C.A.J.A. 325-32.)

Proceedings in the District Court

A grand jury empaneled by the United States District Court for the Western District of Virginia on January 2, 2020, handed up a seven-count Third Superseding Indictment against Jordan and alleged co-conspirator Clifton Guerrant Myers ("Myers"). (C.A.J.A. 38-43.) On February 14, 2020, at the government's request the district court dismissed Counts Two and Seven. (C.A.J.A. 227A.) On January 4,

2021, the district court dismissed Count Six following Jordan's trial. (C.A.J.A. 1960-88.)

In Count One Jordan and Myers were charged with conspiracy to distribute controlled substances in violation of 21 U.S.C.S. §§ 846 and 841(a)(1) and (b)(1)(A) and (B) (Lawyers Edition 2010 and Cum. Supp. 2020). (C.A.J.A. 38-39).[1]

In Count Three the grand jury charged Jordan with possessing with distributive intent 400 grams of fentanyl on August 5, 2017. (C.A.J.A. 40.) Counts Four and Five were closely related attempted drug trafficking charges arising from events on August 10, 2017, the date Jordan was arrested in Bedford County, Virginia.

Jordan filed several pre-trial motions, including an Amended Motion to Suppress. (C.A.J.A. 44-66.) In that Fourth Amendment motion, Jordan requested that the court below ". . . SUPPRESS any and all evidence or statements gathered by law enforcement as a result of the issuance (and subsequent re-issuance) of the Search Warrants for Tracking Device." [Emphasis in original.] (C.A.J.A. 44.) The subject of the Amended Motion to Suppress was an Affidavit Detective J. B. Flippin of the City of Roanoke, Virginia, Police Department submitted to a state magistrate in support of an Application for Search Warrants for Tracking Device

[1] Prior to trial prosecutors filed an Amended Notice of Enhancement pursuant to 21 U.S.C.S. § 851 (Lawyers Edition 2016). Prosecutors in their notice informed Jordan they would rely at sentencing upon his felony conviction in 1995 for conspiracy to distribute crack cocaine. (C.A.J.A. 43A-G.) By filing this information, the government exposed Jordan to a mandatory, minimum sentence of 15 years.

("Application") on February 8, 2017. (C.A.J.A. 44-66.) Granting the Application, the magistrate issued warrants on February 8, 2017, which authorized officers to attach GPS tracking devices to two vehicles Jordan owned ("the GPS Search Warrants").

Jordan sought suppression of the evidentiary fruits of the GPS Search Warrants on the ground that Detective Flippin's Affidavit contained no particularized facts to establish probable cause to track the movements of his cars with GPS devices. (C.A.J.A. 45-49.) The district court held an evidentiary hearing on Jordan's Amended Motion to Suppress on February 5, 2020, at which Detective Flippin testified. (C.A.J.A. 94-216.)

In a Memorandum Opinion (Pet. App. 7a-16a) and Order (C.A.J.A. 227) dated February 11, 2020, the district court agreed with Jordan that Detective Flippin's Affidavit failed to establish probable cause for the GPS Search Warrants. The court upheld the GPS Search Warrants nonetheless under the good faith exception recognized in United States v. Leon, 468 U.S. 897 (1984).

Jordan was tried before a jury in Roanoke on February 19 through 25, 2020, on Counts One, Three, Four, Five, and Six of the Third Superseding Indictment. (C.A.J.A. 228-1315.) The jury found him guilty on those charges. (C.A.J.A. 1293-94.) Following the verdict, the court dismissed Count Six. (C.A.J.A. 1960-88.)

Proceedings in the Court of Appeals

Among the issues Jordan raised on appeal was whether the district court misapplied the good faith exception to the Fourth Amendment exclusionary rule when the court upheld the GPS Warrants and denied in his Amended Motion to Suppress. Rejecting Jordan's challenge to the district court's denial of his Amended Motion to Suppress, the United States Court of Appeals for the Fourth Circuit affirmed the district court in an unpublished Opinion on February 2, 2023. (Pet. App. 1a-6a) and a subsequent Order denying Jordan's Pro Se Motion Pursuant to Federal Rules and Appellate Procedure Rule 35 and 40 for Panel Rehearing and Rehearing En Banc on March 7, 2023. (Pet. App., 17a).

Jordan petitions the United States Supreme Court for certiorari review of the court of appeals' Opinion.

ARGUMENT

The Court Of Appeals Misapplied United States v. Leon, 468 U.S. 897 (1984) When It Affirmed The District Court's Refusal To Suppress All Evidence Collected As A Result Of Search Warrants Authorizing Agents To Affix GPS Tracking Devices To Vehicles Owned Or Operated By Petitioner Monta Olander Jordan.

In his Amended Motion to Suppress Jordan sought to exclude from trial ". . . any and all evidence or statements gathered by law enforcement as a result of the issuance (and subsequent re-issuance) of the Search Warrants." (C.A.J.A. 44.) Jordan assailed Detective Flippin's Affidavit in support of his Application for warrants authorizing agents to fasten GPS tracking devices to a 2002 Chrysler

Sebring and a white 2016 Mercedes Benz SUV. Jordan sought suppression of the evidentiary fruits of these GPS Search Warrants on the grounds that Detective Flippin's Affidavit did not establish probable cause in support of the Application.

At a hearing on Jordan's Amended Motion to Suppress on February 5, 2020 (C.A.J.A. 94-216), the government essentially conceded Detective Flippin's Affidavit on its face failed to demonstrate probable cause to support the GPS Search Warrants issued in February 2017 and subsequently extended by the City of Roanoke Circuit Court. (C.A.J.A. 164.) Relying upon Detective Flippin's hearing testimony, the government nevertheless opposed Jordan's Amended Motion to Suppress under the good faith exception defined in United States v. Leon, 468 U.S. 897 (1984).

Called as a witness by the government, Detective Flippin testified at the suppression hearing that he did not include in the Affidavit two sets of facts known to him concerning Jordan's drug trafficking. First, Detective Flippin did not disclose in his Affidavit or otherwise inform the magistrate that he had interviewed five individuals who identified Jordan as a drug dealer. (C.A.J.A. 173; 177-78.) Second, Detective Flippin omitted from the Affidavit any reference to intercepted telephone conversations during which Jordan talked about narcotics. Detective Flippin received these recorded conversations from Baltimore police officers at some unspecified point prior to February 2017. (C.A.J.A. 174.)

On February 11, 2020, the district court issued a Memorandum Opinion in which it agreed with the government's position that while the four corners of the Affidavit failed to meet Fourth Amendment standards for probable cause, Detective Flippin's hearing testimony was sufficient to salvage the GPS Search Warrants under the Leon good faith exception. (C.A.J.A. 217-27.)

To reach this result, the district court relied in particular upon the Fourth Circuit's application of Leon in United States v. McKenzie-Gude, 671 F.3d 452, 460 (4th Cir. 2011) and United States v. Thomas, 908 F.3d 68, 74 (4th Cir. 2018). The Fourth Circuit in McKenzie-Gude joined the Eighth and Eleventh Circuits by holding that Leon permits courts to consider ". . . uncontroverted facts known to [law enforcement] but inadvertently not presented to the magistrate," McKenzie-Gude, 671 F.3d at 460; accord, Thomas, 908 F.3d at 74.

In the district court's view, Detective Flippin's failure to mention in his Affidavit that several individuals had reported to police either buying drugs from Jordan or seeing him distribute narcotics was the result of oversight rather than deliberate concealment on the part of the detective. These informants' reports, coupled with the intercepted telephone conversations supplied by Baltimore officers, provided probable cause to believe the GPS Search Warrants, once executed, would unearth evidence of narcotics trafficking by Jordan, the district court declared. (C.A.J.A. 223-24.) Citing McKenzie-Gude, 671 F.3d at 460, the court observed that reports from reliable informants, once corroborated by investigating officers, could

establish probable cause to issue a search warrant. Detective Flippin's testimony concerning this additional evidence he knew about but neglected in good faith to incorporate into his Affidavit rendered agents' reliance upon the GPS Search Warrants reasonable, the court held.

> . . . Detective Flippin testified that he and other investigators had conducted several interviews of Jordan's co-conspirators. Flippin explained that these persons provided consistent accounts against their penal interest that they had either received narcotics from Jordan or witnessed him distribute narcotics to others. Flippin also testified that he and Task Force Officer Sloan were contacted by law enforcement officers from Baltimore with wiretap evidence of Jordan engaging in narcotics conversations. Flippin testified that he was aware of this information when applying for the Sebring and Mercedes Search Warrants, which makes the information obtained from these interview "uncontroverted facts" known to the officers at the time of application. McKenzie-Gude, 671 F.3d at 460.

C.A.J.A. 223-24.

The district court overextended the Leon good faith exception to uphold the GPS Search Warrants. The court of appeals' Opinion affirming the district court is consistent with Fourth Circuit precedent. But that Fourth Circuit jurisprudence is incompatible with Leon.

A circuit split exists with respect to whether Leon allows courts to consider information officers knew but inadvertently omitted from their search warrant applications. The Fourth Circuit since McKenzie-Gude, 671 F.3d at 452 has aligned itself with the Eighth and Eleventh Circuits, both of which maintain that a reviewing court undertaking the good-faith inquiry prescribed by Leon is not

confined to the four corners of the officer's sworn application for a search warrant. See e.g., United States v. Dickerman, 954 F.3d 1060, 1065 (8th Cir. 2020) ("When assessing the officer's good faith reliance on a search warrant . . . , we can look outside the four corners of the affidavit and consider the totality of the circumstances, including what the officer knew but did not include in the affidavit.") [internal quotations omitted]; accord, United States v. Martin, 297 F.3d 1308, 1320 (11th Cir. 2002).

Other circuits hold that reviewing courts must examine only the objective facts set out by the officer in his or her warrant application and supporting affidavit. See e.g., United States v. Helton, 35 F.4th 511, 522 (6th Cir. 2022) (confirming Sixth Circuit position that "the good faith exception to the exclusionary rule does not permit consideration of information known to a police officer, but not included in the affidavit, in determining whether an objectively reasonable officer would have relied on the warrant.") [internal citations omitted]; accord, United States v. Knox, 883 F.3d 1262, 1271-72 (10th Cir. 2018); United States v. Koerth, 312 F.3d 862, 871 (7th Cir. 2002); United States v. Thai Tung Luong, 470 F.3d 898, 904 (9th Cir. 2006) ("This Court has repeatedly held that all data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of the written affidavit given under oath.") [internal quotations omitted].

The United States Court of Appeals for the Fourth Circuit in affirming the district court's Leon analysis rejected Jordan's argument that McKenzie-Gude and Thomas, should be overruled as wrongly decided precedent. (Appellant's Brief, C.A. Document 28, pp. 17-18; Defendant's Pro Se Motion Pursuant to Federal Rules and Appellate Procedure Rule 35 and 40 for Panel Rehearing and Rehearing En Banc, C.A. Document 56.) This refusal by the Fourth Circuit to reexamine and overturn McKenzie-Gude and Thomas was erroneous as a matter of law.

The Supreme Court should resolve the split in circuits on this important question by holding that decisions such as McKenzie-Gude and Thomas are inconsistent with the Warrants Clause of the Fourth Amendment as applied in Leon. The position of the Sixth, Seventh, Ninth, and Tenth Circuits is better reasoned than the the conflicting approach taken by the Fourth, Eighth, and Eleventh Circuits.

As the United States Court of Appeals for the Tenth Circuit in 2018 observed astutely, its view that courts must be confined to the four corners of the officer's affidavit is faithful ". . . to the plain text of Leon itself." Knox, 883 F.3d at 1272. Under the most straightforward reading of Leon, the Tenth Circuit observed, an officer's reliance upon a defective search warrant is not reasonable unless the officer manifested *objective* good faith. The knowledge and subjective ruminations of the applicant officer are never enough to save a vacuous warrant under Leon. As the Tenth Circuit explained, the Supreme Court in Leon emphasized that reliance upon

a flawed warrant is unjustified unless the officer demonstrates "objective good faith." Leon, 468 U.S. at 923. Knox, 883 F.3d at 1272-73. Only if the officer's reliance is "objectively reasonable" shall the warrant qualify for protection under the Leon safe harbor. Leon, 468 U.S. at 922. The Leon Court went out of its way to "eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant." Id. at 922 and note 23; Knox, 883 F.3d at 1272-73.

Decisions such as McKenzie-Gude, 671 F.3d 452, 460 (4th Cir. 2011) and United States v. Thomas, 908 F.3d 68, 74 (4th Cir. 2018) turn Leon on its head. Those errant Fourth Circuit decisions call upon reviewing courts to undertake inquiries into the officer's "subjective beliefs," Leon, 468 U.S. at 922 and note 23, rather than focusing exclusively upon the objective information framed by the officer's affidavit.

By misapplying Leon in accordance with its own precedent, the United States Court of Appeals for the Fourth Circuit affirmed the district court's decision to uphold the GPS warrants. The unpublished Opinion should be reversed as fundamentally inconsistent with the good faith exception enunciated in Leon.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner Monta Olander Jordan's Petition for Writ of Certiorari and reverse his convictions and sentence.

Respectfully submitted,

Paul G. Beers
Counsel of Record
Glenn, Feldmann, Darby & Goodlatte
37 Campbell Avenue, S.W.
P. O. Box 2887
Roanoke, Virginia 24001-2887
Telephone: (540) 224-8000
pbeers@glennfeldmann.com

Counsel for Petitioner

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4129

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTA OLANDER JORDAN, a/k/a Ghost,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Michael F. Urbanski, Chief District Judge. (7:17-cv-00056-MFU-1)

Submitted: November 9, 2022 Decided: February 2, 2023

Before HARRIS and RUSHING, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Paul G. Beers, GLENN, FELDMANN, DARBY & GOODLATTE, Roanoke, Virginia, for Appellant. Christopher R. Kavanaugh, United States Attorney, Roanoke, Virginia, Jennifer R. Bockhorst, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Abingdon, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A federal jury convicted Monta Olander Jordan of conspiracy to possess with intent to distribute and distribute heroin, Fentanyl, methamphetamine, and cocaine, in violation of 21 U.S.C. § 846; possession with intent to distribute Fentanyl, in violation of 21 U.S.C. § 841(a); attempt to possess with intent to distribute cocaine, in violation of § 841(a); attempt to possess with intent to distribute heroin, in violation of § 841(a); and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Prior to the sentencing, the district court granted in part Jordan's Fed. R. Crim. P. 29, 33 motion for a judgment of acquittal or a new trial based on the Government's failure to tender exculpatory and impeachment evidence to the defense; the court thus vacated the firearm conviction. The court sentenced Jordan to 240 months of imprisonment, and he now appeals. We affirm.

On appeal, Jordan first argues that the district court erred in denying his motion to suppress all evidence obtained through the tracking of two of his vehicles, asserting that the affidavits in support of the warrants lacked probable cause and the court incorrectly found that the good faith exception applied. In reviewing a district court's ruling on a motion to suppress, we review legal conclusions de novo and the underlying factual findings for clear error, viewing the evidence in the light most favorable to the government. *United States v. Cloud*, 994 F.3d 233, 241 (4th Cir. 2021). The Fourth Amendment requires that the police obtain a warrant before installing a tracking device on a target's vehicle. *United States v. Jones*, 565 U.S. 400, 404 (2012). In an effort to deter police misconduct, courts apply the exclusionary rule to "evidence obtained in violation of a defendant's

Fourth Amendment rights." *United States v. Stephens*, 764 F.3d 327, 335 (4th Cir. 2014). But "exclusion of evidence has always been the last resort, not the first impulse," because it "exacts a heavy toll on both the judicial system and society at large." *Id.* (cleaned up). The exclusionary rule, therefore, is not applied "when the police act with an objectively reasonable good-faith belief that their conduct is lawful." *Id.*

In determining whether officers acted in good faith, we "begin with the assumption that there was not a substantial basis for finding probable cause" and question only whether "reliance on" the warrant at issue "was nevertheless reasonable." *United States v. Andrews*, 577 F.3d 231, 236 n.1 (4th Cir. 2009). "Usually, searches conducted pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *United States v. Perez*, 393 F.3d 457, 461 (4th Cir. 2004) (internal quotation marks omitted). However, good faith does not apply when the warrant's supporting affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *United States v. Leon*, 468 U.S. 897, 923 (1984) (internal quotation marks omitted).

In assessing whether official belief in probable cause was "entirely unreasonable," our "inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal," under all the circumstances. *Id.* at 922 n.23 (internal quotation marks omitted); *United States v. McKenzie-Gude*, 671 F.3d 452, 458-59 (4th Cir. 2011) ("*Leon* requires that [this Court] assess whether the officers harbored an objectively reasonable belief in the existence of this factual predicate."

(internal quotation marks omitted)). "[A]n assessment of an officer's objective reasonableness . . . cannot turn on the subjective good faith of individual officers," but we may "consider[] the uncontroverted facts *known* to the officer, which he has inadvertently failed to disclose to the magistrate." *McKenzie-Gude*, 671 F.3d at 460 (internal quotation marks omitted); *see also United States v. Thomas*, 908 F.3d 68, 74 (4th Cir. 2018) (noting that we can look beyond the four corners of the affidavit because the omission was inadvertent and not in bad faith). We "look to all the facts and circumstances of the case, including the nature of the unlawful activity alleged, the length of the activity, and the nature of the property to be seized." *United States v. Farmer*, 370 F.3d 435, 439 (4th Cir. 2004).

Here, the Government conceded that the contested warrant applications failed to establish probable cause. However, based on the officer's testimony regarding information known to him at the time of the applications, and the facts that a neutral magistrate granted the applications and two state court judges later renewed them, the district court determined that the officer had a reasonable belief that the resulting searches and gathering of evidence were lawful. We agree. The officer testified that he had recent information from several cooperating witnesses who provided information on Jordan's drug dealing activities and also made statements against their own penal interest, information that he inadvertently left out of the warrant applications. Therefore, the officer's belief that he possessed probable cause was not unreasonable.

Jordan also challenges the district court's denial of his motion for a judgment of acquittal or a new trial on the drug counts based on the Government's violation of *Brady v.*

Maryland, 373 U.S. 83 (1963). We review a district court's denial of a Rule 33 motion for a new trial for abuse of discretion. *United States v. Wilson*, 624 F.3d 640, 660 (4th Cir. 2010). To receive a new trial based on a *Brady* violation, Jordan must "show that the undisclosed evidence was (1) favorable to him either because it is exculpatory, or because it is impeaching; (2) material to the defense, i.e., prejudice must have ensued; and (3) that the prosecution had [the] materials and failed to disclose them." *Id.* at 661 (internal quotation marks omitted). To establish that such favorable evidence is material, the defendant must show that, had the evidence been disclosed, there is a reasonable probability that the outcome of the proceeding would have been different. *United States v. Caro*, 597 F.3d 608, 619 (4th Cir. 2010).

Here, the Government failed to produce the recording of the interview of a cooperating witness who provided information to the Government about Jordan's activities. During the course of that interview, the witness took sole responsibility for the firearms Jordan was charged with possessing in the § 924(c) count. The district court found that this information, while material to the firearm charge, was not material to the drug charges. Given the extensive evidence of Jordan's involvement in narcotics trafficking, we agree. As the district court noted, the Government presented substantial evidence, unrelated to the firearm charge, that Jordan distributed controlled substances over the course of more than a year. Therefore, the court did not err in denying Jordan's request to vacate his drug convictions based on the *Brady* violation.

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case No. 7:17-CR-00056**
	)	
	)	**By: Michael F. Urbanski**
MONTA ORLANDO JORDAN, et al.	)	**Chief United States District Judge**

MEMORANDUM OPINION

This matter comes before the court on defendant Monta Orlando Jordan's ("Jordan") amended motion to suppress "any and all evidence or statements gathered by law enforcement as a result of the issuance (and subsequent re-issuance) of the Search Warrants for Tracking Device" ("Search Warrants"). Def.'s Am. Mot. Suppress, ECF No. 193 at 1. Claiming the search warrant affidavits are facially deficient, Jordan seeks suppression of all evidence obtained "as a result of or in relation to the GPS tracking devices" as "fruit of the poisonous tree." Id. at 7. The government responded, arguing that even if the warrant applications were deficient, the "good faith" exception saves the evidence obtained. Gov't. Resp., ECF No. 199 at 1. A hearing was held on February 5, 2020 during which the court heard the testimony of Detective J.B. Flippin ("Detective Flippin"), an officer with the Roanoke City Police Department ("RCPD"), who prepared affidavits for the Search Warrants in question. For the reasons that follow, Jordan's request to suppress the evidence obtained as a result of the Search Warrants is **DENIED.**

I.

According to the affidavits for the Search Warrants, Roanoke Valley Regional Drug Unit ("the Unit") investigated Jordan for suspected distribution of cocaine, methamphetamine, and heroin in the Roanoke Valley during 2016 and 2017. Id. at 2. At the February 5, 2020 hearing, Detective Flippin testified that based on surveillance; statements against penal interest made by confidential informants; information obtained by other law enforcement jurisdictions in the course of their own unrelated investigations; trap and trace monitoring; and other sources, the Unit believed that probable cause supported Jordan's involvement in narcotics distribution and that attaching GPS devices to his vehicles would aid their investigation.

On February 8, 2017, RCPD detectives applied for the Search Warrants to place GPS tracking devices on a gold 2002 Chrysler Sebring (the "Sebring") and a white 2016 Mercedes Benz SUV (the "Mercedes"), the latter of which was driven primarily by his longtime girlfriend, Amany Raya. Id. at 1-3. Later, in May 2017, the RCPD applied for search warrants for two additional vehicles, one of which was a 2005 Lincoln Sedan (the "Lincoln"). The Search Warrants were initially reviewed and approved by a state magistrate and were later renewed three times by two state circuit court judges. ECF No. 199 at 5. Detective Flippin testified that for renewal, it is RCPD policy to notify the Commonwealth's Attorney of their desire to seek a warrant extension, after which it is the Commonwealth's Attorney's responsibility to approach a competent court with the request.

The sworn affiant for the Search Warrants in question was Detective Flippin. ECF No.

193 at 2. He has been with RCPD since 2008, is currently assigned to the Unit, and "has experience with narcotic investigations that has led to the seizures of narcotics and arrest of narcotics traffickers related to heroin as well as other narcotics." ECF Nos. 199-1 at 6, 199-2 at 6. He testified to having significant experience applying for search warrants. He also testified that it is RCPD practice to include in a search warrant application the minimum amount of accurate factual information necessary to establish probable cause. Detective Flippin cited as a reason the need to protect the investigation. He testified that on occasion, a magistrate will find a search warrant application to be insufficient. In these instances, Detective Flippin will reapply with additional information.

Jordan's argument focuses on the minimalist nature of the applications for the Search Warrants, arguing that they are "wholly lacking in any probable cause whatsoever." ECF No. 193 at 2 (emphasis removed). While conceding at oral argument that the applications on their face do not provide probable cause, the government argues they are admissible because the officer reasonably relied on their validity under United States v. Leon, 468 U.S. 897, 926 (1984). The court agrees with the government and declines to apply the exclusionary rule because the officer had a reasonable belief that probable cause existed at the time of application and Detective Flippin's failure to disclose more information on the affidavit was inadvertent, not due to bad faith.

II.

Under the Fourth Amendment,[1] citizens are protected from unreasonable searches and

[1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

seizures. U.S. Const. amend. IV. Attaching a GPS tracking device to an individual's vehicle to monitor its movements constitutes a search within the meaning of the Fourth Amendment. United States v. Jones, 565 U.S. 400, 402 (2012). For a search to be reasonable, it must either be approved by the issuance of a search warrant backed by probable cause or fall within one of the established exceptions to the search warrant requirement. Here, because the government does not assert an exception to the search warrant requirement applies, a warrant is required for the search to be valid, and the warrant must be supported by probable cause found by a "neutral and detached" magistrate. Gerstein v. Pugh, 420 U.S. 103, 112 (1975). When a search warrant is found to be facially deficient, courts may apply the exclusionary rule as a remedy, suppressing all the evidence obtained pursuant to the invalid warrant. Davis v. United States, 564 U.S. 229, 231-232 (2011). However, evidence obtained by officers reasonably relying on a subsequently invalidated search warrant is not subject to the exclusionary rule. United States v. Leon, 468 U.S. 897, 926 (1984).

Jordan argues the affidavits for the Search Warrants lacked sufficient information to establish probable cause. Probable cause exists when, given all the circumstances set forth in the warrant application, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238-39 (1983). Therefore, "[a]n affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause…his action cannot be a mere ratification of the bare conclusions of others."

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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." U.S. Const. amend. IV.

Id. at 239. Reviewing courts apply the "clear error" standard to determine whether the magistrate erred in issuing the search warrant. Id. A "strong presumption of validity" attaches to an affidavit in support of a search warrant and reviewing courts are limited to the "four corners of the application documents." United States v. Wilford, 961 F.Supp.2d 740, 773 (D. Md. 2013). Indeed, a magistrate's assessment of facts when finding probable cause should be awarded "great deference." United States v. Anderson, 851 F.2d 727, 728 (4th Cir. 1988).

The affidavits for the Search Warrants are sparse. The first, regarding the Sebring, states five facts to demonstrate probable cause: (1) Jordan was under investigation for narcotics trafficking; (2) Detective Flippin has seen Jordan driving the vehicle within 72 hours of filing the application; (3) the vehicle is registered to Jordan; (4) Detective Flippin suspects Jordan of distributing narcotics; and (5) Detective Flippin "knows it to be common for individuals that distribute narcotics to drive multiple vehicles to distribute narcotics/collect drug proceeds to attempt to not alert police detection." ECF No. 199-1 at 5. The second affidavit, regarding the Mercedes, includes six facts to demonstrate probable cause: (1) Jordan was under investigation for narcotics trafficking; (2) Detective Flippin believes Jordan is dating Amany Raya; (3) Detective Flippin believes Jordan owns the vehicle; (4) Raya has been seen driving it within the past fifteen days; (5) Detective Flippin believes Raya and Jordan distribute drugs; (6) Detective Flippin "knows it to be common for individuals that distribute narcotics to drive multiple vehicles to distribute narcotics/collect drug proceeds to attempt to not alert police detection." ECF No. 199-2 at 5. Jordan contends these facts amount to conclusions without any supporting proof in the form of informant statements, witnesses, or specific transactions,

among other things. ECF No. 193 at 2-3. The court agrees.

The court finds that the affidavits for the first two Search Warrants to be insufficient to provide probable cause that "contraband or evidence of a crime will be found in a particular place." United States v. Williams, 974 F.2d 480, 481 (4th Cir. 1992). Probable cause is evaluated based on the "totality of the circumstances," meaning, the information and inferences derived from the facts alleged in the affidavit. Here, no corroborated facts are offered; rather the affidavits state merely that Jordan is under investigation for narcotics trafficking. Simply stating that Jordan is suspected of criminal activity falls short of establishing probable cause. See, e.g., United States v. Wilhelm, 80 F.3d 116, 120-21 (4th Cir. 1996). For an affidavit to demonstrate a "fair probability" that evidence of a crime would be found at the search site, it must at a minimum provide a "substantial basis" for believing there has been a crime. Illinois v. Gates, 462 U.S. 213, 238-39 (1983). Here, the court is given nothing more than the "bare conclusions of others." Id. at 239.

Regardless, the court exercises its discretion to proceed directly to the question of good faith. See Leon, 468 U.S. at 925; United States v. Legg, 18 F.3d 240, 243 (4th Cir. 1994).

III.

The evidence discovered pursuant to the Search Warrants is admissible, even if the warrants are invalid for lack of probable cause, because investigators reasonably relied on their validity. United States v. Leon, 468 U.S. 897 (1984). In Leon, the Supreme Court held that evidence obtained by an officer who relied, in good faith, on a facially invalid search warrant is still admissible if the officer had an "objectively reasonable belief" that there was

probable cause to execute the search. Id. at 919. The Court states that the test is whether a "reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Id. at 922 n. 23. If the error was on the part of the judge, not the officer, then the exclusionary rule would not further the ends of justice. Id. at 919-21. The exclusionary rule endeavors to protect defendants from the use of illegally obtained evidence against them, "to deter future unlawful police conduct." United States v. Calandra, 414 U.S. 338, 347 (1974).

At the February 5, 2020 hearing, counsel for Jordan argued that the Sebring and Mercedes affidavits were so facially deficient that no reasonable officer, let alone one with over ten years of experience, could have an "objectively reasonable belief" in their validity. Leon, 468 U.S. at 919. In reaching this question, the court is permitted to consider information beyond the four corners of the application such as the "uncontroverted facts" known to an officer that were "inadvertently not presented to the magistrate." United States v. McKenzie-Gude, 671 F.3d 452, 460 (4th Cir. 2011). Additionally, courts can look to subsequent judicial determinations made based on the original warrant application. United States v. Lalor, 996 F.2d 1578, 1583 (4th Cir. 1993) (discussing how the fact that two judicial officers determining that the affidavit provided probable cause to search indicates that officer's reliance on the affidavit is objectively reasonable).

At the suppression hearing, the government demonstrated that probable cause for the search existed at the time of the application. Detective Flippin testified that he and other investigators had conducted several interviews of Jordan's co-conspirators. Flippin explained

that these persons provided consistent accounts against their penal interest that they had either received narcotics from Jordan or witnessed him distribute narcotics to others. Flippin also testified that he and Task Force Officer Sloan were contacted by law enforcement officers from Baltimore with wiretap evidence of Jordan engaging in narcotics conversations. Flippin testified that he was aware of this information when applying for the Sebring and Mercedes Search Warrants, which makes the information obtained from these interviews "uncontroverted facts" known to the officer at the time of application. McKenzie-Gude, 671 F.3d at 460. Sources of information making statements that are consistent with each other, against their own penal interests, and corroborated by officer investigation is more than sufficient to establish probable cause. Id. at 462. ("an affidavit based on hearsay can establish probable cause depending on 'all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information' and the 'degree to which an informant's story is corroborated'") (quoting United States v. Hodge, 354 F.3d 305, 309 (4th Cir. 2004)). Courts need not disregard specific, uncontroverted facts known to officers, based on their knowledge and experience, including the unique knowledge and experiences of the affiant. Herring v. United States, 555 U.S. 135, 145 (2009). At the hearing, the court found Detective Flippin to be a credible witness.

At the February 5, 2020 hearing, Jordan also argued the existence of bad faith, which would preclude the application of Leon. As evidence of bad faith, Jordan cited: (1) Detective Flippin's decision to apply for a search warrant in state court, despite the ongoing investigation into Jordan at the federal level; and (2) Detective Flippin's inclusion of new facts in the May

12, 2017 Lincoln affidavit that were not included in the February Search Warrant affidavits. Jordan's counsel suggested that Detective Flippin was gaming the system by seeking state court warrants based on barebones affidavits in an otherwise federal investigation. Additionally, Jordan suggested that Flippin knew the February Search Warrant affidavits were insufficient, as evidenced by the fact that additional information was included in the May Lincoln affidavit. The Lincoln affidavit mirrored the Sebring and Mercedes affidavits but added a reference to the interviews he had conducted indicating that Jordan was their source of supply for narcotics. ECF no. 212-4 at 5.

The court does not conclude that Detective Flippin acted in bad faith. With regard to the decision to seek state court warrants, Detective Flippin testified that as a Roanoke City Police Officer, his normal procedure is to seek state warrants. When asked why he included the five interviews in the Lincoln application but not the earlier Sebring or Mercedes applications, Detective replied that the omission of the reference to the interviews was an oversight. Having listened to the testimony of Detective Flippin, the court finds this inadvertence not to be indicative of bad faith. United States v. Thomas, 908 F.2d 68, 74 (4th Cir. 2018).

Finally, the government contends that Detective Flippin's reliance on the warrant was reasonable because three separate state judicial officers on a total of four occasions found the search warrant applications to be supported by probable cause. ECF No. 199 at 6. The confirmation of a search warrant's validity by more than one judge helps support the argument of good faith reliance. United States v. Perez, 393 F.3d 456, 461 (4th Cir. 2004); Lalor, 996

F.2d at 1583. "[I]t is the magistrate's responsibility to determine whether probable cause exists, and officers cannot be expected to second-guess that determination in close cases." United States v. Mowatt, 513 F.3d 395, 404 (4th Cir. 2008) (abrogated on other grounds by Kentucky v. King, 563 U.S. 452 (2011)).

The court finds that Detective Flippin acted in good faith reliance on the Search Warrants. While the affidavits themselves did not on their face reflect that Flippin had conducted multiple interviews indicating that Jordan was trafficking in illegal narcotics, the court finds that the absence of this information from the warrant application was an oversight and not the product of bad faith. The applications were approved by the state magistrate and extended by two state circuit judges over several months. Under these circumstances, the Leon good faith exception bars application of the exclusionary rule in this case. Jordan's motion for suppression of evidence borne of the GPS tracking devices is **DENIED**.

An appropriate Order will be entered.

ENTERED: 02/11/2020

/s/ Michael F. Urbanski

Michael F. Urbanski
Chief United States District Judge

FILED: March 7, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4129
(7:17-cr-00056-MFU-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MONTA OLANDER JORDAN, a/k/a Ghost

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Harris, Judge Rushing, and Senior Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk