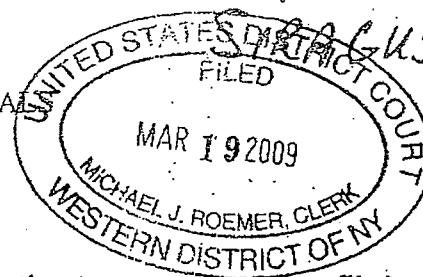


MANDATE

07-0505-cr
United States v. SykesUNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

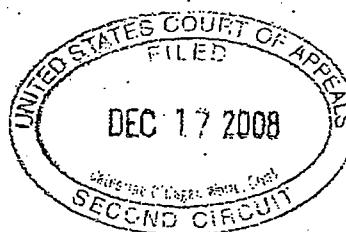


Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at <http://www.ca2.uscourts.gov/>). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 17th day of December, two thousand and eight.

PRESENT:

HON. PETER W. HALL,
HON. DEBRA ANN LIVINGSTON,
Circuit Judges,
HON. COLLEEN McMAHON,
District Judge.



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

07-0505-cr

TERRANCE SYKES,

Defendant-Appellant.

* The Honorable Colleen McMahon, of the United States District Court for the Southern District of New York, sitting by designation.

ISSUED AS MANDATE

1/7/09

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For Defendant-Appellant: SCOTT M. GREEN, Rochester, New York.

For Appellee: CHRISTOPHER V. TAFFE, Assistant United States Attorney for Terrance P. Flynn, United States Attorney for the Western District of New York, Rochester, New York.

Appeal from the March 12, 2007, judgment of the United States District Court for the Western District of New York (Siragusa, J.) convicting Defendant-Appellant of multiple counts and imposing a sentence of a life term of imprisonment.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is **AFFIRMED**.

Terrance Sykes appeals from his conviction of: (1) one count of possession with intent to distribute fifty grams or more of a mixture and substance containing a detectable amount of cocaine base in violation of 21 U.S.C. § 841(b)(1)(A); and (2) one count of simple possession of five or more grams of cocaine base in violation of 21 U.S.C. § 844(a). We assume the parties' familiarity with the facts, the procedural history, and the issues on appeal.

In this appeal, Sykes challenges his conviction and sentence on three grounds: (1) the warrant pursuant to which law enforcement searched his residence and vehicle was not supported by probable cause; (2) the vehicle searched by law enforcement was not within the scope of the warrant; and (3) his sentence is unconstitutionally cruel and unusual.

Defendant's principal argument is that the district court erred in failing to suppress on Fourth Amendment grounds evidence seized as a result of the searches of Defendant's residence and vehicle. "With respect to a denial of the motion to suppress, we review the district court's factual findings for clear error, and review its conclusions of law *de novo*." *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006).

Defendant first argues that the warrant to search his apartment and its curtilage was not supported by probable cause. A judicial officer issuing a warrant must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . 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 (1983). The probable cause determination here was based on the law enforcement officer's observations and firsthand knowledge and on statements made by a known, reliable confidential informant, which were corroborated by law enforcement. The "totality-of-the-circumstances" therefore supports issuance of the warrant. *See id.*; *United States v. Gagnon*, 373 F.3d 230, 235 (2d Cir. 2004). Likewise, Defendant's argument that we may not apply the good faith exception because the "affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" lacks merit. *United States v. Singh*, 390 F.3d 168, 181 (2d Cir. 2004).

Plaintiff next challenges the search of his vehicle as beyond the scope of the warrant.¹

¹ The warrant authorized a search of "# 263 Emerson St., down . . . described as a two story, multi-family dwelling," and further specified that entry was to be made through a particular door leading "directly into the apartment." The warrant also stated that the "areas to be searched [are] the entire premises described above, including all its storage areas and curtilage." Relying on the language of the warrant, the district court found that the automobile search was proper because the warrant authorized a search of the "premises" and "its . . . curtilage."

We take this opportunity to note, as Judge Friendly did almost thirty years ago, "[t]erming a particular area curtilage expresses a conclusion; it does not advance Fourth Amendment analysis." *United States v. Arboleda*, 633 F.2d 982, 992 (2d Cir. 1980). Defining an area as curtilage is a legal conclusion that "relies essentially on factual determinations." *United States v. Reilly*, 76 F.3d 1271, 1275 (2d Cir. 1996). We base our definition of the curtilage of particular premises on "factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself," with a special focus on "whether the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life." *United States v. Titmore*, 437 F.3d 251, 258 (2d Cir. 2006) (internal quotation marks omitted).

The factual determination of whether a vehicle is included within the scope of particular premises' curtilage may vary depending on, *inter alia*, whether the premises host a single-family or a multi-family dwelling. Compare *United States v. Freeman*, 685 F.2d 942, 955 (5th Cir.

Because we find that any error was harmless with respect to the search of Defendant's vehicle, however, we need not reach the question of whether any constitutional violation occurred.

Where an error of constitutional dimension occurs, we must vacate a conviction unless we are "convinced that the error was harmless beyond a reasonable doubt." *United States v. Reifler*, 446 F.3d 65, 87 (2d Cir. 2006). As "we consider the nature of the violation and the context in which it occurred" to evaluate the error's likely impact, several factors are relevant: (1) the strength of the Government's case; (2) the degree to which the inadmissible evidence was material to a critical issue; (3) the extent to which the evidence was cumulative; and (4) the degree to which the Government emphasized the evidence in its presentation of its case. *Id.* Though all of these factors are relevant, we have stated that the strength of the Government's case is "probably the single most critical factor." *Id.* (internal quotation marks omitted).

The strength of the Government's case against Sykes was overwhelming. Found in the bag beneath Sykes when he was arrested was enough cocaine alone to meet the threshold for possession with intent to distribute 50 grams or more of a substance containing cocaine.

1982) (search warrant for defendant's house justified search of vehicle "parked off the street and close to the house") with *Mack v. City of Abilene*, 461 F.3d 547, 554 (5th Cir. 2006) (finding apartment dweller's parking space was not within the curtilage of his apartment). The curtilage analysis of a unit within a multi-family dwelling will also depend on the degree of privacy tenants of that particular multi-family dwelling can reasonably expect in a particular location on the premises. See e.g., *United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985) ("[T]he common halls and lobbies of multi-tenant buildings are not within an individual tenant's zone of privacy even though they are guarded by locked doors."); *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) (defendant could "reasonably expect privacy" in the backyard area of a multi-unit residence where the backyard was "sufficiently removed and private in character").

In light of these considerations, we would require additional fact finding by the district court in order to determine whether Sykes had a reasonable expectation of privacy in the backyard area where the vehicle was located that would bring it within the scope of the curtilage of his apartment. Because we find that any improper admission of evidence found in the vehicle was harmless, however, neither we nor the district court need conduct that further Fourth Amendment analysis.

base—notwithstanding the almost 700 grams of cocaine Sykes concedes were found elsewhere in the residence. *See 21 U.S.C. § 841(a)(1), (b)(1)(A)(iii).* The fact that Sykes was lying on top of the bag when the officers found him in the apartment would be sufficient for a jury to connect him to at least the 57.16 grams of cocaine Sykes concedes were found in that bag. As such, the evidence obtained from the vehicle was cumulative and not material to the establishment of a critical fact. Additionally, the evidence was not emphasized by the prosecutor in arguments to the jury, and the jury's deliberations were speedy, indicating that they did not appear to regard the case as a "close" one. *See United States v. Dhinsa*, 243 F.3d 635, 649-50 (2d Cir. 2001).

We therefore conclude that it is not only "highly probable that the error did not contribute to the verdict," *United States v. Columbo*, 909 F.2d 711, 713 (2d Cir. 1990) (internal quotation marks omitted), but also "beyond a reasonable doubt that a rational jury would have rendered a verdict of guilty absent the alleged error." *Dhinsa*, 243 F.3d at 649; *see also United States v. Lombardozzi*, 491 F.3d 61 (2d Cir. 2007); *Reifler*, 446 F.3d at 87. As we "possess[] a sure conviction that the error did not prejudice the defendant," any improper admission of evidence from Sykes's vehicle was harmless. *Dhinsa*, 243 F.3d at 649.

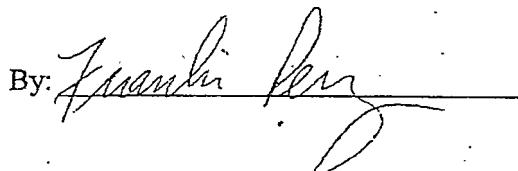
Finally, Defendant argues that his sentence of life imprisonment is disproportionate to his crime and thus violates the Eighth Amendment as "cruel and unusual." Defendant's sentence does not implicate the Eighth Amendment, which "forbids only extreme sentences that are grossly disproportionate to the crime." *United States v. Yousef*, 327 F.3d 56, 163 (2d Cir. 2003) (internal quotation marks omitted). The Supreme Court has indicated that "three-strike" recidivist provisions requiring imposition of a life sentence upon commission of a third triggering offense—like § 841(b)(1)(A)—do not violate the Eighth Amendment. *See Rummel v. Estelle*, 445 U.S. 263 (1980). Based on Defendant's multiple felony drug convictions, the district

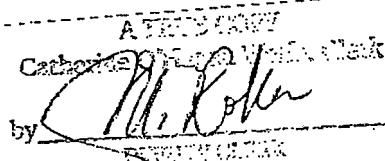
court properly sentenced Defendant in accordance with the mandatory minimum sentence prescribed by 21 U.S.C. § 841(b)(1)(A). His challenge is without merit.

We have considered all of Sykes's other arguments and find them to be without merit.

For the reasons stated herein, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: 

A. T. COHEN
Catherine O'Hagan Wolfe, Clerk
by 

6

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UNITED STATES DISTRICT COURT

WESTERN

District of

NEW YORK

UNITED STATES OF AMERICA

v.

TERRANCE SYKES

JUDGMENT IN A CRIMINAL CASE

Case Number: 6:05-CR-06057-001

USM Number: 14552-055

Scott Green

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) I, II & IV
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(b)(1)(A)	Possession with Intent to Distribute 50 Grams or More of Cocaine Base	10/28/2004	I
21:844(a)	Possession in Excess of 5 Grams of Cocaine Base	10/28/2004	II
18:922(g)(1)	Felon in Possession of a Firearm	10/28/2004	IV

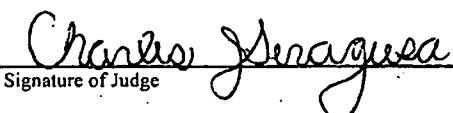
The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

February 12, 2007
Date of Imposition of Judgment


Signature of Judge

Charles J. Siragusa, U.S. District Judge
Name and Title of Judge

3-9-07
Date

DEFENDANT: TERRANCE SYKES
CASE NUMBER: 6:05-CR-06057-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Count I: Life Imprisonment, Count II: 240 months (20 years), Count IV: 120 months (10 years) to be served concurrently.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on May 30, 2007 to USP HAZETON
at BRUCETON MUS, IN, with a certified copy of this judgment.

R. Martinez, Warden
UNITED STATES MARSHAL

By John R. So
DEPUTY UNITED STATES MARSHAL

DEFENDANT: TERRANCE SYKES
CASE NUMBER: 6:05-CR-06057-001**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Ten (10) years on Count I, three (3) years on Count II and three (3) years on Count IV, to be served concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as required by the Justice for All Act of 2004. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: TERRANCE SYKES
CASE NUMBER: 6:05-CR-06057-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to substance abuse testing, to include urinalysis. If indicated by testing, the defendant shall submit to a substance abuse evaluation and enter into any treatment as deemed necessary by the U.S. Probation Office and/or the Court. The defendant is not to leave treatment until discharge is agreed to by the U.S. Probation Office and/or the Court and is to abstain from the use of alcohol while in treatment. The defendant is required to contribute to the costs of services rendered (co-payment) in an amount to be determined by the probation officer, based on ability to pay or availability of third party payment.

The defendant shall submit to a search of his person, property, vehicle, place of residence or any other property under his control, based on reasonable suspicion, and permit confiscation of any evidence or contraband discovered.

DEFENDANT: TERRANCE SYKES
CASE NUMBER: 6:05-CR-06057-001Judgment — Page 5 of 6**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS \$ 300	\$ 3,000	\$ 0

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ _____	\$ _____
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Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: TERRANCE SYKES
CASE NUMBER: 6:05-CR-06057-001Judgment — Page 6 of 6**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

The \$300 Special Penalty Assessment is due, in full, immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

**Additional material
from this filing is
available in the
Clerk's Office.**