UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 13-CR-234

DAMIAN PATRICK,

Defendant.

RECOMMENDATION ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

I. PROCEDURAL BACKGROUND

On November 26, 2013, a federal grand jury sitting in this district returned an indictment against Damian Patrick, charging Patrick with knowingly possessing a firearm as a previously convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Patrick was arraigned on December 19, 2013, and he pled not guilty to the above-mentioned charge. The case was assigned to United States District Judge Rudolph T. Randa for trial and to United States Magistrate Judge Patricia J. Gorence for pretrial processing.

On January 11, 2014, Patrick filed a motion to suppress in which he argued that he was seized unlawfully and without reasonable suspicion. Judge Gorence held an evidentiary hearing on Patrick's motion on February 4, 2014. At the hearing, the court heard testimony from two law enforcement officers from the Milwaukee Police Department (MPD). Following their testimony, Patrick requested to withdraw his motion, which Judge Gorence granted.

Thereafter, on April 29, 2014, Patrick's attorney filed a motion to withdraw as counsel of record. Judge Randa granted the motion the following day and appointed new counsel to represent Patrick. On July 3, 2014, Patrick filed a motion for leave to file a new motion to suppress. Judge Randa approved Patrick's motion and referred the matter back to Judge Gorence. During a status conference, counsel for the parties agreed that another evidentiary hearing was unnecessary. Moreover, Patrick's attorney requested that his motion for leave to file a motion to suppress also serve as his opening suppression motion. The court agreed and set out a briefing schedule on Patrick's motion. Patrick filed a brief in support of his motion to suppress on August 1, 2014. The government filed its response on August 14, 2014, and Patrick filed a reply on August 21, 2014.

On September 17, 2014, the case was reassigned to this court for pretrial processing. Patrick's trial before Judge Randa currently is adjourned, and a new date has not yet been set. Now pending before this court is Patrick's motion to suppress, which is fully briefed and ready for resolution. For the reasons that follow, I will recommend that Patrick's motion be denied.

II. FACTUAL BACKGROUND

On October 28, 2013, law enforcement officers from MPD observed Patrick sitting in the passenger seat of a vehicle that was parked in an alley behind an apartment complex located at 5909 N. Teutonia Ave., in the City of Milwaukee. At that time, the officers were aware that Patrick was wanted for violating his probation/extended supervision. The officers ordered Patrick to exit the vehicle and, as he did, they observed a firearm on the floor of the vehicle between Patrick's feet. Patrick was then taken into custody.

At the February 4, 2014 evidentiary hearing, Patrick learned that law enforcement located him on October 28, 2013, by tracking his cell phone. (Hr'g Tr. 34.)[1] On October 27, 2013, Milwaukee County Circuit Court Judge Maria Carolina Stark issued an order authorizing, among other things, the disclosure of location information for a cell phone that was known to be used by Patrick. Accordingly, the court will summarize the contents of that state court order as well as its supporting application and affidavit.

On October 27, 2013, MPD officer Mark Harms submitted a sworn affidavit in support of an application by the Milwaukee County District Attorney's Office for three orders: (1) an order approving the installation and use of a trap and trace device; (2) an order approving the installation and use of a pen register device; and (3) an order approving the release of certain subscriber information, including what is commonly referred to as cell-site location information. (Govt. Ex. A at 6-10, ECF No. 42-1 [hereinafter "Ex. A"].) Officer Harms indicated that he was "conducting or assisting with a criminal investigation involving the offense(s) of Violation of Probation as detailed in Wisconsin Statute §§ 973.10" and that the information sought "would be useful to investigators." (Ex. A at 6, para. 2.)

Officer Harms then recounted his training, experience, and knowledge concerning electronic surveillance. (Ex. A at 6-7, paras. 3a-k.) Thereafter, Officer Harms set forth the specific facts he believed supported the request for the three orders:

[1] Apparently, this fact was not disclosed in any reports generated by law enforcement. Rather, the three officers who prepared reports concerning their involvement in Patrick's arrest indicated, respectively: (1) law enforcement "obtained information" of Patrick's location; (2) law enforcement had "prior knowledge" that Patrick was occupying the vehicle, which officers observed while on patrol; and (3) law enforcement "obtained information from an unknown source" that Patrick was inside the vehicle at that location. (ECF No. 12-1.) The government now readily acknowledges that law enforcement determined Patrick's location on October 28, 2013, by tracking his cell phone. (ECF No. 42.)

> On July 27th 2013, the Wisconsin Department of Corrections entered a valid felony warrant for Damian L. Patrick, black male, . . . regarding Violation of Parole. To date (10-27-2013), the Felony Violation of Parole warrant for Damian Patrick is currently valid. On today's date 10-27-2013, I PO Mark Harms, FBI SA Jason Soule and FBI SA Rich Bilson, conducted a meeting with a CW (cooperating witness) that has a child in common with Damian Patrick. The CW stated she has been talking and texting Damian Patrick over the past two days on his number 414-484-9162. The CW placed a telephone call to Damian Patrick at 414-484-9162 and put the call on speaker. The CW addressed Damian Patrick by his first name and he responded with conversation. A check through open source data bases revealed the cell phone carrier for number 414-484-9162 is Sprint.

(Ex. A at 8, para. 3l.) Officer Harms indicated that, based on the above facts, "the information likely to be obtained by the installation and use of the pen register and trap and trace device is relevant to an ongoing criminal investigation, related to the offense(s) of Violation of Probation in violation of Wisconsin Statute § 973.10." (Ex. A at 8, para. 3n.) Officer Harms further indicated that "there is probable cause to believe that the physical location of the cellular telephone will reveal evidence of the crime of Violation of Probation in violation of Wisconsin Statute § 973.10." (*Id.*)

Christopher Ladwig, an assistant district attorney (ADA) for Milwaukee County, submitted the application for the orders. (Ex. A at 9-10.) ADA Ladwig stated that the application was made pursuant to Wisconsin Statute § 968.35 and 18 U.S.C. § 2703(c)(1)(B) and (d), § 2711(3), § 3117, and § 3127(2)(B). (Ex. A at 9.) He further stated that "there are reasonable grounds to believe that the requested telecommunications records are relevant and material to this ongoing criminal investigation." (Ex. A at 10, para. 2b.) ADA Ladwig concluded, based on Officer Harms' affidavit, "that probable cause exists for an order approving the release of cellular tower activity, cellular tower location, cellular toll information and cellular telephone global positioning system (GPS) location information,

if available, that will permit identification of the physical location of the target cellular phone." (Ex. A at 10, para. 2c.)

Judge Stark signed the order that same day, which was issued pursuant to Wisconsin Statute § 968.35 and 18 U.S.C. § 2703(c)(1)(B) and (d), § 2711(3), § 3117, § 3125 and § 3127(2)(B). (Ex. A at 1-5.) Based on the application and supporting affidavit, Judge Stark found that Patrick was believed to be utilizing the cell phone assigned the number stated in the affidavit; Patrick was the subject of an investigation; the physical location of the cell phone was unknown; and the affidavit offered "specific and articulable facts showing that there are reasonable grounds to believe that the records and information sought by the applicant are relevant and material to an ongoing criminal investigation." (Ex. A at 1-2, paras. 1-4.) Judge Stark further found that "[t]here is probable cause to believe that the physical location of the target cellular telephone will reveal evidence of the Violation of Parole in violation of Wisconsin Statutes § 973.10." (Ex. A at 2, para. 5.)

Accordingly, the court approved (1) the installation and use of a trap and trace device; (2) the installation and use of a pen register device; and (3) the release of cell-site location information related to the target cell phone. (Ex. A at 2-3, paras. 1-3.) The court ordered Sprint to provide the cell-site location information from July 27, 2013, to the date the order was signed and extending sixty days thereafter. (Ex. A at 4.)

The order was served upon Sprint that same day, (Ex. A at 5), and law enforcement agents began obtaining data related to the location of the target cell phone. Just before noon on October 28, 2013, law enforcement established physical surveillance of Patrick by using

the cell-site location information. Officers then followed Patrick to the area of 5909 N. Teutonia Ave., where ultimately he was arrested.

III. DISCUSSION

Patrick argues that he was unlawfully searched when law enforcement officers located him on October 28, 2013, by tracking his cell phone. Specifically, Patrick maintains that the state court order issued by Judge Stark does not constitute a warrant under the Fourth Amendment and, at any rate, the order's supporting documents failed to satisfy the Fourth Amendment's probable cause standard. Patrick further contends that none of the authority cited in the order or its supporting documents provided adequate authorization to track his cell phone. He also asserts that the unlawful tracking of his cell phone cannot be saved by any exception to the warrant requirement because Officer Harms was dishonest in preparing the supporting affidavit, and the order was so lacking in probable cause as to render law enforcement's belief in its validity entirely unreasonable. Accordingly, Patrick seeks an order suppressing from use at trial all evidence recovered after the government's illegal search—namely, the firearm found at Patrick's feet when he exited the vehicle.

In response, the government argues that the application and affidavit in support of the state court order were supported by probable cause. Specifically, the government maintains that Officer Harms' affidavit established that Patrick was the user of the target cell phone and that he had not been apprehended in three months, despite the existence of a valid probation violation warrant. Coupled with Officer Harms' description of electronic surveillance, these facts established probable cause to believe that evidence of Patrick's whereabouts would be found by obtaining the cell-site location information. Moreover, the

government contends that the state court order is the functional equivalent of a warrant and that the order and its supporting documents cited authority that authorizes the disclosure of prospective cell-site location information. Alternatively, the government asserts that law enforcement officers relied in good faith on Judge Stark's decision to issue the order and, therefore, the *Leon*[2] good faith exception to the warrant requirement applies and dictates that the evidence should not be suppressed.

The ability of law enforcement to track an individual's cell phone in real time is an evolving and somewhat unsettled area of law. One of the principal issues in this ongoing debate is whether such tracking constitutes a "search" within the meaning of the Fourth Amendment and thereby requires a warrant supported by probable cause. *Compare United States v. Skinner*, 690 F.3d 772, 781 (6th Cir. 2012) (finding that the defendant did not have a reasonable expectation of privacy in the GPS data and location of his cell phone and, therefore, such real-time tracking was not a search) *with State v. Earls*, 70 A.3d 630, 639-40, 644 (N.J. 2013) (requiring a warrant) (collecting cases). Although the Seventh Circuit Court of Appeals has yet to definitely weigh in on this issue, *see United States v. Thousand*, 558 F. App'x 666, 670 (7th Cir. 2014) ("We have yet to address whether . . . cell-tower information that telecommunication carriers collect is protected by the Fourth Amendment."), the parties here agree that, at least in this district, law enforcement must obtain a warrant supported by probable cause to obtain real-time location data for Patrick's cell phone, *see, e.g.*, *In re United States*, 412 F. Supp. 2d 947 (E.D. Wis. 2006) (Callahan, Jr., J.) (denying government's application for an order authorizing the disclosure of prospective cell-site information

[2] *United States v. Leon*, 468 U.S. 897 (1984).

exclusively pursuant to the combined authority of 18 U.S.C. § 2703 and § 3122), *aff'd*, 2006 U.S. Dist. LEXIS 73324, at *22 (E.D. Wis. Oct. 6, 2006) (Adelman, J.) (holding that "the government must meet the probable cause standard to obtain cell site information"). This, however, is where the parties' agreement ends.

At times, the parties' arguments tend to muddy the waters and drift away from the "real" issue at hand. As the muck settles, the issue becomes clear: Did law enforcement officers violate the Fourth Amendment when they determined Patrick's location by tracking his cell phone in real time pursuant to a state court order? Consequently, whether the order and its supporting documents cited the proper statutory authority, or whether the order satisfied the requirements of Rule 41 of the Federal Rules of Criminal Procedure, is largely irrelevant. Those authorities are subservient to the Fourth Amendment, and there is no suggestion that the failure to comply with Rule 41 violated any of Patrick's constitutional rights. *See, e.g.*, *In re United States ex rel. an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone*, 849 F. Supp. 2d 526, 564 (D. Md. 2011); *see also United States v. Harrington*, 504 F.2d 130, 133-34 (7th Cir. 1974).[3] Likewise, that the document purportedly authorizing the disclosure of the cell-site location information is labeled an "order" rather than a "warrant" is a distinction without a difference. Just as a rose by any other name would smell as sweet, a warrant by another name is still a warrant, provided that the

[3] That the order failed to comply with the "ministerial terms" of Rule 41(e) and (f) should not invalidate the search. *See Harrington*, 504 F.2d at 134. The order was executed on the same day that Judge Stark issued it, (Ex. A at 5), and the "daytime"/"any time" distinction is rather irrelevant given the nature of the data sought. Likewise, as will be shown, law enforcement officers sought the particular information so that they could locate and apprehend Patrick. Thus, Patrick's property rights were not inadequately protected just because the order apparently was not returned.

document comports with the "Warrant Clause" of the Fourth Amendment. Accordingly, the court's analysis will begin and, as will be shown, end with the Fourth Amendment.

The Fourth Amendment reads in full:

> 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.

U.S. Const. amend. IV. The Supreme Court has stated that the words of the second clause of the Fourth Amendment, referred to as the "Warrant Clause," are "precise and clear" and require only three things:

> First, warrants must be issued by neutral, disinterested magistrates. *See, e. g.*, *Connally v. Georgia*, 429 U.S. 245, 250-251 (1977) (per curiam); *Shadwick v. Tampa*, 407 U.S. 345, 350 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443, 459-460 (1971). Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular offense. *Warden v. Hayden*, 387 U.S. 294, 307 (1967). Finally, "warrants must particularly describe the 'things to be seized,'" as well as the place to be searched. *Stanford v. Texas*, *supra*, at 485.

Dalia v. United States, 441 U.S. 238, 255 (1979).

The state court order at issue here easily satisfies the first and third requirements of the Warrant Clause. The order was issued by a neutral, disinterested state court circuit judge, and the order particularly describes the information to be seized from a specific cell phone. Patrick makes no argument to the contrary. Nevertheless, the parties vehemently disagree as to whether the order's supporting documents satisfied the requisite probable cause showing under the Fourth Amendment. And, more precisely, the parties disagree as

to what that requisite showing is. In other words, the order must establish probable cause of what?

The government maintains that "the information in support of the order established probable cause to believe that evidence of Patrick's whereabouts would be found by obtaining the location data for his cellular telephone." (Govt.'s Resp. 8.) Patrick necessarily concedes the truth of this statement—that is, there was a fair probability that he would be located by tracking his cell phone. (Def.'s Reply 6.) However, Patrick argues, this statement does not accurately set forth the probable cause standard as described in *Illinois v. Gates*, 462 U.S. 213 (1983).[4] In *Gates*, the Supreme Court determined that a search warrant affidavit establishes probable cause if, given all the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. at 238.

According to Patrick, Officer Harms' affidavit clearly did not allege that the cell-site location information would lead to finding any "contraband" in a particular place; he himself was not contraband merely by way of the outstanding probation violation warrant. Patrick further argues that the affidavit failed to allege that "evidence of a crime" would be found in a particular location. While the affidavit asserted that the physical location of the target cell phone would reveal "evidence of the crime of Violation of Probation in violation of Wisconsin Statute § 973.10," (Ex. A at 8, para. 3n), violating one's probation is not a crime and § 973.10 is not a criminal statute. And, having an outstanding violation warrant is not a crime either. Consequently, Patrick maintains that the state court order is invalid because

[4] Patrick also cites the Supreme Court's holding in *Florida v. Harris*, 133 S. Ct. 1050 (2013). However, *Harris* involved a warrantless search of an automobile.

the supporting affidavit failed to allege that there was a fair probability that contraband or evidence of a crime would be found in a particular place.

Although Patrick's recitation of the probable cause standard is not entirely inaccurate, it is incomplete. The Supreme Court has stated that, in addition to seeking contraband or evidence of a crime, "it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals." *Hayden*, 387 U.S. at 306. "[T]he Supreme Court has consistently reiterated this formulation" of the Fourth Amendment probable cause standard. *See In re Smartphone Geolocation Data Application*, 977 F. Supp. 2d 129, 134 (E.D.N.Y. 2013) (collecting cases). Likewise, the Seventh Circuit has quoted *Hayden*'s "aid in apprehension" language in several opinions and has also utilized this language to describe the requisite Fourth Amendment probable cause finding. *See, e.g.*, *United States v. Lisk*, 522 F.2d 228, 230-31 (7th Cir. 1975) (upholding the lawfulness of a seizure of "mere evidence" based on "a reasonable belief that it would aid in a particular apprehension or conviction"); *United States v. Anton*, 633 F.2d 1252, 1254 (7th Cir. 1980) ("Probable cause exists when it is reasonably believed that the evidence sought will aid in a particular apprehension or conviction for a particular offense and that the evidence is located in the place to be searched.")

Here, the affidavit at issue demonstrated that law enforcement was attempting to apprehend Patrick based on the July 27, 2013 felony violation of probation/parole warrant. Officer Harms swore that on October 27, 2013, the day he composed and submitted the affidavit, the warrant was still valid and apparently had not yet been executed. The

affidavit further demonstrated that the prospective cell-site location information could reasonably assist in Patrick's apprehension. On October 27, a CW who had a child in common with Patrick met with law enforcement agents and told them that she had been talking with and texting Patrick on a specific cell phone number over the past two days. In the presence of the agents, the CW called Patrick on that number, placed the call on speaker phone, addressed Patrick by his first name, and Patrick responded with conversation.

Patrick argues that these facts are "completely conclusory." The court disagrees. The above facts demonstrate that Patrick was the user of the target cell phone and that he was the subject of a valid probation violation warrant, which had not been executed during its three months of existence. Nothing more was needed to obtain the information sought by the government. As the Supreme Court has stated, "the probable-cause standard is . . . a 'practical, nontechnical conception.'" *Gates*, 462 U.S. at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). It would be impractical if the government were unable to obtain search warrants for information that would aid in the execution of a valid violation warrant merely because the object to be seized does not constitute "evidence of a crime" in the technical sense.

Indeed, the law already permits the issuance of search warrants to assist law enforcement officers in executing an arrest warrant. Specifically, the government can obtain a warrant to search for a defendant subject to an arrest warrant in a particular place, even if that particular place is the private home of a third party. *See Steagald v. United States*, 451 U.S. 204, 214 (1981); *see also* Fed. R. Crim. P. 41(c)(4). But, according to Patrick's definition of probable cause, the government cannot obtain a search warrant to obtain data that would

assist in locating the same defendant. Such a distinction would defy common sense. Put simply, the above facts are sufficient to sustain a search warrant for information that reasonably could facilitate capture of Patrick.[5]

In sum, Judge Stark had a "substantial basis" for concluding that probable cause existed when she issued the state court order authorizing the disclosure of location information related to Patrick's cell phone because the information sought would "aid in a particular apprehension." *See Gates*, 462 U.S. at 236 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)) (quotation marks omitted). Consequently, the order at issue here effectively served as a warrant that complied with the three requirements of the Warrant Clause of the Fourth Amendment and, therefore, no further authorization was required for the government to track Patrick's cell phone.[6] Given the court's ruling, there is no need to address the government's alternative argument that the order is saved by the *Leon* good faith exception. Nevertheless, considering the unsettled nature of this area of law, it seems certain that the exception would apply. Accordingly, the court will recommend that the district judge deny Patrick's motion to suppress.

NOW THEREFORE IT IS RECOMMENDED that the defendant's motion to suppress (ECF No. 41) be **DENIED**.

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[5] Patrick does not specifically attack the reasonableness of the order's execution. Nevertheless, the court notes that the order was executed on the same day that Judge Stark issued it, and Patrick was apprehended the following day at approximately 12:10 p.m. Thus, although one could argue that it may be unreasonable to allow law enforcement officers to obtain this information for a period not to exceed sixty days when they merely are attempting to locate a wanted subject, the particular facts and circumstances here present no such concerns.

[6] Notably, the Wisconsin Supreme Court recently upheld the lawfulness of a "search" under circumstances very similar to those present in the instant action. *See State v. Tate*, 849 N.W.2d 798 (Wis. 2014).

Your attention is directed to 28 U.S.C. § 636(b)(1)(B) and (C), and Federal Rule of Criminal Procedure 59(b)(2) (as amended effective December 1, 2009), whereby written objections to any recommendation herein or part thereof may be filed within fourteen days of the date of service of this recommendation. Objections are to be filed in accordance with the Eastern District of Wisconsin's electronic case filing procedures. Courtesy paper copies of any objections shall be sent directly to the chambers of the district judge assigned to the case. Failure to file a timely objection with the district court shall result in a waiver of a party's right to appeal.

Dated this 30th day of September 2014, at Milwaukee, Wisconsin.

BY THE COURT:

s/ William E. Callahan, Jr.
WILLIAM E. CALLAHAN, JR.
United States Magistrate Judge