UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 13-Cr-234

DAMIAN PATRICK,

Defendant.

RESPONSE BY THE UNITED STATES TO DEFENDANT'S "MOTION TO SUPPRESS EVIDENCE BASED UPON WARRANTLESS TRACKING OF CELLULAR TELEPHONE."

The United States of America, by and through its attorneys, James L. Santelle, United States Attorney for the Eastern District of Wisconsin, and Bridget J. Domaszek, Assistant United States Attorney for said district, hereby responds to defendant Damian Patrick's motion to suppress evidence. For the reasons set forth herein, the United States respectfully asserts that his motion should be denied.

I. PROCEDURAL HISTORY

On November 5, 2013, a grand jury in this district returned a one-count indictment charging Damian Patrick with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The charge is based on an October 28, 2013, police encounter during which Patrick, a felon, was found in possession of a .40 caliber Smith and Wesson pistol.

On January 11, 2014, Patrick filed a motion to suppress his arrest, arguing that it was not supported by probable cause. The motion was withdrawn because the evidence established that Patrick was arrested pursuant to a valid arrest warrant.

Patrick now seeks suppression of the location information for his cellular telephone. He argues that officers lacked probable cause to track the location of his cellular telephone. (Def. Brf. at 2). In support of his assertion, Patrick contends that the order authorizing the disclosure of the location of his cellular telephone: (1) does not cite the correct statutory authority; and (2) fails to allege that evidence of a crime would be found in a particular location. (Def. Brf. at 13). Inasmuch as there is no legal or factual support for his claims, Patrick's motion to suppress should be denied.

II. FACTUAL BACKGROUND

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 the cellular telephone bearing telephone number (414) 484-9162, which was known to be used by Damian Patrick. (Gov't Ex. A at 1-5). The order authorizes the following:

(1) An order approving the installation and use of a trap and trace device or process.

(2) An order approving the installation and use of a pen register device/process or Dialed Number Recorder (DNR) on a cellular telephone line, a designated Electronic Serial Number (ESN), an International Mobile Subscriber Identifier (IMSI), an International Mobile Equipment Identifier (IMEI), or other cellular lines of a particular subscriber.

(3) An order approving the release of subscriber information, incoming and outgoing call detail, cellular tower activity, cellular tower location, text header information, cellular toll information and cellular telephone global positioning

system (GPS) location information, if available, and authorizing the identification of the physical location of a target cellular telephone.

Id. at 1.

The order, which was issued pursuant to Wisconsin Statute § 968.35, and 18 U.S.C. §§ 2703(c)(1)(B) and (d), 2711(3), 3117, 3127(2)(B), and 3125, was based on a finding 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." *Id*. at 2.

The order application, which was submitted by Milwaukee County Assistant District Attorney Christopher Ladwig, was supported by an affidavit from Milwaukee Police Department Officer Mark Harms. (Ex. A at 6). Officer Harms' affidavit described his training and experience, his knowledge of electronic surveillance, and his familiarity with the then outstanding probation violation warrant for Damian Patrick. *Id*. at 6-8, ¶¶ a-m. The affidavit provides, in pertinent part:

> On July 27th 2013, the Wisconsin Department of Corrections entered a valid felony warrant for Damian L. Patrick, black male 05-21-19XX, regarding Violation of Parole.[1] To date (10-27-2013), the Felony Violation of Parole warrant for Damian Patrick is currently valid. On today's date, 10-27-13, 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 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.

[1] Patrick's full date of birth is intentionally redacted.

> I checked the Internet database telcodata.us to confirm the cellular telephone carrier company. I have used this database in the past and found it to be reliable and correct. I entered the area code (414) and prefix 484 and found the number lists to Sprint. I also checked the Nuestar Wireless Portability Database and found that the phone has not been ported to another company.

Ex. A. at 8, ¶¶ l & m. Harms concluded 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." Ex. A at 8.

On the afternoon of October 27, 2013, case agents began to obtain data related to the location of cellular telephone (414) 484-9162. The data revealed that cellular telephone (414) 484-9162 traveled to various locations on Milwaukee's north side between October 27 and 28, 2013. When case agents physically observed Patrick on October 28, 2013, they began physical surveillance of him and the vehicle in which he was riding. Case agents ultimately approached Patrick while he was sitting in a vehicle behind 5909 N. Teutonia Ave., Milwaukee, WI. Upon Patrick's exit from the vehicle, case agents observed a black and grey Smith and Wesson .40 caliber pistol at Patrick's feet.[2]

III. ANALYSIS

A. Because the application and affidavit in support of the order are supported by probable cause, and because the order was intended to act as a warrant, the order authorizing the disclosure of the cellular telephone's location was reasonable under the Fourth Amendment.

[2] The testimony of Milwaukee Police Department Officer Phillip Ferguson at the evidentiary hearing may have implied that Patrick's phone was tracked to 5909 N. Teutonia Ave., it appears that the phone was actually tracked to the area of 43rd and Good Hope, where Patrick was then followed via physical surveillance to 5909 N. Teutonia Ave. For purposes of resolving the pending motion to suppress, this distinction is immaterial.

Patrick argues that the order is invalid because the Stored Communication Act (SCA) does not authorize the disclosure of prospective cell site data without a warrant. (Def. Brf. at 12-13). Where a search is conducted under the authority of a validly issued state warrant, the products of the search are lawfully obtained if "that warrant satisfied constitutional requirements and does not contravene any Rule-embodied policy designed to protect the integrity of the federal courts or to govern the conduct of federal officers." *United States v. Harrington*, 504 F.2d 130, 133 (7th Cir. 1974)(quoting *Navarro v. United States*, 400 F.2d 315 (5th Cir. 1968)). Although not yet definitively decided in this circuit, consistent with the decision issued in *In the Matter of the Application of the United States of America for an Order Authorizing the Disclosure of Prospective Cell Site Information*, No. 06-MISC-004 (E.D. Wis. Oct. 6, 2006)("Adelman opinion"), it is the practice in this district to obtain a warrant for prospective cell site information. At least one other district in this circuit concurs. *See In the Matter of the Application of the United States of America for an Order Relating to Target Phone 2*, 733 F. Supp. 2d 939, 940 (N.D. Ill. 2009)(holding that disclosure of prospective cell site data is not authorized absent a showing of probable cause)). Thus, the government does not dispute that law enforcement was required to obtain a warrant supported by probable cause and that complied with Federal Rule of Criminal Procedure 41, in order to obtain real time location data for Patrick's cell phone.[3]

[3] The government is not, as Patrick contends, relying on a "hybrid" authority argument to justify the reasonableness of the order. *See In the Matter of the Application of the United States of America for an Order Authorizing the Disclosure of Prospective Cell Site Information*, 412 F. Supp. 2d

Under Federal Rule of Criminal Procedure 41(c), a warrant may be issued for "a person to be arrested or a person who is unlawfully restrained." Rule 41(d) further provides that, "[a]fter receiving an affidavit or other information, a magistrate judge-or, if authorized by Rule 41(b), a judge of a state court of record-must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device." There is no dispute that at the time the order was issued on October 27, 2013, Patrick was subject to a valid state probation violation warrant. In the State of Wisconsin, as in federal district courts, individuals on supervision may be arrested for violations of their conditions of release. *See* Wis. Admin. Code § DOC 328.27 (authorizing the arrest of a defendant for a probation violation); 18 U.S.C. § 3148(b) (stating that a court "may issue a warrant for the arrest of a person charged with violating a condition of release."). Such violations need not rise to the level of a crime to support the issuance of a valid arrest warrant. *See, e.g., Wisconsin v. Flagstadt*, 664 N.W.2d 938 (Ct. App. 2003); *United States v. Davis*, 1987 U.S. Dist. LEXIS 7607, *7, Case No. 86-Cr-842 (N.D. Ill. Jul. 14, 1987). Thus, contrary to Patrick's assertion, the order authorizing the disclosure of location data for his cellular telephone is not invalid merely because it cites to a non-criminal probation violation statute.

Moreover, the order is valid because it is supported by probable cause. In *Illinois v. Gates*, the Supreme Court emphasized that probable cause means "fair probability,"

947, 951 (E.D. Wis. 2006)(explaining that 18 USC §§ 2703(d) and 3122 do not grant statutory authority to disclose prospective cell site information)).

not certainty or even a preponderance of the evidence. *Gates*, 462 U.S. at 246. Probable cause exists when it is reasonable to believe that (1) the evidence sought will aid in the prosecution of a particular offense, and (2) the evidence is located in the place to be searched. *United States v. Lloyd*, 71 F.3d 1256, 1263 (7th Cir. 1995).

Probable cause is a fluid concept, turning on the assessment of probabilities in a particular factual context. The term denotes something more than a mere suspicion, "but does not require certainty." *United States v. McNeese*, 901 F.2d 585, 592 (7th Cir. 1990)(internal quotations omitted). A search warrant may issue "even in the absence of [d]irect evidence linking criminal objects to a particular site." *United States v. Sleet*, 54 F.3d 303, 306 (7th Cir. 1995)(internal citations and quotations omitted). The issuing judge "is entitled to draw reasonable inferences about where evidence is likely to be kept based on the nature of the evidence and the type of offense, and . . . need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit." *Sleet*, 54 F.3d at 306.

This Court should uphold the issuing judge's decision "so long as the magistrate had a 'substantial basis for ... conclud[ing]' that a search would uncover evidence of wrongdoing." *Gates*, 462 U.S. at 236.

> A magistrate's determination of probable cause "is to be given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, does not allege specific facts and circumstances from which the magistrate could reasonably conclude that the items sought to be seized are associated with the crime and located in the place indicated." *United States v. Spry*, 190 F.3d 829, 835 (7th Cir. 1999) (citations omitted).

United States v. Newsom, 402 F.3d 780, 782 (7th Cir. 2005); *see also United States v. Walker*, 237 F.3d 845, 850 (7th Cir. 2001).

In this case, Officer Harms' affidavit established that Patrick was the user of cellular telephone number (414) 484-9162 and that he had not been apprehended in 3 months, despite the existence of a valid probation violation warrant. As also explained in the affidavit, cellular telephones send signals to a cell tower when a call is placed and cellular telephone companies record this information. This cell tower information can assist in locating the cellular telephone. In light of the foregoing, the information offered 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.

Patrick asserts that the legal authorities cited in the order, Wisconsin Statute § 968.35, and 18 U.S.C. §§ 2703(c)(1)(B) and (d), 2711(3), 3117, 3127(2)(B), and 3125, do not provide authority for the disclosure of prospective cell site data. (Def Brf at. 6-7). The government concedes that, to the extent the order relies solely on 18 U.S.C. § 2703(c)(1)(B), Patrick is correct because this section authorizes the disclosure of certain information without a showing of probable cause. *See Adelman opinion* at 9. In other words, 18 U.S.C. § 2703(c)(1)(A) is more appropriate than section 2703(b)(1)(B) because it requires a showing of probable cause. *See id*. However, the order also relies on the tracking device statute, 18 U.S.C. § 3117, which also authorizes the disclosure of location

data and requires a showing of probable cause. *See Adelman opinion* at 9, n.6. Several courts have held that prospective cell site technology, which tracks a cell phone's signal as it looks for a cell tower, turns a phone into a tracking device. *See United States v. Amaral-Estrada*, 509 F.3d 820, 823 (7th Cir. 2007); *United States v. Jenious,* Case No. 09-Cr-207 (E.D. Wis.)(collecting cases)). Thus, reliance on section 3117 for authority to obtain location data is not inapt. *See Adelman opinion* at 9, n.6. Thus, regardless of any technical mistake, the prospective cell site order was authorized by at least one statute cited therein, and Patrick's claim that the warrant is invalid because it fails to cite the appropriate legal authority is meritless.

However, even if the typographical error (citing to the wrong provision of the SCA), such a minor technical defect does not mandate suppression. The Supreme Court has declined to suppress evidence based on technical flaws in the warrant because "the officers reasonably believed that the search they conducted was authorized by a valid warrant." *Massachusetts v. Sheppard*, 468 U.S. 981 (1984)(search warrant valid where officer used incorrect form)). This circuit has explained that probable cause determinations are not technical; rather, "they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *United States v. Hicks*, 650 F.3d 1058, 1065 (7th Cir. 2011); *see also United States v. Buonomo*, 441 F.2d 922, 929 (7th Cir. 1971)(holding that court will not invalidate warrants "by hypertechnical rather than commonsense interpretation.")); *United States v. Trost*, 152 F.3d 715, 721 (7th Cir. 1998)(warrant valid where no federal agent present

and it was returned late)). In a case like this, where an order is supported by an affidavit containing probable cause, and the order complies with Rule 41, suppression for a typographical error elevates form over function. Hence, Patrick's motion should be denied on this ground.

This is particularly true when it is obvious that the order was intended to function as a warrant. Consistent with Rule 41(d), the order is supported by an affidavit submitted for the purpose of establishing probable cause for disclosure of the location data. Notably, no probable cause affidavit is required by the other provisions of the SCA which have a lower threshold of proof. *See, e.g.*, 18 U.S.C. § 2703(d)(stating that records concerning electronic communication service or remote computing service may be disclosed if "the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the records are material to an ongoing criminal investigation.")). And, Judge Stark found that the application and affidavit established probable cause, which is consistent with a belief that the order would be treated as a warrant. Ex. A at 2.

Finally, Patrick claims that the order violates Communications Assistance for Law Enforcement Act of 1994 (CALEA) because the service provider disclosed information about the physical location of the subscriber without a warrant. Patrick is mistaken. As discussed above, the order was the functional equivalent of a warrant. Moreover, the remedies for violating the SCA are limited to those set forth in 18 U.S.C. §§ 2707 and 2708, and do not include suppression. *United States v. Thousand*, 558 Fed.

Appx, 666, 679 (7th Cir. Mar. 12, 2014); *see also City of Ontario v. Quon*, 560 U.S. 746, 764 (2010)(holding that suppression is not a remedy because a violation of the SCA does not equate to a violation of the Fourth Amendment)). For all these reasons, the order is supported by probable cause and Patrick's motion to suppress should be denied.

B. Even if this court were to find that the order was not supported by probable cause, the *Leon* good faith exception is applicable.

In *Leon*, the Supreme Court held that evidence seized pursuant to a subsequently invalidated search warrant need not be suppressed if the officers relied in good faith on the judge's decision to issue the warrant. 468 U.S. 897, 924 (1984); *see also United States v. Miller*, 673 F.3d 688, 692-93 (7th Cir. 2012); *United States v. Prideaux-Wentz*, 543 F.3d 954, 958 (7th Cir. 2008); *United States v. McIntire*, 516 F.3d 576, 578 (7th Cir. 2008)). An officer's decision to obtain a search warrant is *prima facie* evidence of the officer's good faith. *United States v. Miller,* 673 F.3d 688, 693 (7th Cir. 2012). The defendant can rebut the presumption of good faith only by showing that the issuing judge abandoned the detached and neutral judicial role, the officer was dishonest or reckless in preparing the affidavit, or that the warrant was so lacking in probable cause as to render the officer's belief in its validity entirely unreasonable. *Id.* None of those circumstances presents itself here.

Patrick does not suggest that (1) or (2) applies, but it can be inferred that he claims that the warrant was so lacking in probable cause that law enforcement could not have reasonably relied on its issuance. As discussed above, however, the order complies with Rule 41 inasmuch as it is supported by an affidavit establishing probable

cause; it was intended to function as a warrant; and any technical deficiencies do not undermine its validity.

Furthermore, suppression would not serve the deterrent purpose of the exclusionary rule. As the Supreme Court explained in *Sheppard*, 468 U.S. at 990, the exclusionary rule is intended to punish mistakes made by law enforcement, not mistakes made by judges. In *Sheppard*, the agents used the incorrect form to obtain a search warrant for evidence of a murder in the defendant's house. The only available form was one used to search for controlled substances. The agents attempted to conform the warrant to search for evidence of the murder, but inadvertently missed several references to controlled substances. In upholding the validity of the warrant, the Supreme Court explained that the agents reasonably relied on the judge's representation that the warrant was valid, and that suppressing evidence because the judge failed to make all the necessary clerical corrections does not serve the exclusionary rule's deterrent function. *Id*. Similarly, in this case suppressing the location data obtained pursuant to the order would not punish any mistake made by law enforcement. This is particularly true where the error involved a legal citation, which was not mentioned in the officer's affidavit, and was, therefore, arguably more attributable to the prosecutor and judge than to law enforcement.

Because Patrick has failed to make a substantial primary showing that the warrant was so lacking in probable cause as to render the officer's belief in it entirely unreasonable, the *Leon* good faith exception is available. Moreover, suppression of the

information obtained pursuant to the order does not serve the purpose of the exclusionary rule. Therefore, the United States respectfully requests that the defendant's motion be denied on this ground.

IV. CONCLUSION

For the reasons set forth above, the order authorizing the disclosure of location data is supported by probable cause and Patrick's motion to suppress should be denied. If, however, the court finds the affidavit to lack probable cause, the case agents relied on the order in good faith and the defendant's motion to suppress should be denied.

Respectfully submitted at Milwaukee, Wisconsin, this 14th day of August, 2014.

JAMES L. SANTELLE
United States Attorney

By: s/ *Bridget J. Domaszek*

BRIDGET J. DOMASZEK
Assistant United States Attorney
Wisconsin Bar Number:1053696
Attorney for Plaintiff
Office of the United States Attorney
Eastern District of Wisconsin
517 East Wisconsin Avenue, Room 530
Milwaukee, Wisconsin 53202
Telephone: (414) 297-1720
Fax: (414) 297-1738
E-Mail:bridget.j.domaszek@usdoj.gov