UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 13-CR-234

DAMIAN PATRICK,

Defendant.

REPLY BRIEF IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE BASED UPON WARRANTLESS TRACKING OF CELLULAR TELEPHONE

Mr. Patrick offers the following in reply to the government's response brief:

I. The state court order and supporting documentation at issue here (1) do not constitute a warrant or a request for a warrant, and (2) regardless of form, do not establish a sufficient showing of probable cause to believe that contraband or evidence of a crime would be found in a particular place.

The government concedes that a search warrant supported by probable cause is required to track an individual's cell phone in real time, *see* Govt. Br. at 5, but then confuses the ability of police to arrest someone based upon an arrest warrant with obtaining a warrant to search that individual's person or property.[1] On page 6 of its brief, the government emphasizes that Fed. R. Crim. P. 41 authorizes courts to issue arrest

[1] The Seventh Circuit has not expressly found that tracking an individual's cell phone is a search, but as the government notes, Judge Adelman in this district and Judge James F. Holderman in the Northern District of Illinois, Eastern Division, have so found and require the government to establish probable cause that evidence of a crime will be found by tracking a cell phone. *See* Govt. Br. at 5. Judge Holderman's decision collects cases from district courts around the country that agree with his holding, *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, 941 n. 2 (N.D. Ill. 2009), and several appellate courts also agree. *See United States v. Davis*, 754 F.3d 1205, 1217 (11th Cir. 2014) and *State v. Earls*, 214 N.J. 564, 588 (2013); *see also United States v. Barajas*, 710 F.3d 1102, 1108 (10th Cir. 2013) (assuming without deciding that "pinging" a cell phone is a search).

warrants, that individuals on supervision can be arrested for violations of their conditions of release, and that such violations need not rise to the level of a crime to justify the apprehension of the person. All of these assertions are correct as far as they go, but Mr. Patrick is not arguing that the arrest warrant issued for his absconding from state supervision was invalid nor that his eventual arrest was illegal, thereby providing grounds for the suppression remedy he seeks. Rather, he argues that the order signed by the state court judge in this case (1) was not a search warrant in the first place, and (2) regardless of its form, was not based upon a sufficient showing of probable cause to believe that evidence of a crime would be found in a particular location. It is this lack of a warrant and showing of probable cause required by Supreme Court precedent[2] that requires this Court to suppress the fruits of the illegal tracking of Mr. Patrick's cell phone (i.e. the gun found in the vehicle he was arrested in) to deter similar police misconduct in the future.

The government does not argue that implicit in every arrest warrant is permission for police to track the cell phone of the person the warrant is issued for, and Mr. Patrick is aware of no authority that allows for this (and any such argument would undermine the government's concession that probable cause for a search is required track a cell phone).[3] To reiterate, Mr. Patrick is not challenging that he could be arrested for his alleged violations of release on supervision, only that he was illegally tracked by the police via his cell phone to effectuate his arrest and therefore any fruits of that illegal activity (the gun) must be suppressed.

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[2] Specifically, *Illinois v. Gates*, 462 U.S. 213, 238 (1983) and *Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013).

[3] It should be noted that the documentation submitted by the government in this case for Mr. Patrick's arrest warrant for violations of his supervision in no way, shape or form authorizes, much less mentions, tracking his cell phone. *See* Docket Entry 17-2, Exhibit A (Wisconsin Department of Corrections sheet pertaining to the issuance of the warrant).

The government further expressly disavows that the Stored Communication Act (SCA), either alone or combined with the pen register and trap and trace device statutes, provides adequate authority for the order signed by the state court judge here. *See* Govt. Br. at 5, n.3 and at 8. This concession further dooms the government's argument that the order signed by the state court was in fact a warrant supported by probable cause. As explained in Mr. Patrick's opening brief, none of the statutory authorities cited in the court's order and the district attorney's application are based on a probable cause standard, save one. *See* Def. Br. at 6-7 and at 9, n. 7.[4] And the government clings to the one authority offered that does impose a probable cause standard as "not inapt": 18 U.S.C. § 3117 (the federal tracking device statute). *See Govt*. Br. at 8-9. But as already discussed in Mr. Patrick's opening brief, this lone and unsupported reference to § 3117 in the state court order does not turn it into a warrant and magically bestow probable cause. The underlying affidavit of Officer Harms does not reference this statute nor reference the use of a "tracking device," and regardless, the requirements of Fed. R. Crim. P. 41 regarding the issuance of warrants for tracking devices were not even attempted to be met in this case. *See* Def. Br. at 7, n. 5. Probable cause must be found, if at all, in the totality of the contents of the underlying affidavit, and not in the passing reference to a statute that happens to require a showing of probable cause.

The government asserts that the order was intended to "act" or "function" as a warrant, *see* Govt. Br. at 4 and 10, and therefore the search for Mr. Patrick's cell phone was reasonable. Mr. Patrick does not believe that the four corners of the documents this Court must review to determine whether probable cause was shown to track his cell

[4] The opening brief's detailed analysis of these statutes merely illustrated that none of them (except 18 U.S.C. § 3117) require a showing of probable cause. It was not, as the government alleges, to argue that "technical mistakes" invalidated the warrant. *See* Govt. Br. at 9.

phone are capable of "intending" anything- either they amount to a warrant containing probable cause or they don't. It is clear that neither the affidavit nor application asked for a warrant, and it is equally clear that the order is not a warrant. First, the word "warrant" appears nowhere in any of the documents. Judges, lawyers and even policemen are well versed in simple legal terms and concepts and the government offers no explanation for why none of the authors simply used the term "warrant" if that what was really sought and issued here. Second, the caption of each document is clearly titled as follows:

> In the Matter of an Application by the Milwaukee County District Attorney Office for the Following ***Orders***:
>
> (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…
> (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 the target cellular telephone.

See Exhibit A at 1, 6, and 9 (emphasis added); *see also* Govt. Br. at 2-3. And of course, the document ultimately signed by the state court judge is plainly titled "order." It makes little sense that the author of any of these documents would treat them as a warrant or request for a warrant when a warrant is not required to obtain either a trap and trace device or a pen register device. It is evident that the authors lumped the request for real-time tracking of Mr. Patrick's cell phone together with the other requests that do not require a showing of probable cause, but as conceded by the government here, such tracking does require probable cause. The authors either believed that a request for real-time tracking is as routine as it is for a pen register or trap and trace device, or tried to slip the request in hoping it would not be carefully reviewed and noticed. This Court

must be careful not to let state court's stamp of approval for the pen register and trap and trace device swallow whole the probable cause requirement to track a cell phone in real-time.

Ultimately, the standard this Court must employ to determine if probable cause was shown to track Mr. Patrick's cell phone is well established: that the government establish "there is a fair probability, given the totality of the circumstances, that contraband or evidence of a crime will be found in a particular place." *Gates* at 238; *Harris* at 1055. This is where the government's attempts to turn what is clearly a state court order into a warrant fails most critically: no showing was made that contraband or evidence of a crime would be found by tracking Mr. Patrick's cell phone. Mr. Patrick is of course not deemed to be contraband merely because he had an arrest warrant issued for him, and the government does not make any such argument. The government does seem to argue that evidence of a crime would be found by tracking his phone. But this is simply not true, as an individual having an arrest warrant out for them does not constitute a crime. This is confirmed by the fact that Officer Harms had to make up a crime to report in his affidavit for the orders he requested: "Violation of Probation" under Wis. Stat. § 973.10, which the application and order changed to "Violation of Parole" under the same statute.[5] As Mr. Patrick noted in his opening brief, Wis. Stat. § 973.10 is titled "Control and supervision of probationers," and does not define a crime under Wisconsin law. *See* Def. Br. at 4.

Simply put, it is not a crime to have an arrest warrant issued for alleged violations of post-conviction supervision conditions as it is, for example, to commit violations of

[5] It should be noted that parole in Wisconsin was abolished over 15 years ago in 1997 pursuant to enactment of its "truth in sentencing" law. *See State v. Williams*, 2014 WL 3407499 (Wis. 2014) at 7, ¶ 28.

conditions while released on bail (i.e. "bail jumping" under Wis. Stat. § 946.49). The affidavit's only mention of "probable cause" for anything is when it asserts there is "probable cause to believe that the physical location of the cellular telephone will reveal evidence of" the (non-existent) crime of "violation of probation." *See* Exhibit A at 6, ¶ 2 and at 8, ¶ 3(n). The government does not rebut that this is not actually a crime, and therefore must concede that the standard required by *Gates* and *Harris* is not met here: that there is probable cause to believe that contraband or evidence of a crime will be found in a particular place. The only "probable cause" established in this case was that tracking Mr. Patrick's phone would reveal his whereabouts, *see* Govt. Br. at 8, but such tracking is not authorized by a simple arrest warrant, and for the reasons argued, was not supported by a sufficient showing of probable cause in the state court documents at issue.

II. Good faith does not save this search.

The government recites the well-worn holding of *United States v. Leon,* 468 U.S. 897 (1984): that even if a search warrant is later invalidated for failure to establish probable cause, evidence seized when executing it should not be suppressed if the police relied in good faith on the judge's decision to issue the warrant. *See id*. at 922. A good faith claim can be defeated by showing that (1) the affiant was dishonest or reckless in preparing the affidavit, (2) the issuing magistrate abandoned his or her neutral and detached judicial role, or (3) the warrant was so lacking in probable cause or is so facially deficient (i.e. by failing to particularize the place to be searched or the things to be seized) that the officer could not reasonably presume it to be valid. *See id*. at 923; *see also United States v. Miller*, 673 F.3d 688, 693 (7th Cir. 2012). Before arguing that two of these three factors are present in this case and defeat any good faith claim, Mr. Patrick must once again emphasize the threshold issue that for this Court to even engage in a

Leon analysis, it must first find that the order that was signed by the state court judge was actually a warrant. For the reasons already argued above and reasserted here, the order and supporting documentation do not amount to a warrant to track Mr. Patrick's phone, and therefore the Court need not even engage in a *Leon* analysis should it agree with this finding.

Even if this Court finds that the order and supporting documentation amount to a warrant but finds deficient probable cause, good faith is nonetheless defeated for two reasons: the affiant was dishonest when preparing the affidavit, and the warrant is so lacking in probable cause that the officers in this case could not presume it to be valid. First, the affiant was dishonest by presenting Wis. Stat. § 973.10 as constituting the crime "Violation of Probation." This has already been shown to be false as that statute does not define a crime and is in fact titled "Control and supervision of probationers." This dishonest recitation of the statute is critical because in order for the documentation in this case to be found sufficient as a search warrant, it must satisfy *Gates* and *Harris'* requirement that probable cause exist to believe that evidence of a crime will be found in a particular place. Without alleging an actual crime, this showing cannot be made, and therefore Officer Harm's dishonest statement is fatal to finding good faith existed in this case.[6]

Second, good faith also does not apply because the warrant here is so lacking in probable cause that the officers in this case could not presume it to be valid. This

[6] As noted in the opening brief, serious concerns about Officer Harms' integrity exist and have been recognized by the U.S. Attorney's Office in this district to the extent it won't prosecute cases where he would be called to testify. *See* Def. Br. at 2, n. 1. The government here offers no explanation for why it would institute that policy but still find it acceptable to prosecute cases based upon an affidavit sworn by him. This information should give this Court pause when examining his affidavit in this case, at least insofar as it bears on whether or not the police acted in good faith when obtaining the state court order.

conclusion is compelled by considering the completely conclusory nature of the affidavit. As noted in the opening brief, Officer Harms related very little beyond his knowledge of how pen registers, trap and trace devices, and cellular networks operate and how police linked the phone number in question to Mr. Patrick, before declaring "probable cause" existed to reveal evidence of the nonexistent crime of "violation of probation." *See* Def. Br. at 5. The state court judge merely ratified and adopted this conclusory assertion regarding "probable cause" (most likely because it viewed the affidavit primarily as requesting an order for a pen register and trap and trace device which do not require probable cause), and *Leon* should not allow for good faith when the lack of probable cause originates with the underlying affidavit itself and is merely ratified by the state court judge. Zero plus zero cannot equal anything but zero.

Officer Harms is an experienced Milwaukee police officer (16 years, *see* Exhibit A at 6, ¶ 1), and works closely with federal agents, including on this case (FBI Agents Jason Soule and Rich Bilson, *see id.* at 8, ¶ 3(l)). He should have known that the law in this district, at least since 2006, required him to obtain a warrant supported by probable cause to track a cell phone in real time. *See* Govt. Br. at 5, *citing* Judge Adelman's decision from 2006; *see also Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (holding that a reasonably competent public official should know the law that governs his conduct). Even if he did not have actual knowledge of this requirement for some reason, the federal government should not be able to benefit from his ignorance when choosing to prosecute a case in federal court based upon actions taken by state law enforcement officers.

The exclusionary rule was created by the Supreme Court to "compel respect for the constitutional guaranty" against unreasonable searches and seizures. *See Davis v.*

United States, 131 S.Ct. 2419, 2426 (2011). The rule's purpose "is to deter future Fourth Amendment violations." *Id*. The deterrent benefits of exclusion vary with the culpability of the law enforcement conduct at issue- more serious Fourth Amendment violations call more strongly for exclusion of evidence than do more minor, isolated violations. *See id.* at 2427. Here, the Fourth Amendment violation is serious and not minor or isolated. First, it is clear that Officer Harms did not seek a warrant to track Mr. Patrick's phone despite Judge Adelman's ruling from 2006 holding that he is required to do so. Rather, he sought only a state court order where his request to track the phone was lumped in with his request to obtain a pen register and trap and trace device. This might pass muster under state law, but it does not pass muster under federal law as detailed above. Second, even if the order and supporting documentation in this case were construed to be a warrant, Officer Harms' dishonest recitation of Wis. Stat. § 973.10 defeats any claim of good faith and calls for exclusion to deter any similar future misconduct. Third, good faith also does not apply because the warrant so lacked probable cause that the officers in this case could not presume it to be valid, originating with the conclusory and deficient showing of probable cause contained in Officer Harms' own affidavit. The deficiencies present in this case are not minor or isolated in nature- they display a belief by Officer Harms that he can track an individual's cell phone merely by requesting orders such as the ones here by a state court judge, all in violation of the Fourth Amendment and Judge Adelman's opinion from 2006. Such conduct must be deterred now and in the future, and call for excluding the gun recovered in this case notwithstanding the government's claim of good faith under *Leon*.

III. Conclusion

The government in this case tries to turn an erroneously issued state court order allowing the police to install a trap and trace device and pen register into a search warrant supported by probable cause to track Mr. Patrick's cell phone. But many facts present in this case cut against that attempt: (1) even a cursory examination of the documents at issue here show them to be requests for and issuance of an order and not a warrant; (2) regardless of their form, they do not allege sufficient probable cause under *Gates* and *Harris* to believe that contraband or evidence of a crime will be found in a particular place; and (3) all the statutory authorities cited in the application and order fail to require a showing of probable cause except one, 18 U.S.C. § 3117 (tracking device statute), and the procedural requirements for obtaining a tracking device warrant under Fed. R. Crim. P. 41 were not even attempted to be complied with here.

Ultimately, the police had a warrant to arrest Mr. Patrick for alleged violations of his state supervision rules, but this did not carry with it the authority to track his phone to locate him. The state court order the police obtained to do so also was not sufficient for all the reasons argued, and good faith does not save the police actions here because Officer Harms was dishonest in preparing the underlying affidavit, and also because the warrant was so lacking in probable cause the police could not presume for it to be valid. Because the police action in failing to obtain a valid warrant here was a serious Fourth Amendment violation, suppression is called for and necessary to deter similar police misconduct in the future. Therefore, this Court must suppress the fruits of the illegal police search in this case, including the gun found in the car Mr. Patrick was arrested in.

Respectfully submitted at Milwaukee, Wisconsin this 21st day of August, 2014.

/s/_____

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