UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 13-CR-234

DAMIAN PATRICK,

Defendant.

DEFENDANT'S OBJECTIONS TO MAGISTRATE JUDGE'S RECOMMENDATION TO DENY DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Magistrate Judge Callahan found (and the government conceded in briefing), that in this district, law enforcement officers must obtain a search warrant supported by probable cause under the Fourth Amendment to obtain real-time location tracking data for an individual's cell phone. *See* Docket Entry 47 at 7. The question to be answered is whether the state court order issued in this case upon an affidavit of a Milwaukee police officer satisfies this standard. *See id*. at 8; *see also* Exhibit A. Based upon his opening and reply briefs (Docket Entries 44 and 46), hereby incorporated herein, and based on the following arguments, Mr. Patrick argues that this standard was not met and objects to Magistrate Judge Callahan's recommendation finding that it was.

Magistrate Judge Callahan correctly noted the difference between probable cause to believe that tracking Mr. Patrick's cell phone would reveal his location (which Mr. Patrick conceded) versus probable cause required to be shown under the Fourth Amendment to obtain a search warrant. *See* Docket Entry 47 at 10; *see also Illinois v.*

Gates, 462 U.S. 213, 238 (1983) (holding that law enforcement must convince a court that 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). He credited Mr. Patrick's arguments that neither of the *Gates* showings had been met in this case: first, there was no fair probability that contraband would be found as Mr. Patrick "was not contraband merely by way of the outstanding probation violation warrant" issued for him. *See id*. at 10. Second, there was no fair probability that evidence of a crime would be found as "violating one's probation is not a crime" and the statue mentioned in the underlying state court documents, Wis. Stat. § 973.10, is not a criminal statute. *See id*. He further found that while Mr. Patrick accurately recited the *Gates* probable cause standard, it was incomplete- he found that *Warden v. Hayden*, 387 U.S. 294, 306 (1967) allows search warrants to be issued "for the purpose of obtaining evidence which would aid in apprehending and convicting criminals." *See id*. at 11. Reliance on *Hayden* is misplaced and requires this Court to reject Magistrate Judge Callahan's recommendation for the following reasons:

The issue presented in *Hayden* was whether searches and seizures under the Fourth Amendment were limited to instrumentalities of crime, fruits of crime, and contraband, or extended to also include "merely evidentiary materials." *See id*. at 295-96. In that case, the police had seized from the defendant's home some clothing (including a cap, a jacket and trousers) that matched the description of clothing worn by an individual who committed an armed robbery. *See id*. at 296. The Supreme Court held that nothing in the Fourth Amendment prohibited the search for and seizure of evidence "simply for the purpose of proving" a crime. *See id*. at 306. As noted by Magistrate

Judge Callahan, the Supreme Court held that "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." *Id*. But this recognition that Fourth Amendment searches and seizures can extend to "mere evidence" of crimes did not dispense with the requirement that a "nexus," or connection, be shown between the items in question and criminal behavior. *See id*. at 307. Thus, *Hayden's* language about "apprehending and convicting criminals" was not made in isolation and without limit, but rather in the context of the requirement that a connection be established between any items to be searched for/seized and criminal behavior. In that case, the connection existed because the clothing recovered in the defendant's house matched the description of that worn by the armed robber, and therefore the police "could reasonably believe that the items would aid in the identification of the culprit." *Id*.

Here, Magistrate Judge Callahan failed to find that any connection existed between the items to be seized by the search warrant (real-time location data generated by Mr. Patrick's cell phone) and any criminal behavior. If anything, Magistrate Judge Callahan found that there was *not* a connection between the data to be seized and criminal behavior because he recognized that "violating one's probation is not a crime," that Wis. Stat. § 973.10 is "not a criminal statute," and that "having an outstanding violation warrant is not a crime either." Docket Entry 47 at 10. Thus, Magistrate Judge Callahan's finding that Mr. Patrick's citation to *Gates'* probable cause requirement was "incomplete" because it did not account for *Hayden's* "aid in apprehension" language is itself incomplete: under both *Gates* and *Hayden*, some connection to a crime must be established to justify a search under the Fourth Amendment. No such connection exists

in this case because no fair probability was shown that contraband or evidence of a crime would be found in a particular place (*Gates*), nor was any connection established between the items to be seized and any criminal behavior (*Hayden*).

Other courts have held that *Hayden* only allows for the issuance of a search warrant to locate the subject of an arrest warrant if the government can show probable cause to believe the subject's location itself is evidence of a crime (for example, a violation of 18 U.S.C. § 1073 for flight to avoid prosecution). *See In the Matter of an Application of the United States of America for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone*, 849 F.Supp.2d 526, 561 (D. Maryland 2011). That court found that the "aid in apprehension" language of *Hayden* is dicta because the facts of *Hayden* actually related to the use of the seized items to convict the defendant, not to apprehend him. *See id*. The court further stated that it could find no case where a search warrant was issued to obtain information to aid in the apprehension of a criminal where the information sought would not constitute evidence of a crime. *See id*. at 562. Ultimately, the court found that the Fourth Amendment's probable cause standard has a firmly embedded nexus component, and searches made without a connection between the items to be seized and criminal behavior are unreasonable. *See id*.

Magistrate Judge Callahan also cited to *Steagald v. United States*, 451 U.S. 204 (1981) in his recommendation. *See* Docket Entry 47 at 12. He reasoned that because *Steagald* allows law enforcement officers to obtain a search warrant to search for an individual subject to an arrest warrant in a particular place- even the home of a third party- that they must be allowed to obtain one to search for a person subject to an arrest

warrant based on real-time location data generated by his or her cell phone. *See id*. But his reliance on *Steagald* is misplaced for several reasons.[1] First, the information sought here is extremely broad and concerns an individual's ongoing location (via tracking his cell phone), which is not known to law enforcement and is the reason it wants the information in the first place. *Steagald* and *Payton* (see footnote 1 below) represent narrow exceptions to general Fourth Amendment constraints, however, in that they require law enforcement to establish that there is reason to believe that the subject of an arrest warrant is located *at a particular place*- for *Payton* in his or her home, for *Steagald* in the home of a third party. *See Wireless Telephone* at 563. Thus, these cases do not "absolve the government from having a reasonable belief that the suspect is in a particular location before it may enter" a constitutionally protected area to execute an arrest warrant. *See id*. at 545. In cases like this one where law enforcement seeks a court order or warrant to track a person's cell phone precisely because they do not know where they are, this threshold requirement of both *Payton* and *Steagald* is not met and therefore reliance on either is misplaced.

Second, implicit in Magistrate Judge Callahan's citation to *Steagald* is a belief that because a search warrant can be obtained to effectuate an arrest warrant in a third party home, obtaining one to track an individual by their cell phone is justified because it is considered a lesser intrusion. But this does not automatically follow- *Wireless Telephone* found that tracking someone by their cell phone "does arguably infringe upon the privacy rights of the subject of an arrest warrant more than a [home] search would

[1] Even though it is not cited by Magistrate Judge Callahan, *Payton v. New York*, 445 U.S. 573 (1980) is also relevant to this analysis. *Payton* held that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the *limited authority* to enter a dwelling in which a suspect lives when *there is reason to believe the suspect is within*." *Id*. at 602-03 (emphasis added).

and certainly does provide more information." *Id*. at 551. The search requested in these types of cases "informs the government on an almost continual basis where the subject is, at places where the government *lacked* probable cause to believe he was, and with persons about whom the government may have no knowledge." *Id*. (emphasis in original). Accordingly, the Supreme Court's approval of a "limited" intrusion into the home under *Payton* and *Steagald* "cannot reasonably be interpreted to endorse other infringements of privacy, that is, the constitutional right to location and movement privacy." *Id*. at 552; *see also id*. at 538-543 (discussing that individuals have a reasonable expectation of privacy in their location and movements). The government here has not argued that a subject of an arrest warrant enjoys less of an expectation of privacy in their location and movements than an uncharged person, and *Wireless Telephone* found that such expectations are maintained for individuals subject to an arrest warrant for many of the reasons already discussed. *See id*. at 543-44.

Returning to the facts of this case, it is clear that none of the foundational requirements of *Gates, Hayden, Steagald* or *Payton* were met here, and therefore this Court must reject Magistrate Judge Callahan's recommendation and grant Mr. Patrick's motion to suppress evidence (specifically, the gun recovered from the car he was arrested in after the police located him by tracking his phone). The underlying police officer affidavit in this case failed to establish any of the following:

1. A fair probability that contraband or evidence of a crime would be found in a particular place per *Gates*. As Magistrate Judge Callahan recognized, Mr. Patrick was not himself contraband due to having an arrest warrant out for him. *See* Docket Entry 47 at 10. Nor was there probable cause to

believe that evidence of a crime would be found because "violating one's probation is not a crime," the "crime" mentioned in the affidavit- Wis. Stat. § 973.10- is not in fact a criminal statute and instead governs control and supervision of probationers, and "having an outstanding violation warrant is not a crime either." *Id*.

2. A connection between the item to be seized (here, real-time location data generated by Mr. Patrick's cell phone) and any criminal behavior per *Hayden*. For the same reason no evidence of a crime under *Gates* was shown, neither was any connection to any criminal behavior shown (for example, a violation of 18 U.S.C. § 1073 for flight to avoid prosecution, or a violation of 8 U.S.C. § 1326 for reentry of removed aliens). Simply put, Mr. Patrick absconding from state supervision was not a crime and did not constitute criminal behavior and therefore no *Hayden* nexus requirement could be shown.

3. Probable cause to obtain a search warrant because police had reason to believe that Mr. Patrick was located in a particular third party's home per *Steagald*. Absolutely no assertion was made in the underlying affidavit that police had reason to believe that Mr. Patrick was located in a particular third party's home that would justify obtaining a search warrant to effectuate Mr. Patrick's arrest warrant. As noted, the police sought real-time location data generated by Mr. Patrick's cell phone precisely because they did not know where he was. Therefore *Steagald* provides no authority for the police obtaining the information they sought here.

4. Apart from any assertions in the underlying affidavit, it is clear that the police also had no limited authority to enter a dwelling in which Mr. Patrick lived with reason to believe he was located therein per *Payton*.

The underlying affidavit focused almost exclusively on how "useful" the requested information would be to law enforcement in attempting to locate Mr. Patrick, and how such information would be "relevant to an ongoing criminal investigation." *See* Exhibit A at 6-8, ¶¶ 2, 3(a), and 3(n). It then stated in conclusory terms 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.* at 8, ¶ 3(n). As already noted throughout this brief, however, that statute does not define a crime and is actually titled "Control and supervision of probationers." Therefore, what law enforcement was really asking for and expected in this case was for the state court to sanction its belief that it can obtain real-time location data generated by a cell phone that belongs to any subject of an arrest warrant, even when it cannot tie that data to any criminal behavior. As *Wireless Telephone* put it, "there is no precedent for what the government seeks… no court under any rubric has approved a warrant or order for location data on the simple showing of an outstanding arrest warrant and the possession of a cell phone by the subject of the arrest warrant." *Wireless Telephone* at 585; *but see In re Smartphone Geolocation Data Application*, 977 F.Supp.2d 129, 131 (E.D.N.Y. 2013) (case decided after *Wireless Telephone* holding that a court may issue a search warrant to access prospective geolocation data when the government demonstrates probable cause to believe it will aid in the apprehension of a subject of an arrest warrant).

For all the reasons argued herein, this Court should resist becoming only the second in the country (as far as undersigned counsel's research has revealed) that allows the government to track an individual's cell phone based only upon a showing that he or she has an arrest warrant issued for them and possesses a cell phone but where law enforcement cannot otherwise show any connection to criminal behavior. The government has not identified or argued any law that allows for this under the Fourth Amendment, and the cases Magistrate Judge Callahan cites and relies upon in his recommendation are either distinguishable or simply not controlling for these types of cases. Accordingly, Magistrate Judge Callahan's recommendation must be rejected by this Court and Mr. Patrick's motion to suppress be granted.[2]

Respectfully submitted at Milwaukee, Wisconsin this 7th day of November, 2014.

/s/__________________________
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[2] Magistrate Judge Callahan did not reach the government's *Leon* good faith arguments in his recommendation. *See* Docket Entry 47 at 13. For the reasons argued in Mr. Patrick's reply brief (Docket Entry 46 at 6-9), *Leon* does not save the search in this case.