U.S.C.A. No. 07-10567

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v.
MICHAEL CLAY PAYTON,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District of California

Honorable Oliver W. Wanger
United States Senior District Judge

U.S.D.C. No. 1:05-cr-00333 OWW

APPELLANT'S REPLY BRIEF

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I.

ARGUMENT

A. THE GOVERNMENTS STATEMENT OF FACTS CONTAINS TWO MISLEADING ALLEGATIONS.

The government's statement of facts contains two misleading statements. First, it asserts that when requesting the search warrant:

> Officer Horn inspected the suspected methamphetamine and packaging. Relying on the fact that the suspected methamphetamine was packaged in two separate bags and its total quantity, Officer Horn informed the judge that based on his training and belief, the suspected methamphetamine was possessed for sale.

Government's Brief (hereinafter GB) at 5, ¶ 4.

In fact, Officer Horn relied upon a combination of three factors, not two, when informing the judge that he believed the suspected methamphetamine was possessed for sale. The government omits the most important of these factors, the allegation that neighbors had complained of drug sales at Mr. Payton's residence. Horn's exact statement was:

> Because of my experience and training I believe that these drugs were possessed for sales. This opinion is based on complaints received from neighbors of drug sales at 544 Spur Court, the way the drugs were packaged, and the amount possessed.

ER 325.

The failure to include the alleged complaints of drug sales is significant because it is the only factor that truly creates an inference of sales. See ER 147-151. There is nothing inherent in a 2.7 gram quantity of methamphetamine that is indicative of sales. Officer Horn acknowledged that this quantity is also consistent with personal use. ER 95. Regarding the packaging, the trial courted noted that while it did have some significance, the bare fact that the substance was contained in two packages inside a slightly larger package was of "minimal" significance. ER 149.

The second misleading statement is the assertion that Officer Horn advised the magistrate he "was aware of complaints from neighbors regarding drug activity at [Mr. Payton's] residence." GB 5, ¶5. If fact, Horn's affidavit includes only the bald statement that neighbors had complained of "drug sales." The affidavit contains no information which indicates that neighbors complained of any other "drug activity." See ER 324-326.

Mr. Payton does not dispute that complaints of "drug sales" could constitute complaints of drug activity. However, Officer Horn specifically advised the magistrate that neighbors had complained of drug sales. He did not advise the magistrate of anything else that could be construed as a complaint of drug activity.

This difference is significant because, in fact, no neighbor ever complained of drug sales.

B. THE SEARCH WARRANT WAS ISSUED WITHOUT PROBABLE CAUSE AND CONTAINED INTENTIONAL AND/OR RECKLESS MISSTATEMENTS OF MATERIAL FACTS.

Officer Horn's affidavit avers that the police "received complaints from neighbors of drug sales" at Mr. Payton's residence. At the *Franks* hearing, however, Officer Horn acknowledged that no neighbor ever complained of drug sales. ER 101. Neither Officer Horn or the government has ever asserted that this contradiction resulted from any mistake or misunderstanding. Rather, the government argues: "The fact that [Mr. Payton's neighbor] never reported sales is irrelevant." GB 33. The government asserts Officer Horn was entitled to inform the magistrate that neighbors complained of drug sales – even though no such complaints existed – because the police were aware of information which they believed was consistent with drug sales. GB 31-33. No authority supports this proposition.

Mr. Payton's neighbor complained about the amount of traffic to and from Payton's residence, the type of people who constituted the traffic, and her suspicion that drugs were being used at the house. GB 32. The neighbor also

recorded what was occurring and provided the videotape to the police. The police viewed the tape and concluded that the activity was consistent with drug sales. ER 101-102. However, *none* of this information was provided to the magistrate. Consequently, the magistrate could not rely on this information when issuing the search warrant.

If Officer Horn presented the true facts to the magistrate and opined that the activity was indicative of drug sales one of two scenarios would have occurred. First, the magistrate could have exercised his discretion and determined, contrary to Officer Horn's opinion, that the reported activities were insufficient to justify a search of Mr. Payton's computer. Alternatively, the magistrate could have exercised his discretion, concurred with Officer Horn's opinion, and issued a warrant which authorized the search of Mr. Payton's computer for evidence of drug sales. Under either circumstance the Fourth Amendment would be satisfied because the warrant would have been issued, or not, based upon the magistrate's evaluation of the facts – not Officer's Horn's. *See Illinois v. Gates*, 462 U.S. 213, 239 (1983).

Mr. Payton agrees that a magistrate may rely upon law enforcement's interpretation of evidence when the magistrate determines whether probable cause exists. The problem here is that the magistrate did not knowingly rely on the

Officer Horn's opinion or interpretation evidence. Rather, the magistrate relied on Officer Horn's factual allegation that neighbors had complained of "drug sales."

Officer Horn did not describe what he observed, or what others informed him, and opine that the activity was indicative of drug sales. Instead, he withheld the details and falsely informed the magistrate only that neighbors had complained of "drug sales." In so doing, Officer Horn usurped the authority of the magistrate and violated the requirements of the Fourth Amendment.

Absent the allegation that neighbors complained of drug sales, the factual information in the affidavit consisted of the following: (1) Melinda Fuentes was arrested in Mr. Payton's residence while in possession of a glass pipe that is commonly used to smoke methamphetamine; (2) she possessed 2.7 grams of suspected methamphetamine at the time; and (3) the methamphetamine was packaged in two plastic bags inside a slightly larger bag that was safety pinned to the inside of her bra. Based upon this information no reasonable magistrate would issue a search warrant authorizing the search of any computer that might be located in the residence for evidence of drug sales.

C. THE SEARCH OF MR. PAYTON'S COMPUTERS WAS NOT OBJECTIVELY REASONABLE.

The district court affirmed the search of Mr. Payton's computer based upon its determination that "the failure to include computers in attachment A was the result of mistake and oversight." ER 27-39. The problem with the ruling is that the error was made by Officer Horn. It was not made by the magistrate.

The magistrate authorized the police to search only for the property listed in attachment A. ER 197-199. He did not authorize the search of Mr. Payton's computer. The government does not assert that the magistrate ever assured Officer Horn, or affirmatively indicated that the search of computers was authorized. We now know that the magistrate intended to authorize the search of computers only because he so testified at the evidentiary hearing, long after the warrant was issued.

This is not a case like *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), or *United States v. Hurd*, 499 F.3d 963 (9th Cir. 2007). In those cases it was objectively reasonable for law enforcement to believe their requested searches were authorized because the magistrates so informed the officers, with words and actions, when the warrants were approved.

In *Sheppard*, the police presented their affidavit to a neutral judge who informed them that he would authorize the search as requested, and assured the officers that the necessary changes in the warrant would be made. The officers then observed the judge make some changes and received the warrant and the affidavit. An issue arose because the magistrate then neglected to make some of the necessary changes. *Sheppard*, 468 U.S. at 990-991.

In *Hurd*, the police requested permission to conduct their intended search and properly included the intended items in the warrant. The magistrate reviewed the warrant, signed it, and advised the officer that "his warrant request was 'fine' (or words to that effect)." *Hurd*, 499 F.3d at 967. However, despite this verbal assurance, the magistrate inadvertently neglected to initial one of the items listed in the warrant. *Id.* at 968.

In both *Sheppard* and *Hurd*, it was the magistrate, not the police, who committed errors when issuing warrants. The Courts upheld the searches because they "refuse[d] to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Sheppard*, 468 U.S. at 989-990; *Hurd*, 499 F.3d at 969.

Here, in contrast, while Officer Horn may have *subjectively* believed he was authorized to search computers – *objectively*, this belief was unreasonable. The magistrate never affirmatively indicated that the search of computers was authorized when the warrant was issued. Nor could anyone who read the warrant *objectively* believe that the search of computers was authorized.

D. THERE WERE NO SUITABLE WORDS OF REFERENCE WHICH PERMITTED THE STATEMENT OF PROBABLE CAUSE TO EXPAND THE SCOPE OF THE SEARCH WARRANT.

The government incorrectly asserts that the probable cause statement expanded the scope of the warrant because the affidavit was "incorporated" into the warrant. See GB 17-23. Their position fails because the warrant's boilerplate incorporation clause incorporates the affidavit solely to provide probable cause to search for the items listed in attachment A. ER 322.

A court may construe a warrant with reference to a supporting application or affidavit only "if the warrant uses appropriate words of incorporation." *Groh v. Ramirez,* 540 U.S. 551 (2004). The Ninth Circuit describes these as "suitable words of reference." *See, e.g., United States v. Towne*, 997 F.2d 537, 539 (9th Cir. 1993) (warrant affirmed where space reserved for description of items to be searched stated "See Attachment B"); *United States v. Fannin*, 817 F.2d 1379,

1381(9th Cir. 1987) (warrant authorized seizure of evidence "of the specific crimes and fruits of the crimes described in the supporting affidavit").

Here, the district court ruled that scope of the warrant was not expanded by the statement of probable cause because the affidavit "was not incorporated by suitable words of reference into the description of items to be seized." ER 39.

The government points to nothing which indicates that the affidavit was incorporated for any purpose other than providing probable cause to search for the items listed in attachment A. Because the warrant lacks appropriate words of incorporation, the probable cause statement cannot expand the scope of the search.

E. THE RECENT OPINION IN *UNITED STATES v. GIBERSON* DOES NOT ESTABLISH THAT THE SEARCH OF MR. PAYTON'S COMPUTER WAS WITHIN THE SCOPE OF THE WARRANT.

The search warrant authorized the search of Mr. Payton's residence for, *inter alia:*

> Sales ledgers showing narcotics transactions such as pay/owe sheets, telephone recording equipment and tapes, which are included in the equipment that are pertinent and contain information dealing with hand to hand transactions, shall be included. Financial records of the person(s) in control of the residence or premises, bank accounts, loan applications, income and expense records, safety deposit box keys and records, property acquisitions and notes, and any lease or rent applications.

ER 323.

The government has never asserted that the inclusion of these items authorized the police to search any computer under the "container" theory. The recent opinion in *United States v. Giberson*, U.S.D.C. No. 07-10100, 2008 U.S. App. LEXIS 11517 (9th Cir. May 30 2008)[1] does not establish that the search of Mr. Payton's computer was proper under this theory.

The *Giberson* opinion states that the "container" theory may extend to computers.[2] However, the opinion should not be read broadly as such a ruling was not necessary to resolve the issue before the Court. The opinion states:

> Computers, like briefcases and cassette tapes, can be repositories for documents and records. We have not yet had occasion to determine, in an opinion, whether computers are an exception to the general principle that a warrant authorizing the seizure of particular documents also authorizes the search of a container likely to contain those documents. We hold that, in this case, where there was ample evidence that the documents authorized in the warrant could be found on Giberson's computer, the officers did not exceed the scope of the warrant when they seized the computer.

2008 U.S. App. LEXIS 11517, *12.

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[1] The opinion was issued on May 30, 2008, after Appellant's Opening Brief and the Government's response had been filed.

[2] Counsel understands that the Appellant in *Giberson* either has, or intends to request rehearing *en banc*.

Giberson possessed false I.D. cards and used a false identity in order to avoid efforts to collect a child support arrearage. 2008 U.S. *Id.* at *2-*3. The police obtained a warrant to search his residence for:

> (1) "records or documents that appear to show ownership of assets or property"; (2) "records or documents from financial institutions" in Giberson's name or the names of any known or unknown aliases; (3) "records and correspondence relating to identification cards"; (4) "records, documents or correspondence . . . related to the use or attempted use" of other individual's identities; (5) "correspondence, records and documents" relating to Giberson's or his aliases' earnings and employment; (6) tax records; (7) documents or records showing receipt of income or expenditure of funds; and (8) records referring to Giberson's employer.

Id. at *3. When executing the warrant, the police discovered a personal computer and printer along with several false identification cards and related materials that appeared to have been printed off of the computer. *Id.* at *4. Based on this discovery, agents secured the computer until a second warrant could be obtained to search Giberson's hard drive. *Id.* at *5.

The specific issue in *Giberson* was "whether a warrant that describes particular documents authorizes the seizure of a computer where ... the searching agents reasonably believed that documents specified in the warrant would be found stored in the computer. *Id.* at *10. The Court held that under the facts of

that case, "where there was ample evidence that the documents authorized in the warrant could be found on Giberson's computer, the officers did not exceed the scope of the warrant when they seized the computer." *Id.* at *12. The opinion notes:

> numerous documents related to the production of fake I.D.s were found in and around Giberson's computer and were arguably created on and printed from it. It was therefore reasonable for officers to believe that the items they were authorized to seize would be found in the computer, and they acted within the scope of the warrant when they secured the computer.

Id. at *15.

In *Giberson,* the agents seized the computer and obtained a second warrant prior to conducting a search of the hard drive. The opinion explains that these "actions were particularly appropriate because the agents merely secured the computer while they waited to get a second warrant that would specifically authorize searching the computer's files." *Id.* at *17.

Here, in contrast, the officers did not secure Mr. Payton's computer and request judicial authorization prior to searching the computer's files. Instead, they immediately searched the computer's files in the absence of judicial authorization.

In addition, in *Giberson*, numerous documents related to the production of fake I.D.s were found in and around the defendant's computer. It was therefore

reasonable for the agents to believe the items they were authorized to seize would be found in the computer. Here, no such circumstances existed. While the warrant authorized a search for financial records and sales ledgers showing narcotics transactions, no evidence of drug sales was discovered in the residence, much less in and around the computer.

For these reasons, it was not reasonable for the police to search Mr. Payton's computer in the absence of prior judicial authorization.

II.

CONCLUSION

Based upon the foregoing, all fruit of the July 30, 2004 search warrant should be suppressed. Mr. Payton should be permitted to withdraw his guilty plea and the matter should be remanded for further proceedings.

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 1:05-CR-333 OWW

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 6869 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type of style requirements of Fed. R. App. P. 32(a)(6) because this brief has been proportionately spaced typeface of 14 points in Times New Roman style.

Dated: June 23, 2008

Respectfully submitted,

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The undersigned hereby certifies that she is an employee in the Office of the Federal Defender for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers. On June 23, 2008, she personally served a copy of the original of the attached:

APPELLANT'S REPLY BRIEF

on the plaintiff and interested parties by placing a copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States mail at Fresno, California, as follows:

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DATED: June 23, 2008

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