UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 13-CR-234

DAMIAN PATRICK,

Defendant.

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

On July 3rd, 2014, Mr. Patrick filed a motion for leave to file a suppression motion based on the police tracking his cell phone to locate and then arrest him (Docket Entry 41), the government responded on July 15th (Docket Entry 42), and Magistrate Judge Gorence then held a telephone status conference on July 18th. Pursuant to all of these filings and proceedings, both the government and the defense agree that a search warrant is required in order for law enforcement to track or "ping" an individual's cell phone in real-time to ascertain its location (as opposed to obtaining historical records to recreate its movements at a later date, which is not at issue in this case). Where the parties part company is whether an order signed by a state court judge in this case (Docket Entry 42, Exhibit A at 1-5) was a search warrant and satisfies the probable cause standard demanded by the Fourth Amendment ("no Warrants shall issue, but upon probable cause…"). For the following reasons, the state court documentation provided by the government in Exhibit A in Docket Entry 42 is not a search warrant and does not satisfy the probable cause requirement of the Fourth Amendment.

I. The affidavit and application presented to the state court judge do not establish probable cause as required by the Fourth Amendment. Further, the order itself does not rest upon a sufficient showing of probable cause and none of the statutory authority it cites provides adequate authority to track an individual's cell phone.

This Court must review the state court's determination of probable cause by looking only at the "four corners" of the documents presented to it by law enforcement. *See United States v. Orozco*, 576 F.3d 745, 748 (7th Cir. 2009). Therefore, a detailed examination of their contents is called for, and based upon the following, the probable cause standard was not met in this case:

A. The Affidavit of Police Officer Mark Harms[1]

Police Officer Mark Harms drafted an affidavit dated October 27th, 2013 asking the state court for an order approving the use of a trap and trace device, a pen register, and the release of subscriber information that (among other things) would include the "cellular telephone global positioning system (GPS) location information" and "identification of the physical location of the target cellular telephone" (i.e. Mr. Patrick's phone). *See* Exhibit A at 6. A trap and trace device and a pen register record the numbers dialed to and from a telephone, respectively, and a request for either does not require a showing of probable cause. *See In the Matter of the Application of the United States of America For an Order Authorizing the Disclosure of Prospective Cell Cite Information*, 2006 WL 2871743 (E.D. Wis. 2006) at 2 (hereafter "*E.D. Wis.*").

[1] It should be noted that undersigned counsel is aware that the United States Attorney's Office here in Milwaukee has a policy to not prosecute cases where Officer Harms would have to testify. Undersigned counsel is not aware of the exact reasons for this policy other than he has heard Officer Harms has been referred to as "*Brady* and *Giglio* tainted." The government would be in a much better position to inform this Court of the problems associated with Officer Harms should the Court wish to know more. Because it appears Officer Harms will not be required to testify in this case even should it go to trial, the government apparently is not concerned about prosecuting a case where his affidavit was used to obtain the order now in question.

In support of obtaining the information requested, including the real-time location of Mr. Patrick's cell phone, Officer Harms cited to no statutory authority allowing him to do so, rather asserting only that he was involved with an investigation "involving the offense(s) of Violation of Probation as detailed in Wisconsin Statute §§ 973.10"[2] and that "it became apparent that particular information found in cellular call records would be useful to investigators." *See* Exhibit A at 6, ¶ 2. Officer Harms further stated how the information sought would be "useful in attempting to identify the physical location of a cellular/wireless device," *see id*. at ¶ 3(a), and how the technology of cellular telephones, pen registers, and trap and trace devices work. *See id*. at ¶¶ 3(b)-(j). Officer Harms informed the state court that should his requests be granted, "law enforcement has the technological capability to engage in real time identification of the target cellular telephone location." *See id*. at ¶ 3(k). He recited how police linked the specific number in question to Mr. Patrick, *see id*. at ¶ 3(l), and how they determined which company serviced that number. *See id*. at ¶ 3(m). He then concluded by stating that the information sought "is relevant to an ongoing criminal investigation" and that further "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." *See id*. at ¶ 3(n).

If this was merely a routine affidavit asking for a trap and trace device and a pen register, it might be sufficient to support a court order as the standard to for obtaining either of these under federal law is very low: law enforcement only need present "a certification... that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." *E.D. Wis*. at 2, *citing* 18 U.S.C. §

[2] As discussed later, this is an incorrect description of Wis. Stat. § 973.10.

3122(b)(2). But the Fourth Amendment probable cause standard requires much more: it requires that law enforcement convince the 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." *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *see also Florida v. Harris*, 133 S.Ct. 1050, 1055 (2013). It is here that Officer Harm's affidavit fails. First, there is no serious argument to be made that tracking Mr. Patrick's cell phone and locating him by doing so would lead to finding contraband in a particular place, and indeed no mention of any type of contraband[3] is made in the affidavit.

Second, Officer Harms fails to allege that evidence of a crime would be found in a particular location. Twice in his affidavit he asserts that probable cause existed to believe that the physical location of the phone would reveal evidence of the crime of "Violation of Probation in violation of Wisconsin Statute § 973.10." *See* Exhibit A at 6, ¶ 2 and at 8, ¶ 3(n). The statute he cites, Wis. Stat. § 973.10, is not titled "Violation of Probation" but rather "Control and supervision of probationers." Significantly, it is not a criminal statute because it does not define a crime which under Wisconsin law "is conduct which is prohibited by state law and punishable by fine or imprisonment or both." Wis. Stat. § 939.12. Wis. Stat. § 973.10 merely discusses how probationers are deemed to be in the custody of the department of corrections, *see* subsection (1), can be ordered to perform community service, *see* subsections (1m)(a) and (b), and describes revocation procedures to be used in the event a probationer violates conditions of probation. *See* subsections (2) to (4). Officer Harms offered no other alleged crimes that would be revealed by tracking Mr. Patrick's phone, and accordingly his affidavit fails to meet either of the probable

[3] Defined by Black's Law Dictionary, 9th Ed. 2009, as "goods that are unlawful to import, export, produce, or possess."

cause requirements articulated in *Gates* and *Harris:* that there is a fair probability that either contraband or evidence of a crime will be found in a particular place.

Almost as troubling as the affidavit's failure to demonstrate the fair probability of finding contraband or evidence of a crime in a particular location is the abrupt and completely conclusory nature of it. It substantively recites very little before declaring that probable cause exists to believe the location of the cellular phone will reveal evidence of the nonexistent crime of "violation of probation": it discusses Officer Harms' 16 years of experience, *see* Exhibit A at 6, ¶ 1, his knowledge of the technical workings of pen registers, trap and trace devices, and cellular telephone networks, *see id*. at 6-7, ¶¶ (3)(a)-(k), and how he linked the phone in question to Mr. Patrick and the service provider. *See id*. at 8, ¶¶ (3)(l)-(m). Nothing beyond that is provided before declaring "probable cause" exists to reveal evidence of a (nonexistent) crime. The United States Supreme Court warned in *Gates* that reviewing judges must guard against "mere conclusory statement[s] that gives the magistrate virtually no basis at all for making a judgment regarding probable cause." *Gates* at 239. The Court stated "sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Id*. Ultimately, courts must "continue to conscientiously review the sufficiency of affidavits on which warrants are issued" to ensure that magistrates are not abdicating their duty when signing off on orders and warrants. *See id*. Here, the statements made in the affidavit not only fail to allege that there is a fair probability that contraband or evidence of a crime will be found, but also fail to provide any basis upon which to find probable cause in any type of substantial and non-conclusory manner.

B. The Application of Assistant District Attorney Christopher Ladwig

It is with Milwaukee County Assistant District Attorney Christopher Ladwig's application, *see* Exhibit A at 9-10 (also dated October 27th, 2013), that an effort is made to link the information requested in officer Harms' affidavit to actual statutory authority, but for the following reasons each attempt fails as none satisfy the probable cause requirement of the Fourth Amendment and each rest on as conclusory and bare-boned assertions as those made in the affidavit:

1. Wis. Stat. § 968.35: this is the Wisconsin statute version of the federal pen register and trap and trace device statute. It is titled "Application for an order for a pen register or a trap and trace device." It does not require a showing of probable cause and instead only requires "a certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." *See* subsection (2)(b).
2. 18 U.S.C. §§ 2711(3) and 3127(2)(B): these are definitional statutes only and do not bear on establishing probable cause.[4]
3. 18 U.S.C. §§ 2703(c)(1)(B) and (d): these provisions are part of a federal statute known as the Stored Communications Act (SCA), and allow the government to obtain records and other information pertaining to a subscriber or customer of a phone company upon the government offering "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an

[4] Both statutory subsections define the term "court of competent jurisdiction."

ongoing criminal investigation." *E.D. Wis.* at 2, *citing* 18 U.S.C. §§ 2703(c)(1) and (d). This imposes a slightly higher "intermediate" burden upon the government than the showing required to obtain a pen register or trap and trace device, but does not meet the higher probable cause standard required by the Fourth Amendment. *See id*.

4. 18 U.S.C. § 3117: this federal statute discusses "tracking devices," which is "an electronic or mechanical device which permits the tracking of the movement of a person or object." *See* subsection (b). In order to obtain permission to use a tracking device "the government must meet the probable cause standard for warrants." *E.D. Wis.* at 2. Of course, the application's mere citation to this statute does not establish probable cause, which would have to be contained within Officer Harms' underlying affidavit. For the reasons already given above, the affidavit does not meet the probable cause standard required by *Gates* and *Harris*. Further, the procedural requirements for a tracking device warrant were not met (nor even attempted to be met) in this case, further indicating that this single, isolated reference to 18 U.S.C. § 3117 does not provide the actual basis for what the application was seeking in this case.[5]

After attempting to beef up Officer Harms' affidavit with citation to these (largely) non-probable cause statutes, the application regurgitates Officer Harms'

[5] These requirements include setting forth in the warrant the person or property to be tracked, designation of which judge the warrant must be returned to, and a reasonable length of time that the device may be used. *See* Fed. R. Crim. P. 41(e)(2)(C). When returned to the designated judge, the officer executing the warrant must note the date and time the device was installed, and the period it was used. *See* Fed. R. Crim. P. 41(f)(2)(A) and (B). Also, a copy of the warrant must be served on the person who was tracked or whose property was tracked within 10 days after the tracking ended. *See* Fed. R. Crim. P. 41(f)(2)(C).

misstatement of Wis. Stat. 973.10 constituting the "crime" of "Violation of Parole"[6] and recites language that tracks the requirements of the SCA (i.e. that the requested information is "relevant and material to this ongoing criminal investigation."). *See* Exhibit A at 10, ¶ (2)(b). The single mention of "probable cause" in the application differs from that of Officer Harms' affidavit, however: in the affidavit he asserted 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…" where the application backs away even from that assertion and states instead that "I believe 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.*" *See id*. at ¶ (2)(c) (emphasis added). Hence, the application does not even make the claim that probable cause exists for evidence of the nonexistent crime of "Violation of Probation"; rather, it asserts only that there is probable cause to believe that the information sought will reveal the physical location of the tracked cell phone (which is correct and really the only substantive point made by the underlying affidavit). This is a probable cause showing that falls far short of that required by *Gates* and *Harris:* that there is a fair probability that either contraband or evidence of a crime will be found in a particular place.

C. The State Court Order Signed by Judge Carolina Maria Stark

The order signed by state court judge Carolina Maria Stark stated that it found, pursuant to the application submitted by Christopher Ladwig and all the authorities cited

[6] The application and order refers to "parole," where the affidavit refers to "probation." As noted, neither reference is correct.

therein[7] and upon the affidavit of Officer Harms, that Mr. Patrick's phone number was the one specified in the affidavit and application; that Mr. Patrick is the subject of an investigation; that the location of the telephone with his number is unknown; and that the court was presented with a certification from the applicant stating that the information sought is relevant and material to an ongoing criminal investigation. *See* Exhibit A at 1-2, ¶¶ (1) – (4). The order then recited and ratified the conclusory statement contained in the affidavit that "there is probable cause to believe that the physical location of the target cellular telephone will reveal evidence" of the nonexistent crime of Violation of Parole (rather than the application's assertion that there is only probable cause to believe the requested information will reveal the physical location of the telephone). *See id*. at 2, ¶ 5.

In light of these meager findings based off the documents deficient in probable cause for the reasons already argued, the state court then approved the installation of a trap and trace device and pen register for Mr. Patrick's number. *See id*. at 2, ¶¶ (1) and (2). It also approved the release of information broader than anything asked for in either the affidavit or application, including "engineering maps or spread sheets if a map is not available that shows all cell site/tower locations by address, latitude/longitude, sector and orientation for the state of Wisconsin or any other state where the target phone/wireless device may be located," and a requirement that the service provider "initiate a signal to determine the location of the subject's mobile device on the service provider's network or with such other reference points as may be reasonable [sic] available and at such intervals and times as directed by the law enforcement agent serving this order." *See id*. at 3. Further, the service provider was ordered to be at law enforcement's beck and call 24

[7] The order added one authority beyond the application: 18 U.S.C. § 3125, titled "Emergency pen register and trap and trace device." It is not clear why this was added, but it does not bear on whether probable cause was established or not in this case.

hours a day. *See id*. In short, the state court went well beyond ordering the production of records already in existence as contemplated by the SCA: it ordered the phone company to actively assist law enforcement in an ongoing investigation and contemporaneously turn over records not yet in existence.

It is these sweeping portions of the state court order that not only fail to meet the Fourth Amendment's probable cause standard, but also squarely violate another federal law called the Communications Assistance for Law Enforcement Act of 1994 (CALEA), whose primary purpose "is to ensure that telecommunications carriers make their equipment capable of providing law enforcement with information to which it is entitled under the statutes relating to electronic surveillance." *E.D. Wis*. at 2. CALEA requires that carriers take certain steps to ensure the government, pursuant to a court order or warrant, has access to call-identifying information before, during, or immediately after the transmission of a wire or electronic communication. *See id., citing* 47 U.S.C. § 1002(a)(2). One important limitation is imposed by CALEA, however, relevant to the issue here: "with regard to information acquired solely pursuant to the authority for pen registers and trap and trace devices (as defined in section 3127 of title 18, United States Code), such call-indentifying information *shall not include any information that may disclose the physical location of the subscriber* (except to the extent that the location may be determined from the telephone number)." *Id*. at 3, *citing* 47 U.S.C. § 1002(a)(2) (emphasis added).

Almost every court to have considered the question (including two judges in this district), has concluded that the SCA does not provide sufficient authority, either alone or in addition to trap and trace and pen register device statutes, to track a cell phone in real-

time. *See E.D. Wis.* at 5-7 (Judge Adelman); *In the Matter of the Application of the United States of America For an Order Authorizing the Disclosure of Prospective Cell Cite Information*, 412 F.Supp.2d 947 (E.D. Wis. 2006) (Magistrate Judge Callahan); *In the Matter of the Application of the United States of America For an Order Authorizing Prospective and Continuous Release of Cell Site Location Records,* 2014 WL 3513120 at 1 (S.D. Tex. 2014) (Magistrate Judge Stephen Wm. Smith, providing a recent, updated overview of this issue and collecting cases) (hereafter "*S.D. Tex.*"). Several courts have gone as far as finding that real-time tracking information of cell phones must be obtained under the Fourth Amendment/Fed. R. Crim. P. 41/§ 3117(b) probable cause standard (as the government agrees it must here), or under 18 U.S.C. § 2518[8]. *See E.D. Wis*. at 5; *see S.D. Tex*. at 1.

Sound reasons exists for why all of these courts have found that the SCA does not grant the authority (either alone or in addition to the pen register and trap and trace device statutes[9]) requested in the underlying documents here to track a person's cell phone in real time. First, nothing in the legislative text, history or purpose of the SCA demonstrates that real-time tracking of a cell phone falls within its purview. *See E.D. Wis.* at 5 (discussing how various operative terms of the SCA do not square with tracking a cell phone). Second, the structure of the SCA establishes it is aimed at obtaining retrospective, stored communications- and not with obtaining prospective, real-time data that will assist law enforcement with ongoing surveillance. *See E.D. Wis.* at 6. Simply

[8] This is the wiretap statute, and the theory goes that because this statute requires the government to satisfy additional burdens beyond that of ordinary search warrants, the lesser intrusion of tracking a person's cell phone would also be covered by such a showing. *See E.D. Wis.* at 2-4.
[9] Courts have referred to the government's argument that some other authority (usually the SCA) in addition to the pen register/trap and trace device statutes allow for real-time tracking as the "hybrid theory" or "dual authority" theory. *See E.D. Wis.* at 3.

put, the SCA "has no monitoring periods, no extensions, no minimization requirements, no periodic reporting, no automatic sealing. In short, none of the signature elements of an ongoing surveillance scheme are present." *S.D. Tex.* at 4. Third, the SCA generally forbids the disclosure of subscriber information to the government absent certain exceptions, none of which mention the pen register or trap and trace device statutes. *See E.D. Wis.* at 6*; S.D. Tex.* at 7. Fourth, all of the relevant statues at issue here (the SCA, CALEA, and the pen register and trap and trace device statutes) were enacted at different times and do not reference each other working together the way the "hybrid theory" advances in their text or legislative history. *See E.D. Wis.* at 6; *S.D. Tex.* at 7. Fifth and lastly, Congress expressly created a statute that governs when the government wants to turn cell phones into real-time tracking devices: 18 U.S.C. § 3117. *See E.D. Wis*. at 5; *S.D. Tex.* at 5. It makes little sense that Congress would enact a detailed scheme for location tracking, yet intend for the SCA to "open a back door for law enforcement to employ the same surveillance technique under different (and less rigorous) standards." *S.D. Tex.* at 5.

Hence, none of the authorities cited in the state court's order (both federal and state pen register and trap and trace device statutes, and the SCA) suffice to allow the tracking that occurred here. The one authority it cites that would allow for such tracking (18 U.S.C. § 3117) requires probable cause but this standard was not met either as it was not sufficiently established in the underlying affidavit and application. Therefore, the state court's mere recitation and ratification of the assertions contained in those documents fails to meet the standard required by *Gates* and *Harris*: that a fair probability be shown that contraband or evidence of a crime will be found in a particular place.

II. Conclusion

The documentation submitted in this case by the government does not amount to a warrant under the Fourth Amendment. Rather, it is merely a routine state court order and related paperwork that erroneously found authority under pen register and trap and trace device statutes, combined with the SCA, to track Mr. Patrick's cell phone. Beyond these statutes failing to allow for this on their own terms, the "hybrid theory" does not satisfy the Fourth Amendment's probable cause requirement that the government agrees applies here, and therefore the government's attempt to masquerade these documents as a warrant satisfying the Fourth Amendment's probable cause standard fails for all of the reasons already argued. Ultimately, the police here wanted to find Mr. Patrick by tracking his cell phone, but failed to do so pursuant to adequate statutory authority or by providing the state court sufficient reason to believe that a fair probability existed that contraband or evidence of a crime would be found in a particular place. As such, Mr. Patrick assets that the government effectively tracked his cell phone without a warrant in violation of the Fourth Amendment of the United States Constitution.

The government has indicated it will attempt to further save the search that occurred here by invoking exceptions to the warrant requirement, but Mr. Patrick will not speculate on the basis for these arguments and will not endeavor to make them for the government. Further, he expressly reserves the right to respond to any such arguments in his reply brief. As of now, Mr. Patrick has established that the state court order issued in this case is not a warrant and does not meet the probable cause standard that was required to track his cell phone in real-time. Because the order rests on no other legitimate authority, his motion to suppress should be granted and all evidence recovered after the

government's illegal search (including the firearm recovered from the car he was arrested in) should be deemed inadmissible at trial.

Respectfully submitted at Milwaukee, Wisconsin this 1st day of August, 2014.

/s/_____
Chris Donovan
Bar No. 1055112
Counsel for Defendant
Pruhs & Donovan, S.C.
757 N. Broadway, 4th Floor
Milwaukee, WI 53202
Tel: 414-221-1950
Fax: 414-221-1959