05-1734-cr(L)

To Be Argued By:
ROBERT M. SPECTOR

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-1734-cr(L)
05-6477-cr(XAP)

UNITED STATES OF AMERICA,
Appellant-Cross-Appellee,

-vs-

VAMOND ELMORE,
Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==========

REPLY BRIEF AND BRIEF IN OPPOSITION FOR THE UNITED STATES OF AMERICA

==========

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

ROBERT M. SPECTOR
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATEMENT OF THE ISSUES PRESENTED

I. Did the arresting officers have reasonable, articulable suspicion to support the June 25, 2003, traffic stop of the defendant which led to the seizure of the firearm charged in Count Two of the Indictment?

II. Did the defendant have standing to challenge the search of the apartment containing the firearms charged in Count One of the Indictment?

III. Did the district court properly apply the good faith exception to the exclusionary rule in concluding that the firearms seized as a result of the June 27, 2003, search warrant should not be suppressed?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-1734-cr(L)
05-6477-cr(XAP)

UNITED STATES OF AMERICA,
Appellant-Cross-Appellee,

-vs-

VAMOND ELMORE,
Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF AND BRIEF IN OPPOSITION FOR THE UNITED STATES OF AMERICA

SUMMARY OF ARGUMENT [1]

I. The district court erred in concluding that the June 25, 2003, traffic stop which gave rise to the seizure of the firearm charged in Count Two was not supported by

---

[1] The government will not repeat the Preliminary Statement, Statement of the Case and Statement of Facts, all of which were set forth in its initial brief.

reasonable suspicion. As argued in the initial brief, the informant here was not anonymous and gave enough personal information to render herself accountable to authorities. She identified herself by name and gave the police two telephone numbers – including one which the police used twice to contact her the day before the traffic stop. She also demonstrated her basis for personal knowledge about the defendant by providing detailed information about her relationship as his former girlfriend, and nonpublic information about a shooting that involved the defendant one year earlier.

Prevailing Supreme Court and Second Circuit case law does not require law enforcement officers to meet face-to-face with an identified and identifiable informant before conducting a *Terry* stop based on information provided by that informant. In this case, the police attempted to corroborate as much information as they could, and, although the confidential informant provided only limited predictive information about the defendant, including his likely whereabouts and the car he would be driving, the police were able to corroborate numerous other details she provided. Thus, under the totality of the circumstances, their traffic stop was amply supported by reasonable suspicion.

II. The district court properly denied the defendant's motion to suppress the firearms charged in Count One of the Indictment.

First, contrary to the district court's conclusion, the defendant lacked standing to challenge the search of Tanea Humphrey's apartment. Other than the contraband that the defendant stored in Humphrey's bedroom closet, the defendant had absolutely no connection to the searched premises, and, even under the liberal standard set forth in *United States v. Fields*, 113 F.3d 313, 320 (2d Cir. 1997), cannot establish a reasonable expectation of privacy in the searched premises.

Second, the district court properly applied the good faith exception to the exclusionary rule as to the firearms seized pursuant to the June 27, 2003, search warrant. As the district court concluded, the information in the warrant application was accurate, and the affiant did not intentionally or recklessly omit information. Moreover, the affiant had no reason to know that the warrant was illegal despite the judicial officer's authorization. The decision to suppress the firearm seized as a result of the traffic stop, which information was a key component to the probable cause finding supporting the search warrant was, as the district court itself characterized, a "close call" and one that the affiant could not have foreseen.

ARGUMENT

I. The District Court Erred In Ruling That The Police's June 25, 2003, Traffic Stop Was Not Supported By Reasonable Suspicion

In support of this argument, the government principally relies on its initial brief, with the exception of the following responses to specific points articulated in the defendant's brief.

First, in the factual statement of the defendant's brief, he maintains that Detective Roncinske was not certain whether the confidential informant, Dorothy Mazza, provided her last name before or after the traffic stop. Def.'s Brief at 3. To support this statement, the defendant cites pages 119 and 120 of the Joint Appendix, which is a portion of the transcript of the cross examination of Detective Roncinske. A review of those pages, however, reveals the following colloquy:

Q After the phone call was made initially, you only had a first name, correct?
A Yes.
Q It was Dorothy. When did you learn of her last name?
A In a subsequent phone call.
Q Can you be more specific?
A The best I can recall I would think it was on the second set of phone calls. Somewhere around there. I'm not sure.

Q When [were] the second set of phone calls . . . placed?
A They occurred the best I can remember is that I had gotten the name before Mr. Elmore had been arrested.
Q But you are not 100 percent.
A I'm not positive exact date and time, no sir.
Q It is possible it could be after he was arrested?
A I don't believe so.

JA119-JA120. In addition, on direct examination, Detective Roncinske had specifically stated that he had learned Mazza's last name from her during a telephone call that had occurred some time between the time of the first telephone call with her and the time when he authored the memo that gave rise to the traffic stop. JA78.

Second, although the defendant attempts to distinguish the various cases relied upon by the government for the proposition that a face-to-face encounter with an informant is not necessary to prevent the informant from being characterized as anonymous, the defendant fails to address the government's underlying argument. In the government's view, the district court erred because it dissected the information possessed by Detective Roncinske and viewed the various facts in isolation, rather than together. A key issue, for the reasonable suspicion calculus, is whether Mazza provided sufficient information to Detective Roncinske so that a reasonable person in her situation would have felt accountable for providing false or unreliable information. She not only provided Detective Roncinske with her name and cellular telephone

number, she spoke to the detective using that same telephone approximately four separate times that night. She told Detective Roncinske that she was the defendant's ex-girlfriend and gave him personal information about the defendant to which an ex-girlfriend would be privy. The district court and the defendant focus too much attention on the distinction between what Detective Roncinske actually knew about the caller and what he could have reasonably inferred about her from the information she provided. Although it is always possible that a witness will provide false information to a police officer, in the government's view, the relevant inquiry is whether the police officer had sufficient information about the informant to be able to rely upon her information for the purpose of conducting a *Terry* stop.

Third, the defendant mischaracterizes the government's reliance on *United States v. Johnson*, 364 F.3d 1185 (10th Cir. 2004). Def.'s Brief at 14 n.1. The government did not cite that case to support its claim that Mazza was not anonymous in this case. It cited that case to support the proposition that, when an individual provides the police with his or her cellular telephone number and stays on the telephone with the police for some period of time (as the caller did in *Johnson*), he or she is more accountable than someone who provides the police with no identifying information. Although the defendant is correct that the *Johnson* court was not called on to decide whether the information from the caller alone could support the initial stop in that case, the court did hold that the tip was sufficiently reliable to be used as additional information to

support the patdown of the suspect. *See Johnson*, 364 F.3d at 1191, 1194.

Reasonable suspicion merely requires "some minimal level of objective justification" for making a stop, which is "considerably less than proof" by a preponderance of the evidence and "obviously less demanding" than probable cause. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989). The reviewing court must be guided, not by factors in isolation, but on the "totality of the circumstances." *United States v. Arvizu,* 534 U.S. 266, 274 (2002). Based on the detailed information provided by Mazza, which was derived from her own timely, personal observations and her close personal relationship with the defendant, and the corroboration of both Mazza's identity and the innocent details of her information, the police developed an articulable, reasonable suspicion to stop the defendant's vehicle on June 25, 2003.

II. The District Court's Ruling Denying The Motion To Suppress As To The Firearms Charged In Count One Was Correct Both Because The Defendant Lacked Standing To Challenge The Search Warrant Which Gave Rise To The Seizure Of The Firearms And Because The Officers Reasonably Relied on The Issuance Of The Warrant In Seizing The Firearms

A. Factual and Procedural Background

On June 18, 2004, the defendant filed a motion to suppress, claiming that the initial police stop on June 25, 2003, which gave rise to the discovery of the firearm charged in Count Two of the Indictment, was not supported by reasonable suspicion and that, as a result, the firearm seized from the defendant's vehicle and charged in Count Two should be suppressed. JA14, JA17. The defendant further argued that the firearms and ammunition charged in Count One should be suppressed because, without the information in the search warrant affidavit discussing the fruits of the June 25 stop, the warrant giving rise to the seizure of the firearms and ammunition charged in Count One was not supported by probable cause. JA14, JA19.

In responding to the portion of the motion directed at the firearms seized as a result of the search warrant, the government first argued that the defendant lacked standing to challenge the validity of the warrant. JA34. Specifically, the government argued that the defendant did

not have a reasonable expectation of privacy in the searched premises. JA34-JA35. On November 9, 2004, after the court held oral argument on the standing issue and asked the parties to address the issue in additional, written submissions, the government filed a memorandum arguing that the operative question to answer for the purposes of determining standing was not whether the defendant had a reasonable expectation of privacy in the bags containing the firearms, but whether he had a reasonable expectation of privacy in the searched premises. JA219-JA226.

In the alternative, the government addressed the defendant's second contention that the warrant lacked probable cause without the information in it regarding the June 25, 2003, traffic stop. JA253. The government agreed with the defendant's argument that the warrant would not be supported by probable cause and argued instead that the exclusionary rule did not apply under the good faith exception. JA253-JA258.

On February 28, 2005, the court issued a written ruling denying in part, and granting in part, the motion to suppress. JA269. Specifically, the court granted the motion to suppress as to the firearm charged in Count Two based on its conclusion that the Norwalk police's June 25, 2003, motor vehicle stop of the defendant was not supported by an articulable, reasonable suspicion. JA275-JA282. As to the firearms and ammunition charged in Count One, the Court rejected the government's argument that the defendant lacked standing to challenge the search warrant. JA288-JA289.

Specifically, the court reasoned that the defendant would have "standing to challenge the validity of the search warrant if the court finds that he has a reasonable expectation of privacy in either Tanea Humphrey's apartment . . . or a reasonable expectation of privacy in the closed containers found in Humphrey's apartment." JA283. As to Humphrey's apartment, the court agreed with the government that the defendant's "connection to [the] apartment [was] too attenuated for his subjective expectation of privacy to be reasonable." JA286. Citing this Court's decision in *Fields*, 113 F.3d 313, the court rejected the defendant's argument that his connection to the searched premises in this case was similar to the defendants' connection to the apartment in *Fields*. JA285. As the court explained:

> Elmore's expectation of privacy with regards to Humphrey's apartment does not fit neatly into either category. Elmore did not have property or possessory rights [in] the apartment. Elmore visited the apartment with the tenant's permission between seven and ten times over a period of a year or two, did not have a key to the apartment, did not pay rent, did not take meals at the apartment, could not come and go as he pleased, and never stayed there overnight. Additionally, Humphrey testified that Elmore stayed for only about five minutes on the occasions he visited the apartment. However, Elmore did have Humphrey's permission, at least tacitly, to store the contraband in her closet. Also, there is no evidence that Elmore entered the

apartment solely to engage in any type of "commercial transaction" or business dealings.

Based on these facts, the court finds Elmore's connection to Humphrey's apartment to be too attenuated for his subjective expectation of privacy to be reasonable. . . . While Fields paid rent, spent large amounts of time at the residence in question in that case, and used it almost without restriction, Elmore's visits to Humphrey's apartment were few and always under the strict supervision of Humphrey. Elmore more closely resembles [an] occasional visitor "who is merely present with the consent of the householder."

Elmore's expectation of privacy is not one "that society is prepared to recognize as reasonable.". . . His relationship to Humphrey's apartment is based primarily on Humphrey's willingness to store contraband inside it for Elmore's benefit. While illegal activity does not doom a defendant's claim to a reasonable expectation of privacy . . . it, by itself, does not provide a basis with which to invoke the societal understandings and "privacy sharing" discussed in [*Minnesota v. Olsen*, 495 U.S. 89 (1990)].

Elmore's connection to the apartment is basically transient, and not one generally recognized as reasonable by society. Therefore, Elmore did not have a reasonable expectation of privacy with regards to Humphrey's apartment, and

his Fourth Amendment rights were not violated by the search conducted by the Norwalk Police.

JA286-JA288 (internal citations omitted).

Despite the district court's conclusion that the defendant did not have a reasonable expectation of privacy in the searched premises, it found that he had standing to challenge the search warrant. In particular, the court held that "the owner of a closed bag has a reasonable expectation of privacy in the bag, such that he has standing to challenge a search of that bag." JA288. The court found this proposition to be true even if the owner of the bag "does not have a reasonable expectation of privacy in the location the bag was seized." JA288.

As to the underlying validity of the search warrant, the Court agreed with the government's argument that the good faith exception applied. JA290. First, the court rejected the defendant's argument that the affiant "intentionally omitted several pieces of information from his warrant application affidavit that made the affidavit misleading." JA291. The defendant had argued that the affidavit was misleading because (1) it failed to state that the affiant did not know Mazza before their first phone conversation, (2) it failed to "detail exactly what [the affiant] knew of Mazza," (3) it failed "to state that [the affiant] did not know when Mazza last saw a firearm or narcotics in Elmore's car," (4) it failed "to state that the information concerning Elmore's shooting had not been proven in a court of law," (5) it failed "to state that Mazza had refused to meet with police," and (6) it failed "to alert

the court that Mazza was Elmore's ex-girlfriend, and hence might have a motive to falsely incriminate him." JA291. The court concluded:

> The omissions cited by Elmore are not sufficient for a finding that the magistrate was "knowingly misled" by Detective Roncinske. While Detective Roncinske may not have included every minute piece of information as Elmore sets forth, he is not required to do so. . . . The court finds that, while insufficient for a finding of probable cause, the information contained in the warrant application was true and correct to the best of Detective Roncinske's knowledge, and he did not intentionally omit information.

JA292.

In addition, the district court found that "a reasonably well trained officer, in this case Detective Roncinske, would not have known 'that the search was illegal despite the magistrate's authorization.'" JA293. The court characterized its reasonable suspicion ruling as a "close call" and held that Detective Roncinske "was entitled to rely on a judge's opinion of the correct answer to a difficult legal problem." JA293. Thus, the court concluded that "Detective Roncinske and the Norwalk Police officers involved in the search of Tanea Humphrey's apartment conducted the search in good faith reliance on a warrant obtained from a neutral magistrate and acted within the scope of that warrant." JA293.

The defendant moved for reconsideration of the court's ruling. JA295. In support of his motion, the defendant relied heavily on this Court's opinion in *United States v. Reilly*, 76 F.3d 1271 (2d Cir. 1996), and asserted two arguments. First, the defendant claimed that the court ignored this Court's precedent in applying the good faith exception despite the fact that the affidavit allegedly omitted critical information about the traffic stop. JA298-JA303. Second, the defendant claimed that Detective Roncinske "recklessly misled" the magistrate into "believing that the caller was much more credible, and her information much more reliable, than they actually were." JA304. Specifically, according to the defendant, the affidavit recklessly suggested that the caller had actually seen the firearms in Humphrey's apartment. JA305.

The district court granted the defendant's motion for reconsideration, but refused to alter its previous ruling. JA321. First, the court rejected the defendant's contention that the issue of whether the officer intentionally, recklessly or negligently omitted information was irrelevant to the issue of whether the good faith exception applied. JA324. The court understood *Reilly* to require an analysis of whether the officer either intentionally misled the magistrate, or recklessly omitted "clearly critical" or "crucial" facts. JA324-JA325.

Second, the court found that Detective Roncinske did not recklessly omit information from the warrant affidavit. JA325-JA329. Specifically, the court was not convinced that the defendant had pointed out "clearly critical" omissions. JA326.

As to the defendant's claim that Detective Roncinske did not state that the confidential informant was unknown to him prior to this investigation, the court explained that Detective Roncinske had made no claim that he had known the informant or had found the informant to be reliable before this case. JA326. As to the defendant's claim that Detective Roncinske failed to convey that the informant had not seen the firearms or drugs in the defendant's car for six days prior to the defendant's arrest, the court found that Detective Roncinske had explicitly "informed the issuing judge that the CI had told him that the CI had last seen the firearms 'on or about 6/19/03.'" JA326. As to the defendant's claim that Detective Roncinske omitted the fact that the informant was the defendant's ex-girlfriend, the court concluded that the information was not clearly critical, could have supported the government's claim that the informant was in a better position to have inside information as to the defendant's criminal activities, and would have effectively identified her as the informant. JA327. As to the defendant's claim that Detective Roncinske should have characterized the informant's inside information as "unproven," the court was not persuaded that the omission was critical. JA328. Finally, as to the defendant's claim that Detective Roncinske should have informed the issuing judge that the informant had not wanted to meet with the police, the court noted that the detective had advised the issuing judge that the informant feared for her safety and had made no claim that a face-to-face meeting had occurred. JA328.

In summary, the court explained:

> [T]his is not a situation where the police had crucial information and did not provide it to the issuing judge. The police simply did not have enough information. It was, however, a situation in which an issuing judge could have observed the paucity of information, and required more. While it was a close call, reviewing the totality of the circumstances, it was a call the judge, not Detective Roncinske, was required to make. The police did not recklessly omit clearly critical information, they merely did not have sufficient information to provide.

JA329.

B. Governing Law And Standard Of Review

1. Standing

The Fourth Amendment guarantees: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amend. 4. "The Amendment protects persons against unreasonable searches of 'their persons [and] houses' and thus indicates that the Fourth Amendment is a personal right that must be invoked by an individual." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

"[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.*, one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Carter*, 525 U.S. at 88 (internal quotation marks omitted). The "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* (internal quotation marks omitted). "A defendant lacks 'standing' in the Fourth Amendment context when his contacts with the searched premises are so attenuated that no expectation of privacy he has in those premises could ever be considered reasonable." *United States v. Fields*, 113 F.3d 313, 320 (2d Cir. 1997). "[A]n overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." *Carter*, 525 U.S. at 90. A defendant has the burden of establishing a reasonable expectation of privacy by a preponderance of the evidence. *See United States v. Vega*, 221 F.3d 789, 795 (5th Cir. 2000).

2. The Good Faith Exception

"[T]he 'good faith' exception to the exclusionary rule allows the admission of evidence, despite the absence of probable cause, 'when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.'" *United States v. Smith*, 9 F.3d 1007, 1015 (2d Cir. 1993) (quoting *United States v. Leon*, 468 U.S. 897, 920 (1984)). "The Supreme Court held in *Leon* that the exclusionary rule barring illegally obtained evidence from the courtroom does not apply to evidence seized in 'objectively reasonable reliance on' a warrant issued by a detached and neutral magistrate, even where the warrant is subsequently deemed invalid." *United States v. Jasorka*, 153 F.3d 58, 60 (2d Cir. 1998) (quoting *Leon*, 468 U.S at 922 n.23). The *Leon* Court reasoned that, "even assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 918-19; *see also Groh v. Ramirez*, 540 U.S. 551, 557-58 (2004) (refusing to apply good faith exception to warrant which omitted entirely description of items to be seized).

"The test of objective good faith is 'whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.'" *United States v. Moore*, 968 F.2d 216, 222 (2d Cir. 1992) (quoting *Leon*, 468 U.S. at 922 n.23). "The exception,

however, will not apply when, *inter alia*, the warrant application 'is so lacking in indicia of probable cause as to render reliance upon it unreasonable.'" *Smith*, 9 F.3d at 1015 (internal quotation marks omitted).

3. Standard Of Review

"When reviewing rulings on motions to suppress, [this Court] examine[s] the evidence before the district court in the light most favorable to the government, and will disturb factual findings only when they are clearly erroneous." *Fields*, 113 F.3d at 319 (citing *United States v. Fullwood*, 86 F.3d 27, 29 (2d Cir. 1996)). "Legal conclusions are reviewed de novo." *Id.*

C. Discussion

1. The Defendant Lacked Standing To Challenge The Search Warrant

The district court properly concluded that the defendant did not have the requisite contacts to 133 Montery Place Building 14 apartment 174 to establish an objective, reasonable expectation of privacy in that residence. Based on the testimony of Tanea Humphrey, it appears to be undisputed that the defendant did not live in her apartment, had never been an overnight or dinner guest there, did not have a key or free access to the apartment, had only ever been to the apartment a handful of times for five minutes each time, had only come to the apartment to access the firearms he had given to Humphrey to store for him, and

had not stored anything else in the apartment other than the firearms.

"A defendant lacks 'standing' in the Fourth Amendment context when his contacts with the searched premises are so attenuated that no expectation of privacy he has in those premises could ever be considered reasonable." *Fields*, 113 F.3d at 320. As the district court here concluded, the defendant's sole connection to the apartment was that Humphrey had permitted him to store contraband in her bedroom and access it from time to time. Thus, just as was true for the apartment in *Carter*, which was simply a "place of business" for the charged defendants, the Humphrey apartment was simply a place for the defendant to store his contraband. *See Carter*, 525 U.S. at 90-91 (holding that two individuals who used apartment to package drugs did not have a reasonable expectation of privacy in the premises because they were not overnight guests, had not been accepted into the household as anything akin to overnight guests, and were not present in the apartment for any reason other than to package drugs).

In the government's view, the inquiry as to standing does not extend beyond the issue of whether the defendant had an objectively reasonable expectation of privacy in Humphrey's apartment. *See Carter*, 525 U.S. at 88 (holding that, to challenge the admissibility of evidence seized from the execution of a warrant, the defendant must have standing as to the "place searched"). "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or

seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." *Jones v. United States*, 362 U.S. 257, 261 (1960). The district court did not agree.

Instead, the defendant argued, and the district court concluded, that the defendant had standing to challenge the search and seizure of the firearms taken from the apartment because he had a reasonable expectation of privacy in the plastic bag and duffle bag in which they were stored. The facts at the suppression hearing established that, upon entry into the apartment, Tanea Humphrey told the officers that the defendant had placed the firearms in bags in her bedroom closet. A search of that closet revealed a duffle bag and a plastic grocery store bag. When opened, the officers discovered the three firearms specifically named in the search warrant. The district court found that the defendant had standing to challenge the seizure of the firearms by virtue of his reasonable expectation of privacy in the bags. This ruling, however, misconstrues the law as it relates to standing to challenge the propriety of a search warrant.

"A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *United States v. Ross*, 456 U.S. 798, 820-21 (1982). In so holding, the Supreme Court relied on the following language by Professor LaFave:

> Places within the described premises are not excluded merely because some additional act of entry or opening may be required. In countless cases in which warrants described only the land and the buildings, a search of desks, cabinets, closets and other similar items has been permitted.

Ross, 456 U.S. at 821 n.27 (quoting 2 W. LaFave, Search and Seizure 152 (1978)) (internal quotation marks omitted). "Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chest, drawers, and containers in which the weapon might be found." *Ross*, 456 U.S. at 821. "[I]tems found in closed containers during a lawful search do not require a separate warrant. . . ." *United States v. Terry*, 702 F.2d 299, 309 n.9 (2d Cir. 1983). "A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside." *Ross*, 456 U.S. at 821. "A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search." *Id.* "When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *Id.*

"The scope of a search pursuant to a valid warrant is defined by the warrant's description of the premises and the objects of the search, and by the places in which the

officers have probable cause to believe those objects may be found." *United States v. Kyles*, 40 F.3d 519, 523 (2d Cir. 1994). "Officers may force open a locked door on the premises if they have probable cause to believe the objects sought are behind it." *Id.*

In this case, the search warrant authorized a search of "133 Montery Place Building 14 apartment 174," JA211, which is Humphrey's apartment. The warrant authorized entry into the apartment and the search for, and seizure of, the following contraband: one "AK-47 style" assault rifle, one 12 gauge "pump action" shotgun, one .22 caliber pistol, .38 caliber ammunition, .22 caliber ammunition, and "7.62 x 39" ammunition. JA211. The "person aggrieved" by the search was Tanea Humphrey and her family, not the defendant. It was the Humphrey residence that was the target of the search warrant and that was, in fact, searched. The defendant had no connection to that residence. Moreover, regardless of whether the firearms had been stored in clear bags, open bags, bags which made it obvious that they contained firearms, or in plain view, the officers' ability to seize those firearms hinged on the authority given to them by the search warrant, which explicitly authorized the search for specific firearms and ammunition. If the warrant were invalidated for any reason, the officers' authority to seize those firearms would evaporate entirely. To challenge the warrant in the first place, however, the defendant had to establish a reasonable expectation of privacy in the target of the warrant, i.e., the apartment. A ruling that the defendant has standing to challenge the search warrant based on his expectation of privacy in the bags searched would render

the standing requirement meaningless. In essence, any defendant, by virtue of his expectation of privacy in the contraband seized, would have standing to challenge any warrant which authorized their seizure, regardless of the defendant's connection to the searched premises.

The Supreme Court's decision in *United States v. Salvucci*, 448 U.S. 83 (1980), is instructive. In that case, the Court struck down the rule of "automatic standing," which had previously allowed any defendant charged with a possessory offense to challenge the search and seizure of the contraband he or she had been charged with possessing. *See id.* at 86-89. As the Court stated, "We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." *Id.* at 92. Courts must ask "not merely whether the defendant has a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched." *Id.* at 93.

In its ruling, the district court relied on *United States v. Perea*, 986 F.2d 633, 641-42 (2d Cir. 1993), *United States v. McGrath*, 613 F.2d 361, 365-66 (2d Cir. 1979), and *United States v. Wilson*, 536 F.2d 883 (9th Cir. 1976), to find that the defendant could establish standing to challenge the search warrant if he could show that he had a reasonable expectation of privacy "in the closed containers found in Humphrey's apartment." JA283. Specifically, the court held that "the owner of a closed bag has a reasonable expectation of privacy in the bag, such that he has standing to challenge a search of that bag . . .

even if the person does not have a reasonable expectation of privacy in the location the bag was seized." JA288. The court also noted that the officers did not seek a separate warrant to search the bags found in the apartment, despite the fact that they had accumulated probable cause to search the bags independent of the information contained in the original search warrant.[2] JA288-JA289.

In *Perea*, this Court agreed with a district court's finding that the defendant, as a passenger in a livery cab, had no reasonable expectation of privacy in the trunk of the cab, but overruled the district court's finding that the defendant had no reasonable expectation of privacy in a duffel bag found inside the trunk of the cab. *See Perea*, 986 F.2d at 639-41. In *McGrath*, this Court held that the defendants did not have standing to object to a search of a briefcase because neither defendant could show a privacy interest in the suitcase. *See McGrath*, 613 F.2d at 356-66. In *Wilson*, the court analyzed a defendant's standing to challenge the search of suitcases stored in the residence of another individual who had authority to consent to the search of the residence, but no authority to consent to the search of the suitcases found there. *See Wilson*, 536 F.2d at 884-885 (ultimately concluding that defendant did not

---

[2] In *Ross*, the Court noted that requiring an additional warrant for a container inside a vehicle would both exacerbate the privacy intrusion by forcing the police to continue to search the vehicle for contraband even after locating the container and be inconsistent with the rationale justifying warrantless searches of vehicles under the automobile exception. *See id.*, 456 U.S. at 821 n.28.

have reasonable expectation of privacy in the suitcase containing contraband).

These cases are distinguishable. They did not involve the execution of a search warrant, but rather the search of items pursuant to exceptions to the warrant requirement, such as consent (*Wilson*) and abandonment (*Perea*). In this case, the officers did not seize the firearms at issue pursuant to a consent search or because they were abandoned property. Rather, the officers' authority for seizing these items derived from a search warrant. Whereas the scope of a warrant search is limited only by whether the contraband listed in the warrant may be found in the searched property, the scope of a consent search is limited by the authority of the consenting individual. The search warrant here authorized the search and seizure of three firearms and numerous rounds of ammunition. To execute the warrant, the police were entitled to search the entire apartment, without limitation posed by any container located therein. To challenge the admissibility of evidence seized as a result of the execution of the warrant, the defendant must establish his standing as to the "place searched," *Carter*, 525 U.S. at 88, i.e., Tanea Humphrey's apartment.[3] The crux of the issue before this Court,

---

[3] Even if the Court focuses on the defendant's privacy interests in the bags taken from the apartment, it should still conclude that the defendant had no objective, reasonable expectation of privacy in those bags. The defendant chose to store the bags in the closet of an apartment to which he had virtually no contact. He chose to entrust them to a woman who

(continued...)

therefore, is not whether the defendant had a reasonable expectation of privacy in the apartment. It is undisputed that he did not. It is whether the government is correct in its argument that the proper inquiry addresses the defendant's expectation of privacy in the searched premises, rather than the searched items.

2. The District Court Properly Applied The Good Faith Exception

The government agrees with the defendant that, if the Court excises from the search warrant affidavit the description of the June 25, 2003, stop, the discovery of the .38 caliber revolver in the defendant's vehicle, and the

---

[3] (...continued)
was described as an acquaintance, and certainly not a close friend. He chose to store them in a place where, by virtue of his own lack of free access, he had absolutely no ability to insure their safekeeping or even to prevent the firearms from being moved or handled. *See, e.g.*, *United States v. Harwood*, 470 F.2d 322, 325 (10th Cir. 1972) (holding that defendant who stored containers in attic of friend's garage with latter's permission to "come and go" to check the property had standing to challenge a search). He chose not to prevent others from accessing the firearms by locking the bedroom closet or locking shut the bags in which they were stored. In fact, as to the .22 caliber firearm, he chose to store it in a plastic grocery store bag. In short, even if the defendant had a subjective expectation of privacy in the firearms themselves or the bags in which they were stored, he did nothing to convert that subjective feeling into an expectation of privacy that society recognizes as objectively reasonable.

defendant's admission as to that firearm, the search warrant would not be supported by probable cause. This information, which was set forth in paragraph five of the search warrant affidavit, corroborated a significant portion of Mazza's statement in several key respects and thereby gave the officers probable cause to believe that the information about the three additional firearms in Tanea Humphrey's apartment was accurate.[4]

The inquiry does not end there. Under the good faith exception, "the exclusionary rule barring illegally obtained evidence" does not apply to evidence that an officer seizes in reasonable reliance on a warrant issued by a neutral magistrate where the warrant is subsequently deemed invalid for lack of probable cause. *See Jasorka*, 153 F.3d at 60. "The test of objective good faith is 'whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.'" *Moore*, 968 F.2d at 222.

In this case, Detective Roncinske and his co-affiant, Detective Paul Vinett, placed all of the information leading up to the June 25 traffic stop into the warrant

---

[4] At the time the detectives applied for the search warrant, Mazza was unwilling to be identified as the informant because she was afraid of the defendant. Her unwillingness to be identified prevented the officers from stating more specifically in the affidavit her basis of knowledge, a fact which surely would have bolstered the probable cause supporting the issuance of the warrant, even without the facts related to the traffic stop.

application. The affidavit informed the issuing judge that, according to a confidential informant, the defendant was in knowing possession of a .38 caliber revolver that he had purchased "from a white male crack addict for $75.00," that the defendant hid the weapon in a cutaway portion of the carpet in his 1992 Acura, and that the car had a new, recently issued, Connecticut license plate. JA212-JA213. The affidavit explained that the informant had personal knowledge of the defendant and had known specific facts related to when the defendant was shot in November 2002. JA212. The affidavit did not identify the informant or state that she had a prior track record. JA212. As to the traffic stop, the warrant stated that Sergeant King had stopped the defendant's vehicle on June 25, 2003, solely because of Detective Roncinske's memo, which had been written based on what the informant had told him about the .38 caliber pistol. JA213. The detectives did not omit or alter any of the information about the traffic stop. The issuing judge, Connecticut Superior Court Judge Susan Reynolds, knew exactly what justification supported the stop, and considered that information in deciding to issue the warrant.

The good faith exception applies here because the warrant affidavit did not contain "a knowing or reckless falsehood," Judge Reynolds did not act "as a mere 'rubber stamp' for the police," and the warrant and affidavit, "after extending appropriate deference to the issuing judge's determination," established probable cause. *See United States v. Logan*, 250 F.3d 350, 366 (6th Cir. 2001) (citing *Leon*, 468 U.S. at 919-23). The officers were justified in

relying upon the issuance of a search warrant, supported by probable cause, by a neutral and detached judge, and, as the district court concluded, they could not have been expected to foresee the suppression of the firearm seized from the defendant's vehicle. In applying the good faith exception, the district court candidly referred to its decision on the *Terry* stop issue as a "close call," which the affiants certainly could not have predicted. *See United States v. Real Property Located at 15324 County Highway E.*, 332 F.3d 1070, 1075-76 (7th Cir. 2003) (holding that "any error that is said to have occurred must be attributed to the magistrate, and not law enforcement officers, for the former was in a relatively better position to divine the as-yet unannounced unconstitutionality of the thermal imaging scan"). The affiants placed the information relevant to the traffic stop in the search warrant affidavit for Judge Reynolds's review, and her issuance of the warrant indicated to the detectives that she knew and accepted the justification for the traffic stop.

According to the Eighth Circuit, the relevant inquiry "is whether the facts surrounding reasonable suspicion are 'close enough to the line of validity' that the police officers were entitled to a belief in the validity of the warrant and the existence of reasonable suspicion." *United States v. Fletcher*, 91 F.3d 48, 51 (8th Cir. 1996) (quoting *United States v. White*, 890 F.2d 1413, 1419 (8th Cir. 1989)). "If the case presents such a 'close' question, the *Leon* good faith exception to the exclusionary rule should be considered." *Id.* As the court in *White* explained, the law "encourages" police officers to "prudently obtain[] warrants," so that "evidence seized

pursuant to a warrant, even if in fact obtained in violation of the Fourth Amendment, is not subject to the exclusionary rule if an objectively reasonable officer could have believed the seizure valid." 890 F.2d at 1419.

The facts here fall into "the gray area created by *Leon*." *Id*. At every stage of the investigation, the officers did what they could to verify the information they were given. Although Mazza initially refused to meet with the officers, they were able to verify several pieces of information with her over the telephone. Their stop of the defendant's vehicle and the defendant's subsequent confession confirmed that Mazza was not only telling the truth about the defendant's revolver, but that she had accurately detailed information about the type of ammunition in the firearm, the existence of a cutaway portion of the carpet in the vehicle, and the manner in which the defendant had come into possession of the firearm. When the officers applied for and received the search warrant, they did so based on extensive and detailed information given to them by someone with a close, personal relationship to the defendant, and significant corroboration establishing the truthfulness of that information.

In his motion for reconsideration, the defendant principally relied upon *Reilly*, 76 F.3d 1271, to argue that, because the warrant affidavit allegedly failed to disclose all the information relevant to the June 25, 2003, traffic stop, the good faith exception should not apply. In *Reilly*, this Court refused to apply the good faith exception because the officers failed to provide the magistrate with key information about how they secured incriminating

information against the defendant. Specifically, the police officers entered a suspect's enclosed backyard and walked around his pool, guest cottage, and well groomed and landscaped backyard until they found incriminating evidence. The officers then omitted from the search warrant affidavit the fact they illegally entered an area that was obviously curtilage, saying only that "they walked along the [defendant's] property." *Reilly*, 76 F.3d at 1280. The Court stated that it was upset by the fact that the officers "knew very well that large parts of their search were illegal – and yet they never told the issuing judge about it." *Id.* at 1281-82. As the Court explained, "The officers presented only a bare-bones description of Reilly's land to Tomkins County Court Judge William Barrett. It was a description that was almost *calculated to mislead*. Moreover, the officers failed to give Judge Barrett information as to their behavior, on the basis of which he could determine whether even this scant description was itself the fruit of an illegal search that lacked the elements of good faith." *Id.* at 1280 (emphasis added). In short, the decision in *Reilly* is about police officers' intentional deception of a magistrate regarding their own illegal actions.

On appeal, the defendant repeats this same argument and again heavily relies on *Reilly*. Def.'s Brief at 18. He claims that Detective Roncinske omitted critical facts by (1) "failing to note that, prior to the stop, [Detective Roncinske] had never [before] worked with [Mazza]"; (2) failing to state that Mazza had refused to meet with the police; (3) failing to identify Mazza as the defendant's ex-girlfriend; (4) failing to explain that Mazza's information

had not been established as accurate; and (5) misleading the issuing judge into thinking that Mazza had seen the firearms in Tanea Humphrey's apartment. Def.'s Brief at 19-20.

As the district court concluded, the defendant's reliance on *Reilly* is misplaced, and the detectives did not intentionally or recklessly mislead Judge Reynolds. They did not represent that the confidential informant had a track record or was known to be reliable, and Judge Reynolds most certainly knew that she was dealing with a confidential informant who had not been proven reliable. In addition, Detective Roncinske described accurately how he had tested the confidential informant's basis of knowledge as to the defendant. Had Detective Roncinske provided any additional information regarding Mazza's relationship with the defendant and her reasons for fearing the defendant and for not wanting to be seen with the police, he most certainly would have risked disclosing her identity to the defendant. In addition, Detective Roncinske accurately described the information given to him by Mazza, and did not mislead Judge Reynolds into believing that she had seen the firearms in Humphrey's apartment. While Detective Roncinske recounted Mazza's detailed information about the firearm located in the defendant's vehicle, he did not provide similar detailed information about the firearms in the Humphreys' apartment, simply representing that Mazza had last seen those firearms on June 19.

The key point for the good faith exception is that the content of the information in the search warrant affidavit was accurately set forth so that Judge Reynolds was able to determine on her own whether such facts gave rise to an inference that the confidential informant knew the defendant. As the district court concluded, the facts of this case bore no resemblance to the facts of *Reilly*. Here, the detectives made it quite clear to Judge Reynolds what facts gave rise to the traffic stop on June 25, 2003. They explained the information given by the confidential informant on June 22, 2003, the informant's basis of knowledge, and the efforts made to corroborate the information. To the extent that the detectives omitted information about the informant, they did so to protect her identity, not to mislead Judge Reynolds. Had the detectives explained that the informant was the defendant's ex-girlfriend, or that she had seen the firearms in her own home, they would have effectively disclosed her identity in the warrant affidavit. This omitted information would have strengthened the probable cause supporting the warrant, not weakened it, and certainly did not mislead Judge Reynolds as to any weakness in the affidavit. Indeed, the detectives explicitly stated in the warrant affidavit that the June 25, 2003, traffic stop was based solely on the informational memorandum he had drafted on June 22, 2003. The inclusion of this sentence prevents the defendant from arguing that Judge Reynolds could have been confused as to the circumstances giving rise to the *Terry* stop.

The facts of this case are far closer to those of *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), than to

those of *Reilly*. The search warrant in *Thomas* was issued based on the results of a canine sniff outside the target apartment, information from a reliable informant, and suspicious activity by the defendant. *See Thomas*, 757 F.2d at 1366. The Court struck down the warrant because the canine sniff provided "the only possible support for probable cause, and the sniff violated the Fourth Amendment." *Reilly*, 76 F.3d at 1281 (discussing *Thomas* decision). The Court then applied the good faith exception because "[t]he officer [who] . . . presented the canine sniff evidence to the magistrate was clearly acting in good faith in doing so" and "did not have any significant reason to believe that what he had done was unconstitutional." *Id.* (discussing *Thomas* decision).

The same was true here. The detectives did not mislead Judge Reynolds. They recounted the specific facts giving rise to the traffic stop. To the extent that the traffic stop was not justified by reasonable suspicion, Judge Reynolds had that information before her when she issued the warrant. As the district court explained, "[T]his [was] not a situation where the police had crucial information and did not provide it to the issuing judge. The police simply did not have enough information. . . . While it was a close call, . . . it was a call the judge, not Detective Roncinske, was required to make." JA329.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the government's initial brief, the district court's ruling suppressing the firearm charged in Count Two of the Indictment should be reversed, and the defendant's judgment of conviction as to Count One should be affirmed.

Dated: September 18, 2006

Respectfully submitted,

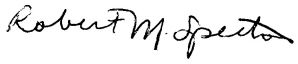
KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,608 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY