No. 09-30429

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HORSELY THEROW SOHAPPY,

Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Washington
District Court No. CR-09-2037-EFS

The Honorable Edward F. Shea
United States District Court Judge

DEFENDANT-APPELLANT'S REPLY BRIEF

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v.	
HORSELY THEROW SOHAPPY,	U.S.D.C. No. CR-09-2037-EFS
Defendant-Appellant.	

I. There Was Not Probable Cause to Believe Mr. Sohappy Lived at Marisela Mora's Residence

The initial issue in this case is whether law enforcement were entitled to search Marisela Mora's residence, based upon Mr. Sohappy's violation of the terms of his probation. As set forth in the opening brief, it is well-established that, without a warrant, the only way such a search could have taken place was if officers had probable cause to believe Mr. Sohappy lived at Ms. Mora's residence. They did not. The government's attempts to persuade the Court otherwise are unconvincing.

As the government notes in its brief (Red Brief at 12) the timing in this case is unique and requires close scrutiny. However, contrary to

the government's assertions, the short time line supports Mr. Sohappy's position. The following is a graphic depiction of the pertinent events:

Prior to 2/20/09	**2/20/09**	**2/23/09**	**2/24/09**	**2/25/09**
Officer Hisey encounters Sohappy at least once at M. Mora's residence (ER 3, 33)	Sohappy transferred from Yakima County Jail to Toppenish City Jail (ER 72)	Sohappy in jail, visited by Officer Vela (ER 72)	Sohappy fails to report to Officer Vela (ER 1-2, 73)	9:35 a.m.: J. Diaz arrested, talks to Officer Hisey (ER 2, 71)
Sohappy in custody on unrelated matters, start date unknown		Sohappy released from jail sometime at night (ER 72)	S. Diaz reports fight between Sohappy and her son, J. Diaz (ER 2)	Phone call to L. Luna. She denies Sohappy is living at residence (ER 3)
		Date J. Diaz originally said assault took place (ER 71)	4:03 p.m.: Officer Hisey fails to find Sohappy at his reported residence on N. Oldenway (ER 6, 72)	Contact at M. Mora's house, leading to Sohappy's arrest and search
			Sohappy came to dinner at L. Luna & M. Mora's residence (ER 3)	

Given this time line, Javier Diaz's original statement that Mr. Sohappy got in a fight with him on February 23 and that, during the incident, Mr. Sohappy reported living with Marisela Mora, was not facially credible. Mr. Sohappy was in custody for most of February 23. He had yet to spend one night out of jail. Prior to February 23, law enforcement knew beyond any doubt that Mr. Sohappy was not living with Marisela Mora. He had been in jail since at least some time prior to February 20, 2009. Under these circumstances, law enforcement should have seen, from the outset, that Mr. Diaz's statements about Mr. Sohappy's living arrangements were implausible.

Apart from his statement's lack of facial validity,[1] Javier Diaz was not a credible informant. Diaz lodged his statements against Mr. Sohappy while he was in jail and it was well known that there was bad blood between Mr. Sohappy and Mr. Diaz. The district court correctly found that Mr. Diaz was not reliable. ER 6. Indeed, the district court did not rely on Mr. Diaz's statements at all in its assessment of

[1]In fact, Mr. Diaz later admitted that he had his dates wrong.

whether there was probable cause to believe Mr. Sohappy lived at Ms. Mora's residence. ER 8-9(V1).

Apart the reliability problems, Mr. Diaz's statements also cannot support a finding of probable cause because Mr. Diaz and Mr. Sohappy were not co-residents. This Court has never held that statements of a non-resident can be relied upon to discern the residence of a probationer. It is the statements of a resident that are critical. *United States v. Howard*, 447 F.3d 1257, 1265-66 (9th Cir. 2006). Even in the recent case of *United States v. Franklin*, __F.3d__, 2010 WL 1711497, NO. 09-30041 (April 29, 2010), the Court's residency determination rested largely on the fact that the defendant was the registered renter of the residence in question (a motel room), not that a reliable non-resident informant told the police of the defendant's whereabouts.

Outside of Javier Diaz's statement, law enforcement did not have any evidence suggesting that Mr. Sohappy was more than a mere visitor at Marisela Mora's address. The contrary position taken by the government and the district court confuses the difference between residency and presence. Page 15 of the government's brief makes the confusion blatant. The government cites *Howard* for the rule that a co-

resident's admission of a probationer's residency is strong evidence of residency. This is a correct statement of the law. However, contrary to the government's analysis, no such admission occurred in this case. Marisela Mora never admitted that Mr. Sohappy lived at her residence. All she ever did was state he was present.

If, as held in *Watts v. County of Sacramento*, 256 F.3d 886, 890 (9th Cir. 2001), the fact that a probationer is present at his girlfriend's residence clothed only in his underwear is not sufficient proof of residency, there certainly was not sufficient proof of residency here. The fact that law enforcement may have had probable cause to believe Mr. Sohappy was present at Ms. Mora's residence was not good enough to justify a search. "If the police lack probable cause to believe the suspect is an actual resident, but have probable cause to believe he's present, they must get a search warrant" *United States v. Harper*, 928 F.2d 894, 896 (9th Cir. 1991)(case addressing probation search). Because law enforcement here did not have probable cause on the specific issue of residency, a warrant was required.

II. Reasonable Suspicion Did Not Support Searching Ms. Mora's Residence Pursuant to Her Release Conditions

The government fundamentally misunderstands Mr. Sohappy's analysis with respect to the argument that Ms. Mora did not violate the terms of her community custody. As such, the government's cursory rejection of Mr. Sohappy's position is unhelpful to the Court's resolution of this matter. Mr. Sohappy's argument on this front is two-fold: First, Ms. Mora was not in violation of her community custody because the terms of her supervision did not require her to answer all inquiries by her probation officer. Second, even if Ms. Mora had been required to answer all inquiries, she ended up doing so prior to the initiation of the search. Thus, she was not in violation.

Going to the first prong of the analysis, Mr. Sohappy's argument is not that the questions posed to Ms. Mora violated her Fifth Amendment rights. Mr. Sohappy's argument with respect to the Fifth Amendment has to do with interpreting the terms of Ms. Mora's supervision. If Ms. Mora's release conditions were interpreted in a way that required her to answer all inquiries by her probation officer, the conditions would raise serious constitutional problems. Probation

conditions should be interpreted in a manner that does not render them susceptible to constitutional problems, if at all possible. *Minnesota v. Murphy*, 465 U.S. 420, 437 (1984)(probation condition construed only to proscribe false statements to a probation officer, not the exercise of the right to silence, so as to avoid Fifth Amendment problems); *United States v. Saechao*, 418 F.3d 1073, 1078 (9th Cir. 2005). This is a rule akin to the long standing doctrine of "constitutional doubt" whereby statutes are to be interpreted in a manner that avoids serious constitutional problems. *Jones v. United States*, 526 U.S. 227, 239-40 (1999).

Because interpreting Ms. Mora's release conditions to require her to answer all of her probation officer's questions raises serious constitutional problems, the condition must be read differently, if at all possible. Because the Washington courts have interpreted laws requiring compliance with law enforcement instructions to allow for a right to refuse to provide information, *see State v. Contreras*, 92 Wash.App. 307, 316 (1998), *State v. Hoffman*, 35 Wash.App. 13, 17 (1983), Ms. Mora's conditions must be read similarly.

Once properly interpreted, it is clear that Ms. Mora's release conditions did not require her to answer Officer Nelson's questions about who was inside her residence. Consistent with Washington law, Ms. Mora was entitled to refuse to answer. Because Ms. Mora did not violate the terms of her supervision, no search was authorized based upon her probationary status.

Going to the second prong of the analysis, the search in this case also was unauthorized because Ms. Mora did, in fact, answer Officer Nelson's questions. Prior to anyone going inside the residence, Ms. Mora told the probation officers that Mr. Sohappy was inside the residence, in her bedroom. Given this admission, even if Ms. Mora's terms of probation required her to tell Officer Nelson who was inside, such terms were met prior to the search taking place. The government never responds to this aspect of Mr. Sohappy's argument at all. It is Mr. Sohappy's position that Ms. Mora's eventual compliance with Officer Nelson's request, prior to the initiation of the search, constitutes a second, alternative reason, for prohibiting a search pursuant to the terms of Ms. Mora's release conditions.

III. Conclusion

As Judge Kozinski noted in *United States v. Harper*, 928 F.2d 894, 895 (9th Cir. 1991), "[t]here's a simple way for police to avoid many complex search and seizure problems: Get a search warrant." Had the officers here obtained a warrant, they would have been able to search Marisela Mora's residence. But because they did not, the search was illegal and the evidence derived therefrom should have been suppressed. Mr. Sohappy asks that the court reverse his conviction and instruct the district court to grant his motion to suppress.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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I certify that this brief complies with the page limitation set by FRAP 32(a), in that it is proportionally spaced, has a typeface of 14 points, and does not exceed 15 pages.

May 7, 2010.

s/Rebecca L. Pennell
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CERTIFICATE OF SERVICE

I, the undersigned, declare:

On May 7, 2010, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service of the brief will be accomplished by the appellate CM/ECF system.

I certify that the foregoing is true and correct. Executed on May 7, 2010, at Yakima, Washington.

s/Rebecca Pennell
Rebecca Pennell