UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America, Plaintiff, vs. Wayne Michael Fisher, Defendant.	)))))))))	DEFENDANT WAYNE MICHAEL FISHER'S MEMORANDUM IN SUPPORT OF PRETRIAL MOTIONS Crim. No. 19-320 (SRN/LIB)

This Court received evidence on Defendant's motions for suppression, disclosure, and other relief at a hearing on 10 February 2020. Most of the motions were either resolved at the hearing or submitted for the Court's resolution without further argument. The two motions that are the subject of this further briefing are Defendant Wayne Michael Fisher's Motion to Dismiss [Docket No. 22], and Defendant's Motion to Suppress All Evidence Derived from Unlawful Searches and Seizures [Docket No. 25].

I. Motion to Suppress Search and Seizure Evidence.

Defendant raised a variety of challenges to the various searches and seizures at issue in this case. They are addressed in turn below.

A. Location Monitoring Data.

The first search and seizure at issue was the concededly warrantless GPS and cell tower tracking of Defendant's mobile phone beginning on or about 26 July 2016.

The agents were using the data and "were tracking his movements" to permit them to find him for the purpose of making an arrest. Mot. Hrg. Tr. at 33, 59-61. At the hearing, the Government submitted Exhibit 3, which is the state court order purportedly requiring the phone service provider to provide historical and real time location data to the agents so they could conduct the tracking of the mobile telephone. *See* Mot. Hrg. Tr. at 23. As established in *Carpenter v. United States*, ___, U.S. ___, 138 S. Ct. 2206 (2018), however, the information obtained was in violation of the Fourth Amendment because of the lack of a valid warrant or an applicable exception to the warrant requirement.

In its response to the pretrial motions, the Government conceded that the search and seizure of the data required a warrant, but suggested that the exclusionary rule nonetheless should not apply here because the agents were acting in "good faith." Gov't Response to Pretrial Motions [Docket No. 26] at 9. Presumably, the Government intended to rely on *Illinois v. Krull*, 480 U.S. 340 (1987) – though it did not say so.

But the Court in *Krull* acknowledged that a defendant may argue "that a police officer's reliance on . . . a statute was not objectively reasonable and therefore cannot be considered to have been in good faith." *Krull* at 354. It further concluded that "a law enforcement officer [cannot] be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer *should have known* that the statute was unconstitutional." *Id.* at 355 (emphasis added). In *Krull*, the Court's

analysis of the statute at issue found that the "defect in the statute was not sufficiently obvious so as to render a police officer's reliance upon the statute objectively unreasonable." *Id*. at 359. It specifically noted that the statute there was "directed at one specific and heavily regulated industry, the authorized warrantless searches were necessary to the effectiveness of the inspection system, and licensees were put on notice that their businesses would be subject to inspections pursuant to the state administrative scheme." *Krull* at 359.

None of those considerations apply in this case. The Stored Communications Act does supply the kind of "check" on "the discretion of Government officers" that is a hallmark of an apparently valid statute "[u]nder the standards established" in the cases regarding "valid inspection schemes" that provide for "a constitutionally adequate substitute for a warrant." *Krull*, at 358. Indeed, the only limit the Stored Communications Act placed on the discretion of officers seeking to conduct the kind of search and seizure that took place here is that the data sought by the government agents be considered "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). That is essentially no limit on the officers' discretion whatsoever, and it therefore is not "objectively reasonable" to presume the statute to be a constitutionally adequate substitute for a warrant.

The further fact that the statute presents the government officers with the *choice* between a real warrant or a simple court order (*see* 18 U.S.C. § 2703(b) and (c)), is a

red flag that puts every *reasonable* officer on notice that choosing to compel the production of the records *without* a warrant is a constitutionally suspect course of action – especially in the context of a criminal investigation, rather than as a tool to enforce a civil regulatory scheme.

In this case, of course, the officers also had been put on notice by a panel decision of the Eleventh Circuit that "obtaining [ ] that data without a warrant is a Fourth Amendment violation." *United States v. Davis*, 754 F.3d 1205, 1217 (11th Cir.), *reh'g en banc granted, opinion vacated*, 573 F. App'x 925 (11th Cir. 2014), and *on reh'g en banc in part*, 785 F.3d 498 (11th Cir. 2015). At the time of the search, moreover, the government agents already were well aware of the holding in *United States v. Jones*, 565 U.S. 400 (2012), that held that when the government engages in location tracking of a person, it conducts a search under the Fourth Amendment requiring a warrant.

Because there was no applicable Eighth Circuit precedent on the issue, the unsettled nature of the law in other courts is certainly relevant to whether the agents may claim they were acting in "good faith." The holding in *Krull* does not permit government agents to bury their head in the sand, and then claim later that they were acting in good faith. The good faith asserted must be objectively reasonable; and it cannot be considered to be objectively reasonable if the unsettled nature of the legal question at the time would caution a prudent officer to get a warrant.

In short, the agents in this case did not rely on binding appellant precedent, and could not have, because none existed at the time they acquired the data. The very unsettled law of the *other* circuits in 2016, together with the obviously inadequate safeguards built into the statute, renders the "good faith" asserted here defective.

B. The Warrantless Search and Seizure of Defendant's Person and Vehicle During a Purported Traffic Stop on 27 July 2016.

The stop and search of the vehicle, and everything that arose from it, is contingent on the location data that was unlawfully obtained without a warrant as described above. Without the location data, there would be no traffic stop of any kind, and no subsequent search of the vehicle. Because the location data is itself the fruit of the poisonous tree, so too is the stop and search of the vehicle and the seizure of its occupants. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

The purported justification for the traffic stop – even if the location data were deemed not subject to the exclusionary rule – also fails. The only basis for the traffic stop asserted by the testifying trooper was his claimed observation of the purported "illegal tint" of the windows. Mot. Hrg. Tr. at 35. The best evidence on this allegation is the squad video itself, admitted as Exhibit 1, in which the windows are clearly visible, and the observer has no trouble clearly seeing through them. The Trooper's further testimony that he issued a warning ticket to the driver for having the tinted windows, *see* Mot. Hrg. Tr. at 53, also is belied by the video. In it, the Trooper clearly

tells the driver: "I'm gonna give you a ticket . . . for driving after suspension." Gov't Ex. 1, at 1:05:23-40. No mention is made of tinted windows.

C. The Second Search of Defendant's Chrysler 300 that Was Seized During the "Traffic Stop" on 27 July 2016.

The *second* search of Defendant's Chrysler 300, executed on 30 July 2016, was supposedly executed according to the authority of the warrant that was admitted as Exhibit 4. Defendant now requests a hearing, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), based on the deliberate and reckless omissions in the affidavit of Trooper Otterson that was submitted in support of the warrant. "Under *Franks*, a criminal defendant may request a hearing to challenge a search warrant on the ground that the supporting affidavit contains factual misrepresentations or omissions relevant to the probable cause determination." *United States v. Arnold*, 725 F.3d 896, 898 (8th Cir. 2013). The affidavit submitted in support of the issuance of the warrant here contains either intentional or reckless omissions of material facts that undermine the probable cause required for issuance of the warrant. Considering that the affidavit is insufficient on its face to establish probable cause for the second search of the vehicle, the consideration of that affidavit together with the deliberately omitted material leaves no question that the warrant was invalid.

Trooper Otterson, for example, makes no mention in the affidavit of the fact that he, with the assistance of at least one other trooper, already had spent an entire hour searching, and re-searching, the vehicle looking for the exact same property and things

that he was seeking permission to look for the second time around. This stark omission is proved up by the video of the search that was introduced as Gov't Ex. 1. The affidavit in support of the warrant for the *second* search provides no reason to believe that anything further would be found in the vehicle that was not already found during the first very thorough search.

Also starkly omitted from the affidavit was the frank admission at the evidentiary hearing that the request for the search warrant for the second search was based on nothing more than a hunch: "So Investigator Frake and I had discussions that day about thinking that there was maybe still something in the vehicle, but we weren't entirely sure." Mot. Hrg. Tr. at 53.

Trooper Otterson's affidavit, even without the benefit of the omitted material, is insufficient to support a finding of probable cause. "For a search warrant to be valid, the warrant must be based upon a finding by a neutral and detached judicial officer that there is probable cause to believe that evidence, instrumentalities or fruits of a crime, [or] contraband . . . may be found in the place to be searched." *United States v. Proell*, 485 F.3d 427, 430 (8th Cir. 2007). Probable cause exists when an affidavit in support of a warrant sets forth adequate facts to ascertain that there is a "fair probability that contraband or evidence of criminal activity will be found in the particular placed searched." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The affidavit supplied by Trooper Otterson falls far short of that mark. It recites

that there was a warrant for Defendant, that he was a felon, and that he had numerous convictions for felony offenses. It also states that: "Fisher is a suspected high level distributor of controlled substances" and that "Fisher was also suspected of having a silver pistol in his possession," but it provides no basis to support these "suspicions." The affidavit also contains a single reference to information allegedly obtained from a "Confidential Reliable Informant." That information consisted of the following: "Wayne Fisher was reported to be transporting a large quantity of methamphetamine to northern Minnesota." The affidavit supplies nothing more regarding this report or how to evaluate it. It does not even say whether the informant indicated that Fisher would have the drugs in his possession in the vehicle in which he was travelling or that he would possess the drugs on the particular day when the vehicle was seized. It is abysmally insufficient by itself:

> an affidavit based on an informer's tip, standing alone, cannot provide probable cause for issuance of a warrant unless the tip includes information that apprises the magistrate of the informant's basis for concluding that the contraband is where he claims it is (the "basis of knowledge" prong), *and* the affiant informs the magistrate of his basis for believing that the informant is credible (the "veracity" prong).

Illinois v. Gates, 462 U.S. 213, 267 (1983) (WHITE, J., concurring). The lone assertion included in Otterson's affidavit "is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause." *Gates*, 462 U.S. at 239.

Courts evaluate whether a tip is sufficiently credible and reliable to establish

probable cause based on the totality of the circumstances. *See Gates,* 462 U.S. at 230–31; *United States v. Buchanan,* 574 F.3d 554, 561–62 (8th Cir. 2009). The factors courts consider in evaluating whether a tip establishes probable cause are: 1) the "richness of detail of a first-hand observation;" 2) whether the statement was against the informant's penal interest; and 3) the extent to which an agent or officer meets personally with an informant to question him and assess his credibility. *See, e.g., United States v. Robertson,* 39 F.3d 891, 893 (8th Cir.1994); *United States v. Jackson,* 898 F.2d 79, 81 (8th Cir.1990). If an independent police investigation at least partially corroborates the information the informant provides, a court may consider an informant reliable.

Otterson's affidavit here provides absolutely no detail about the tipster's background or history of providing reliable information, and nothing else at all to support a finding of probable cause based on the single conclusory statement included in his affidavit.

The only other relevant information contained in the affidavit is the recounting of how Trooper Otterson's trained canine indicated on the center console area of the vehicle, and a small amount of marijuana and some pills were found in that area.

When this affidavit, which is insufficient on its face, is supplemented with the intentional and reckless material omissions set forth above, the warrant is rendered plainly invalid for a lack of probable cause. If the judge who issued the warrant had

been informed that a lengthy and thorough search of the vehicle already had been performed, and that nothing of evidentiary value was found, she certainly would have insisted on knowing what supplemental facts supported probable cause to conduct the *second* search. It is quite clearly for that very reason that Otterson intentionally left out the material information about the extent and negative results of the previous search, and also failed to inform Judge DeMay that the agents were simply working on a hunch that they may have missed something. Of course, as Exhibit 4 shows, even if Judge DeMay had any follow-up questions for Trooper Otterson, he was apparently not available, as it was not Judge DeMay who put him under oath to make his assertions, but rather a second police officer (Badge Number 182), who is not otherwise identified by the exhibit.

The Court should grant the motion to suppress, or failing that, it should grant the present request for a *Franks* hearing to follow up on the issues regarding the material omissions discussed above.

D. The Search of Defendant's Mobile Phone on or about 5 August 2016.

The Search of Defendant's phone appears to have been supported by the warrant admitted as Exhibit 5. Defendant contests this search solely for the reason that the entire factual basis for probable cause submitted in the affidavit in support of the warrant was derived from previous searches and seizures that were constitutionally infirm. Because the validity of this warrant therefore rests on "fruit of the poisonous

tree," it too must be declared invalid, and the evidence searched and seized pursuant to said warrant must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

E. The Search and Seizure of Defendant's Person and Vehicle on 27 June 2019.

In support of the constitutionality of the contested searches and seizures on 27 June 2019, the Government offered Exhibit 6, which purports to be a tribal search warrant. Whether Exhibit 6 really is a tribal warrant – and its validity if the Court so finds – are specifically here contested. Notwithstanding Defendant's objection when the exhibit was offered, *see* Mot. Hrg. Tr. at 24-25, the Government offered no evidence to support the exhibit's authenticity. It certainly does not qualify as self-authenticating evidence under Federal Rule of Evidence 902, and no extrinsic evidence was offered to authenticate it under the provisions of Rule 901.

> A party authenticates a document by presenting evidence sufficient to support a finding that the document is what the party claims it to be. The party authenticating a document need only prove a rational basis for that party's claim that the document is what it is asserted to be. This may be done with circumstantial evidence.

United States v. Wadena, 152 F.3d 831, 854 (8th Cir. 1998) (quotation marks and citations removed).

Not only has the Government failed to establish its foundational authenticity, but its authenticity and validity are facially cast into doubt by a variety of errors within the four corners of the alleged warrant and affidavit that simply would not appear in

an authentic, real warrant.

For example, the purported "warrant" authorizes a search for "heroin" when the application for the warrant instead sought authority specifically to search for methamphetamine. It also is apparent that the "judge" who purported to sign the warrant did not even bother to read the affidavit, since the oath of the affiant was administered at exactly the same time as the warrant supposedly was signed, rendering the "judge" a simple rubberstamp rather than the required "detached and neutral magistrate." Even the signature of the alleged judge on the warrant is not a signature authorizing the warrant, but rather a signature that is "[s]ubscribed and sworn to before me," indicating that the so-called judge was simply an affiant swearing out the findings set forth in the boilerplate language above. The language of the "command" section of the alleged warrant also fails to order the search that is requested – at least not in grammatically understandable English. It says: "ARE HEREBY COMMANDED A ANYTIME SEARCH," suggesting, one supposes, that the police could insert a verb of their own choosing. The so-called warrant further fails to identify the officer who is to execute the warrant, directing it only to "(A) PEACE OFFICER(S) OF THE RED LAKE BAND OF CHIPPEWA."

In short, the exhibit should not be admitted here because its proponent has failed to prove its authenticity and it is facially invalid.

Defendant also notes that even if Exhibit 6 were a valid warrant that had been

properly issued by a court with proper jurisdiction, this alleged warrant did not give the anonymous peace officers the authority to arrest or detain Defendant Fisher. The alleged warrant only authorized the search of a named house and vehicle, and the search and seizure of two named persons – but *not* Defendant Fisher.

II. Motion to Dismiss.

Defendant also has moved to Court to dismiss Count III. *See* Motion to Dismiss [Docket No. 22]; Mot. Hrg. Tr. at 14-16. The basis for the request rested on the Double Jeopardy and Due Process Clauses of the Fifth Amendment, and on Defendant Fisher's previous prosecution in Red Lake Tribal Court for the same crime charged in Count 3 of the Indictment. It further relied on the explicit promise made to Mr. Fisher when he accepted a plea offer that the matter would stay on the Red Lake Reservation, and not be prosecuted federally or by the State of Minnesota.

As noted in Defendant's motion, although the Court recently reconsidered the dual sovereignty question in *Gamble v. United States*, 139 S. Ct. 1960 (2019), the *Gamble* decision was limited to successive prosecutions by the federal and state authorities, and did not raise the question with regard to tribal prosecutions. Defendant nonetheless acknowledges that the question may already have been answered by the Court's previous decision in *United States v. Lara*, 541 U.S. 193 (2004). Indeed, the *Lara* case arose from an *en banc* opinion of the Eighth Circuit granting the relief requested here. While it appears that *Lara* forecloses the relief sought, Defendant

Fisher nonetheless persists in his request for the explicit purpose of raising the issue again before the Eighth Circuit and the Supreme Court.

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Respectfully submitted,

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