UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,	)	
	)	DEFENDANT WAYNE MICHAEL FISHER'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE
Plaintiff,	)	
	)	
vs.	)	
	)	
Wayne Michael Fisher,	)	Crim. No. 19-320 (SRN/LIB)
	)	
Defendant.	)	

* * *

Defendant Wayne Michael Fisher, through his counsel, Daniel L. Gerdts, Esq., respectfully objects, pursuant to Local Rule 72.2(b), to the hereinafter specified portions of the Magistrate Judge's Report and Recommendation entered on 7 July 2020 [Doc. No. 37] in the above-captioned case. Defendant objects specifically to the following recommendations: to deny his Motion to Dismiss [Doc. No. 22], and Motion to Suppress Evidence [Doc. No. 25]. Defendant hereby incorporates the arguments previously made a part of the record, and provides the further observations below.

I. Motion to Dismiss Count III.

Defendant moved to Court to dismiss Count III. *See* Motion to Dismiss [Docket No. 22]; Mot. Hrg. Tr. at 14-16. 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.

The magistrate recommended denial of the motion based on *United States v. Lara*, 541 U.S. 193 (2004), but acknowledged that "Defendant wishes to persist in his request for the explicit purpose of raising the issue again before the Eighth Circuit Court of Appeals and the United States Supreme Court." Report and Recommendation at 13. On this issue the magistrate is correct, and Defendant expressly objects to the magistrate's legal conclusions and factual findings to preserve the issue for further review.

II. Motion to Suppress Search and Seizure Evidence.

Defendant also moved for an order suppressing any evidence obtained as a result of the 26 July 2016 location monitoring order, the 27 July 2016 roadside search of the Chrysler 300, the 30 July 2016 search of the Chrysler 300 while it was impounded, the 5 August 2016 search of two cellular telephones seized during the stop of the Chrysler 300, and the 27 June 2019 execution of a purported Red Lake search warrant. [Doc. No. 25]. The magistrate recommended denial of all relief requested. Report and Recommendation at 14-33.

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 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.

The magistrate erroneously concluded that the state court order at issue was the functional equivalent of a real warrant, and therefore was good enough. *See* Report and Recommendation at 16 ("The July 26, 2016, application, affidavit, and "Findings, Order, and Tracking Warrant" now at issue are, however, far more extensive than the mere application and certification of relevance at issue in Carpenter."). But the document on its face expressly cites and relies on the authority of 18 U.S.C. §3122(b)(2), and states that "the information likely to be obtained from the pen register, trap and trace device including caller identification, is relevant to an ongoing criminal investigation." That is the exact authority and standard that the Court in *Carpenter* found to be insufficient.

While the application for the order *also* states that "there is reason to believe

that probable cause exists that the person who possesses an electronic device is committing, has committed, or is about to commit a crime," the facts set forth in support of that position clearly do not amount to probable cause that anybody has committed or might commit a crime. It says simply that a warrant had issued for Defendant for violating his supervised release. There is no allegation of any crime being committed, no allegation that any crime had been committed, and no suggestion that a crime might be committed in the future.[1] Stating that there exists an on-going criminal investigation, and that the data sought would be relevant to that investigation is insufficient on its face to constitute probable case. The order itself, in paragraph 6, also makes clear that there was no probable cause to believe any crime had or will be committed, but only that a warrant existed arising from a supervised release violation:

> Statement of Offense: The offense(s) to which the information likely to be obtained by the pen register and trap and trace device including caller identification and or cellular tower location and service information including Global Positioning System (GPS) information relates to violations of federal and state law relative to an outstanding arrest warrant for a supervised release violation.

The magistrate's conclusion that this order was the functional equivalent of a real warrant is clearly erroneous.

[1] Supervised release violations routinely arise from perfectly ordinary, legal conduct that is nonetheless restricted for the person under supervision.

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 magistrate did not address this issue based on his finding that the order authorizing the seizure of location data was the functional equivalent of a true warrant.

The magistrate also erred in concluding that the purported justification for the traffic stop was valid. 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 and fatally undermines his credibility. The Trooper clearly tells the driver in the video: "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. The

magistrate ignores the Trooper's lie about issuing a warning ticket for tinted windows by simply bypassing the issue and observing that the trooper had mentioned the tinted windows in other contexts. *See* Report and Recommendation at 18.

C. The Second Search of Defendant's Chrysler 300 that Was Seized during the "Traffic Stop."

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 requested 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. Defendant also asserted that the affidavit was insufficient on its face to establish probable cause for the second search of the vehicle.

The magistrate apparently concluded that Defendant's arguments had merit because he chose not to address these arguments at all – concluding that the warrant was "superfluous." *See* Report and Recommendation, at 26 n.12. Rather, the magistrate concluded that because the first search of the vehicle three days earlier was valid pursuant to the automobile exception, the trooper could search it again as often as he liked without needing to seek a warrant to authorize the new searches. Report and Recommendation at 24-26. The magistrate cited no authority that supports that proposition. He did cite a half dozen cases that stand for the proposition that if police officers have probable cause for the search of a vehicle on the scene, there is no

constitutional infirmity in conducting the search at a later time and in a different place. This is not a controversial proposition, but it is *not* what occurred in this case. In this case the vehicle *was* searched at the scene. It was searched thoroughly, with the assistance of at least one other trooper, over the course of an entire hour of searching and re-searching. And they found what they had probable cause to search for: drugs that were located exactly where the canine had indicated. The exhaustive, but fruitless, follow-up search of the vehicle after the discovery of what they were looking for removed any residual probable cause that may have existed *before* the search.

In short, the probable cause that permitted the first search no longer existed at the time of the second search. There was no longer any basis to believe that contraband or evidence of a crime would probably be found in the vehicle. The trooper's testimony confirmed the lack of probable cause, and candidly admitted that the request for the search warrant to permit 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. Because the probable cause that supported the first search of the vehicle no longer existed, there was no valid basis to search the vehicle a second time several days later. The magistrate clearly erred in concluding that the basis for the first search warrant served equally well for the second search.

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

The Search of Defendant's phone was supported by the warrant admitted as Exhibit 5. Defendant contested 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).

The magistrate judge explicitly disagreed, noting that he had found the other searches and seizures constitutionally valid, rendering the seizure of the phone and its search constitutionally valid as well. Report and Recommendation at 26-27. For the reasons already identified above, the magistrate erred in this analysis.

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 – were specifically 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).

The magistrate judge disagreed, concluding that the warrant was in fact "self-authenticating." Report and Recommendation at 29 ("'warrant'" signed by a judge is a "self-authenticating" document"). The authority relied upon for this proposition, however, does *not* support the magistrate's conclusion. In that case, *Moore v. City of Desloge, Mo.*, 647 F.3d 841, 848 (8th Cir. 2011), the Eighth Circuit found that the warrant at issue was "self-authenticating under Fed.R.Evid. 902(1) and (4), both as a public document under seal and as a public document signed by an official (judge, clerk, and sheriff)." *Id.* at 848. The document offered by the Government in this case, however, bore no seal, was not certified, and there is no evidence in this record that it was ever publicly filed or that it was indeed signed by a "judge" – tribal or otherwise. Even the identity of the person who purportedly signed it is completely unknown, let alone whether said person was in fact a judge.

This is *not* the typical case in which the Government has properly offered

certified copies of true warrants that had been filed with the court. Here, it offered only an unverified document, signed by an unidentified individual, that could have been manufactured by any school child with a computer. As noted by the magistrate, Defendant also pointed to a variety of errors within the four corners of the alleged warrant and affidavit that simply would not appear in an authentic, real warrant. Defendant reasserts those observations as set forth in his previous arguments. The magistrate, of course, found them unpersuasive. Report and Recommendation at 30-31. As for the magistrate's confusion about which vehicle is at issue, there was only one vehicle referenced in the paperwork.

For the reasons set forth above, Defendant Fisher urges the Court to exercise its power of *de novo* review and reject in whole the recommendations proposing denial of Defendant's motions.

Dated: 21 July 2020

Respectfully submitted,

DANIEL L. GERDTS, LAWYER

s/ Daniel L. Gerdts

Daniel L. Gerdts (#207329)
331Second Avenue South, Suite 705
Minneapolis, MN 55401
612.800.5086