UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

UNITED STATES OF AMERICA

v. **Case No. 2:15-cr-29-FTM-29DNF**

GEORGE JOYNER, III
_____/

MOTION TO SUPPRESS EVIDENCE AND MEMORANDUM OF LAW

The Defendant, GEORGE JOYNER, moves this Court pursuant to the Fourth Amendment to enter an Order suppressing evidence, and for an evidentiary hearing, and states as follows:

THE ALLEGATIONS

Mr. Joyner is charged with five counts of theft of government property in violation of 18 U.S.C. §§ 641 and 2 (counts 1 through 5), and five counts of aggravated identity theft in violation of §§ 1028A and 2 (counts 6-10). These counts allege conduct between November 2, 2011 and December 11, 2011, relating to allegedly fraudulent federal income tax returns. Mr. Joyner is also charged with possession of fifteen or more unauthorized access devices on or about August 10, 2013. (count 11).

FACTUAL BACKGROUND

On August 10, 2013, Mr. Joyner was driving a lawfully-rented gray Ford vehicle in the vicinity of Ben Street and Lincoln Blvd in the City of Fort Myers. FMPD officers Arturo

Gonzalez and Scott Newberry were conducting a narcotics investigation in the area. Although this investigation had no relation to Mr. Joyner, the vehicle he was driving was observed in the area which was the subject of the investigation. The officers then followed Mr. Joyner in an unmarked vehicle as he came to a stop sign at Dr. Martin Luther King Jr. Blvd. and turned eastbound. Despite the fact that Mr. Joyner had committed no traffic violation at that time, the officers continued to follow him and eventually pulled their vehicle along side his. At that point, they claim they were able to observe that Mr. Joyner was not wearing a seat belt. The officers then called in Officers Ed Quinn and Brandon Birch, who were driving in a marked police vehicle, to effect a traffic stop. It is then claimed that Mr. Joyner suddenly changed lanes and "appeared to 'cut off ' a white older model van without using a turn signal." It is further claimed that Mr. Joyner then left his lane and almost struck the metal guard rail.

Officer Quinn, who had been positioned to make a traffic stop before the alleged improper lane changes, proceeded to stop Mr. Joyner at the intersection of MLK and Ortiz Avenue. Mr. Joyner acknowledged that his driver's license was suspended. He was then arrested and placed in the back of a police vehicle.

Mr. Joyner's wife, who had been traveling in a separate vehicle, stopped at the scene. The officers refused to accept Mrs. Joyner's offer to take possession of the vehicle, and instead proceeded with a full-blown search of the vehicle, including the trunk and closed containers within the vehicle. While conducting this search, Officer Youngblood, a canine officer who had been called to the scene, located and opened a lap top case containing a lap top computer, various digital media storage devices, two credit card

readers, a credit card encoder, numerous credit cards, gift cards, credit card "blanks," and several pieces of paper containing the names, dates of birth and social security numbers of several individuals. Additionally, inside Mr. Joyner's wallet, the officers claim to have found thirteen credit cards, gift cards, bank information, medical prescriptions for another individual, MoneyGram receipts , as well as scrap paper containing a name, date of birth and a social security number for someone other than Mr. Joyner. The officers further contend that credit cards (some with account numbers written on them) found in Mr. Joyner's wallet matched the credit card "blanks" found in the laptop case. The government contends that Mr. Joyner made statements when confronted with the items in the vehicle.

Based upon "Officer Youngblood's prior training and experience" he believed that numerous items found in Mr. Joyner's vehicle may have been evidence of credit card fraud. After consulting further with Special Agent Linda Beltran of the Florida Department of Law Enforcement, who allegedly is "very knowledgeable" in identity theft and credit card fraud crimes, Officer Walter Mickey of the Fort Myers Police Department submitted a search warrant which was then signed by Lee County Court Judge Tara Paluck on the same date.

The search warrant, which is attached as Exhibit A, contained a finding that there was probable cause to believe that various Florida statutes had been violated and that evidence connected thereto [was] "currently being contained, stored, or concealed within" 32 separate items. Many of these items were not containers at all, but rather were items such as scraps of paper, receipts, and business cards. However, the search warrant failed to describe any items to be searched with particularity. Instead the items to be searched simply read:

ITEMS TO BE SEARCHED AND SEIZED:

1. Any and all computers, computer media to include, but not limited to cd's, floppydisks, jump drives, zip drives and any type of memory storage device.

2. All stored electronic information in any form or format, which could house personal identification information and files containing personal identification information; in any form wherever it may be stored or found, and any information pertaining to the use of personal identification information; and/or distribute, receive, or possess personal identification information.

3. Information or correspondences pertaining to the possession, receipt or distribution of personal identification information using the computer.

4. Any and all correspondences to or from any individual or individuals who engage personal identification information.

5. Any and all correspondences or other documents pertaining to the possession, receipt, origin or distribution of personal identification information.

6. Any and all correspondences pertaining to the personal identification information.

7. Data contained on all storage devices, including, but not limited to personal identification information and text files. Any and all documents and registry files tending to show ownership and control over seized computer and installed software.

8. Files and data on the computer that show the suspect's ownership, possession andcontrol at time of the offense.

9. Any and all materials and photographs, either electronic, printed or any other form.

10. Any and all software that may be utilized to create, receive, distribute, store, or modify the evidence sought and all software that may be used to communicate or store online communications.

11. Encrypted, deleted and unallocated files on electronic media that contain any of the information listed in previous paragraphs.

> 12. Any documents depicting the use of personal identification data to include the computers, but not limited to DVD's, thumb drives, hard drives and or any other storage devices.
>
> 13. Any and all film and or cellular phones which depict personal identification information, any information pertaining to the personal identification information; and/or distribute, receive, or possess personal identification information.

The specific authorization as to what the officers were permitted to search was even less particular, simply stating "You, Officer Walter Mickey, an Officer with the Fort Myers Police Department, and/or any other Fort Myers Police Officer in Lee County, Florida with the proper and necessary assistance, are hereby commanded to search forthwith the *numerous items of digital media*. . . ."[1]

Although the search warrant did not state with particularity what premises were to be searched, the officers proceeded to search the computers and equipment which were seized from Mr. Joyner's vehicle. This search resulted in the government obtaining the evidence they seek to use against Mr. Joyner at trial. As a result of the search warrant a forensic computer examination was conducted which revealed an Excel spreadsheet which contained personal information for 163 individuals. After finding these materials on the computer, the Fort Myers Police Department contacted the Internal Revenue Service for assistance. From the evidence contained in the spreadsheet, the IRS found evidence of tax returns filed between January through June 2012, as well as indicators of that there had been multiple filings of these returns from the same IP address provided by Centurylink. Further investigation resulting from the search of the computer established

[1] It appears that this search warrant was simply a boiler-plate form which would be used, for example, if the premises to be searched was a residence or business.

that the IP address in question was registered to Mr. Joyner's wife. The resulting investigation included interviews with some of the individuals whose identities were learned from the spreadsheet. These individuals indicated that their identities had been stolen and that they had not authorized their tax returns to be filed. Additionally, as a result of this search, the agents found information concerning a bank account associated with Mr. Joyner. The resulting investigation established that treasury checks had been deposited into that account, and money withdrawn, between October-November, 2011. Some of the individuals to whom these checks were ostensibly issued were interviewed. These individuals also purportedly confirmed that the checks were fraudulent. In essence, the government's entire case is the product of the August 10, 2013 traffic stop and search.

GROUNDS FOR SUPPRESSION

1. The initial stop of the vehicle driven by Mr. Joyner violated the Fourth Amendment.

2. The warrantless search of the vehicle, and the seizure of the items therein, violated the Fourth Amendment.

3. The search warrant was the product of the unlawful stop, search, and seizure. Therefore, the items seized pursuant to the warrant, and all evidence derived therefrom, must be suppressed.

4. The search warrant failed to comply with the Particularity Clause of the Fourth Amendment. For this reason as well, the items seized pursuant to the search warrant and all evidence derived therefrom, must be suppressed.

MEMORANDUM OF LAW

The Stop and Search of the Vehicle

The burden of establishing the reasonableness of the traffic stop subsequent detention and subsequentsearch rests with the government. *See United States v. Freire*, 710 F. 2d 1515, 1519 (11th Cir. 1983)(providing that where there is a warrantless search, the Government must demonstrate that the challenged action falls within one of the recognized exceptions of the warrant requirement, thereby rendering it reasonable within the meaning of the Fourth Amendment.).

Stopping a vehicle and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Of course, the Fourth Amendment permits an officer to stop a vehicle where there is probable cause to believe that a traffic violation has occurred. *United States v. Simmons*, 172 F. 3d 775, 778 (11th Cir. 1999). However, where there is no probable cause to believe that a traffic violation has occurred, or the officer's belief that there has been a traffic violation is not grounded in a reasonable understanding of the governing law, the stop cannot be justified under the Fourth Amendment. *See, Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014)(holding that a traffic stop premised on officer's *objectively reasonable* misunderstanding of governing law is not grounds for suppression). *C.f. United States v. Whren,* 517 U.S. 806, 815 (1996)(an officer's ulterior motives do not invalidate a traffic stop).

Both the Eleventh Circuit and the Supreme Court have expressed intolerance with the practice of using routine traffic stops to conduct criminal investigations. *See Rodriguez*

v. United States, — S. Ct— , 2015 WL 1780927 (April 21, 2015)(police may not extend a traffic stop to allow the use of a narcotics dog); *United States v. Perkins*, 348 F.3d 965, 971-972) (11th Cir. 2003) (affirming a suppression order where vehicle search resulted from a detention which exceeded the scope of a traffic stop); and *United States v. Boyce,* 351 F.3d 1102, (11th Cir. 2003) (reversing, and ordering suppression of vehicle search results where the detention of the driver was prolonged to obtain the results of a criminal records check). Similarly, an inventory search can not be a ruse to conduct a criminal investigation. *See Florida v. Wells*, 495 U.S. 1, 4, 110 S. Ct. 1632, 1635 (1990)("The individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime")(citations omitted); and *United States v. Khoury,* 901 F.2d 948, 958 (11th Cir. 1990)(*citing Wells).* Even a lawful arrest of a vehicle occupant no longer permits a search of the passenger compartment where, as here, the occupant has already been removed from the vehicle. *See Arizona v. Gant,* 556 U.S. 332, 129 S. Ct. 1710(2009) (overruling *New York v. Belton,* 453 U.S. 454, 101 S. Ct. 2860 (1981)).

The stop in this case was clearly pre-textual. It strains credibility to believe that a plain clothes detective would break away from a surveillance, and actually call in back-ups, to pursue a seat-belt violation. Nonetheless, under *Whren*, the issue is not the pre-textual nature of the stop, but whether a traffic violation actually occurred, and whether a reasonable officer would have stopped the vehicle based upon the violations. The government will need to establish that the stop was based upon a good-faith understanding of the governing law and that a reasonable officer would have conducted a traffic stop

under those circumstances.

Even assuming a valid initial stop, there does not appear to have been any basis for the warrantless search of Mr. Joyner's vehicle. It is clear that this was a full-blown search for evidence, as the officers seized everything within the vehicle, including computers and items found within closed containers. Mr. Joyner had already been removed from the vehicle and was handcuffed. There is finally no claim that there was probable cause to conduct a search of the vehicle.

The Particularity Clause

The Fourth Amendment provides that "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*." *Maryland v. Garrison*, 480 U.S. 79, 84-85 (1987)(emphasis added). A warrant must, therefore, "describe the place to be searched with sufficient particularity to direct the searcher, to confine his examination to the place described, and to advise those being searched of his authority." *United States v. Burke*, 784 F.2d 1090, 1093 (11th Cir. 1986).

In *Garrison*, the Supreme Court made clear that the

> manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide ranging exploratory searches the Framers intended to prohibit.

Id. (emphasis added)(quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)).

In addition to the prevention of general searches, a particular warrant also assures

the individual whose property is searched and seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search. *Groh v. Ramirez*, 540 U.S. 551, 562 (2004). In *United Stated v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988), the Tenth Circuit set forth the general standard for evaluating when the Fourth Amendment's particularity requirement has been met.

> A description is sufficiently particular when it enables the searcher to reasonably ascertain and the identify the things authorized to be seized. Even a warrant that describes the items to be seized in a broad or generic terms may be valid when the description is as specific as the circumstances and nature of the activity under investigation permit. *However*, the *fourth amendment requires the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized*.

(emphasis added).

Therefore, it does not matter what the officers believed the search warrant authorized. Nor does it matter what the issuing judge intended the warrant to authorize. Rather, the warrant is invalid unless it can be determined what it specifically and explicitly authorized. Otherwise, the search becomes the general exploratory search that the Fourth Amendment forbids. Here, there was no description of exactly what the warrant authorized the officers to search. This violated the Particularity Clause.

Items to be Suppressed.

Of course, suppression is not limited to items directly seized in an unlawful search. The exclusionary rule generally bars the admissibility at trial of tangible evidence, as well

as verbal statements, acquired through unconstitutional means. *See Wong Sun v. United States,* 371 U.S. 471, 485, 83 S. Ct. 407 (1963). The rule excludes from admissibility "not only primary evidence obtained as a direct result of an illegal search or seizure, *Weeks v. United States,* 232 U.S. 383, 34 S. Ct. 341 (1914), but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *Segura v. United States,* 468 U.S. 796, 804, 104 S. Ct. 3380 (1984) (quoting *Nardone v. United States,* 308 U.S. 338, 341, 60 S. Ct. 266 (1939)); *see also Murray v. United States,* 487 U.S. 533, 536-37, 108 S. Ct. 2529(1988) ("[T]he exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes 'so attenuated as to dissipate the taint").

As explained in *Segura:*

> Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. The question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is "fruit" of a prior illegality is whether the challenged evidence was "'come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "

Segura, 468 U.S. at 804-05 (citing *Wong Sun*, 371 U.S. 488).

Here, the tainted evidence includes not simply the items found in the vehicle, and found pursuant to the search warrant. It also includes the records (such as tax returns and bank records) and other evidence, including witness testimony, obtained from investigation resulting from the unlawful search.

WHEREFORE, the Defendant moves this Court to grant the motion to suppress and to exclude evidence as set forth above and to conduct an evidentiary hearing on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2015, a true copy of the foregoing filed in this court and a copy was forwarded using CM/ECF to Yolande Viacava Office of the United States Attorney, 2110 First Street 3-137 Fort Myers, Florida 33901.

/s/ Russell K. Rosenthal
Russell K. Rosenthal
Assistant Federal Defender