

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 3:11-cr-248-J-34TEM

DONALD MITCHELL

**UNITED STATES' RESPONSE IN OPPOSITION TO
DEFENDANT'S FIRST MOTION TO SUPPRESS EVIDENCE**

In his first Motion to Suppress (Doc. 52), Donald Mitchell seeks suppression of items recovered during a lawful automobile inventory search conducted in compliance with police policy. Mitchell also seeks suppression of the search of an iPhone and two iPads, which were only searched following consent given by both Mitchell and his attorney. As more fully set forth below, the Motion should be denied.

I. BACKGROUND

On December 16, 2010, a Duval County judge issued a warrant to arrest Mitchell for grand theft, stemming from Mitchell deliberately failing to pay Tire Kingdom for two tires installed on a silver Maserati being driven by Mitchell.¹ On December 21, 2010, a different Duval County judge issued a second warrant to arrest Mitchell for grand theft, which stemmed from Mitchell deliberately failing to pay for \$9,372.59 worth of services from Midas Brakes on a Black Bentley being

¹ Mitchell was subsequently adjudicated guilty of this offense and sentenced to 175 days time served by the Circuit Court, in and for Duval County, Florida, Case No. 16-2010-CF-14026A.

driven by Mitchell.² At the time that both warrants were issued, United States Secret Service (USSS) Special Agent (SA) Lawrence Lomonaco, Jacksonville Sheriff's Office (JSO) Detective Dave Bisplinghoff (now retired from JSO), and agents of the Federal Bureau of Investigation (FBI) were already investigating Mitchell and other potential co-conspirators for fraudulent activity.

On December 28, 2010, Detective Bisplinghoff observed Mitchell driving a silver Maserati in downtown Jacksonville. Having knowledge of the two outstanding warrants for Mitchell's arrest, Detective Bisplinghoff requested the assistance of a nearby patrol officer in taking Mitchell into custody on the warrants. When JSO Officer M.S. Lundquist took Mitchell into custody as Mitchell walked out the office of a local attorney, Mitchell asked Officer Lundquist to go inside the Maserati and retrieve Mitchell's license from a Louis Vuitton bag. When Officer Lundquist opened the Louis Vuitton bag in compliance with Mitchell's request, Officer Lundquist observed a sum of cash inside the bag and relayed these observations to Detective Bisplinghoff. However, neither Officer Lundquist nor Detective Bisplinghoff seized any items from the Maserati on December 28, 2010. The Maserati key that Mitchell gave Officer Lundquist to retrieve Mitchell's license was returned to Mitchell and included in Mitchell's personal property when he was booked into Duval County Jail on December 28,

² Mitchell was subsequently adjudicated guilty of this offense and sentenced to 175 days time served by the Circuit Court, in and for Duval County, Florida, Case No. 16-2010-CF-13732A.

in addition to two cell phones (one iPhone, one HTC phone), one license, two other keys, and the clothing and jewelry that Mitchell was wearing at the time.

Detective Bisplinghoff advised the State Attorney's Office of Mitchell's arrest and was requested by an Assistant State Attorney to hold the Maserati as evidence of the grand theft of the tires. On the morning of December 29, 2010, Detective Bisplinghoff retrieved the key to the Maserati from Mitchell's inventoried personal property at the jail, and proceeded to the location that Mitchell was arrested on the previous day. The Maserati was parked at the same metered spot, but the time on the meter had expired. In compliance with JSO's operational order regarding the towing and storage of vehicles, Detective Bisplinghoff conducted an inventory of the items inside the Maserati, which included, among other things, two Apple iPads, a USAA check, several debit cards, a checkbook, two BB guns, \$177.46 in cash, and a Louis Vuitton bag with miscellaneous papers.

In furtherance of the fraud investigation being conducted by USSS, JSO and FBI, Mitchell's attorney at the time, Amy Newby, was interviewed by SA Lomonaco and Detective Bisplinghoff on January 4, 2011. Newby was advised of her Miranda rights and agreed to be interviewed. During the interview, Newby stated that the iPhone that was in Mitchell's possession when he was arrested on December 28 belonged to Newby and was in Newby's name. Newby then gave SA Lomonaco and Detective Bisplinghoff verbal consent to search the iPhone.

Only after Newby's consent did Detective Bisplinghoff retrieve the iPhone from Mitchell's inmate property and place the phone into JSO property as evidence. Newby's verbal consent on January 4 was followed by written consent on January 5, 2011, to search the iPhone, as well as the two iPads found in the Maserati, which Newby stated belonged to her. Additionally, during calls made by Mitchell to SA Lomonaco on February 9 and 10, 2011, Mitchell gave verbal consent to search all items in the Maserati, including the iPads.

During the course of SA Lomonaco and Detective Bisplinghoff's investigation of Mitchell, they learned that Mitchell had been falsely representing himself as a financial advisor. Mitchell would lure victims by driving expensive automobiles and claiming to be able to yield multi-million dollar returns on small investments in a short period of time. The identities of the victims of Mitchell's investment scheme were revealed to law enforcement independent of the iPhone and iPads, regardless of when and how they were obtained.

II. DISCUSSION

A. The search of the Maserati was a valid inventory search.

Inventory searches are reasonable when executed in accordance with standard police practices. United States v. Laing, 708 F.2d 1568, 1570 (11th Cir. 1983) (citing South Dakota v. Opperman, 428 U.S. 364, 376 (1976); United States v. Edwards, 577 F.2d 883, 893 (5th Cir. 1978)). Police departments' routine practice of conducting inventory searches was developed in response to

three distinct needs: 1) the protection of the owner's property while in police custody; 2) the protection of the police department against disputes over lost or stolen property; and 3) the protection of the police from potential danger.

Opperman, 428 U.S. at 369 (internal citations omitted).

Inventory searches are a "well-defined exception" to the Fourth Amendment's warrant requirement. United States v. Farley, 607 F.3d 1294, 1333 (11th Cir. 2010) (quoting Colorado v. Bertine, 479 U.S. 367, 371 (1987)); see also Laing, 708 F.2d at 1570. In order for an automobile search to be valid pursuant to the inventory search doctrine, the police must first have the authority to impound the automobile and must then follow the procedures outlined in the police office's policy. United States v. Williams, 936 F.2d 1243, 1248 (11th Cir. 1991). Further, "[i]nventory searches must be limited to effectuation of the recognized purposes, for which they are conducted and they may not be used as a pretext for intrusive investigatory searches that would otherwise be impermissible." Laing, 708 F.2d at 1570 (quoting United States v. Prescott, 599 F.2d 103, 105 (5th Cir. 1979).

The legitimacy of an inventory search does not hinge on the existence of probable cause, but rather the reasonableness of the search "in light of the community caretaking functions that allow inventory searches." Laing, 708 F.2d at 1571 (citing Edwards, 577 F.2d at 893). The reasonableness of an inventory search is a fact-specific inquiry. Id. In Laing, the Eleventh Circuit held that an

officer's opening of a container during an inventory search was valid since the officer needed to determine if the container contained anything of value that needed to be catalogued in accordance with police policy.

JSO's operational order provides that all vehicles impounded must be subject to an inventory of its contents. As set out in Jacksonville Municipal Ordinance § 804.1101, impounded vehicles include vehicles which are unlawfully parked in violation of the municipal code, as well as vehicles subject to being held for use as evidence in a criminal trial. Jacksonville, Fla., Code § 804.1101 (2011). Unlawfully parked vehicles include those parked at an expired meter. Id. at § 802.105. Here, Detective Bisplinghoff was having the Maserati impounded because it contained evidence of the grand theft. Additionally, Detective Bisplinghoff was authorized to impound the vehicle because it was illegally parked, in violation of Jacksonville Municipal Code. In compliance with JSO's operational order, an inventory of the Maserati had to be conducted.

Detective Bisplinghoff, like the officer in Laing, needed to determine whether the Maserati contained anything of value that needed to be inventoried. Based on information relayed by Officer Lundquist during Mitchell's arrest on December 28, Detective Bisplinghoff already knew that there was cash inside of the Louis Vuitton bag. Therefore, he followed proper operational procedure by opening the Louis Vuitton bag to catalogue the cash inside of it.

Moreover, the searches of the iPhone and two iPads were not performed as part of the inventory search of the Maserati. As previously set forth, the iPhone was in Mitchell's inmate property and was not searched until consent was provided by the phone's owner, Amy Newby. Additionally, the two iPads were searched pursuant to Newby's consent, as well as Mitchell's own consent given to Special Agent Lomonaco. Therefore, any argument that the iPhone and iPads were unlawfully searched is ill-fated.

B. The exclusionary rule should not be applied.

Even if this Court were to find a Fourth Amendment violation, the exclusionary rule should not be applied. The rule is not automatic. It is a “prudential doctrine” the Supreme Court created to “compel respect for the constitutional guaranty”, it is “not a personal constitutional right.” Davis v. United States, 131 S.Ct. 2419, 2426 (2011) (internal citations omitted).

The Supreme Court recently made clear in Davis that when determining whether or not to apply the exclusionary rule, courts must weigh the deterrent benefit of suppression against its substantial societal costs, such as “ignor[ing] reliable, trustworthy evidence bearing on guilt or innocence” and possibly setting a “criminal loose in the community without punishment.” Id. at 2427. “For exclusion to be appropriate the deterrence benefits of suppression must outweigh its heavy costs.” Id.; Herring v. United States, 129 S.Ct. 695, 700 (2009).

The deterrence benefits of suppression depend on the culpability of the

officers. Davis, 131 S.Ct. at 2427. When officers show a deliberate, reckless, or grossly negligent disregard for a defendant's rights, the deterrence benefits are strong and usually outweigh the societal costs. Id. Conversely, when officers have an “objectively reasonable good faith belief that their conduct is lawful” or their conduct involves even isolated negligence, “the deterrence rationale loses much of its force and exclusion cannot pay its way.” Id. at 2427-28 (internal quotation omitted).

The actions by Detective Bisplinghoff in conducting an inventory search of the Maserati were objectively reasonable. Detective Bisplinghoff merely followed JSO's standard operational orders. Additionally, the iPhone and two iPads were not searched until after consent by the owners was given. Thus, any deterrent value in applying the exclusionary rule is low.

Against that backdrop of no (or minimal) deterrent benefit are the societal costs in applying the exclusionary rule in this case. To do so would potentially preclude evidence of a USAA check that one of the victims had issued to Mitchell, believing that Mitchell was a financial advisor. Thus, as in Davis, with no deterrent benefit on one hand and high societal costs on the other, the application of the exclusionary rule in this case is inappropriate. Even if there had been a Fourth Amendment violation, suppression of the search is not warranted.

III. CONCLUSION

For the reasons set forth, this Court should deny the first Motion to Suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Clyde M. Collins, Jr., Esq.

s/ Diidri W. Robinson

DIIDRI W. ROBINSON
Assistant United States Attorney