NO. 12-12956-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

TREVOR RANSFER,

Defendant/Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

APPELLANT TREVOR RANSFER'S REPLY BRIEF

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

PRELIMINARY STATEMENT

By addressing only some of the matters contained in Appellant's Initial Brief in this herein Reply Brief, Appellant does not intend to waive any of the arguments or positions in the Initial Brief or to otherwise concede any of the issues, arguments, or statements made by the Government in its Answer Brief.

ARGUMENT

I. THE COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS

Appellant's statements in this case were not freely and voluntarily given as supported by the facts set forth in Appellant's Initial Brief, which are summarily highlighted herein. Appellant was subjected to "pre-interviews" that were not recorded and was subjected to interviews throughout the day that happened at least 12 hours after Appellant signed the original Miranda form. Detective William Garcia interviewed Appellant and provided another Miranda form to Appellant [DE:100:74-75] whereupon Appellant, subsequent to giving a recorded statement, and despite having seen and signed a Miranda waiver prior, nevertheless asked W. Garcia, "Is this going to be used, like, against me? Like evidence bad? Like in a bad way?" *Id.* at 75. W. Garcia told the Appellant that his statement could not hurt him because he is cooperating and therefore his statement could only help him despite

that W. Garcia knew Appellant's statement would be used as evidence against him. *Id.* at 124.

The Government, in its Answer Brief, fails to address what is transparent-that Appellant did not understand his rights and was further confused by W. Garcia, who instead of taking affirmative and curative action to inform Appellant of his substantive rights per Miranda, proceeded as if Miranda were a mere formality. One cannot conclude based on the two-part inquiry as set forth in *Moran v. Burbine*, 475 U.S. 412 (1986), that Appellant's statements were voluntarily made and that he understood the nature of his right and the consequence of abandonment. *See, Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). As a result of Appellant's status of being "in custody" for purposes of *Miranda,* the police officers who questioned Appellant as set forth *supra,* were required to advise Defendant of his Miranda rights *prior to* questioning Appellant.

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966)(*emphasis added).* Appellant was questioned in "pre-interviews" that were not recorded prior to Miranda. *See, Missouri v. Siebert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643(2004)(when a police officer conducts a two-step interview, i.e., when he obtains a confession first, then advises a person of the Miranda warnings, "admissibility of the post-warned confession should depend on whether the Miranda warnings

delivered midstream could have been effective enough to accomplish their objects."). It is clear that the Miranda warnings given after Appellant had already started answering custodial questions could not have been effective to make clear to Appellant that he still had the right to terminate the interview, request an attorney, and not incriminate himself.

Alternatively, even if Appellant's statements were made after a "knowing and voluntary waiver" of Miranda, "[t]he due process 'voluntariness' test . . . requires the suppression of statements obtained by techniques and methods offensive to due process, or under circumstances in which the suspect clearly had no opportunity to exercise a free and unconstrained will." *Martin v. Wainwright*, 770 F.2d 918, 924 (11th Cir. 1985)(internal quotations and citations omitted). The facts set forth in Appellant's Initial Brief, including but not limited to, the psychological coercion experienced by Appellant due to detectives pressuring Appellant to maintain a certain story-line, a promise that the evidence would not be used against him, and the question of whether Appellant was on pills or other substances, makes clear that Appellant had no real opportunity to exercise free will.

II. THE COURT ERRED IN DENYING APPELLANT'S JOINT MOTION TO SUPPRESS STATEMENTS AND EVIDENCE SUBSEQUENT TO ARREST

The Government incorrectly asserts that Appellant did not raise the issue of whether his arrest was supported by probable cause. [Gov. Brief at 37]. Appellant raised the issue of probable cause for his arrest as part and parcel of his challenge to the use of the GPS tracking device that led to his arrest as part of the hearing on his Joint Motion to Suppress. [DE: 324:21-24].

At said hearing, it was conclusively established that the police were unaware of Ransfer's name or involvement in the alleged robbery ring prior to the time of his arrest. [DE:324:21-24, 27-28]. On June 1, 2011, when a robbery occurred at the Wendy's Restaurant, Villaverde went to his computer and tracked the Expedition utilizing the GPS placed on the vehicle prior, ordered a perimeter be established, and ordered other officer's on scene to effectuate a stop whereby Appellant was arrested. Appellant's arrest was premised upon an unreliable and unverified tip that did not and does not serve as probable cause for Appellant's arrest. Although a white vehicle was seen leaving the scene of a Wendy's that had just been robbed, [DE:99:17] and subsequent thereto a white vehicle was seen following a white Ford Expedition on which the police had placed a GPS [DE:99:18: DE:100:31-32], given the location of the Expedition relative to the timing of the Wendy's robbery it was physically impossible that the Expedition could have been involved in the Wendy's robbery. [DE:324:17-18]. Villaverde conceded as much. *Id.*

Based on *United States v. Jones,* 132 S. Ct. 945 (2012), 565 U.S. ____ (2010), it is clear that the surveillance and subsequent stop of the vehicle was illegal and therefore all statements obtained from Appellant, as well as any and all evidence, physical or otherwise, should be suppressed as fruit of the poisonous tree. *Wong Sun v. United States,* 371 U.S. 471(1963). The Government, however, contends that Appellant does not have standing to challenge the utilization of the tracking device to locate and arrest him on the night of the incident in question prior to addressing the substance of the *Jones* opinion and application to the case at bar. Appellant, as the driver of the vehicle at the time of his arrest, not only was in exclusive use and possession of the Expedition, but had a reasonable expectation of privacy rooted in Fourth Amendment jurisprudence, which not only extends to protecting places, but people. *See United States v. Miller,* 821 F.2d 546, 548 (11th Cir. 1987); and *United States v. Jones,* 132 S. Ct. 945 (2012), 565 U.S. ____ (2010).

The Government's reliance on *United States v. Gibson,* 708 F.3d 1256 (11th Cir. 2013) for a different conclusion is misplaced. Although the Court in *Gibson* decided the case on the issue of standing and did not address the issue left undecided by *Jones,* which is whether a tracking device used to track a vehicle's movements violates the Fourth Amendment if supported by probable cause or reasonable suspicion, *Gibson* is nevertheless inapplicable and does not address whether

Appellant had standing in the case at bar. In the case at bar, Appellant was the driver of the vehicle in question whereas Gibson was neither the driver nor passenger. As such, *Gibson* does not aid in the resolution of the standing issue or in the issue it left undecided, i.e., whether the warrantless placement and utilization of a tracking device violates the Fourth Amendment if reasonable suspicion or probable cause is present. In any event, the facts of this case make clear that at the time of the utilization of the GPS to track the vehicle's location and at the time of the Appellant's arrest, there was no probable cause for either action by the police.

There is little merit in the Government's position that because the GPS in the case before the Court was merely used to locate the vehicle, whereupon traditional surveillance techniques took over, and that the GPS was not used to actually track the vehicle, no search occurred. This reasoning, when followed to its logical conclusion, would mean that the police may act contrary to the principles set forth in *Katz v. United States*, 389 U.S. 347 (1967). The utilization of the GPS to locate is where the tracking, the searching, and the gathering of information to use in the investigation first begins. Villaverde's use of the GPS to locate the Expedition was a non-traditional surveillance technique that allowed Villaverde to know the location of the vehicle without relying upon traditional surveillance techniques in the public thoroughfares. The GPS in the case at bar was utilized, without a warrant, to locate

a vehicle assumed to be in a robbery and there would have been no point in relying on same if the police knew of the location of the Expedition through traditional methods.

The Government's locating verses tracking distinction seems to be made to both support its contention that the mere locating of a vehicle using the GPS is not the same as tracking and therefore is not a search, but if it is a search, then it is a reasonable search. In the case at bar, contrary to the Government's position, there was no reasonable suspicion or probable cause that the Expedition, let alone Appellant, was involved in the Wendy's robbery on the night the GPS was used to locate the Expedition and that Appellant was arrested. In point of fact, the use of the GPS to locate the Expedition made clear that the Expedition could not have been involved in the Wendy's robbery. There is simply no exception to the warrant requirement and that the GPS was used to "merely" locate and not track does not make the search per se reasonable under the circumstances. Because the search in the case at bar was conducted without a warrant, it is presumptively unreasonable, *see Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967).

Last, the Government's position that the exclusionary rule should not apply and that evidence obtained from the GPS tracker should not be suppressed because

agents "reasonably relied" on binding precedent is erroneous for the reasons set forth fully in Appellant's Initial Brief. In sum, again, there was no binding precedent relevant to the issue before the trial court below that was settled and binding.

III. THE COURT ERRED IN ADMITTING HEARSAY EVIDENCE REGARDING THE ROBBERY DETAILS

The Government contends that Villaverde's testimony was not offered for the truth of the matter asserted, but for the non-hearsay purpose of establishing the course of the investigation and subsequent police action. [Gov.Brief at p. 49]. In support, the government cites *United States v. Jiminez*, 564 F.3d 1280, 1288 (11th Cir. 2009). However, *Jiminez* is not on point, as far as merely rehabilitating a witnesses credibility by explaining his actions as happened in *Jiminez*. In the instant case, the officer (Villaverde) was permitted to testify as to the clothing descriptions of the alleged perpetrators, that positive identifications had been made, that a white Expedition was being used, and that law enforcement had received information that a robbery was going to happen just days before the Wendy's robbery occurred. [DE: 364:72-84]. Each piece of evidence was critical relative to Appellant because the Government's evidence linking Appellant to any in particular robbery was minimal to none. The aforementioned evidence was not simply offered to show the "course of the investigation."

Even assuming that the evidence could have been admitted for a non-hearsay

purpose, the jury was not given any limiting instruction that they were to consider the evidence for the sole purpose of explaining the course of the investigation. Without such an instruction, the jury was free to consider Villaverde's testimony as true. The prejudice to Appellant is great, as he had no opportunity to bring out the informant's bias, motive, and unreliability. See *Idaho v. Wright*, 497 U.S. 805, 819(1990). As such, Villaverde's inadmissible hearsay testimony was a violation of the Confrontation Clause. To further bolster the identity evidence, Villaverde testified that the robbery crew used a White Expedition and stole minivans to utilize in the robberies, including the blue minivan used in this case. Villaverde's testimony about what others told him relative to the robberies is only relevant to establish its truth, i.e., that Appellant was part of the robbery crew that used certain vehicles to commit various robberies in a certain pattern and practice. *See, United States v. Baker*, 432 F.3d 1189, 1213 (11 Cir. 2005).

IV. THE EVIDENCE WAS INSUFFICIENT TO CONVICT RANSFER ON ALL COUNTS

Appellant relies on the arguments and positions in his Initial Brief as to this issue. Contrary to the Government's contention in its brief, the evidence against Appellant was not substantial, but was indirect, unreliable, and piece-mealed unless viewed in hind-sight in the light of a shining totality of evidentiary errors that appear to have the ends justify the means.

CONCLUSION

For the above stated reasons, Appellant's conviction should be reversed and this case remanded to the lower court for a new trial.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B), as this herein brief contains 2,151 words. Additionally, this brief complies with the typeface requirement of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6), as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and 6 copies of the foregoing reply brief for the Appellant was sent by U.S. Mail on the 6th day of May, 2013 and that, on the same day, the foregoing brief was electronically uploaded to the Eleventh Circuit Court of Appeals' Internet web site at www.ca11.uscourts.gov. (See attached Brief Upload Result Page). I hereby further certify that a true and correct copy of the foregoing Brief was mailed by U.S. mail to Lisa Hirsch, Assistant United States Attorney, 99 N.E. Fourth Street, Miami, Florida 33132-2111.

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