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STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

People of the State of Michigan, Plaintiff/Appellant, v. Michael Georgie Carson, Defendant/Appellee. /	Docket No. 166923 Court of Appeals No. 355925 57th Circuit Court No. 20-5054-FC
Emmet County Prosecutor's Office Attorney for Plaintiff/Appellant 200 Division St., Suite G42 Petoskey, MI 49770 231-348-0686	J. Nicholas Bostic P40653 Attorney for Defendant/Appellee 909 N. Washington Ave. Lansing, MI 48906 517-706-0132

/

DEFENDANT/APPELLEE'S RESPONSE TO PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

Mr. Carson, for his response, states:

1. The Court of Appeals decision contains no application of law that is contrary to a decision of this Court or a decision of the United States Supreme Court.

2. The rules of particularity under Fourth Amendment principles were clearly established and properly applied to both this warrant and the fact of this case.

3. The government's application fails to establish adequate grounds for this Court's consideration.

WHEREFORE, Mr. Carson respectfully requests this Honorable Court deny the application for leave to appeal and allow this matter to proceed in Circuit Court.

05/08/2024
Date

/s/ J. Nicholas Bostic
J. Nicholas Bostic P40653
Counsel for Mr. Carson

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STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

People of the State of Michigan,
Plaintiff/Appellant,

v.

Michael Georgie Carson,
Defendant/Appellee.
_____/

Docket No. 166923
Court of Appeals No. 355925

57th Circuit Court No. 20-5054-FC

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STATEMENT OF JURISDICTION

Mr. Carson concurs that this Court has jurisdiction to exercise jurisdiction over this application for leave to appeal pursuant to MCR 7.303(B)(1).

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE SEARCH WARRANT AND SUPPORTING AFFIDAVIT ARE INVALID?

II. WHETHER THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLIES TO THIS FACIALLY INVALID WARRANT AND AFFIDAVIT?

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FACTS

This factual summary is only to provide a basic outline of the case. The facts relevant to each issue are set forth in detail within the discussion of those issues. The investigation started on November 29, 2019 when Deputy Midyett responded to Mr. Billings' home. Jury Trial, Vol 1, p. 107 (JT1). Mr. Billings was a neighbor of Mr. Carson's. He was retired from driving a truck. He went to California in 2019 with his wife. She did not return and they divorced. In the fall of 2019, he had back surgery and temporarily moved in with his brother in Cheboygan. *Id*., pp. 23-28.

Mr. Billings had decided to downsize his personal belongings and knew that Mr. Carson was familiar with selling things online. He asked Mr. Carson and Mr. Carson's girlfriend, Brandi DeGroff, to sell things for him and gave him a key to his home. *Id*, pp. 29-32. Mr. Billings claimed that he had two safes in his shop room. It contained old coins, one-hundred-dollar bills and important personal papers. The safes could be opened with a combination lock or a key. Most of the currency was in yellow bank money straps. He claimed that the safes contained between $59,000.00 and $63,000.00 in cash. *Id*, pp. 33-39.

In the fall of 2019, he retrieved the key from Mr. Carson or Ms. DeGroff. He called the police when he noticed numerous items of property (mostly cash or coins) were missing. When he tried to use the combination, it would not work so he called a locksmith. Once the safe was open, he realized the extent of the theft. *Id*, pp. 45-49. The government then presented several witnesses who attempted to establish that Mr. Carson did not have steady income yet Mr. Carson and Ms. DeGroff were seen with large amounts of cash in various circumstances. Many of these witnesses provided statements from Ms. DeGroff but Ms. DeGroff did not testify. Jury Trial, Vol. II, pp. 7 – 10; 18-26; 33-36.

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On February 26, 2020, Deputy Midyett was asked by D/Sgt. Matt Leirstein to execute an arrest warrant on Mr. Carson at Mr. Carson's home. He chose 4:00 a.m. to make the arrest. Deputy Midyett explained that D/Sgt. Leirstein had said the phone would be beneficial and if it was discovered to seize it. He allowed Mr. Carson to smoke a cigarette and allowed him to enter the house to get dressed. The Deputy told Mr. Carson that since he was under arrest he would have to accompany him wherever he went. As they went into the bedroom, the Deputy saw a cell phone on a charger on a nightstand. Mr. Carson was sitting on the bed putting on his socks. The Deputy claimed the phone was within his arms reach but he made no gestures or advance toward the phone. Deputy Midyett asked Mr. Carson if it was his cellphone and Mr. Carson said it was. The Deputy than told Mr. Carson he was going to seize it. The Deputy testified that he told Mr. Carson that the phone was part of the investigation but there was no further discussion.

D/Sgt. Leirstein testified as to obtaining a search warrant for the contents of the cellular phone seized by Dep. Midyett. The examination of the phone included text messages the detective claimed created admissions of Mr. Carson and were incriminating. *Id*, pp. 199-211.

PROCEEDINGS BELOW

On February 21, 2020, Mr. Carson was charged with Count 1, safe breaking, Count 2, Larceny $20,000 or more, Count 3, Receiving and Concealing Stolen Property $20,000 or more, Count 4, Larceny in a Building, and as a Fourth Habitual Offender based on an offense date of August 1, 2019. He was arraigned in District Court on February 26, 2020. The preliminary examination was waived. The original information was filed on May 22, 2020. ROA 2. Mr. Carson filed a motion to suppress the cellular phone on June 26, 2020. ROA 6. On July 2, 2020, the government filed an amended information charging an additional four counts of conspiracy for each of the existing charges. ROA 9. The hearing on the motion was heard on July 7, 2020 at

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which time the trial court denied the motion. ROA 10. A written opinion and order denying the motion was entered on July 15, 2020. ROA 11.

Mr. Carson filed a motion in limine regarding certain messages from his phone on July 23, 2020. ROA 14. This motion was heard on August 31, 2020. ROA 27. The motion was denied in part and trial counsel stipulated to some items coming in for context. Motion in limine, pp.10 – 13. On October 5, 2020, the government filed another amended information. ROA 33.

The matter went to a jury trial on October 19, 20, and 21, 2020. ROA 38, 39, 40. Mr. Carson was found guilty on all counts. Sentencing occurred on December 15, 2020 and Mr. Carson was sentenced as follows: 10 years to 20 years for Count 1, safe breaking and Count 5, conspiracy; 9 years to 20 years for Count 2 Larceny over $20,000, Count 3, Rec & Conc. Over $20,000 and the related conspiracies in Counts 5 and 6, respectively; 3 years to 15 years for Count 4, Larceny in a building and Count 8, Conspiracy to commit Larceny in a building. Restitution was ordered in the amount of $80,010.00 with state minimum costs of $544.00, a crime victim rights fee of $130.00. Court costs were waived. Sentence Transcript, pp. 23.

Mr. Carson timely submitted a claim of appeal through retained counsel on January 4, 2021. After extensions, Mr. Carson timely filed a motion for new trial on September 10, 2021. The trial court granted an evidentiary hearing on ineffective assistance of counsel. The trial court conducted a *Ginther* hearing on April 28, 2022 and issued a written opinion on May 17, 2022 which instructed Defendant to submit a proposed final order. The trial court signed and entered that final order on May 26, 2022. The matter then proceeded in the Court of Appeals and the Court of Appeals reversed in a published opinion on February 15, 2024.

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LAW/ARGUMENT

I. THE COURT OF APPEALS' DECISION PROPERLY APPLIES EXISTING PRECEDENT TO THIS SEARCH WARRANT.

A. Preservation of the issue and standard of review.

1. Preservation of the issue.

The current claim that identification of the categories of crimes being investigated "cabined" the search warrant sufficiently to preclude it from being invalid was not included in the brief to the Court of Appeals by the government. COA Appellee Brief, pp. 18-19. The general validity of the affidavit and search warrant was argued by the government in the brief to the Court of Appeals based on the information contained in the affidavit.

2. Standard of review.

Should this Court grant leave to appeal, the standard of review for this constitutional issue is de novo.

B. Standards.

From the affidavit:

> y) The aforementioned information combined with your affiant's training and experience causes him to believe that the execution of this search warrant will assist with the furtherance of this criminal investigation.

See Government's Appendix 2. A confession would also assist the investigation but the rules to obtain it still have to be followed.

The crimes being investigated are identified as Larceny in a Building and Safe Breaking. *Id*, at Item 2, p. 1, para. 2; see also Paragraph 3. a). There is nothing about either of these crimes to establish that use of a cellular phone would be inherent in the crime or even likely. The only limitation in that first sentence of what is being searched for is “pertaining to the investigation of . . . .” In light of the introductory phrase “Any and all records or documents*” this is hardly a

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limitation imposed by the judicial officer but simply left to the discretion of the executing official. The asterisk is not explained separately but the remainder of that paragraph includes an extensive and exhaustive list of anything and everything stored on any phone.

Paragraphs 3. b) through v) explain how the investigation started and some investigative steps that occurred including three interviews (but none of Mr. Carson) and the gathering of some records primarily from a casino. Not a single fact exists in these paragraphs to establish that Mr. Carson used his telephone or any possible application on it such as social media, text messaging, e-mail, chat platforms or video platforms to commit the listed crimes.

Paragraph 3. w) provides a statement about what is known about mobile communication devices and how they are "often" used to plan, commit, and conceal criminal activity and evidence. The affiant claims that data obtained from "these devices" can assist law enforcement in establishing the involvement of a possible suspect or suspects. There are numerous problems with this conclusion:

- Other than stating in Paragraph 3. a) that the affiant is a deputy sheriff and a certified police officer, his experience is not stated. The affiant's training to support the claim in Paragraph 3. w) is absent.
- The word "often" is very speculative and there is an absence of any fact in this affidavit to establish that *this* device contains evidence.
- The fact that a device may contain information to "assist law enforcement in establishing the involvement of a possible suspect or suspects" sounds precisely like a fishing expedition and nothing close to probable cause.

Paragraph 3. x) asserts that records created by cell phones can assist law enforcement in establishing communication activity/behavior, patterns, anomalies, patterns of life and often the

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identity of the device user. The paragraph concludes by explaining that a thorough, comprehensive analysis of a broad time frame of data is needed to accomplish this. There is nothing to suggest that any of these categories are evidence.

Paragraph 3. y) asserts that the affiant's training and experience (again unexplained) causes him to believe that the execution of this search warrant "will assist with the furtherance of this criminal investigation." This paragraph makes no effort at establishing that probable cause exists to believe that evidence exists on the phone. Even if probable cause were established, there is nothing in this affidavit to identify the evidence being sought.

The affiant's *belief* is totally irrelevant. It is the reviewing magistrate's conclusion that is important. For the magistrate to be able to properly perform this official function, the affidavit presented must contain adequate supporting *facts* about the underlying circumstances to show that probable cause exists for the issuance of the warrant. ***Whiteley v Warden***, 401 US 560, 564; 91 SCt 1031, 1034–35; 28 LEd2d 306 (1971); ***Nathanson v United States***, 290 US 41, 47; 54 SCt 11, 13; 78 LEd 159 (1933). The affidavit must contain more than mere beliefs and conclusions. ***People v Martin***, 271 Mich App 280, 298; 721 NW2d 815 (2006). The affiant points to absolutely nothing in the application to support his belief (because there is nothing in it).

The Fourth Amendment to the United States Constitution says that "no Warrants shall issue, but upon probable cause . . . and *particularly describing* the place to be searched, and *the* persons or *things to be seized*." U.S. CONST. amend. IV (emphasis added). "The chief purpose of the particularity requirement [is] to prevent general searches by requiring a neutral judicial officer to cabin the scope of the search to those areas and items for which there exists probable cause that a crime has been committed." ***United States v Richards***, 659 F3d 527, 537 (CA 6 2011) (quoting ***Baranski v Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco and Firearms***, 452 F3d

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433, 441 (CA 6 2006)). The constitutionality of a warrant is determined by the four corners of the warrant, although the government can incorporate by express reference affidavits and other material. See ***Groh v Ramirez***, 540 US 551, 557–58; 124 SCt 1284; 157 LEd2d 1068 (2004).

The warrant must contain information sufficient "to guide and control the agent's judgment in selecting what to take." ***Richards***, 659 F3d at 537 (quoting ***United States v Upham***, 168 F3d 532, 535 (CA 1999)). An overly broad search warrant exists where the category of things specified "is too broad in the sense that it includes items that should not be seized." *Id*. This is often referred to as "overbreadth." "The degree of specificity required depends on the crime involved and the types of items sought." ***United States v Abboud***, 438 F3d 554, 575 (CA 6 2006) (quoting ***United States v Blakeney***, 942 F2d 1001, 1026 (CA 6 1991)) (for example, "[i]n a business fraud case, the authorization to search for general business records is not overbroad").

There is no formula that determines whether a warrant is sufficiently particular. A sufficiently particular warrant "supplies enough information to guide and control the [executing] agent's judgment in selecting what to take." ***Richards***, 659 F3d at 537 (quoting ***United States v Upham***, *supra* at 535). Whether this bar has been cleared is "best resolved upon examination of the circumstances of the particular case." ***United States v Logan***, 250 F3d 350, 365 (C A 6, 2001). "[T]he degree of specificity in a warrant must be flexible, depending upon the type of items to be seized and the crime involved." ***United States v Blair***, 214 F3d 690, 697 (CA 6t 2000). Finally, "where a warrant adequately describes 'a category of seizable papers,' it is not lacking in specificity merely 'because the officers executing the warrant must exercise some minimal judgment as to whether a particular document falls within the described category.'" ***United States v Bruce***, 396 F3d 697, 709 (CA 6 2005), vacated in part on other grounds, 405 F3d 1034 (mem.) (CA 6 2005) (quoting ***United States v Ables***, 167 F3d 1021, 1034 (CA 6 1999)). Bearing in mind

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that only the four corners of the affidavit can be considered in analyzing the investigation, it is incumbent on the affiant to include in the affidavit the parameters he or she intends to apply. In the instant case, the opposite occurred because the scope of items requested was deliberately inflated in terms of its categorization and time frame.

It is important to remember the language of Paragraph 3.x) of the affidavit:

> *Records created by mobile communication devices can also assist law enforcement in establishing communication activity/behavior, patterns, anomalies, patterns of life and often the identity of the device user. This is most effectively accomplished by reviewing a larger segment of records ranging prior to and after the incident under investigation if possible.*

Any limitation on the officer's exercise of discretion that might be inferred by naming two specific crimes was completely eliminated by this extremely broad language. As this Court considers whether to grant leave to appeal, the simple fact that law enforcement wanted to use this cellular telephone to establish "patterns of life" should bring an end to that consideration. This phrase is not a conclusion on the part of Mr. Carson, the trial court, or the Court of Appeals. It is directly from the affiant.

The preceding paragraph, Paragraph 3.w) claims that data and records created by cell phones can "assist law enforcement in establishing the involvement of a possible suspect or suspects." A reasonably prudent person considering whether probable cause exists would likely expect that a suspect was already identified – hence the warrant to look for *evidence*.

The challenge to the search warrant for the phone is two-fold. First, the warrant is facially invalid for failing to establish – even allege – the existence of probable cause for presence of evidence. Second, the method of the search and the scope of the seizure are invalid because the government performed a "dump" of the phone which is simply obtaining every single item of data and capturing it for forensic examination. The "dump" of the phone is a single .pdf file consisting

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of 935 pages. It is 10.7 megabytes in size. Defendant's Post-Judgment Appendix, Item 3, Page 2. It is a summary showing the number of items included in the report by category.

In ***United States v Laughton***, 409 F3d 744 (CA 6 2005), the Sixth Circuit found a warrant facially invalid. There was significant discussion in that case as to how much weight a claim of "training and experience" can be given in the analysis. As an issue of first impression in the Sixth Circuit, that panel held that additional information known to the officer but not included in the affidavit is NOT part of the analysis. It is limited to the four corners of the affidavit. ***Laughton***, *supra*, at 751-752. ***People v Landt***, 188 Mich App 234, 240; 469 NW2d 37 (1991), rev'd on other grounds, 439 Mich 870; 475 NW2d 825 (1991).

The government presently claims that the Court of Appeals decision here conflicts with ***People v Hughes***, 506 Mich 512; 958 NW2d 98 (2020). In the introductory paragraph of the Michigan Supreme Court's opinion in ***Hughes***, the following appears:

> We conclude--in light of the particularity requirement embodied in the Fourth Amendment and given meaning in the United States Supreme Court's decision in *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (addressing the "sensitive" nature of cell-phone data)--that a search of digital cell-phone data pursuant to a warrant must be reasonably directed at obtaining *evidence* relevant to the criminal activity alleged in *that* warrant.
>
> ***Hughes***, 506 Mich at 516 (first emphasis added; second emphasis in original).

The Michigan Supreme Court specifically identified that the particularity requirement it was relying on had been recognized and discussed by the United States Supreme Court in 2014. Notwithstanding the Court of Appeals statements about "first impressions," in ***Carson*** the Court of Appeals did nothing more than faithfully apply that well-established principle to this particular warrant. The last three paragraphs inarguably lead to the conclusion that this was a fishing expedition to establish suspects, establish patterns of life, and "assist with the furtherance of this

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criminal investigation." There is not the slightest indication of what evidence they believed actually existed on the device.

The government complains that the Court of Appeals has created special treatment for cellular phones. Mr. Carson asserts that the Michigan Court of Appeals did nothing more than recognize the same intense privacy interests that the U.S. Supreme Court recognized in ***Riley v. California***, *supra*. See ***Hughes***, *supra*, at 526 -527. Essentially, the government is complaining about application of a standard set forth by the highest court in the land 10 years ago. This completely fails to adequately establish grounds for the granting of leave by this Court.

II. THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD ONLY BE APPLIED WHERE THERE IS NO DETERRENCE TO BE ACCOMPLISHED. IN LIGHT OF LONG-STANDING U.S. SUPREME COURT PRECEDENT ON THIS ISSUE, THIS WARRANT DEMONSTRATES THAT SUCH INTRUSIONS MUST BE DETERRED.

Mr. Carson asserts that Paragraphs 3.w, 3.x, and 3.y of the affidavit coupled with the failure to identify the training and experience of the officer and the extensively broad categories listed, make further discussion of the application of the exclusionary rule unwarranted. The argument and analysis above demonstrates both facial invalidity and the lack of good-faith reliance. See ***People v Czuprynski***, 325 Mich App 449, 472; 926 NW2d 282 (2018); ***People v Hellstrom***, 264 Mich App 187, 197; 690 NW2d 293 (2004). See also ***United States v Leon***, 468 US 897, 925; 104 SCt 3405; 82 LEd2d 677 (1984) (it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue).

RELIEF REQUESTED

WHEREFORE, Mr. Carson respectfully requests this Honorable Court deny the application for leave to appeal and allow this matter to proceed in Circuit Court.

05/08/2024
Date

/s/ J. Nicholas Bostic
J. Nicholas Bostic P40653
Counsel for Mr. Carson

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CERTIFICATION OF COMPLIANCE WITH MCL 7.305(D) and MCR 7.212(B)

The brief in support of this application consists of 3,278 words and complies with spacing, margin and font requirements of MCR 7.212(B).

05/08/2024
Date

/s/ J. Nicholas Bostic
J. Nicholas Bostic P40653
Attorney for Defendant/Appellee