No.

IN THE

Supreme Court of the United States

ARMANDO GARCIA

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals (7th Cir.)

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Whether the affidavit filed in support of the search warrant in this case establishes probable cause. On appeal the Seventh Circuit, based on *United States v. McIntire*, 516 F.3d 576 (7th Cir. 2008)[1], granted "great deference" to the conclusion of the judge who issued the warrant. Thus, granting great deference, the Seventh Circuit found that the magistrate's finding of probable cause was not unreasonable. The Supreme Court should review this matter because the Circuits are split on the proper appellate standard of review for a probable cause finding in an affidavit and because there are reasons not to grant deference to the issuing magistrate's conclusion.

II. Whether the the "good faith" exception to the exclusionary rule ought to apply where the police in this case used a "fill-in-the-blanks" form and what was put into the blanks was a generalized claim by a confidential informant that the police would find some quantity of cocaine in Garcia's apartment.

1 Petition for certiorari filed on May 7, 2008.

Parties to the Proceedings

All parties appear in the caption of the case on the cover page.

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SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the United States court of appeals appears at Appendix A to the petition and is reported at *United States v. Garcia,* 528 F.3d 481 (7th Cir. 2008).

The opinion of the United States district court appears at Appendix B to the petition and is reported at *United States v. Garcia*, 007 U.S. Dist. LEXIS 22745.

Jurisdiction

The date on which the United States Court of Appeals decided this case was June 3, 2008. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Constitutional and Statutory Provisions Involved

The issues presented by this appeal involve the Fourth Amendment to the United States Constitution. That amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.

Statement of the Case

The petitioner, Armando Garcia (hereinafter "Garcia") was named as a defendant in an indictment returned by a grand jury in the Eastern District of Wisconsin on November 7, 2006. The indictment alleged that on October 30, 2006 Garcia possessed 500 grams or more of cocaine with intent to distribute contrary to 21 U.S.C. §841(a)(1) and 841(b)(1)(B). The indictment also alleged in a second count that Garcia possessed a firearm in furtherance of a drug trafficking crime contrary to 18 U.S.C. §924(c)(1)(A)(i).

The charges arose out of the execution of a search warrant on October 30, 2006. Briefly, the affidavit filed in support of the search warrant application alleged that within the previous seventy-two hours a confidential informant had seen some unspecified amount of cocaine inside the residence at 5527 W. Lincoln Avenue in Milwaukee.

Garcia entered not guilty pleas to both counts.

On November 29, 2006 Garcia filed a motion to quash the warrant and to suppress all evidence seized as a result of the search. In the motion Garcia argued that the affidavit failed to establish probable cause to believe that cocaine would be found within the apartment and that the officer was not acting in good faith.

The District Court thereafter entered an order denying Garcia's motion to suppress. In sum, the court found that the affidavit did establish probable cause because the observations of the informant could be taken at face value; however,

even if the affidavit did not establish probable cause the officers were acting in good faith.

The case proceeded to jury trial on July 2, 2007. The jury returned verdicts finding Garcia guilty of count one (possession with intent to distribute) but not guilty of count two (the firearm count)

On October 17, 2007 the court sentenced Garcia to eight years prison with four years extended supervision.

Garcia timely filed a notice of appeal to the United States Court of Appeals. The Court of Appeals affirmed the district court finding that a "sensible judge" could find probable cause based on the meager facts alleged in the affidavit. The Court of Appeals expressed concerns, though, about the sufficiency of the affidavit. Firstly, the court noted that the affidavit lacks much detail. Secondly, the affidavit is a "fill-in-the-blanks" form. Nonetheless, the Court of Appeals found that the affidavit fell under the "good faith exception" of *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

Reasons for Granting the Petition

I. The Supreme Court should review this matter because the affidavit does not state probable cause .

Milwaukee Police Detective David Baker filed an affidavit in support of his application for a warrant to search the residence at 5527 W. Lincoln Avenue in Milwaukee. Although the affidavit was several pages long, the only non-boilerplate information was an allegation that within the preceding seventy-two hours a confidential informant had seen a plastic bag containing cocaine in the residence. In the absence of any detail concerning the amount of cocaine seen, the circumstances under which the informant found himself in the apartment, and whether any person within the apartment exercised control over the cocaine, Garcia argued that there simply was no probable cause to believe that there would be cocaine in the apartment three days later.

The Seventh Circuit expressed serious reservations about whether the affidavit filed in support of the search warrant application in this case stated probable cause. The court noted that there is almost no detail provided which would permit the magistrate to evaluate the reliability of the informant; and, further, the affidavit is itself a "fill-in-the-blanks" form. Nonetheless, the court felt compelled to grant "great deference" to the decision of the judge who issued the warrant. *See, United States v. Garcia,* 528 F.3d 481, 485 (7th Cir. Wis. 2008) Thus, with these reservations the court found probable cause.

A. The Supreme Court should review this matter in order to clarify the appellate standard of review for probable cause in a search warrant application.

The "great deference" standard of appellate review, which the Seventh Circuit felt compelled to apply here, requires the attention of the Supreme Court. As the Seventh Circuit observed, "For what it is worth, we have checked how other circuits handle this question and found ample variability." *United States v. McIntire*, 516 F.3d 576, 579 (7th Cir. Ill. 2008)[2] There could, perhaps, be no more important legal issue pertaining to Fourth Amendment jurisprudence than the appellate standard of review for the existence of probable cause in a search warrant affidavit.

There is simply no reason to grant great deference to the finding of a trial judge who issues a search warrant- to the contrary, meaningful appellate review requires that the issue be reviewed as a matter of law. To be sure, an appellate court ought to grant deference to the decisions of a lower court where the lower court had information available to it that cannot appear in an appellate record. Perhaps the best-known example of this principle is the standard of review for factual findings based on the the testimony of live witnesses. Under such circumstances the lower court is, undoubtedly, in a better position than is the appellate court to judge witness demeanor and to make credibility determinations.

However, where, as here, the lower court was merely reviewing an affidavit the same considerations do not apply. The lower court is in no better position to

2 There is currently pending before the Supreme Court a petition for certiorari in the *McIntyre* case

make a probable cause determination than is the appellate court. In fact, a persuasive argument may be made that the trial court is in a far less favorable position than is the appellate court. Firstly, the issuing judge makes the determination *ex parte* and, therefore, he or she does not have the benefit of the legal arguments of counsel. Secondly, the decision whether to issue a warrant is yet one more ministerial task assigned to frequently overburdened magistrates. And, finally, there is the human element. Magistrates may see the same officers in their courts with warrant applications day-after-day. Under those circumstances warrants may get issued on the basis of the reputation of the officer more than on the content of the application.

"Probable cause" is a legal determination that either exists or it does not. For many years the appellate courts characterized the existence of probable cause as question of law. This was the better approach.

In order to have meaningful appellate review the appellate court must not pay any deference to the determination of the issuing judge. Otherwise, a warrant that was improvidently issued by an overburdened magistrate based solely on the reputation of the police officer will be perpetuated through the legal process.

Finally, the "good faith" exception already exists to save warrant that should not have been issued in the first place. Nothing less than intellectual honesty requires the standard of review of the existence of probable cause to be a question of law. Either probable cause exists based on the warrant or it does not.

If probable cause does not exist then, and only then, ought the reviewing court then proceed to determine whether the search should be validated nonetheless because the parties involved were acting in good faith.

B. The affidavit in this case is seriously inadequate

Here, the substance of the information Detective Baker obtained from the confidential informant was to the effect that within the preceding seventy-two hours the informant had seen some unspecified amount of cocaine in a plastic bag in the residence at 5527 W. Lincoln Avenue. The affidavit does not allege that the informant purchased cocaine from the residents of the apartment. It does not describe the circumstances under which the bag of cocaine was seen. The affidavit fails, even, to allege that any person associated with the residence exercised any ownership or control over the baggie.

Thus, the sparse factual allegations of the affidavit make it impossible to determine whether the informant saw less than a gram of powder cocaine in a baggie that a guest left on the living room table during a party or whether Garcia himself pulled out a kilogram package of cocaine and put it on the table. The first possibility would certainly not create probable cause to to search the residence three days later.

II. The Supreme Court should review this case for the purpose of further clarifying the "good faith" exception.

Certainly, when the Supreme Court created the "good faith" exception in

Leon the court envisioned police officers who properly investigated a case, marshaled their evidence, and then presented this evidence in an organized manner in an affidavit in support of a warrant application. Where this is the case there does seems to be little reason to apply the exclusionary rule because, in hindsight and on appeal, it appears that there was some technical flaw in the application.

This was hardly the sort of police officers we had here.

The police officers in this case used a "fill-in-the-blanks" form- and what they filled into the blanks was hardly the result of a thorough investigation. The blanks contained the vague claims of a confidential informant that amount to nothing more than the CI's belief that there would be cocaine in Garcia's apartment. As the Seventh Circuit pointed out at oral argument in this case, even the boilerplate language was itself sloppy. ¶9 of the affidavit, which is almost entirely boilerplate language, reads, "That affidavit believes based on . . . affiant's personal observation of the appearance of the substance . . . that the aforementioned substance is cocaine." Plainly, the police officer (the affiant) did not observe the substance. It was the confidential informant who observed the substance.

Is this really the sort of police work that the Supreme Court envisioned in creating the good faith exception?

For these reasons the Supreme Court should grant this petition for the purpose of clarifying the application of the good faith exception where the police use "fill-in-the-blanks" forms.

Conclusion

For the foregoing reasons it is respectfully requested that the Supreme Court grant this petition of certiorari.

Dated this _____ day of August, 2008.

Law Offices of Jeffrey W. Jensen
Attorneys for Petitioner

By:_____
Jeffrey W. Jensen

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Proof of Service

I, Jeffrey W. Jensen, attorney for the petitioner, do swear or declare that on the _____ day of August, 2008, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Michelle Jacobs, Asst. United States Attorney
United States Courthouse
517 E. Wisconsin Ave., Suite 1515
Milwaukee, WI 53202

Solicitor General of the United States
Room 5614, Department of Justice
950 PennsylvaniaAve., N.W.
Washington, D. C. 20530–0001.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at Milwaukee, Wisconsin, this ____ day of August, 2008.

_____
Jeffrey W. Jensen

Certificate of Compliance

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 1901 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at Milwaukee, Wisconsin, this ____ day of August, 2008.

_____

Jeffrey W. Jensen