Docket No.. 07-3582

United States Court of Appeals
For the Seventh Circuit

United States of America,

Plaintiff-Appellee,

v.

Armando Garcia.

Defendants-Appellant.

Appeal from a judgment of conviction and sentence entered in the United States District Court (ED-Wis), the Honorable Rudolph Randa, presiding
District Court No. 06-CR-292

Brief and Short Appendix of the Appellant, Armando Garcia

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Disclosure Statement

The attorney for the appellant is Jeffrey W. Jensen who is a sole practitioner in Milwaukee, Wisconsin with an office located at the address set forth on the cover of this brief. During the trial court proceedings the following lawyers appeared on behalf of the appellant: Attorney Andres Velez. Attorney Jensen and Attorney Velez are not associated. Rather, Jensen succeeded Velez as Garcia's counsel.

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Jurisdictional Statement

A. The District Court had jurisdiction over the matter pursuant to 21 U.S.C. sec. 841(a)(1) because an indictment was filed naming the defendant and alleging a violation of that section.

B. The Court of Appeals has jurisdiction over the matter pursuant to 18 U.S.C. sec. 3742 as a direct appeal of the appellant's sentence.

C. The judgment of conviction was entered on October 16, 2007 and the notice of appeal was filed on October 22, 2007. Therefore the appeal was timely.

D. The appeal is from a final judgment of conviction in a criminal case and, therefore, the appeal is from a final judgment that disposes of all parties' claims,

Statement of the Issues Presented for Review

I. Whether the District Court erred in denying Garcia's motion to suppress evidence on the grounds that the warrant filed in support of the search warrant application failed to state probable cause and no officer acting in good faith could have believed that the affidavit stated probable

cause.

Answered by the District Court: No

II. Whether the District Court abused its discretion in denying Garcia's motion to compel the government to identify those confidential informant who was a transactional witnesses merely because the motion was not filed within the scheduled time for filing pretrial motions?

Answered by the District Court: No.

III. Whether the trial court erred in overruling Garcia's hearsay and confrontation objection to the officer testifying that Armando Garcia's name was on the search warrant and was associated with the residence.

Answered by the District Court: No.

Statement of the Case

The defendant-appellant, 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) . (Doc. 4). 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. (Doc. 8). 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 magistrate filed a recommendation that Garcia's motion be granted. (Doc. 14). However, the government objected. (Doc. 15)

The District Court thereafter entered an order denying Garcia's motion to suppress. (Doc. 20) 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. *Ibid.*

On April 9, 2007 Garcia then filed a motion seeking to compel the government to identify the confidential informant who gave the police the information that was recited in the affidavit. (Doc. 22) Garcia argued that due process required that the government identify all transactional witnesses. According to Garcia, the informant who claimed to have been in his home within seventy-two hours prior to the search was, by definition, a transactional witness.

The District Court never reached the merits of the motion; rather, the trial court denied the motion on the grounds that it was untimely. (Doc. 33)

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. (Doc. 51).

Garcia timely filed a notice of appeal to the United States Court of

Appeals.

Statement of the Facts

On October 30, 2006 Milwaukee Police were investigating drug dealing in the city and, as part of that investigation, the officers obtained a warrant to search a home located at 5527 W. Lincoln Avenue in Milwaukee. (Tr. Trans. p. 99) At trial the prosecutor asked Milwaukee Police Officer Kezeske what "type" of warrant they were executing that day. (Tran. p. 57). Garcia objected on the grounds that the type of warrant was not relevant. *Ibid.* Kezeske then told the jury that under the search warrant they were looking for a large quantity of cocaine and that it was a "high risk" warrant. *Ibid.* Additionally, the prosecutor asked Police Detective Baker, "And when you applied for that search warrant, did you have a name that you had affiliated that location with?" (Tran. p. 99) Garcia objected on the grounds that the question called for hearsay and that is also violated Garcia's confrontation rights. *Ibid.* The District Court overruled the objection. Thereafter, Baker told the jury that it was Armando Garcia who was associated with that residence. (Tr. Trans. p. 100)

Police assembled a tactical squad of eight officers to execute the warrant. (Tr. Trans. p. 55). The squad "breached" the front door and, once inside, they found a woman holding a baby. (Tr. Tran. p. 58). The squad proceeded further into a bedroom where they found Garcia standing near a window. (Tr. Tran. p. 58) The officers ordered Garcia to show his hands, which he did, and he was then handcuffed and placed onto the bed. *Ibid.* When Garcia was searched incident to the arrest police found approximately one-half gram of cocaine powder in Garcia's pants pocket. (Tr. Tran. p. 110)

The police then searched the apartment. In a hallway closet they found a baggie of cocaine that happened to be sitting next to a prescription pill bottle that had the name of "Armando Garcia" printed on it. (Tr. Trans. p. 64)

On the floor in the bedroom where Garcia was arrested the police found a digital scale that "appeared to have cocaine residue on it." (Tr. Trans. p. 71) On the wall directly behind where the scale was found was a plumbing access panel. *Ibid.* Police searched the dead space there and found four kilograms of cocaine. *Ibid.* According to the officers who con-

ducted the search, the cover to the panel was already off when got into the bedroom.

In the bedroom closet was a fire safe. The fire safe contained papers belonging to Garcia and also a gold bracelet with the name "Garcia" printed on it. (Tr. Tran. p. 75) Some of the papers had handwriting on them and the police offered the opinion these these were "drug notes". *Ibid.*

Police also found a pistol beneath the mattress in the room where Garcia was arrested. (Tr. Trans. p. 70).

Following his arrest Garcia agreed to be interviewed by police. According to the detectives, Garcia told them that since May, 2006 he had separated from his wife and he had moved in with his girlfriend, Gabriela Ordońez, who lived at 5527 W. Lincoln Ave., Apt. 8, Milwaukee (the apartment in question here). (Tr. Trans. p. 92). Garcia also admitted that the cocaine police found in his pocket was his (Tr. Tran. p. 95) and that he had a fairly severe problem with snorting powder cocaine. (Tr. Trans. p. 93)

Significantly, though, during the course of the entire interview Garcia never mentioned anything about the four kilograms of cocaine that the police found in the wall. (Tr. Tran. p. 95)

Garcia told detectives that he made his living by purchasing and selling cars. (Tr. Trans. 92) Additionally, Garcia testified at trial that although he did, in fact, split up with his wife in May, 2006, he thereafter lived at his sister's house at 1607 S. 34th Street in Milwaukee. (Tr. Trans. p. 117) However, after a time, Garcia began occasionally spending nights at Ordońez's apartment.

Nonetheless, Garcia told the jury, Ordońez's name was on the lease and she paid the rent on the apartment at 5527 W. Lincoln. Garcia never even had a key to the apartment. *Ibid.*

Garcia denied that he knew there were four kilograms of cocaine stored in the wall of Ordońez's bedroom. (Tr. Tran. p. 124) According to Garcia, on the day the police executed the search warrant the plumbing access panel (the cover for the hole that is) was fixed to the wall and he had never looked behind it. (Tr. Tran. p. 125).

Summary of the Argument

I. Denial of the motion to suppress evidence.

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, there simply was no probable cause to believe that there would be cocaine in the apartment three days later. Likewise, the *Leon* good-faith exception does not apply because Detective Baker's investigation failed to establish even the most mundane information. His effort in obtaining the warrant was practically non-extant.

II. **Denial of the motion to identify the confidential informant.** The District Court entered a scheduling order under Fed. R. Crim. P. 12(c) re-

quiring that *all* motions be filed by November 29, 2006. Garcia's counsel at the time filed a motion to suppress evidence; however, counsel did not file a motion to identify the confidential informant who claimed to have purchased cocaine from Garcia. On December 13, 2006 Garcia switched attorneys. Then, on December 21, 2006 the magistrate issued a recommendation that Garcia's motion to suppress be granted (thereby suppressing all evidence).

The government objected to the recommendation and on March 14, 2007 the District Court issued an order rejecting the magistrate's recommendation and denying Garcia's motion to suppress. Thereafter, on April 9, 2007 Garcia filed a motion to identify the confidential informant on the the grounds that the informant was a transactional witness who possessed circumstantial evidence concerning who was in control of the apartment at 5527 W. National Avenue.

The District Court denied the motion on the grounds that it was untimely.

The District Court abused its discretion in denying the motion. Firstly, the reason for the delay is obvious and it is in the record- Garcia

switched attorneys shortly after the deadline expired and then, only days later, the magistrate recommended that the motion to suppress be granted. This made the identity of the informant meaningless. When the District Court denied the motion, though, Garcia almost immediately made the motion. In the Eastern District the court customarily orders the government to identify transactional witness but not until thirty days before trial. Thus, there was good reason for the delay in filing the motion and granting the motion would not have prejudiced the government nor would it have delayed the trial.

III. **Confrontation violation.** Police found four kilograms of cocaine in a plumbing access panel in an apartment at 5527 W. National Avenue in Milwaukee. Garcia was present in the bedroom when the police executed the search warrant. The key issue in this trial was whether the government possessed sufficient circumstantial evidence to connect Garcia to the apartment at 5527 W. National Avenue such that the jury might reasonably draw the inference that Garcia *must* have know of the cocaine. Over Garcia's confrontation clause objection the District Court permitted the government to present evidence that the "name on the search warrant was Arman-

do Garcia." This information could have only been based on hearsay statements made by a confidential information. Thus, it violated the confrontation clause to permit the government to introduce this evidence. The error was not harmless because the evidence went directly to the heart of the trial issue and the remaining evidence of Garcia's connection to the apartment was hardly "overwhelming."

Argument

I. The trial court erred in denying Garcia's motion to suppress evidence because the affidavit filed in support of the search warrant application failed to state probable cause and no police officer acting in good faith could have believed that the affidavit stated probable cause.

A state court commissioner issued a warrant to search the residence at 5527 W. Lincoln Avenue in Milwaukee. The application for the search warrant was based solely on the affidavit of Milwaukee Police Detective David Baker. The affidavit contains what appears to be primarily boilerplate language concerning Baker's experience in investigating drug offenses. The substance of the affidavit is that Baker developed a confidential informant who on two prior occasions provided information that led to the

arrest of persons for drug offenses. Additionally, the affidavit alleges that within the seventy-two hours preceding the application the informant was inside of the residence and saw an "off white powdery substance packaged in a plastic bag in the living area of the house" and that the informant knows that the substance was cocaine based upon his prior experience. (Doc. 8-3) Significantly, the affidavit does not allege that Garcia sold the informant any cocaine nor does the affidavit establish the amount of the cocaine that was seen in the plastic bag. Likewise, there is no allegation as to the ownership or control of the bag (i.e. was this during a party where the cocaine could belong to any of the guests or was only Garcia home?)

As will be set forth in more detail below, although the affidavit ought not be reviewed in a hyper-technical manner, there must at least be some substantial basis for believing that cocaine would be found in the area to be searched. Here, the affidavit fails to allege the amount of the cocaine seen and fails to establish the circumstances under which it was seen. As such, the magistrate simply could not have reasonably concluded that days later the residence probably still contained cocaine.

A. Standard of Review

To uphold the search warrant, the appellate court must find that the affidavits "provided the magistrate with a substantial basis for determining the existence of probable cause." *United States v. Leon,* 468 U.S. 897, 915, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1983). The Seventh Circuit has interpreted this standard to require review for clear error on the part of the issuing magistrate. See *United States v. Pless*, 982 F.2d 1118, 1124 (7th Cir. 1992).

The Court of Appeals, however, reviews *de novo* the District Court's conclusion of whether a law enforcement officer reasonably relied upon a search warrant lacking probable cause. *See United States v. Peck*, 317 F.3d 754, 757 (7th Cir. 2003)

B. The affidavit filed in support of the warrant application fails to establish probable cause.

The applicable law is well settled. "When an affidavit is the only evidence presented to a judge in support of a search warrant, the validity of the warrant rests solely on the strength of the affidavit." *Peck*, 317 F.3d at 755-756 (7th Cir. 2003) (citing *United States v. Roth*, 391 F.2d 507, 509 (7th Cir. 1967)). Probable cause is a fluid concept, *United States v. McNeese*, 901

F.2d 585, 592 (7th Cir. 1990), determined by the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). An affidavit has made a proper showing of probable cause when it sets forth facts "sufficient to induce a reasonably prudent person to believe that a search . . . will uncover evidence of a crime." *McNeese*, 901 F.2d at 592; *Gates*, 462 U.S. at 238 (probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place); *United States v. Gilbert*, 45 F. 3d 1163, 1166 (7th Cir.1995).

> Where information from an informant is used to establish probable cause, courts should assess the informant's credibility by considering the following factors: (1) whether the informant personally observed the events, (2) the degree of detail shown in the informant's statements, (3) whether the police independently corroborated the information, (4) the interval of time between the events and application for a warrant, and (5) whether the informant appeared in person before the judicial officer who issued the warrant.

United States v. Mykytiuk, 402 F.3d 773, 776 (7th Cir. 2005) (citing *United States v. Koerth*, 312 F.3d 862, 866 (7th Cir. 2002); *United States v. Jones*, 208 F. 3d 603, 609 (7th Cir. 2000)). "None of these factors is determinative; . . . 'a deficiency in one factor may be compensated for by a strong showing in

another or by some other indication of reliability." *Peck,* 317 F.3d at 756 (quoting *United States v. Brack*, 188 F.3d 748, 756 (7th Cir. 1999)).

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 information 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.

Beyond these obvious flaws, there is question of how the informant

could possibly have known that substance was cocaine just by looking at it. The level of detail in the affidavit is one of the factors that the court may consider. Certainly one can imagine circumstantial facts that would permit the magistrate to infer that a substance is cocaine. For example, the owner of the substance might represent it to be cocaine; or, perhaps, persons might ingest the substance believing it to be cocaine. Here, though, it appears that the informant merely looked at the bag. Even though the informant might be familiar with the appearance of cocaine, in the absence of any circumstantial detail concerning the substance, it is literally impossible to infer that the white powdery substance in the baggie was cocaine as opposed to baby powder, baking soda, powdered sugar, or any number of other white powdery substances.

Finally, the affidavit offers no description of how the informant came to be within the apartment. In the absence of such information there is literally no way to evaluate the informant's reliability. Any allegation as to how the informant found himself to be within the apartment would have permitted the magistrate to draw an inference about the relationship between the informant and the occupants of the residence (a key question in

evaluating reliability). For example, if the informant were a repairman who had only a professional reason for being in the apartment then the magistrate might properly infer that the the informant has little motive to fabricate. On the other hand, if the informant were a neighbor of the occupants of the apartment, or, worse, a rival gang-member, there is a far greater likelihood that the informant may have some beef against the occupants of the apartment. Here, there is simply no description of how the informant came to be within the apartment. The way the affidavit is written it is entirely possible that the informant saw the baggie by looking through the living room window as opposed to actually being inside of the apartment.

This is not even a close call. The affidavit utterly fails to establish probable cause to believe there would be cocaine in the apartment at 5527 W. Lincoln Avenue.

C. Because this was not a close call, Detective Baker could not have been acting in good faith.

In determining whether Detective Baker acted in good faith the court must not be misled by the fact that the affidavit in question is several pages

long. The vast majority of the writing is purely boilerplate language having no real relevance to the existence of probable cause. The affidavit certainly does not represent the culmination of a detailed investigation conducted by Detective Baker (such as one frequently sees in federal court). Rather, the non-boilerplate language appears to be limited to the allegation that Baker talked to the informant who said that he saw cocaine in a plastic baggie in the residence within the preceding seventy-two hours.

The only plausible explanation for the marked paucity of details is that Baker did not possess any such details. Put another way, it appears that Baker did not bother to even ask the informant such routine questions as:

- Why were you in the apartment?
- Who else was there?
- How much cocaine was in the bag?
- What makes you think it was cocaine?
- Whose cocaine did it appear to be?

Although police officers are not expected to be legal scholars, an officer ought not be allowed to claim that he was acting in good faith when his

investigation is plainly amateurish and incomplete. Baker should have been put on notice that he was acting at his own peril when the "affidavit" filed in support of the warrant application was nothing more than a sentence or two of non-boilerplate information. It is difficult to award Baker the *Leon* gold star for effort when he failed to ask even the most routine questions. Baker might as well have just driven over and searched residence for all the effort he put into obtaining the warrant.

For these reasons, the *Leon* good faith exception does not apply.

II. The trial court erred in denying Garcia's motion to compel the government to identify the confidential informant.

The District Court entered a scheduling order under Fed. R. Crim. P. 12(c) requiring that *all* motions be filed by November 29, 2006. Garcia's counsel at the time filed a motion to suppress evidence; however, counsel did not file a motion to identify the confidential informant who claimed to have purchased cocaine from Garcia. On December 13, 2006 Garcia switched attorneys. Then, on December 21, 2006 the magistrate issued a recommendation that Garcia's motion to suppress be granted (thereby sup-

pressing all evidence).

The government objected to the recommendation and on March 14, 2007 the District Court issued an order rejecting the magistrate's recommendation and denying Garcia's motion to suppress. Thereafter, on April 9, 2007 Garcia filed a motion to identify the confidential informant on the the grounds that the informant was a transactional witness who possessed circumstantial evidence concerning who was in control of the apartment at 5527 W. National Avenue.

The District Court denied the motion on the grounds that it was untimely.

As will be set forth in more detail below, the District Court abused its discretion in denying the motion. Firstly, the reason for the delay is obvious and it is in the record- Garcia switched attorneys shortly after the deadline expired and then, only days later, the magistrate recommended that the motion to suppress be granted. This made the identity of the informant meaningless. When the District Court denied the motion, though, Garcia almost immediately made the motion. In the Eastern District the court customarily orders the government to identify transactional witness but not

until thirty days before trial. Thus, there was good reason for the delay in filing the motion and granting the motion would not have prejudiced the government nor would it have delayed the trial.

A. Standard of review

A District Court's ruling regarding whether a defendant has shown cause for failure to file pretrial motions and notices under Fed.R.Crim.P. 12.2(b) is reviewed only for abuse of discretion. *United States v. Weaver*, 882 F.2d 1128, 1135-36 (7th Cir. 1989), cert. denied, 493 U.S. 968 (1989) *See also United States v. Simone*, 931 F.2d 1186 (7th Cir. 1991), cert. denied, 502 U.S. 981 (1991) (failure to raise defects in indictment before trial constitutes waiver, and appellate court addresses a waived claim only where cause is shown justifying the granting of relief form waiver; if cause is shown, the claim is evaluated under the plain error standard).

B. Good cause existed for the late filing

The reason that Garcia's motion was filed late are obvious and they are a matter of record. Very shortly after the deadline for filing motions had passed the magistrate issued a recommendation that Garcia's motion to suppress be granted. If the judge accepted the recommendation- as the

judges do in the vast majority of the cases- Garcia could not have established a need to know the identity of the informant because all evidence would have been suppressed.

Shortly after the judge denied the motion to suppress, though, Garcia filed the motion. The motion was filed nearly three months before the date set for trial. Moreover, it is the custom of the courts in the Eastern District to allow the government to identify the transactional informants only thirty days before trial. Thus, Garcia's late filing of the motion would have in no way delayed the trial.

Thus, the District Court abused its discretion in denying the motion purely on procedural grounds.

C. The informant was clearly a transactional witness

Generally, the identity of a confidential informant is protected from disclosure. *Roviaro v. United States*, 353 U.S. 53, 59, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957). The informer's privilege, which is actually held by the government, exists to encourage private citizens to provide law enforcement with information about the commission of crimes without fear of retaliation. Id. The privilege is qualified, however, for an exception exists "where the dis-

closure of an informer's identity, or of the contents of his communication, are relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . ." *Id*. at 60-61. A trial court must balance the public interest in encouraging assistance to law enforcement against the need of the defendant who seeks disclosure. Id. at 62.

However, where an informant is a transactional witness, that is, where he or she was an active participant in the events leading to an arrest, the government must disclose the informant's identity to the defendant. *Roviaro*, 353 U.S.at 64-65.

Here, the informant was plainly a transactional witness and therefore the government was required to disclose his identity. The key issue in this trial was whether the government possessed sufficient circumstantial evidence of Garcia's connection to the apartment where the four kilograms of cocaine was discovered. By the very allegations of the affidavit filed in support of the search warrant application, the informant claimed to have been in the apartment shortly before the police executed the search warrant. Thus, the information is a key transactional witness concerning several important facts: (1) Who was in possession of the apartment; and, (2)

Even if Garcia did sell a small amount of cocaine to the informant did Garcia say or do anything that would lead one to believe that he had access to large amounts of cocaine. Put another way, did it appear to the information that Garcia was a "large level" wholesale dealer of cocaine who would likely have access to four kilograms of cocaine; or was Garcia merely a lackey who answered the door and served small amounts of cocaine (and was therefore not likely to know about and have access to the four kilograms of cocaine)?

For these reasons, the District Court abused its discretion in denying Garcia's motion of procedural grounds and had the court considered the merits of the motion it should have been granted.

III. The trial court erred in denying Garcia's hearsay/confrontation objections to the government introducing "the name" that was listed on the search warrant .

Garcia's theory of defense was that he had only a minimal connection to the apartment at 5527 W. Lincoln Avenue and, therefore, the circumstantial evidence in the case left a reasonable doubt as to whether he knew

about the four kilograms of cocaine stored in the wall or the pistol beneath the mattress in the bedroom. The government, over Garcia's objection, was permitted to have a police officer testify that the target of the search warrant was Armando Garcia.

As will be set forth in more detail below, without a more complete foundation, the only way Detective Baker could have had knowledge that Garcia was the target of the search warrant is based upon the hearsay statements of the confidential informant. The informant's statements to Baker are clearly testimonial because they were made solely for the purpose of court proceedings. Thus, it violated Garcia's rights under the Confrontation Clause to admit this testimony.

A. Standard of review

The Court of Appeals reviews *de novo* the question whether an evidentiary ruling infringed upon a defendant's constitutional rights. *see, e.g., United States v. Carter*, 410 F.3d 942, 951 (7th Cir. 2005); *see also United States v. Bajakajian*, 524 U.S. 321, 337 n.10, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998) Any findings of fact or credibility determinations, however, are reviewed for clear error. *United States v. Walker*, 272 F.3d 407, 412 (7th Cir. 2001).

Here, the testimony that was allowed is a matter of record. No credibility determination is involved. Therefore, whether the admission of that testimony violated Garcia's Sixth Amendment rights is reviewed on appeal without any deference to the ruling of the District Court.

B. The evidence was "testimonial hearsay" and, therefore it is barred by the Confrontation Clause.

In, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), held that the Sixth Amendment's Confrontation Clause bars the admission of testimonial hearsay statements in a criminal trial unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. 541 U.S. at 68; While Crawford did not firmly define the word "testimonial" for every situation, see 541 U.S. at 68, examples and other guidance from the Supreme Court indicate that the term pertains to statements that a declarant makes in anticipation of or with an eye toward a criminal prosecution. *See Davis v. Washington*, 126 S. Ct. 2266, 2273, 2276, 2279, 165 L. Ed. 2d 224 (2006)

Here, the testimony in question is the testimony of Detective Baker who, over Garcia's hearsay and confrontation objections (Tr. Tran. p. 99),

was permitted to testify as follows:

Q. And what were your duties and responsibilities on that day?

A. I was conducting an investigation of a drug source in the City of Milwaukee.

Q. And were you able to identify who that drug source was? Or who-- you got a name for person you were investigating?

MR. JENSEN: I object. That calls for hearsay, and it also violates the confrontation--

THE COURT: The Court will sustain that objection.

MR. GONZALES:

Q. Let me rephrase. On Monday, October 30th-- on Monday, October 30th, 2006, did you obtain a State search warrant?

A. I did.

Q. And was that for 5527 W. Lincoln Avenue, Apartment Number 5?

A. Yes.

Q. And when you applied for that search warrant, did you have a name that you had affiliated that location with?

MR. JENSEN: I object again. It's the same question. Hearsay and confrontation.

THE COURT: Well, the Detective can state what was on the warrant. The name on the warrant. He had it in his possession. The Court, without further discussion as to why it has that authenticity, is going to make that ruling.

MR. GONZALES:

Q. Whose name was on that warrant?

A. Armando Garcia.

(Tr. Trans. pp. 99-100).

The first issue, of course, is whether the testimony of Detective Baker implicates the Confrontation Clause. The Confrontation Clause is not implicated if the evidence is not offered for the truth of the matter asserted, *see, e.g., Martinez v. McCaughtry*, 951 F.2d 130 (7th Cir. 1991); or if the hearsay statement is not "testimonial" under *Crawford.*

The government might persuasively argue that the "name on the search warrant" was offered only to show that the correct location was searched (i.e. not for the truth of the matter asserted) if it were not for the prosecutor's immediately preceding questions.

The prosecutor asked Detective Baker who was the source of the cocaine and the the District Court sustained Garcia's hearsay and confrontation objection. Thereafter, the prosecutor "rephrased" the question by asking "whose name" was on the search warrant. By the prosecutor's own words ("Let me rephrase"), this was just another way of asking who was

the source of the cocaine. Inexplicably, though, this time the District Court overruled Garcia's objection.

Plainly, the name on the search warrant was offered to establish the "truth of the matter asserted" that Garcia was the source of the cocaine.

Just as clear is the fact that the statements of the declarant- that is, the statements of the confidential informant to Detective Baker- is testimonial hearsay. In *Crawford,* the Supreme Court explained that, at a minimum, testimony hearsay includes statements that a declarant makes in anticipation of or with an eye toward a criminal prosecution. *See Davis,* 126 S. Ct. 2266 at 2273 Could there be any more clear example of statements made with an eye toward criminal prosecution than the statements of a snitch made to a police detective who is investigating a drug case?

C. The error was not harmless

In *Arizona v. Fulminante*, 499 U.S. 279, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991), the Supreme Court held that.

> Since this Court's landmark decision in *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967), in which we adopted the general rule that a constitutional error does not automatically require reversal of a conviction, the Court has applied harmless error analysis to a wide range of errors and has

> recognized that most constitutional errors can be harmless. . . . In applying harmless-error analysis . . . the Court has been faithful to the belief that the harmless-error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focussing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'

111 S. Ct. at 1263-64 (citations omitted) (emphasis added). "{I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States v. Hasting*, 461 U.S. 499, 508-09, 103 S. Ct. 1974, 1980, 76 L. Ed. 2d 96 (1983) (emphasis added) (citations omitted). In applying harmless error analysis the reviewing court must decide whether the evidence presented at trial was "overwhelming." *See United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1020 (7th Cir. 1987) ("Typically we require other evidence of guilt to be 'overwhelming' before concluding a constitutional error is harmless.").

Here, Garcia's theory of defense was that although he did possess small amounts of cocaine for personal use he had no knowledge of the four kilograms of cocaine in the plumbing access panel. On that point Garcia

argued that he had insufficient circumstantial contacts with the apartment to permit the inference that he must have known of the existence of the cocaine. Thus, the circumstantial evidence of Garcia's relationship to the apartment was the very crux of the case.

Therefore, to permit the government to present evidence that Garcia was the target of the search warrant at 5527 W. Lincoln Avenue went directly to the heart of the issue- it is almost *ipso facto* not harmless error. The evidence suggested to the jury that the police had certain evidence that proved that Garcia was in control of the apartment. The problem, of course, is that this evidence was never disclosed during trial. Garcia never had an opportunity to confront and to cross-examine the confidential informant who claims to have come to the door of the apartment and purchased cocaine from Garcia.

Additionally, it is no small matter that, as set forth earlier in this brief, Garcia attempted to learn the identity of this person and was denied.

Nonetheless, the error could still be harmless if the remaining circumstantial evidence of Garcia's contacts with the apartment could be said to be "overwhelming." This is hardly the case, though. The government's

trial evidence on this point was merely that Garcia was present in the bedroom when the warrant was executed. Additionally, there was a safe in the closet that contained some of Garcia's personal papers. For Garcia's part, he testified that he did not actually live in the National Avenue apartment-though he admitted to staying overnight there on occasion. Rather, Garcia told the jury that the leaseholder was his girlfriend, Gabriella Ordońez. Garcia testified that he never even had a key to the apartment.

Thus, although the evidence might be sufficient to defeat a motion challenging the sufficiency of the evidence, the evidence can certainly not be said to be "overwhelming."

For these reasons, Garcia's conviction should be reversed and a new trial should be ordered.

Conclusion

For these reasons, it is respectfully requested that the Court of Appeals reverse the District Court's order denying Garcia's motion to suppress evidence. If this occurs, the case should be dismissed because the government will possess no evidence on which to proceed. In the alterna-

tive, the Court of Appeals should reverse Garcia's conviction and order a new trial because the District Court erred in denying Garcia's motion to compel the government to identify the confidential informant and because the trial court violated Garcia's Sixth Amendment confrontation rights in permitting the government to introduce evidence that Garcia was named in the search warrant.

Certification as to Form and Length

The undersigned hereby certifies that this brief meets the length and format requirements of Fed. R. App. P. 32(a)(7). A fourteen point "Book Antiqua" font was used with justification and automatic hyphenation. The length of the brief is 6,454 words not counting the table of authority and table of contents. The word court was determined using the word count function of the word processing software *OpenOffice.*

Circuit Rule 31(e) Statement

An electronic copy of this brief consisting of digital media has been uploaded to the Seventh Circuit Court of Appeals Legal Brief System. I

certify that the file does not contain a computer virus. I additionally certify that, pursuant to Circuit Rule 31(e)(4), a digital copy of the brief has been served upon each party individually represented by counsel.

Circuit Rule 30(d) Statement

All materials required by Circuit Rule 30(a) and (b) are included in the attached appendix.

Certificate of Non-Availability of Appendix Materials in Digital Format

None of the materials contained in the appendix are available in digital format and, therefore, have not included in the digital copy of the brief.

Certificate of Service

Fifteen copies of this brief are being served and filed at the Clerk of Court Office, United States Court of Appeals for the Seventh Circuit, 219 S. Dearborn Street, Chicago, Illinois on _____ by placing the same in the United States Mail. Two copies of this brief are being served on the United States Attorney's Office, 517 E. Wisconsin Ave., Room 530, Milwaukee, Wisconsin on _____ by placing the same in the United States Mail.

Dated at Milwaukee, Wisconsin, this _____ day of December, 2007:

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Docket No.. 07-3582

United States Court of Appeals
For the Seventh Circuit

United States of America,

Plaintiff-Appellee,

v.

Armando Garcia.

Defendants-Appellant.

Short Appendix of the Appellant, Armando Garcia

A. Detective Baker's affidavit in support of the search warrant

B. District Court's memorandum decision denying the motion to suppress.

C. Exerpt of transcript of Garcia's confrontation clause objection

D. Judgment in Criminal Case

E. Docket Entries