United States v. Jacobs

The Defendant was facing a mandatory minimum sentence of 20 years based on possession of one pound of cocaine, an assault rifle, and an illegally sawed-off shotgun. The jury found the defendant not guilty on three of the five charges, but convicted him of Possession of Cocaine with Intent to Deliver and of Use of an Assault Rifle while Drug Dealing. Mr. Erdahl made a Motion for Acquittal Notwithstanding the Jury's Verdict. His motion was granted with respect to Count II, and the Defendant was sentenced on Count I to serve five years. Mr. Erdahl then appealed the denial of Defendant's suppression motion. This appeal was argued before the Eighth Circuit Court of Appeal and, three days later, the Defendant was released from custody and all charges were resolved favorably to him. The District Court and Appeals Court rulings are set forth below.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

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SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CRIMINAL NO. 91-129
vs.	)	RULINGS
RONALD FOSTER JACOBS,	)	
Defendant.	)	

A five count indictment was returned against Ronald Foster Jacobs: Count 1 charged defendant with possession with intent to distribute cocaine; Count 2 charged defendant with using and carrying a firearm during and in relation to a drug trafficking offense; Count 3 charged defendant with using and carrying a short-barrelled shotgun during and in relation to a drug trafficking offense; Count 4 charged defendant with possession of an unregistered weapon; and Count 5 charged defendant with using the mail to facilitate the possession of cocaine with intent to distribute. The jury returned not guilty verdicts on Counts 3, 4, and 5; the jury returned guilty verdicts on Counts 1 and 2.

On March 24, 1992, a hearing was held on defendant's post-trial motions for judgment of acquittal and for new trial. The parties were granted to and including March 27, 1992, to present the court with additional authority in support of their positions; the motions are now ready for ruling. The court grants the motion for judgment of acquittal on Count 2 but denies the

motion for judgment of acquittal on Count 1 and the motion for new trial.

MOTION FOR JUDGMENT OF ACQUITTAL

The jury's verdict must be sustained if, viewing the evidence in the light most favorable to the government and giving the government the benefit of all reasonable inferences, a reasonable fact-finder could have found defendant guilty beyond a reasonable doubt. United States v. Marin-Cifuentes, 866 F.2d 988, 992 (8th Cir. 1989). Jacobs does not contest the jury's guilty verdict on Count 1 charging him with possession with intent to distribute cocaine. He challenges only the guilty verdict on Count 2, the count charging him with knowingly using and carrying a firearm during his commission of Count 1 in violation of 21 United States Code section 924(c).

The court's jury instructions on Count 2 placed the burden on the government to prove beyond a reasonable doubt that Jacobs knowingly used and carried a firearm while committing the crime of possession with intent to distribute cocaine. The marshalling instruction, the court's jury instruction Number 14, stated as an element of Count 2 the requirement that the government prove Jacobs had "used and carried" the firearm. Regardless whether the word "and" rather than the word "or" should have been used, the instruction as given became the law of the case when it was not objected to by the parties. Indeed, the jury's handwritten note to the court during deliberations pointed out the variance between the phrase "used and carried" in instructions 14 and 15 and

the use of the phrase "used or carried" in instruction Number 16. The instruction required the government to prove that Jacobs both used and carried the Chinese assault rifle.

The evidence at trial stopped far short of proving beyond a reasonable doubt that Jacobs used and carried any firearm while committing the crime charged in Count 1. The firearm referred to was the Chinese assault rifle that was located during a search of Jacobs's residence. It was located in an upstairs closet, encased and unloaded. The ammunition clip for the Chinese assault rifle was found on the first floor. This evidence does not present sufficient nexus between the unloaded Chinese assault rifle and the drugs and cash found on the first floor. The government plainly failed to prove that Jacobs carried the Chinese assault rifle in connection with his commission of the Count 1 offense.

The government now suggests that the "firearm" referred to in Count 2 could be the shotgun referred to in Count 3 as well as the Chinese assault rifle. But in its trial brief filed before trial commenced, the government specifically identified the assault rifle as the firearm referred to in Count 2 and identified the short-barrelled shotgun as the firearm referred to in the charge in Count 3, a separate section 924(c) charge. The jury acquitted defendant Jacobs on Count 3. Moreover, there is no evidence he carried the shotgun in connection with commission of the Count 1 offense.

Even if the court had instructed the jury that the government had only to prove the firearm was "used or carried,"

the evidence was insufficient to support a verdict of guilty on Count 2. The government had the burden to prove that the assault rifle was present and readily available in the house where Jacobs was conducting his drug trafficking activity.

> [T]he mere presence and ready availability of a firearm at a house where drugs are dealt constitutes the "use" of a gun during a narcotics offense.

United States v. Drew, 894 F.2d 965, 968 (8th Cir.), cert. denied, 494 U.S. 1089 (1990).

Two recent Eighth Circuit decisions are instructive. In United States v. Bennett, Nos. 91-2010 and 91-2169, the Court of Appeals found sufficient evidence to sustain a conviction under section 924(c) where a loaded handgun was found in the defendant's small apartment with substantial quantities of drugs and amounts of money and the apartment was used for drug transactions. Slip op. at 13. In United States v. Curry, 911 F.2d 72 (8th Cir. 1990), the Circuit Court considered whether there was sufficient evidence to sustain such a conviction under the facts presented. See Id. at 78-79. There, a "fully loaded .357 caliber revolver was discovered on the floor of the master bedroom closet. An operable unloaded .38 caliber revolver was found in the same closet." Id. at 79. The Court noted the facts presented a close question but held, "[u]nder the totality of the circumstances, the evidence here was sufficient to permit a finding that Curry's possession of the loaded handgun 'had undoubted utility in the protection of the valuable [cocaine] supply and the cash on hand,' and thereby 'facilitate[d]' his commission of the drug trafficking offense.

[United States v. LaGuardia, 774 F.2d 317, 321 (8th Cir. 1985)]." Curry, 911 F.2d at 80. It is noteworthy that in Curry, where both loaded and unloaded weapons were found in the same closet, the Court of Appeals relied on the presence of the loaded, not unloaded, handgun to sustain the conviction.

Other published decisions from the Eighth Circuit and other circuits have upheld convictions of defendants charged with using and carrying of a firearm in connection with a drug trafficking offense. But none of those cases concerned an unloaded weapon encased and located on a different floor from where the drug trafficking offense was committed. See United States v. Johnson, 952 F.2d 1407 (D.C. Cir. 1992); United States v. Duke, 940 F.2d 1113 (8th Cir. 1991); United States v. Galvan, 949 F.2d 777 (5th Cir. 1991); United States v. Head, 927 F.2d 1361 (6th Cir. 1991); United States v. Rocha, 916 F.2d 219 (5th Cir. 1990); United States v. Vasquez, 909 F.2d 235 (7th Cir. 1990); United States v. Williams, 923 F.2d 1397 (10th Cir. 1990); United States v. Coburn, 876 F.2d 372 (5th Cir. 1989); United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989); United States v. Matra, 841 F.2d 837 (8th Cir. 1988); United States v. LaGuardia, 774 F.2d 317 (8th Cir. 1985). Courts must draw a line between cases where the evidence is sufficient to satisfy section 924(c) and those cases where the firearm has no nexus to the drug trafficking offense. This case is on the acquittal side of the line, just as was United States v. Sullivan, 919 F.2d 1403, 1432 (10th Cir. 1990) (defendant Mary

Sullivan acquitted; no "specific evidence to indicate that she carried or used a firearm").

Jacobs is entitled to judgment acquitting him on Count 2 notwithstanding the guilty verdict returned by the jury.

There is no basis for overturning the conviction of guilty on Count 1, and the motion for judgment of acquittal is denied as to Count 1.

MOTION FOR NEW TRIAL

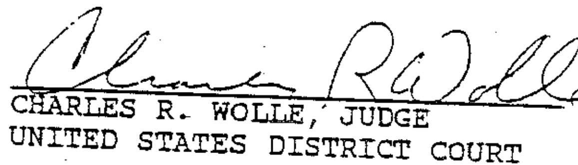
Jacobs moves for new trial on the ground that the court erred in overruling his motion to suppress based on his rights under the Fourth Amendment to the Constitution. The court concludes the motion to suppress was properly denied, and the evidence from the searches and seizures was properly received in evidence.

The defendant's motion for new trial is denied.

The court will proceed with sentencing on Count 1, but the clerk of court shall enter judgment of acquittal for defendant on Count 2 of the indictment.

IT IS SO ORDERED.

Dated this 22nd day of April, 1992.



CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

United States of America, Appellee, v. Ronald Foster Jacobs, Appellant.

No. 92-2170SI

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

986 F.2d 1231; 1993 U.S. App. LEXIS 3210

October 16, 1992, Submitted
March 1, 1993, Filed

PRIOR HISTORY: [**1] On Appeal from the United States District Court for the Southern District of Iowa. District No. 91-129. Charles R. Wolle, Chief Judge.

DISPOSITION: Reversed and Remanded

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Lester Alan Paff, Clifford D. Wendel, U.S. ATTORNEY'S OFFICE, E. First & Walnut Streets, 115 U.S. Courthouse, Des Moines, IA 50309, 515-284-6257, FTS 862-4595.

For RONALD FOSTER JACOBS, Defendant - Appellant: Clemens A. Erdahl, 311 Iowa State Bank Building, Iowa City, IA 52240. Ronald Foster Jacobs, 910 South Dodge, Iowa City, IA 52240.

JUDGES: Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN and BEAM, Circuit Judges.

OPINIONBY: RICHARD S. ARNOLD

OPINION: [*1232] RICHARD S. ARNOLD, Chief Judge.

The defendant appeals from his conviction under *21 U.S.C. § 841*(a)(1) for possession with intent to distribute cocaine. The basis for this conviction was laid when Iowa City Police Officer Michael Brotherton received a tip from a Phoenix, Arizona, police officer that a Federal Express package addressed to the defendant appeared to be suspicious. After obtaining a search warrant, a team of officers from the Johnson County Multi-jurisdictional Task Force (an Iowa drug-interdiction unit) opened the package at the Federal Express office in Iowa City. After finding that the package contained drugs, the officers resealed the package and delivered it to the defendant at his residence. Shortly thereafter, the officers executed a second search warrant at the residence and took the defendant into custody.

The defendant was charged with possession with intent to distribute cocaine, as well as several firearms offenses. At a pre-trial [**2] suppression hearing, and again during trial, the defendant attempted to exclude the evidence found in the Federal Express package and in his residence on the ground that it was the fruit of an illegal search. The District Court overruled the defendant's objection, and a jury found him guilty of the drug offense.

On appeal, the defendant raises several arguments challenging the search of the Federal Express package. Initially, he asserts that a canine sniff conducted at the Federal Express office violated his Fourth Amendment rights because the police did not have a reasonable, articulable suspicion that the package contained drugs. In addition, the defendant, relying upon *Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978),* claims that Officer Brotherton included a deliberate falsehood and deliberately omitted relevant information in his warrant application. Finally, the defendant argues that his Fourth Amendment rights were violated when the police failed to inform the magistrate judge that a second canine sniff had yielded negative results.

I.

The focus of this appeal arises out of events occurring on November 20 and 21, 1991. On the evening of November 20, 1991, [**3] Officer Brotherton and another police officer received a tip from Officer Billingsley in Phoenix, Arizona. He told the officers that a package being shipped to the defendant via Federal Express was suspicious. Specifically, Billingsley told Brotherton that the well-wrapped, three-pound package was delivered to the Federal Express office just before the company shipped its packages, by a person (other [*1233] than the sender) who did not know the local zip

code. In addition, the cost of mailing was paid in cash. On the basis of this information, as well as Brotherton's allegation that the defendant was involved in the distribution of drugs, the Iowa City police decided to examine the package, and if it was indeed suspicious, to obtain a search warrant and open it.

On the morning of November 21, 1991, the Task Force split into two groups. Officer Brotherton took a warrant application and went to a magistrate judge's office. The remainder of the group proceeded to the Iowa City Federal Express office to intercept the package and conduct a canine sniff. Officer Brotherton maintained contact with this group via a cellular telephone.

At the Federal Express office, six to eight packages, including [**4] the package addressed to the defendant, were isolated in a room. The police then brought in a drug dog, "Turbo," to conduct a canine sniff. "Turbo" examined all of the packages and showed an interest in the defendant's package by pushing it around with his nose and scratching it twice. This action did not amount to an official "alert," however, so the dog's handler was not sure that the package contained drugs. Officer Henderson, a Task Force member at the Federal Express office, called Brotherton in the magistrate judge's chambers to relay this information. He told Brotherton that "the dog had showed an interest in the package, but had not given a full alert to the package." Suppression Hearing Tr. 39. Brotherton then typed on the warrant application that "the Johnson County Drug Dog, 'Turbo' was presented with 8 different packages including the package being sent to Ron Jacobs. The Canine exhibited an interest in only that particular package addressed to Ron Jacobs." Appellant's Add. 3.

After Henderson's call, the police requested that a second dog examine the package. This dog failed to alert or show an interest in the defendant's package. In a second phone call to Brotherton, [**5] Officer Henderson learned that the warrant had already been issued. Henderson informed Brotherton that a second dog had arrived, and that the team was going to wait for this dog to conduct a sniff before executing the warrant. Neither the magistrate judge or, apparently, Officer Brotherton was informed of the results of the second sniff.

After receiving the search warrant, the Task Force, despite the results of the second sniff, decided to open the package. Upon opening the package, the police discovered cocaine. They then rewrapped the package and delivered it to the defendant's residence. Approximately fifteen minutes after this delivery, the police executed a second search warrant at the defendant's residence. There, the police found the Federal Express package, additional quantities of drugs, several guns, drug paraphernalia, and a large sum of money.

The defendant's primary argument on appeal is that the police violated the Supreme Court's holding in *Franks v. Delaware, supra,* by their actions in obtaining the search warrant. n1 The defendant's attack under Franks is two-fold: (1) that by including and emphasizing the word "interest" in [**6] the warrant application, the police told a deliberate falsehood; and (2) that by failing to include Henderson's statement that "Turbo" had not alerted to the package, Brotherton deliberately omitted vital information necessary to the magistrate judge's determination of probable cause. In addition, the defendant also asserts that the officers' failure to notify Brotherton and the magistrate judge of the results of the second canine sniff rendered the search warrant affidavit misleading in violation of Franks.

> n1 We need not rule on the defendant's claim that the police lacked a reasonable, articulable suspicion to conduct the canine sniff. Our holding that the warrant authorizing the opening of the package was invalid is fully dispositive of the motion to suppress.

II.

Under Franks v. Delaware, if a

> defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with [*1234] reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly [**7] false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false materials set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). We have applied this rationale to cover material that has been deliberately or recklessly omitted from a search-warrant affidavit. See *United States v. Reivich,*

793 F.2d 957, 960 (8th Cir. 1986). In Reivich this Court held that the defendant "had to show (1) that the police omitted facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading, . . . and (2) that the affidavit if supplemented by the omitted information would not have been sufficient to support a finding [**8] of probable cause." *Id. at 961* (citations omitted).

As support for his argument that the police included a deliberate falsehood in the warrant application, the defendant points to Brotherton's statement that "the Canine exhibited an interest in only that particular package addressed to Ron Jacobs." Appellant's Add. 3 (emphasis in original). The defendant argues that by underlining "interest," Brotherton was attempting to mislead the magistrate judge by emphasizing the word in such a fashion as to equate it with the term of art "alert." As the testimony at trial indicated, "Turbo" did not "alert" to the package, as it was trained to do if drugs were present. As a result, the dog's handler could not say with certainty that drugs were present. The defendant argues that Brotherton was attempting to brush over this fact by emphasizing the word "interest" in a manner designed to influence the magistrate judge's thinking. We disagree.

While the defendant's interpretation of these actions is plausible, we find it equally likely that by underlining the word "interest," Officer Brotherton was indicating, at least to some readers, that an alert did not occur. [**9] He could have been attempting to show the magistrate judge that, while the dog was attracted to the package, it did not give the response it was trained to give in the presence of drugs. In any event, we will not engage in speculation about the officer's intention in underlining the word "interest." Suffice it to say that this issue could be resolved equally well in favor of the police as in favor of the defendant.

III.

The defendant's argument that the police violated Franks by omitting key information from the warrant application is more forceful. First, he argues that by omitting "Turbo's" failure to alert, Officer Brotherton was deliberately misleading the magistrate judge. Secondly, the defendant argues that the failure to notify Brotherton and the magistrate judge that the second canine sniff was negative further violated Franks by depriving the magistrate judge of key information necessary to a determination of probable cause.

Officer Brotherton correctly informed the magistrate judge that the dog had shown an interest in the Jacobs package, but neglected to include Henderson's statement that no alert had occurred. In order for this omission to be a violation of [**10] Franks and Reivich, the defendant must make two showings. The first is a showing that the police omitted the information with the intent to make, or in reckless disregard of whether they made, the affidavit misleading. *Reivich, 793 F.2d at 961; United States v. Lueth, 807 F.2d 719, 726 (8th Cir. 1986).* In the present case, "Turbo's" failure to alert was omitted from the affidavit. Because of the highly relevant nature of the omitted information, we hold the omission occurred at least with reckless disregard of its effect upon the affidavit. [*1235] Brotherton knew that the dog had failed to alert to the box before he submitted the affidavit to the magistrate judge, yet he did not include this information. Any reasonable person would have known that this was the kind of thing the judge would wish to know.

Under Reivich, the failure to include the information and a reckless disregard for its consequences may be inferred from the fact that the information was omitted. However, in order for this inference to be valid, the defendant must show that the omitted material would be "'clearly critical' to the finding of probable [**11] cause." *793 F.2d at 961* (quoting *United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980)).* The omission of the fact that the dog failed to alert to the package satisfies this criterion.

Having shown that relevant information was recklessly omitted from the warrant application, Jacobs must further show that the affidavit, if supplemented with the omitted information, would not be sufficient to support a finding of probable cause. *Reivich, 793 F.2d at 961; Lueth, 807 F.2d at 727.* "Only if the affidavit as supplemented by the omitted material could not have supported the existence of probable cause" will suppression be warranted. *Lueth, 807 F.2d 719 at 726.*

In this case, if the warrant application were reworked to include the omitted phrase, it would read something like this: "The dog had showed an interest in the [defendant's] package, but had not given a full alert to the package." Testimony of Detective Henderson, Suppression Hearing Tr. 39. We hold that such an application, on its face, would not support probable cause. The evidence [**12] in support of probable cause would be limited to the information that Officer Brotherton received from Officer Billingsley in Phoenix, plus the fact that the dog had shown an interest in the package, but had not alerted to it. Without an alert, the police clearly lacked the probable cause necessary to open the package. While the information received from Officer Billingsley, plus the fact that the dog showed an interest in the package, might have provided reasonable suspicion that it contained contraband, more is needed to overcome the defendant's Fourth Amendment right to privacy in its contents. In this case, the failure to inform the magistrate judge that the dog had not given its trained response when confronted with a package containing drugs, cou-

pled with the dog handler's admission that he could not say with certainty that drugs were in the package, causes us to hold that the warrant would not have been supported by probable cause, if the omitted material had been included.

IV.

In an effort to protect the admission of this evidence, the government argues that the actions of the police should be excused under the objective-reasonableness exception of *United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984).* [**13] This argument fails for two reasons. First, under Leon, a Franks violation is not excused. *Id. at 914 & n.12, 923.* Second, even if the violation of Franks could be protected under Leon, we could not find that the officers acted reasonably when they executed this warrant. At the time the warrant was executed, not only did the officers know that "Turbo" had failed to alert to the package, they were also aware that a second dog called in to verify this conclusion had not even shown the amount of interest that "Turbo" exhibited. Nevertheless, the officers executed the warrant, ignoring the obvious negative finding obtained during the second sniff. This is indefensible. Not only was the warrant deficient under Franks, this further information should have alerted the officers that they lacked probable cause to examine the package. Furthermore, we think the officers had a duty to provide the magistrate judge with any information which would undercut the warrant's validity. The officers could not simply rest on a warrant they had already received when this information came to light. We feel confident that if the magistrate judge had been [**14] aware of the full scope of the investigation, the application for a warrant would not have been granted. The facts surrounding [*1236] the second sniff, if not sufficient to invalidate the warrant (already invalidated, anyway, without reference to the second sniff), are clearly sufficient to negative any "good faith" defense, in the Leon sense.

The judgment of the District Court is reversed, and the cause remanded for further proceedings consistent with this opinion.