Appeal No. 22-CF-447

DISTRICT OF COLUMBIA COURT OF APPEALS

ROBERT WILSON DEAN, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division
Case No. 2018-CF1-5520

REPLY BRIEF FOR APPELLANT

Anne Keith Walton, Esq.
Bar No. 991042
4315 50th St. NW
Suite 100-7104
Washington, DC 20016
Phone: (202) 642-5046
Email: waltonlawdc@gmail.com

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

ARGUMENT

I. The government has failed to embrace *Burns* as precedent in the District of Columbia, which undermines its entire argument.

The government boldly states in its brief that:

> Although we recognize this Panel is bound by *Burns*, we respectfully disagree with its conclusions and reserve the right to challenge them in future proceedings. Under Supreme Court precedent, a warrant limited to searching for evidence of a particular crime violating a particular statute satisfies the Fourth Amendment's particularity requirement. *See Andresen v. Maryland*, 427 U.S. 463, 479-82 (1976). Federal circuits have accordingly recognized that a warrant to search a cell phone or computer for evidence of a specified crime is sufficiently particular.

Gov. Br. at 29-30, n. 2 (federal circuit court citations omitted).[1] The government goes on to accuse this court of ignoring Supreme Court precedent in refusing to apply the good-faith exception, stating:

> *Burns* ignored *Andresen* and, as one federal judge has explained, was "articulated . . . without citation to any authority beyond *Riley*" – a case that "addressed only *warrantless* searches and said nothing about the appropriate scope of the search of a cell phone pursuant to a warrant." Given the conflicting federal consensus, *Burn's* refusal to apply the good-faith exception is especially problematic. *Burns* accordingly should be overruled.

Gov. Br. at 30, n. 2 (internal citation omitted). The above statement is blatantly false. *Riley v. California*, 573 U.S. 373 (2014) is certainly not the only authority cited in *Burns v. United States*, 235 A.3d 758 (D.C. 2020), and this should go without saying.

[1] "Gov. Br." refers to the appellee's brief. "App. Br." refers to the appellant's brief. "Tr." refers to the trial transcript.

The *Burns* decision, for example, provided a detailed comparison of the case with *United States v. Morales*, 77 M.J. 567 (A. Ct. Crim. App. 2017). *Burns*, 235 A.3d at 776. Of course, this is just one of many cases cited by the *Burns* court. As an additional attack on the *Burns* decision, the government states that:

> Insofar as dicta in *Burns* casts doubt on catchalls for "any and all evidence" of the crime, it is the Supreme Court's holding in *Andresen* – not the panel's dicta in *Burns* – that binds this Court.

Gov. Br. at 38, n. 6.

Mr. Dean asserts that the *Burns* decision is not "problematic." Instead, it is a well-reasoned decision that protects individuals' constitutional rights in the face of major technological developments, and it places necessary limits on law enforcement in searching modern smart phones. The government's insistence that *Burns* should be overruled is inappropriate at best. This court has analyzed several other cases similar to *Burns* without overruling *Burns*. The government may not like the *Burns* decision, but the government must accept the law, just as the defense must accept case law that does not fully support its position. The government's entire argument must be read in the context of its failure to accept *Burns* as precedent in the District of Columbia and its suggestion that the opinions of federal judges are superior to this court's opinion.

II. The search warrant in Mr. Dean's case failed to meet the dual requirements of probable cause and particularity.

Mr. Dean argued in his opening brief that the affidavits in support of the search warrants for cell phone data in Mr. Dean's case were substantially similar to those in the *Burns* case – lacking in both probable cause and particularity, in violation of the Warrant Clause of the Fourth Amendment.[2] The government has set forth several arguments to the contrary, which all fail.

First, the government argues that "Dean's suspected offense of domestic-abuse murder demands close examination of the relationship between the defendant and the decedent," and that "[p]rior incidents between domestic partners will inevitably bear on the suspect's mens rea, motive, and potential claims of self-defense." Gov. Br. at 31 (citation omitted). The government even goes so far as to state that, "given that W2 reported a *four*-month relationship, Judge Smith's edits restricting the warrant's search to just *one* month before the murder were unduly restrictive, preventing law enforcement from collecting obviously relevant evidence from the first three months of the relationship." Gov. Br. at 32, n. 3. This is quite a claim. It suggests that, if two people are in a relationship and it is suspected that one killed the other, it would be permissible to search cell phone data going back to the beginning of the relationship, which could span decades. The government cannot

[2] Hereinafter, this reply brief will refer only to the 2020 search warrant.

carve out an exception to the dual requirements of probable cause and particularity for "domestic abuse murder."

The government also argues that there was a "justified [] expectation that the phone would contain an array of other evidence of the crime. . . " Gov. Br. at 32. The government then lists motive, other relationships, surrounding movements and activities, accomplices, screwdriver, and appearance as examples. *Id.* at 32-33. As for "surrounding movements and activities," the government states that the police were entitled to explore whether Mr. Dean used his phone in ways similar to calling and texting Mr. Morris to pick him up, but the government does not explain this, and the fact remains that the affidavit did not establish probable cause to believe that Mr. Dean was using his phone in similar ways. *Id.* at 32-33.

As for accomplices, the government states that, "the affidavit did describe a potential accomplice: W2," as "driving Dean from the crime scene and offering him food or shelter are classic actions of an accessory after the fact." *Id.* at 36 (citations omitted). The government now identifies Mr. Morris as a potential accessory after the fact or accomplice despite Mr. Morris encouraging Mr. Dean to turn himself in, contacting law enforcement to report Mr. Dean, fully complying with law enforcement, and even allowing the detective and prosecutor to view and photograph his messages and calls with Mr. Dean. Tr. 10/26/21 at 34-54. At no point could Mr. Morris remotely have been considered an "accomplice" or accessory after the fact,

and the affidavit failed to set forth probable cause to believe that any accomplices were involved in the homicide. Herein lies the danger of using a template for cell phone search warrants – it draws in categories that do not apply to the specific facts of the case.

Turning to particularity, the government has argued that the categories listed in attachment B of the affidavit were "similar to the precise descriptions that the Supreme Court has called 'models of particularity.'" Gov. Br. at 38 (quoting *Andresen*, 427 U.S. at 479 & n. 10). The main problem with the government's argument is that the *Andresen* decision was issued in 1976, which was nearly half a century ago – well before anyone could have predicted the capabilities of a modern smart phone.

Andresen (a case upon which the government primarily relies in its brief) involved an investigation of real estate settlement activities in 1972 and the resulting search of two offices connected to an attorney. 427 U.S. at 465-66. The investigation led to probable cause to believe that the attorney had committed the crime of false pretenses, and the application for the search warrant sought permission to search for specified documents pertaining to the sale and conveyance of a lot. *Id.* The *Andresen* court, as well as the petitioner, focused entirely on the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." *Id.* at 479-81. The court noted, however, that the warrant contained "a lengthy list of specified

and particular items to be seized," all pertaining to the lot under question. *Id.* at 480. The "specified and particular items" did indeed include a comprehensive list of items that were carefully tailored to the specific allegations. *Id.* at 480, n.10. Whereas the *Andresen* warrant specified such things as title notes, abstracts and rundowns, contracts of sale and/or assignments limited to specific people and specific entities, lien payoff correspondence and memoranda, and disbursement sheets and memoranda, the Dean warrant used broad language ("any and all evidence") and the expansive, generic categories rejected in *Burns*. *Id.* Regardless, the *Andresen* circumstances and warrant have very little bearing on Mr. Dean's case, as they do not involve a modern smart phone.

III. The good faith exception to the exclusionary rule should not apply in Mr. Dean's case.

As recognized in *Burns*, the good faith exception to the exclusionary rule is itself subject to exceptions that are recognized in *United States v. Leon*, 468 U.S. 897 (1984). The *Burns* court explained that "federal courts have consistently viewed 'bare bones' search warrant affidavits as fitting squarely within" one of the exceptions that was recognized in *Leon*, and specifically pointed to the use of boilerplate language of a template. 235 A.3d at 779. The *Burns* court also explained that the warrants were issued more than a year after the Supreme Court's decision in *Riley*, "and any reasonably well-trained police officer with a reasonable knowledge of what the Fourth Amendment prohibits would have known they were invalid

notwithstanding their approval by a judge." *Id.* While it is true that the warrants in Mr. Dean's case were issued before the *Burns* decision, the state of the law at the time nevertheless included the principles set forth in *Riley*, specifically regarding modern smart phones.

The government relies on *Abney v. United States*, 273 A.3d 852 (D.C. 2022) and *In re J.F.S.*, 300 A.3d 748 (D.C. 2023) for its argument that the good faith exception to the exclusionary rule should be applied in Mr. Dean's case. First, *Abney* addressed the narrow issue of the good faith exception and whether "the officers could reasonably have relied on the judge's decision to issue the warrant." 273 A.3d at 863. The *Abney* court was clear that it was not "express[ing] any view as to whether the warrant in this case actually was or was not overbroad or lacking in particularity." *Id.* at 866. Despite the government's arguments to the contrary, the warrant in Mr. Dean's case was more similar to the warrant in *Burns* than to the one in *Abney*, and thus, as in *Burns*, the good faith exception should not apply. The warrants in Mr. Dean's case listed "generic categories covering virtually all of the different types of data found on modern cell phones," which is "intolerable." *Burns*, 235 A.3d at 775.

In re. J.F.S. also focused on the good faith exception rather than the issue of whether the warrant met the dual requirements of probable cause and particularity, and the case can be easily distinguished from Mr. Dean's case. The *J.F.S.* warrant

included a 21-page "detailed affidavit" that explained "why a broad swath of data on the phone might contain relevant evidence." 300 A.3d at 753, 758. This court explained:

> For instance, the affidavit stated that, based on Detective Jordan's experience investigating these kinds of crimes, he would expect to find messages about planning the crime in the phone's messaging apps; "trophy photos" of weapons in photo storage apps; and searches of police investigations into the crime in the internet search history.

Id. at 758. The 7-page affidavit in Mr. Dean's case was not nearly as detailed. For example, whereas the detective in *J.F.S.* indicated that photos of weapons may be found in photo storage apps, the detective in Mr. Dean's case provided no detailed reason to search anything besides specific calls, messages, and location data. Thus, the good faith exception to the exclusionary rule should not apply to Mr. Dean's case.

IV. The trial court's error in denying Mr. Dean's motion to suppress evidence recovered from his phone was not harmless.

The government argues that any error was harmless because "the data extracted from Dean's cell phone added little" and "had no meaningful bearing on the self-defense issue relevant now . . ." Gov. Br. at 59. The government focuses on Mr. Dean's assertion that he was acting in self-defense and seems to argue that the jury would have rejected the self-defense claim with or without the cell phone data evidence, stating that there is "no chance that the jury convicted Dean because of the disputed cell phone records." Gov. Br. at 60.

The government ignores the fact that, without the evidence recovered from Mr. Dean's phone, the jury may have reached a different conclusion as to the witnesses' credibility and Mr. Dean's actions. At trial, it was revealed that Ms. McNeal and Mr. Lewis were motivated by money, and Mr. Lewis admitted that he asked about a $25,000 reward while on his way to testify before the Grand Jury. Tr. 10/27/21 at 80-81. Ms. McNeal admitted that she had been wanting to move out of her Section 8 housing, and she benefitted from her testimony against Mr. Dean. Tr. 10/26/21 at 158-64. She also admitted to multiple prior convictions involving dishonesty. *Id.* at 167-68, 176; Tr. 10/27/21 at 12-13. Without the cell phone records, the jury may well have concluded that the witnesses could not be believed when they testified that Mr. Dean said such things as, "I hope that bitch dead." Tr. 10/26/21 at 222.

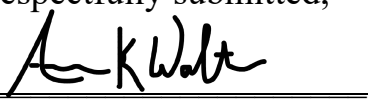
The government also points to one message ("I feel that am about to go to jail") that it claims to be the "single most notable message." Gov. Br. at 59. This is a red herring. The government presented lengthy testimony by Mr. McMenamin and two lengthy exhibits to the jury that were full of messages and other data that were prejudicial to Mr. Dean. The jury received several exhibits with cell phone data, including an exhibit prepared by the government that highlighted many additional calls, text messages, internet searches, and other items that were clearly prejudicial to Mr. Dean. The government's brief even lists the admitted exhibits and the

substantial amount of information they contained. Gov. Br. at 21-22. Certainly, the trial court's error cannot be deemed harmless.

CONCLUSION

Mr. Dean respectfully requests that this Court reverse his conviction, which is the appropriate remedy in this case.

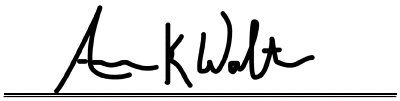
Respectfully submitted,



Anne Keith Walton, Esq.
Bar No. 991042
4315 50th St. NW
Suite 100-7104
Washington, DC 20016
Phone: (202) 642-5046
Email: waltonlawdc@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that, on April 19, 2024, a copy of the foregoing Reply Brief for Appellant was served via the court's e-filing system to: Chrisellen R. Kolb, Chief of the Appellate Division of the United States Attorney's Office for the District of Columbia, and on Assistant United States Attorney Michael McGovern, Esq.



Anne Keith Walton, Esq.

District of Columbia
Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (filed April 3, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
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(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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Case Number(s)

Anne Keith Walton

Name

4/19/24

Date

waltonlawdc@gmail.com

Email Address