No. 14-1846

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America,	)	
	)	Appeal from the United States
Plaintiff-Appellee,	)	District Court for the Northern
	)	District of Indiana, South Bend
v.	)	Division
	)	
Willie J. Harris,	)	No. 2:10-cr-00123
	)	
Defendant-Appellant.	)	The Honorable Philip P. Simon
	)	
	)	

REPLY BRIEF OF WILLIE HARRIS

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I. The Prosecution Implies Probable Cause For The Arrest is Absent.

A. The arrest first, ask questions later description holds.

The Response Brief is notable not for what it says, but what it does not. Swathes of the Opening Brief are left untouched as the prosecution cedes most of Harris' argument that the stop, detention, and arrest violated the Fourth Amendment. The prosecution's response is tepid: "it is not entirely clear that Harris' arrest was without probable cause." (Response Brief at 39.)

The prosecution does argue that officers can assume "a passenger involved in criminal activity may be engaged in a common enterprise with the driver sufficient to permit the arrest of both." *Id.*, quoting *Maryland v. Pringle*, 540 U.S. 366, 373 (2003) (internal quotes omitted). But this argument is unavailing because Harris was arrested first, without any knowledge or suspicion by officers that he was connected to the events in the bank. (App. at A3.) And as set forth in the Opening Brief, this case cannot be likened to *Pringle* because Harris was not in the car with Watkins when he was stopped, detained, and arrested. (Opening Brief at 21.) Since he was merely in the parking lot of a building Watkins was in, his arrest was illegal.

Ultimately, the prosecution contends the lack of probable cause is irrelevant because "an illegal arrest or detention does not void a subsequent

conviction." (Response Brief at 40.) The prosecution misses the point. Harris is not seeking "life-long immunity from investigation and prosecution." (Response Brief at 40.) Rather, it is the illegal arrest and the evidence obtained through it that raise constitutional concerns.

For that reason, the prosecution's reliance on *United States v. Crews* cannot save it. 445 U.S. 463 (1980). In *Crews*, the Court held that while a pre-trial identification obtained through illicit means should have been excluded, other evidence such as an in-court identification was admissible. The Court reasoned that the police's knowledge of the defendant's identity and the victim's independent recollections of him preceded the unlawful arrest and were thus untainted by the constitutional violation. *Id.* at 477. In contrast, Harris is not arguing evidence obtained prior to his arrest should be excluded; only that evidence discovered during his arrest and subsequently derived from it.

Additionally, the prosecution argues the Postal Inspector identified Harris in its own investigation in March 2009 and Harris was arrested again in August 2010 after committing additional illegal acts. (Response Brief at 41.) Again, Harris challenges the notebook seized as part of his illegal arrest. The notebook was a smoking gun that, if not spawning the investigation, at least guided the investigation and prosecution of Harris and assured his conviction.

The situation at bar differs from *United States v. Carter*, 573 F.3d 418 (7th Cir. 2009). Relying on *Carter*, the prosecution constructs a straw man. *Carter* involved an identification of a suspect (after an improper search) by a witness who had no knowledge of the illegal search and was not shown any of the evidence gained through it. *Id*. at 425. The Court further observed the record did not support an inference of bad faith. *Id*. at 425-26. Since witnesses cooperated with the investigation and provided the police with tangible evidence, the deterrent purpose of the exclusionary would not be furthered. *Id*. No such dynamic exists here. As set forth in the Opening Brief, the stop, detention, arrest, and search occurred simultaneously. Moreover, Officer Janiga did not bother to speak with vehicle's driver and determine whether he would consent to a search. (Doc. 325 at 20-21.) The prosecution can thus not establish attenuation per *Brown v. Illinois*, 422 U.S. 590 (1975).

B. The prosecution cannot show probable cause.

The prosecution must prove that a warrantless stop is supported by probable cause. *United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000). It cannot do so here.

Harris was not in the truck with Watkins when arrested. (Doc. 325 at 10-12.) He was in a parking lot open to bank patrons and the public. (App. at A3.) Moreover, officers did not know his connection to Watkins. (*Id*.) The prosecution thus asks the Court to hold that patrons inside an establishment

and the general public outside it are engaged in a common enterprise. The Court should reject this overreaching interpretation.

The prosecution argues the notebook was not seized incident to Harris' arrest, but Watkins' arrest. (Response Brief at 42.) However, the Fourth and Fourteenth Amendments protect the legitimate expectations of privacy of persons, not places. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). Mere proximity in time and place to another committing a crime cannot establish probable cause. Harris cited a number of cases on these issues that the prosecution disregards. First, affirming his stop and detention contradicts *United States v. Bohman*, 683 F.3d 861 (7th Cir. 2012). (Opening Brief at 19.) Second, the Munster police acted illegally as demonstrated by *United States v. Rivers*, 121 F.3d 1043 (7th Cir. 1997). (Opening Brief at 19.) Third, probable cause must be particularized to an individual per *Ybarra*. (Opening Brief at 20.) Fourth, mere presence in a suspicious area does not establish probable cause under *United States v. Ingrao*, 897 F.2d 860 (7th Cir. 1990). (Opening Brief at 22.) Fifth, the lack of individualized suspicion found in the factually similar *United States v. Collins*, 427 F.3d 688 (9th Cir. 2005). (Opening Brief at 22.) Evading these cases highlights the frailty of the prosecution's position.

Reviewed *de novo*, probable cause is absent as a matter of law, and suppression is the remedy.

II. The Notebook Was Improperly Seized From Harris' Truck.

A. The automobile exception cannot save the warrantless search.

The prosecution's invocation of the automobile exception is built on a flawed premise—that probable cause existed. The automobile exception to the Fourth Amendment permits a search without a warrant if there is probable cause to believe the search will uncover evidence of a crime. *United States v. Pittman*, 411 F.3d 813, 817 (7th Cir. 2005). The prosecution argues there was "reason to believe that Watkins might have left further evidence of her fraud inside the car . . . ." (Response Brief at 33.) But unlike the prosecution's authority, there was no evidence the Munster police had specific reason to suspect evidence of Watkins' crime in Harris' truck. (App. at A3.) Moreover, Harris was apparently detained because his car was in a handicapped parking spot, not for identity theft. There was no basis to search his car based on a parking infraction.

The prosecution touts *United States v. Zahursky*, 580 F.3d 515 (7th Cir. 2009). But *Zahursky* is distinguishable on its face. A Secret Service agent posed as an underage minor in an adult chat room, where the defendant agreed to meet the minor for sex and to bring condoms and lubricant. *Id.* at 517-18. Agents followed the defendant to the assignation and watched him exit his vehicle. *Id.* at 519. After a search of the defendant revealed no condoms or lubricant, the officers searched his car and discovered the items,

along with directions to the meeting place. *Id.* The Court affirmed the district court's denial of the motion to suppress. Probable cause existed to search the car for condoms, lubricant, and evidence of interstate commerce (an element of the charge), such as maps and directions. *Id.* at 522.

Relying on *Zahursky* reflects the prosecution's overreach. The agents there had an actual basis to believe specific evidence was in the car: they exchanged e-mails with the defendant, knew he would bring certain items, knew he was traveling interstate, followed his car, and watched him exit his car. There was thus a probability, based on agents' specific knowledge, that evidence of the crime would be in the car. In sharp contrast, the Munster police knew nothing about Harris, did not follow his truck, and did not see Watkins leave the truck. The officers also did not have specific information that Watkins had more evidence than the fraudulent identification she had on her person.

Similarly inapt is the prosecution's invocation of *United States v. Edwards*, 769 F.3d 509 (7th Cir. 2014). (Response Brief at 31.) In *Edwards*, the defendant was arrested for suspicion of driving a vehicle without the owner's consent, and it was reasonable to believe evidence of the car's ownership would be in the car. *Id*. at 515-16. That dynamic was not present here. In sum, probable cause exists where an officer has an actual basis to believe a specific and identifiable type of evidence is in the car. Officer Janiga

did not have that basis, which is why he did not go through the car for items other than what he thought belonged to Watkins.

B. The prosecution uses a diluted probable cause standard.

The prosecution contends that an officer may suspect a person would leave further evidence of identity theft in a vehicle. (Response Brief at 33.) It cites no factual basis for this notion. Indeed, the record is to the contrary. Neither Janiga nor anyone else thought to search the vehicle until Watkins asked Janiga to bring her backpack and coat. Moreover, Janiga did not search the vehicle after he took the backpack, wallet, and notebook. There was no evidence that Watkins was part of a larger scheme, or that prior observations by officers would lead them to believe such evidence existed and could be in Harris' truck. This is borne out by the district court, which said Janiga had "nothing specific" to lead to the probability that Harris' truck might have evidence of Watkins' crime. (App. at A10.)

Furthermore, Janiga admitted Watkins never asked him to retrieve the notebook, since it was not hers. (Doc. 325 at 20-21.) Nor did Janiga speak to Harris before searching the truck. (*Id*. at 21.) Janiga did not know why Harris was removed from his vehicle and put in the squad car. (*Id*. at 28.) Finally, Watkins could not consent to a search of Harris' vehicle. The prosecution ignores these points.

The prosecution distorts the issue by arguing "Harris offers no

principled reason for treating drug offenses and other crimes differently." (Response Brief at 34.) Harris never made such an argument, and this assertion is baseless. It was the district court that said "there is something unique about the crime of identity theft that makes this case a little bit different from run-of-the-mill cases." (App. at A10.) Harris thus argued the court should not treat drug offenses and identity theft differently. (Opening Brief at 28.) The prosecution thus frames Harris for the court's mistake.

C. Summation

Since identity theft involves information, adopting the prosecution's position would permit law enforcement to take cellphones, computers, or anything else without a warrant or asking for consent to search. The Court should reject the prosecution's novel Fourth Amendment interpretation. The ramifications of its reading are real. "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

III. It Was Harmful Error to Admit the Notebook.

A. Harmless error analysis is inapplicable when the right violated precludes a fair trial.

The prosecution's harmless error defense also falls short. An error is not harmless if it has a substantial and injurious effect on the verdict. *United*

States v. Beasley, 809 F.2d 1273, 1280 (7th Cir. 1987). To avoid a finding of harmless error, the defendant need not show that a jury would acquit him on remand. *United States v. Richards*, 719 F.3d 746, 765-66 (7th Cir. 2013). The Court has noted that even where the defendant "probably" would have still been convicted in the absence of improper evidence, the error is not necessarily harmless. *Id. See also United States v. Lee,* 724 F.3d 968, 982-83 (7th Cir. 2013) (admitting prior conviction not harmless despite drugs in defendant's car, defendant's fingerprints on the drugs, and a witness testifying that defendant sold him drugs).

As the following section demonstrates, far from being harmless, the introduction of the illegally seized notebook and the evidence flowing from it guaranteed a guilty verdict.

B. The notebook was crucial to the conviction.

The prosecution's downplaying of the notebook represents a flight from reality. While the trial involved hundreds of exhibits and numerous witnesses, the notebook was the definitive proof linking Harris to the crimes and exposing their breadth. Laden with detailed cardholder information and rife with Harris' fingerprints, the notebook was a paragon of incriminating evidence. It was also instrumental in the Postal Inspector's investigation of Harris and matching the identities Harris had with the unauthorized purchases and cash advances.

As such, minimizing the notebook is a task of Sisyphean proportions. Various witnesses discussed the notebook. For example, Diontria Frazier saw Harris multiple times with a notebook containing social security numbers, birthdates, and other identifying information. (Doc. 591 at 147, 189.) Lauren Price testified at length about the notebook and its significance to the scheme. (Doc. 591 at 204-06; Doc. 592 at 34, 49-50.) She saw Harris with a notebook on numerous occasions and that it had identifying information. (*Id*.) Price also recalled a damning conversation with Harris:

> Q: What if anything did the Defendant Willie Harris tell you regarding doing any handwriting samples ?
>
> A: He told me that . . . . the police ended up pulling up on him, and they had searched the car and they found the notebook inside of the car. . . . And then they end up -- he had to come to court to do a handwriting test to see if his handwriting matched the notebook. And he was practicing at my house one day, practicing a different handwriting so his handwriting wouldn't match up in the notebook.

(Doc. 591 at 207-08.)

Not surprisingly, the prosecution devoted significant attention to the notebook's content, where it was found, and the fingerprint analysis. *See* (Doc. 592 at 72) (where notebook was found); (Doc. 592 at 82, 85-90)

(questioning Officer Janiga on the content of the notebook); (Doc. 592 at 155-60) (questioning fingerprint expert on notebook). Indeed, the prosecution argued for the notebook's admission by stressing its importance: "There are at least 12 people identified with this personal -- with their personal information that was contained in this notebook." (Doc. 592 at 62.)

The district court was convinced of the notebook's significance when it denied an objection to its admission. "The jury could infer that the Defendant Harris had this notebook containing the personal identification of a number of people, and that is evidence relevant to the defendant's intent to engage in the conspiracy listed in Count 1 of the indictment." (Doc. 592 at 63.) The court also found it "highly probative that somebody would be carting around a notebook containing the identifiers of several people from around the country . . . . [and] it's not unfairly prejudicial inasmuch as it's evidence that was seized directly from the Defendant's car." (Doc. 592 at 65.)

The prosecution's revisionist history thus fails. The notebook was integral because it was the hub of the identity theft operation and therefore influenced the jury. Admitting the notebook and the evidence derived from and related to it was not harmless.

IV. Erroneous Enhancements Inflated Harris' Sentence.

The Court should reverse based on the constitutional violations set forth above. But even if the Court disagrees, remand is still proper for resentencing.

A. The 2008 Guidelines should have been used.

A six-level enhancement was misapplied to Harris' sentence due to the district court's reliance on an improper definition of victims found in the 2012 Guidelines. Because the 2007 Guidelines required a victim to have suffered pecuniary harm and only a handful of victims (the financial institutions), suffered pecuniary harm, the 2012 Guidelines created a longer sentence for Harris. In light of *Peugh v. United States*, applying the 2012 Guidelines imposed a more onerous sentence upon Harris violating the Ex Post Facto Clause. *Peugh*, 133 S. Ct. 2072, 2088 (2013).

B. Harris was not a manager or supervisor.

The prosecution equates Harris' conduct with that of the defendant in *United States v. Grigsby*, 692 F.3d 778 (7th Cir. 2012). (Response Brief at 48.) However, the *Grigsby* defendant had more control over his cohorts than Harris. The defendant in *Grigsby* met with each participant to plan the robberies, and supervised the participants and the robberies. 692 F.3d at 791. Harris did not (and could not) dictate or manage the co-Defendants' activities that spanned state lines and years. There were too many people involved, too

many loose affiliations, and too many purchases for one person. In fact, other co-Defendants such as Diontria Frazier, Amber Fields, and Joniette Davis participated in ways that resembled Harris' role. *See, e.g., United States v. Vargas,* 16 F.3d 155, 160 (7th Cir. 1994) (supplying contraband does not indicate a greater degree of responsibility for putting drug transactions together than anyone else involved).

The prosecution's attack on *United States v. Weaver*, 716 F.3d 439 (7th Cir. 2013), is ineffectual. (Response Brief at 51.) Again, like *Weaver* there was no single scheme here; there were multiple transactions and divergent criminal activities over a couple years. Also like *Weaver*, Harris did not provide ongoing supervision of the co-Defendants' illegalities. *See* 716 F.3d at 444. Nor did Harris punish co-Defendants for their actions. *See id.* (finding the ability to coerce underlings by imposing some sanction or reward suggests managerial responsibility).

C. The sophisticated means enhancement was erroneous.

The prosecution argues that Harris' "scheme" was complex because it took investigators "over a year to unravel the full scope" and "cards were sent to at least 21 different addresses in three states." (Response Brief at 53.) The prosecution mistakes size for sophistication. Mailing credit cards to multiple addresses in different states is not arduous. *See also United States v. Kaufman*, 800 F.Supp. 648, 655 (N.D. Ind. 1992) (finding checks in the mail

and cashing them is not sophisticated under section 2T1.3(b)(2)). Similarly, the prosecution cites no authority that the time it takes agents to "unravel" a scheme (here, one year) evinces sophistication to warrant a two-level enhancement. The time lag could stem from other law enforcement priorities, inertia, or jurisdictional clashes—factors having nothing to do with the underlying offense.

Further, handwritten lists in an 18-year-old's notebook and the use of minors who were, as the district court found, "very unsophisticated and almost infantile," lack the complexity required under the Guidelines. (Doc. 595 at 124.) *See also Kaufman*, 800 F.Supp. at 655 (pegboards, post-it notes, and fake deposit slips far removed from off-shore banks or dummy corporations to warrant enhancement).

D. The relocation enhancement fails because there was no intent to evade law enforcement.

The prosecution asserts Harris moved his scheme from Indiana in 2007 after "several close calls" and that Harris' comment to Inspector Frink was an admission that he was starting his criminality anew in Georgia. (Response Brief at 55-56.) The prosecution fails to address a key fact: Harris moved to Georgia in December of 2007. (Doc. 592 at 11-12; Doc. 593 at 170-71.) This date thwarts any possibility Harris moved to Georgia to evade investigators

as neither Harris nor his co-Defendants knew an investigation was brewing until at least May of 2008, when conspirators were questioned.

Instructive is the Eighth Circuit's decision in *United States v. Smith*, 367 F.3d 737 (8th Cir. 2004). *Smith* affirmed a relocation enhancement where the prosecution presented evidence suggesting the defendant relocated to another state because he knew about a warrant. *Id.* at 740. Such facts do not exist here.

E. The gap between Harris' 13-year sentence and no jail time is unbridgeable.

Despite the prosecution's contention that the conspiracy was sophisticated, every one of Harris' co-Defendants (except Sanders) escaped prison. The prosecution concedes the noncustodial sentences for the six co-Defendants was "perhaps . . . too low." (Response Brief at 58.) Still, the prosecution excuses this result because a defendant's cooperation warrants a sentencing disparity, citing *United States v. Gonzalez*, 765 F.3d 732 (7th Cir. 2014). Harris does not quarrel with this proposition in theory, but rather its application here, where six co-Defendants walked while he received 13 years.

The prosecution attempts to seek refuge in *Gonzalez* and *United States v. Boscarino*, 437 F.3d 634 (7th Cir. 2006). But these cases are of no utility as they do not involve the disparity here. In *Gonzalez*, the defendant was sentenced to 360 months while his three co-defendants received between 240

and 288 months. 765 F.3d at 737-40. In *Boscarino*, the disparity was similarly trivial. The defendant was sentenced to 36 months while his co-defendant received 20 months. 437 F.3d at 637. Thus, the prosecution points to no authority that the 13-year disparity, especially when the co-Defendants received no jail time, is acceptable. Resentencing is thus proper.

CONCLUSION

The Court should reverse for entry of judgment of acquittal, or alternatively, a new trial, or alternatively, resentencing.

Respectfully submitted,

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January 16, 2015

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Appellant, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the provisions of F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally-spaced font. The length of this brief is 4,156 words according to the Microsoft word count function.

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CERTIFICATE OF SERVICE

This is to certify that on January 16, 2015, I served a copy of the Reply Brief of Willie Harris upon the party listed herein, via the Seventh Circuit ECF filing system:

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