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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ANTHONY PELLICANO, Defendant - Appellant.	No. 04-50043 D.C. No. CR-02-01278-DT MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted January 13, 2005
Pasadena, California

Before: REINHARDT, O'SCANNLAIN, and CLIFTON, Circuit Judges.

Anthony Pellicano appeals his conviction following a conditional guilty plea to possession of unregistered firearms in violation of 26 U.S.C. § 5861(d) and possession of plastic explosives in violation of 18 U.S.C. § 842(n)(1). We affirm.

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Pellicano's primary challenge is to the validity of the first warrant, issued November 19, 2002. It was during the search pursuant to the first warrant that the incriminating items were discovered. That caused the agents to obtain the second warrant, issued November 21, 2002, which authorized the search for and seizure of those items. Pellicano argues that probable cause did not exist for the first warrant because the alleged misconduct (for which the government asserted that it had probable cause) did not, contrary to the government's assertion, constitute a violation of the Hobbs Act. After the Supreme Court's subsequent decision in Scheidler v. NOW, Inc., 537 U.S. 393 (2003), the government effectively acceded to that position, because it dropped the investigation and dismissed a related indictment. Pellicano argues that even prior to Scheidler, the government lacked probable cause based on our decision in United States v. Panaro, 266 F.3d 939, 948 (9th Cir. 2001), in which we held that the "obtaining" element of § 1951 required that the victim must not only be deprived of property, but that someone must receive the property as a result of the deprivation.

We need not determine here whether probable cause existed for the issuance of the warrant. Where the first warrant was issued by a proper authority and there is no evidence that the officer seeking the warrant acted in bad faith or that the

issuing magistrate abandoned his neutral judicial role,[1] the search fell within the good faith exception to the exclusionary rule established in United States v. Leon, 468 U.S. 897 (1984). The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." Leon, 468 U.S. at 906 (citation omitted). As with any remedial device its application should be restricted to those areas where its remedial objectives can be most efficaciously achieved, id. at 908, and "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." Id. at 921.

Warrants were obtained from a magistrate judge for both the first and second searches. Even if Pellicano is correct that probable cause was lacking for the first warrant, such that it should not have been signed by the magistrate judge, it was signed, and because the warrant was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," the agents were allowed to rely upon the warrant to conduct the search. See Leon, 468 U.S. at 921,

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[1] The district court found that Special Agent Ornellas was not dishonest or reckless in preparing the affidavit and that the magistrate judge did not abandon his detached and neutral role when he issued the warrant. Pellicano does not challenge either of these findings and we have no reason to believe they are clearly erroneous.

923. ("It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination . . . .").

Specifically, the officer's actions in applying for the warrant were not unreasonable in light of the legal rules that were "clearly established" at the time the first warrant was obtained and the search conducted. See United States v. Brown, 951 F.2d 999, 1006 (9th Cir. 1991). In United States v. Panaro, we held that the "obtaining" element of § 1951 required not only that the victim must be deprived of property, but that someone must receive the property as a result of the deprivation. Panaro, 266 F.3d at 948. Panaro, however, was a case concerning the extortion of tangible property rights and did not address the line of cases in which we appeared to suggest that it was possible to extort intangible property rights under § 1951 by appropriating control of the right. See United States v. Hoelker, 765 F.2d 1422, 1425 (9th Cir. 1985) (the intangible right at issue was the victim's "*right to make personal and business decisions* about the purchase of life insurance on his own life free of treats and coercion"); United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980) (the intangible right at issue was the victim's "*right to*

solicit business free from threatened destruction and physical harm");[2] see also Scheidler, 537 U.S. at 414 n.1 (Stevens, J., dissenting) (expressing the view that the decision of the majority in Scheidler was inconsistent with prior caselaw, including Zemek, in which threats of violence intended to induce surrender of an intangible right were "embraced by the term 'obtaining'").[3] The decision of the three-judge panel in Panaro could not itself have overruled our prior precedents,

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[2] Notwithstanding the dissent's assertion to the contrary, both Hoelker and Zemek could fairly be read to support the proposition that the destruction of an intangible right was the legal equivalent of appropriating control of the right, thereby satisfying the requisite obtaining element under § 1951. As the dissent correctly observes, Zemek was charged with extorting the goodwill and customer revenues of a competing tavern, but the court's holding was much broader. The court concluded that the "right to solicit business free from threatened destruction and physical harm falls within the scope of protected property rights under the Hobbs Act." Zemek, 634 F.2d at 1174. That was exactly the situation faced here. Pellicano was charged with physically intimidating a Los Angeles Times reporter so that the Times would not run a story unfavorable to his client, thereby usurping the paper's right to make business decisions free from threatened destruction and physical harm. As the dissent concedes Zemek and Hoelker were good law at the time the warrant was issued, it does not follow that the warrant was so lacking in indicia of probable cause as to render the official belief in its existence entirely unreasonable.

[3] The officers could not be required to anticipate the Court's decision in Scheidler, announced three months after the warrant was issued. Furthermore, the fact that Justice Stevens believed Zemek was still good law prior to Scheidler is powerful support for the proposition that a reasonable officer, lawyer, or judge could have reached the same conclusion, despite Panaro, and despite the assertion to the contrary made here by the dissent. The officers here can hardly be faulted for holding the same view that Justice Stevens held.

since only an en banc panel of our court is authorized to do that. See United States v. Gay, 967 F.2d 322, 327 (9th Cir. 1992). Accordingly, thoughtful and competent lawyers and judges could have disagreed on whether, after Panaro, the misconduct that was the subject of this investigation constituted a violation of the Hobbs Act. Therefore, we conclude the officer manifested objective good faith in relying on the first warrant. See United States v. Fowlie, 24 F.3d 1059, 1067 (9th Cir. 1994).[4]

Pellicano also challenges the scope of the first warrant. That warrant detailed three categories of items to be seized, all of which were believed to constitute evidence of precisely identified criminal activity. The warrant was "specific enough to enable the person conducting the search reasonably to identify

[4] Additionally, we observe that the holding of Center Art Galleries-Hawaii v. United States, 875 F.2d 747 (9th Cir. 1989) is not so broad as the dissent asserts. In Center Art Galleries, the court specifically noted that Mass. v. Sheppard, 468 U.S. 981 (1984), did not preclude it from creating an affirmative duty requiring an officer to notify a magistrate when a warrant was clearly facially overbroad. 875 F.2d at 753. The issue here, however, is not whether the warrant was clearly facially overbroad, but whether it was "so lacking in indicia of probable cause as to render official belief in it entirely unreasonable." Leon, 468 U.S. at 923. As the Court explained in Sheppard, even where an officer was on notice that the warrant might be legally flawed, "[w]hatever an officer may be required to do when he executes a warrant. . . we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." 468 U.S. at 989-90.

the things authorized to be seized." United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986) (explaining that the "specificity required in a warrant varies depending on the circumstances of the case and the type of items involved"). While the warrant permitted agents to review each file to determine whether it fell within the items to be seized, it authorized the seizure of only those files related to the three categories described in the warrant. Cf. Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976) (observing that "[i]n searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized"). Accordingly, consistent with our previous cases in which we approved the seizure and off-site examination of computer equipment to identify evidence within the scope of a warrant, we conclude the scope of the first warrant was supported by probable cause and that the warrant was sufficiently specific under the circumstances to protect Pellicano's right to be free from unbounded searches. See, e.g., United States v. Hay, 231 F.3d 630, 636-38 (9th Cir. 2000); United States v. Lacy, 119 F.3d 742, 746 (9th Cir. 1997).

Although Pellicano initially pled guilty to count one of the indictment, prior to sentencing he moved to withdraw his conditional plea of guilty and to dismiss count one. United States v. Stewart, 348 F.3d 1132, 1136-37 (9th Cir. 2003),

decided after Pellicano entered his guilty plea, but before he was sentenced, held that 18 U.S.C. § 922(o) exceeded Congress' commerce power as applied to possession of homemade machine guns that are fabricated within a single state. Pellicano argues that, in light of Stewart, the district court erred by refusing to permit the withdrawal of the guilty plea. Pellicano was not charged with violation of the statute at issue in Stewart, however, but with violation of 26 U.S.C. § 5861(d), which is part of the Internal Revenue Code. In contrast to 18 U.S.C. § 922(o), which criminalized the possession of the machine guns, 26 U.S.C. § 5861(d) criminalized Pellicano's failure to register the firearms in his possession. Section 5861(d) of the Internal Revenue Code is a valid enactment of Congress' taxing power. Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (holding that the National Firearms Act was a valid exercise of Congress' taxing power); Hunter v. United States, 73 F.3d 260, 262 (9th Cir. 1996) (holding that § 5861 continues to be within Congress' power to tax). The district court did not err in denying Pellicano's motion to withdraw his guilty plea and dismiss count one of his conviction.

AFFIRMED.