

**United States District Court
Eastern District of Wisconsin**

United States of America,

Plaintiff,

Case No. 07-CR-123

v.

Patryce Pruitt, et al.

Defendant.

Motion to Suppress Evidence of Wire Communications

NOW COMES the above-named defendant, by her attorney, Jeffrey W. Jensen, and hereby moves to suppress evidence of intercepted wire communications allegedly involving Patryce Pruitt and Jimmie Durant on February 18, 2007 (and any other date) for the reason that probable cause for the issuance of the Title III order for Jimmy Durant's telephone on January 25, 2007 was established through the use of information that the affiant could not have legally had in his possession at the time of the application.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this 29th day of December, 2007.

LAW OFFICES OF JEFFREY W. JENSEN
Attorneys for the Defendant
/s/ Jeffrey W. Jensen
State Bar No. 01012529

633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203-1918

414.224.9484

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Memorandum of Law

Factual Background

Count Thirteen of the Indictment alleges that on February 18, 2007 the defendant Patryce Pruitt ("Pruitt") knowingly and intentionally used a communication facility, to wit: a telephone, to commit, cause, or facilitate the commission of an act or acts constituting a drug trafficking crime, to wit; possession with intent to distribute and distribution of cocaine all contrary to 21 U.S.C. §841(a)(1). Specifically, the complaint alleges:

p. 34: "On February 18, 2007, at 11:53 p.m., Patryce PRUITT called DURANT and said that "David" called her to ask her about the price for 4 speakers and an amp (4½ ounces of cocaine). DURANT said 28 dollars (\$2,800 dollars) PRUITT said she wanted to sell it to David for 32 dollars (\$3,200). DURANT told PRUITT to sell it to David for 28 dollars."

p. 35: "On March 3, 2007 at 8:14 a.m., DURANT called PRUITT and PRUITT asked DURANT if he was still in Memphis. DURANT said he would be back no later then [sic] Sunday. PRUITT said she needs to get that (cocaine). PRUITT asked if Cal (COLEMAN) was straight or whether he'd been going tow ork (i.e. to sell cocaine). PRUITT then asked whether DURANT knew anybody that had cocaine available to sell, because "Dave" had been constantly bothering her for cocaine. PRUITT told DURANT she gave Dave some of that 'bubble gum" (cocaine), and he wanted

more. DURANT said he did not know."

The government's primary evidence of this offense is a recording of a February 18, 2007 telephone call that was intercepted apparently pursuant to a January 25, 2007 authorization to monitor Jimmie Durant's telephone numbers.

Beginning in September, 2006, the government was investigating drug dealing in Milwaukee and pursuant to Title III began intercepting telephone calls made to numbers listed to Calvin Coleman. It was not until December 6, 2006 (Bates No. 258), though, that Jimmie Durant was named as one of the individuals whose communication might be intercepted (though none of his telephone numbers were targets). In the supporting affidavit for the December 6, 2006 application, Detective Daniel Thompson set forth a chart suggesting that three telephone numbers were listed to "Jimmie Durant" and that these numbers made a certain number of calls to the target number (Coleman). The affidavit alleges that the information in the chart- apparently also including the subscriber names- was obtained from "an analysis of pen register, trap and trace, telephone toll records, subscriber data, public records, confidential informants and sources, and/or law enforcement surveillance and seizures."

In paragraph 37, though, Thompson alleges that, "[T]he results of telephone tolls, trap and trace, and pen register information, have been used in this investigation. Pen registers, trap and traces and toll records, do not record the identity of the parties to the conversation, cannot identify the nature or substance of the conversation, and cannot differentiate between legitimate calls and calls for criminal purposes."

How, then, did Thompson determine that the three numbers were listed to Jimmy Durant?

Later, in a January 25, 2007 affidavit (Application 5800; Bates No. 437) filed in support of a Title III application to intercept telephone communications, Thompson alleged, at ¶13, that, "[T]elephone records reveal that **target telephone #5** is a Nextel cellular telephone subscribed to "Steve Wells" at 3437 W. Wells. St. and **target telephone #6** is a Sprint cellular telephone subscribed to DURANT at 2210 N. 29th St., " At p. 30 Thompson alleges that, "Telephone records (cell tower locations) indicate that **target telephone #6** (DURANT) returned to Milwaukee on January 5, 2007 at 3:27

a.m." At page 34 the affidavit reads, "On January 18, 2007, at 11:07 a.m., **target telephone #6** (DURANT) received a 36 second incoming call from 773-817-0174. Telephone records indicate that 773-817-0174 is subscribed to Robert HAMPTON at 13713 S. Stewart Ave., Riverdale, IL." This appears to be information gleaned from subscriber records and/or a pen register and/or cell tower triangulation or a mobile tracking device. At page 42 the affidavit sets forth a chart of calls made to and from target telephones 5 and 6. Thus, it appears that as of **January 25, 2007** government agents *already had* subscriber information and cell tower triangulation information concerning Jimmy Durant and his telephones.

Based on Thompson's affidavit, on January 25, 2007 the court granted the application to intercept calls from Durant's two telephone numbers and Nextel was ordered to provide, among other things, "originating and terminating cellular tower and sector information for calls to and from the target telephones . . . during the time period of this Order." (Application 5800; Bates No. 494) This was the first authorization for the government to intercept wire communication and to obtain cell tower information on Durant's telephones.

Then, on January 30, 2007 the government made an application under 18 U.S.C. 2703(d) to obtain telephone subscriber records concerning Durant's two numbers (460.8561 and 304.4618) This was *after* Thompson's December 6, 2006 affidavit in which he already claimed to know the identity of the subscriber for the numbers 414.460.8561 and 414.304.4618. The order was granted. (Application 6052; Bates 1271)

From a review of the discovery materials provided by the government it appears that the first and only application for cell phone tracking information pursuant to 18 U.S.C. §3117 on Jimmie Durant's cell phones, though, was not made until March 23, 2007- again, *after* Thompson had already alleged in his January 25, 2007 affidavit that he had subscriber information for Durant's numbers *and that Durant's telephone had been operating in Chicago and returned to Milwaukee on January 5, 2007.* (No. 07-M-210; Bates No. 1209)¹

¹ 18 U.S.C. § 3117. Mobile tracking devices

It does not appear that the government ever sought subscriber information for any telephone listed to Patrice Pruitt.

Argument

I. The court must suppress the Title III evidence as to Pruitt because the relevant application demonstrate that government agents had in their possession subscriber information and location tracking information concerning Jimmy Durant's telephone that they could not have obtained legally.

A. Pruitt has standing to challenge communications intercepted on Jimmy Durant's telephone.

18 U.S.C. § 2518(10)(a), in turn, provides the means for invoking the sanction:

Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval. . . .

Finally, 18 U.S.C. § 2510(11) defines the class of persons entitled to invoke the

(a) In general. If a court is empowered to issue a warrant or other order for the installation of a mobile tracking device, such order may authorize the use of that device within the jurisdiction of the court, and outside that jurisdiction if the device is installed in that jurisdiction.

(b) Definition. As used in this section, the term "tracking device" means an electronic or mechanical device which permits the tracking of the movement of a person or object.

sanction through the motion to suppress:

"[A]ggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

This suppression remedy, however, can only be invoked in a criminal trial, by the victim of the illegality, to prevent the use of the tainted evidence against him. *United States v. Calandra*, 414 U.S. 338, 347, 354, 94 S.Ct. 613, 619, 622, 38 L.Ed.2d 561 (1974)

Plainly, Pruitt was aggrieved by the interception of the February 18, 2007 telephone conversation she allegedly had with Durant.

B. Probable cause for the Title III intercept was established through the use of information that Detective Thompson could not have legally had in his possession at the time of the application.

It is a violation of federal and state law to employ a pen register or trap and trace device without court authorization. 18 U.S.C. § 3121(d); Wis. Stat. § 968.34(1).

While the pen register and trap and trace statutes themselves do not codify the exclusionary rule, Title III specifically mandates exclusion of all direct and derivative evidence obtained as the result of an illegal wiretap. 18 U.S.C. § 2515 & § 2518(1)(a). Where a communication has been shown to be "unlawfully intercepted," the Court must suppress both the contents of the communication and any evidence derived therefrom. 18 U.S.C. § 2518(10)(a)(i); *United States v. Giordano*, 416 U.S. 505, 530-31 (1974). Even relatively technical violations may result in suppression under Title III. See, e.g., *Giordano*, 416 U.S. 505 (suppressing evidence where incorrect DOJ personnel authorized wiretap). The purpose of the suppression remedy in Title III is "not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.'" *Gelbard v. United States*, 408 U.S. 41, 51 (1972) (quoted source omitted). Suppression of evidence in this case is

consistent with the purposes of § 2515 and will serve to have a deterrent effect on the illegal interception of telephone data.

Here, the course of events may be determined by reference to the series of affidavits filed with the court. Initially, Jimmy Durant was not listed as a person whose electronic communications would be likely to be intercepted. Suddenly on December 6, 2006, though, Durant was listed by name in a chart as being associated with certain telephone numbers that were involved with calls to and from target phone number 2 (Coleman). The affidavit merely alleges in general terms that the information set forth in the chart was gleaned from trap-and-trace information, public records, confidential informants, and so forth. However, as of December 6, 2006 the government had not even applied for subscriber information for Durant. It might be possible that Detective Thompson referred to some "public record" to determine the names associated with the numbers that were calling target telephone number two. This is doubtful, though, since cellular telephone numbers are not listed in any printed media of which this author is aware.

Any doubt, though, that the subscriber information cell tower location information was legally obtained is erased by Thompson's January 25, 2007 affidavit. In it, Thompson alleges that at ¶13, that, "[T]elephone records reveal that target telephone #5 is a Nextel cellular telephone subscribed to "Steve Wells" at 3437 W. Wells. St. and target telephone #6 is a Sprint cellular telephone subscribed to DURANT at 2210 N. 29th St., " At page 30 Thompson alleges that, "Telephone records (cell tower locations) indicate that target telephone #6 (DURANT) returned to Milwaukee on January 5, 2007 at 3:27 a.m." At page 34 the affidavit reads, "On January 18, 2007, at 11:07 a.m., target telephone #6 (DURANT) received a 36 second incoming call from 773-817-0174. Telephone records indicate that 773-817-0174 is subscribed to Robert HAMPTON at 13713 S. Stewart Ave., Riverdale, IL."

It is simply impossible that Thompson could have this information unless he was referring to subscriber information provided by the cellular telephone company. The government had no authorization to have this information on either January 5, 2007 (the date of the incident) or on January 25, 2007 (the date of the affidavit).

There is only one conclusion. Government agents somehow obtained, and were using, cellular telephone subscriber information and tracking information prior to obtaining court approval. One plausible explanation for this situation is that government agents made use of "national security letters" pursuant to 18 USCS § 2709.² The problem, of course, is that § 2709 prohibits disclosure of information obtained through the use of a NSL and the information can certainly not be used to bootstrap probable cause in a legitimate application for Title III authorization.

Conclusion

For these reasons it is respectfully requested that the court suppress all Title III evidence as to Patryce Pruitt.

Dated at Milwaukee, Wisconsin, this 29th day of December, 2007.

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633 W. Wisconsin Ave., Suite 1515
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414.224.9484

² § 2709. Counterintelligence access to telephone toll and transactional records

(a) Duty to provide. A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.