16-2575

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

***Plaintiff-Appellee*,**

v.

JIMMY RENEE CRUZ, JR.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REPLY BRIEF FOR DEFENDANT-APPELLANT JIMMY RENEE CRUZ, JR.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REITERATED REQUEST FOR ORAL ARGUMENT

In his principal brief, Mr. Cruz asked this Honorable Court to grant oral argument in this case. *See* 6 Cir. R. 28(b)(1)(B). Mr. Cruz now reiterates this request. The government has suggested that this case does not require oral argument. Document 16: Gov. Br., PageID 4. This case, however, involves significant issues of police conduct, public policy, and Fourth Amendment concerns. With oral argument, counsel could respond to questions from the Court that may arise based on the complicated factual record of this case. Counsel could also offer legal distinctions in response to any issues that arise for the Court based on case law the Court reviews.

ARGUMENT

I. Mr. Cruz preserved these issues for appeal and the plea agreement and docket do not indicate any hurdles to the Court's consideration of the suppression issues presented in Mr. Cruz's appeal. Mr. Cruz never stipulated that Sgt. Turner received a tip or communicated a tip to other officers.

The government makes certain assertions to argue that Mr. Cruz's appeal may not offer a record appropriate for a ruling in favor of remand on the suppression issue. The government argues that Mr. Cruz stipulated to certain statements in the plea agreement. Document 16: Gov. Br., PageID 7. The government does concede that Mr. Cruz disputed the veracity of Sgt. Turner's alleged tip. *Id.* (the government refers to "the officer" rather than Sgt. Turner).

The plea agreement in this case contained a section entitled "stipulations." *See* RE. 61: Plea Agreement, PageID 328. While this section listed a set of stipulated facts that would not require proof at the plea or sentencing hearings, this section specifically stated that Mr. Cruz disputed whether "the officer" had received information from a confidential informant regarding Mr. Cruz allegedly living in and selling drugs from a room in the Red Roof Inn. *Id.* Mr. Cruz has maintained his objections to the search warrant in this case throughout these proceedings. He has taken pains to repeatedly lodge his objections to the affidavit, warrant, and search. *See* RE. 22: First Motion to Suppress, PageID 42; RE.45: Restricted Access Motion to Reconsider, PageID 170-247; RE. 53: Restricted Access Supplement to

Motion to Reconsider, PageID 278-292. At no time has Mr. Cruz stipulated to Sgt. Turner actually receiving and communicating a tip. Mr. Cruz wishes to clarify this point in light of the government asserting that certain "facts were uncontroverted" in the plea agreement. *See* Document 16: Gov. Br., PageID 7.

The government also raises the issue of the district court striking record entry 24, Mr. Cruz's reply to the government's response to his initial motion to suppress. *See* Document 16: Gov. Br., PageID 9. The district court struck the brief after finding that it did not contribute to the court's decision on the initial motion to suppress. *See* RE. 54: Order Granting Gov. Motion to Place Reply Under Restricted Access, PageID 296. The title of the order, however, presents some confusion: the title to the order says that the order granted "the government's motion to place defendant's reply brief under restricted access." RE. 54: Order Granting Gov. Motion to Place Reply Under Restricted Access, PageID 293. The order thus leaves some question as to the actual fate of the reply brief docketed as record entry 24. The brief itself remains available on ECF.

The government argues that Mr. Cruz's allegations in support of his suppression issues and request for a hearing under *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), went unsupported. *See* Document 16: Gov. Br., PageID 9. This argument ignores Mr. Cruz's presentation of supporting documents from an investigator who interviewed Ms. Downey, the exotic dancer who had relationships with Mr. Cruz

and Sgt. Turner, and other people familiar with Sgt. Turner's personal pursuit of Mr. Cruz. *See* RE. 45: Restricted Access Motion to Reconsider, Attachments, PageID 170-247. The district court did not cite a lack of evidentiary support as a reason for denying Mr. Cruz's motion to reconsider the motion to suppress. *See* RE. 55: Order Denying Motion for Reconsideration, PageID 298-99.

Later in its brief, the government concedes that Mr. Cruz provided a transcript of a telephone interview of Ms. Downey by the investigator and an affidavit by a barber who had seen Sgt. Turner following Mr. Cruz. *See* Document 16: Gov. Br., PageID 10. Mr. Cruz provided the district court with sufficient materials to determine the appropriateness of conducting a *Franks* hearing. The Supreme Court has said that "[a]ffidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." *Franks*, 438 U.S. at 171. Mr. Cruz satisfied this requirement by providing the barber's affidavit and the "otherwise reliable" transcript of the investigator's interview with Ms. Downey. And had the district court conducted a *Franks* hearing, Mr. Cruz could and would have provided testimony.

To obtain a *Franks* hearing, a defendant need only make a substantial preliminary showing that a search-warrant affidavit contained a knowing or intentional false statement or material omission or such a statement or omission made with reckless disregard for the truth, and that the statement or omission

constituted a necessary brick in the wall of a probable-cause finding. *United States v. Pirosko*, 787 F.3d 358, 369 (6th Cir. 2015). Mr. Cruz provided materials to make such a substantial preliminary showing that the search-warrant affidavit contained a material omission or intentional false statement: Sgt. Turner did not receive a tip from a confidential informant and he had a motive to lie, and he did pursue a vendetta against Mr. Cruz.

Case law does not require any specific evidentiary materials to make this showing. As just discussed, "otherwise reliable statements" will suffice. *Franks*, 438 U.S. at 171. The government's arguments about Mr. Cruz not providing an affidavit himself or from Ms. Downey thus fail to advance the government's position. *See* Document 16: Gov. Br., PageID 10 n.2, 16, 18. As a defendant in the case, Mr. Cruz had ample reason to seek statements from others rather than offer an affidavit himself. *See, e.g.*, *United States v. Reddrick*, 90 F.3d 1276, 1283 (7th Cir. 1996) (noting potential for an obstruction-of-justice enhancement for defendants who testify at suppression hearings; regardless of a defendant's intent to tell the truth, they would not want to open themselves up to such an enhancement). Mr. Cruz provided sufficient grounds and evidence to warrant a *Franks* hearing and suppression of the evidence obtained based on the warrant in question.

II. Sgt. Turner's substantial role in the investigation and in the officers' securing of the warrant justified a *Franks* hearing and subsequent suppression of the evidence derived from the search.

The government makes arguments attempting to minimize Sgt. Turner's role in the investigation to try to distance Sgt. Turner from the search warrant. *See, e.g.*, Document 16: Gov. Br., PageID 9, 16, 18, 19. The government argues that Sgt. Turner "was not part of the arrest or search teams," did not prepare the search-warrant affidavit, and did not work the evening of the search. Document 16: Gov. Br., PageID 9. It also argues that the inquiry revolves around the truth of the affiant's statements, not the truth of any informant. Document 16: Gov. Br., PageID 16.

As Mr. Cruz has already explained, the affiant and other officers likely knew of the issues surrounding Sgt. Turner and Ms. Downey. *See, e.g.*, Document 15: Def./Appellant Br., PageID 38-39, 41. The government attempts to discount this potential knowledge. The government cites the district court's finding that no indications existed that the affiant knew of the love triangle between Mr. Cruz, Sgt. Turner, and Ms. Downey. Document 16: Gov. Br., PageID 18. The district court, however, made the finding the government cites before Mr. Cruz filed his motion to reconsider the suppression ruling and before he provided the extensive supporting materials he gave the court with that motion to reconsider. *Cf.* Document 16: Gov. Br., PageID 18 (citing record entry number 25; Mr. Cruz's motion to reconsider sits as record entry 45). The point remains: the police would not have looked for Mr.

Cruz at the Red Roof Inn, or sought and obtained a warrant for the room at the Red Roof Inn, but for Sgt. Turner's involvement in the investigation.

Circumstances point toward the affiant knowing of Sgt. Turner's volatile relationship with Ms. Downey. *See* Document 15: Def./Appellant Br., PageID 38-39, 41. Thus the government's argument that Sgt. Turner should not affect the warrant because he did not prepare the affidavit must fail. *See* Document 16: Gov. Br., PageID 18. Likewise, Sgt. Turner initiated the pursuit by allegedly seeing Mr. Cruz in a white Nissan Altima around 6:00 p.m., near the Red Roof Inn, on the day of the search. Document 15: Def./Appellant Br., PageID 11. So whether or not he was officially working, Sgt. Turner conversed with the search-warrant affiant regarding Mr. Cruz. As Mr. Cruz stated in his principal brief, the affidavit cites Sgt. Turner's alleged sighting of Mr. Cruz. Document 15: Def./Appellant Br., PageID 11.

Regarding the truthfulness of an alleged informant, Mr. Cruz has already briefed this issue. *See* Document 15: Def./Appellant Br., PageID 20-25. He will not belabor the arguments here. As Mr. Cruz has already explained, anonymous tips present serious concerns in the probable-cause context. *See* Document 15: Def./Appellant Br., PageID 24. The government is correct when it states that the *Franks* inquiry is distinct from the inquiry applicable to anonymous tips. *See*

Document 16: Gov. Br., PageID 16; *see also Franks*, 438 U.S. at 171. Such tips, however, must still stand up to scrutiny; the alleged tip here does not.

III. The civil cases Mr. Cruz cited in his principal brief provide instructive reasoning, even though they do not address the criminal suppression-of-evidence context.

The government suggests that cases Mr. Cruz cited in his principal brief are "inapposite." *See* Document 16: Gov. Br., at 17-18 n.3. These cases, however, offer illustrative reasoning. In *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1013 (6th Cir. 1999), the court confirmed that the police may not use their power to retaliate against unpopular people. The government here posits that "[t]he police did not seek to arrest Cruz because of his relationship with Ms. Downey, but because he was a wanted man engaged in continuing criminality." Document 16: Gov. Br., PageID 18. The government simply misses the mark: officers did not pursue Mr. Cruz because of outstanding warrants; they pursued him because of pressure and fabricated information from their colleague Sgt. Turner. The pursuit started when Sgt. Turner alleged seeing Mr. Cruz driving a white Nissan Altima on March 19, 2015. Document 15: Def./Appellant Br., PageID 11.

Contrary to the government's assertions, evidence does not indicate that authorities actively pursued Mr. Cruz or attempted to arrest him on the outstanding warrants until Sgt. Turner fabricated the tip against Mr. Cruz to retaliate because of Mr. Cruz's relationship with Ms. Downey, and until Sgt. Turner alleged seeing Mr.

Cruz in the Altima. *Cf.* Document 16: Gov. Br., PageID 22. Sgt. Turner initiated the pursuit and drove the investigation that culminated in the search.

IV. Mr. Cruz's sentence of 123 months qualifies as substantively unreasonable: it is longer than necessary to serve the purposes of sentencing in 18 U.S.C. § 3553(a) and the government's principal brief raises irrelevant and inappropriate factors for consideration.

In its answer brief, the government presents a list of factors related to substantively unreasonable sentences. *See* Document 16: Gov. Br., PageID 23. The government argues that a sentence is only substantively unreasonable if the sentencing court selected the sentence arbitrarily, based it on impermissible factors, failed to consider pertinent § 3553(a) factors, or gave an unreasonable amount of weight to any pertinent factor. Document 16: Gov. Br., PageID 23. The government emphasizes that the sentence here fell within the advisory guideline range. Document 16: Gov. Br., PageID 25.

The guidelines, however, do not constitute an overarching consideration: they simply constitute one factor among many for sentencing courts to consider. *United States v. Cabrera*, 811 F.3d 801, 813 (6th Cir. 2016). Within-guideline sentences may receive an appellate presumption of reasonableness, but the guidelines cannot override the other 18 U.S.C. § 3553(a) factors. *See id.* at 808, 813; *see also United States v. Erazo*, No. 10-5949, slip op. at 2 (6th Cir. Dec. 15, 2011) (unpublished) (the properly calculated guideline range is simply the starting point "because it is one of

the § 3553(a) factors"). The presumption of reasonableness applies only on appeal; it does not apply at sentencing, when a district court should reach its own determination regarding sentencing. *United States v. Wilms*, 495 F.3d 277, 281-82 (6th Cir. 2007). The government places too much emphasis on Mr. Cruz's sentence falling within the advisory guidelines.

A sentence may be substantively unreasonable simply because it is too long given the circumstances of a case and defendant. Courts consider the *length* of a sentence along with the procedures employed to reach that sentence when they review a sentence. *See Wilms*, 495 F.3d at 280. Ultimately, a sentence should be sufficient, but not greater than necessary, to serve the purposes of 18 U.S.C. § 3553(a)(2). *Id.* at 281; *see also* 18 U.S.C. § 3553(a).

In the context of the commonly-listed substantive-reasonableness factors the government cites, Mr. Cruz's sentence reflects a failure to consider fully the § 3553(a) factors and the potential state time in custody, and the district court's giving the guidelines an unreasonable amount of weight. *Cf.* Document 16: Gov. Br., PageID 23. As Mr. Cruz has already demonstrated in his principal brief, the circumstances of his case and his background justified a lower sentence. The drug quantity represented a wholesale value of probably less than a thousand dollars, a quantity that is not large or remarkable in the federal context. *See* RE. 77: Sent. Trans., PageID 459. Mr. Cruz will likely serve more than fourteen years given the

looming potential state time in custody. *See* RE. 66: Presentence Report, PageID 374, ¶ 60 (parole-revocation proceedings anticipated upon Mr. Cruz's release from federal custody).

The government impermissibly implies this Court should consider that Mr. Cruz has "fathered nine children by eight women (none of whom he married or supported)." Document 16: Gov. Br., PageID 24. This Court has called "irrelevant" the fact that a defendant has children born out of wedlock whom he or she does not support. *See United States v. Barahona-Montenegro*, 565 F.3d 980, 981, 985 (6th Cir. 2009). Such a factor cannot contribute to the sentencing considerations.

As Mr. Cruz explained in his principal brief, before this offense, his longest sentence came in 2008. RE. 66: Presentence Report, PageID 372, ¶ 52. He received a probation-revocation sentence of just under two years. *Id.* His sentence of one-to-forty years resulted in less than two years of custody. *Id.* The sentence in this instant case, a sentence exceeding ten years for twenty-nine grams of heroin for a defendant with a criminal history that has resulted in sentences of two year's custody as a maximum, simply represents punishment greater than necessary to serve the § 3553(a)(2) purposes.

Substantive reasonableness involves consideration of "the substantive aspect of the sentence (i.e., the relationship between the length of the sentence and the strength of the reasoning under [18] § 3553(a))." *Cabrera*, 811 F.3d at 808-09. In

Mr. Cruz's case, that relationship does not qualify as reasonable. His 123-month sentence is longer than necessary to serve the purposes of sentencing.

CONCLUSION

For these reasons and those presented in his principal brief, Mr. Jimmy Renee Cruz, Jr., asks this Court to reverse his conviction and remand this cause for withdrawal of his guilty plea and suppression of evidence, as contemplated in his conditional plea agreement, and/or vacate his sentence and remand his case for resentencing.

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Date: March 20, 2017

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CERTIFICATE OF COMPLIANCE

Scott Graham, counsel for Defendant/Appellant, certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). A word count was made using Word 2010, and the brief contains 2,627 words, excluding portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6).

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that he filed this appellate brief through the Court's CM/ECF electronic system on March 20, 2017. *See* Fed. R. App. P. 25(d)(1)(B); 6 Cir. R. 25(f)(2). Notice of this filing will be sent through the CM/ECF system to all parties indicated on the electronic filing receipt, namely Assistant United States Attorney Mark V. Courtade. Parties may access this filing through the CM/ECF system.

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APPELLANT'S DESIGNATION OF RECORD

No further designation of record is necessary. Under Sixth Circuit Rule 30(g)(1), principal briefs must designate certain documents in the record. Mr. Cruz's principal brief contains this designation; his reply brief needs no further designation of the record.