

U.S. v. Flores

(9th Cir. 2015) 802 F.3d 1028

Issue

Was the information in a search warrant affidavit “stale”?

Facts

Citlalli Flores was arrested at the U.S.-Mexico border near Tijuana when a Customs and Border Patrol officer found 36 pounds of marijuana hidden in a rear section of her car. Shortly after she was booked into jail, Flores phoned her cousin and instructed him to purge her Facebook account. The call was recorded and officers used the recording to obtain a warrant to search Flores’s Facebook account for messages pertaining to a drug conspiracy and the “importation of a controlled substance.” For reasons that were not explained, there was almost a four month delay between the phone call and the application for the search warrant. The warrant was, however, issued.

In complying with the warrant, Facebook provided the officers with 11,000 pages of data, although only about 100 pages were relevant to drug conspiracies and the importation of drugs. When officers realized that approximately 10,900 pages should not have been released to them, they sealed those pages in an evidence bag which they could not access without a new warrant. The bag was apparently never opened.

Flores filed a motion to suppress the incriminating evidence on grounds that the warrant was based on “stale” information and that it was overbroad. The motion was denied and she was convicted. She appealed the suppression ruling to the Ninth Circuit.

Discussion

To establish probable cause for a warrant, officers must not only prove that the evidence they are seeking was taken to or produced at the place they want to search, but that there is a fair probability that it is still there.¹ In most cases, it is sufficient that the affidavit consisted of “fresh” information, meaning information pertaining to acts, conditions, or circumstances that existed or occurred so recently that it was likely that no material change in the existence and location of the evidence had taken place. The issue in Flores was whether the information was “stale”. Flores argued it was, that the affidavit failed to establish probable cause that the Facebook records still existed and were still in the possession of Facebook.

Although the time lapse is highly relevant in determining the staleness of information, there are some other relevant circumstances. As the First Circuit observed, “When evaluating a claim of staleness, we do not measure the timeliness of information simply by counting the number of days that have elapsed. Instead, we must assess the nature of the information, the nature and characteristics of the suspected criminal activity, and the likely endurance of the information.”² For example, some types of evidence will ordinarily remain in one place for weeks, months, and even years; while other types will normally be gone in a matter of hours. Two good examples of this were provided by the Maryland Court of Appeals:

¹ See *People v. Cooks* (1983) 141 Cal.App.3d 224, 298 “[A]n affidavit in support of a search warrant must provide probable cause to believe the material to be seized is still on the premises to be searched when the warrant is sought.”]

² *U.S. v. Morales-Aldahondo* (1st. Cir. 2008) 524 F.3d 115, 119.

The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later.³

The question, then, was whether it was reasonable to believe that Flores's Facebook data was still stored in Facebook's computers. The answer, said the court, was yes; and that is because business data that is stored electronically is usually kept for relatively long periods of time. This was also the opinion of the Seventh Circuit which pointed out that "the persistence of digital storage, noting that in only the 'exceptional case' will a delay between the electronic transfer of an image and a search of the computer destroy probable cause to believe that a search of the computer will turn up the evidence sought."⁴

Although it would ordinarily be reasonable to believe that Flores's Facebook records would be retained for at least four months after she was arrested, Flores instructed her cousin to purge her Facebook account. Did this matter? No, said the court, because "[i]n this day and age, even persons with minimal technological savvy are aware that data is frequently preserved and recovered after deletion from an electronic device, particularly when a third party like Facebook is involved." Accordingly the court ruled that, "even if the agents were less likely to find evidence of drug smuggling in Flores's account [when the warrant was issued] than [when Flores was arrested], a fair probability of finding such evidence remained when the warrant issued." POV

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³ *Andresen v. State* (Md. App. 1975) 24 Md. App. 128, 172.

⁴ *U.S. v. Valley* (7C 2014) 755 F.3d 581, 586.