

Tentative Minute Order re Pretrial Motions

Defendant Andres Burgara (“Burgara”) brings three pretrial motions. The Court now enters its rulings.

I. Motion to Compel Discovery.¹

Burgara moves to compel discovery in eleven categories. (Docket No. 37.) The Government has filed an opposition. (Docket No. 42.) Burgara has not replied.

Three categories, 8 through 11, relate to documents which the Government has already produced or will produce. (Opposition, p. 6.)

The balance of the requests relate to confidential informants (“CIs”). The Government represents that no CI will testify at trial. (Id., p. 2.) No CI participated in the stop which led to Burgara’s arrest, nor did any CI participate in any of the subsequent searches. (Id.)

The Government has a privilege to withhold information concerning CIs. Roviaro v. United States, 353 U.S. 53, 59 (1957). The defendant bears the burden of overcoming that privilege, and must come forward with a showing that such evidence is relevant and helpful to the defense and essential for a fair determination. United States v. Wong, 886 F.2d 252, 256, 257 (1989).

The Court looks to the following factors: “(1) the degree of the informant’s involvement in the criminal activity; (2) the relationship between the defendant’s asserted defense and the likely testimony of the informant; and (3) the government’s interest in nondisclosure.” United States v. Gonzalo-Beltran, 915 F.2d 481, 489 (9th Cir. 1990). Given that no CI will not testify, the first two

¹The Court notes that Burgara failed to meet and confer prior to filing the Motion. (Local Rule 7-3, adopted by Local Criminal Rule 57-1.) This is a sufficient basis to decline to hear the Motion.

factors disfavor any waiver of the privilege. The third factor—the Government’s interest in protecting the safety of the CI—strongly disfavors any waiver.

Having balanced all the factors, the Court finds no basis to compel the information concerning the CI. The Motion is denied.²

II. Motion to Suppress Wiretap and Resulting Fruits.

Burgara moves to suppress the wire tap in this case and any resulting fruits. (Docket No. 38.) The Government has filed an opposition. (Docket No.41.) Burgara has not replied.

The thrust of the Motion is that the wiretaps and GPS tracking data obtained during the course of Government’s investigation were obtained with constitutionally insufficient showings, and that the subsequent stop and arrest of Burgara on March 18, 2018 and all subsequent statements by Burgara and the result of post arrest searches should be suppressed. The Motion must be denied for several reasons.

First, while the Government does not concede any legal defect in securing the warrants, the Government will not offer evidence obtained through the wiretaps or GPS tracking at trial. (Opposition, p. 5.) This portion of the Motion is denied as moot.

Second, the lawfulness of Burgara’s stop is unaffected by any tainted prior discovery. Wren v. United States, 517 U.S. 806, 813 (1996) (“We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”). Rather, it turns on the objective reasonableness of the stop. (Id.) The subjective intent of the officers is irrelevant, even if that subjective intent is influenced by prior constitutionally deficient activities. United States v. Ibarra, 345 F.3d 711, 713-14 (9th Cir. 2003); see United States v. Magallon-Lopez, 817 F.3d 671, 675 (9th Cir. 2016) (The standard for determining whether probable cause or reasonable suspicion exists is an objective one; it does not turn either on the

²There is no basis for claiming production on the ground that the CI’s name has been disclosed. (Opposition, p. 11.)

subjective thought processes of the officer or on whether the officer is truthful about the reason for the stop.”). In short, Burgara’s “parallel construction” theory has been rejected by both the United States Supreme Court and the Ninth Circuit.

Whether the stop was constitutionally valid is the focus of a separate motion which will entail an evidentiary hearing. (See Docket 24.) For present purposes, the Court denies the Motion without prejudice as duplicative of the earlier motion.

III. Motion to Suppress Stop and Resulting Statements and Searches.

Burgara contests the constitutionality of the March 18, 2018 stop and all subsequent statements and searches for which the Government claims consent. (Docket No. 24.) The Government has filed an opposition. (Docket No. 33.) Burgara has not replied.

The Court acknowledges the legal principles which the parties discuss in their briefs. The Court will enter its final ruling based on the results of the evidentiary hearing.