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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF SAN MATEO

13)
14 THE PEOPLE OF THE STATE OF)
CALIFORNIA,)

15 Plaintiff,)

16 vs.)

17)
18 [REDACTED])

19 Defendant.)
20)

21)
22)
23)
24)
25)
26)
27)
28)
**REPLY IN SUPPORT OF MOTION TO
SUPPRESS EVIDENCE AND TO
TRAVERSE AND TO QUASH SEARCH
WARRANT**

DATE: February 18, 2009
TIME: 10:00 a.m.
PLACE: 2A

1 **I. THERE WAS NO PROBABLE CAUSE TO ARREST [REDACTED]**

2 A prerequisite to an inventory search or search incident to arrest is that probable cause
3 existed to make the arrest in the first place. Here, probable cause did not exist to arrest [REDACTED]
4 such that the later searches of his iPhone and car were unconstitutional under the Fourth
5 Amendment. [REDACTED] provided the clerk his valid Arizona ID with his name on it, a copy of
6 [REDACTED] tax ID number, the company's articles of incorporation, and sent an email
7 to the Sprint store from his business account. ([REDACTED] Decl. ¶ 4; Ex. A.)

8 Regardless, the police arrested [REDACTED] without any investigational questioning. One of
9 the stated bases for probable cause was that [REDACTED] was "providing false financial statements."
10 (Garteiser Decl., Ex. B – Arrest Probable Cause Determination.) However, the documents [REDACTED]
11 [REDACTED] had in his hands were actual (not fraudulent) financial statements for [REDACTED]
12 ([REDACTED] Decl., ¶¶ 4,5, Ex. 2 at 4.) The validity of the arrest depends upon [REDACTED] providing
13 some false information to Sprint, but the documents he had with him to present to the Sprint clerk
14 were accurate. Accordingly, no probable cause existed to arrest [REDACTED] and evidence from the
15 subsequent search of his iPhone and his car should be suppressed.

16
17 **II. THE WARRANTLESS INVESTIGATORY SEARCH OF [REDACTED] CAR
18 WAS UNCONSTITUTIONAL.**

19 The prosecutor agrees [REDACTED] has standing to challenge the search of his car.
20 (Opposition at 6.) An inventory search is constitutionally unreasonable when used as a ruse to
21 conduct an investigatory search. (*Colorado v. Bertine* (1986) 479 U.S. 367, 371-372; *People v.*
22 *Steeley* (1989) 210 Cal.App.3d 887, 891-892.) The prosecutor relies on 'community caretaking
23 function' to impound the car. The prosecutor ignores the rule of law set out in *People v. Williams*,
24 which states whether impoundment is warranted under the community caretaking doctrine
25 "'depends on the location of the vehicle and the police officers' duty to prevent it from creating a
26 hazard to other drivers or being a target for vandalism or theft.'" (*People v. Williams, supra*, 145
27 Cal.App.4th at 761.) Here, there was no hazard to other drivers as the car was properly parked in a
28 strip mall shopping center. There was no evidence presented by the prosecutor that either

1 vandalism or theft were concerns of the arresting officer. The arrest occurred in the early afternoon.
2 The prosecutor argues that the private parking lot is for customers of the Sprint PCS store and after
3 [REDACTED] was arrested he was no longer a customer. (Opposition at 6.) The prosecutor has not
4 provided the Court with any law or evidence in support of his position. (*Id.* at 6-7.)

5 “[A]n inventory search must not be a ruse for a general rummaging in order to discover
6 incriminating evidence.” (*Florida v. Wells*, 495 U.S. 1, 4 (1990); *People v. Needham* (2000) 79
7 Cal.App.4th 260, 266.) Where there is no standardized criteria or established routine, an inventory
8 search is “not sufficiently regulated to satisfy the Fourth Amendment.” (*Florida v. Wells, supra*,
9 495 U.S. at 4; *People v. Williams* (1999) 20 Cal.4th 119, 126.) The prosecutor fails to explain the
10 fact that the officer decided to have the vehicle towed only after [REDACTED] refused to let the officer
11 search his car without a warrant. This fact supports a finding that the impoundment was just a ruse
12 to conduct an investigative search of the car.

13
14 Nor did officers have the car towed to the police impound yard. The car was available for
15 pick up from the tow truck lot as soon as it got there. It was never delivered to any police impound
16 facility for safekeeping. (Garteiser Decl., ¶9.) The prosecutor offers the explanation that the
17 “Defendant had no companions to take possession of the car.” However, the owner of the
18 automobile ([REDACTED] girlfriend) was available and could have picked up the vehicle. She was
19 readily reachable. An officer called [REDACTED] girlfriend and told her where to retrieve from the
20 car after [REDACTED] was transported from the Sprint store to the prisoner processing center. She
21 could have picked the vehicle up from the strip mall parking lot and not had to pay over \$360 to a
22 private towing company to get her car back.

23 The officer did not conduct the inventory search according to “standardized criteria” or
24 “established routine” based on some standard other than suspected criminal activity. No inventory
25 list exists from the alleged inventory search. As pointed out in the Motion, the completed CHP 180
26 Form does not contain a property list whatsoever. (Motion at 7; Garteiser Decl., Ex. E – Completed
27 CHP 180 Form.) The officer did not need to read any documents in the car in order to protect [REDACTED]

1 [REDACTED] property or safeguard the police from danger. Accordingly, the search of the car without a
2 warrant was unconstitutional and evidence obtained pursuant to that search must be suppressed.

3 (*Murray v. U.S.* (1988) 487 U.S 533; *Wong v. U.S.* (1963) 371 U.S 471, 485-486.)

4 **III. THE WARRANTLESS SEARCH OF [REDACTED] IPHONE WAS**
5 **UNCONSTITUTIONAL.**

6 As the Supreme Court made clear in *Arizona v. Gant*, the search incident to arrest exception
7 does not permit a warrantless search when an arrestee is not within reaching distance of the item,
8 container or area at the time of the search. ((2009) 129 S. Ct. 1710, 1719.) “If there is no
9 possibility that an arrestee could reach into the area that law enforcement officers seek to search . . . the
10 [exception] does not apply.” (*Id.* at 1716.)¹ The rule is clear: while a search incident to arrest may
11 be for evidence of the crime, it must be closely tied in time, place, and scope to the offense of arrest.
12 (*Id.* at 1719.) If the defendant is no longer in reaching distance of the item, police may not search it
13 incident to arrest. The case the prosecutor cites to the contrary, *People v. Rege* (2005) 130
14 Cal.App.4th 1584, relies heavily on its interpretation of *New York v. Belton* (1981) 453 U.S. 454.
15 But *Belton* has been strictly narrowed by *Gant* and to the extent that either *Belton* or *Rege* suggest
16 that search incident to arrest applies after the defendant is immobilized, those cases have been
17 overruled.

18 Here, [REDACTED] was in custody at the police station when Detective Bocci searched the
19 iPhone on the evening following the arrest. (Garteiser Decl., ¶ 11.) There was no possibility that
20 [REDACTED] could access the iPhone under these circumstances, so the exception to the warrant
21 requirement does not apply. Indeed, courts throughout the country have found that the search
22 incident to arrest exception does not permit the warrantless search of a cell phone at the police
23 station hours after arrest.²

24
25 ¹ *Gant* also found that “circumstances unique to the vehicle context justify a search incident to a
26 lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found
27 in the vehicle.” (*Id.* at 1719 (internal quotation marks omitted.)) Because this is not a case involving
a search of a vehicle, this extension of the doctrine does not apply here.

28 ² (See, e.g., *U.S. v. Park* (N.D. Cal. May 23, 2007) 2007 WL 1521573 (unpublished) (warrantless
search of cell phones at police station an hour and a half after arrest not incident to arrest); *U.S. v.*

1 Furthermore, the police may not use the time- and space-delineated search incident to arrest
2 as an exploratory rummaging for evidence. “The principal evil sought to be forestalled, of course,
3 is the invasion of individual privacy by wholesale exploratory searches conducted under color of
4 governmental authority.” (*People v. Superior Court (Keifer)* 3 Cal.3d 807, 813-41 (1970) (citations
5 omitted)). For this reason, “[t]he scope of the search must be strictly tied to and justified by the
6 circumstances” of the arrest. (*Id.* (internal quotation marks omitted.))

7
8 The prosecutor relies on *Keifer* to argue that police officers may conduct a search incident to
9 arrest “for instrumentalities used to commit the offence.” (*See* Opposition at 8-9.) This reliance is
10 misplaced. In *Keifer*, the Court invalidated a search of a car after the occupants had been arrested
11 following a traffic violation. (*Id.* at 812-13.) Rather than finding that *any* evidentiary search is
12 proper incident to arrest, *Keifer* sets forth an additional ground on which to invalidate a search made
13 at the time of arrest: that the scope of the search extended beyond that justified by the offense. (*Id.*
14 at 813 (while the vehicle was the “instrumentality” used to commit the traffic violation, the police
15 could not justify a search the vehicle’s interior incident to arrest.)) Here, not only was the
16 warrantless search of [REDACTED] iPhone improper because it occurred long after and far from the
17 scene of arrest, but also because the police had no cause to believe that any information relevant to
18 [REDACTED] effort to purchase Blackberry phones would be found on his iPhone. Thus, all
19 evidence seized from the device should be suppressed.

20 **IV. THE WARRANTLESS SEARCH OF [REDACTED] IPHONE VIOLATED THE**
21 **STORED COMMUNICATIONS ACT.**

22 The prosecutor contends that the Stored Communications Act is inapplicable here because
23 “nowhere is there any information that the iPhone was locked or otherwise password protected.”

24
25 *Lasalle* (D. Haw. May 9, 2007) 2007 WL 1390820, at *7 (unpublished) (warrantless search of cell
26 phone a few hours after arrest during booking not incident to arrest); *U.S. v. Wall* (S.D. Fla. Dec.
27 22, 2008) 2008 WL 5381412, at * 3 (warrantless search of cell phone during booking not incident to
28 arrest); *U.S. v. Yockey* (N.D. Iowa Aug. 3, 2009) 2009 WL 2400973, at *5 (unpublished)
(warrantless search of cell phone after suspect had been taken into custody and booked not incident
to arrest); *State v. Smith* (Ohio 2009) 2009 Ohio 6426, P24 (police may not search a cell phone’s
contents incident to a lawful arrest without first obtaining a warrant.)

1 (Opposition at 9.) As [REDACTED] declaration makes clear, however, his iPhone was indeed
2 password protected, as was his email account. ([REDACTED] Decl., ¶ 8.) [REDACTED] did not consent to
3 have his iPhone searched, and Detective Bocci was not authorized to access the remote server on
4 which [REDACTED] email was stored. ([REDACTED] Decl., ¶ 8.) If he accessed [REDACTED] email without
5 [REDACTED] authorization, Detective Bocci violated 18 U.S.C. § 2701(a)'s prohibition against
6 "intentionally access[ing] without authorization a facility through which an electronic
7 communication service is provided" and "thereby obtain[ing] . . . access to a wire or electronic
8 communication while it is in electronic storage in such system." (18 U.S.C. § 2701(a).) The
9 prosecutor has neither asserted that [REDACTED] stored emails were not accessed, nor offered any
10 evidence to show that Detective Bocci's access was authorized.

11 V. INSUFFICIENCY OF THE WARRANT

12 When excised of improperly seized information, the affidavit in support of the search
13 warrant fails to establish any nexus between the offense conduct and [REDACTED] iPhone. Without
14 the officer's exploratory rummaging, there is simply no information in the affidavit that provides
15 probable cause to believe that [REDACTED] phone contained any evidence about the Blackberry
16 purchase effort. The prosecutor can point only to boilerplate language included in the affidavit at
17 pages 8 and 9. But that language fails to connect [REDACTED] iPhone to this or any other offense. It
18 is merely the usual verbiage included in search warrant applications for phones. What is lacking is
19 a reason to believe that [REDACTED] used his phone in any way connected to the alleged scheme such
20 that one could reasonably believe that relevant evidence would be found on the device. Without
21 that connection, the affidavit is insufficient and the subsequent warrant must be quashed.

22 CONCLUSION

23 For the reasons stated here and in the Motion, all evidence obtained from the car and the
24 iPhone must be suppressed. Furthermore, the warrant should be quashed, and any evidence
25 obtained pursuant to it suppressed.
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DATED: February 16, 2010

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