NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DAVID MARTIN, Plaintiff - Appellant, v. COUNTY OF SAN DIEGO; SAN DIEGO COUNTY SHERIFF'S DEPARTMENT ROLAND MAUS, Detective; ELIZABETH SILVA, Deputy District Attorney, aka D. Elisabeth Silva; WILLIAM A. PHILLIPS ANDY'S ORCHIDS, Defendants - Appellees.	No. 06-56537 D.C. No. CV-03-01788-IEG MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, Chief District Judge, Presiding

Argued and Submitted April 9, 2008
Pasadena, California

Before: PREGERSON, D.W. NELSON and FERNANDEZ, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

David Martin ("Martin"), a doctoral candidate in zoology and former cooperating individual working with the United States Fish and Wildlife Service, appeals a district court order granting Appellees' motion for summary judgment. The parties are familiar with the facts of the case, which we repeat only to the extent necessary to explain our decision. We have jurisdiction under 28 U.S.C. § 1291. We reverse in part, affirm in part, and remand.

"We review a grant of denial of summary judgment de novo." *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). Whether omissions or misstatements in an affidavit are material is a mixed question of law and fact, which we review de novo. *United States v. Elliot*, 322 F.3d 710, 714 (9th Cir. 2003). We also review de novo whether a corrected affidavit is sufficient to establish probable cause. *Id*.

Though an affiant need not include all information, an omission is material if the omitted information would have led a magistrate or judge to refuse to issue a warrant. *Lombardi v. City of El Cajon*, 117 F3d 1117, 1124 (9th Cir. 1997). Here, Detective Roland Maus ("Detective Maus") omitted several pieces of information

that could have swayed the magistrate's decision. Martin told Detective Maus that Andy Phillips ("Phillips"), the alleged burglary victim who identified Martin as the culprit, was a suspect[1] in Martin's Fish and Wildlife investigation of orchid smuggling. Before Detective Maus presented the warrant affidavit, federal agents confirmed that Phillips was indeed a subject of investigation, and told Detective Maus that they had full faith in Martin's credibility and honesty. Detective Maus omitted all of this material information from the warrant affidavit.

Nor did Detective Maus disclose that Martin possessed potentially exculpatory phone records placing him 190 miles from the scene of the crime on the morning of the burglary. These records might well have affected the magistrate's decision to issue the search warrant. As such, Detective Maus should not have omitted this information from the affidavit.

Phillips also reported that he wounded the burglar during the attempted break-in at his nursery. Phillips told Detective Maus that he bit the burglar's hand and hit the burglar numerous times in the head and face with a piece of wood, drawing significant amounts of blood and knocking the burglar briefly unconscious. One would expect that the burglar would have displayed signs of

[1] It appears that Martin misspoke during the tense telephone exchange with Detective Maus, which ended on a hostile note. Phillips was actually a "subject" of investigation, not a "suspect."

these serious wounds to the head, face, and hand. Federal agents informed Detective Maus, before he filed his affidavit, that Martin displayed no visible signs of injury one week after the burglary took place. Detective Maus never disclosed this material information in his warrant affidavit.

Having determined that omissions from the warrant affidavit were material, we must now determine whether an affidavit including the improperly omitted material would still establish probable cause. *Elliot*, 322 F.3d at 714; *United States v. Ippolito*, 774 F.2d 1482, 1487 n. 1 (9th Cir. 1985). The probable cause inquiry requires a totality of the circumstances approach. *Illinois v. Gates*, 462 U.S. 213, 230 (1983). Martin's refusal on privacy grounds to voluntarily provide DNA is of no import.[2] *Graves v. City of Coeur D'Alene*, 339 F.3d 828, 842 (9th Cir. 2003) ("[R]efus[al] to consent to search cannot be used to establish probable cause"). Phillips did identify Martin in a photo lineup, and Martin did know the location of Phillips's nursery. Phillips, however, had admittedly seen Martin before at various orchid shows. Martin's knowledge of Phillips's location is hardly surprising considering Martin's role as a cooperating individual in a Fish and Wildlife investigation of Phillips.

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[2] As a matter of interest, Martin's blood was drawn, pursuant to the search warrant. Martin's DNA did not match the DNA obtained at the scene of the crime.

Phillips accused the very person who happened to be covertly investigating him for orchid smuggling. Martin offered evidence that he was nowhere near the scene of the crime on the morning of the burglary. Martin had the full confidence of federal agents, and displayed no signs of the multiple injuries that the true burglar would have displayed. Under the totality of the circumstances, the corrected affidavit here would not have established probable cause.

We therefore AFFIRM in part, REVERSE in part, and REMAND for further proceedings consistent with this disposition.[3] Martin shall recover his costs on appeal.

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[3] We affirm, however, the district court's conclusion that California Penal Code § 1536 establishes exclusive jurisdiction over Martin's DNA request in the state court.

We also affirm the district court's grant of summary judgment with respect to Deputy District Attorney Elisabeth Silva. Silva did not sign the warrant, and therefore did not seek it.

We also conclude that the district court for the Central District of California did not abuse its discretion by transferring Martin's case to the Southern District of California on forum non conveniens grounds. *See Creative Tech., Ltd. v. Aztech Sys. Pte. Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995)