

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2014

5
6 (Argued: February 2, 2015 Decided: September 29, 2015)

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8 Docket No. 14-338-cr
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10 _____
11 UNITED STATES OF AMERICA,
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13
14 *Appellee,*
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16 v.
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18 DAVID LEVY,
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20 *Defendant-Appellant.**
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22 _____
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24 Before:

25 HALL and LOHIER, *Circuit Judges*, and MEYER, *District Judge*.**
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28 A United States Customs officer at Miami International Airport
29 examined and photocopied a hardcopy notebook belonging to defendant-
30 appellant David Levy, who had arrived at the airport from a trip abroad.

* Although the initial caption on appeal identified the Government as an
“Appellee-Cross-Appellant,” the Government is not pursuing a cross-
appeal. The Clerk of Court is therefore respectfully requested to amend
the case caption as set forth above.

** The Honorable Jeffrey Alker Meyer of the United States District Court for
the District of Connecticut, sitting by designation.

1 Before trial, Levy moved to suppress the photocopy of the notebook. The
2 United States District Court for the Southern District of New York (Crotty,
3 J.) denied the motion on the ground that the officer's search, though not
4 routine, was based on reasonable suspicion of Levy's participation in
5 criminal activity. Because the District Court properly denied the motion to
6 suppress, we affirm.

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8 MARC FERNICH, Law Office of Marc Fernich, *for*
9 *Defendant-Appellant*.

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11 HOWARD S. MASTER (Carrie H. Cohen, Brian A.
12 Jacobs, *on the brief*), *for* Preet Bharara, United
13 States Attorney for the Southern District of New
14 York, New York, NY, *for Appellee*.

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16 LOHIER, *Circuit Judge*:

17 The principal question presented is whether United States Customs
18 officers at an international airport may lawfully and without a warrant
19 examine and photocopy a document that belongs to a traveler entering the
20 United States if the officers have reasonable suspicion on the basis of
21 information supplied from another federal agency that the traveler is
22 engaged in criminal activity unrelated to contraband, customs duties,
23 immigration, or terrorism. We hold that such a search is lawful under the
24 border search doctrine and that the District Court properly denied the
25 defendant's motion to suppress. We therefore affirm.

26 We dispose of Levy's remaining claims on appeal in a separate
27 summary order filed simultaneously with this opinion.

BACKGROUND

On December 17, 2011, following a business trip to Panama, David Levy returned to the Miami International Airport to face criminal charges that he expected would be leveled against him.¹ By then, Levy was the target of a criminal investigation into a series of stock manipulation schemes that nearly a year earlier had resulted in the indictment of Levy's wife. At the airport, United States Customs and Border Protection (CBP) officers detained Levy and escorted him to a holding area without interrogating him. The officers apparently had received information about the investigation of Levy from a Drug Enforcement Administration (DEA) task force,² which for reasons not relevant to this appeal was primarily responsible for looking into Levy's role in the manipulation schemes. Outside of Levy's presence, the officers inspected Levy's luggage, focusing on a spiral-bound notebook that contained eighteen pages of Levy's handwritten notes on various subjects, including travel information,

¹ Levy's lawyer had previously contacted federal prosecutors to discuss the potential charges against Levy.

² Although the task force appears to have been under the control of the DEA, it included agents with the Bureau of Immigration and Customs Enforcement.

1 business contacts, bank and trading account data, and limited details of
2 Levy's personal affairs. One of the CBP officers examined and
3 photocopied the notebook. After about two hours, the CBP officers
4 returned the original notebook and other items to Levy, who was still in
5 the holding area, and allowed him to leave the airport.

6 Less than seventy-two hours later, on December 20, 2011, Levy was
7 indicted on charges of securities fraud and conspiracy to commit securities
8 fraud and wire fraud. In a superseding indictment filed June 28, 2012,
9 Levy was also charged with conspiracy to commit money laundering, as
10 well as other crimes in which the Government claimed he was engaged at
11 the time Levy's notebook was examined and photocopied. All of the
12 charges arose from Levy's participation in the stock manipulation
13 schemes.

14 Before trial, Levy moved to suppress the photocopy of the notebook
15 that the CBP officer had inspected. The District Court denied the motion
16 under the border search doctrine. As relevant here, the District Court
17 agreed with Levy that the search of the notebook was a "non-routine"
18 border search because "[t]he close reading and photocopying of an

1 entrant's documents goes beyond the general searching one expects at a
2 point of entry" and may "intrude greatly on a person's privacy." United
3 States v. Levy, No. 11-cr-62-PAC, 2013 WL 664712, at *6, *12 (S.D.N.Y. Feb.
4 25, 2013). But it held that the search was still justified under the Fourth
5 Amendment because the CBP officers reasonably suspected that Levy was
6 "engaged in a stock fraud conspiracy." Id. at *12.

7 In denying the motion, the District Court also rejected Levy's
8 argument that CBP officers could not search material unless it related to a
9 crime that CBP is authorized by regulation to investigate – that is, a crime
10 relating to contraband or dutiable merchandise. To the contrary, the
11 District Court determined, none of the cases upon which Levy relied in
12 advancing this argument "limit[ed] the crimes for which customs agents
13 may conduct non-routine searches if they have a reasonable suspicion."
14 Id.

15 At trial, the parties stipulated that a photocopy of the notebook
16 could be introduced as evidence. The Government relied on the evidence
17 with some effect. Among other things, it used the names listed in the
18 notebook to tie Levy both to various illegal trades and to certain

1 unindicted co-conspirators who participated in the securities fraud
2 schemes. The Government also referred to the notebook in closing
3 argument, pointing out that Levy's forgery of certain relevant documents
4 could be proven by the handwriting in the notebook.

5 Levy was convicted of all the counts against him and sentenced
6 principally to a term of 108 months' imprisonment. This appeal followed.

7 **DISCUSSION**

8 In evaluating the denial of a motion to suppress evidence, we review
9 the district court's factual findings for clear error and its conclusions of law
10 de novo. United States v. Foreste, 780 F.3d 518, 523 n.3 (2d Cir. 2015).

11 When the evidence at issue derives from a border search, we recognize the
12 Federal Government's broad plenary powers to conduct so-called
13 "routine" searches at the border even without "reasonable suspicion that
14 the prospective entrant has committed a crime." Tabbaa v. Chertoff, 509
15 F.3d 89, 97-98 (2d Cir. 2007); see United States v. Montoya de Hernandez,
16 473 U.S. 531, 538 (1985) ("Routine searches of the persons and effects of
17 entrants are not subject to any requirement of reasonable suspicion,
18 probable cause, or warrant . . ."). It is well established that the Customs

1 area of an international airport is the functional equivalent of a border for
2 purposes of the border search doctrine. See, e.g., United States v. Irving,
3 452 F.3d 110, 123 (2d Cir. 2006).

4 Had the CBP officer merely skimmed the notebook and returned it
5 to Levy without copying it, we have no doubt that the inspection would
6 have been routine. Cf. United States v. Arnold, 533 F.3d 1003, 1009 (9th
7 Cir. 2008) (holding border search of an electronic device permissible even
8 without reasonable suspicion where “CBP officers simply had [the
9 traveler] boot [the laptop] up, and looked at what [he] had inside”).

10 Whether searching and copying the notebook here constitutes a “routine”
11 border search that could be conducted without reasonable suspicion is
12 somewhat more debatable.³ But for now we avoid resolving that question

³ We question whether a Customs official’s inspection, copying, and subsequent return of a document in a traveler’s luggage at the border can be so “intrusive” that it becomes a “non-routine” search requiring reasonable suspicion. Like the Supreme Court, see United States v. Flores-Montano, 541 U.S. 149, 152 (2004), we have suggested that the label “non-routine” should generally be reserved for intrusive border searches of the person (such as body-cavity searches or strip searches), not belongings, see United States v. Charleus, 871 F.2d 265, 267 (2d Cir. 1989); see also United States v. Irving, 452 F.3d 110, 123-24 (2d Cir. 2006) (explaining that routine searches may include searches of a person’s luggage, personal belongings, outer clothing, and the contents of a purse, pockets, and shoes, but

1 because the record of the Government’s criminal investigation of Levy
2 prior to the inspection of his notebook supports the District Court’s ruling
3 that the inspection was justified by reasonable suspicion.

4 The Supreme Court has instructed that “the level of suspicion the
5 [reasonable suspicion] standard requires is considerably less than proof of
6 wrongdoing by a preponderance of the evidence, and obviously less than
7 is necessary for probable cause.” Navarette v. California, 134 S. Ct. 1683,
8 1687 (2014) (quotation marks omitted). Reasonable suspicion requires only
9 “a particularized and objective basis for suspecting the particular person
10 stopped of criminal activity.” Id. (quotation marks omitted).

11 The CBP officer had such a basis in this case. Although Levy
12 disputes this conclusion, a review of the allegations in the initial
13 underlying indictment against Levy (filed within days of the search) and
14 the allegations in the subsequent, superseding indictment confirm that the
15 search was justified by the CBP officer’s reasonable suspicion of Levy’s

declining to decide whether searches of computer diskettes found within
luggage were routine or non-routine); United States v. Grotke, 702 F.2d 49,
51-52 (2d Cir. 1983) (routine search includes search of luggage and
personal belongings, among other items).

1 ongoing criminal participation in securities fraud schemes. In fact, the
2 level of suspicion was so high that Levy himself was aware of his status as
3 a target of an ongoing federal investigation even prior to arriving at the
4 airport, and his lawyer previously had contacted federal prosecutors about
5 the investigation.

6 We also conclude that the CBP officer was entitled to rely on
7 information provided by the DEA task force to justify the border search in
8 this case. Official interagency collaboration, even (and perhaps especially)
9 at the border, is to be commended, not condemned. Whether a Customs
10 official's reasonable suspicion arises entirely from her own investigation or
11 is prompted by another federal agency is irrelevant to the validity of a
12 border search, which we have held "does not depend on whether it is
13 prompted by a criminal investigative motive." United States v. Irving, 452
14 F.3d 110, 123 (2d Cir. 2006); see United States v. Schoor, 597 F.2d 1303, 1306
15 (9th Cir. 1979) (Kennedy, L.) ("That the search was made at the request of
16 the DEA officers does not detract from its legitimacy. Suspicion of
17 customs officials is alone sufficient justification for a border search."). We
18 note, for example, that DEA or Federal Bureau of Investigation agents

1 “frequently assist customs officials in the execution of border searches.”
2 Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 232 (2008) (Kennedy, J.,
3 dissenting) (citing United States v. Gurr, 471 F.3d 144, 147-49 (D.C. Cir.
4 2006); United States v. Boumelhem, 339 F.3d 414, 424 (6th Cir. 2003);
5 Formula One Motors, Ltd. v. United States, 777 F.2d 822, 824 (2d Cir.
6 1985)). We see no constitutional reason to prevent these and other federal
7 law enforcement agents from also supplying information to Customs
8 officials in aid of a border search. Nor are Customs officials prevented by
9 the Fourth Amendment from conducting such a search merely because it
10 furthers another federal agency’s criminal investigation.

11 Levy argues that border searches conducted by the CBP, even at the
12 prompting of another federal agency, should at least be confined to crimes
13 that a statute or regulation specifically authorizes CBP to investigate. We
14 recognize that CBP officers focus primarily on contraband, dutiable
15 merchandise, immigration fraud, and terrorism. See United States v.
16 Flores-Montano, 541 U.S. 149, 153 (2004); Tabbaa, 509 F.3d at 93. But (like
17 other federal law enforcement officers) CBP officers are neither expected
18 nor required to ignore tangible or documentary evidence of a federal

1 crime. They have the authority to search and review a traveler's
2 documents and other items at the border when they reasonably suspect
3 that the traveler is engaged in criminal activity, even if the crime falls
4 outside the primary scope of their official duties. United States v. Gurr,
5 the only other circuit court decision to have resolved this specific issue, is
6 in accord. In Gurr, the D.C. Circuit explained:

7 We recognize that the primary purpose of a border search is to
8 seize contraband property unlawfully imported or brought
9 into the United States. However, where customs officers are
10 authorized to search for material subject to duty or otherwise
11 introduced illegally into the United States and they discover
12 the instrumentalities or evidence of crimes, they may seize the
13 same.
14
15 471 F.3d at 149 (quoting Schoor, 597 F.2d at 1306); cf. United States v.
16 Seljan, 547 F.3d 993, 1004 (9th Cir. 2008) (en banc) ("Seljan has not cited
17 authority under the Fourth Amendment that required the agents to
18 disregard evidence of other unlawful activity, even if the unlawfulness
19 had nothing to do with transporting unreported monetary instruments.").

20 Because their conduct was fully supported by reasonable suspicion
21 that Levy was engaged in a financial crime, the CBP officer in this case was
22 entitled to inspect and copy the notebook as evidence of that crime.

1 Neither our case law nor the applicable regulations relating to CBP officers
2 or border searches is to the contrary, and the District Court correctly
3 denied Levy's motion to suppress the photocopy.

4 **CONCLUSION**

5 For the foregoing reasons and those set forth in the accompanying
6 summary order, we **AFFIRM** the judgment of conviction of the District
7 Court.