SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM L. WITHAM, JR.
RESIDENT JUDGE

KENT COUNTY COURTHOUSE
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September 27, 2016

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Department of Justice
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David Preston, SBI 00543791
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RE: *State v. David Preston*
ID No. 1604009646

Gentlemen:

Before the Court are five motions filed by Defendant David Preston ("Defendant"). Defendant is charged with six counts of Possession of a Firearm or Firearm Ammunition by a person prohibited and one count each of Drug Dealing with Aggravating Factors; Possession of a Weapon with a Removed, Obliterated, or Altered Serial Number; Receiving a Stolen Firearm; Possession of Drug Paraphernalia; and Possession of a Firearm During the Commission of a Felony. For ease of understanding and judicial economy, the Court will consolidate its decision on all five motions.

Four of the Defendant's motions seek to suppress evidence, including drugs and firearms, that the police collected from two cars allegedly owned by the Defendant. The police performed a canine scan, towed the cars, applied for and obtained search warrants, and then searched both cars. In his motions, Defendant challenges the initial canine scan and seizure of the cars, alleging that they were part of an illegal entry onto the property where the cars were parked. He further disputes

the sufficiency of the search warrant affidavits and the validity of the warrants themselves.

The fifth motion seeks to compel the State under *State v. Flowers*[1] to disclose the identity of one of its confidential informants, referred to in the search warrant affidavits as "CI-3." Defendant argues that the informant was an actual participant in a criminal transaction and therefore the informant's identity is subject to disclosure.

At the hearing on these motions, the Court issued a bench ruling denying the Defendant's second motion to suppress, finding that it had no basis in law. For the reasons that follow, the Defendant's remaining motions to suppress and his motion to disclose the identity of a confidential informant are **DENIED**.

FACTS AND PROCEDURAL HISTORY

The facts of this case arise from two separate investigations. One of the investigations centered on a controlled purchase of heroin from Defendant. Conducting the investigation were members of the Delaware State Police (DSP) Kent County Drug Unit and the Kent County Governor's Task Force. The other investigation, led by the DSP Criminal Investigative Unit (CIU), concerned a burglary which implicated Defendant's brother, William Preston ("William").

The controlled purchase from Defendant took place on April 14, 2016. An undercover officer, Detective Vernon, witnessed a hand-to-hand transaction that occurred on a driveway shared by 117 and 121 Terry Drive in Magnolia, Delaware. The detective observed the Defendant retrieve the heroin from his 2000 Ford Crown

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[1] 316 A.2d 564 (Del. Super. 1973).

Victoria and sell it to a confidential informant, referred to as CI-3. After the controlled purchase, the detective and the informant left Terry Drive.

I. The Warrantless Seizure of the Cars

Later the same day, and just across the street, CIU officers investigating the Defendant's brother William arrived. The officers held a search warrant for the residence at 122 Terry Drive. When the officers got to the scene, William and several other individuals fled.

As the search warrant for 122 Terry Drive was being executed, officers from the Kent County Drug Unit and the Kent County Governor's Task Force arrived in the area to contact the Defendant and two cars: the Crown Victoria and an unregistered 2002 Chevrolet Impala allegedly belonging to the Defendant. The cars were parked on the common driveway shared by 117 and 121 Terry Drive. The officers were told by residents, including Jean Hernandez, that both cars were owned by the Defendant.

The officers requested and received consent from Ms. Hernandez, the occupant of one of the homes, to conduct a "K-9 scan" of the car, which resulted in the dog alerting to the presence of drugs in both cars.[2] The officers then towed the cars to Troop 3.

II. The Search Warrants

At Troop 3, Detectives Vernon and Lamon completed search warrant

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[2] In her affidavit and during her hearing testimony, Ms. Hernandez testified that she neither gave consent nor identified the vehicle as belonging to Defendant. Based on its observation of her testimony and demeanor, the Court finds these statements not to be credible.

applications and affidavits. In addition to their personal knowledge, the detectives relied upon three confidential informants.

The affidavits state that the first confidential informant, CI-1, was "past-proven" and "reliable." CI-1 told officers that a man who went by the nickname of "Soup" was selling "large quantities" of heroin from the back of his dark blue Crown Victoria on Terry Drive and that "Soup" sat in his car all day long selling drugs. Detective Vernon knew from previous investigations that "Soup" is a nickname for Defendant. CI-1 was able to identify Defendant in a photograph and gave a registration number for the Crown Victoria.

The affidavits do not state that the second confidential informant, CI-2, was a past-proven, reliable informant. CI-2 was also familiar with "Soup" and his sales of heroin from his blue Ford Crown Victoria on Terry Drive.

The affidavits likewise do not state that CI-3 was a past-proven, reliable informant. CI-3 provided similar information to CI-1 and CI-2 and also indicated that "Soup" stored large quantities of heroin and firearms in both the Crown Victoria and his silver Chevrolet Impala. CI-3 was also relied upon to complete the controlled purchase.

While waiting for a Justice of the Peace to sign the warrants, the officers maintained custody of the cars. Shortly thereafter, the police obtained the warrants and searched the cars, recovering contraband and items linking both cars to the Defendant.

STANDARD OF REVIEW

I. Motions to Suppress

The motions to suppress are subject to two different standards of review:

When a defendant moves to suppress evidence collected in a warrantless search, the State bears the burden of proving by a preponderance of the evidence "that the challenged police conduct comported with the rights guaranteed [to the defendant] by the United States Constitution, the Delaware Constitution and Delaware statutory law."[3]

When a defendant moves to suppress evidence collected pursuant to a warrant, however, the defendant bears the burden of proving by a preponderance of the evidence that the search or seizure violated his rights under the United States or Delaware Constitutions or Delaware statutory law.[4]

II. Motion to Disclose the Identity of a Confidential Informant

With respect to the Defendant's motion to disclose the identity of a confidential informant, it is the Defendant's burden to show, "beyond mere speculation, that the confidential informant may be able to give testimony that 'would materially aid the defense.'"[5]

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[3] *State v. Kang*, 2001 WL 1729126, at *3 (Del. Super. Nov. 30, 2001).

[4] *State v. Palmer*, No. 151100742, 2016 WL 2604692, at *3 (Del. Super. May 3, 2016).

[5] *Hooks v. State*, 612 A.2d 158 (Table), 1992 WL 219078, at *3 (Del. Aug. 17, 1992) (quoting D.R.E. 509(c)(2)).

DISCUSSION

I. Motions to Suppress

The evidence from the seizure and subsequent search of the cars should not be suppressed. As to the seizure of the cars, the Defendant has no standing to challenge the officers' allegedly unlawful entry onto the driveway, and the State has met its burden of showing that a resident consented to the towing away of the vehicles. Yet even if the police had lacked that consent, the State would still meet its burden by application of the inevitable discovery doctrine.

As to the search warrants, the Defendant has failed to meet his burden of showing that they were issued in the absence of probable cause.

A. Timeliness of Suppression Motions

As an initial matter, the Defendant's final three motions to suppress are untimely. As the Delaware Supreme Court has observed, this Court "has broad discretion to enforce its pre-trial orders," and "[a]bsent exceptional circumstances, the Superior Court need not consider untimely motions to suppress."[6]

In view of the Defendant's status as a *pro se* criminal defendant, the Court will exercise its discretion to consider the untimely filed motions together with the timely filed motion to suppress.

B. The Seizure of the Cars

Regardless of whether the seizure of the cars was improper, the evidence derived from the cars should not be suppressed, and the Defendant's arguments to the

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[6] *Davis v. State*, 38 A.3d 278, 280 (Del. 2012).

contrary are unavailing.

1. The Defendant Only Has Standing to Challenge the Search and Seizure of the Cars that He Owned.

The Defendant lacks standing to challenge the legality of the entry onto the driveway. Courts engage in a two-prong inquiry when ruling upon a motion to suppress. In the first prong, the court determines whether the movant has standing to challenge the search or seizure. If the defendant lacks standing, "the inquiry ends, and the evidence will not be suppressed. Only when the movant has standing must the court assess the validity of the police conduct."[7]

To show standing, the movant must show that he had a "legitimate expectation of privacy in the invaded place."[8] Such a legitimate expectation is found when the expectation "is one that society is prepared to recognize as reasonable."[9]

In the usual case, only the owner or driver of a car has a reasonable expectation of privacy with respect that car.[10] And as for real property, a person has a reasonable expectation of privacy in his own residence or in the residence of another when he is an overnight guest.[11]

The Defendant lacks standing to challenge the police's entry onto the property

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[7] *Hanna v. State*, 591 A.2d 158, 162 (Del. 1991).

[8] *Cooper v. State*, 80 A.3d 959 (Table), 2013 WL 5874813, at *2 (Del. Oct. 30, 2013) (quoting *Wilson v. State*, 812 A.2d 225 (Table), 2002 WL 31106354, at *1 (Del. Sept. 18, 2002)).

[9] *Id.* (quoting *Hanna*, 591 A.2d at 163).

[10] *Mills v. State*, 900 A.2d 101 (Table), 2006 WL 1027202, at *1 (Del. Apr. 17, 2006).

[11] *Cooper*, 2013 WL 5874813, at *2 (quoting *Washington v. State*, 653 A.2d 306, 1994 WL 716044, at *2 (Del. Dec. 20, 1994)).

where the cars were located, near 117 Terry Drive. He has not provided any facts which suggest he had any reasonable expectation of privacy in the home at that address or in the land on which his cars were parked.

To the extent that the Defendant argues that there is no proof the Impala was his car, he would lack standing to challenge the legality of its seizure and subsequent search.[12] The Court assumes, without deciding, that the Defendant has standing as to the Impala.

2. The Defendant's Cars Were Not Seized Until They Were Towed.

Further, the Defendant's cars were not searched or seized when the police conducted a canine scan of the cars. "Performing a canine sniff test does not constitute a search within the meaning of the Fourth Amendment."[13] A canine alerting to the presence of drugs in the car, however, can provide probable cause for a search.[14] Thus, the cars were not subject to a Fourth Amendment seizure at all until they were towed by the police.

3. The Police Obtained Consent for the Seizures.

Evidence presented at the hearing indicated that a warrant was not required because the vehicles were towed with the consent of the tenant, Ms. Hernandez. "[A]

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[12] *E.g.*, *Fair v. State*, 127 A.3d 1170 (Table), 2015 WL 6941336, at *2 (Del. Nov. 9, 2015); *McCray v. State*, 54 A.3d 256 (Table), 2012 WL 4846543, at *2 n.9 (Del. Oct. 10, 2012).

[13] *Nelson v. State*, 708 A.2d 631 (Table), 1998 WL 171534, at *4 (Del. Mar. 30, 1998) (citing *United States v. Place*, 462 U.S. 696 (1983)).

[14] *Id.* (citing *United States v. Friend*, 50 F.3d 548, 552 (8th Cir.), *cert. denied*, 516 U.S. 1093 (1996)).

warrantless seizure is presumed unreasonable under the Fourth Amendment, [although] this presumption may be rebutted by showing that a specific exception to the warrant requirement applies."[15] Among the exceptions are "searches and seizures justified by exigent circumstances . . . consent searches, [and] searches of vehicles."[16] At the hearing, Detective Skinner testified that Ms. Hernandez consented to the tow of the vehicles, which would remove the need for a warrant. The State also presented hearing evidence that suggest the presence of exigent circumstances, including the potential for destruction of evidence.

4. The Evidence Need Not Be Excluded Because Its Discovery was Inevitable.

Even if the seizures were improper, the State correctly contends that the discovery of the contraband by the police was inevitable and thus the evidence is not subject to the exclusionary rule.

The inevitable discovery doctrine "allows for the admission of evidence that would have been discovered even without the unconstitutional source."[17] Like the independent source doctrine, the inevitable discovery doctrine is based on the principle that exclusion of evidence that would have been inevitably discovered "would put the police in a worse position than they would have been in absent any

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[15] *Williams v. State*, 962 A.2d 210, 216 (Del. 2008) (citing *Mason v. State*, 534 A.2d 242, 248 (Del. 1987)).

[16] *Id.* n.20.

[17] *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (citing *Nix v. Williams*, 467 U.S. 431, 443–44 (1984)).

error or violation."[18] Invocation of the exception is particularly appropriate when routine police investigatory procedures are in progress and the challenged behavior merely accelerates discovery of the evidence.[19]

Here, the evidence within the cars would have been discovered even if the cars were not seized. If, for example, the police had merely kept the cars under observation until the warrant was issued, they would have been entitled to seize and search the cars and discover the same evidence. The police towed the cars to the station not to initiate a warrantless search but to secure the cars while the search warrant was obtained. During the hearing, Detective Vernon testified that he was already working on the warrants when the cars were towed. None of the facts alleged in the search warrant application or affidavit are based upon the cars' seizure.

Even if the seizures were improper, then, the evidence obtained from the eventual search (conducted with a warrant), would have been inevitably discovered. Thus, the State has carried its burden of showing that the evidence derived from the warrantless seizure is not subject to the exclusionary rule.

C. Validity of the Search Warrants for the Cars

The search warrants were supported by probable cause. Contrary to the Defendant's contentions, the information in the warrant affidavits was not stale, most of it having been obtained within two weeks of the affidavits being signed.

1. The Warrants Were Supported by Probable Cause.

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[18] *Nix*, 467 U.S. at 443.

[19] *Cook v. State*, 374 A.2d 264, 268 (Del. 1977) (quoting Comment, *The Inevitable Discovery Exception to the Exclusionary Rules*, 74 Col. L. Rev. 88, 90 (1974)).

The search warrants at issue here were supported by probable cause. And the affidavit contained enough independent information for the magistrate to find probable cause even without knowing much about the reliability of confidential informants two and three.

A search warrant, to be valid under the Constitutions of the United States and of Delaware, may only be issued upon a showing of probable cause.[20] "An affidavit in support of a search warrant must, within the four[ ]corners of the affidavit, set forth facts adequate for a judicial officer to form a reasonable belief that an offense has been committed and the property to be seized will be found in a particular place."[21] Courts reviewing whether a warrant was supported by probable cause apply a "totality of the circumstances" test.[22]

Among the factors considered by a magistrate are "the reliability of the informant, the details contained in the informant's tip and the degree to which the tip is corroborated by independent police surveillance and information."[23] Crucially, "[i]f an informant's tip is sufficiently corroborated by independent police work, the tip may form the basis for probable cause even though nothing is known about the

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[20] *LeGrande v. State*, 947 A.2d 1103, 1107 (Del. 2008).

[21] *Id.* (quoting *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006)).

[22] *Id.* at 1107–08 (quoting *Sisson*, 903 A.2d at 296).

[23] *Id.* at 1108 (citing *Brown v. State*, 897 A.2d 748, 751 (Del. 2006)).

informant's credibility."[24]

The Defendant contends that the warrant is tainted by what he describes as an "illegal entry" onto 117 Terry Drive. Similar to the warrantless seizures above, even if the officers' entry onto the driveway was unlawful, the Defendant lacks standing to assert the rights of a resident or other person with a reasonable expectation of privacy, and therefore cannot be heard to challenge the warrants on that ground.

Further, the lack of information about CI-2 and CI-3's reliability does not destroy probable cause. CI-3's transaction with the Defendant was independently surveilled by state police detectives, and the informant's claims about Defendant's ownership of the Impala were confirmed by Ms. Hernandez at the scene.[25] CI-2's information was similarly corroborated by the later police surveillance of the transaction. Considering the total mix of information available to the magistrate, including the independent corroboration by police surveillance, additional information about the informants' credibility was not required.

The Defendant's bare statement in his motion papers that he did not participate in a controlled purchase on April 14 is insufficient to carry his burden on the motion. This Court's review of the warrants is limited to the four corners of the affidavits.

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[24] *Id.* (citing *Hubbard v. State*, 782 A.2d 264 (Table), 2001 WL 1089664, at *4 (Del. Sept. 5, 2001)).

[25] In the search warrant affidavits, the police indicated that Ms. Hernandez not only confirmed the Defendant's ownership of the Impala, but further "had been asking [the Defendant] to remove it from her property." Impala Search Warrant Aff. ¶ 14. At the hearing, Detective Skinner testified that Ms. Hernandez told the officers they were free to take the car. Ms. Hernandez denied making any statements about the Impala.

And Detective Vernon testified at the hearing that he witnessed a hand-to-hand transaction at the Crown Victoria on Terry Drive. In fact, at the hearing on his motions to suppress, the Defendant himself appeared to concede that there was probable cause for the search of the Crown Victoria. Because it is his burden to prove that probable cause was not present, his argument must fail.

Likewise, as discussed earlier, the Defendant's challenge to the warrant for the Impala is self-defeating. If he does not own the Impala, he would not have standing to complain it was subject to an illegal search. As it stands, however, there was ample evidence linking Defendant and the firearms to the Impala. That information came both from confidential informants and Ms. Hernandez, and it provided probable cause for the search warrants.

2. The Information Contained in the Warrant Was Not Stale.

The Defendant also claims at several points that the information contained in the warrant affidavits was stale, notwithstanding the fact that virtually all of the information contained within them was from the month of April 2016. Because the affidavits were signed on April 14, 2016, most of the information could not have been more than two weeks old. And the Delaware Supreme Court has held that information in an affidavit is not stale after four days or even twenty-seven days.[26] It follows that the information in the affidavits was not stale and that the searches conducted according to the search warrants were proper.

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[26] *Turner v. State*, 826 A.2d 289, 293 (Del. 2003) (citing *Jensen v. State*, 482 A.2d 105, 112 (Del. 1984)).

II. Disclosure of a Confidential Informant's Identity

Because the confidential informant was used only to provide probable cause for the search warrant, the informant's identity need not be disclosed. A criminal defendant does not have an unqualified right to discover the identity of government informants.[27] Under Delaware Rule of Evidence 509(a), the identity of an informant is privileged.

"[T]he Delaware rule of informer privilege follows, in part, the Superior Court's holding in *State v. Flowers*."[28] That holding describes four situations from which the issue of disclosure may arise: "(1) the informer's information formed the basis to establish probable cause for a search; (2) the informer witnessed a criminal act; (3) the informer participated in, but was not a party to, an illegal transaction; and (4) the informer was an actual party to an illegal transaction."[29] In the first situation, disclosure generally is not required, while in the fourth situation, disclosure generally is required. In the second and third situations, disclosure is required only if the trial judge determines that the informant's testimony would materially aid the defense.[30]

In *State v. Colbert*, the Superior Court held that the identity of a confidential informant need not be disclosed when the informant participated in a drug transaction

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[27] *See generally State v. Flowers*, 316 A.2d 564 (Del. 1973).

[28] *Kennard v. State*, 933 A.2d 1250 (Table), 2007 WL 2523022, at *3 (Del. Sept. 6, 2007) (quoting *Butcher v. State*, 906 A.2d 798, 802 (Del. 2006)).

[29] *Id.* (citing *Butcher*, 906 A.2d at 802).

[30] *Butcher*, 906 A.2d at 802–03.

that was not one of the charged crimes.[31] In that case, while the informant did engage in a controlled purchase, the defendant's charges related to the *possession* of contraband, not to its sale.[32]

Similarly here, all of the crimes with which the State has charged the Defendant relate to the possession of illegal drugs. The charges are based not on the illegal transactions the Defendant is alleged to have engaged in with the informant, but on his later possession of drugs and firearms. The confidential informant was only used to provide probable cause for the searches of the cars. As such, this case falls into the first of the four scenarios contemplated by *Flowers*, and thus disclosure is not required.

CONCLUSION

Even if the tow of the cars was unreasonable, the evidence would have inevitably been discovered in the later search. That later search was conducted according to a validly issued warrant. Thus, the Defendant's remaining motions to suppress; motions number 1, 3, and 4; are **DENIED**. Because the informant was only used to provide probable cause for a search, the Defendant's motion to disclose the identity of a confidential informants is likewise **DENIED**.

IT IS SO ORDERED.

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[31] I.D. No. 1502010981, 2015 WL 9002304, at *2 (Del. Super. Dec. 9, 2015) (Clark, J.).

[32] *Id.* at 1.

WLWJr./dsc
oc: Prothonotary
cc: Gregory R. Babowal, Esquire
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