

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	ID# 0902001541
	)	
KADEEM B.WHITE,	)	
Defendant.	)	

Date Submitted: January 22, 2010
Date Decided: February 2, 2010

Upon Consideration of Defendant's Motion to Suppress Evidence (Nighttime Search Warrant) - **GRANTED**

Josette D. Manning, Esq., Sean P. Lugg, Esq., Phyllis R. Scully, Esq., Department of Justice, 820 North French Street, 7th Floor, Wilmington, DE 19801

Kevin J. O'Connell, Esq., Darryl J. Rago, Esq., Office of the Public Defender, 820 North French Street, 3rd Floor, Wilmington, DE 19801

Jurden, J.

BACKGROUND

In the afternoon of February 1, 2009, Delaware State Police Troop 2 patrol units were dispatched to room #149 of the Fairview Inn, located at 1051 South Market Street in Wilmington. Upon arrival, the police learned that an infant, later identified as Jaylah Salam, 15 months old, was transported to A.I. DuPont Hospital for Children.¹ Jaylah was pronounced dead after her arrival at A.I. A.I. Hospital officials informed the Delaware State Police that Jaylah had a distended stomach and blood in her stomach and around her liver.² According to the treating physicians, Jaylah's injuries were not a result of life saving measures performed on her by emergency response services.³ The police interviewed neighbors staying at the Fairview Inn. These neighbors reported that they heard a verbal argument coming from inside room #149, along with several "thuds" against connecting walls. After hearing the "thuds," the neighbors "did not hear the infant crying anymore."⁴ In response to this information, in the early morning hours of February 2, 2009, the police requested a nighttime search warrant to:

examine/collect any evidence from inside the motel room which may suggest circumstances which led up to the victim's death including any evidence of violent activity inside room #149 of the motel. This evidence could

¹ Affidavit of Probable Cause, ¶ 3. (Attached as Exh. 1 to State's Response to Defendant's Motion to Suppress (Nighttime Search Warrant) and admitted as State's Exh. 12 at the 1/22/2010 Suppression Hearing.)

² Affidavit of Probable Cause, ¶ 4.

³ *Id.*

⁴ *Id.* at ¶ 5.

corroborate the “thuds” heard by the neighbors of room #149, prior to the stopping of the infant’s crying.⁵

The entire Affidavit of Probable Cause prepared by the affiant, Detective Papili of the Delaware State Police, reads as follows:

The facts tending to establish probable cause for believing that the foregoing grounds for the application exist are as follows:

Affiant and Witness:

1. Your Affiant is employed by the State of Delaware and has been so since 04/01/98. Your Affiant is currently assigned as a Detective with the Delaware State Police Homicide Unit. Previous to this assignment, I was assigned as a Detective with the Delaware State Police, Troop 2 Robbery Squad. Throughout my career, I have investigated numerous felony type complaints including robberies, assaults, sexual complaints, homicides and death investigations.

History and Facts of the Complaint:

1. On 02/01/09, DSP Troop 2 Patrol Units where [sic] dispatched to room #149 of the Fairview Inn, located at 1051 South Market Street, Wilmington, DE 19801. This location is found in New Castle County, State of Delaware.
2. Upon arrival to the location, it was learned an infant, later identified as Jaylah Salam ((D.O.B. 10/27/07) was transported to the A.I. DuPont Childrens Hospital for treatment.
3. The infant was later pronounced deceased at the hospital.

⁵ *Id.* at ¶ 6.

4. Hospital officials later informed DSP they examined the infant and found the infant's stomach was distended and there was blood surrounding the liver and was present in the stomach of the infant. According to the treating physicians, these injuries were not a result of the life saving measures provided to the infant by emergency response services.
5. Neighbors staying at the motel were interviewed during the investigation. Several of the neighbors, who stayed in separate rooms, stated they heard a verbal argument coming from inside Room #149, along with several "thuds" against connecting walls. After hearing the "thuds", the neighbors stated they did not hear the infant crying anymore. Shortly thereafter, emergency response personnel arrived on scene.
6. Your Affiant is requesting this search warrant in order to examine/collect any evidence from inside the motel room which may suggest circumstances which led up to the victim's death including any evidence of violent activity inside room #149 of the motel. This evidence could corroborate the "thuds" heard by the neighbors of room #149, prior to the stopping of the infant's crying.
7. Through my training and experience as an investigator, I am aware there is the possibility of degradation of evidence, particularly blood and biological evidence. The loss of key evidence could be crucial to this investigation. Your Affiant therefore requests a nighttime search warrant for this investigation.
8. Your Affiant prays this search warrant be issued based upon the above information.

The magistrate granted the nighttime search warrant on February 2, 2009.

The defendant contends that the application for the nighttime search warrant failed to "provide sufficient facts to support a finding that a nighttime search was

necessary in order to prevent the escape or removal of the person or thing to be searched for.”⁶ The defendant argues that the sole exigency offered to support the nighttime warrant -- that “there is the possibility of degradation of evidence...” a conclusory allegation in that the affiant offers no explanation why the blood and biological evidence sought would degrade before a daytime warrant could be executed, and therefore, the nighttime search warrant was not supported by sufficient probable cause.⁷

DISCUSSION

The United States and Delaware Constitutions protect the right of persons to be secure in their homes against “unreasonable searches and seizures.”⁸ Delaware statutory law affords even greater protection against the nighttime search or seizure of a home. 11 *Del. C.* § 2308 provides:

A search warrant shall not authorize the person executing it to search any dwelling house in the nighttime unless the judge, justice of the peace or magistrate is satisfied that it is necessary in order to prevent the escape or removal of the person or thing to be searched for, and then the authority shall be expressly given in the warrant. For purposes of this section the term “nighttime” shall mean the period of time between 10:00 p.m. and 6:00 a.m.

⁶ Defendant’s Motion to Suppress, ¶ 4.

⁷ Defendant’s Motion to Suppress, ¶ 6.

⁸ U.S. Const. Amend. IV; Del. Const. Art. I, § 6.

Section 2308 is clear and unambiguous.⁹ Under Delaware law, even when a search warrant is supported by probable cause, a nighttime search may not be conducted “absent the showing of exigent circumstances which make it necessary to conduct the search at night.”¹⁰ A nighttime search warrant must include sufficient facts *on the face of the affidavit* for a magistrate to find that the nighttime warrant is necessary to prevent the removal or destruction of potentially incriminating evidence.¹¹ In determining whether the issuance of the warrant satisfies these statutory requirements, the Court may consider only the facts presented in the affidavit of probable cause supporting the warrant application, the so-called “four corners” of the affidavit.¹² A probable cause determination by a magistrate is entitled to “great deference by a reviewing court and will not be invalidated by a hypertechnical, rather than common sense, interpretation of the warrant affidavit.”¹³

Here, the only facts contained in the affidavit that suggest exigent circumstances are the location to be searched, a motel room, and the affiant’s cursory statement that he is aware of the “possibility of degradation of evidence, particularly blood and biological evidence.”¹⁴ The affidavit is most striking for all

⁹ *Mason v. State*, 534 A.2d 242, 251 (Del. 1987).

¹⁰ *Hanna v. State*, 591 A.2d 158, 162 (Del. 1991).

¹¹ *Jensen v. State*, 482, A.2d 105, 111-13 (Del. 1984).

¹² *Henry v. State*, 373 A.2d 575, 577 (Del. 1977); *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984); *Scott v. State*, 2007 WL 539650, at *2 (Del. Feb. 22, 2007).

¹³ *Jensen v. State*, 482, A.2d 105, 11 (Del. 1984).

¹⁴ Affidavit of Probable Cause at ¶ 1 and ¶ 7.

the information it does not contain, much of which could have supported exigent circumstances justifying a nighttime warrant. For example, nowhere in the affidavit does the affiant tell the magistrate:

1. Who resided in room #149.
2. Who rented room #149.
3. How long the room was rented for, *i.e.*, when the room was expected to be vacated by the current occupant(s).
4. Whether the rooms at the Fairview Inn were cleaned on a daily basis.
5. Who was allegedly in room #149 before, during or after the police and/or emergency services were previously in the room.
6. Who was caring for Jaylah at the time she was injured.
7. Whether any potential suspects or persons of interest were or were not in custody and had access to room #149, or could gain access.
8. Whether third persons had access or could gain access to room #149.
9. That when the police interviewed the defendant on February 1, he told them that he and Jaylah's mom expected to check-out of the motel room on February 3.¹⁵

¹⁵ State's Exh. 1 at 14.

10. Why the blood and biological evidence sought would degrade prior to the time that a daytime warrant could be executed.¹⁶
11. Why a search could not have been completed during the daytime hours of February 2nd.
12. Whether the police or emergency medical personnel who were in the motel room on February 1 saw anything in plain view to suggest that a crime had been committed in the room #149.

Interestingly, in the State's opposition to the suppression motion, it alleges additional facts that could have been included in the affidavit and could well have supported a finding of exigent circumstances. For example, the State points out that because neither the defendant nor Jaylah's mother were in police custody when police sought the warrant, "each could potentially access the scene and compromise the integrity of the evidence."¹⁷ This fact is suggestive of exigent circumstances and raises the spectre of possible destruction of evidence by them. Inexplicably, the affiant failed to include this critical information in the affidavit.¹⁸ In fact, the affidavit nowhere even mentions Jaylah's mother or indicates that she even has a mother, much less that her mother might destroy evidence. Similarly, the affidavit does not mention the defendant or allude to his existence, much less his potential access to the motel room. Contrary to the State's argument, the Court

¹⁶ A daytime search warrant could have been executed as early as 6:00 a.m.

¹⁷ State's Response to Defendant's Motion to Suppress (Nighttime Search Warrant) at ¶ 9.

¹⁸ The Court pointed this out to the State at oral argument and expressed surprise that the State would attempt to uphold the warrant on this ground when this ground was not given to the magistrate. The State explained that this is a "reasonable inference" the magistrate could have drawn from the facts contained in the affidavit. The Court disagrees.

does not find that the magistrate could have reasonably inferred these facts from the scant facts in the affidavit. In short, there is no mention in the affidavit of facts suggestive of potential destruction of evidence. There is only mention of the affiant's awareness of the "possibility of degradation" of evidence, based on his years of experience.

This case is different from *Scott*.¹⁹ In *Scott*, the affidavit supporting the nighttime warrant contained an averment that evidence (possible blood stains) within the residence where the victim was killed was in plain view, family members of the victim's roommate wanted to retrieve items from the apartment and there was a danger of tampering or loss because the victim's roommate or others would find a way to enter and disturb the scene. In *Scott*, the Court found that there were sufficient facts on the face of the affidavit showing a nighttime search was necessary to prevent the destruction of evidence. The affidavit here falls far short of the affidavit in *Scott*, and fails to meet the standard expressed in §2308. Detective Papili failed to include sufficient facts showing that a nighttime search was necessary to prevent the removal, destruction or degradation of evidence. It may have been so, and indeed there are facts argued by the State now (but not in the affidavit) that would support such a claim.²⁰ But the law does not

¹⁹ *Scott v. State*, 919 A.2d 562 (Del. 2007).

²⁰ Detective Papili's affidavit does not even attempt to make the case, by inference or otherwise, that evidence within the place to be searched might be tampered with by individuals who would have a motive to conceal evidence. To the extent his affidavit attempts to set forth any exigency, it is that the evidence, through some form of

allow the Court to consider those facts. The State is limited by those facts presented within the four corners of the affidavit.

Even giving great deference to the magistrate, a common sense interpretation of the four corners of the affidavit does not show exigent circumstances sufficient to support a nighttime warrant. The fact that the place to be searched was a motel room and the affiant's conclusory statement that "there is the possibility of degradation of [key] evidence...crucial to this investigation," without more, is just not enough. For these reasons, the nighttime search violated 11 *Del. C.* § 2308, the Fourth Amendment to the United States Constitution, and Article I, Section 6 of the Delaware Constitution. The Motion to Suppress the Nighttime Search Warrant is therefore **GRANTED**.

In so holding, the Court notes that it has not been presented with, nor decided, the issue of whether the evidence seized pursuant to the nighttime warrant would have been inevitably discovered.²¹

IT IS SO ORDERED.

Jan R. Jurden, Judge

natural "degradation" might be compromised. Any evidence has the change to be degraded over time. His mere reference to the possibility of degradation hardly provides the specificity to establish the exigency required to justify a nighttime search warrant. *See Hanna*, 591 A.2d at 162.

²¹*Cook v. State*, 374 A.2d 264 (Del. 1977).