

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,)
)
v.)
)
GALEN D. BROOKS,)
(ID. No. 1206011471))
)
Defendant.)

Submitted: April 5, 2013
Decided: July 30, 2013

Nicole S. Hartman, Esq., Department of Justice, Dover, Delaware. Attorney for the State.

James E. Liguori, Esq., Dover, Delaware. Attorney for the Defendant.

*Upon Consideration of Defendant's
Motion to Suppress*
DENIED

VAUGHN, President Judge

ORDER

Upon consideration of the parties' briefs and the record of the case, it appears that:

1. Defendant Galen Brooks ("Brooks") moves to suppress all evidence obtained as a result of the wiretaps of cellular telephone numbers 302-222-5082 ("5082"), 302-723-1412 ("1412"), 302-399-3838 ("3838") and 302-535-9787 ("9787"). This is one of several related motions from multiple defendants that attack the wiretap applications. Brooks' motion primarily focuses on the State's alleged failure to satisfy 11 *Del. C.* § 2407(a)(3), which is known as the "necessity requirement."

2. The charges against the defendant arise in the context of an extensive police investigation into an alleged drug trafficking syndicate (the "Organization") in Kent County. The investigation largely focused on Brooks, who, at the time of the wiretap applications, was believed to be the head of the Organization. The Organization allegedly specialized in the distribution of cocaine and crack cocaine.

3. With the exception of 1412, which was used by Jermaine Dollard, another defendant, the wiretap applications that defendant Brooks challenges were for his own cellular phones. Investigators obtained orders authorizing the wiretaps of 3838 and 5082 on May 15, 2012. The order authorizing the wiretap of 9787 was issued on May 25, 2012 and the order for Dollard's phone, 1412, was issued on June 5, 2012.

4. The State submitted an "Affidavit in Support of Application for Interception of Wire Communications" to accompany each of the contested wiretap

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applications. The affidavits necessarily present and rely upon much of the same information. Generally, they recount the police investigation into the Organization. The investigation began in 1996, and involved the use of physical and video surveillance, sixteen confidential informants (“CIs”), interviews with suspected associates of the Organization, pen registers, search warrants, an Attorney General Subpoena and controlled purchases of drugs by informants. The affiants are Detectives Jeremiah Lloyd and G. Dennis Shields of the Delaware State Police. The affidavits are lengthy. Each individual affidavit contains more than eighty pages.

5. As mentioned, the affidavit must also contain a full and complete statement that explains why a wiretap is necessary to the investigation. Therefore, the Court’s attention is directed to that portion of each affidavit that discusses the previous implementation of and future impracticalities associated with normal investigative techniques. The following is a summary of these pertinent sections:

- Physical Surveillance: The affiants state that although physical surveillance has been attempted and has been useful in identifying a number of suspects, it has not succeeded in gathering sufficient evidence of criminal activity and will not establish conclusively the elements of a criminal violation. Furthermore, the affiants state that physical surveillance will not establish the identity and roles of all of the alleged conspirators in the drug organization, and that the surveillance will likely be noticed by the suspects, which will cause them to become more cautious and would risk jeopardizing the investigation.
- Search Warrants: The affiants state that the use of search warrants will not provide the police with sufficient evidence to determine the full scope of the drug organization, because suspected drug dealers do not keep permanent records of their illegal activities. In addition, the police do not know the location of all of the premises where illegal activities

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take place, and the other members of the drug organization would be alerted of the investigation when the police begin conducting searches of some or all of the known residences.

- Attorney General Subpoenas: The affiants state that they spoke with the Chief Prosecutor for Kent County, and that it is his belief that the use of Attorney General subpoenas would be unsuccessful because the alleged conspirators would likely invoke their Fifth Amendment privilege against self-incrimination. Additionally, they could compromise the investigation by alerting other conspirators regarding the existence of the investigation.
- Confidential Reliable Individuals: The affiants state that confidential informants have been used in the investigation, but that they have provided only limited information with respect to the following: the specific activities of the drug organization; the names and roles of all of the members of the drug organization; the sources of the drugs; the methods of concealing the proceeds of the sales of drugs; and the details of specific drug transactions. The affiants further state that it is unlikely that members of the drug organization would share this information with confidential informants.
- Undercover Law Enforcement Activity: The affiants state that undercover officers have been unable to infiltrate the drug organization due to its close and secretive nature, and that even if they could, the undercover officers would not be able to infiltrate the Organization at a level high enough to learn details about the Organization's activities and its members.
- Interview of Suspects: The affiants state that interviewing suspected members of the Organization will produce insufficient information about the Organization's members and activities; that the suspects would lie to the police; that they would likely invoke their Fifth Amendment privilege against self-incrimination; and that interviewing suspects would alert other members of the investigation, which would cause them to be more cautious and jeopardize the investigation.
- Pen Register and Telephone Tolls: The affiants state that pen register trap trace devices and telephone tolls have been used in the investigation

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to verify communications between certain target phone numbers, but that they are insufficient because they do not record the identity of the parties to the conversations or the substance of the conversations.

6. Regarding necessity, Brooks specifically contends that the State prematurely sought the wiretap warrants before it exhausted other reasonable investigative techniques; that the affiants failed to explain why such techniques would be fruitless or dangerous; that the affidavits are wrought with boilerplate language and generalizations; that they lack case-specific details; that the affiants fail to explain why physical surveillance “would most likely be noticed;” that search warrants were only attempted on one occasion; that there were no facts to support the argument that Attorney General Subpoenas would be ineffective; and that the affidavits are inadequate because they discuss typical problems associated with drug cases rather than problems specific to the Organization. The defendant also contends that the affidavits contain stale, conclusory, irrelevant and speculative information that does not rise to the level of probable cause; that the affidavits are devoid of the statutory mandate as to the nature and location of the communication or place where the interception is granted; that the affidavits do not identify who will be utilizing the various telephones which are the subject of the application; that some of the information relied upon came from CIs who were not past proven reliable; that the information given by CIs was not independently corroborated by police investigation; and that the preliminary pen register applications lacked probable cause.

7. The State contends that before seeking wiretaps, the investigating officers employed the normal investigative techniques available to them, including

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search warrants, interviews of other defendants, the use of CIs, the use of computer databases such as DELJIS, property records and many others; that other techniques were found to be too dangerous or unlikely to succeed; that the affidavit contains case-specific details when it is considered as a whole; and that normal investigative techniques were insufficient to discover the breadth of the Organization's conspiracy because members "had insulated themselves from routine police detection." The State next argues that the application includes fresh information, and that the older information contained therein is not stale because it evidences a long term continuing investigation. The State further contends that probable cause existed for the wiretap applications and the pen register applications. In support of this contention, the State points to the controlled purchases of cocaine from Brooks by CIs. The State argues that even though some of the CIs were not past proven reliable, that does not negate the importance of the information received. The State represents that seven CIs were past proven reliable; that investigators corroborated information given by an additional three; and controlled buys were done by four of them. The State contends that the application for the pen register refers to several controlled purchases of cocaine or crack cocaine from Brooks that were achieved by contacting the telephone numbers subject to the pen register application.

8. To obtain an order authorizing the interception of wire communications under Section 2407 of the Delaware wiretap statute, the application must include "[a] full and complete statement as to whether or not other investigative procedures have been tried and failed, why such procedures reasonably appear to be unlikely to

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succeed if tried, or why such procedures would be too dangerous if tried.”¹ In *State v. Perry*, this Court discussed how to determine if a wiretap warrant application complies with the aforementioned necessity requirement:

When reviewing the application and accompanying affidavits for compliance with these sections, it is enough if the affidavit explains the prospective or retroactive failure of several investigative techniques that reasonably suggest themselves. The government’s burden of establishing compliance is not great. Compliance is tested in a practical and common sense fashion and subject to the broad discretion of the judge to whom the wiretap application is made. The purpose of the “necessity” requirement is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques. Each case is examined on its own facts and factors to be considered are the type of crime involved and the relationships between the suspected defendants. Finally, a wiretap order should not be invalidated simply because defense lawyers are able to suggest post factum some investigative technique that might have been used and was not.²

9. This Court reviews the question of whether a full and complete statement of necessity for a wiretap was made in the application *de novo*.³ Once it is determined

¹ 11 *Del. C.* § 2407(a)(3).

² *State v. Perry*, 599 A.2d 759, 764 (Del. Super. 1990) (citations and internal quotation marks omitted).

³ *United States v. Phillips*, 959 F.2d 1187, 1189 (3d Cir. 1992).

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that the statement was made, the Court will review the magistrate's determination of necessity for an abuse of discretion.⁴

10. Clearly, each affidavit offered a full and complete statement regarding necessity. What remains for the Court to determine is whether the issuing judge abused his discretion when he concluded that the contents of each statement satisfied the necessity requirement.

11. I will first address the defendant's reliance on the Sixth Circuit's decision in *United States v. Rice*.⁵ Brooks cites *Rice* for the proposition that to satisfy the necessity requirement, wiretap affidavits must be case-specific, and cannot merely recite typical problems associated with using normal investigative techniques in typical drug cases.⁶ I agree with that principle. However, the affidavit at issue in *Rice* was plainly inferior to those now before the Court.

12. In *Rice*, the Sixth Circuit affirmed the district court's decision to suppress the fruits of a wiretap because the affidavit in support thereof did not comply with the necessity requirement.⁷ Testimony from a motion to suppress hearing revealed that investigators had made misleading statements in the affidavit regarding the use of physical surveillance, and the court decided to exclude consideration of

⁴ *Id.*

⁵ 478 F.3d 704 (6th Cir. 2007).

⁶ *Id.* at 708-09.

⁷ *Id.* at 711.

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those portions of the affidavit from its necessity analysis.⁸ The Sixth Circuit summarized what remained of the statement after the district court took this action:

(1) that the [CI] used in the investigation of [a previously wiretapped suspect] was not able to make contact with Rice [the target of the new wiretap] and, therefore, would not be of use; and (2) that pen registers and telephone tolls revealed possible connections to other people with histories of drug-related arrests. Beyond that, the district court found that the Wenthert Affidavit contained generalized and uncorroborated information about why grand jury subpoenas, witness interviewing and search warrants, and trash pulls would not be useful.⁹

Unlike in *Rice*, nothing in this case suggests that the affiants misled the issuing judge as to what normal investigative techniques had been attempted. Additionally, the section discussing the history of the investigation is replete with case-specific details about the Organization that bolster the necessity statements located towards the end of the affidavits.

13. Brooks attacks the affidavits' use of boilerplate language that he argues can be recycled and used indiscriminately against any drug dealing ring. Certainly, there is some general language contained in the "Normal Investigative Techniques" portion of each affidavit. In particular, I note that the section discussing physical

⁸ *Id.* ("After determining that it could not consider the misleading information, the district judge examined what was left of the Wenthert Affidavit."). The opposite situation is present in the case *sub judice*, where officers omitted relevant information regarding physical surveillance that could have been included. See *infra* note 10.

⁹ *Rice*, 478 F.3d at 711.

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surveillance unnecessarily speaks in generalities despite the affiants' possession of ample, relevant information regarding certain peculiarities of Brooks' house that made it difficult for officers to observe his movements without revealing themselves.¹⁰ Nonetheless, I do not find the defendant's argument to be persuasive. When each affidavit is considered in its entirety, it is readily apparent that the statements contained within the "Normal Investigative Techniques" section are applicable to the Organization and to Galen Brooks.

14. To the extent that there are general statements in the "Normal Investigative Techniques" section that could apply to any drug ring, one can look back to the numbered paragraphs discussing the history of the investigation to acquire specific information supporting those statements. Moreover, the mere fact that a statement is applicable to multiple, similar criminal organizations does not make it speculation or conjecture. The investigators were entitled to refer to their specialized training and experience with drug organizations to aid in the preparation of the affidavit, and the issuing judge was permitted to take those qualities into account when he assessed their affirmations.¹¹ I conclude that the necessity statements are

¹⁰ Detective Lloyd's testimony at the motions hearing revealed several reasons why the location of Brooks' home made physical surveillance impractical. He stated that the back of the property could not be effectively observed because it abuts Route 1; that the home's location towards the back of the neighborhood did not provide an inconspicuous location for investigators to stake out the front of the property; that visitors often went around the house and outside investigators' field of vision when they arrived; and that police did attempt to utilize a "pole camera," but were unsuccessful. Unfortunately, none of these reasons were explicitly provided in the affidavits.

¹¹ *United States v. Heilman*, 377 F. App'x 157, 186 (3d Cir. 2010) (discussing necessity, the court opined that "the issuing court should take into account affirmations based on the specialized

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sufficiently case-specific and applicable to the Organization, notwithstanding the inclusion of some general language.

15. The affidavits suitably explain the retroactive inadequacy of prior investigative techniques that reasonably suggested themselves to the investigators. As mentioned *supra*, the history of the investigation demonstrates that the State employed numerous techniques to compile evidence against Brooks and the Organization, including physical and video surveillance, 16 CIs, interviews with suspected associates of the Organization, pen registers, search warrants, an Attorney General Subpoena and controlled purchases of drugs by informants. Although some degree of success was achieved with the aforementioned tactics, investigators were unable to conclusively establish the identities and roles of all conspirators within the Organization, and unable to obtain admissible evidence against each of those conspirators despite investing significant time and resources into the investigation. The State did not need to exhaust all other reasonable investigative techniques before applying for a wiretap.¹² Investigators made reasonable efforts to pursue conventional investigative procedures, but the evidence procured from those efforts did not accomplish the goals of the investigation. The wiretap requests were not

training and experience of law enforcement officers”).

¹² *Perry*, 599 A.2d at 764 (“The purpose of the ‘necessity’ requirement is not to foreclose electronic surveillance until ‘every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques.’” (quoting *United States v. Alfonso*, 552 F.2d 605, 611 (5th Cir.1977))).

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“initial step[s] in [the] criminal investigation.”¹³

16. I further find that each affidavit properly informed the issuing judge as to why conventional investigative procedures were unlikely to be successful in bringing down the Organization in the future. The investigators noted that they were familiar with how drug traffickers operate in general, and with the nature of the Organization in particular. The affidavits observed that physical surveillance and search warrants, while useful, had not and would not “conclusively establish the identities of all conspirators” or “provide sufficient evidence necessary to determine the full scope of the Racketeering Activity of the Brooks Organization.” In discussing the feasibility of search warrants, the affiants explained that drug dealers generally do not keep records detailing the full nature and scope of their criminal activities. Moreover, the investigators “believe[d] that all of the premises involved in the illegal activity [we]re not known to law enforcement” when the applications were submitted, and that conducting a search at one location would “only serve to alert others” as to the existence of the investigation. They reasonably concluded that executing a premature search would have frustrated the purpose of the investigation, as it “would not . . . be adequate to sustain a successful prosecution of all members of the Brooks Organization.”

17. The investigators did not believe that the use of Attorney General subpoenas or interviews with known associates would be effective due to expected non-cooperation of the suspects. One specific example described in the affidavit

¹³ *Rice*, 478 F.3d at 710 (quoting *United States v. Giordano*, 416 U.S. 505, 515 (1974)).

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lends credence to this belief. On April 27, 2012, Edwin Scarborough, an alleged member of the Organization, was contacted during a drug investigation. After he was arrested, Scarborough refused to provide information regarding where he obtained the crack cocaine that was found in his possession. CIs had previously advised that Scarborough gets his cocaine from Brooks, and the affidavit states that evidence obtained pursuant to a pen register confirmed that Brooks and Scarborough frequently communicated via cell phone. Additionally, the affidavits describe two other, separate incidents where first Brooks, and then Gerald Landry, another alleged member of the Organization, refused to cooperate with police investigators despite being victims of crimes that they, themselves, reported.¹⁴ The lack of victim cooperation resulted in a *nolle prosequi* in Brooks' case, and an unsolved crime in Landry's. The investigators were aware of these incidents, and reasonably posited that associates of the Organization would be unlikely to cooperate with law enforcement. The affiants additionally suggested that interviewees might provide untruths to the police in an effort to frustrate the investigation. Lastly, the affiants remark that the use of Attorney General Subpoenas or suspect interviews would inevitably serve to alert co-conspirators as to the existence of the investigation, thus compromising the safety of CIs and the objectives of law enforcement.

18. The affiants note that the use of CIs and undercover law enforcement activity would be insufficient to achieve the objectives of the investigation because they would be “unable to infiltrate the inner workings of the conspiracy due to the

¹⁴ Brooks was the victim of a burglary and Landry was the victim of a home invasion.

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close and secretive nature of th[e] Organization.” It is true that CIs had yielded valuable information during the course of the investigation, particularly through controlled purchases of narcotics orchestrated by investigators. However, they had been unable to identify all members of the criminal conspiracy or define the roles of the conspirators, as needed for a successful criminal prosecution. It was reasonable for the issuing judge to accept the affidavits’ representation that continued efforts in this area, without the support of a wiretap, would be unlikely to achieve the investigation’s desired results.

19. As to the defendant’s remaining contentions, the older information relied upon in the affidavits is not stale; it provides context and insight into a long term investigation. Even if the Court excluded such information from its consideration, there is enough “fresh” information in the applications to satisfy the probable cause standard, including, *inter alia*, the controlled purchases of drugs from the defendant by CIs that were initiated by placing telephone calls to Brooks’ numbers. Similarly, the fact that some of the information obtained by investigators came from CIs who were not past proven reliable is not dispositive of the probable cause determination when everything else is taken into account. The wiretap applications and the preliminary pen register applications provide a factual basis for a finding of probable cause.¹⁵

¹⁵ Anzara Brown, another alleged associate of the Organization, makes a more specific probable cause argument that only attacks the wiretap warrant for Brooks’ third phone, 9787. Brown’s argument is thoroughly addressed in a separate order issued today. *See State v. Brown*, ID No. 1205025968 (Del. Super. July 30, 2013) (ORDER).

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20. For the foregoing reasons, I conclude that the affidavits provided a sufficient factual basis to support the issuing judge's findings of necessity and probable cause. The defendant's motion is *denied*.

IT IS SO ORDERED.

President Judge

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