

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,)
)
 v.)
)
JERMAINE DOLLARD,)
(ID. No. 1206010837))
)
 Defendant.)

Submitted: April 5, 2013

Decided: July 30, 2013

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

Eugene J. Mauer, Esq., Wilmington, Delaware. Attorney for the Defendant.

*Upon Consideration of Defendant's
Motion to Suppress*

DENIED

VAUGHN, President Judge

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OPINION

The defendant, Jermaine Dollard, moves to suppress evidence derived from a wiretap of his telephone on the ground that the affidavit supporting the wiretap warrant does not establish any of the necessity elements set forth under 11 *Del. C.* § 2407(a)(3).

FACTS

On May 15 and 25, 2012, the Delaware State Police obtained three wiretap warrants for three different cellular telephones used by Galen Brooks, a suspected drug dealer in what the police believed was a large drug organization that allegedly operated in Dover, Delaware. On May 30, 2012, while intercepting Brooks' phone conversations, the police heard Brooks discussing the sale and delivery of several kilograms of cocaine with an unknown male, who was using a phone with the number (302) 723-1412. At 2:09 p.m. on May 31, the unknown male using the same phone number asked Brooks when he would be arriving, and Brooks advised the male that he was fifteen minutes away. The police observed Brooks arrive at a residence located at 112 Dominion Court, Smyrna, Delaware at 2:33 p.m. and park next to a silver Honda Accord located in the driveway.

Detective Jeremiah Lloyd of the Delaware State Police, who was conducting surveillance of Brooks that day, performed a DELJIS inquiry of the Honda Accord's license plate number. That search revealed that the car belonged to Keisha Adkins and was registered to the 112 Dominion Court address. Detective Lloyd also conducted a Delaware driver's license inquiry of Keisha Adkins, which revealed that Keisha Dollard lived at the same address. Lieutenant Wallace of the Delaware State

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Police later conducted a Kent County property tax inquiry of the address, which revealed that Jermaine Dollard and Kei-sha Dollard owned the property located at 112 Dominion Court. According to the affidavit used to support the wiretap warrant, Brooks “began supplying area drug dealers with quantities of crack cocaine and cocaine” following his meeting with Dollard.

On June 2, 2012, Dollard advised Brooks over the phone that he just obtained \$5,000 from the bank and that he needed \$1,200 to “finish his mission.” Brooks responded that he had that amount in his pocket. Brooks and Dollard met later that day and, according to the police affidavit, Brooks again began supplying area drug dealers with crack cocaine and cocaine. Brooks also advised Dollard over the phone that the new price of cocaine was \$1,250 per ounce.

On June 5, 2012, the police submitted a warrant application for the wiretap of (302) 723-1412, which was believed to be Dollard’s phone number. The affidavit accompanying the wiretap warrant application included the operative facts mentioned above, and a list of “normal investigative techniques” that the affiant states have been tried and failed, reasonably appear to be unlikely to succeed if tried, or were too dangerous to employ. That list of techniques is virtually identical to the list contained in the prior affidavits used to apply for the wiretaps of Galen Brooks’ three phones. The following is a summary of the normal investigative techniques contained in Dollard’s wiretap warrant affidavit:

- Physical Surveillance: The affiant states that although physical surveillance has been attempted and has been useful in identifying a number of suspects, including Dollard, it has not succeeded in gathering sufficient evidence of criminal activity and will not establish

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conclusively the elements of a criminal violation. Furthermore, the affiant states, physical surveillance will not establish the identity and roles of all of the alleged conspirators in the drug organization, and the police will likely be noticed, which will cause the suspects to become more cautious and would risk jeopardizing the investigation.

- Search Warrants: The affiant states 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 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 affiant states that he 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 and it would compromise the investigation by alerting the other conspirators, who would become more cautious.
- Confidential Reliable Individuals: The affiant states 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 affiant further states that it is unlikely that members of the drug organization, including Dollard, would share this information with confidential informants.
- Undercover Law Enforcement Activity: The affiant states 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 the details about the organization's activities and its members.

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- Interview of Suspects: The affiant states that interviewing suspected members of the organization will produce insufficient information about the organization's members and activities; the suspects would lie to the police; they would likely invoke their Fifth Amendment privilege against self-incrimination; and 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 affiant states that pen register, trap devises, and telephone tolls have been used in the investigation to verify communications between certain target phone numbers, but that it does not record the identity of the parties to the conversations or the substance of the conversations.

On June 5, a Superior Court Judge granted the wiretap warrant application, and shortly thereafter, the police began to intercept Dollard's phone calls. Based on incriminating information communicated over Dollard's phone, the police were able to obtain search warrants for Dollard's Honda Accord and his home, where the police later discovered drugs and weapons. Dollard now moves to suppress the communications seized under the warrant which applied to his phone, and the evidence (*i.e.* the drugs and weapons) found in his Honda Accord and his residence.

CONTENTIONS

Dollard contends that the police failed to establish the "necessity" requirement in the wiretap warrant, *i.e.* that the police tried normal investigative techniques, which failed, or that such techniques were unlikely to succeed or were too dangerous to employ. Specifically, Dollard contends that the affidavit used to support the wiretap warrant for his phone contains a virtually identical recitation of the "normal investigative techniques" that were used by the police in the earlier Brooks wiretap

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affidavits, and that the State cannot establish that other normal investigative techniques would have been futile or too dangerous without a separate and independent investigation of Dollard. He further contends that “it is impossible to conclude that any more traditional avenues of investigation were conducted or could have failed during the [six] day period” between the time that the police became aware of Dollard and when they applied for the wiretap warrant for his phone.

The State contends that the Superior Court Judge did not abuse his discretion when he granted the wiretap warrant, because the affidavit supporting the warrant stated that the police unsuccessfully attempted normal investigative techniques to lead to an arrest, including physical surveillance and the DELJIS and property tax records inquiry, and that, based on the police officers’ experience, further attempts to perform additional investigative procedures would have been futile. Furthermore, the State contends that “all investigative methods used against the organization should be included in the determination of whether the necessity requirement was met,” because Dollard, as the alleged supplier of controlled substances, was a part of the “Brooks organization.”

DISCUSSION

In order 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 This is known as the “necessity” requirement. In *State v. Perry*, this Court summarized the standard of review utilized when determining whether the necessity requirement has been satisfied:

When reviewing the application and accompanying affidavits for compliance with [11 *Del. C.* § 2407(a)(3)], 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

This Court reviews the question of whether a full and complete statement of

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).

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necessity for a wiretap was made in the application *de novo*.³ Once it is determined that the statement was made, the Court will review the authorizing Judge's determination of necessity for an abuse of discretion.⁴

In his motion, Dollard concedes that the necessity requirement was established in Brooks' prior affidavits. He contends, however, that the police impermissibly relied on the normal investigative procedures used in those affidavits and that the authorizing Judge could not have concluded that such procedures would have been futile with regard to Dollard, given the brief six-day investigation of him. However, having reviewed the affidavit used to support the wiretap warrant for Dollard's phone, I find that the authorizing Judge did not abuse his discretion in finding that the necessity requirement had been satisfied.

In *United States v. Heilman*⁵, the United States Court of Appeals for the Third Circuit held that the government established the necessity requirement for the wiretap of the defendant's phone despite the fact that much of the evidence used in the warrant to establish necessity was also referenced in the wiretap application for the phone of a different defendant involved in the same conspiracy. In *Heilman*, the police were investigating members of a motorcycle gang that were allegedly involved in a conspiracy to distribute crystal methamphetamine. As part of the investigation, the police sought and obtained a wiretap for a phone used by defendant Johnson.

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

⁴*Id.*

⁵ 377 F. App'x 157 (3d Cir. 2010).

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After conducting further investigation into the gang, including listening to Johnson's phone calls and using confidential informants to conduct controlled drug purchases, the police applied for wiretaps of Johnson's second phone and for the phone used by defendant Napoli, an alleged co-conspirator and supplier of drugs to the organization. The affidavits used to support the wiretap warrants for Johnson's second phone and Napoli's phone contained much of the same information with regard to why normal investigative tools precluded the police from obtaining sufficient evidence to prosecute the gang members.

Napoli moved to suppress the fruits of the wiretap because the government allegedly failed to establish the necessity requirement, and the District Court denied that motion. On appeal, the Third Circuit Court of Appeals rejected Napoli's argument that because the affidavits for Johnson and Napoli contained substantially similar information, the police did not conduct an independent investigation to establish necessity with respect to Napoli's phone. The court held that "[t]he wiretap applications make clear that law enforcement investigated Johnson, Napoli, and many other [gang] members as part of a larger investigation of a drug conspiracy," and concluded that "the District Court did not abuse its discretion when it found that the wiretap application for Napoli's phone established necessity, even though much of the evidence referenced to establish necessity was also referenced in the wiretap application for Johnson's second phone."⁶

Here, it is clear that Dollard, having been identified in the affidavit as a

⁶ *Id.* at 190.

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Brooks' drug supplier, was believed to have become part of a large drug conspiracy that the police had been investigating for years. Prior to applying for a wiretap warrant for Dollard, the police engaged in a very lengthy investigation into Galen Brooks and the alleged drug organization. After years of largely unsuccessful investigations, the police determined that it was necessary to obtain a warrant to wiretap Brooks' phones.

The affidavit used to support Dollard's wiretap warrant detailed the investigation into Brooks and the alleged drug organization, how the police became aware of Dollard, and what the normal investigative procedures were and why they would be futile. Those investigative procedures included physical surveillance; search warrants; Attorney General subpoenas; confidential reliable individuals; undercover law enforcement activity; interview of suspects; and pen register and telephone tolls. The affiant further stated that it was his belief that a wiretap was the only available technique that had a reasonable likelihood of securing the evidence necessary to prove that Dollard and the other suspected members of the drug organization were engaged in a drug distribution conspiracy.

As in *Heilman*, the wiretap applications for Brooks and Dollard make clear that the police were investigating them, among others, as part of a large drug organization conspiracy. Although much of the evidence referenced to establish necessity in Dollard's wiretap warrant was also referenced in Brooks' warrants, it was reasonable for the authorizing Judge to conclude that other normal investigative techniques would also fail with regard to Dollard, because Dollard belonged to the same secretive drug organization as Brooks. The fact that only six days had passed

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between the time that the police became aware of Dollard and when they applied for a wiretap warrant is immaterial if the police can establish that normal investigative procedures would be futile. As mentioned above, I believe that the State has met that burden.

CONCLUSION

For the foregoing reasons, Dollard's Motion to Suppress is *denied*.

IT IS SO ORDERED.

President Judge

oc: Prothonotary
cc: Order Distribution
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