## IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

# IN AND FOR KENT COUNT

STATE OF DELAWARE,	)
	)
V.	)
	)
EDWIN SCARBOROUGH,	)
(ID. No. 1208002007)	)
	)
Defendant.	)

Submitted: April 5, 2013 Decided: July 31, 2013

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

William G. Bush, IV, Esq., Dover, Delaware. Attorney for the Defendant.

Upon Consideration of Defendant's

Motion to Suppress **DENIED** 

VAUGHN, President Judge

July 31, 2013

#### **ORDER**

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

- 1. Defendant Edwin Scarborough ("Scarborough") moves to suppress all evidence obtained as a result of the wiretaps of cellular telephone numbers 302-222-5082 ("5082"), 302-399-3838 ("3838"), 302-732-1412 ("1412") and 302-535-9787 ("9787"). This is one of several related motions from multiple defendants that attack the wiretap applications. The defendant's motion asserts many of the same probable cause and necessity arguments as are presented in Brooks' corresponding motion to suppress. As to those arguments that overlap with Brooks', the rulings and reasoning set forth in my order denying Brooks' motion to suppress are equally applicable here. This order will only address Scarborough's contentions that are not asserted by other defendants.
- 2. The charges against Scarborough 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 specialized in the distribution of cocaine and crack cocaine.
- 3. With the exception of 1412, which was used by Jermaine Dollard, another alleged associate of the Organization, the wiretap applications that the

<sup>&</sup>lt;sup>1</sup> See State v. Brooks, I.D. No. 1206011471 (Del. Super. July 31, 2013) (ORDER) ("Brooks Order").

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defendant challenges were for Brooks' 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 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.<sup>2</sup>
- 5. Scarborough offers three primary contentions in support of his motion to suppress all evidence derived from the wire interceptions. First, he contends that the State's affidavits fail to satisfy the necessity requirement of 11 *Del. C.* § 2407(c)(1)(c); that normal investigative procedures were working and would have been likely to succeed without resorting to wiretaps; that such normal procedures included undercover officers, confidential informants ("CIs"), trash grabs, arresting defendants and providing immunity, additional surveillance and search warrants; that

<sup>&</sup>lt;sup>2</sup> See Brooks Order for a more comprehensive description of the affidavits' contents.

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CI #9 was able to infiltrate the Organization and identify a source of the Organization's cocaine in New York; that investigators never attempted to infiltrate the Organization through individuals other than Galen Brooks; that undercover police officers should have been used; that surveillance and Attorney General Subpoenas were successful and should have been continued; that the affidavits only addressed general problems associated with drug cases; and that the affidavits lacked specificity as to this case. Second, the defendant contends that he was not provided with inventories and notices within 90 days of the termination of the period authorized for the wiretaps, in violation of 11 *Del. C.* § 2407(g)(4). Third, Scarborough contends that probable cause did not exist for the issuance of the wiretap orders; that the applications contained stale and speculative information; and that six CIs were not past proven reliable or proper verification did not occur.

6. The State contends that the necessity requirement was satisfied. In support of that contention, it discusses the likelihood of success associated with several normal investigative techniques including: CIs, interviews of other suspects, undercover police officers, surveillance and Attorney General subpoenas. Next, the State contends that although the official inventory notice was technically late, the defendant had actual notice of the existence of a wiretap. The State suggests that Scarborough did not suffer any prejudice from the late post-intercept notice. Lastly, the State contends that the CI hearsay information complained of by the defendant is far from the only information in the affidavit, which details all of the independent police investigation as well. The State argues that the totality of the circumstances presented in the affidavits provide a substantial basis for a finding of probable cause.

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- 7. As mentioned, Scarborough's contentions regarding necessity and probable cause are largely identical to those raised by Brooks in his motion. Some minor differences include his emphasis on the specific successes achieved by normal investigative procedures and his suggestions regarding additional tactics that investigators should have pursued. These arguments are not persuasive. The information obtained by conventional procedures fell well short of accomplishing the asserted objectives of the investigation. Further, I do not find Scarborough's suggestion that investigators should have implemented strategies not mentioned in the affidavits—such as trash grabs and focusing on members of the Organization other than Brooks—to be reason enough to disturb the issuing judge's finding of necessity.<sup>3</sup> For the aforementioned reasons and for the reasons given in this Court's Order addressing Brooks' motion to suppress,<sup>4</sup> I conclude that the affidavits provided a sufficient factual basis to support Resident Judge Witham's findings of necessity and probable cause.
- 8. The defendant's remaining contention is that all evidence derived from the wiretap interceptions must be suppressed because he did not timely receive the "inventory notice" required by 11 *Del. C.* § 2407(g)(4). Section 2407(g)(4) provides:

Within a reasonable time but not later than 90 days after the termination of the period of an order or extensions

<sup>&</sup>lt;sup>3</sup> State v. Perry, 599 A.2d 759, 764 (Del. Super. 1990) ("[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.").

<sup>&</sup>lt;sup>4</sup> See Brooks Order.

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thereof, the issuing judge shall cause to be served, on the persons named in the order and the other parties to intercepted communications as the judge may determine in that judge's discretion that is in the interest of justice, an inventory that shall include notice of:

- a. The fact of the entry of the order;
- b. The date of the entry of the order and the period of authorized interception; and,
- c. The fact that during the period, wire, oral or electronic communications were or were not intercepted.

The judge, upon the filing of a motion, shall make available to the person or the person's counsel for inspection, portions of the intercepted communications, applications and orders pertaining to that person and the alleged crime.<sup>5</sup>

9. In *State v. Marine*,<sup>6</sup> the Delaware Supreme Court was presented with a situation where a defendant was not provided with timely, official post-intercept notice. The court cited the United States Supreme Court opinion, *United States v. Donovan*,<sup>7</sup> for the controlling principle that because post-intercept wiretap provisions are not central to the purpose of the wiretap statute, "in the absence of a showing of prejudice to the defendant or evidence of deceptive intent by the government, an inventory notice violation d[oes] not render a wiretap unlawful and suppression [i]s

<sup>&</sup>lt;sup>5</sup> 11 Del. C. § 2407(g)(4).

<sup>&</sup>lt;sup>6</sup> 464 A.2d 872 (Del. 1983).

<sup>&</sup>lt;sup>7</sup> 429 U.S. 413 (1977).

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not required." In *Marine*, the court found that no prejudice was suffered by the defendant because she received actual notice of the wiretap upon her arrest, which was before inventory notice was required; she was aware of the existence of wiretap evidence prior to the date inventory notice was required; and she was able to review transcripts of conversations well in advance of her trial date. The court concluded that "[s]he could not have suffered prejudice from a failure to provide her with timely, official post-intercept notice, since those provisions were designed to inform her of facts of which she already knew."

10. The situation here is similar to that in *Marine*, but it is also distinguishable in a few respects. It is undisputed that the State did not send the inventory notice within 90 days of the termination of the wiretap orders, as is prescribed by the statute. The orders ended on June 15, 2012, therefore, the ninety day period elapsed on September 13, 2012. The defendant contends that he was not provided with the notice until November 5, 2012. The State asserts that the defendant was indicted on September 4, 2012, within the ninety day time frame, and wanted on a Rule 9 warrant until his arrest on September 20, 2012. On that day, he was interviewed and told about the wiretaps.

11. Unlike in *Marine*, the defendant here may not have had actual notice of the wiretap interceptions until September 20, 2012, a week after the inventory notice

<sup>&</sup>lt;sup>8</sup> 464 A.2d at 876.

<sup>&</sup>lt;sup>9</sup> *Id*.

<sup>&</sup>lt;sup>10</sup> *Id*.

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was due. However, there has been no showing that Scarborough suffered prejudice

resulting from the failure to send timely post-intercept notice and there is no

allegation of any deceptive intent by the government. The defendant was apprised

of the existence of the wiretap upon his arrest, one week after inventory notice should

have been supplied. He has not yet been scheduled for trial and has ample time to

consider the wiretap evidence while he prepares his defense. Under these

circumstances, in the absence of prejudice, the late inventory notice is not grounds

for suppression.

12. Therefore, the defendant's motion is *denied*.

IT IS SO ORDERED.

President Judge	

oc: Prothonotary

cc: Order Distribution

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