

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,)
)
 v.)
)
MARK E. MATTHEWS,)
(ID. No. 1208002002))
)
 Defendant.)

Submitted: April 5, 2013

Decided: July 31, 2013

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

John R. Gary, 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. On June 2, 2012, investigators intercepted incriminating telephone conversations between Galen Brooks ("Brooks") and defendant Mark Matthews ("Matthews"). Matthews now moves to suppress all evidence obtained as a result of the wiretaps of cellular telephone numbers 302-222-5082 ("5082"), 302-399-3838 ("3838") and 302-535-9787 ("9787"). These numbers are alleged to have belonged to Brooks. This is one of several related motions from multiple defendants that attack the wiretap applications. On April 5, 2013, the Court heard oral argument on the wiretap motions and granted certain defendants an additional twenty days to make supplemental submissions. The defendant's original motion asserted probable cause and necessity arguments that were identical to those presented in Brooks' corresponding motion to suppress. Matthews' supplemental brief provides more specific allegations to support his contentions, but the essence of his arguments remains the same. In this order, I will address Matthews' arguments to the extent that they are unique from those offered by Brooks. As to Matthews' arguments that overlap with Brooks', the reasons set forth in my order denying Brooks' Motion to Suppress are equally applicable here.¹

2. The charges against Matthews arise in the context of an extensive police

¹ See *State v. Brooks*, I.D. No. 1206011471 (Del. Super. July 31, 2013) (ORDER) ("Brooks Order").

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investigation into an alleged drug trafficking syndicate 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 syndicate. The syndicate is alleged to have specialized in the distribution of cocaine and crack cocaine.

3. 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 syndicate. The investigation began in 1996, and involved the use of physical and video surveillance, 16 confidential informants (“CIs”), interviews with suspected associates of the syndicate, 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 80 pages.²

4. Matthews first contends that the State failed to establish probable cause. Specifically, he contends that the State improperly relied upon CIs who were not past proven reliable, and who provided anonymous tips that lacked sufficient indicia of reliability for the establishment of probable cause. He argues that CI #1 was ultimately uncooperative with police and that CI #5 was eventually imprisoned. The defendant next contends that the State failed to satisfy the necessity requirement of 11 *Del. C.* § 2407(a)(3). In particular, he contends that police learned Brooks’

² See Brooks Order for a more comprehensive description of the affidavits’ contents.

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identity, the location of Brooks' residence, Brooks' cell phone number and the names of ten alleged conspirators utilizing confidential informants, search warrants and physical surveillance. He contends that this demonstrates that police were able to effectively investigate the syndicate without resorting to wiretaps.

5. The State contends that even though some of the CIs were not past proven reliable, that does not negate the importance of the information received; that information provided by three of those CIs was corroborated and verified by investigators; that of the 16 total CIs, seven were past proven reliable when the information was given; that four CIs conducted controlled purchases of drugs; that the warrant application must be reviewed as a whole rather than reviewing portions in a vacuum; and that the defendant suggests the standard for the necessity requirement is stricter than courts have previously found.

6. Title 11, Section 2407 of the Delaware Code sets forth the probable cause requirements necessary to obtain the issuance of an order authorizing a wiretap:

c) Issuance of order.--

(1) Upon the application a judge may enter an ex parte order, as requested or as modified, authorizing interception of wire, oral or electronic communications . . . if the judge determines on the basis of the facts submitted by the applicant that:

- a. There is probable cause for belief that an individual is committing, has committed, or is about to commit an offense enumerated in § 2405 of this title;
- b. There is probable cause for belief that

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particular communications concerning that offense will be obtained through the interception;

....

d. There is probable cause for belief that the facilities from which or the place where the wire, oral or electronic communications are to be intercepted are being used or are about to be used in connection with the commission of the offense or are leased to, listed in the name of, or commonly used by an individual engaged in criminal activity described.³

“To establish probable cause, the police are only required to present facts which suggest, when *those facts* are viewed under the totality of the circumstances, that there is a fair probability that the defendant has committed a crime.”⁴ The determination of probable cause by the issuing magistrate is entitled to great deference by a reviewing court.⁵

7. I conclude that the totality of the circumstances presented in the

³ 11 *Del. C.* § 2407(c).

⁴ *State v. Maxwell*, 624 A.2d 926, 930 (Del. 1993).

⁵ *State v. Perry*, 599 A.2d 759, 765 (Del. Super. 1990) (citing *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984)); *see also State v. Holden*, 60 A.3d 1110, 1114 (Del. 2013) (discussing search warrants in general, the court noted, “[a] court reviewing the magistrate's determination has the duty of ensuring ‘that the magistrate had a substantial basis for concluding that probable cause existed.’ A magistrate's determination of probable cause ‘should be paid great deference by reviewing courts’ and should not, therefore, ‘take the form of a de novo review.’” (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983))).

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affidavits demonstrate that there was a fair probability that communications intercepted pursuant to the contested wiretaps would reveal evidence of drug trafficking undertaken by the syndicate.⁶ 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. The affidavits are replete with information upon which the issuing judge could reasonably rely upon in making his probable cause determination.⁷ The affidavits easily provide sufficient factual bases for deciding that probable cause existed notwithstanding their reliance upon some information from CIs who were not past proven reliable.

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 succeed if tried, or why such procedures would be too dangerous if tried.”⁸ 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

⁶ Anzara Brown, another alleged associate of the syndicate, 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 31, 2013) (ORDER).

⁷ See Brooks Order.

⁸ 11 *Del. C.* § 2407(a)(3).

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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.⁹

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*.¹⁰ Once it is determined that the statement was made, the Court will review the magistrate's determination of necessity for an abuse of discretion.¹¹

10. Matthews' contentions regarding the necessity requirement are not persuasive. The State does not dispute that it was able to acquire *some* information

⁹ *State v. Perry*, 599 A.2d 759, 764 (Del. Super. 1990) (citations and internal quotation marks omitted).

¹⁰ *United States v. Phillips*, 959 F.2d 1187, 1189 (3d Cir. 1992).

¹¹ *Id.*

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regarding the Organization through its pursuit of normal investigative techniques, but that does not, in and of itself, “extinguish the need for a wiretap.”¹² The information obtained fell well short of accomplishing the asserted objectives of the investigation and discovering the extent of the syndicate’s operations. The applications state that “usual investigative means have proved insufficient to establish all of [the conspirators’] true identities, the full scope of the Organization, sources of supply, off load locations, money collection and laundering methods. Gathering this information is the goal of the investigation.” The affidavits document the efforts that were undertaken prior to the applications for a wiretap, and reasonably predict that normal investigative procedures are unlikely to yield sufficient information in the future.

11. For the aforementioned reasons, and for the reasons set forth in this Court’s order addressing Brooks’ Motion to Suppress, I conclude that the defendant’s motion should be *denied*.

IT IS SO ORDERED.

President Judge

oc: Prothonotary
cc: Order Distribution
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¹² *United States v. Bennett*, 219 F.3d 1117, 1122 (9th Cir. 2000) (discussing the federal wiretap statute’s necessity requirement, the court stated that “the mere attainment of some degree of success during law enforcement’s use of traditional investigative methods does not alone serve to extinguish the need for a wiretap.”).