IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. No. 1411008699
	)	
KEITH CAMPBELL,	)	
	)	
Defendant.	)	

Submitted: September 22, 2015
Decided: October 5, 2015

On Defendant's Motion to Suppress
GRANTED IN PART, DENIED IN PART

MEMORANDUM OPINION

Matthew Frawley, Esquire; Department of Justice, 820 N. French Street, Wilmington, DE 19801. Counsel for the State of Delaware.

Robert Goff, Esquire; Office of the Public Defender, 820 N. French Street, Wilmington, DE 19801. Counsel for Defendant Keith Campbell.

CARPENTER, J.

The Court has before it several motions relating to the search warrants

executed in Keith Campbell's ("Defendant") case and the statements he made to the police. While combined in two motions, the issues can be broken down into five categories:

(1) The sufficiency of information in the warrant to establish probable cause;

(2) The nexus between the request to collect a DNA sample and the bullet casings recovered from the shooting scene;

(3) Whether the collection of DNA was simply a pretext to interview the defendant;

(4) Whether there have been alleged misstatements by the detective in the search warrant affidavit which require a *Franks* hearing; and

(5) Whether the detective violated Defendant's *Miranda* rights by continuing to interview him in violation of his Fifth and Sixth Amendment right to counsel.[1]

[1] While Defendant's Motion is captioned as a Fifth Amendment violation, the Court finds the argument is more appropriately characterized as a Sixth Amendment violation of his right to counsel. Regardless of the proper characterization, the Constitutional violation is the failure of the police to terminate the interview once Defendant invoked his right to counsel.

The Court will address each issue separately:

1. <u>Probable Cause</u>

There were three search warrants executed in this case. One for the Defendant's residence, one for his vehicle, and the final one for a DNA swabbing, photographs, and to recover his cell phones. The first 23 paragraphs of each warrant are identical and represent the critical portions of the warrant relating to Defendant's overall suppression argument.

The warrants reflect that on the evening of November 7, 2014, Aleem Sadizwakil and Veniece Morrow were in a vehicle parked in front of Aleem's house when a dark-colored SUV drove past them and parked on the opposite side of the road. Two African American males exited the vehicle, and as they came to the front of Mr. Sadizwakil's vehicle, the driver of the SUV began to shoot into the car. As a result, Mr. Sadizwakil started his vehicle and began to drive in reverse down New Castle Avenue. Ms. Morrow was struck by a bullet on her left side but was able to exit the vehicle. Mr. Sadizwakil continued to drive toward Wilmington eventually running into a Wilmington Police Department vehicle as he was suffering from multiple gunshot wounds. Both victims were eventually transported to Christiana Hospital.

Three days after the incident, Ms. Morrow's mother called the investigating detective and advised that she had "received information" that the suspects involved in her daughter's shooting fled in a black Ford Explorer and she had a partial Delaware Registration number of PC31. The affidavit does not indicate how the mother received this information or its source.

On November 8, 2014, the day after the shooting, Defendant was stopped by New Castle County Police for a traffic violation. At the time he was operating a black Ford Explorer with Delaware Registration number PC116369. Defendant told the officer that he had "just purchased" the vehicle.

On November 12, 2014, Detective Garcia ("detective") received information from a confidential source that the individual involved in the shooting had a girlfriend by the name of Dayna. It appears that this information was shared with other detectives and it was learned that in an unrelated investigation, Defendant and Dayna Waters had been identified as having an ongoing relationship.[2]

The United States and Delaware Constitutions protect against unreasonable searches and seizures by requiring that search warrants be issued only upon a showing of probable cause.[3] "An affidavit in support of a search warrant must,

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[2] The officer also included in his affidavit that he had received additional information from a confidential informant that Defendant had admitted to being involved in the hit and they knew that Dayna was his girlfriend. This information however is not identified by time and place and will not be considered.

[3] *See, e.g.*, *LeGrande v. State*, 947 A.2d 1103 (Del. 2008); *see also* Del. Const. art 1, § 6 ("The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to

within the four-corners of the affidavit, set forth facts adequate for a judicial officer to form a reasonable belief that an offense has been committed and the property to be seized will be found in a particular place."[4] The determination of whether probable cause exists requires the Court to consider the totality of the circumstances.[5]

The Court's duty "is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed" in a manner that affords a certain degree of deference to the factual inferences drawn by the issuing magistrate.[6] "Notwithstanding this deference, our 'substantial basis' review requires us to determine whether 'the warrant was invalid because the magistrate's probable-

search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.").

[4] *LeGrande*, 947 A.2d at 1107 (citing *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006)); *see also* 11 *Del. C.* § 2307(a) ("If the … magistrate finds that the facts recited in the complaint constitute probable cause for the search, that person may direct a warrant to any proper officer or to any other person by name for service. The warrant shall designate the house, place, conveyance or person to be searched, and shall describe the things or persons sought as particularly as possible.").

[5] *See LeGrande*, 947 A.2d at 1107-08; *see also Stewart v. State*, 2008 WL 482310, at *2 (Del. Feb. 22, 2008) ("The existence of probable cause is to be measured by the totality of the circumstances; factual and practical considerations of life on which reasonable men, not legal technicians, act.").

[6] *See LeGrande*, 847A.2d at 1108 (quoting *Sisson*, 903 A.2d at 296); *see also Gardner v. State*, 567 A.2d 404, 409 (Del. 1989) ("This Court has also eschewed a hypertechnical approach to the evaluation of the search warrant affidavit in favor of a common-sense interpretation, bearing in mind that the court reviewing the search warrant owes a certain degree of deference to the issuing magistrate.").

cause determination reflected an improper analysis of the totality of the circumstances....'"[7]

An informant's tip may provide probable cause where the totality of the circumstances, if corroborated, indicates that the information is *reliable*. Inquiry as to the information's reliability involves consideration of "the reliability of the informant, the specificity of the informant's tip, and the degree to which the tip is corroborated by independent police surveillance and information."[8] Where an informant's tip is sufficiently corroborated, "the tip may form the basis for probable cause even though 'nothing is known about the informant's credibility.'"[9]

Having considered the totality of the circumstances, the Court finds that the affidavit in support of the warrant is sufficient to establish probable cause that the crime was committed and Defendant was involved. The victims were able to provide a description of the shooter and his accomplice and identify the vehicle they arrived in. This information was corroborated by and was consistent with the information subsequently provided by the victim's mother. While certainly it

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[7] *See LeGrande*, 847A.2d at 1108 (quoting *United States v. Leon*, 486 U.S. 897, 915 (1984) ("Even if the warrant application was supported by more than a 'bare bones' affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.")).

[8] *See Miller v. State*, 25 A.3d 768, 771-72 (Del. 2011).

[9] *See Hubbard v. State*, 2001 WL 1089664, at *4 (Del. Sept. 5, 2001) (quoting *Tatman v. State*, 494 A.2d 1249, 1251-52 (Del. 1985)).

would have been helpful to identify the source or under what circumstances the information was obtained by the mother, the Court does not find it is fatal to the sufficiency of the warrant.[10]

Having identified the type of car used in the crime, Detective Garcia's efforts shifted to trying to determine the identity of the shooter. Five days after the shooting, the detective received information from a confidential source that one of the individuals involved in the incident had a girlfriend by the name of Dayna. Not only was this a unique spelling for this name, another detective indicated that he was familiar with a Dayna Waters and that she and Defendant had been identified as boyfriend and girlfriend in an earlier investigation. Recognizing that Defendant had been stopped for a traffic violation the day after the shooting while operating a motor vehicle similar to that described by the victim and her mother, the reliability of the confidential informant information was reasonably confirmed.

While the pieces of the affidavit standing alone do not support probable cause, when considered together, it reflects a reasonable probability Defendant was involved in the shooting.[11] The warrant here does not have to establish

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[10] *See McAllister v. State*, 807 A.2d 1119, 1124 (Del. 2002) ("An informant's tip that is corroborated by independent police work can form the basis for probable cause, regardless of what is known about the informant's personal credibility or reliability.").

[11] *See Dorsey v. State*, 761 A.2d 807, 811 (Del. 2000) ("Accordingly, we have held that the affidavit supporting the search warrant must be 'considered as a whole and not on the basis of separate allegations.'").

Defendant's guilt beyond a reasonable doubt. That will be decided at trial. But under the standards for establishing probable cause, the Court finds the warrant is sufficient.

While the Court will uphold the warrants, it does not want to leave the impression that it believes the detective's efforts here were stellar. While this was good police investigative work, the effort to support it in written documents was minimal at best.[12] Perhaps the intent here was to protect the detective's sources, but by doing so, he made the Court's decision regarding the sufficiency of these warrants a very close call and unnecessarily jeopardized the arrest. In any event, under the totality of the circumstances, the Court is satisfied the warrants are sufficient and will not suppress any evidence seized from their execution.

2. DNA Nexus

Defendant next argues that there is no nexus between the taking of a DNA swab from Defendant and the evidence recovered from the crime scene. "In determining whether probable cause has been demonstrated, there must be a *logical* nexus between the items sought and the place to be searched."[13] The affidavit's four corners, along with logical inferences based on the specific facts

[12] *See id*. ("The requirement that all facts relied upon by the magistrate be in a written affidavit insures that the reviewing court may determine whether the constitutional requirements have been met without reliance upon faded and often confused memories.").
[13] *Id.* at 811-12.

alleged therein, "must demonstrate *why* it was objectively reasonable for the police to expect to find the items sought in those locations."[14] Delaware Courts do not necessarily require that probable cause be based on firsthand knowledge that the items specified in affidavits are actually located in the places to be searched, nor is it required that the owners of properties identified be suspected of criminal activity.[15] Rather, our Courts have framed the question as "whether, based upon the specific facts alleged within the affidavit's four corners, one would *normally* expect to find those items at that place."[16] If answered in the affirmative, "then that inference will suffice to allow the valid issuance of a search warrant for that place."[17]

To justify taking the DNA sample, the detective included the following additional paragraphs in the warrant:

> 28. Your affiant is aware that several casings from the firearm that was fired were located at the scene and collected as evidence.
>
> 29. Your affiant is aware that it is possible to collect DNA evidence of the suspect(s) from the casings. Your affiant is aware that DNA belonging to Keith Campbell 8/3/1988 can be compared to any DNA found on the casings.

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[14] *See id*. (emphasis added).

[15] *See id*. at 813.

[16] *See id.* (emphasis in original) (finding it "illogical for the State to argue that it is 'normal' to expect to find the murder weapon missing from a crime scene concealed in the automobile of the first person to discover a murder victim's body").

[17] *See id*.

Critical to Defendant's argument is that, at the time the warrant was issued, no effort had been undertaken to determine whether usable DNA was on the shell casings recovered at the crime scene. Without any support for his conclusion, the detective simply stated he "is aware that it is possible" to recover DNA from shell casings. The statement is not supported by the detective's personal knowledge gained from work experience or other investigations that may have occurred or even based on specific training or education. It is simply a conclusory statement without any support.

Defendant has presented a series of cases to the Court in which courts have found that, absent law enforcement recovery of a comparison sample of DNA, a DNA swab search warrant is unsupported by probable cause.[18] In the most recent decision cited by Defendant, *Hindman v. United States*,[19] the United States District Court for the Northern District of Alabama stated the standard,[20] applied by many

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[18] *See Hindman v. United States*, 2015 WL 4390009, at *22(N.D. Ala. July 15, 2015); *United States v. Marshall*, 2012 WL 2994020, at *3 (W.D.N.Y. July 20, 2012) *aff'd*, 2012 WL 5512548 (W.D.N.Y. Nov. 14, 2012); *People v. Turnbull*, 2014 WL 4378809, at *3 (V.I. Super. Sept. 4, 2014); *United States v. Myers*, 2014 WL 3384697, at *7 (D. Minn. July 10, 2014) (emphasis in original); *United States v. Robinson*, 2011 WL 7563020, at *2-5 (D. Minn. Dec. 2, 2011) *report and recommendation adopted*, 2012 WL 948670 (D. Minn. Mar. 20, 2012).

[19] 2015 WL 4390009 (N.D. Ala. July 15, 2015) (There, the defendant argued the affiant officer's representations and omissions were misleading as they related to collection of DNA evidence from a cigarette).

[20] The Court ultimately did not apply the standard, however, because the defendant's claim was procedurally defaulted.

of the cases supporting Defendant's proposition, for demonstrating probable cause sufficient to authorize collection of DNA from a free citizen suspected of crime:

> [T]he government must possess a testable DNA sample sufficiently linked to the subject crime, which might then be compared to the suspect's sample to attempt to establish a 'match' placing him at the scene. The testable DNA is necessary because DNA, like a fingerprint, is a means of identification and not, in and of itself, evidence of any particular crime.[21]

This standard was applied in *United States v. Myers*, in which the United States District Court for the District of Minnesota found no probable cause existed for the issuance of a buccal swab search warrant where the affidavit provided only that the defendant's DNA would be compared to "*possible* DNA to be recovered from seized firearms," without any indication that law enforcement officials had even tested the evidence for a comparison sample.[22] Even still, citing the United States Supreme Court's decision in *United States v. Leon*,[23] the Court held "law enforcement's good faith reliance on [the] warrant militate[d] against suppressing

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[21] *Hindman*, 2015 WL 4390009, at *22 (internal citations omitted); *see also People v. Turnbull*, 2014 WL 4378809, at *3 (V.I. Super. Sept. 4, 2014) ("Here, a comparison sample of DNA found on the MAC–11 firearm may very well exist. However, absent evidence of such a sample in Detective Joseph's supporting affidavit, this Court does not find probable cause exists that evidence of criminal activity may be discovered by compelling Turnbull to submit to buccal swabbing."); *United States v. Marshall*, 2012 WL 2994020, at *3 (W.D.N.Y. July 20, 2012) *aff'd*, 2012 WL 5512548 (W.D.N.Y. Nov. 14, 2012) ("Without evidence that the DNA samples recovered from the firearms are of a sufficient quality to be used for comparison purposes with the DNA the government seeks to obtain from the defendants, there is nothing to suggest that compelling defendants' DNA will lead to probative evidence in this case."); *United States v. Robinson*, 2011 WL 7563020, at *2-5 (D. Minn. Dec. 2, 2011) *report and recommendation adopted*, 2012 WL 948670 (D. Minn. Mar. 20, 2012) (finding probable cause did not exist for collection for DNA when no comparison sample existed, but applying *Leon* good faith exception and denying motion to suppress).

[22] *United States v. Myers*, 2014 WL 3384697, at *7 (D. Minn. July 10, 2014) (emphasis in original).

[23] 468 U.S. 897, 919-22 (1984) (exclusionary rule does not apply "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope").

any evidence obtained in the search."[24] The Court explained that "although some district courts have held that absent law enforcement's recovery of comparison sample of DNA, a buccal swab search warrant is unsupported by probable cause, this principle is not so clearly established in this Circuit or across the country that law enforcement unreasonably neglected this requirement."[25]

The reasoning in these decisions is compelling but, in the Court's opinion, goes too far. In spite of the public perception created by the "CSI effect," the determination of whether DNA exists on an object is not an easy or quick process. And in an underfunded and resource-limited criminal justice system, to mandate such a finding is simply unrealistic. That said, the Court does believe more is required than the detective's unsupported belief that DNA may be recovered from an object. At a minimum, the assertions made in the affidavit must be supported by training, education, or experience that would reasonably justify and explain the detective's conclusion that DNA could reasonably be recovered from that particular object. On occasion, this will be easy to justify simply from the object

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[24] *Myers*, 2014 WL 3384697, at *7-8 ("Investigator Eikam's supporting affidavit indicates that he presented Judge Hylden with specific facts concerning underlying criminal incidents and the recovery of criminal paraphernalia believed to be, in good faith, bearing testable DNA sufficient to create probable cause in support of an application for a buccal swab search warrant. Accordingly, on January 14, 2014, when executing the search warrant for a buccal swab of Defendant's DNA, law enforcement appropriately relied on the search warrant issued by Judge Hylden.").
[25] *Id*. at 8 ("It was not unreasonable for law enforcement to be unaware of [the above-described] required showing of probable cause prior to seizing the DNA sample from the Defendant. The law in this area is not so clearly established that the officers could reasonably predict that the affidavit lacked sufficient indicia of probable cause.") (quoting *Robinson*, 2011 WL 7563020, at *2-5).

being tested, such as blood or semen. On other occasions, when the object is one on which DNA is not routinely found because of the properties of that object, more justification for the search will be needed.

Here, the lack of any foundation to support the detective's conclusion would require the Court to suppress the evidence seized from the DNA swab. However, during oral argument it was disclosed to the Court that no DNA testing was ever performed on the shell casings in spite of the DNA evidence taken from Defendant. As such, there is nothing to suppress. While perhaps this circumstance may be relevant to other arguments made by Defendant, the nexus argument set forth in his Motion is moot by the lack of any testing.

3. Pretext

Defendant next asserts that the warrant obtained to take a DNA swab, photos of Defendant, and his cell phone were simply a pretext in order to interview him. While Defendant has asserted that the actions of the detective were conducted in bad faith, there is simply nothing before the Court to support that contention.

There does not appear to be any dispute that, after receiving the "body warrant," the police went to Defendant's place of employment around 9:15 a.m. In order to take the DNA swab and photos, Defendant was transported to the New Castle County Police headquarters. There is nothing to suggest this was improper

or Defendant was placed under arrest or improperly detained at that time. The closest Defendant comes to circumstantially supporting his pretext argument is the nearly three-hour delay in performing the search. It is clear that the delay here was associated with the detective taking the opportunity to talk with Defendant regarding the shooting incident. The Court has listened to the interview tapes and the detective began the first interview by giving Defendant a copy of the "body warrant." Detective Garcia then stated:

> DG: Listen. I have here, I'm going to give you a copy okay, this copy of the search warrant authorizing me to get your DNA, basically a buccal swab okay. (UI) Q-tip in your mouth get a saliva, DNA sample and your cell phone, okay and pictures, okay.
>
> KC: What's this for?
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> DG: Right here it'll tell you.
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> KC: I know but
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> DG: Tell you what the crime is.
>
> KC: Murder. What?
>
> DG: Um-hmm.
>
> (Pause)
>
> DG: Hear me out. What I would like to do is talk to you about this case, okay. I need to hear your side of the story. I have one side. I need to hear your side. I'm (UI) a judge thought I had enough evidence to get your DNA and he signed to my–signed

off on my search warrant, okay. I'm going to ask you do you want to talk. Can we talk? Do you want to know what this is all about?

KC: (UI) Please

DG: Okay. I'm going to leave this with your property, okay. Give me a couple minutes and I'll be right back. We can sit down and talk, okay.

The detective subsequently returned with a written *Miranda* document, explained Defendant's rights to him and then Defendant signed and dated the document. From the Court's review of the interview tape, it is clear Defendant agreed to speak with the detective primarily because he wanted to know "what was going on." Defendant had not been arrested, was told he was not being placed under arrest, and was clearly free to refuse to talk with the officer.

After the initial discussion, Defendant asked that the detective return to the interview room for a second interview and told him that he was now willing to give the officer his cell phone pass code. This had been a topic of discussion in the first interview and Defendant had refused to provide the code because he did not want the detective to have access to photographs of his girlfriend that were on the phone. This was a very short interaction between Defendant and the detective, but it did subsequently lead to a third interview that was again initiated by Defendant.

The Court will agree that the detective here took the opportunity afforded by

the execution of the warrant to talk with Defendant, but there is nothing to support that the warrants were simply a ruse in an effort to obtain the interview. Defendant was free to refuse to talk to police, allow them to execute the warrant, and leave the premises.[26] However, even if the Court was to agree that the motive of the detective here was simply to get Defendant to the police station so he could interview him, the detective still had to obtain authorization and approval from the Court for the warrant. There has been no assertion that the Court here approved the warrant for any reason other than being convinced that there was sufficient probable cause. While the warrant provided the detective with an opportunity to talk to Defendant, which Defendant did voluntarily, such conduct is not improper. The Court is confident that, in hindsight, Defendant wished he had not talked with the police. Nonetheless, the Court finds the detective's conduct here was appropriate and is not a basis to suppress the statements.

[26] Subsequent to the third interview an administrative warrant for a violation of probation was attained and Defendant was arrested on that warrant.

4. ***Franks* Hearing**

Defendant next contends Detective Garcia's statements purporting to justify the body warrant were "either deliberately untrue or made with reckless disregard for their truthfulness" and as such, the Court should exclude them under *Franks v. Delaware*[27] from its determination of whether the body warrant was supported by probable cause.[28]

In *Franks*, the Supreme Court of the United States emphasized that, "[w]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing."[29] Accordingly, where a defendant makes a substantial preliminary showing that (1) the affiant made a false statement in the warrant either knowingly and intentionally, or with reckless disregard for the truth and (2) the allegedly false statement is necessary to the finding of probable cause, the Court must hold a hearing at the defendant's request.[30] A defendant will not be afforded a *Franks* hearing unless his or her claims are "more than conclusory," meaning the "allegation[s] … must point out specifically with supporting reasons the portion of

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[27] 438 U.S. 154 (1978).

[28] Def.'s Mot. to Suppress ¶16.

[29] *Franks*, 438 U.S. at 164-65 (emphasis in original) (citation omitted) (the Court defined "truthful" in this context as when information provided in the affidavit "is believed or appropriately accepted by the affiant as true" and *not* "in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily").

[30] *See id*. at 154.

the warrant affidavit that is claimed to be false" and "be accompanied by an offer of proof, including affidavits or sworn or otherwise reliable statements of witnesses, or a satisfactory explanation of their absence."[31] Under *Franks*, a search warrant will only be voided, and the fruits of the search excluded, if after the hearing, the defendant proves by a preponderance of the evidence "that the false statement was included in the affidavit by the affiant knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to the finding of probable cause."[32]

Here, Defendant argues Paragraphs 28 and 29 of the affidavit pertaining to the buccal swab are misleading and, if omitted from the document, the affidavit would be devoid of probable cause. Specifically, he maintains the detective *knew* it would be nearly impossible to recover a DNA sample from the casings and only requested the buccal swab for purposes of interviewing him.[33] In support of his assertion, Defendant cites a Minnesota Appellate Court case in which a DNA analyst from a private laboratory testified as to the lab's minimal statistical success in retrieving DNA samples from casings and that "the greater number of forensic scientists believe that heat affects the ability to get DNA from a casing."[34] Though

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[31] *See id.*

[32] *See id.* at 155.

[33] Def.'s Mot. to Suppress ¶15 (emphasis added).

[34] *State v. Jackson*, 2013 WL 5019151, at *3 (Minn. Ct. App. Sept. 16, 2013), *review denied* (Nov. 26, 2013) (testimony of DNA analyst).

interesting, this information is simply insufficient to make a preliminary showing that the detective here was deliberately or recklessly untruthful in stating that he was aware that casings from the gun were collected at the scene and that "it is *possible* to collect DNA evidence" from the casings and compare it to the Defendant's DNA. Truthfulness under *Franks* does not require "every fact recited in the warrant affidavit is necessarily correct."[35] While the information provided by the detective to support the body warrant is not ideal, there is no proof his statements were untruthful, let alone deliberately or recklessly untruthful. It is also important to bear in mind that "[t]he 'assessment of probabilities' that flows from the evidence presented in support of the warrant 'must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'"[36] Thus, Defendant failed to make the substantial preliminary showing required for a *Franks* hearing.

5. <u>Recorded Statements</u>

The final argument asserted by Defendant is that his Fifth and Sixth Amendment right to counsel was infringed when the detective continued to question him after he requested to be taken before a judge. Fundamental to our system of justice is that a suspect must be fully informed of his *Miranda* rights

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[35] *See Franks*, 438 U.S. at 164-65.
[36] *See Gardner*, 567 A.2d at 409.

prior to a custodial interrogation.[37] These rights are maintained throughout the interrogation, and if the defendant indicates in any manner and at any stage of the process that he wishes to consult with an attorney or terminate the interview, those requests must be honored by the police.[38]

Unfortunately, on most occasions neither the police officer nor the defendant are legal scholars, and how those rights are invoked is not always clear or stated in legalese. As a result, the law has developed that when it appears that a defendant is attempting to invoke his *Miranda* rights, the police officer must stop the questioning and clarify the defendant's intention before continuing the interview.[39] In addition, upon inquiring into a defendant's intention, the police may not coerce or intimidate or otherwise discourage the exercise of those rights.[40]

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[37]*See Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way").

[38]*See id.* (Throughout the interrogation, if the suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.").

[39]*See Norcross v. State*, 816 A.2d 757, 762 (Del. 2003); *see also State v. Sumner*, 2003 WL 21963008, at *13 (Del. Super. Ct. Aug. 18, 2003) ("Under the Delaware Constitution, however, the police must clarify the suspect's intention before continuing with the interrogation.").

[40]*See State v. Restrepo-Duque*, 2014 WL 1724755, at *6 (Del. Super. Apr. 15, 2014) (quoting *Draper v. State*, 49 A.3d 807, 810 (Del. 2002)) ("[A]ny inquiries made in this context 'may not be used to coerce or intimidate the suspect or otherwise discourage his effort to secure counsel, if that is his intention.'").

The Court first finds that Defendant here was advised of his *Miranda* rights and executed a written document acknowledging them. As indicated previously, it appears Defendant voluntarily agreed to talk with the detective since he wished to know "what was going on." He had been given a copy of the search warrant which indicated the police were investigating an attempted murder, and since Defendant was not new to the criminal justice system, he appreciated that he appeared to be the focus of that investigation. The Court finds that during the initial interview the detective appropriately advised Defendant of his *Miranda* rights and Defendant knowingly waived them.[41]

That said, the Court has also reviewed all of the taped statements that were made by Defendant when he was taken to the police station to execute the search warrant. Approximately halfway through Defendant's first interview, he stated "I need to see a fucking judge now, I need to call my_____." The Court finds this was a sufficient invocation of Defendant's rights that would have called for the detective to stop the interview and clarify the statement.[42] Instead of taking such action, the detective engaged in a course of conduct intending to discourage the

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[41]*See Miranda*, 384 U.S. at 444-45 (finding that the *Miranda* rights may be waived, provided the suspect does so voluntarily, knowingly, and intelligently); *see also Norcross*, 816 A.2d at 762 (Based on the totality of the circumstances, the court must be satisfied that the waiver was "the product of a free and deliberate choice rather than intimidation, coercion or deception").

[42]*See Sumner*, 2003 WL 21963008, at *13 (Del. Super. Aug. 18, 2003) (holding that where a suspect equivocally invokes his right to counsel, "[f]urther questioning thereafter must be limited to clarifying that request until it is clarified").

exercise of those rights.[43] Therefore, the initial interview from the bottom of page 23 of the transcript to the end of that interview will be excluded.[44]

Generally, such conduct would require the suppression of all of the interviews conducted that day.[45] However, it is also clear that Defendant here is the one who initiated the subsequent two contacts with the detective and at least at the beginning of the third interview, a discussion of Defendant's *Miranda* rights again occurred.[46] The Court finds these statements are the result of Defendant initiating those conversations and during which he waived his *Miranda* rights that had been previously invoked.[47] As such, the conversations, which the Court has characterized as the second and third interview, will not be suppressed.[48]

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

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[43] *See Restrepo-Duque*, 2014 WL 1724755, at *6.
[44] *See Wainwright v. State*, 504 A.2d 1096, 1102 (Del. 1986) (holding that, once a suspect evokes the right to counsel, "[i]f the police initiate further questioning …[the] resulting statements are excludable apart from the issue of waiver").
[45] *See id.*
[46] *See id.* at 1100 (citing *Edwards v. Arizona*, 451 U.S. 477, 485 (1981)) (noting that, if the prosecution can "establish that the accused initiated further contact with the police, *and* validly waived his previously invoked right to counsel" the statements are admissible under *Edwards v. Arizona)*; *see also Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (affirming that even where the accused reinitiates contact, if "reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation"); *see also Sumner*, 2003 WL 21963008, at *13 (noting the Delaware Supreme Court's position that "the police should be entitled to attempt to determine the suspect's intention ... [w]hich may include ... the repeating of *Miranda* warnings as a means of emphasizing the defendant's constitutional right to counsel.").
[47] *See Miranda*, 384 U.S. at 444-45; *see also Garvey*, 873 A.2d at 297 (noting that whether a defendant subsequently waived his or her right to counsel must be decided on a case-by-case basis considering the totality of the circumstances); *see also Arizona v. Roberson*, 486 U.S. 675, 687 (1988) ("'[F]urther communication, exchanges, or conversations with the police' that the suspect *himself initiates* are perfectly valid.").
[48] The second "interview" provided no information that was incriminating to Defendant nor any evidentiary value. While the Court has not excluded it for a *Miranda* violation, it would be surprised if the State played this recording for the jury.