

INTRODUCTION

The issue decided by the Court was whether to grant Defendant's Motion to File Out of Time and accept Defendant's untimely filed Motion to Suppress. The Court has issued a bench ruling denying Defendant's Motion to File Out of Time. This Order provides further clarification as to the grounds for the Court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

On September 6, 2012, Defendant Dashawn Ayers (hereinafter "Defendant") was arrested by approximately four law enforcement officers with the Dover Police Department for drug dealing at his apartment in Dover. The arrest was effected pursuant to a valid arrest warrant in the doorway of his apartment, and police subsequently searched the apartment and found a small amount of marijuana and related drug paraphernalia. These items provided the basis for several other charges. Dover Police did not have a search warrant, but claim that the Defendant consented to the search and that the contraband was lawfully seized pursuant to the plain view doctrine.

The Office of the Public Defender already represented a co-defendant in this case, thus Defendant's original attorney (hereinafter "original counsel") was appointed to represent Defendant by the Office of Conflicts Counsel on October 1, 2012. Initial case review was held on November 27, 2012. The record reflects that the trial date was continued three separate times: January 8, 2013; March 18, 2013; and October 1, 2013.

Original counsel ultimately left his law firm to accept a position with the

Delaware Attorney General's office. On October 30, 2013 Defendant's current attorney (hereinafter "current counsel") was assigned to Defendant's case by the Office of Conflicts Counsel. Current counsel was employed by the same law firm that original counsel worked for prior to accepting the position with the Attorney General's office.

On December 18, 2013, current counsel received a letter from Defendant that current counsel claims "revealed suppression issues." Based on this letter, current counsel filed two motions on December 26, 2013: a Motion to File Out of Time and a Motion to Suppress. Defendant's Motion to File Out of Time cites original counsel's departure from the case, current counsel's appointment, and Defendant's December 18 letter as reasons why Defendant should be allowed to file the untimely Motion to Suppress.

As to the Motion to Suppress itself, Defendant argues that when the Dover Police Department arrested Defendant in the doorway of his apartment on September 6, 2012, the four police officers forced Defendant into his apartment and unlawfully coerced Defendant into signing a consent to search form. Defendant claims the police officers obtained Defendant's consent by denying him access to pain medication and the restroom and threatening to "destroy" the apartment unless Defendant consented to the warrantless search. Defendant argues that the police lacked a valid search warrant, and that the plain view doctrine does not apply because consent was unlawfully obtained, and because the police officers' view of the apartment was blocked while arresting Defendant in the apartment doorway.

LEGAL STANDARD

Pursuant to Superior Court Criminal Rule 12(c), the Court is vested with authority to set the time for pretrial motions, either at the time of arraignment or “as soon thereafter as practicable. . . .”¹ Accordingly, pursuant to this Court’s criminal case management plan, pretrial motions including motions to suppress must be filed within 10 days of the initial case review unless otherwise ordered by the Court.² The Court “has broad discretion to enforce its rules of procedure and pre-trial orders.”³ The Court will not consider untimely motions to suppress unless the defendant provides the court with evidence of “exceptional circumstances” to justify the late filing.⁴ Exceptional circumstances exist when there are circumstances that warrant the Court’s consideration of the untimely motion, and those circumstances “outweigh the countervailing interest in ensuring the timely and orderly processing of the Superior Court’s criminal docket.”⁵

DISCUSSION

The Delaware Supreme Court has made it abundantly clear that a change in

¹ Del. Super. Ct. Crim. R. 12(c). The Court notes that the State did not raise any issue with respect to this Rule.

² Kent County Criminal Case Management Plan at 5.

³ *Carney v. State*, 931 A.2d 436, 2007 WL 2254543, at *2 (Del. Aug. 7, 2007) (TABLE) (citing *Barnett v. State*, 691 A.2d 614, 616 (Del. 1997)).

⁴ *See id.*

⁵ *Miller v. State*, 3 A.3d 1098, 2010 WL 3328004, at *2 (Del. Aug. 24, 2010) (TABLE).

representation alone does not rise to the level of exceptional circumstances warranting the Court's consideration of an untimely motion to suppress. In *Pennewell v. State*, there was an "eleventh-hour substitution of out-of-state counsel" due to the original attorney's incapacity due to illness, after the cut-off date for motions to suppress had already passed.⁶ The Supreme Court affirmed the Superior Court's denial of out-of-state counsel's motion to file out of time because "there was ample opportunity on the part of competent counsel to file suppression motions had they been warranted."⁷ In *Carney v. State*, conflicts counsel was appointed to represent a defendant only two months after the public defender had originally been retained; the deadline for suppression motions had passed while the public defender remained on the case.⁸ The Supreme Court found no evidence of exceptional circumstances because the defendant's "original attorney had all of the relevant information necessary to support filing the motion."⁹ In *Miller v. State*, the defendant replaced his public defender with private counsel on the eve of trial; the change in representation was found to be "no excuse for the untimely suppression motion because prior counsel could have filed the motion if he had believed there was a basis

⁶ *Pennewell v. State*, 822 A.2d 397, 2003 WL 2008197, at *1-2 (Del. Apr. 29, 2003).

⁷ *Id.* at *2.

⁸ *Carney*, 2007 WL 2254543, at *1.

⁹ *Id.* at *2.

to do so.”¹⁰ Even when there has been no change in counsel, both the Supreme Court and the Superior Court have focused on whether the attorney had enough opportunity to file any pre-trial motions in denying untimely motions to suppress.¹¹

An examination of the foregoing authority leads to a common-sense conclusion: a change of counsel does not create exceptional circumstances justifying the untimely filing of a motion to suppress when: the original attorney was competent; original counsel had knowledge of all available and relevant information as to be able to investigate the basis for and pursue a motion to suppress if the motion had merit; and original counsel had ample opportunity to file the motion before the deadline. In the instant case, any motion to suppress had to be filed within 10 days of the initial case review on November 27, 2012. Defendant’s Motion to Suppress was filed by current counsel on December 26, 2013—over a year after the filing deadline for motions to suppress, and after three separate continuances of the trial date. Current counsel was without fault in filing the untimely motion; he received the letter from defendant regarding his claims of unlawfully obtained consent on December 18, and promptly filed the instant motions shortly thereafter.

¹⁰ *Miller*, 2010 WL 3328004, at *2.

¹¹ *See Davis v. State*, 38 A.3d 278, 281 (Del. 2012) (finding no exceptional circumstances warranting consideration of untimely motion because “[defendant] has not shown that the motion was based on evidence not available as of the deadline for motions to suppress, or that extraordinary circumstances. . .precluded the filing of a timely motion.”); *State v. Williams*, 2013 WL 5881236, at *1 (Del. Super. Nov. 1 2013) (finding exceptional circumstances standard not satisfied based on counsel’s illness, when “this matter has been scheduled seven times and defense counsel has had ample opportunities to file pre-trial motions, and elected not to do so.”).

However, that is not enough to provide exceptional circumstances to justify the late filing. The “revealed suppression issues” in Defendant’s December 18 letter were not based on previously unavailable evidence. Rather, they were simply the unsubstantiated claims of Defendant that the four police officers unlawfully obtained Defendant’s consent to the warrantless search. It is unclear whether Defendant brought these claims to the attention of original counsel. However, assuming original counsel was competent, a reasonable investigation into any potential suppression issues (which should have been triggered by the fact that no search warrant existed) should have uncovered this claim prior to the motion deadline, if the motion had any merit.¹² Defendant has provided no evidence or argument that original counsel was anything other than competent. Original counsel had more than ample opportunity to file a suppression motion, based on the three continuances that have prolonged this case, prior to his change of career. Defendant (and current counsel) cannot avail themselves of original counsel’s career move to justify the untimely filing, because these circumstances do not outweigh the Court’s countervailing interest in maintaining a timely and efficient criminal docket. Accordingly, the Court finds that no exceptional circumstances exist to justify Defendant’s untimely Motion to Suppress.

¹² The Court notes that it is unlikely that even if timely filed, the Motion to Suppress would have been successful, because it only consists of Defendant’s unsubstantiated claims of coercion against the word of four individual law enforcement officers, without any corroborating evidence. *See Davis*, 38 A.3d at 280 (“[t]he Superior Court denied the motion, finding that. . .counsel had not offered sufficient excuse to justify the untimely filing and that the motion did not show a likelihood of success.”).

State v. Dashawn E. Ayers

I.D. No. 1209004131

January 24, 2014

CONCLUSION

Defendant's Motion to File Out of Time is **DENIED**. Defendant's Motion to Suppress is **DENIED** as untimely.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Gregory R. Babowal, Esquire
James M. Stiller, Jr., Esquire