



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BERNARDO MCKINNEY,)
)
 Defendant – Below,)
 Appellant,)
)
 v.) **No. 29, 2014**
)
 STATE OF DELAWARE,)
)
 Plaintiff – Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE’S ANSWERING BRIEF

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DATE: March 24, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

On March 18, 2013, the New Castle County Grand Jury returned an indictment against Bernardo McKinney alleging two counts of Possession of a Firearm By a Person Prohibited, one count of Illegal Possession of a Controlled Substance, one count of Possession of Marijuana, one count of Endangering the Welfare of a Child and one count of Possession of Drug Paraphernalia. B1. McKinney filed a Motion to Suppress on August 12, 2013. B2. That motion was denied by the Honorable Richard R. Cooch after a hearing on August 30, 2013. B2. On October 4, 2013, the Superior Court heard and granted McKinney's Motion to Proceed *Pro Se*. B4. McKinney's case proceeded to a non-jury trial on November 5, 2013, before the Honorable Charles H. Toliver, IV. B5. McKinney was found guilty of Possession of a Firearm By a Person Prohibited and the State entered a *nolle prosequi* on the remaining charges in the indictment. B5. Sentencing was deferred, and the State filed a motion to declare McKinney an habitual offender pursuant to 11 *Del. C.* § 4214(a) on November 21, 2013. B6. Immediately prior to sentencing on January 10, 2014, the Superior Court granted the State's motion and sentenced McKinney to eight years incarceration. B6, *Exhibit A*. McKinney appealed the Superior Court's order denying his Motion to Suppress and resultant conviction. This is the State's response.

SUMMARY OF THE ARGUMENT

Appellant's argument is denied. The Superior Court correctly denied McKinney's Motion to Suppress. The facts contained in the four corners Affidavit of Probable Cause in support of the search warrant for McKinney's residence demonstrated that drug sales were occurring in McKinney's residence and police would likely discover drugs in the residence. The police officer's face to face encounter with the informant coupled with the officer's corroboration of certain information provided by the informant rendered the tip reliable.

STATEMENT OF FACTS

On December 9, 2012, Pfc. John L. Mitchell, III (“Mitchell”) of the Elsmere Police Department was contacted by a confidential source who told Mitchell that he purchased one gram of marijuana from 1509 Maple Avenue, Apt. 1 in the Fenwick Park Apartments located in Elsmere, Delaware.¹ The confidential source indicated that when he arrived at the apartment, a white female with dark hair and blue eyes wearing sweatpants and a tank-top answered the door.² The confidential source said that he gave the female \$20 and she gave him marijuana wrapped in foil.³ According to the confidential source, he purchased marijuana from a black male in the apartment on two prior occasions and noticed that there were cameras outside of the door to the apartment.⁴

Mitchell, who knew that Bernardo McKinney lived in at 1509 Maple Ave., Apt. 1, conducted a DELJIS inquiry on Bernardo McKinney (“McKinney”) and discovered that there had been a reported domestic incident at the apartment.⁵ A

¹ A015. At the time, Mitchell was a ten-year veteran of the Elsmere Police Department and had made over 200 drug arrests as well as participated in large drug and weapons seizures.

² A015.

³ A015.

⁴ A015.

⁵ A015.

review of the report of that incident revealed that McKinney was the suspect and his girlfriend, Ashley King (“King”) was listed as the victim.⁶ Using DELJIS, Mitchell verified that King had blue eyes.⁷ Mitchell also checked the Fenwick Apartments directory and verified that Bernardo McKinney was listed as the renter of 1509 Maple Ave., Apt. 1.⁸

As part of his investigation, Mitchell prepared a photographic line-up of six suspects that included a photo of Ashley King.⁹ The confidential source met Mitchell at the Elsmere Police Department to view the photo line-up and immediately identified King from the array as the person who sold him drugs from 1509 Maple Ave., Apt. 1.¹⁰

Using the above information, Mitchell applied in the Justice of the Peace Court for a search warrant for 1509 Maple Ave., Apt.1.¹¹ The search warrant was signed by a judge and issued on December 20, 2012.¹²

⁶ A015.

⁷ A015.

⁸ A015.

⁹ A015.

¹⁰ A015.

¹¹ A013.

¹² A014.

ARGUMENT

THE SEARCH WARRANT ISSUED BY THE JUSTICE OF THE PEACE COURT WAS BASED ON PROBABLE CAUSE THAT THE POLICE WOULD FIND EVIDENCE OF DRUG DEALING WITHIN MCKINNEY'S RESIDENCE.

Question Presented

Whether the Superior Court erred by finding that the search warrant issued for McKinney's residence was supported by probable cause based on a review of the four corners of the warrant.

Standard and Scope of Review

This Court reviews a trial court's denial of a motion to suppress for abuse of discretion.¹³ "Where the facts are not in dispute and only a constitutional claim of probable cause is at issue, this Court's review of the Superior Court's ruling is *de novo*."¹⁴

Merits of the Argument

On appeal, McKinney argues that the Superior Court erroneously gave deference to the magistrate who signed the warrant because Mitchell failed to identify whether the confidential source was a past proven and reliable source of

¹³ *Rivera v. State*, 7 A.3d 961, 966 (Del. 2010).

¹⁴ *State v. Holden*, 60 A.3d 1110, 1113 (Del. 2013). However, in *LeGrande v. State*, 947 A.2d 1103, 1108 (Del. 2008), this Court stated that "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)).

information. Because the warrant did not set forth any information about the reliability of the informant, McKinney argues, the Superior Court should not have considered it. The State disagrees.

As this Court noted in *Rivera v. State*,

Search warrants are issued only upon a showing of probable cause. An affidavit submitted in support of a search warrant application must set forth facts that, within the affidavit's four corners, are sufficient for a neutral magistrate to conclude that "a crime has been committed and that the property sought to be seized would be found in a particular place." In determining whether probable cause exists, the magistrate must apply a "totality of the circumstances" test to decide if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." In so doing, the magistrate may draw reasonable inferences from the affidavit's factual allegations.¹⁵

When making the probable cause determination, one of the factors which the court is required to examine is the reliability of the informant.¹⁶ However, "[i]f an informant's tip is sufficiently corroborated by independent police work, the tip may form the basis for probable cause even though nothing is known about the informant's credibility."¹⁷ This Court's duty, while giving "great deference" to the

¹⁵ 7 A.3d at 966-67 (citations omitted).

¹⁶ *LeGrande*, 947 A.2d at 1108 (citing *Brown v. State*, 897 A.2d 748, 751 (Del. 2006); *Tolson v. State*, 900 A.2d 639, 643 (Del. 2006); *Hubbard v. State*, 2001 WL 1089664 at *4 (Del. Sept. 5, 2001)).

¹⁷ *LeGrande*, 947 A.2d at 1108 (citing *Hubbard*, 2001 WL 1089664, at *4; *McAllister v. State*, 807 A.2d 1119, 1124 (Del. 2002); *Tatman v. State*, 494 A.2d 1249, 1251 (Del. 1985); *Illinois v. Gates*, 462 U.S. at 242-43).

factual inferences drawn by the issuing court, is to ensure that the magistrate had a substantial basis for concluding that probable cause existed.¹⁸ Further, a common-sense approach should be taken when reviewing the affidavit so as to avoid interpreting it in a hyper-technical manner.¹⁹

Here, McKinney attempts to portray Mitchell's informant as an anonymous tipster.²⁰ However, the Superior Court recognized that this situation represented a "middle ground of the person being a confidential source known to the police officer, which distinguishes it from cases that are just totally anonymous tips called into 911 or a police station."²¹ The affidavit reveals that after initially telling Mitchell that the confidential informant purchased drugs from a dark-haired woman in McKinney's residence, he met face to face with Mitchell at the police station.²² Even if this Court were to presume that the information provided to Mitchell came in the form of an anonymous tip, "not all anonymous tips are equal."²³ "A tip given face to face is more reliable than an anonymous telephone

¹⁸ *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006); *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984).

¹⁹ *United States v. Freeman*, 666 F. Supp. 2d 454, 460 (D. Del. 2009); *Jensen*, 482 A.2d at 111.

²⁰ McKinney describes the informant as an "anonymous confidential informant." *Op. Brf.* at 15.

²¹ *Exhibit A to Op. Brf.* (Hearing Transcript at pp. 28-29).

²² A015.

²³ *Schneider v. State*, 2010 WL 3277434, at *3 (Del. Aug. 19, 2010).

call.”²⁴ This is significant because “an informant is more reliable if he meets with the police face-to-face because he runs a greater risk that he will be held accountable if his information proves false.”²⁵ Moreover, informants who make statements adverse to their own penal interests may bolster their credibility.²⁶ In this case, not only did the confidential informant meet with Mitchell face to face, he admitted to engaging in illegal activity by purchasing marijuana.

To the extent McKinney claims that this case is similar to *Florida v. J.L.*²⁷ and *LeGrande v. State*, he is mistaken. *J.L.* is distinguishable on its facts, because in *J.L.* the United States Supreme Court held that an anonymous caller’s tip, by itself, could not justify a stop and frisk.²⁸ Similarly, in *LeGrande*, this Court held that an uncorroborated phone tip from an anonymous informant was insufficient to

²⁴ *Id.* (quoting *United States v. Valentine*, 232 F.3d 350, 354 (3d Cir. 2000) (internal quotations omitted)).

²⁵ *United States v. Cardona*, 2013 WL 618294 (2d Cir. 2013) (citing *United States v. Salazar*, 945 F.2d 47, 50–51 (2d Cir. 1991)). See *United States v. Perkins* 363 F.3d 317, 323 (4th Cir. 2004) (stating that law enforcement in a face-to-face encounter with an informant, can “judge the credibility of the tipster firsthand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion”); *United States v. Christmas*, 222 F.3d 141, 144 (4th Cir. 2000) (informants who report tips face-to-face are “more trustworthy and reliable than [an] anonymous tip” because law enforcement can hold the informant accountable for false statements).

²⁶ *United States v. Harris*, 403 U.S. 573, 583 (1971) (stating “[a]dmissions of crime ... carry their own indicia of credibility.”).

²⁷ 529 U.S. 266 (2000).

²⁸ *Id.* at 270-73.

establish probable cause for the issuance of a search warrant.²⁹ In contrast, the instant case presents a magistrate-authored search warrant based upon a confidential informant's specific information about a residence and occupants who were known to police. The substance of the information related to drug transactions in which the informant was personally involved. Importantly, the informant met with the police face to face.

Here, there were sufficient grounds to support a reasonable belief that drugs would be found in McKinney's residence. The informant contacted the police and informed Mitchell that he had purchased marijuana from a female in McKinney's residence. The informant described the person from whom he purchased the marijuana in great detail. He also told Mitchell that he had previously purchased marijuana from a different person at McKinney's residence. And, contrary to McKinney's assertions, Mitchell corroborated the information provided by the informant. Mitchell was familiar with McKinney's residence and its occupants, and ran a DELJIS inquiry discovering the identity of the female associated with that address, Ashley King. King matched the description given by the informant. Mitchell then met face to face with the informant at the Elsmere Police Department and showed him a photo line-up from which the informant identified King as the female who sold him marijuana. The face to face meeting with the informant

²⁹ *LeGrande*, 947 A.2d at 1105.

provided Mitchell with “an opportunity to assess the informant’s credibility and demeanor.”³⁰ The meeting also helped Mitchell to corroborate the information provided by the informant.

Viewing the totality of the circumstances, the Superior Court correctly determined that the factual averments in the search warrant affidavit provided a substantial basis for the magistrate’s probable cause determination.

³⁰ *Schneider*, 2010 WL 3277434 at *3.

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

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DATE: March 24, 2014

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

VS.

BERNARDO MCKINNEY

Alias: No Aliases

DOB: [REDACTED] 1984

SBI: 00448583

CASE NUMBER:
1212007654

CRIMINAL ACTION NUMBER:
IN13-01-2187
PFBPP DRUG CONV(F)

COMMITMENT

Nolle Prosequi on all remaining charges in this case

SENTENCE ORDER

NOW THIS 10TH DAY OF JANUARY, 2014, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. Costs are hereby suspended. Defendant is to pay all statutory surcharges.

AS TO IN13-01-2187- : TIS
PFBPP DRUG CONV

Effective December 23, 2013 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5
- This sentence is consecutive to any sentence now serving.

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
BERNARDO MCKINNEY
DOB: [REDACTED] 1984
SBI: 00448583

CASE NUMBER:
1212007654

NO SPECIAL CONDITIONS AT ORDER LEVEL

NOTES

This sentence is consecutive to the sentence given in case number 1301012706.

JUDGE CHARLES H TOLIVER IV

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
BERNARDO MCKINNEY
DOB: [REDACTED] 1984
SBI: 00448583

CASE NUMBER:
1212007654

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	1.00
DELJIS FEE ORDERED	1.00
SECURITY FEE ORDERED	10.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	15.00
SENIOR TRUST FUND FEE	
<hr/>	
TOTAL	27.00

APPROVED ORDER

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March 24, 2014 08:03

CERTIFICATION OF SERVICE

The undersigned certifies that on March 24, 2014, he caused the attached *State's Answering Brief* to be delivered via Lexis/Nexis File and Serve to the following person:

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DEPARTMENT OF JUSTICE

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