

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

v.

BRICE HALL,

Defendant.

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I.D. No. 1802018588
Kent County

Submitted: August 28, 2018

Decided: October 15, 2018

ORDER

Upon Defendant's Motion to Suppress.

Denied.

Lindsay A. Taylor, Esquire, Department of Justice, Dover, Delaware; attorney for the State of Delaware.

Anthony J. Capone, Esquire of the Office of the Public Defender, Dover, Delaware; attorney for Defendant.

WITHAM, R.J.

Upon consideration of Brice Hall's ("Defendant") Motion to Suppress, the State of Delaware's Response in opposition, the Court's hearing on the motion, along with supplemental memorandums from the parties, it appears that:

1. On February 27, 2018, Delaware police detained the seventeen-year-old Defendant for violating his probation.

2. Law enforcement transported the Defendant to the police station and summoned his mother.

3. With the Defendant's mother present, Officer Jacob Rankin ("Rankin") read him his rights pursuant to *Miranda*. The conversation was recorded. The Defendant waived his rights and provided a non-incriminatory statement.

4. After the Defendant's statement, Rankin requested consent to obtain a DNA sample from the Defendant. The Defendant and his mother both signed a "Consent Form" (hereinafter, the "DNA Consent Form") acknowledging the Defendant's consent for the search.¹

5. Subsequently, Rankin ceased recording and escorted the Defendant's mother from the interrogation room.

6. A short time later, Officer Robert Cunningham ("Cunningham") entered the interview room and, in the absence of the Defendant's mother, requested the Defendant's consent to search his cell-phone. This interaction was not recorded.

7. The Defendant initially refused. However, Cunningham told the Defendant

¹ Apparently Rankin did not read the form to the Defendant, noting that the Defendant could read it if he wanted to.

that they would obtain a warrant to search the phone. He subsequently agreed to sign the second “Consent Form” (hereinafter, the “Cell-Phone Consent Form”) permitting the search. Cunningham read the form, in its entirety, to the Defendant before he signed.² The Cell-Phone Consent Form was never presented to the Defendant’s mother.

8. Cunningham searched the Defendant’s cell-phone and found evidence of the charges filed in the present case.³ Another police officer, Officer John Wilson (“Wilson”) confronted the Defendant about the evidence, whereby he made incriminating statements. This conversation was recorded.

9. On June 4, 2018, the Defendant filed the instant motion seeking to suppress the evidence seized during the search of his cell-phone. The Defendant contends that his consent was not voluntary in light of the preceding circumstances, and particularly takes issue with the failure of police to record the conversation that secured his consent.

10. On June 11, 2018, the State filed its response in opposition. The State contends that the Defendant’s consent was voluntary because: (i) he executed two separate “Consent Forms”⁴ that informed him of his right to refuse a search; (ii) he

² Record at 32-33, 69. However, this was disputed for the first time at the hearing by the Defendant.

³ The Defendant is charged with Possession of Firearm During the Commission of Felony, Possession of a Firearm by a Person Prohibited, Possession of Firearm Ammunition by a Person Prohibited, and Illegal Gang Participation.

⁴ The DNA Consent Form and the Cell-Phone Consent Form.

has had numerous interactions with the police prior to this incident, where he previously refused to waive his rights; (iii) he is a high-school student of average intelligence; (iv) he communicated effectively with police during his detention; (v) he cooperated with police in the presence of his mother, thereby making his subsequent cooperation in her absence less suspicious; (vi) his detention, up until the point of his consent, was relatively short; and (vii) during the entire process, Rankin, Cunningham, and Wilson were polite and respectful toward the Defendant.

11. As a result of the Defendant's presentation at the suppression hearing that expanded the scope of his argument which was not specifically stated in his motion, the Court permitted both parties to exchange memoranda to address the argument's expanded scope; specifically, whether the Dover Police Department had a duty to record all interviews involving the Defendant.

12. The Fourth Amendment of the United States Constitution and Delaware Constitution protects against "unreasonable searches and seizures."⁵ A warrantless search is deemed *per se* unreasonable unless that search falls within a recognized exception.⁶ If a search proceeds without a warrant, the State must prove by a preponderance of the evidence that the search fell within an established exception to

⁵ U.S. Const. amend. IV; Del. Const. art. I, § 6.

⁶ *Katz v. United States*, 389 U.S. 347, 357 (1967); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Higgins v. State*, 89 A.3d 477, at *2 (Del. 2014) (TABLE).

the warrant requirement.⁷

13. One recognized exception to a warrantless search is a search conducted with a person's voluntary consent.⁸ "To be deemed 'voluntary,' consent need not be 'knowing and intelligent,' but it cannot be the product of coercion by threat or force."⁹

14. Whether or not consent was given voluntarily is determined by examining "the totality of the circumstances surrounding the consent" including: (i) knowledge of the constitutional right to refuse consent; (ii) age, intelligence, education, and language ability; (iii) the degree to which the individual cooperates with police; and (iv) the length of detention and the nature of the questioning, including the use of physical punishment or other coercive police behavior.¹⁰

15. In this case, the Court finds that the Defendant had knowledge of his right to refuse consent for the search of his cell-phone because the Defendant executed the Cell-Phone Consent Form, explicitly informing him of this right. Despite the Defendant's contentions to the contrary, there is no evidence that he failed to read

⁷ *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013); *Schneckloth*, 412 U.S. at 222; *Scott v. State*, 672 A.2d 550, 552 (Del. 1996).

⁸ *Schneckloth*, 412 U.S. at 221-22; *Scott*, 672 A.2d at 552; *Higgins*, 89 A.3d at *2.

⁹ *Higgins*, 89 A.3d at *2 (quoting *Schneckloth*, 412 U.S. at 233).

¹⁰ *Cooke v. State*, 977 A.2d 803, 855 (Del. 2009).

and/or fully understand his right to refuse.¹¹ Furthermore, the Defendant was not “an ignorant newcomer to the law,”¹² as the State indicated that he had numerous other interactions with police prior to this incident whereby he did in fact refuse to waive his rights.¹³

16. Second, the Court appreciates that the Defendant was technically a juvenile at the time he consented to the search of his phone. However, a minor’s age alone is not enough to preclude a finding of valid consent.¹⁴ Moreover, the Court agrees with the State that the Defendant asked and answered questions thoughtfully during his detention and suppression hearing, thereby indicating to the Court that he was emotionally and mentally mature enough to give valid consent with or without his mother present.¹⁵

17. Third, the Court believes that Defendant’s cooperation with police is self-

¹¹ Record at 69. Like the DNA Consent Form, here, for the first time, the Defendant asserts that Cunningham failed to read the Cell-Phone Consent Form to him.

¹² See *Higgins*, 89 A.3d at *2 (explaining that the defendant who had previously been arrested was not a newcomer to the law).

¹³ In those instances, the Defendant asserted his rights pursuant to *Miranda*.

¹⁴ See *In re J.M.*, 619 A.2d 497, 507 (D.C. 1992) (citing *Commonwealth v. Maxwell*, 477 A.2d 1309, 1315 (Pa. 1984), *cert. denied*, 469 U.S. 971 (1984)).

¹⁵ Cf. *In re Jermaine*, 582 A.2d 1058, 1064 (Pa. Super. 1990) (where the court held that there was no evidence to support a finding that the sixteen-year-old defendant was emotionally or mentally immature so as to be incapable of giving valid consent for the police to search her bag. “To believe otherwise is to discount entirely the fact that the juvenile was sufficiently mature to purchase a train ticket in New York and travel alone to Philadelphia”).

evident. For example, immediately before he permitted Cunningham to search his phone, the Defendant had spoken with Rankin after waiving his rights pursuant to *Miranda*. Perhaps more importantly, the Defendant gave his consent to collect his DNA, after being assured by Rankin that if he had not possessed a weapon, a DNA test would, in fact, clear him.¹⁶ The Court views the Defendant's consent to search his phone, subsequent to consenting to give DNA, as merely a continuation of the Defendant's ongoing cooperation with police.¹⁷

18. Fourth, according to the State, the Defendant executed the Cell-Phone Consent Form shortly after his first interview with Rankin. The second interview lasted approximately five minutes. Thus, the Court finds that the relatively short time frame weighs in favor of finding that the Defendant consented voluntarily.

19. Fifth, the Court will address the allegedly "coercive" tactics by Cunningham in this case. The Court understands that the best practice would have been for police to record every conversation with the Defendant. But, in this instance, seeing as the Defendant merely continued his cooperation, such a recording was unnecessary. The Court's decision may be different if the Defendant, all of the sudden, began cooperating with the police officers when the recording was turned off. Yet, there is no indication that happened in this case. This logic should also apply to

¹⁶ Record at 21.

¹⁷ There is some evidence to suggest that the Defendant lied to police regarding knowledge of the weapon in question or other weapons, which would, in the words of one witness, amount to uncooperativeness. However, the Defendant voluntarily gave consent *before* the alleged discrepancy took place, accounting for the continuation.

the absence of the Defendant's mother during the time that he executed the Cell-Phone Consent Form. Again, the Court views this as a continuing pattern of cooperation, not a sudden shift toward it.

20. Sixth, in regards to Cunningham's assertion that they would obtain a warrant, while this Court has invalidated a defendant's consent when officers unlawfully claimed to possess a warrant,¹⁸ "Fourth Amendment jurisprudence does not forbid a law enforcement officer from attempting to persuade an individual to consent to a search."¹⁹ In this instance, Cunningham did not dishonestly claim to possess a warrant, but only informed the Defendant of their lawful intentions to procure a warrant, if he refused to consent.

21. Finally, the Defendant contends for the first time at the suppression hearing that this case is controlled by *Deberry*²⁰ and its progeny cases, that required police in this case to collect evidence of the Defendant's interview, as the recorded interview would be discoverable under Rule 16(a)(1)(A) of the Delaware Superior Court's Criminal Rules of Procedure.²¹

22. When a claim of missing evidence is asserted, the Court considers: (i)

¹⁸ *Cooke*, 977 A.2d at 857 (distinguishing cases in which consent to search was invalidated when searching officers represented they had a warrant, when in fact, none existed).

¹⁹ *State v. Mauk*, 2014 WL 4942177, at *6 (Del. Super. Sep. 29, 2014) (citing *Higgins*, 89 A.3d at *3)).

²⁰ *Deberry v. State*, 457 A.2d 744 (Del. 1983).

²¹ D. Memo at 5.

whether the evidence would have been subject to disclosure; and if so (ii) whether there was a duty to preserve the material; and if so (iii) whether the duty was breached.²² In evaluating if that duty was breached, the Court will consider: (a) the degree of negligence or bad faith involved; (b) the importance of the missing evidence considering the probative value and reliability of the secondary or substitute evidence that remains available; and (c) the sufficiency of other evidence produced.²³

23. In this case, there was no breach of duty on the part of any police officer involved, specifically Cunningham. Both parties agree that if the recording of the Defendant's second consent had been made, the Defense would have been granted a copy under Rule 16(a)(1). Additionally, the Defendant fails to cite one case in Delaware, or anywhere else, that supports his assertion that law enforcement is mandated to record every interview of arrested individuals. In Delaware, however, our courts have held that individual police departments are permitted to develop and implement evidence gathering procedures, providing that they do not violate due process.²⁴

24. In this case, there was no obligation to record the interaction between Cunningham and the Defendant. Despite the Defendant's claims to the contrary,

²² *Deberry*, 457 A.2d at 750 citing *Brown v. United States*, 372 A.2d 557, 359 (D.C. Ct. App 1977).

²³ *Id.* at 752 citing *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir.1979) (Kennedy, J., concurring) [quoting *United States v. Higginbotham*, 539 F.2d 17, 21 (9th Cir.1976)].

²⁴ *See Lolly v. State*, 611 A.2d 956, 960 (Del. 1992).

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Cunningham's actions were not for interview or interrogation purposes. Rather, Cunningham asked for the Defendant's consent and told him in the alternative that he would obtain a warrant to substitute for consent. Nothing more. As such, Cunningham's actions did not amount to negligence, bad faith, or any other violation of the Defendant's due process. Furthermore, there is no evidence or any other indication that Cunningham's actions grossly deviated from the standard conduct expected and demanded of a reasonable officer asking a defendant for consent to search a piece of property.

25. Considering the foregoing facts in their totality, this Court finds that the Defendant voluntarily consented to the search of his cell-phone. Evidence seized as a result, therefore, will not be suppressed and the Defendant's motion is hereby **DENIED**.

IT IS SO ORDERED.

A handwritten signature in blue ink, appearing to read 'W. L. Witham, Jr.', is written above a horizontal line.

Hon. William L. Witham, Jr.
Resident Judge

WLW/dmh