

STATE OF DELAWARE

$$\mathbf{V}_i$$

DAMON ANDERSON,

Defendant

ID# 1710006710

Submitted: September 23, 2018

Decided: November 5, 2018

On Defendant's Motion to Suppress Evidence Seized from Defendant's Seven Cell Phones. **GRANTED IN PART. DENIED IN PART.**

ORDER

Mark A. Denney, Jr., Esquire, and Annemarie Puit, Esquire, Deputy Attorneys General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Eugene J. Maurer, Jr., Esquire, and Christina Ruggiero, Esquire, Eugene J. Maurer Jr., P.A, Wilmington, Delaware, Attorneys for Defendant.

COOCH, R.J.

This 5th day of November, 2018, upon consideration of Defendant's Motion to Suppress Evidence Seized from Seven Cell Phones, it appears to the Court that:

1. On October 27, 2017, police arrested Damon Anderson (“Defendant”) in connection with an alleged drug dealing and racketeering enterprise in Wilmington. Prior to Defendant’s arrest, a police investigation had identified Defendant as an alleged participant in the criminal racketeering conspiracy. During the investigation, police intercepted numerous cell phone communications of one Dwayne “Boop” White, who was also allegedly involved in the criminal conspiracy. On

September 1, 2017, White allegedly coordinated a suspected drug transaction and was later seen leaving the alleged stash location with a large bag, accompanied by Defendant and another individual. A search of the stash location revealed crack cocaine paraphernalia and a small amount of cocaine. The grand jury indicted Defendant for Conspiracy to Commit Racketeering and related charges on October 16, 2017. Police obtained a warrant to search Defendant's home and car on October 27, 2017. Police located seven cell phones on/in Defendant's property. On January 18, 2018, police obtained a search warrant to search the contents of the seven cell phones.

2. Defendant originally filed two motions to suppress under Superior Court Criminal Rule 41(f) in connection with this case. The motions sought to suppress evidence seized pursuant to the search warrants obtained by police during their investigation into Defendant's alleged criminal activities. The first motion sought to suppress evidence seized from Defendant's home and car. The second motion sought to suppress evidence seized from seven cell phones found on Defendant's property.
3. On August 28, 2018, after oral argument, based on the "four corners" of the search warrant for the home and car, the Court orally denied that Motion to Suppress. The Court found (a) sufficient probable cause to support the warrant; and (b) that a logical nexus existed between Defendant's home, car, and the alleged criminal activity.¹ The Court, however, deferred decision on the motion to suppress evidence seized from the seven cell phones, and ordered supplemental briefing.
4. Defendant challenges the search warrant that authorized the police to search seven cell phones seized from his property. The police cited various alleged criminal activities involving defendant that occurred from the second week of August 2017 until the phones' seizure on October 27, 2017.² The warrant authorized police to search:

Any and all store[d] data contained within the internal memory of the cellular phones, including but not limited to, incoming/outgoing

¹ *State v. Damon Anderson*, ID# 1710006710, Oral Arg. Tr. (Del. Super. Aug. 28, 2018).

² See State's Resp. to Def.'s Mot. to Suppress at 6 (June 29, 2018); *infra* at ¶ 9.

calls, missed calls, contact history, images, photographs and SMS (text) messages.³

5. Defendant contends the evidence seized from the seven cell phones was obtained “in violation of [his] rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, § 6 of the Delaware Constitution.”⁴ The parties agree that the Court’s analysis is limited to the “four corners” of the search warrant to determine its validity.
6. Defendant first argues that the search warrant affidavit failed to set forth specific facts sufficient to establish probable cause to search all seven cell phones.⁵ Secondly, Defendant contends the warrant failed to meet the particularity requirement of the Fourth Amendment, which he contends rendered it a “general warrant” which thus authorized an unconstitutionally overbroad, unconstrained search that was illegal as a matter of law.⁶ Specifically, Defendant argues the warrant (1) did not limit what type of data within the cell phone was to be searched; and (2) did not set forth a temporal limitation on the data to be searched. Such a warrant, Defendant asserts, gave police authority to “generally search all seven cell phones, granting broad permission to rummage through all digital contents.”⁷ Accordingly, Defendant argues that all evidence seized from the seven cell phones by the State should be suppressed.
7. The State responds that “the specific nature of the defendant’s case and criminal conduct articulated within the four corners of the search warrant” supports a finding of ample probable cause, a logical nexus, and permissible scope.⁸ The State highlights key aspects of the warrant affidavit which articulate Defendant’s alleged criminal conduct: Defendant had just been indicted by a grand jury for Racketeering; four past proven reliable informant tips had implicated Defendant in a drug dealing enterprise; Defendant had accompanied an alleged accomplice

³ Def.’s Mot. to Suppress, Ex. A at 2 (May 30, 2018) (emphasis added) (hereinafter Search Warrant).

⁴ Def.’s Mot. to Suppress at 1.

⁵ *Id.* at 4–6.

⁶ *Id.* at 4, 16–20.

⁷ *Id.* at 18.

⁸ State’s Resp. at 1.

to an alleged drug stash location; and Defendant had met with another individual in an alleged drug transaction, that same individual having been found with 13,000 bags of heroin just days later.⁹ Cell phone communications between Defendant and Dwayne White were intercepted in a wiretap, which allowed police to observe the meetings at the alleged stash location and the alleged drug transaction.¹⁰ As to the scope of the warrant, the State contends it was necessarily somewhat broad because of the expansive nature of criminal racketeering enterprises and “the continuous activity of a drug business and money laundering business.”¹¹ The State argues that in this case, quite unlike the situation of a singular act, there are numerous articulated acts amounting to probable cause that an ongoing drug dealing enterprise existed, in which Defendant partook. Thus, the State contends, the warrant permits the search of communications data and pictures/video related to drug dealing, and is permissibly limited to the time period of the alleged acts set forth in the warrant affidavit.¹²

8. When determining the sufficiency of a search warrant, the Court is limited in its analysis to the information provided “within the four-corners of the affidavit[.]”¹³ Thus, “sufficient facts must appear on the face of the affidavit so that an appellate court can verify the factual basis for the [magistrate’s] determination regarding the existence of probable cause.”¹⁴ The Court must also consider the information in the affidavit under a totality of the circumstances.¹⁵ “[R]easonable inferences [may be drawn] from the factual allegations in the affidavit.”¹⁶ Defendant bears the burden of establishing that the warrant was unlawful.¹⁷
9. First, the Court finds the issuance of the search warrant was proper because it was supported by probable cause. The affidavit provided a

⁹ See *infra* ¶ 9.

¹⁰ State’s Resp. at 5.

¹¹ *Id.* at 6.

¹² *Id.* at 7.

¹³ *LeGrande v. State*, 947 A.2d 1103, 1107 (Del. 2008).

¹⁴ *Dorsey v. State*, 761 A.2d 807, 811 (Del. 2000).

¹⁵ See *LeGrande*, 947 A.2d at 1107–08.

¹⁶ *State v. Westcott*, 2017 WL 283390, at *2 (Del. Super. Jan. 23, 2017) (quoting *Bradley v. State*, 51 A.3d 423, 431 (Del. 2012)).

¹⁷ See *State v. Sisson*, 883 A.2d 868, 875 (Del. Super. Mar. 11, 2005); *State v. Dick*, 2004 WL 1172883, at *3 (Del. Super. May 21, 2004).

detailed account of the investigation thus far, which implicated Defendant at almost every turn. To highlight key points of the warrant affidavit below:

...

2. [Investigators] conducted an investigation regarding a group of individuals involved in conspiring to commit numerous crimes ... includ[ing] drug dealing[.] [One] [t]arget of the investigation [was] Dwayne WHITE [D]uring the second week of August 2017 [investigators] began intercepting wire communications of Dwayne "Boop" White on two (2) of his cellular phones[.] ...

3. White was found to be utilizing a secondary apartment, north of Wilmington, as a stash location for his drugs. White would routinely respond to this location or be at this location prior to conducting a drug transaction. On 01SEP17 White coordinated a suspected drug transaction with another subject while he was at the apartment. Surveillance was established at the apartment and White was observed leaving the apartment with a large bag. [White] was accompanied by Damon ANDERSON and another subject. They responded to the city of Wilmington and met several subjects, one of which was William Wisher. Wisher was arrested a few days later and a search warrant executed at this residence. He was found to be in possession of 13,000 bags of heroin.

4. [F]or several years this detective and other members of the FBI [Safe Streets Violent Crimes Task Force] SSTF have been contacted by numerous (more than 4) past proven and reliable informants who have advised that White and ANDERSON work in conjunction with each other and other members of a drug dealing organization to distribute illegal drugs in the city of Wilmington, DE.

...

6. ... as part of the investigation it was learned that White and other members of his organization routinely gamble at casinos as a means to launder their drug proceeds and pass them off as gambling winnings. On 26AUG17, White contacted Damon ANDERSON via cellphone ... At the time ANDERSON was in Las Vegas, Nevada. White directed ANDERSON to place a large wager on a sporting event for him.

7. ... on October 16, 2017 Damon ANDERSON was indicted by a New Castle County Grand Jury and a Rule 9 warrant was issued for his arrest for charges to include a violation of Title 11, Section 1503, Delaware Code, in that Conspiracy to Criminal Racketeering, warrant ID #171006710. []

10. ... on 27OCT17 a search warrant was conducted at [Anderson's residence] and of ANDERSON'S vehicle parked out front. Located

in ANDERSON'S property were seven (7) cellular phones, to include the phone used to contact WHITE[.]¹⁸

10. Here, police sufficiently documented the investigation into the criminal enterprise in which Defendant allegedly engaged. Defendant was seen with Dwayne White at White's stash location, and later with William Wisher a few days before Wisher was arrested and 13,000 bags of heroin were seized from Wisher's house. Further, White contacted Defendant via a cell phone which was later seized by police. White allegedly asked Defendant to engage in conduct which a court may reasonably infer—when viewed in a totality of the circumstances—was intended to launder money for the criminal organization. Lastly, and importantly, a grand jury had indicted Defendant just prior to the search warrant's issuance. This was stated in the search warrant application. "Racketeering" by its definition, is an ongoing enterprise.¹⁹
11. Despite the documentation of alleged criminal activity, Defendant maintains that it is still insufficient to establish probable cause to search the seven cell phones. Defendant relies on the recent Delaware Supreme Court ruling in *Buckham v. State*.²⁰ In *Buckham*, the Court dealt with a warrant to search a single cellular phone. Investigators in *Buckham* supported their affidavit of probable cause to search the one cell phone simply by asserting that "criminals often communicate through cellular phones."²¹ The Court noted: "who doesn't [use a cell phone] in this day and age?" and the Court struck down the warrant on the grounds that "warrant was both vague about the information sought ... and expressly authorized the search of materials there was no probable cause to search[.]"²² Defendant contends the current investigator's identical assertion that "criminals communicate with cell phones" similarly condemns the warrant as the Supreme Court did in *Buckham*.
12. Defendant's case is, however, distinguishable. The amount of cell phones seized in the instant matter is a key distinguishing factor. A high percentage of people do use cell phones, but the magistrate reasonably

¹⁸ Search Warrant, Affidavit of Probable Cause at 5–6.

¹⁹ The State stresses "the continuous [nature] of a drug business and money laundering business." State's Resp. at 6.

²⁰ *Buckham v. State*, 185 A.3d 1 (Del. 2018).

²¹ *Id.* at 17.

²² *Id.*

determined, in light of the totality of the circumstances, the discovery of seven cell phones in this particular case suggested criminal activity. The rhetorical question asked by the Court in *Buckham* has less applicability to this situation when seven cell phones were found in Defendant's possession. Accordingly, this Court finds the State had probable cause to enter and search the seven cell phones for evidence of racketeering under a totality of the circumstances.

13. Beyond probable cause, a warrant must also be sufficiently particular in its description of the places to be search and items to be searched for. A warrant seeking to search digital evidence, specifically, requires a more restricted scope to be set forth in the warrant itself. The Delaware Supreme Court has addressed the unique issues of these types of search warrants before. In *Wheeler v. State*, the Delaware Supreme Court cautioned that “the risk that warrants for digital and electronic devices take on the character of ‘general warrants’ is substantial.”²³ More recently, the Delaware Supreme Court in *Buckham* acknowledged that warrants for digital information “call for particular sensitivity given the ‘enormous potential for privacy violations’ that ‘unconstrained searches of cell phones’ pose.”²⁴ *Wheeler* stressed that the items to be searched and search for must be described “as particularly as possible.”²⁵
14. Defendant argues that the warrant at issue lacked particularity because it permitted police to “rummage through all digital contents” of the seven cell phones. Defendant relies on the language in *Wheeler* and *Buckham* in support of this assertion. However, the warrant at issue specifically lists the various categories of data to be searched. The warrant limited the search to types of data pertinent to the investigation as supported by probable cause. This warrant does not contain the limitless request to search a large number of devices condemned in

²³ *Wheeler v. State*, 135 A.3d 282, 307 (Del. 2016) (holding that the search warrants for ten electronic devices and forty-nine CDs/DVDs were prohibited general warrants that failed to meet the particularity requirement). The Supreme Court further cautioned that “heightened vigilance, at the outset, on the part of judicial officers [is necessary] to guard against unjustified invasions of privacy.” *Id.*

²⁴ *Buckham*, 185 A.3d at 19 (citing *Wheeler*, 135 A.3d at 299).

²⁵ *Wheeler*, 135 A.3d at 296 (citing 11 Del. C. §2307(a)); see also *State v. Westcott*, 2017 WL 283390, at *3 (Del. Super. Jan. 23, 2017).

Wheeler.²⁶ Nor are the seven cell phones vaguely connected to the crime, as the *Buckham* cell phone was.²⁷ The categorical scope of Defendant's warrant satisfies the particularity requirement.

15. As to the temporal scope, the lack of an explicit temporal limitation for the search of the seven cell phones is somewhat problematic. *Wheeler* criticized warrants that "[contained] no temporal limitations, despite relevant dates being available to the police."²⁸ However, the *Wheeler* Court declined to "prescribe rigid rules" in this area and thus did not mandate temporal limitations in every warrant. According to *Wheeler*, a warrant must simply describe the items to be searched for and seized with "as much particularity as the circumstances reasonably allow[.]"²⁹
16. In the case at bar, the Court believes the circumstances allowed for a more particularized description of the search and its scope than the warrant in fact provided. Investigators here "had available to them a more precise description of the alleged criminal activity[.]"³⁰ The State established that alleged criminal activity occurred from the second week of August 2017 until the cell phones were seized on October 27, 2017. The warrant does not limit the search to that date range however. The limiting information was not in the warrant itself, merely the affidavit.³¹ "[S]uch information should be included in the [warrant] and the search and seizure should be appropriately narrowed to the relevant time period so as to mitigate the potential for unconstitutional

²⁶ See *Wheeler*, 135 A.3d at 289–90, 307 (police searched ten electronic devices and forty-nine CDs/DVDs); *State v. Diamonte Taylor*, ID# 1605012921A, Oral Arg. Tr. at 80–82 (Del. Super. Feb. 16, 2018) (holding that the warrant was valid partly because it specifically limited the officer's search to certain types of data and media that were pertinent to the investigation).

²⁷ *Buckham*, 185 A.3d at 19–20 (discussing the tenuous relationship between Buckham's single cell phone and the single criminal act, a murder, in the case).

²⁸ *Wheeler*, 135 A.3d at 304.

²⁹ *Id.* at 305.

³⁰ *Wheeler*, 135 A.3d at 305 (citing *United States v. Bright*, 630 F.2d 804, 812 (5th Cir. 1980)).

³¹ In *State v. Rizzo*, a pre-*Buckham* case, the Superior Court upheld a warrant that lacked an explicit temporal limitation, partly because the warrant affidavit provided an "implied temporal limit." *State v. Rizzo*, 2018 WL 566794, at *2 (Del. Super Jan. 26, 2018). *Rizzo* determined *Wheeler* "did not impose a temporal requirement for search warrants for digital devices pursuant to Delaware Law." *Id.* This Court agrees with the State that *Wheeler* did not impose a temporal limitation requirement. This Court need not reach the issue of whether an "implied temporal limitation," one appearing only in the warrant affidavit, is always sufficient under *Wheeler* and *Buckham*.

exploratory rummaging.”³² Thus, the warrant should have contained a temporal limitation in this situation.

17. Defendant argues that total suppression of all evidence from the seven cell phones is the only permissible remedy for the temporal defect. The State counters that that it will not use any information extracted prior to the second week of August 2017. The Court does not believe the defect in the warrant is so pervasive as to compel total suppression of all evidence seized. Several cases are instructive. In *State v. Diamonte Taylor*, the Superior Court was presented with a similar issue in a similarly structured search warrant.³³ Taylor argued that the search warrant which authorized a search of his two cell phones was an overly broad general warrant because it lacked a temporal limitation to the scope of the search.³⁴ The warrant affidavit established that criminal activity occurred from May 16, 2016, to May 19, 2016, but the warrant directive did not limit the scope to those dates.³⁵ The search resulted in the production of a 4,645-page report detailing the entirety of the cell phones’ data, ranging by date from 2005 to 2016.³⁶ Taylor sought the suppression of all evidence seized, even evidence from within the narrow time frame set forth in the affidavit, arguing that the scope of the search was not limited by the affidavit’s reference to the time frame. The Superior Court declined to implement such a broad and sweeping remedy. Instead, the Court found the affidavit effectively limited the search to a relevant time frame, and opted for selective suppression.³⁷ The evidence the State sought to present was from the proper time frame as detailed in the warrant affidavit, and thus admissible. Total suppression was not warranted.
18. In *United States v. Santiago-Rivera*, the United States District Court for the Middle District of Pennsylvania was confronted with a very similar issue.³⁸ In *Santiago*, the District Court considered whether a

³² *Wheeler*, 135 A.3d at 305.

³³ *Taylor*, ID# 1605012921A, Tr. of Oral Arg., at 47–49.

³⁴ *Id.* at 49–50.

³⁵ *Id.* at 53.

³⁶ *Id.*

³⁷ *Id.* at 82. See also *Rizzo*, 2018 WL 566794, at *2 (finding, although a pre-*Buckham* case, an implicit temporal limitation can be applied to the warrant itself if the time frame only appears in the affidavit).

³⁸ See *United States v. Santiago-Rivera*, 2017 WL 4551039, at *15 (M.D. PA Oct. 12, 2017).

warrant violated the particularity requirement of the Fourth Amendment because it did not restrict a search of a cell phone to a specific time period.³⁹ Relying on Third Circuit Court of Appeals rulings, the District Court held that the lack of a time period did “not provide a ground for suppressing the evidence.”⁴⁰ Instead, the proper remedy for the defect “was simply to excise the years for which there was no probable cause[.]”⁴¹

19. Defendant argues that *Santiago* should not inform this Court’s decision because the District Court partly based its analysis on the federal good-faith exception to the warrant requirement. The good-faith exception is not recognized under the Delaware Constitution.⁴² However, while the Court in *Santiago* did reference the good-faith exception in its probable cause analysis of the search warrant, the District Court ultimately found the warrant satisfied the Fourth Amendment’s particularity requirement:

[T]he Third Circuit considered whether a warrant violated the particularity requirement because it did not restrict the search and seizure to documents concerning transactions that occurred during the time period of the alleged illegal scheme. The court stated that ‘[t]his argument, however, does not provide a ground for suppressing the evidence....’ ...The court finds that while the warrant for defendant’s cell phone may be broad in terms of the time frame, it was not general. ... Based on the facts and circumstances of the instant case, the court finds that the search warrant satisfied the Fourth Amendment’s particularity requirement.⁴³

In both *Santiago* and the instant case, the “objectives of deterrence and integrity [may be served] in the same way and to the same degree [as total suppression] by [instead] limiting suppression to the fruits of the warrant’s” defects.⁴⁴

³⁹ *Id.*

⁴⁰ *Id.* (citing *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents* (\$92,422.57), 307 F.3d 137, 150–51 (3d Cir. 2002)).

⁴¹ *Id.* (citing *United States v. Christine*, 687 F.2d 749, 753 (3d Cir. 1982)).

⁴² *See Dorsey v. State*, 761 A.2d 807, 815–16, 820 (Del. 2000).

⁴³ *Santiago*, 2017 WL 4551039, at *15 (citing *Ninety-Two Thousand*, 307 F.3d 137, 150-51 (3d Cir. 2002)) (emphasis added).

⁴⁴ 2 Wayne R. LaFave, *Search and Seizure* 816 (5th ed. 2012) (citing *United States v. George*, 975 F.2d 72 (2d Cir. 1992); *State v. Tucker*, 133 N.H. 204, 575 A.2d 810 (N.H. 1990); *Warren v. State*, 760 N.E.2d 608 (Ind. 2002)).

20. Defendant demonstrated the State did not have probable cause to search the entirety of all data on the seven cell phones. Instead, the State merely established probable cause to believe criminal activity occurred from the second week of August 2017 until the time the seven cell phones were seized on October 27, 2017. Any evidence from that time period was found pursuant to a search supported by probable cause. Suppression of that evidence would not serve the objectives of deterrence and integrity. A search beyond the time period was not supported by probable cause, however. The State has represented to the Court, as did the government in *Santiago*, that it will not use any information extracted prior to August 2017.⁴⁵ The Court will suppress the information extracted from Defendant's seven cell phones prior August 12, 2017.⁴⁶
21. Therefore, evidence dated prior to August 12, 2017 which was seized from the seven cells phones must be suppressed. Evidence dated on and after August 12, 2017 is admissible. Accordingly, Defendant's Motion to Suppress is **DENIED IN PART** and **GRANTED IN PART**.

IT IS SO ORDERED.


Richard R. Cooch, R.J.

cc: Prothonotary

⁴⁵ See *Santiago*, 2017 WL 4551039, at *15.

⁴⁶ Although the State represents that the police began intercepting wire communications “during the second week of August, 2017,” the only specific date in August 2017 provided to the Court is the date of a specific phone call between Dwayne White and Defendant on August 26, 2017. State's Resp. at 2–3; *supra* at ¶ 9. The Court will deem August 12, 2017, the last day of the second week of August 2017, as the start of the time period in which the alleged criminal activities occurred, and will suppress all pre-August 12, 2017, cell phone evidence.