IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	:	
	:	ID No. 1805009371 WLW
v.	:	
	:	
EUGENE RILEY,	:	
	:	
Defendant.	:	

Reargument Heard: August 20, 2019
Decided: August 20, 2019

ORDER

Defendant's Motion to Suppress Evidence (DNA Search Warrant)
Granted.

Gregory R. Babowal, Esquire and Kevin B. Smith, Esquire of the Department of Justice, Dover, Delaware; attorneys for the State of Delaware.

Alexander W. Funk, Esquire of Curley Dodge & Funk, LLC, and Thomas D. Donovan, Esquire of the Office of Defense Services, Dover, Delaware; attorneys for Defendant.

WITHAM, R.J.

INTRODUCTION

The Court announced its decision in open court and this opinion constitutes the Court's written decision in the matter of Defendant Eugene Riley (hereinafter "Defendant") and his Motions to Suppress Evidence. The evidence in question is a buccal swab conducted by law enforcement on May 14, 2018, after Justice of the Peace Court #7 (hereinafter "JP Court") signed a search warrant seeking DNA evidence from Defendant.

After the Court had initially decided the matter, the Defendant, pursuant to Superior Court Rule of Civil Procedure 59(e), filed a Motion for Reargument. Upon reconsideration, the Court granted the Defendant's motion because it found the State had misrepresented, albeit unintentionally, a dispositive fact for which the Court, in part, based its decision.

Today, the Court intends to resolve the matter and accordingly the Court's June 20, 2019 order is hereby vacated.

After considering the parties' motions, oral arguments, including the State's clarification of the material fact in question, and the record in its entirety, including the record for today, the Court finds that the search warrant lacks the required nexus between Defendant's DNA and a crime and is therefor invalid. The Court also finds that the Defendant's DNA was not seized subject to a valid search incident to an arrest.

Accordingly, and for the reasons that follow below, the Defendant's Motion to Suppress is **GRANTED**.

FACTUAL FINDINGS[1]

On May 13, 2018, Jameir Vann-Robinson (hereinafter "Victim") was shot and killed following a verbal altercation at 82 Mitscher Road in Dover, Delaware. Law enforcement officers responded to the scene of the shooting and located four (4) 9mm shell casings and six (6) .40 shell casings along the sidewalk and roadway in close vicinity to the scene at 106 Mitscher Road.[2]

The subsequent investigation revealed that two suspects, Defendant and Ahmir Bailey (hereinafter "Defendant Bailey") had allegedly shot the victim at or near 82 Mitscher Road. The investigation also led law enforcement to discover one of the suspected handguns used in the shooting, along with magazines and other ammunition matching the kind and caliber of shell casings found at the scene during the execution of a search warrant at Defendant's residence.[3] On May 14, 2018, Defendant and Defendant Bailey were arrested.

Subsequent to the search warrant being executed at Defendant's residence, Detective Stephen Boone (hereinafter "Det. Boone") of the Dover Police Department,

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[1] Portions of the record contradict the State's representations presented to the Court through its written response to Defendant's motion, it's responses at the initial suppression hearing, and it's response to Defendant's reargument motion. Due to misrepresentations of material fact by both counsel at the initial hearing, the Court feels a restatement of its finding of facts is necessary.

[2] 106 Mitscher Road is located less than 300 feet from 82 Mitscher Road.

[3] *See* D. Ex. A - Affidavit of Probable Cause Attached to Defendant's Motion (hereinafter "Affidavit of Probable Cause") at ¶ 11 (May 14, 2018). Law enforcement executed a search warrant at 21039 Cubbage Pond Rd., Lincoln, Delaware, Defendant's residence, and located a loaded .40 caliber M&P handgun, a .40 caliber magazine loaded with six rounds, a box of 9mm ammunition, and a 9mm magazine with 6 rounds.

(hereinafter "DPD"), applied for an additional Search Warrant from JP Court #7 that sought to collect a sample of Defendant's DNA. Det. Boone's Affidavit in support of the Search Warrant (hereinafter "Affidavit") stated the basis for its application, including information reciting his training and experience, basic facts of the case, and evidence seized as a result of the search warrant executed at Defendant's residence. The Affidavit also contained the following statement:

> Affiant is requesting to secure a sample of [DNA] from [Defendant] *for an analysis/comparison with a sample from the recovered .40 caliber M&P handgun, .40 caliber magazine loaded with 6 rounds of ammunition, box of 9mm ammunition, 9mm magazine with 6 rounds of ammunition[,]* and any other evidence seized relating to this incident that may contain [Defendant's] DNA.[4]

After JP Court #7 approved the search warrant, Defendant's DNA was collected at 8:15 p.m. on May 14, 2018, a little less than twelve hours after Defendant's arrest. The DNA was analyzed and determined to match DNA recovered from the .40 caliber M&P handgun found at Defendant's residence.[5]

PROCEDURAL HISTORY

On May 13, 2019, Defendant filed his Motion to Suppress seeking to suppress

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[4] D. Ex. A - Affidavit of Probable Cause at 2 (emphasis added). This is the language taken from the Affidavit verbatim.

[5] St. Reply at ¶ 2 ("Riley's DNA was a positive match for DNA recovered from the handgun."); *cf.* St. Reply to D. Mot. for Reargument at 1 (State is now contending that Det. Boone only believed that police would find a DNA sample on the physical evidence.).

the seized DNA. The State's response, in opposition, was filed on May 16, 2019 and the Court heard oral arguments initially on May 30, 2019.

During the suppression hearing, the following exchange took place between the Court and the State:

> **Court**: The affidavit itself of probable cause seems to indicate in the last paragraph that the [- -]which can be inferred by the [judicial officer], that there was a DNA sample recovered from the [.]40 caliber M&P handgun, and the [.]40 caliber magazine loaded with [six] rounds of ammunition and boxed with 9[mm] ammunition, a 9[mm] magazine with six rounds of ammunition, that that apparently does refer to.
>
> **State**: Correct, but that is the specific evidence found at the [D]efendant's residence as established by the warrant.
>
> **Court**: So I presume that it would be your position that the [judicial officer] can assume, based upon facts in the affidavit, that there was a DNA sample taken, which could reasonably be viewed as a basis for another DNA sample that can be gleaned from the ammunition and weapon seized at the apartment were [Defendant] was residing.
>
> **State**: Exactly. And I believe that's why the officer put that specific information in there. A search warrant executed at this residence. That is the residence of the [D]efendant. Here's what's found at the residence, and goes forward from there.[6]

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[6] *State v. Riley*, No. 1805009371, TR at 28:5-23; 29:1-3, May 30, 2019.

This exchange echoed a representation made in not only the State's reply to Defendant's suppression motion, but also the Affidavit itself.[7]

At the completion of the suppression hearing, the Court reserved its decision, in part, for two reasons. First, there remained a factual discrepancy regarding the method of extraction that law enforcement utilized when collecting Defendant's DNA collection.[8] Second, because Defendant had not been afforded the opportunity to address the State's argument regarding the lawfulness of DNA evidence collection pursuant to a valid search incident to arrest argument prior to the suppression hearing, the Court granted both parties additional time to submit supplemental memoranda on the issue.[9]

On June 20, 2019, the Court, relying on the plain language of Det. Boone's Affidavit **and** the State's representations (written and oral) confirming that a DNA sample was collected from evidence seized at Defendant's residence, issued its decision and denied Defendant's suppression motion. Moreover, the Court, in its decision, relied heavily on the State's representation that a DNA sample had been

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[7] *See* Supra n.4.

[8] Defense counsel's misrepresentation of material fact was addressed immediately after the hearing after the Court confirmed a discrepancy existed between defense counsel's motion and oral arguments regarding the method of DNA extraction and the State's representation of the DNA extraction in its written response. The factual misrepresentation was resolved by defense counsel in a letter to the Court and State dated May 31, 2019, where he confirmed Defendant's DNA was taken via oral buccal swab rather than by a needle extraction, as he adamantly argued at the oral argument.

[9] Both parties timely submitted additional Court sanctioned memoranda regarding the issue of search incident to arrest.

collected from evidence seized from Defendant's home, thus confirming Det. Boone's representation in the Affidavit.[10]

Also in its decision, the Court distinguished Defendant's case from *State v. Campbell*, where the affiant in that case had stated in his affidavit that it was *possible* to collect DNA evidence from the items sought in that search warrant.[11] Because the Court initially found JP Court #7's actions to be proper, and that Defendant's case was not about the recovery of possible DNA evidence, but actual recovery of DNA evidence, it did not reach a decision regarding the State's alternative argument that the DNA seizure was lawful pursuant to a valid search incident to arrest.[12]

On June 27, 2019, and frankly to the Court's surprise, Defendant filed his Motion for Reargument. The Court received the State's response on July 5, 2019 and despite the State's opposition to certain assertions made by Defendant, it ultimately conceded that reargument should be granted. While it agreed with Defendant that the Court had misapprehended the facts of the case, the State did not admit it made a misrepresentation of material fact, not only at the suppression hearing but in its written reply to Defendant's motion. As a result of this new information, the Court was required to grant Defendant's motion, and did so on July 8, 2019. The reargument hearing was scheduled for July 22, 2019, and later re-scheduled for August 20, 2019.

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[10] *State v. Riley*, 2019 WL 2539280, at *5 (Del. Super. June 20, 2019).

[11] *State v. Campbell*, 2015 WL 5968901, at *4-5 (Del. Super. Oct. 5, 2015).

[12] *Riley*, 2019 WL 2539280, at *5-6.

PARTIES' CONTENTIONS[13]

In his reargument motion, Defendant states that the Court made an incorrect factual interpretation of the allegations, including its interpretation of Det. Boone's Affidavit seeking Defendant's DNA. As previously stated, the State conceded Defendant's argument that the Court misapprehended its factual findings.[14] The State continues to assert, however, that the search warrant was still valid. In the alternative, the State contends again that Defendant's DNA was collected pursuant to a lawful search incident to arrest.

LEGAL STANDARDS OF REVIEW

Where the Superior Court Rules of Criminal Procedure do not provide a rule or procedure for a particular practice, that practice is governed by the Superior Court Rules of Civil Procedure.[15] As such, a Motion for Reargument is governed by Superior Court Rules of Civil Procedure Rule 59(e) (hereinafter "Rule 59(e)"). Rule 59(e) provides that a motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision.[16] The Court will grant a Motion for

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[13] As this is a reargument, the parties' contentions regarding the initial suppression motion have not changed. *See* D. Mot. to Suppress at ¶¶ 26-28; St. Reply to D. Mot. to Suppress at ¶¶ 8, 13.

[14] *See* St. Reply to D. Mot. for Reargument at 1 ("...[A]lthough [Det.] Boone believed police would find a sample of DNA on physical evidence, he did not represent that testing had already determined whether DNA was present. And while the affidavit leads to a logical inference that DNA would be found (upon later testing), the Court's conclusion that it had already been found was incorrect.).

[15] Super Ct. Crim. R. 57(d).

[16] Super. Ct. Civ. R. 59(e).

Reargument only where "the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.[17] In order for the motion to be granted, the movant must "demonstrate newly discovered evidence, a change in the law, or manifest injustice."[18] A movant's reargument motion is not an opportunity to rehash arguments already decided by the Court or to present new arguments not previously raised.[19]

Furthermore, in a motion to suppress challenging the validity of a search warrant, it is the defendant who bears the burden of establishing that the challenged search or seizure was unlawful.[20]

DISCUSSION

This Court grants great deference to the judicial officer's determination of probable cause.[21] That deference, however, is not absolute. Section 2307 of Title 11

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[17] *State v. Brinkley*, 132 A.3d 839, 842 (Del. Super. 2016).

[18] *Id.* (citing *Brenner v. Village Green, Inc.*, 2000 WL 972649, at *1 (Del. Super. May 23, 2000) (citing *E.I. du Pont de Nemours Co. v. Admiral Ins. Co.*, 711 A.2d 45, 55 (Del. Super. 1995))).

[19] *Brinkley*, 132 A.3d at 842 (citing *Kennedy v. Invacare, Inc.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006)).

[20] *State v. White*, 2017 WL 1842784, at *2 (Del. Super. May 8, 2017) (citing *State v. Sisson*, 883 A.2d 868, 875 (Del. Super. 2005) (stating that "[o]n a motion to suppress challenging the validity of a search warrant, the defendant bears the burden of establishing that the challenged search or seizure was unlawful.")).

[21] *State v. Holden*, 60 A.3d 1110, 1114 (Del. 2013) (citing *Illinois v. Gates*, 462 U.S. 213. 238–39 (1983)).

of the Delaware Code authorizes a judicial officer to issue a warrant if the facts recited in the complaint constitute probable cause for the search.[22] Unless there is a showing of a factual basis for probable cause within the "four corners" of the affidavit that was submitted to the judicial officer in support of the warrant, the warrant will not be issued.[23] In determining whether probable cause exists to obtain a search warrant, Delaware courts apply a "totality of the circumstances" test.[24] In so keeping, the Court reviews the judicial officer's determination that probable cause existed, justifying his or her approval of the search warrant.[25]

The judicial officer issuing the warrant must make a practical, common-sense decision whether, given all the circumstances set forth in the accompanying affidavit, including the veracity and the basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[26] In other words, *a logical nexus must be established between the sought after items and the place in which law enforcement wishes to search.*[27]

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[22] *See* 11 *Del C.* § 2307(a).

[23] *State v. Morris*, 2017 WL 6513487, at *1 (Del. Super. Dec. 19, 2017) (citing *Pierson v. State*, 338 A.2d 571, 573 (Del. 1975)).

[24] *LeGrande v. State*, 947 A.2d 1103, 1107-08 (Del. 2008) (citing *Sisson*, 903 A.2d at 296).

[25] *Holden*, 60 A.3d at 1114 (citing *Gates*, 462 U.S. at 238–39).

[26] *Id.* (citing *Gates*, 462 U.S. at 237).

[27] *White*, 2017 WL 1842784, at *2 (citing *Hooks v. State*, 416 A.2d 189, 203 (Del. 1980) (emphasis added)).

A. Misrepresentations of Material Fact have Plagued This Case Throughout

As a preliminary matter, the Court would be remiss if it did not discuss the reason that Defendant's motion is being reargued. At the Court's last count, there have been at least three misrepresentations of material fact made by multiple counsel involved in this case. Two of those misrepresentations have been made by the State and one by defense counsel. These misrepresentations are a considerable, and an unnecessary, burden to the Court's time and resources.

By resolving the remaining misrepresentations today, the Court hopes to send a clear message that misrepresentations of this sort, albeit unintentional, will not be tolerated in the future and thus should be avoided. The Court accepts the apologies from all counsel and considers this side matter closed.

B. Lack of Nexus between DNA Evidence and Evidence of the Murder

Moving forward with Defendant's motion, the Court will now conduct its analysis based on the facts as clarified and confirmed by the State upon written and oral arguments. Based on those now undisputed representations, this Court finds this case akin to the Court's precedent in *State v. Campbell*,[28] *State v. White*,[29] and *State v. Risper*,[30] and thus, must suppress the seized DNA evidence from Defendant. Not only does the Court find that the search warrant signed by JP Court #7 was

[28] *See* Supra n.11.

[29] 2017 WL 1842784.

[30] *State v. Risper*, No. 1805007714 (Del. Super. Mar. 29, 2019) (Bench Order).

insufficient to establish the required nexus between Defendant's DNA and evidence of a crime, i.e., the victim's murder, but it also finds that the DNA extraction was not the fruit of a valid search incident to arrest.

In his reargument motion, Defendant argues that language found in Det. Boone's affidavit supporting a search warrant to collect his DNA was nothing more than a collection of conclusory statements that are insufficient to establish the required heightened nexus between his DNA and evidence of a crime. Defendant further relies on *Campbell* and the recent bench decision in *Risper* in support of his position. Under these unusual circumstances, the Court feels again that a review of *Campbell* would be helpful.

In *Campbell*, a law enforcement officer obtained a search warrant for that defendant's DNA.[31] In that affidavit, the only information regarding DNA was the following statement:

> [y]our affiant is aware that several casings from the firearm that was fired were located at the scene and collected as evidence, [and] [y]our 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 [defendant] 8/3/1988 can be compared to any DNA found on the casings.[32]

The *Campbell* court was concerned by the fact that the affiant's statement was not supported by the affiants's personal knowledge gained from work experience or

[31] *Campbell*, 2015 WL 5968901, at *1.

[32] *Id.* at *4 (emphasis added).

other investigations that may have occurred, specific training, and/or education.[33] The Court also acknowledged that many jurisdictions throughout the United States have held that without "law enforcement recovery of a comparison sample of DNA, a DNA swab search warrant is unsupported by probable cause."[34] The *Campbell* court rejected that view as "go[ing] too far,"[35] but stated that, at a minimum, an affiant's affidavit must be supported by his/her training, education, or experience that would "reasonably justify and explain the detective's conclusion that DNA could reasonably be recovered from the particular object."[36] Applying this principle to that affiant's affidavit, the *Campbell* court ultimately would have suppressed the DNA evidence, but found that no DNA testing had occurred.[37]

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[33] *Id.*

[34] *Id. See also Hindman v. United States*, 2015 WL 4390009, at *2 (N.D. Ala. July 15, 2015) (holding that in order to establish probable cause for DNA, "the 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' "); *United States v. Robinson*, 2011 WL 7563020, at *5 (D. Minn. Dec. 2, 2011) report and recommendation adopted, 2012 WL 948670 (D. Minn. Mar. 20, 2012) (recommending that probable cause has not been established for the defendant's DNA because the government has not shown that DNA evidence on the firearm exists to compare against defendant's DNA); *United States v. Pakala*, 329 F.Supp.2d 178, 181 (D. Mass. 2004) (holding that the defendant cannot be subjected to a buccal swab until the government has determined whether the firearm contains a sufficient DNA profile in which to compare it to); *State v. Turnbull*, 61 V.I. 46, 54–55 (V.I. Super. Ct. 2014) (holding that absent a DNA sample to compare defendant's to, a search warrant lacks probable cause).

[35] *Campbell*, 2015 WL 5968901, at *5.

[36] *Id.*

[37] *Id.* at *6 (The Campbell court ultimately found the DNA nexus issue to be moot because it was disclosed at oral argument that no DNA testing was ever performed on the shell casings in

Approximately two years later in *White*, this Court again reviewed a supporting affidavit in support of a search warrant seeking DNA evidence. The *White* court agreed with *Campbell* in that probable cause should not be rejected automatically on nexus grounds if law enforcement does not specifically recite in the affidavit that DNA evidence was found at the crime scene and found what is required to demonstrate that nexus is a *fair probability* that the seized sample of DNA can be linked to a crime.[38]

In denying the suppression motion, the court distinguished *White* from *Campbell* by comparing the affidavits from both cases. In *White*, the affidavit in support of the search warrant included information regarding the officer's experience investigating homicides and the fact that DNA is often left behind at those crime scenes.[39] Additionally, the affidavit specified that when perpetrators leave certain items behind (it was an item of clothing), those items can contain DNA.[40] As a result, the affiant in *White* believed that defendant's DNA would be found on the evidence collected at the scene.[41] This information was not presented on the affidavit

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spite of the DNA evidence taken from Defendant. However, the Court also stated that if there had been a test performed, the lack of any foundation to support the affidavit in support of the search warrant would *require* the Court to suppress the evidence seized from the DNA swab.).

[38] *White*, 2017 WL 1842784 at *5 (emphasis added).

[39] *White*, 2017 WL 1842784 at *5.

[40] *Id.*

[41] *Id.*

considered by the *Campbell* court.[42]

More recently, the court in *Risper* again echoed the court's view from *Campbell*, in that concerning DNA evidence, there is a heightened nexus requirement. As the court stated:

> Regarding searches for a person's DNA, there has been what I would call a focused or a heightened or a perhaps somewhat different nexus requirement. *These cases have often required the affidavit for the search warrant to state that DNA evidence was obtained from the evidence the police have that can be compared to the person's DNA. The rationale seems to be that the government ought to at least establish that it has something to compare a person's DNA to before getting a person's DNA.*[43]

Turning back to Defendant's motion, the State now represents Det. Boone's affidavit as the following:

> ...[A]lthough [Det.] Boone believed police would find a sample of DNA on the physical evidence, he did not represent that testing had already determined whether DNA was present.[44]

Thus, based on the State's clarification, this case appears to fall into the realm of *Campbell* and *Risper*. Unlike White, Det. Boone's Affidavit is completely devoid of any reference to his experience leading him to believe that it was a fair probability

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[42] *Campbell*, 2015 WL 5968901, at *4.

[43] *Risper*, No. 1805007714 (Bench Order) (emphasis added).

[44] St. Reply to D. Mot. for Reargument at 1.

that evidence would be found on the seized .40 caliber and ammunition recovered from Defendant's residence that would be linked to the victim's murder or shell casings found at the crime scene. And despite the plain language of Det. Boone's Affidavit that appears to the Court to suggest otherwise, apparently, he only believed that it was possible to recover DNA and that no DNA had been collected from the evidence seized from Defendant's residence.

As a result, and based on the new representation of material fact by the State, there was no DNA sample recovered from the evidence seized pursuant to the search warrant executed at Defendant's residence. The Court agrees with Defendant and finds that a heightened nexus did not exist between Defendant's DNA and evidence of a crime. As a result, this Court will follow the precedent established by the sister counties of this Court and require more than Det. Boone's unsupported belief that DNA may be recovered from the objects.

C. Defendant's DNA Evidence was not Seized Pursuant to a Lawful Search Incident to Arrest

In the alternative, the State argues that Defendant's DNA was collected subsequent to a lawful search incident to arrest. As the Court has already determined that the search warrant was invalid, the State now must bear the burden of establishing that the challenged warrantless search was a proper search incident to arrest.[45] The Court finds that the State has not met its burden.

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[45] *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001).

Warrantless searches are "justified as incident to a lawful arrest."[46] Warrantless searches incident to arrest has been codified in Delaware by 11 *Del. C.* *§* 2303. Section 2303 states:

> A search of a person, house, building, conveyance, place, or other thing may be made without a warrant if:
>
> (1) The search is made incidental to and contemporaneous with a lawful arrest:
>
> (2) The search is made in order to find and seize (a) the fruits of a crime; (b) the means by which the crime was committed; (c) weapons and other things to effect an escape from arrest or custody; and (d) evidentiary matter[s] pertaining to the commission of a crime.[47]

Here, despite the parties' spirited and detailed arguments involving both Delaware Constitutional interpretation and the true applicability of *Maryland v. King*[48] to this specific case, the Court finds this issue is simple to decide. As previously stated 11 *Del. C.* *§* 2303 requires the search incident to a lawful arrest to be both incidental *and* contemporaneous with the arrest.[49] According to the police report documenting Defendant's arrest, Defendant was arrested, taken into custody, and transported to DPD on May 14, 2018 at 9:28 a.m.[50] That same report details that

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[46] *Jones v. State*, 745 A.2d 856, 872 (Del. 1999).

[47] 11 *Del. C.* *§* 2303.

[48] 569 U.S. 435 (2013).

[49] *See* Supra n.45.

[50] *See* D. Reply to St. Brief Regarding Search Incident to Arrest Ex. A.

Defendant's DNA was not seized until nearly eleven hours later at 8:15 p.m.[51] As a result, it can not be said to have occurred "contemporaneous" with the arrest and cannot be determined to be a valid search incident to arrest.

CONCLUSION

For the reasons stated above, Defendant's Motion to Suppress DNA evidence obtained pursuant to the search warrant dated May 14, 2018 is hereby **GRANTED.**

IT IS SO ORDERED.

Hon. William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
cc: Gregory R. Babowal, Esquire
Kevin B. Smith, Esquire
Alexander W. Funk, Esquire
Thomas D. Donovan, Esquire

[51] *Id.*