

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)	
)	
v.)	ID. No. 2110005631
)	
ASCIA HARRISON,)	
)	
Defendant.)	

Submitted: July 8, 2022

Decided: July 14, 2022

Defendant's Motion to Suppress
is **DENIED, *in part***, and **GRANTED, *in part***.

ORDER

AND NOW TO WIT, this 14th day of July of 2022, the Court having duly considered both Defendant's Motion to Suppress and Supplemental Motion to Suppress,¹ the State's Response in Opposition, oral arguments, and the State's Supplemental authority, **IT IS HEREBY ORDERED** that Defendant's Motion to Suppress is **DENIED, *in part***, and **GRANTED, *in part***, for the following reasons:

1. Ascia Harrison ("Defendant") is charged with Possession of a Firearm During the Commission of a Felony ("PFDCF"), Possession or Control of a Firearm by a Person Prohibited ("PFBPP"), Drug Dealing, Drug Possession, Endangering

¹ These motions are merged for purposes of this ruling.

the Welfare of a Child, Disregarding a Stop Sign, and Failure to Use Turn Signal.² These charges stem from events that occurred on October 12, 2021, and investigated by the Special Operations Division, specifically the Safe Streets Task Force Unit (“Safe Streets”).

2. Detective Guarino offered facts at an evidentiary hearing on July 8, 2022, in support of two searches conducted of Defendant’s vehicle and residence.³ Detective Guarino is a member of the New Castle County Police Department (“NCCPD”).⁴

3. On October 12, 2021, the detective was notified by a past proven reliable confidential informant (“CI”) that Defendant was selling large amounts of marijuana on Instagram and that she possessed firearms at her residence. The CI did not provide a location of where the drug dealing was taking place but did provide the address of Defendant’s residence at Charing Crossing in Wilmington in New Castle County.

4. Detective Guarino conducted a DELJIS/CJIS inquiry that revealed Defendant’s registered address to be the same and provided a photo of Defendant to the CI, who positively identified Defendant as the person she knew to be the

² Indictment, True Bill Filed No. 44, D.I. 4.

³ The recitation of facts is based upon the testimony of Detective Guarino and the pleadings from both sides, including but not limited to Detective Guarino’s averments from the Application and Affidavit in Support of Nighttime Search Warrant [hereinafter Search Warrant].

⁴ Detective Guarino is a member of Safe Streets, having served as a police officer for a decade and with Safe Streets for three years.

individual selling marijuana. Detective Guarino was also made aware that Defendant owns and operates a black 2019 Ford Fusion.

5. On the same day, at approximately 7:30 pm, Safe Streets established surveillance of Defendant's residence and observed Defendant exit her residence and enter the black Ford Fusion. The officers followed Defendant to an area on Old Forge Road in New Castle County where another Safe Streets officer observed a "hand-to-hand" transaction take place between Defendant and an unknown black male. The officers continued to follow Defendant and observed her commit two traffic violations—failure to use a turn signal and stop at a stop sign.

6. The officers then conducted a traffic stop.⁵ Upon approaching Defendant's vehicle, Detective Guarino testified that he smelled a strong odor of marijuana emanating from the vehicle and saw a thick cloud of smoke. Defendant was alone in the vehicle and admitted that she was smoking marijuana in the car. As she was directed to get out of her car, Defendant complies and is heard saying "babe, I got pulled over" to someone with whom she was on the phone, later learned to be Defendant's girlfriend.

⁵ Thirteen minutes and thirteen seconds of camera footage was introduced into evidence by the State that shows the vehicle stop, the search of the vehicle, and Detective Guarino's exchange with Defendant from the time the officer approached the vehicle until Defendant invoked her right to counsel during her post-*Miranda* interview.

7. Defendant was then placed in handcuffs while the vehicle was searched. Officers discovered two pre-packaged bags of marijuana and a firearm.⁶ Detective Guarino then placed Defendant under arrest and the search of the vehicle continued. Located in the rear passenger seat were edible marijuana, raw marijuana packaged in clear plastic baggies and labeled packaging with marijuana. Additional packaging material was found in the center console and a digital scale was also located in the trunk of the vehicle. While conducting the search of the vehicle, the detective also calls and directs another officer—located at Defendant’s residence—to detain Defendant’s girlfriend if she tried to leave the house.

8. After being placed under arrest and during her post-*Miranda* interview conducted in the back of Detective Guarino’s vehicle, Defendant was told she was pulled over due to the two traffic violations. She initially answered questions including that the vehicle belonged to her but when asked about the marijuana located in the vehicle, she invoked her right to counsel.

9. At the suppression hearing, the detective could not recall if Defendant made any statements about having drugs at the residence. But after the State prosecutor refreshed his recollection, he testified that when he drove Defendant to the police station, Defendant allegedly volunteered that she had “a little less than a

⁶ Through the NCIC inquiry, Defendant is prohibited from owning/possessing a firearm due to a Felony Conspiracy conviction from 2016 in Philadelphia, Pennsylvania.

pound” of marijuana back at her residence, and that her three-year-old daughter was also in the house. This statement was allegedly made in response to the officer informing her that he was getting a warrant to search her residence.⁷

10. While preparing the application for the search warrant, three other officers were at the residence and observed Defendant’s girlfriend exit the house with a three-year old child. While outside the residence, the officers detained both and searched the girlfriend who was carrying a diaper bag where marijuana was discovered.⁸ The officers then told the girlfriend that Defendant had been arrested and that they were waiting for a search warrant to search the residence. The girlfriend and child were ordered back into the house.

11. According to the State, even though the two persons (girlfriend and child) had attempted to leave the house, it was “the presence of persons *inside* the residence [that] prompted detectives to proceed to the Defendant’s residence and secure any potential evidence inside... and [after making contact with the girlfriend outside, they] detained her pending a protective sweep of the residence.”⁹ At 10:17 PM, the nighttime search warrant was executed, which yielded additional marijuana/THC edibles, drug paraphernalia, and approximately \$13,000 in cash.

⁷ No video of this exchange was presented at the hearing. If the alleged statement was made, it was well after she invoked her right to counsel.

⁸ “Officers also recovered 20.6 grams of raw marijuana and 62 grams of edible marijuana in a diaper bag [Defendant’s girlfriend] had removed from the residence.” *See* State’s Response to Defendant’s Motion to Suppress, D.I. 19, ¶ 16 [hereinafter State’s Response].

⁹ *Id.* ¶ 14 (emphasis added).

12. Defendant filed this pending Motion to Suppress on June 7, 2022, and Supplemental Motion to Suppress on June 23, 2022, merged as one Motion. The State filed its response on July 5, 2022. Oral arguments were held on July 8, 2022. This matter is now ripe for decision.

Party Contentions

13. Citing to *Juliano v. State*¹⁰ for support, Defendant argues the officers did not have probable cause that Defendant possessed a criminal amount of marijuana and therefore lacked probable cause to search the vehicle.¹¹ Defendant also contends that the nighttime warrant should be suppressed because it did not allege sufficient facts to establish the existence of exigent circumstances.¹²

14. In response, the State contends the officers had sufficient probable cause to search the vehicle, and that *Juliano* is not applicable.¹³ The State maintains that although the affidavit could have contained more facts to better explain the exigent circumstances, the averment of the presence of the juvenile and Defendant's girlfriend was sufficient to allow a neutral magistrate to conclude that the preservation of evidence could not wait until morning to justify the nighttime search.¹⁴

¹⁰ 260 A.3d 619 (Del. 2021).

¹¹ See generally Motion to Suppress, D.I. 15 [hereinafter Motion to Suppress].

¹² See generally Supplemental Motion to Suppress, D.I. 17.

¹³ State's Response, ¶¶ 23-33.

¹⁴ *Id.* ¶¶ 36-40.

Standard of Review

15. Delaware Superior Court Criminal Rule 12(b)(2) permits a defendant to file a motion to suppress evidence prior to trial.¹⁵ The State bears the burden of proof on a motion to suppress in a warrantless search or seizure.¹⁶ The defendant bears the burden where the motion to suppress challenges the validity of a search warrant.¹⁷ Any evidence obtained from an illegal search or seizure must be excluded from trial.¹⁸ Here, the State bears the burden as to the vehicle and the Defendant bears the burden as to the residence.

Discussion

16. Under both the Fourth Amendment of the United States Constitution and the Delaware Constitution, citizens have the right to be free from unreasonable searches and seizures.¹⁹ Probable cause is a flexible standard and exists where “the facts and circumstances within the arresting officer’s knowledge, of which he has trustworthy information, are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been committed.”²⁰ “Only a fair

¹⁵ Super. Ct. Crim. R. 12(b)(2).

¹⁶ See *State v. Kang*, 2001 WL 1729126, at *3 (Del. Super. Nov. 30, 2001) (citing *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001)).

¹⁷ See *State v. Sisson*, 883 A.2d 868, 875 (Del. Super. 2005), *aff’d*, 903 A.2d 299 (Del. 2006).

¹⁸ *Jones v. State*, 745 A.2d 856, 872–73 (Del. 1999).

¹⁹ See U.S. Const. Amend. IV; Del. Const. art. 1, §6; *State v. Adams*, 13 A.3d 1162, 1172 (Del. Super. Aug. 22, 2008) (citations omitted).

²⁰ *Stafford v. State*, 59 A.3d 1223, 1229 (Del. 2012) (citing *Tolson v. State*, 900 A.2d 639, 643 (Del. 2006)).

probability, not a *prima facie* showing, of criminal activity is the standard for probable cause”²¹ and the Court must consider the totality of circumstances.²²

A. The Officers had Probable Cause to Search the Vehicle

17. The United States Supreme Court has authorized a warrantless search of a vehicle where the police possess “probable cause to believe the vehicle contains evidence of criminal activity”²³ which justifies the search of “every part of the vehicle and its contents that may conceal the object of the search.”²⁴ Delaware courts have adopted this “automobile exception.”²⁵ Yet, Defendant relies on *State v. Juliano*²⁶ to assert that the officers lacked probable cause to search the vehicle because the officer failed to ascertain whether Defendant possessed a criminal amount of marijuana. Not only are the facts here distinguishable, the limited holding in *Juliano* does little to advance Defendant’s constitutional challenge.

18. It is true that the Supreme Court in *Juliano* held that the custodial arrest of a juvenile passenger was invalid because it was based solely on the odor of

²¹ *Id.* (citing *State v. Maxwell*, 624 A.2d 926, 928 (Del. 1993)).

²² *Maxwell*, 624 A.2d at 928 (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)).

²³ *Arizona v. Gant*, 556 U.S. 332, 347 (2009) (citing *United States v. Ross*, 456 U.S. 798, 820–21 (1982)).

²⁴ *Wyoming v. Houghton*, 526 U.S. 295, 301 (1999) (quoting *Ross*, 456 U.S. at 825).

²⁵ *See, e.g., Hall v. State*, 981 A.2d 1106, 1114 (Del. 2009) (quoting *Gant*, 556 U.S. at 347).

²⁶ 260 A.3d 619 (Del. 2021).

marijuana.²⁷ Yet, the odor of marijuana may be considered as a factor in determining whether there was probable cause to effect an arrest.²⁸

19. Importantly, *Juliano* explicitly declined to determine whether the odor of marijuana was sufficient to establish probable cause for the search of a vehicle.²⁹ In the more applicable cases of *Law v. State*³⁰ and *Valentine v. State*,³¹ we know that the Supreme Court *has* held that the odor of marijuana is relevant to a probable cause consideration for searching a vehicle. Also, in *State v. Terry*,³² the Court found probable cause to search the vehicle was established where the officers smelled a strong odor of cologne and marijuana emanating from the vehicle and had witnessed a hand-to-hand exchange of contraband,³³ and determined that the officers were permitted to search the vehicle under the automobile exception.³⁴ The same applies here.

20. Defendant was being investigated by Safe Streets for drug-related activity based on factors developed well before the officers detected the odor of

²⁷ *See id.* at 634.

²⁸ *See id.* at 619.

²⁹ *Id.* at 631 n.60 (“Because *Juliano* has not challenged the search of Soto’s SUV, we need not decide whether the odor of marijuana provided sufficient probable cause for that search.”).

³⁰ 185 A.3d 692, 2018 WL 2024868 (Del. Apr. 30, 2018) (Table) (affirming lower court’s denial of the motion to suppress where search of the vehicle was conducted incident to the smell of marijuana).

³¹ 207 A.3d 166, 2019 WL 1178765, at *2 (Del. Mar. 12, 2019) (Table) (“That possession of personal uses of marijuana is not a criminal offense does not render marijuana odors . . . irrelevant to determinations of probable cause.”).

³² 227 A.3d 555, 2020 WL 1646775 (Del. Apr. 2, 2020) (Table).

³³ *Id.* at *2.

³⁴ *Id.*

marijuana.³⁵ These events culminated with the officer's observation of a hand-to-hand transaction—probable cause existed that Defendant had engaged in drug-related criminal activity and additional evidence would be found in the vehicle.³⁶

21. In addition to the drug investigation, Defendant also admitted that she was driving and smoking marijuana in the vehicle. Thus, *Juliano* is not instructive as to whether the officers here could reasonably suspect Defendant of driving under the influence of drugs, a misdemeanor under Delaware law.³⁷ In *Juliano*, the Court concluded no reasonable suspicion existed to believe that either the crime of driving under the influence of marijuana or drug dealing had occurred, in part where *Juliano* was a passenger in the vehicle.³⁸ But here both crimes were in play and Defendant concedes there was reasonable articulable suspicion to stop the vehicle after the officers observed Defendant commit two traffic violations.

³⁵ These included information from a CI that Defendant was selling marijuana and possessed firearms at her residence. Safe Streets received an address that confirmed Defendant lived there and the description of Defendant's vehicle as a black Ford Fusion. Investigating officers surveilled the residence and corroborated the CI's account where Defendant is seen exiting her residence, proceeds to drive away in the black vehicle, and she engages in what officers observe to be a hand-to-hand drug transaction from the car.

³⁶ See *Stafford*, 59 A.3d at 1229 (Finding the reviewing court must “examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.”) (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)).

³⁷ See 16 Del. C. § 4764(d) (“Any person who knowingly or intentionally uses or consumes up to a personal use quantity of a controlled substance or a counterfeit controlled substance . . . in a moving vehicle . . . shall be guilty of an unclassified misdemeanor . . .”).

³⁸ *Juliano*, 260 A.3d at 631 (“It is undisputed that *Juliano* was not driving . . .”).

22. Defendant was an adult, the driver and the sole occupant of the vehicle, engulfed in a cloud of smoke with an emanating smell of burnt marijuana—admitting to smoking marijuana while driving in the vehicle. These facts were sufficient to establish that she was committing, at a minimum, an unclassified misdemeanor. Defendant’s argument that the officers did not pursue this charge for Driving Under the Influence of Drugs is unavailing.

23. In sum, based on the CI’s information, surveillance that corroborated this information, and the officer’s observation of drug dealing from the vehicle, sufficient probable cause existed for officers to believe that the vehicle contained evidence of criminal activity. Upon making contact, the officers observed more criminal activity in their presence and had sufficient probable cause that she was committing an unclassified misdemeanor. The officers had more than just the strong odor of burnt marijuana to justify a warrantless search of the vehicle. *Juliano* is not persuasive to suppress the evidence found in the vehicle.³⁹

³⁹ Reliance on Maryland’s *Pacheco v. State*, 214 A.3d 505 (Md. 2019) is misplaced and is not applicable where the defendant was sitting in a parked car. Similarly, references to the more recent Delaware decision in *State v. Jeffrey Rose* also is not persuasive as that Court limited the decision to facts that are not present here, namely whether there existed reasonable articulable suspicion, and summarized “...that a vaguely described odor of marijuana associated with a parked vehicle, without any further credible testimony regarding whether the odor was burnt or raw and without any other facts suggesting the vehicle’s occupant was engaged in criminal activity, does not amount to reasonable articulable suspicion justifying an investigatory detention of the vehicle’s occupant.” See *State v. Jeffrey Rose*, 2022 WL 2387803, at *7 (Del. Super. June 30, 2022).

B. The Nighttime Search Warrant is Insufficient

24. Under 11 *Del. C.* § 2308, a warrant to search a dwelling at nighttime can only be authorized where the judicial officer “is satisfied that it is necessary in order to prevent the escape or removal of the person or thing to be searched for, and then the authority shall be expressly given in the warrant.”⁴⁰ The sufficiency “must be tested by considering the affidavit as a whole”⁴¹ and requires “more than probable cause.”⁴² “Sufficient facts showing that a nighttime search is necessary . . . must appear on the face of the affidavit before such a search may be authorized.”⁴³ Although specific language is not required,⁴⁴ the application must nevertheless provide facts to support that exigent circumstances exist to justify the nighttime intrusion.

25. At the outset, the State concedes that paragraph 19 of the 20-paragraph affidavit “which [was] intended to justify the nighttime search, could [have] contain[ed] more facts and more clearly explain[ed] the exigency.”⁴⁵ Instead, the exigency justification in Paragraph 19 reads simply: “*due to the presence of drugs inside the residence with a juvenile and due to the fact no further intrusion will be*

⁴⁰ 11 *Del. C.* § 2308. This provision also defines “nighttime” as being between 10:00 PM and 6:00 AM.

⁴¹ *Mason v. State*, 534 A.2d 242, 252 (Del. 1987).

⁴² *Id.* at 251.

⁴³ *Id.* at 252 (quoting *Henry v. State*, 373 A.2d 575, 577 (Del. Super. 1977)).

⁴⁴ See *Scott v. State*, 919 A.2d 562, 2007 WL 539650, at *2 (Del. 2007) (Table); *Hope v. State*, 570 A.2d 1185, 1187 (Del. 1990).

⁴⁵ State’s Response, ¶ 37.

made since police are already on scene with the juvenile and [Defendant's] girlfriend."⁴⁶

26. The State suggests that the remaining paragraphs in the warrant read in its totality sufficed to allow a magistrate to conclude that the preservation of evidence required the nighttime search.⁴⁷ Problematic are both what the affidavit contains and what it fails to include.

27. First, there is no averment that exigent circumstances existed in order to prevent the escape or removal of the person or thing to be searched.⁴⁸ Nothing in the application mentions the girlfriend or supports a conclusion that she was aware of police presence and would attempt to remove or destroy the marijuana.⁴⁹ Detective Guarino testified that he understood a nighttime search warrant required the presentation of exigent circumstances but conceded he failed to include any.

⁴⁶ Search Warrant, ¶ 19 (emphasis added).

⁴⁷ State's Response, ¶ 38.

⁴⁸ The Affidavit for the search warrant did not include any information about police contact with Defendant's girlfriend or the marijuana found in the diaper bag as she attempted to exit the residence. Therefore, the police detention and search were not considered by the magistrate as a basis to determine if a nighttime search warrant was necessary to prevent the removal of drugs.

⁴⁹ See *Caldwell v. State*, 780 A.2d 1037, 1054 (Del. 2001) (Allowing the issuance of a nighttime search warrant to stand where the State's asserted concern was sufficient where "the warrant application indicat[ed] that [the defendant] was involved with several other individuals who, if alerted to his arrest, might seek to destroy evidence.... The issuing court cannot merely rely on a conclusory allegation that a coconspirator may get wind of an arrest and attempt to destroy evidence located in the premises to be searched. The application must also include averments that support such an assertion—for example, averments describing the conspiracy and indicating that the coconspirators are in the vicinity or have access to the premises.").

28. Second, it remains unclear why the police entered the residence before obtaining the nighttime search warrant when they knew a warrant was required. To indicate “*due to the fact no further intrusion will be made since police are already on scene*”⁵⁰ is an insufficient justification. The circular argument is constitutionally prohibited (i.e., we entered the house and are detaining persons while we await the warrant and therefore, our presence is not intrusive because we are already here).

29. Furthermore, to say they were “on scene” is factually inaccurate and misleading. It is inaccurate because they were already in the house, not merely “on scene.” It is misleading because the “scene” of the criminal activity was at the vehicle stop, not the residence. The only location provided by the CI was where Defendant resided, not that illegal activity took place there. In fact, the detective reiterated that no location was provided by the CI of where the drug dealing activity had allegedly occurred.

30. The bodycam footage confirms that Detective Guarino ordered another officer to make sure the girlfriend did not leave the house during the search of the vehicle. This was before there was any indication that there was a nexus to the residence. Even assuming that Defendant volunteered that more marijuana would be found in her house, this alleged statement from Defendant came well after the

⁵⁰ Search Warrant, ¶ 19 (emphasis added).

detective had already decided to apply for the nighttime search warrant and after he ordered officers to detain the girlfriend at Defendant's residence.

31. The Court does not consider the justification for the detention, search, and seizure of Defendant's girlfriend because Defendant lacks standing to challenge that police conduct. But to the extent the State intends to use the evidence from the diaper bag seized from the girlfriend, the Court considers it as part of the evidence obtained from the residence since the police ordered that evidence be returned to the residence. Next, we turn to the justification to enter the residence.

32. The affidavit sought a warrant "due to the presence of drugs inside the residence"⁵¹ This fact was only established because the officers entered the residence prior to getting the search warrant and "observed marijuana in vacuum sealed bags in plain view in the living room of the residence."⁵² The justification for entering the residence was twofold: "the presence of persons *inside* the residence [that] prompted detectives to proceed to the Defendant's residence...and the [detention of the persons] pending a protective sweep of the residence."⁵³

33. This averment is also inaccurate as there were no persons inside the residence. The "presence of persons" inside the residence was created when the officers ordered those persons (i.e., girlfriend and child) back inside the house. And

⁵¹ *Id.*

⁵² *Id.* ¶ 16.

⁵³ *Id.* ¶ 14 (emphasis added).

that is when they assert they saw the drugs in plain view. At the hearing, the State originally conceded that this “plain view” observation of marijuana should not have been averred if it was discovered during what the State conceded was an involuntary intrusion into the residence. But in the pleadings and its supplement, the State argues that a “protective sweep” justified entry into the under *State v. Hedley*.⁵⁴ This argument is unavailing.

34. This was not a protective sweep.⁵⁵ The detective testified they made the decision to enter the house only to wait for the nighttime warrant. There was no evidence to suggest that the residence needed to be searched because officers believed it harbored a person that posed any danger on the scene. The decision to enter into Defendant’s residence was not incident to her arrest nor “on the scene.” Nor did they conduct a sweep.

35. In sum, the search warrant fails to establish the existence of exigent circumstances to necessitate a nighttime search and the State did not provide any authority to support its position that the mere presence of drugs or people in a house is sufficient to satisfy the requirements of § 2308. That police have already entered

⁵⁴ 593 A.2d 576 (Del. Super. 1990).

⁵⁵ See *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (“[A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.”).

the residence to justify the intrusion does not pass constitutional muster. The remaining bases in the warrant are insufficient to establish exigency. The entry into the house was illegal. Neither the plain view doctrine nor the protective sweep exception applies. Accordingly, all evidence discovered in and around the residence must be suppressed.

36. Moreover, for the reasons stated at the hearing, the form of the search warrant is also problematic under *Mason v. State*,⁵⁶ and therefore fails in both form and substance under § 2308 and also under § 2310.⁵⁷

Conclusion

For the reasons stated above, the State has met its burden and established probable cause for the search of the vehicle. Defendant has met her burden that invalidates the nighttime search warrant. Therefore, Defendant's Motion to Suppress is **DENIED, *in part*, and GRANTED, *in part***.

IT IS SO ORDERED.

/s/ Vivian L. Medinilla
Vivian L. Medinilla
Judge

cc: Samuel Kenney, DAG
James O. Turner, Jr., Esq.
Prothonotary

⁵⁶ 534 A.2d 242 (Del. 1987).

⁵⁷ *Id.* at 252 (“[N]ot only did the application for the nighttime search warrant fail to satisfy the specific initial statutory requirements of Section 2308, but also [it] did not meet other statutory requirements.”).