



IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS GORDON,)	
)	
Defendant Below-)	No. 461, 2019
Appellant,)	
v.)	
)	
STATE OF DELAWARE,)	
)	
Plaintiff Below-)	
Appellee.)	

**ON APPEAL FROM THE FAMILY COURT
OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

STATE'S ANSWERING BRIEF

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DATE: February 14, 2020

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11 Del. C. § 4214(a) 1

NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Thomas Gordon's January 16, 2020 Opening Brief.

This is the State's Answering Brief in opposition to Thomas Gordon's direct appeal of his Kent County Superior Court jury convictions for aggravated possession of heroin and second degree conspiracy and his sentencing as an habitual criminal pursuant to 11 Del. C. § 4214(a).

SUMMARY OF ARGUMENT

I. DENIED. The police had probable cause to stop the Mazda where Thomas Gordon was riding as a passenger and to search and seize Gordon. The wiretap information and the continuing police surveillance of the two Mazda occupants provided probable cause for all the Kent County police actions in this case.

2. DENIED. If the arresting officer had probable cause to stop the Mazda, no explicit direction to do so from another police officer was required.

3. DENIED. The four corners affidavit limitation has no application where the defendant was already arrested, searched, and found in possession of heroin. A valid reason existed for not disclosing the wiretap operation in the arrest warrant probable cause affidavit. There is no reasonable public policy to place form over substance here and require public disclosure of secret police wiretap investigations that are still continuing.

STATEMENT OF FACTS

In July 2, 2018 the Delaware State Police were conducting a wiretap drug investigation in New Castle County known as Operation Cutthroat. (A-125, 136, 193, 198-99). State Police Detective Thomas Macauley, who was assigned to the Troop 2 drug task force (A-196), was the lead investigator in the Operation Cutthroat wiretap investigation. (A-198-99, 230). The State Police drug investigation had several wiretaps going on (A-298), and it was essential that the existence of the wiretap surveillance remain secret after July until search warrants were executed. (A-296).

Initially, there were two targets in the Operation Cutthroat wiretap investigation. (A-198). On July 14, 2018, a Court Order authorized a wiretap on one of the target's phone. (A-199). Operation Cutthroat was suspended on September 1, 2018, when numerous search warrants were executed. (A-296). Approximately 40 individuals in New Castle County were charged in sealed indictments as a result of the Operation Cutthroat clandestine drug investigation. (A-296). At the time of defendant Thomas Gordon's July 2019 Kent County Superior Court pretrial evidence suppression hearing, the whereabouts of several suspects in Operation Cutthroat were unknown and they had not been apprehended. (A-296-97).

While Thomas Gordon was still incarcerated in 2018, Operation Cutthroat intercepted a call from Gordon. (A-200). One of the wiretap heroin distribution suspects on July 15, 2018 was Kiree Wise. (A-125-26). Thomas Macauley, a brother of Michael Macauley (A-251), was monitoring phone calls in the wiretap operation on July 15, 2018, when he heard a telephone conversation between one of the wiretap targets and Thomas Gordon. (A-200).

The wiretap operation was receiving information from Kiree Wise's cellular phone and relaying that information to other State Police surveillance units on July 15, 2018 that were operated by Michael Macauley, Thomas' brother (A-251), and Michael was also a Delaware State Police Detective assigned to the Governor's drug task force at Troop 2. (A-124).

Pursuant to information from the wiretap operation, Michael Macauley around 3 P.M. on July 15, 2018 followed target Kiree Wise to Building Q of the Georgetown Manor Apartments at 260 Christiana Road, Newark, near Route 273. (A-125-26, 144). Wise was in a Honda automobile with Binta Sow, and Michael Macauley was advised that Wise would be meeting an unknown individual for a drug transaction that afternoon. (A-126). Michael parked his unmarked surveillance vehicle about fifty feet from where Wise was parked. (A-126). Other unmarked police surveillance units were also located nearby. (A-129-30).

Michael Macauley on July 15, 2018 had a clear view of Wise at the Georgetown Manor Apartments. (A-125-26). A little after 3 P.M. on July 15, a blue 2008 Mazda 3 driven by Jasmon Smith arrived at Wise's Newark location. (A-127, 154). Defendant Thomas Gordon was in the front passenger seat of the blue Mazda. (A-127). During this afternoon meeting Michael Macauley began making a video recording of the drug pickup. (A-137, 149-50). The 24.7 minute video was admitted as a defense exhibit at the July 2019 Kent Superior Court pretrial evidence suppression hearing (A-149-50), and the video was played for the Superior Court hearing judge. (A-139).

While making the video recording (A-137), Michael Macauley observed the parking lot activity which he thought was a drug transaction based on the wiretap information he received and what he was observing. (A-153). According to Michael Macauley's July 2019 suppression hearing testimony, the undercover police officer observed Kiree Wise meet Thomas Gordon at the rear of the blue Mazda where Wise gave Gordon a hug. (A-127). Relying on radio what he was seeing, Michael Macauley next saw Wise retrieve something from the Honda and give it to Gordon. (A-127). Gordon put the item received from Wise in his pocket. (A-128).

Next, a tan Ford Focus automobile arrived in the parking lot. (A-128). John Gordon exited the Ford Focus with a black plastic bag. (A-128). John Gordon

handed the black plastic bag to Jasmon Smith. (A-128). Smith opened the bag, viewed the contents, and then placed the black plastic bag on the backseat of the blue Mazda. (A-128). On the video, Smith is seen handing U.S. currency to John Gordon after receiving the black plastic bag. (A-147). Smith and John Gordon walked to the tan Ford Focus and looked at items in the Ford trunk. (A-128). Michael Macauley could not see what was in the Ford trunk. (A-128). Following the trunk view, Jasmon Smith returned to the blue Mazda, Thomas Gordon got in the right front passenger seat, and the Mazda drove away. (A-128-29).

Three unmarked police surveillance vehicles followed the blue Mazda. (A-129-30, 151-52, 162). The blue Mazda turned onto Route 273 in Newark, traveled westbound to Route 1, and proceeded southbound on Route 1. (A-129). At Exit 114 the Mazda left Route 1 and headed southbound on Route 13. (A-129). Travelling on a series of secondary roads in Kent County, the blue Mazda from time to time pulled over and let the police surveillance units pass. (A-129). On Shaws Corner Road the blue Mazda actually pulled into a driveway, reversed back out, and continued on Shaws Corner Road. (A-129). Given the route of travel by the Mazda, Michael Macauley testified at the suppression hearing that “. . . it appeared that they were conducting countersurveillance to see if anybody was following them.” (A-130).

During the surveillance drive from Newark on July 15, 2018, the State Police contacted a Kent County State Police patrol unit operated by Trooper First Class Brian Holl. (A-131, 230). Holl was a State Trooper working patrol at Troop 3 in Kent County. (A-229). Thomas Macauley who was back in New Castle County with the wiretap operation informed Holl police surveillance units were following a vehicle south from Newark. (A-230). According to Holl, unmarked police vehicles were following a blue Mazda (A-231), "Because they had watched a drug transaction and were conducting moving surveillance on the target vehicle." (A-230). Thomas Gordon was thought to be riding in the blue Mazda 3. (A-231).

Prior to July 15, 2018, Thomas Macauley informed Holl that a wiretap investigation had intercepted telephone calls, and Thomas Macauley wanted to know if Holl knew Thomas Gordon. (A-231). As the Mazda travelled south, Holl received location updates via radio and telephone. (A-232). When the Mazda reached the area of Pearsons Corner Road west of Dover (A-232), Thomas Macauley asked Holl to do a traffic stop of the Mazda. (A-233). Holl already knew a wiretap was going on, but to maintain the integrity of the wiretap drug investigation the police thought a traffic violation stop was needed. (A-234). Holl testified at the pretrial suppression hearing that Thomas Macauley informed him, ". . . you need to develop your own probable cause and go from there. Nothing about the wiretap can be revealed" (A-234).

At the time of Thomas Gordon's suppression hearing over a year later, maintaining the secrecy of the wiretap investigation was still a police and Court concern. Prior to Gordon's suppression hearing, Superior Court Judge Clark entered a 3 page Protective Order on April 4, 2019 in Thomas Gordon's prosecution. (B-1-3). At Gordon's July 2019 suppression hearing when the defense objected to testimony about the wiretap information because it was too far afield (A-206) and subject to the earlier protective order (A-201), the Superior Court Judge instructed the State not to ask further questions about the wiretap investigation in New Castle County. (A-207).

The defense at the suppression hearing (A-217-18) argued that the wiretap was not at issue in Gordon's suppression motion. (A-221). In response, the Superior Court in 2019 ruled, ". . . it is not necessary for the State to delve into all of the information in the wiretap" (A-220). Thus, the discussion of Operation Cutthroat at Gordon's suppression hearing was limited by this trial court ruling.

Trooper Holl was in uniform on July 15, 2018 (A-236), and the police officer was driving a marked State Police Tahoe SUV with a top light bar. (A-237). Holl testified that it was raining that afternoon and because the Mazda did not have its headlights on, the police officer initiated a motor vehicle violation stop. (A-234). Holl noted that the Mazda took an abnormally long time to stop. (A-235).

When asked to produce the vehicle insurance card, the driver Jasmon Smith reached into the Mazda glove box. (A-237). There, in plain view, Holl observed a clear plastic bag containing a green leafy substance Holl believed to be marijuana. (A-237). The police officer removed the contraband from the glove box. (A-237).

Next, the State Trooper removed front seat passenger Thomas Gordon from the Mazda. (A-238). Gordon was hostile and verbally combative. (A-238). Gordon's hands were handcuffed behind his back. (A-238). A second Trooper, Corporal Long, then arrived at the Kent County traffic stop. (A-238). After discovering marijuana in the glove box, the police searched the remainder of the Mazda. (A-238-39). In the Mazda rear seat Holl "located a black plastic bag . . . containing a large amount of brand new packaging for the sale and distribution of heroin" (A-239).

There were wax paper baggies to wrap around heroin and glassine baggies where 13 wax paper baggies of heroin would be placed to comprise a "bundle." (A-239). Holl added that heroin dealers then group 10 bundles together to make a "stick" or "brick." (A-239). This heroin drug paraphernalia "was brand new." (A-239-40). In addition to the heroin packaging material, the police discovered a window motor. (A-240-41). According to Holl, window motors are used to power aftermarket compartments added to conceal narcotics. (A-240-41).

Holl patted down Smith and the driver was very cooperative. (A-243).

When the police attempted to pat down Gordon the passenger, “. . . became very hostile and started, you know, saying, hey, that’s my penis, I’m African American, those kind of things and would not allow us to go near his groin area.” (A-242-43).

When Corporal Long attempted to pat down Gordon, he encountered similar difficulties. (A-243). Long told Holl that Gordon was “acting strange,” (A-243), and Holl said that Gordon would “. . . push his butt out or move his waist like he was trying to dodge a fastball in the batter’s box for baseball or dodge a punch, you know, and would not allow us to effectively conduct a pat down.” (A-243-44).

Given Gordon’s evasive and belligerent behavior, Holl transported Gordon to Troop 3. (A-241). Holl testified that he believed Gordon was in possession of heroin based upon the large amount of drug paraphernalia in the Mazda, his own prior dealings with Gordon, and “the information relayed from New Castle County troopers.” (A-245). Unable to complete a pat down search of Gordon, who was suspected to be in possession of heroin (A-246), at the scene of the motor vehicle stop, the State Police transported Gordon to Troop 3 to conduct a strip search. (A-245-46).

Three police officers (Holl, Long, and Michael Macauley) were present in the Troop 3 interview room for Gordon’s strip search. (A-246). Undercover detective Michael Macauley first attempted to do an additional pat down search of

Gordon in the interview room. (A-247). Macauley “. . . felt a suspicious package in his pants, a bulge.” (A-247).

In his suppression hearing testimony, Michael Macauley said that he went to Troop 3 after the motor vehicle arrest. (A-133). There Holl informed Macauley that he felt a plastic bag in a pat down of Gordon. (A-133). There was also heroin packaging material in the Mazda. (A-133). When Macauley did a pat down search of Gordon at Troop 3, the officer felt an item in the suspect's groin area. (A-134).

Macauley asked Gordon to remove the item, but Gordon “continually refused.” (A-134). When Gordon became argumentative and hostile (A-247), the suspect was placed in handcuffs. (A-134). Macauley testified that Gordon's “. . . pants were pulled down just enough to remove the plastic bag that was on the right side by his right testicle.” (A-134). Gordon's underwear was moved enough to remove the plastic bag later determined to contain 10.966 grams of heroin. (A-134).

During the partial strip search Gordon was not asked to reveal any body cavity. (A-135, 248). Michael Macauley was the one who removed the bag of heroin from Gordon's underwear. (A-134-35, 247-48). The amount of heroin discovered in Gordon's underwear qualified for a Tier V heroin possession charge. (A-248). Holl explained that in his arrest warrant the police officer did not mention

the continuing New Castle County wiretap investigation because “You still have to keep the integrity of that investigation.” (A-264, 337).

Testifying in his own behalf on July 25, 2019 at the pretrial suppression hearing, defendant Thomas Gordon claimed the bag of heroin discovered by the police “. . . was tied like in a knot around my testicles.” (A-327). Gordon denied the plastic bag of heroin was loose in his boxer shorts and added, “I had it tied onto my testicles” (A-327). None of the three police officers present during the interview room search confirmed Gordon’s testicle tying claim. On cross-examination, Gordon did confirm that he was not bent over during the Troop search in order for someone to look into any body cavity. (A-332-33).

**I. DENIAL OF THE PRETRIAL EVIDENCE
SUPPRESSION MOTION WAS NOT AN
ABUSE OF DISCRETION**

QUESTION PRESENTED

Did the Superior Court abuse its discretion in denying a defense pretrial motion to suppress contraband drug evidence (heroin) after conducting a 3 day evidentiary hearing?

STANDARD AND SCOPE OF REVIEW

The Superior Court's denial of a pretrial defense motion (A-51-73) after conducting an evidentiary hearing (A-364-80) is reviewed on appeal for an abuse of discretion. See Brown v. State, 117 A.3d 568, 570 (Del. 2015); Stafford v. State, 59 A.3d 1223, 1227 (Del. 2012). A trial court's legal conclusions are reviewed de novo. See Jenkins v. State, 970 A.2d 154, 157 (Del. 2009); Loper v. State, 8 A.3d 1169, 1172 (Del. 2010).

MERITS OF THE ARGUMENT

In this direct appeal of his Kent Superior Court jury convictions for Tier V heroin possession and second degree conspiracy (A-9), the defendant Thomas J. Gordon only challenges the trial court's July 26, 2019 denial of the accused's pretrial motion to suppress the 10.966 grams of heroin found by the Delaware State Police secreted in Gordon's underwear. (A-380).

After conducting a 3 day pretrial evidence suppression hearing in July 2019, the Superior Court first found that there was reasonable suspicion for the State Police on July 15, 2018 to stop the blue Mazda automobile in which Gordon was riding as a front seat passenger. (A-371). In his pretrial suppression ruling the Superior Court Judge stated: “. . . the Court finds that the circumstances here – let me underline – viewed objectively – justify the stop of the vehicle based upon reasonable suspicion of criminal activity that had been developed by the wiretap investigation and surveillance and relayed to Trooper Holl by communications from Detective Michael Macauley and Thomas Macauley.” (A-371).

In reaching this conclusion the Judge said he was relying upon this Court’s “analogous case” of Howard v. State, 2007 WL 2310001 (Del. Aug. 14, 2007) (A-371-72), where the defendant’s traffic violations were found to be irrelevant “. . . because the law enforcement officers already had probable cause to believe that the defendant had engaged in drug activity before the defendant committed the traffic violations” (A-372). In Howard, supra, at * 1, the New Castle County Police received information that an individual was selling cocaine from his maroon Dodge Durango. After the police observed Jermaine Howard in a maroon Dodge Durango make two apparent drug transactions and commit “several traffic violations” (failure to come to a complete stop at a stop sign and failure to use turn signal), they

stopped Howard and discovered cocaine hidden in the ceiling lining above the steering wheel. Howard, supra, at * 1 and n. 5.

Similar to Howard, whether Jasmon Smith, the driver of the blue Mazda in which Gordon was riding on July 15, 2018, was guilty of failing to turn on the vehicle's headlights when it was raining (A-368) was irrelevant to whether there was reasonable suspicion to stop Smith's Mazda and probable cause to search Gordon. (A-372). As the trial judge pointed out, probable cause already existed for the detention and search of Thomas Gordon based upon the wiretap information police surveillance of Detective Michael Macauley in New Castle County where the heroin and contraband drug packaging were apparently delivered to Gordon and Smith. (A-372). Whether it was raining or not at the Kent County scene of the police stop of Smith's blue Mazda was unimportant in this investigation of drug activity because, as the Superior Court pointed out in denying Gordon's pretrial suppression motion, ". . . here Trooper Holl developed reasonable suspicion to perform the traffic stop before he viewed any alleged traffic violation and separate and apart from any traffic violation." (A-372).

Addressing the police stop of the blue Mazda in which Gordon was travelling, the Superior Court at the conclusion of the pretrial suppression hearing pointed out that ". . . Trooper Holl smelled an odor of marijuana coming from the vehicle and Trooper Holl also saw a clear bag with a green leafy substance

suggestive of marijuana once Mr. Smith opened the glove box to retrieve his license and registration. The Court finds that these allegations of the State were confirmed by Trooper Holl's testimony and the MVR." (A-373).

Following the police stop of the blue Mazda, there developed additional factors to establish "probable cause to arrest both Mr. Smith and Mr. Gordon at this time and to search the vehicle." (A-375). The Superior Court Judge correctly stated that ". . . probable cause to arrest is established where an officer detects an odor of marijuana and the suspect exhibits nervous or suspicious behavior." (A-374). Next, the trial court found ". . . Trooper Holl's testimony credible that he detected an odor of marijuana coming from the vehicle upon first making contact with Defendant Gordon and Mr. Smith." (A-374-75). Furthermore, the Superior Court pointed out ". . . that the officer found Mr. Smith and Mr. Gordon to be exhibiting nervous and suspicious behavior and that Trooper Holl observed and confiscated a plastic baggie containing a green leafy substance consistent with marijuana from the open glove box in the vehicle." (A-375).

This was a proper marshalling of the pertinent facts as the basis for the trial court's ultimate legal conclusion that there was sufficient probable cause in this prosecution to arrest both occupants of the Mazda and search the vehicle (A-375).

Contrary to Gordon's initial appellate argument, the Superior Court in ruling on the defense pretrial suppression motion did correctly state and define the

applicable legal principles of reasonable suspicion and probable cause in a motor vehicle stop and the subsequent strip search of defendant Gordon. See Stafford v. State, 59 A.3d 1223, 1227-31 (Del. 2012); Tann v. State, 21 A.3d 23, 26-27 (Del. 2011); Hudson v. State, 2011 WL 2651089, at * 3-5 (Del. July 6, 2011). While Gordon in his Opening Brief at pages 9-12 attempts to distinguish and limits this Court's prior decisions in Howard v. State, 2007 WL 2310001 (Del. Aug. 14, 2007), and Brown v. State, 117 A.3d 568, 577-78 (Del. 2015), both decisions are on point and control the disposition of this appeal.

The 2015 decision in Anzara Brown is particularly compelling because it also involves a police motor vehicle stop of a drug dealer based upon wiretap information and confirmatory visual surveillance of the defendant interacting with Galen Brooks, the contraband drug supplier and wiretap target. Brown v. State, 117 A.3d 568, 571-72 (Del. 2015). In Brown the State Police were using a wiretap to monitor telephone calls of Galen Brooks, a suspected drug supplier. This was the same procedure employed in Operation Cutthroat in 2018 to monitor the calls of target Kiree Wise. On the day of the respective arrests of Anzara Brown and Thomas Gordon there was wiretap information that a drug transaction was about to occur between the target (Brooks or Wise) and a contraband drug distributor (Brown or Gordon).

Subsequent police surveillance of Brooks and Wise revealed apparent drug transfers which were confirmed by later motor vehicle stops of Brown and Gordon. Anzara Brown's departing vehicle was stopped by State Police Sergeant Lance Skinner not because of any observed motor vehicle violation, but merely on the pretext of a claimed "problem with his registration." Brown, 117 A.3d at 571. During this pretextual stop Skinner "recognized Brown's voice from the telephone calls earlier that day." Id. at 571. Just as the stop and pat down search of Anzara Brown was proper in 2012, so was the July 2018 stop, seizure and search of Thomas Gordon.

As pointed out by this Court in Brown, 117 A.3d at 577, "Probable cause is determined by the totality of the circumstances, as viewed by a reasonable police officer given her training and experience." See also Miller v. State, 4 A.3d 371, 373-74 (Del. 2010). Probable cause does not require proof beyond a reasonable doubt, but the discovery of facts that suggest a "fair probability . . . that the defendant has committed a crime." Brown, 117 A.3d at 577 (quoting Jarvis v. State, 600 A.2d 38, 42-43 (Del. 1991)). See also Stafford v. State, 59 A.3d 1223, 1229 (Del. 2012) (fair probability not a prima facie showing of criminal activity). The trial court's finding that the police had probable cause to arrest Gordon and search the Mazda (A-375) was correct, and Gordon's situation is controlled by the earlier case of Anzara Brown.

Even without probable cause, a person may be detained by the police if there is reasonable suspicion the individual is engaged in criminal activity. Hudson v. State, 2011 WL 2651089, at * 3 (Del. July 6, 2011) (citing Hall v. State, 981 A.2d 1106, 1111 (Del. 2009)). A subject is seized when a reasonable person would believe he is not free to ignore the police presence. Hudson, supra, at * 3; Jones v. State, 745 A.2d 856, 869 (Del. 1999). While police need reasonable suspicion to frisk a car passenger [Holden v. State, 23 A.3d 843, 847 (Del. 2011)], a vehicle passenger like Thomas Gordon may be frisked if the police believe the passenger committed a crime independent of the reason for the initial motor vehicle stop. Stafford v. State, 59 A.3d 1223, 1228 (Del. 2012). Of course, the police can arrest individuals when there is probable cause to believe they have committed a crime. Stafford, 59 A.3d at 1228.

There was reasonable suspicion for the July 15, 2018 police stop of Smith's Mazda and for the attempted roadside pat down of Thomas Gordon. Based on the wiretap information and the police surveillance of the interaction between Kiree Wise and Smith / Gordon, there was also probable cause to stop and search Gordon. The Superior Court Judge did not abuse his discretion in denying the suppression motion. (A-365-80).

Gordon's brief second appellate argument at page 12 of his Opening Brief is a contention that the defendant's arrest was invalid because Thomas Macauley, the

lead investigator of Operation Cutthroat (A-199), did not specifically instruct Trooper Holl to immediately arrest Gordon, nor did Michael Macauley, who observed the transaction with Kiree Wise and followed the Mazda into Kent County, give Holl such an immediate arrest order. Trooper Holl's suppression hearing testimony was that Thomas Macauley instructed the Kent County patrol officer, "you need to develop your own probable cause and go from there. Nothing about the wiretap can be revealed" (A-234). The police concern in trying to find a motor vehicle violation by Jasmon Smith was to try to avoid having to disclose information about the continuing wiretap operation. (A-296-97).

Contrary to Gordon's second appellate claim, Holl did have probable cause to stop the Mazda and seize and search Gordon. (A-370-75). Holl was in continuing communication with both Macauleys about the wiretap operation and what Michael Macauley had already observed in Newark. (A-230-34). This information communicated to Holl by the Macauleys was a sufficient basis to establish probable cause to stop the Mazda. Holl did not need to be specifically instructed to make the vehicle stop if he otherwise had probable cause to do so.

Finally, Gordon argues on appeal that the four corners of the probable cause affidavit for the arrest warrant (A-14-15) do not establish probable cause because there is no mention of the wiretap operation the affiant Brian Holl was trying to keep secret. Holl was instructed by Thomas Macauley not to reveal the wiretap.

(A-234). At the suppression hearing Holl said the wiretap was not mentioned in his pc affidavit because “You still have to keep the integrity of that investigation.” (A-264).

Any rigid reliance on the 3-2 decision in McDonald v. State, 947 A.2d 1073, 1078 (Del. 2008), limiting probable cause determinations to the four corners of the probable cause affidavit ignores the reality of what occurred here. For all intents and purposes, Gordon was already under arrest when he was searched at the Troop and heroin was discovered in his underwear. Second, there was a valid reason not to include any wiretap information in Holl’s affidavit. Operation Cutthroat continued for over six more weeks and did not terminate until September 1, 2018. (A-296).

A rigid, formalistic four corners requirement in this case ignores the reality that there was a continuing secret wiretap operation that could not be publicly disclosed, and it is simply contrary to the public goal of effective police investigation of heroin distribution. Saying that Gordon’s heroin conviction must be reversed on appeal because the arrest PC affidavit did not disclose the wiretap operation the police were trying to keep secret exalts form over substance and makes no logical sense.

As Vice Chancellor Noble’s dissent, joined by Justice Berger, in McDonald, 947 A.2d at 1085, notes: “Because the ‘four corners’ test is not properly applied to

a warrantless vehicle stop, it does not limit the universe of facts that the Superior Court was entitled to consider (or that the State had the right to proffer) in support of the vehicle stop.” The reasoning of Vice Chancellor Noble’s dissent in McDonald, 947 A.2d at 108-86, makes far more sense in a situation such as Gordon’s prosecution where the police were trying to maintain the secrecy of the ongoing drug wiretap investigation in New Castle County than a simplistic application of the rigid “four corners” of the arrest affidavit test. See Gardner v. State, 567 A.2d 404, 409 (Del. 1989) (noting that search warrant affidavits should be given common-sense interpretation and applying totality of the circumstances standard to affidavit); State v. Cooke, 2006 WL 2620533, at * 8 (Del. Super. Sept. 8, 2006) (evaluate affidavit under totality of the circumstances utilizing a practical, common sense point of view).

:

:

CONCLUSION

The judgment of the Superior Court should be affirmed.



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AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 14th day of February 2020, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on February 14, 2020, she did serve electronically the attached State's Answering Brief properly addressed to:

Bernard J. O'Donnell, Esquire
Office of Public Defender
Carvel State Office Building
820 North French Street
Wilmington, DE 19801



Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

April Lynn Liciaga
Notary Public




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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times Roman 14-point typeface using Microsoft Word 2016.
2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4713 words, which were counted by Microsoft Word 2016.



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