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IN THE SUPREME COURT OF DELAWARE

RICARDO CASTRO *Defendant-Below Appellant.* – vs. – STATE OF DELAWARE *Appellee.*	No. 318, 2020 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN KENT COUNTY ID No. 1809014319, 1812000589

APPELLANT'S AMENDED OPENING BRIEF

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Dated: December 2, 2020

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NATURE OF PROCEEDINGS

The Defendant below, Appellant Ricardo Castro, was indicted on charges relating to alleged drug dealing. Two separate indictments were filed against Mr. Castro in October 2018. The first indictment charged him with delivering or possessing cocaine with the intent to distribute it, aggravated possession of cocaine, and conspiracy to distribute cocaine on five dates in 2018: April 20, May 1–2, May 11–12, June 8, and June 19. The second indictment charged him with racketeering from March 12, 2018 to July 5, 2018. (A22–71).

Before trial, Mr. Castro moved to suppress wiretap evidence that the State obtained by tapping his cell phone. The trial court denied the motion to suppress. (A72–116: Motion to Suppress): (Exh. B: Order).

The case proceeded to a jury trial in February 2020. After a four-day trial, the jury acquitted Mr. Castro of most counts. However, the jury convicted him of possessing cocaine with the intent to distribute it and conspiracy to distribute cocaine on only two dates: May 1–2, 2018 and May 11–12, 2018.

After trial, Mr. Castro moved for a judgment of acquittal under Rule 29. (A607–221). The trial court denied the motion, finding sufficient evidence to support his convictions. (Exh. B).

Mr. Castro now appeals. He challenges the trial court's denial of his suppression motion and his motion for acquittal under Rule 29.

SUMMARY OF ARGUMENT

1. The jury convicted Mr. Castro of possessing cocaine with the intent to distribute it on May 1–2, 2018 and May 11–12, 2018. But the State's lead witness—the person to whom Mr. Castro allegedly sold cocaine—testified that no exchange of cocaine occurred on these dates. Instead, the cooperating witness testified only to an exchange of money. The trial court erred by finding that a reasonable jury could find Mr. Castro guilty of cocaine possession by disregarding the cooperating witness's testimony and "inferring" guilt despite no testimony that Mr. Castro possessed cocaine on the relevant dates.

2. The jury convicted Mr. Castro of conspiring to deal cocaine on May 1–2, 2018 and May 11–12, 2018. But no sale of drugs occurred and no plan to distribute cocaine was formed on these days. The trial court erred by finding the evidence sufficient to convict on conspiracy charges.

3. The affidavit of probable cause supporting the warrant to tap Mr. Castro's cell phone failed to establish probable cause that evidence of drug crime would be found by intercepting communications to or from that phone.

STATEMENT OF FACTS

A. Police tap Mr. Castro's phone after he texted "yep at work" to a suspected drug dealer; the trial court denies his motion to suppress.

This case arises from an investigation of alleged drug dealing in Kent County. Officers believed that Mr. Castro was supplying cocaine to Lamont McCove. Officers further believed that McCove would distribute the cocaine to lower-level dealers from there. (A95: Affidavit of Probable Cause at ¶ 2).

During the investigation, police obtained warrants to tap the phone of Co-Defendants Barry Haith and Lamont McCove. Police believed that Mr. Castro was supplying them with cocaine. In June 2018, they sought to wiretap a phone that Mr. Castro allegedly used, associated with number (302) 358-0876 (the "target phone"). (A95: *id.* at ¶¶ 1, 3).

To support their conclusion that Mr. Castro was a supplier of cocaine, the affidavit of probable cause discusses two meetings. According to the affidavit, on May 12, 2018, police observed Mr. Castro meeting with Co-Defendant McCove in Mr. Castro's car. Although police did not observe any exchange of drugs, they believed that they were witnessing an illegal exchange given that the meeting was very short. (A97: *id.* at ¶ 10).

On May 17, 2018, police observed Jeffrey Matthews entering Mr. Castro's car. Allegedly, Mr. Castro gave Matthews a bag. Police later seized the bag at some

unspecified time; at that point, it contained cocaine and marijuana. (A97–98: *id.* at ¶¶ 11).

To justify wiretapping the phone, police tried to show that Mr. Castro used it to conduct drug business. The primary supporting evidence was a text exchange between Mr. Castro and McCove. On June 1, 2018, Co-Defendant McCove and the target phone had the following text exchange, which police believed to be coded drug talk:

McCove: "Yo Gucci"

Mr. Castro: "Yep at work"

McCove: "Ok Fam got to Holla at you"

McCove: "Pick it up like you said"

The affidavit also alleged that Mr. Castro used the target phone to contact McCove "numerous times." (A97–99: *id.* at ¶¶ 8, 13–17).

Mr. Castro moved to suppress the wiretap evidence. Primarily, he argued that this text exchange did not justify a tap of the phone. He argued that there was no probable cause to believe "that particular communications concerning [the alleged drug offenses] will be obtained through the interception" as 11 Del. C. § 2407(c)(1)(b) requires. (A74–81).

The trial court denied the suppression motion. The trial court relied on the affiants' "experience and training," giving "considerable weight" to their "conclusions based on their stated experience and training." (Exh. A: July 24, 2019: Op. at 14,

citing *United States v. Kaplan*, 526 F. App'x 208, 212 (3d Cir. 2013) (non-precedential)). The trial court concluded that there was probable cause that Mr. Castro "is currently committing drug crimes" and that "communications regarding these drugs crimes w[ould] be intercepted" on his phone. The trial court did not explain at length its basis for these conclusions. (*Id.* at 14–15).

B. At trial, the State relies largely on a cooperating witness; the jury convicts Mr. Castro of possessing drugs on days when the informant testified that he did not possess drugs.

At trial, the State alleged that Mr. Castro was the supplier of a drug organization. It claimed that he was at the top level, allegedly supplying McCove who in turned allegedly supplied lower-level dealers. At trial, the State relied largely on McCove's testimony. He was cooperating with the State after pleading guilty.

McCove was the centerpiece of the State's case. While a variety of police officers testified, they had no direct evidence of drug possession despite a months-long wiretap investigation with intensive surveillance. Accordingly, this section first discusses McCove's testimony and then what police officers added to it.

i. McCove testifies that he bought cocaine from Mr. Castro, but not on the dates for which the jury convicted Mr. Castro.

McCove was a cocaine dealer. He sold drugs to lower-level dealers. He alleged that his "primary supplier" of cocaine was Mr. Castro. However, he admitted that he also purchased cocaine from other people besides Mr. Castro. (A430–432).

McCove made his money by cutting the cocaine with a bulking agent. Diluting the drugs allowed him to sell more ounces of product than he purchased from his suppliers. He made his money on the spread. It was up to McCove to determine how to cut the drugs. It was also McCove's decision how much bulking agent to use. The more bulking agent he used, the greater his profit. But he could not "over-dilute" the drugs or improperly cut the drugs and thereby harm the quality of his product. (A433, A452–61).

McCove did not claim that Mr. Castro told him how to cut the drugs or that Mr. Castro otherwise participated in the operation of McCove's cocaine business. Nor did he testify to a shared plan for drug distribution or to any organizational structure. Instead, McCove testified about five interactions he had with Mr. Castro, which allegedly related to McCove's purchases of drugs from Mr. Castro. Mr. Castro was indicted for possessing cocaine with the intent to distribute it, aggravated possession of cocaine, and conspiracy to distribute cocaine on each of these dates.

The particular dates are critical to this appeal. The five incidents occurred in 2018, on April 20, May 1–2, May 11–12, June 8, and June 19. The jury would convict Mr. Castro of the charges relating *only* to the events of May 1–2 and May 11–12, 2018.

McCove explained that, on April 20, 2018, he got purchase money from a lower-lever dealer. He then allegedly used that money to purchase cocaine from Mr. Castro,

which McCove provided to the lower-level dealer. (A434–439).

McCove then testified that he met with Mr. Castro on May 1, 2018—a date for which the jury convicted Mr. Castro. McCove testified that he gave Mr. Castro money that he owed him: "That particular day, it was just money." McCove *did not* testify about any possession of drugs on May 1, 2018. (A439–443).

McCove also presented uncertain testimony about the possibility of another meeting on May 11, 2018—the other date for which the jury convicted Mr. Castro. The State asked him whether he met with Mr. Castro on May 11. McCove explained: "I'm thinking I did. I'm not really for sure. I think I did." The State then asked him what the purpose of this possible meeting would have been: "That was probably just to handle money that I owed him." McCove specifically denied receiving any cocaine from Mr. Castro, agreeing that he was "just giving him money." (A443–445).

McCove also testified to two similar incidents on June 8, 2018 and June 19, 2018. In both incidents, McCove explained that he gave Mr. Castro money. On June 8, he would then later meet with Mr. Castro on the same day to get the drugs. (A445–447). On June 19, McCove was only satisfying a debt to Mr. Castro and did not receive any drugs. (A449–450).

To summarize the facts essential to this appeal, McCove did not claim that Mr. Castro provided him with drugs on either May 1 or May 11. Yet the jury convicted Mr. Castro for possessing cocaine on these dates.

ii. Various police officers testify that they observed meetings between Mr. Castro and the middleman but offer no direct evidence of drug dealing.

A variety of police officers testified for the State. None of the officers testified that they ever saw Mr. Castro possess drugs or sell them to McCove—much less on the critical dates of May 1–2 and May 11–12, 2018.

The officers' testimony was in essence that Mr. Castro met with McCove on several occasions. Their testimony specifically about Mr. Castro can be summarized in a fairly short list:

- An officer drove by Mr. Castro's house on April 20, 2018 and saw him with McCove. He viewed this alleged meeting for only "a few seconds." After that, the officer saw McCove meet with one of the alleged lower-level dealers. (A248–249) (testimony of Detective Dean).
- An officer saw Mr. Castro meet with McCove on May 2, 2018 but did not provide any additional details about what he saw during the meeting. (A297–298) (testimony of Detective Lamon).
- An officer saw Mr. Castro drive away from his home on the morning of May 2, 2018 but did not testify about anything else he may have seen. (A300–302) (testimony of Detective Long).
- An officer testified that he observed Mr. Castro seated in his car two minutes after arriving home on May 12, 2018. Then, McCove arrived. McCove entered Mr. Castro's car. The two left the car a "short period of time" later. Mr. Castro went back inside; McCove sat in his own car. Mr. Castro returned some time later; McCove and Mr. Castro then looked inside the passenger compartment of one of the cars. After looking and talking for a "brief period of time," McCove left and Mr. Castro went back inside his home. However, the officer did not testify to observing any drugs or objects

that might have contained drugs. (A346–348) (testimony of Detective Krogh).

- An officer testified that, on May 12, 2018, he saw Mr. Castro's car parked near a construction site that McCove was working on. He then saw McCove approach Mr. Castro's car, and then leave some time later. He did not testify to seeing Mr. Castro himself much less a drug transaction. (A359–363) (testimony of Detective Levere).
- An officer testified about text messages between Mr. Castro and McCove. On June 8, 2018, McCove suggested to Mr. Castro, "Have a Drink Tomorrow." The two agreed to meet up. After that, McCove called a lower-level dealer to arrange a sale of cocaine. (A366–371) (testimony of Detective Lamon).

The officers did not testify that they ever observed Mr. Castro possess drugs. Nor did they testify to ever seeing an exchange of drugs.

C. The trial court upholds the verdict, finding that the jury could disregard the cooperating witness's testimony that Mr. Castro did not possess drugs on the relevant dates.

At trial, Mr. Castro moved for a judgment of acquittal on all counts. (A501, A504). The trial court denied the motion. (A520–521).

The jury acquitted Mr. Castro on most counts. It acquitted him of all charges relating to the events of April 20, June 8, and June 19, 2018. It acquitted him of the racketeering charge. And it acquitted him of aggravated cocaine possession on May 1–2 and May 11–12, 2018. The jury convicted him of four counts, for knowingly delivering or possessing cocaine with the intent to distribute it and for conspiring to

deal cocaine on both May 1–2 and May 11–12, 2018. (A532–538: Charge); (A598–600: Verdict).

Mr. Castro filed a written Rule 29 motion, seeking a judgment of acquittal. At that time, his counsel did not have full transcripts of proceedings. Counsel filed a short motion alleging that the evidence was insufficient as a matter of law to convict him. (A607–611).

Counsel also sought additional time to file a supplemental brief after receiving all transcripts. The trial court allowed additional time. Mr. Castro filed a supplemental brief. (A20: Docket Entry 51).

The supplemental brief argued that there was no evidence that Mr. Castro possessed cocaine on the relevant dates. The informant explicitly testified to that and there was no contrary evidence. Mr. Castro also argued that there was no evidence that he formed into a conspiracy on the relevant dates. To the extent that a conspiracy could exist, he argued that it was not formed on May 1–2, 2018 or May 11–12, 2018. Mr. Castro relied on McCove's testimony that he only paid for drugs he had already purchased—suggesting that any conspiracy would have already been formed on prior dates. (A612–621).

The trial court denied the Rule 29 motion for acquittal. As to the possession charges, the trial court reasoned that the jury was free to reject McCove's exonerating testimony that Mr. Castro did not provide him with drugs on the relevant dates. The

trial court believed that "[t]he jury could have inferred that Mr. McCove was actually conducting drug transactions on those days despite the fact that he stated that he was only engaging in money transactions with [Mr. Castro] because of the ongoing activities involving Mr. McCove and [Mr. Castro]." The trial court did not explain why the jury could "infer[]" guilt beyond a reasonable doubt without any evidence of drug possession on the relevant dates. (Exh. B: Order denying Rule 29 motion at 4–7).

As to conspiracy, the trial court asserted that a reasonable jury could find that "[Mr. Castro] agreed with Mr. McCove to participate in drug dealing on the two dates in question and committed an overt act in furtherance of that agreement." The trial court did not explain these conclusions further. (*Id.* at 7).

From there, the case went to sentencing. The trial court sentenced Mr. Castro to consecutive sentences of 25 years' confinement on the drug-dealing charges. The first sentence of confinement was to be suspended after 4 years, and the second sentence after 2 years. The trial court also sentenced Mr. Castro to 2 years' confinement on the conspiracy charges, both immediately suspended. (Exh. C: Sentencing Order).

ARGUMENT

I. Insufficient evidence supported Mr. Castro's convictions for drug possession because the informant testified that he did not possess drugs on the relevant dates.

A. Question presented.

The State's lead witness, McCove, testified that Mr. Castro did not sell him drugs on May 1–2, 2018 or May 11–12, 2018. Did the trial court err by ruling that the jury could properly have "inferred" that Mr. Castro dealt drugs to McCove on these dates by rejecting McCove's exonerating testimony?

Mr. Castro preserved this issue for appellate review by oral motion for judgment of acquittal at A501 and post-trial written Rule 29 motion for acquittal at A607–21.

B. Scope of review.

This issue implicates the trial court's ruling on a Rule 29 motion for judgment of acquittal. "The standard of review in assessing an insufficiency of evidence claim is "whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt." *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995) (quoting *Robertson v. State*, 596 A.2d 1345, 1355 (Del. Super. 1991)).

C. Merits of argument.

There is no evidence that Mr. Castro possessed cocaine on the dates for which the jury convicted him. Mr. Castro was convicted of possessing cocaine with the intent to distribute it under 16 Del. C. § 4752(a)(1), which prohibits the "[m]anufacture, deliver[y], or possess[ion] with intent to manufacture or deliver a controlled substance in a Tier 3 quantity." The jury found that he possessed cocaine on May 1–2 and May 11–12, 2018.

There is no evidence that Mr. Castro manufactured, delivered, or possessed cocaine on the relevant dates. Nobody testified to seeing any cocaine, distributing any cocaine, or receiving any cocaine. The evidence instead was only that McCove met with Mr. Castro to pay him money for prior cocaine sales.

To state the obvious, money is not the same thing as cocaine. Without evidence of cocaine, the State failed to meet its burden of proving cocaine possession beyond a reasonable doubt.

The trial court found otherwise only by flipping the nature of reasonable doubt on its head. The trial court found that the jury could convict despite McCove's direct testimony that there was no cocaine. The trial court reasoned that the jury could reject that testimony as not credible, while otherwise accepting McCove's testimony about his dealings with Mr. Castro. But it is not enough that the jury was free to reject McCove's exonerating testimony. It is not Mr. Castro's job to prove his innocence. It is the State's burden to prove guilt beyond a reasonable doubt.

The only evidence the trial court relied on to support guilt—that Mr. Castro met with McCove on the relevant dates—does not establish cocaine possession beyond a reasonable doubt. Mr. Castro is not guilty of drug possession for simply meeting someone. There must be sufficient evidence that he possessed drugs. Nobody testified that there were any drugs and so the evidence was insufficient.

Similarly, the State also failed to prove its case beyond a reasonable doubt because it failed to show that Mr. Castro possessed cocaine in "a Tier 3 quantity" as was necessary to support his conviction under 16 Del. C. § 4752(a)(1). A "Tier 3" quantity is "25 grams or more of cocaine or of any mixture containing cocaine." 16 Del. C § 4751C(1)(a).[1] Because there was no evidence of any cocaine at all, there was no evidence that Mr. Castro ever possessed at least 25 grams of cocaine on May 1–2 or May 11–12, 2018.

Nobody can explain what cocaine Mr. Castro possessed on the relevant dates. It is impossible to conclude that non-existent cocaine weighed at least 25 grams.

[1] The trial court charged the jury that possession of only 20 grams of cocaine was sufficient, without objection. (A415, A542). The difference between 20 grams and the statutorily mandated 25 grams is irrelevant here. Mr. Castro's argument is that there was no evidence of any quantity of cocaine.

II. There was no evidence that Mr. Castro formed a conspiracy with the cooperating witness on the relevant dates because no drugs changed hands on those days.

A. Question presented.

The state's lead witness, McCove, testified that Mr. Castro sold him drugs and that he subsequently paid Mr. Castro for these drugs on May 1, 2018 and May 11, 2018. Did the trial court err by ruling that this was sufficient evidence to convict Mr. Castro for conspiring to deal drugs on May 1 and May 11?

Mr. Castro preserved this issue for appellate review by oral motion for judgment of acquittal at A501 and post-trial written Rule 29 motion for acquittal at A607–21.

B. Scope of review.

This issue implicates the trial court's ruling on a Rule 29 motion for judgment of acquittal. "The standard of review in assessing an insufficiency of evidence claim is "whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt." *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995) (quoting *Robertson v. State*, 596 A.2d 1345, 1355 (Del. Supr. 1991)).

C. Merits of argument.

While the jury convicted Mr. Castro of conspiring to deal cocaine on May 1–2, 2018 and May 11–12, 2018, there was no evidence that he formed a conspiracy with

anyone on these dates.

Mr. Castro was convicted of second-degree conspiracy under 11 Del. C. § 512. Section 512 makes it a crime for any person to:

> (1) Agree[] with another person or persons that they or 1 or more of them will engage in conduct constituting the felony or an attempt or solicitation to commit the felony; or
>
> (2) Agree[] to aid another person or persons in the planning or commission of the felony or an attempt or solicitation to commit the felony; and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.

As the trial court charged the jury, the State must establish three elements to prove that there was a § 512 violation: "(1) Defendant agreed to aid another person in the planning or commission of a felony or an attempt to commit a felony. (2) Either defendant or the other person committed an overt act in pursuit of the conspiracy. (3) Defendant acted intentionally." (C 123). In addition, as the trial court charged the jury, the State must "satisfy all the elements [of conspiracy], at or about the date and place stated in the indictment." (C 123–24).

A conspiracy requires a "common design or purpose" to commit future crime. *Bender v. State*, 253 A.2d 686, 687 (Del. 1969). Here, there was no evidence of a shared organizational plan or structure. Instead, the evidence was at most that Mr. Castro sold McCove drugs on multiple occasions.

Appellate courts have struggled to answer precisely when and how a conspiracy

to deal drugs is formed by a mere sale of drugs. Courts disagree about when a buyer and seller of drugs share a common criminal purpose and when they are merely acting for their own purposes in the illegal-drug market and so are not co-conspirators. *See* CONGRESSIONAL RESEARCH SERVICE, *Federal Conspiracy Law: A Brief Overview* at 7 (Apr. 3, 2020) (discussing the federal circuits' "buyer-seller" exception to conspiracy liability and collecting authorities in all federal circuits).

This Court has not squarely addressed the "buyer-seller" doctrine. However, it outlined when the seller of drugs forms a conspiracy with the buyer in *Carter v. State*, 418 A.2d 989 (Del. 1980).

In *Carter*, this Court found that a seller of drugs conspires with the buyer of drugs when the seller transfers drugs to the buyer with the understanding that the buyer "intend[s] to distribute the drugs." In *Carter*, the defendant sold drugs to others in Pennsylvania. The buyers, residents of Delaware, returned to Delaware. Police officers arrested the buyers and found cocaine. Police then arrested the defendant for conspiring to sell drugs in Delaware.

The defendant claimed that Delaware lacked jurisdiction over this alleged offense because the sale occurred in Pennsylvania, requiring this Court to outline the nature of a conspiracy to deal drugs. This Court explained that the defendant's "delivery" of drugs to the buyers was a conspiracy because the defendant knew that the buyers "intended to distribute the drugs in Delaware." The buyers then committed the overt

act necessary to convict by returning to Delaware "with intent to distribute" the drugs.

In sum, *Carter* stands for the proposition that the seller of drugs commits a conspiracy to deal drugs when: (1) he sells drugs to a buyer with the understanding that the buyer will distribute them; and (2) the buyer possesses the drugs with the intent to distribute them.

Here, there is no evidence that a conspiracy was formed on the relevant dates of May 1–2 or May 11–12, 2018. Instead, McCove testified that, on these dates, he merely paid Mr. Castro back for drugs that he had already received from Mr. Castro on prior dates.

If there were any conspiracy between McCove and Mr. Castro, it occurred on these prior dates, when the drugs were allegedly transferred. Under *Carter*, the conspiracy occurred as of the date of the transfer of drugs. As of that date, the transfer would have occurred and McCove would have possessed the drugs with the intent to distribute them. That would satisfy all elements of conspiracy.

However, on the relevant dates, Mr. Castro testified only that he paid for drugs already received. That is not the formation of a new conspiracy. To the contrary, the criminal purpose of the alleged conspiracy—the transfer of drugs for distribution—had already occurred.

The jury had the opportunity to convict Mr. Castro for such a prior conspiracy but chose not to do so. McCove claimed that he received drugs from Mr. Castro on

April 20, 2018. To the extent that a conspiracy existed, this prior sale of drugs created it under *Carter*. However, the jury chose to acquit Mr. Castro of any such charge.

The jury had no basis to then convict on the later dates when no drugs changed hands. Because there was no transfer of drugs and no other evidence of a criminal agreement on these dates, there was insufficient evidence to find that Mr. Castro formed a conspiracy with McCove on May 1–2 or May 11–12, 2018.

III. The trial court erred by not granting Mr. Castro's motion to suppress wiretap evidence because there was no supporting probable cause.

A. Question presented.

Should the trial court have granted Mr. Castro's motion to suppress wiretap evidence because the affidavit of probable cause submitted to tap Mr. Castro's phone failed to establish probable cause that the phone was used to conduct drug business?

Mr. Castro preserved this issue for appellate review through a pre-trial motion to suppress at A72–116.

B. Scope of review.

This Court reviews the denial of a suppression motion for abuse of discretion. *Smith v. State*, 887 A.2d 470, 472 (Del. 2005) (*en banc*). Here, the evidence was obtained based on a search warrant. Evidence can be suppressed even where it is obtained in good-faith reliance on a magistrate's issuance of a search warrant. *Dorsey v. State*, 761 A.2d 807, 818–21 (Del. 2000) (rejecting the contrary rule of *United States v. Leon*, 468 U.S. 897 (1984)). However, the magistrate's decision about probable cause is entitled to "great deference." *Smith v. State*, 887 A.2d 470, 473 (Del. 2005) (quoting *Illinois v. Gates*, 462 U.S. 213 (1983)).

C. Merits of argument.

To justify a wiretap, the State must show not only that there is probable cause that the defendant is committing a drug offense, but also "that particular communications concerning that offense will be obtained through the interception." 11 Del. C. § 2407(c)(1)(b). Here, the affidavit failed to show why there was probable cause to believe that tapping Mr. Castro's phone associated with number (302) 358-0876 (the "target phone") would reveal evidence of drug crime.

The affidavit alleges that Mr. Castro used the target phone to contact McCove to arrange drug sales. The only direct evidence that these communications involved drugs is the following intercepted text conversation:

> McCove: "Yo Gucci"
>
> Mr. Castro: "Yep at work"
>
> McCove: "Ok Fam got to Holla at you"
>
> McCove: "Pick it up like you said"

According to the police, Co-Defendant McCove's statement "Yo Gucci" is not merely a greeting but rather is supposedly "code for asking if the other person has illegal drugs to sell." The only basis for this conclusion was that "Your Affiants are aware from this investigations [*sic*] that a [*sic*] 'Yo Gucci' is code." (*Id.* at 15, ¶ 14).

According to police, Mr. Castro's alleged statement "[y]ep at work" supposedly means that he does indeed have drugs to sell but that he "is at work at this time." The

police listed no basis for this conclusion other than they "believe[d]" they were correct. (*Id.* at 15, ¶ 15).

This scant evidence does not permit the police to wiretap the target phone. Even if Mr. Castro were dealing drugs as the police allege, that does not mean that they can wiretap any phone that he uses. The existence of probable cause to believe that the target is committing a drug offense is only *one* of the four required showings under 11 Del. C. § 2407(c)(1). Police must also show probable cause to conclude that wiretapping the particular phone at issue will reveal communications concerning the drug offense. 11 Del. C. § 2407(c)(1)(b).

Here, there was no probable cause that Mr. Castro used the target phone to commit drug crime. The only documented use of the target phone that Mr. Castro made was to respond to a friendly greeting, "Yo Gucci," by texting "Yep at work." Police did not substantiate their conclusion that this was really coded drug talk. They merely stated that they "believe[d]" it was. But a mere "belief" without supporting evidence fails to establish probable cause.

An affidavit of probable cause must allege facts that "allow the magistrate to make an independent evaluation of the matter." *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984). Here, there is nothing more than the affiant's bare assertion that Mr. Castro used coded drug phrases without supporting evidence. That is not enough

In reaching the opposite conclusion, the trial court placed undue reliance on the

officers' training and experience. In essence, the trial court found that it could rely on a bare conclusion simply because of that training and experience. To reach that conclusion, the trial court relied on a single, non-precedential Third Circuit opinion, *United States v. Kaplan*, 526 F. App'x 208, 212 (3d Cir. 2013)).

The factual differences between *Kaplan* and this case show that the trial court placed undue reliance on the officer's "training and experience" in understanding supposed coded drug talk. In *Kaplan*, six separate confidential informants told police about a cocaine dealing operation of four men, not including the defendant Kaplan. Three of them had prior drug arrests. An informant made a controlled purchase from one of the conspirators. Police observed the conspirator use his cell phone to arrange the meeting. Based on that, they obtained a wiretap of the conspirators. Police noticed the "repeated" use of coded phrases. Police then surveilled drug sales arranged by phone using those repeated coded phrases. They saw the defendant Kaplan at those meetings. A panel of the Third Circuit found this adequate to then tap Kaplan's phone.

In contrast, here, police did not claim that they connected any coded drug phrases to specific drug sales. They did not provide any other evidence to support their conclusion that "Yo Gucci" was a direct request to buy drugs or that "Yep at work" is code for "yes, I have drugs, but I can't sell them to you right now." They simply asserted that without confirming evidence.

In sum, the evidence did not show probable cause to believe that Mr. Castro used

the target phone to conduct drug business. The affidavit thus failed to satisfy 11 Del. C. § 2407(c)(1)(b).

CONCLUSION

Mr. Castro asks this Court to vacate his convictions and to remand this case for further proceedings before the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirement of Rule 13(a); and with the type-volume limitation of Rule 14(d)(i) because this brief is set in 14-point Times New Roman; and contains 5,375 words, not including the front cover, signature block, and any footer included pursuant to Rule 10.2(5).

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TRIAL COURT'S JUDGMENT AND RATIONALE

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