



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICARDO CASTRO,)	
)	
Defendant Below-)	
Appellant,)	
v.)	No. 318, 2020
)	
STATE OF DELAWARE,)	
)	
Plaintiff Below-)	
Appellee.)	

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

STATE’S ANSWERING BRIEF

John Williams (#365)
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19904-6750
(302) 739-4211 (ext. 3285)
JohnR.Williams@delaware.gov

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Ricardo Castro's December 2, 2020 Amended Opening Brief.

This is the State's Answering Brief in opposition to Ricardo Castro's direct appeal of his February 2020 Kent County Superior Court jury convictions for two counts each of drug dealing in violation of 16 *Del. C.* § 4752(1) and second degree conspiracy in violation of 11 *Del. C.* § 512.

SUMMARY OF ARGUMENT

I. DENIED. A rational trier of fact viewing the State's evidence in the light most favorable to the prosecution could find beyond a reasonable doubt that Ricardo Castro was involved in drug dealing on two dates in May of 2018. Prosecution witness Lamont McCove testified that Castro was one of his drug suppliers and that McCove made two cocaine deliveries in May after getting money from the purchasers and then delivering the cash to Castro in exchange for drugs.

II. DENIED. Castro's motion for judgment of acquittal as to his two second degree conspiracy convictions was also properly denied because the jury could conclude on the basis of all the trial evidence that Castro was involved in a continuing course of conduct with McCove and that two overt acts were committed in furtherance of that criminal enterprise agreement.

III. DENIED. There was no abuse of discretion in denying Castro's pretrial motion to suppress all evidence derived from a police wiretap of Castro's cellular phone. Since the court order authorizing the wiretap of Castro's phone did not go into effect until June 4, 2018 [*State v. Castro*, 2019 WL 3321888, at * 1 (Del. Super. July 24, 2019)], Castro cannot show how any evidence derived from a June wiretap could have contributed to Castro's convictions for earlier criminal activity on May 1-2 and 11-12, 2018. Any June wiretap evidence, even if

improperly admitted, did not contribute to Castro's four convictions for activity in the preceding month.

STATEMENT OF FACTS

In the Spring of 2018, the Delaware State Police conducted an investigation of approximately fifteen individuals involved in a Kent County cocaine drug dealing enterprise. (A-197, 201-03). This police investigation of contraband drug activity was named Operation Old School. (A-201). The investigation utilized wiretap intercepted telephone calls and text messages which were confirmed by visual surveillance performed by State Police and City of Dover law enforcement officers. (A-241-42, 247-49, 299-303, 308-12, 321-24, 346-49, 353-54, 359-64).

The Kent County Grand Jury Indictment charged Ricardo Castro with cocaine drug dealing on five 2018 occasions: April 20 (A-25-26); May 1-2 (A-29-30); May 11-12 (A-32-33); June 8 (A-37-38); and June 19 (A-41-42). Although Castro was alleged to have committed drug offenses on five different occasions in 2018 (A-188), the Kent County Superior Court jury, after the February 2020 trial, only found Castro guilty of drug dealing (Counts 4 and 7) and second degree conspiracy (Counts 6 and 9) on two occasions of May 1-2 and May 11-12, 2018. (A-598-99). Castro was found not guilty of twelve other charges, including an allegation of racketeering. (A-597-600).

Thomas Lamon, the Delaware State Police lead investigator in Operation Old School (A-197-98, 201), testified that Castro was the suspected cocaine supplier in Dover (A-206), prosecution trial witness Lamont McCove was the

suspected middleman (A-205), and Barry Haith, Jerome Harris and Brandon McClain were the ultimate cocaine buyers in the on-going enterprise. (A-205).

In May of 2018 McCove was employed as an equipment operator for Greco and Fiera Construction. (A-429). Specifically, McCove was driving trucks at a highway overpass construction site in Middletown, Delaware. (A-429-30, 439-40).

On May 1, 2018 the State Police intercepted a 6:36 P.M. telephone call from Haith to McCove, in which Haith asked to purchase 9 ounces of cocaine from McCove. (A-255-57). When McCove returned Haith's call, the middleman said he could not get the cocaine until the next day, May 2. (A-257). A police recording of the May 1 telephone calls between Haith and McCove (State's Exhibit # 2) was played for the jury at Castro's trial. (A-253, 256).

May 1, 2018 text messages (State's Exhibit # 3) (A-259-60) further indicated that Haith wished to purchase 9 ounces of cocaine for a price of \$9,000 from McCove. (A-260-63). McCove was to get the money from Haith first, then pick up the drugs from the supplier Castro, and finally return to Haith to deliver the cocaine. (A-262-63).

At approximately 9 A.M. on May 2, 2018, State Police Officer Matthew Long was conducting visual surveillance of Castro's Dover residence at 24 Willis Road. (A-300). Long used a handheld video camera to record Castro as he left his home that morning in a black Acura automobile (A-301-02) and drove eastbound

on Route 8 in Dover, then turned onto Route 1, and proceeded North toward Middletown. (A-306). The State played the videotape of Castro's vehicle route as filmed by Long (State's Exhibit # 4) at Castro's trial. (A-303).

At approximately 10 A.M. on May 2, 2018, Castro was observed meeting with McCove at the Middletown construction site where McCove was working. (A-265, 297-98). After work that day, McCove drove to 302 Cutz, a Dover barbershop, to contact Haith. (A-308). A videotape taken from a pole camera at 302 Cutz (State's Exhibit # 5) (A-311-12), and played for the jury, showed McCove arriving at the barbershop at 5:52 P.M. on May 2, 2018 in a Mercury Marquis. (A-310). This videotape showed Haith getting into the passenger side of McCove's vehicle; Haith then exited the Mercury and walked back to the barbershop, and McCove left the area. (A-311-12).

Similar telephone calls and text messages about a cocaine purchase were intercepted by the State Police on May 11-12, 2018 (State's Exhibits # 6 and 7). (A-315, 318-22, 350-52). At 7:31 A.M. on May 11, 2018, McCove received a text message from McClain (A-315) asking to purchase one (1) ounce of cocaine. (A-316). McCove sent a reply text message at 10:51 A.M. on May 12, 2018 stating that McCove was at work. (A-316-17).

The State Police also intercepted telephone calls on May 11 and 12, 2018 between McCove and McClain. (A-317-20). These May 11-12 telephone call

recordings (State's Exhibit # 7) (A-318) were played for the jury during Castro's trial. (A-319-22). In one phone call, McCove and McClain discuss where to meet so that McCove could pick up the money for McClain's one (1) ounce cocaine purchase. (A-319). During a 2:52 P.M. May 12 telephone conversation between McCove and McClain, the two agree to meet that day at the Chase Lounge outside of Cheswold at 3 P.M. and McCove reports that he will be driving a Mercury Marquis automobile. (A-320).

State Police Officer Lamon testified at trial that McCove and McClain did meet at the Chase Lounge at 3 P.M. on May 12, as discussed in the intercepted telephone call. (A-320). McCove was driving his Mercury Marquis seen previously in other surveillance videos and as indicated in the recorded telephone call. (A-320). According to Lamon, the May 12 afternoon meeting between McCove and McClain lasted approximately two minutes, after which they both quickly departed.

Castro's jury next listened to a recording of a 5:44 P.M. May 12, 2018 telephone call between McCove and McCove's cousin, Jerome Harris. (A-321, 468). Initially, Harris wished to purchase an ounce of cocaine from McCove (A-322), but in a subsequent 6:14 P.M. May 12 recorded telephone call played for the jury (A-322), Harris also inquired about purchasing marijuana. (A-322-23). McCove quotes Harris a \$200 price for the marijuana. (A-323). McCove arranged

to meet both Harris and McClain at about 7 P.M. on May 12 in a parking lot near the Red Lobster and Olive Garden restaurants in Dover. (A-323-24).

Shortly thereafter at 6:48 P.M. on May 12, 2018 Dover Police Officer Matthew Krogh was conducting visual surveillance of Castro's 24 Willis Road, Dover, residence when he saw Castro arrive in a black Acura. (A-347).

Approximately two minutes later Officer Krogh observes McCove arrive at Castro's home in a Mercury Marquis vehicle. (A-347).

At trial Officer Krogh testified:

I observed Mr. McCove exit his vehicle and get into the front passenger seat of Mr. Castro's vehicle, where they remained for a short period of time. Then both parties, Mr. Castro and Mr. McCove, got out of Mr. Castro's vehicle, walked around to the front of the vehicles where they appeared to talk for a brief period, and then Mr. Castro walked into the rear of 24 Willis Road.

(A-347).

Krogh then observed McCove return to his vehicle where McCove "sat and waited." (A-347-48). Castro returned from his house, opened the front passenger door of McCove's car, and both men appeared to be looking inside the vehicle. (A-348). After some conversation Castro shut the front passenger side door and McCove returned to the driver's seat and departed. (A-348).

McCove next sent a 6:57 P.M. text message to McClain that McCove was "Five away" (State's Exhibit # 6). (A-350). The jury also heard a 7:10 P.M. May 12 telephone call between McCove and Harris that McCove would be meeting

both Harris and McClain at the Red Lobster/Olive Garden parking lot that evening. (A-352). Detective Brock Dean, who was also involved in the May 12 evening surveillance of McCove (A-353), followed McCove at about 7 P.M. on May 12 to the Red Lobster/Olive Garden restaurant area. (A-354).

Around 10 A.M. on May 12, 2018, Delaware State Police Officer Jeff Levere was assisting the Operation Old School drug investigation by conducting visual surveillance in the Middletown area. (A-358-59). Levere was advised that a black Acura belonging to Castro would be coming to the 301 Middletown construction site that morning. (A-359). Officer Levere knew McCove was working at the construction location driving a very large “dump truck,” and he testified, “. . . there was supposed to be a meeting that morning between Mr. Castro and Mr. McCove.” (A-360).

On the southbound shoulder of Route 301 Officer Levere saw the black Acura with its hazard lights on. (A-361). Officer Levere next observed McCove “at the driver’s side window” of Castro’s Acura. (A-362). McCove then went back to his dump truck and Castro left the area. (A-362-63).

McCove testified as a prosecution witness. (A-428-93). McCove testified that in 2018, he was working driving trucks at a Middletown overpass construction project. (A-429-30). As another source of income in 2018, he testified that he, “S[old] drugs.” (A-430). McCove admitted selling cocaine (A-430) and

acknowledged that he knew Ricardo Castro (A-430-31), as well as Barry Haith, Jerome Harris, and Brandon McClain. (A-430).

In his trial testimony McCove acknowledged that he bought drugs for Haith, Harris and McClain. (A-431). According to McCove, “I would get the money. Then I would go get the drugs.” (A-431). After McCove had the drugs he would deliver the contraband to Haith, Harris and McClain, who would sell the drugs. (A-431). When asked at trial, “And your primary supplier in this order, who was that?” McCove identified “Ricardo” Castro in the courtroom as his primary supplier. (A-431-32). McCove also acknowledged that from time to time he bought cocaine from other suppliers and said, “I just make trips, you know.” (A-432). McCove said he did not get drugs from Castro on May 2 and 11, 2018, but merely gave Castro money. (A-445). But as the testimony bore out, “Mr. McCove, the days that you met with Mr. Castro and didn’t get drugs, you were paying him for prior transactions for those drugs?”, McCove answered, “Yes.” (A-451).

During his trial testimony McCove agreed that he could be described as a middleman. (A-433). McCove conceded that after he obtained the cocaine, he would make money if he “cut it” by adding another mixture to increase the weight. (A-433). If there was more weight to the contraband product McCove delivered, the middleman “could profit more money.” (A-433).

When asked, “Now, as a result of the activities that you were involved in with the defendant and those other individuals, you were arrested, correct?”, McCove answered, “Yes.” The prosecution witness also acknowledged that he had pled guilty and agreed to cooperate and testify truthfully. (A-434). McCove’s plea agreement (Defense Exhibit # 4) (A-477) revealed that he had pled guilty to drug dealing, racketeering, and two counts of conspiracy and had received a 5-year prison sentence. (A-479, 488-89).

The defendant, Castro, elected not to testify. (A-502-03).

**I. THE EVIDENCE WAS SUFFICIENT
TO CONVICT CASTRO OF TWO
COUNTS OF DRUG DEALING**

QUESTION PRESENTED

Did the trial judge correctly deny the defense motion for a judgment of acquittal as to Castro's two drug dealing convictions?

STANDARD AND SCOPE OF REVIEW

Appellate review of a trial judge's denial of a defense motion for judgment of acquittal (A-504-05, 520-21) [*State v. Castro*, 2020 WL 2557142 (Del. Super. May 20, 2020)] is *de novo* to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the essential elements of drug dealing (A-540-43) beyond a reasonable doubt.¹

MERITS OF THE ARGUMENT

After the State rested on the third day of trial (A-495), Castro made a motion for a judgment of acquittal as to all charges. (A-504). After hearing the State's response (A-505), the Superior Court Judge, in a bench ruling, denied the defense motion. (A-520-21). Following consideration of the racketeering allegation, the trial judge ruled: "With reference to the remaining charges, we have testimony from officers and a former co-defendant concerning texts, calls and videos that are

¹ See *Bethard v. State*, 28 A.3d 395, 397 (Del. 2011); *Winer v. State*, 950 A.2d 642, 646 (Del. 2008).

sufficient to allow this court to present this case to the jury for decision.” (A-521).

The jury then found Castro guilty of four of the pending sixteen charges. (A-597-601). Specifically, Castro was adjudged guilty of two counts of drug dealing (Counts 4 and 7) and two counts of second degree conspiracy (Counts 6 and 9). (A-598-99).

On March 17, 2020 Castro filed a written post-trial motion for judgment of acquittal pursuant to Del. Super. Ct. Crim. R. 29. (A-607-09). Castro also submitted a brief on May 5, 2020 in support of his post-trial motion. (A-612-20). The State, on May 8, 2020, filed a written response in opposition. (A-622-25).

The Superior Court on May 20, 2020 issued its Order denying the motion for judgment of acquittal as to Castro’s four jury convictions.² The trial judge summarized the incriminating evidence, as follows:

In this case, one of the State’s witnesses, Lamont McCove, testified that he engaged in numerous drug transactions with Defendant. Mr. McCove admitted meeting with other individuals involved in his drug activities to collect money and later meeting Defendant to purchase the drugs, including cocaine. Mr. McCove claimed that on the two days in question (May 1-2, 2018, and May 11-12, 2018) he met with the same people, including Defendant, but he stated that no drug transactions occurred, even though he gave Defendant money on those days. The jury could have inferred that Mr. McCove was actually conducting drug transactions on those days despite the fact that he stated he was only engaging in money transactions with Defendant because of the ongoing activities involving Mr. McCove and Defendant. Mr. McCove admitted to having drug transactions with Defendant. The jury had the right and

² *State v. Castro*, 2020 WL 2557142 (Del. Super. May 20, 2020).

opportunity to assess the credibility of Mr. McCove's testimony as a whole as well as the specific parts of the testimony.

Furthermore, Detective Lamon testified that Defendant was a supplier of cocaine. Detective Lamon testified that on May 1, 2018, Mr. McCove communicated with one of the individuals he admitted to selling drugs to about making a transaction. Detective Lamon also testified that Mr. McCove met with his supplier on May 2, 2018, at the location Mr. McCove later admitted meeting Defendant for drug transactions. Detective Lamon further testified that on May 2, 2018, Mr. McCove met with Defendant. Detective Long also testified that he saw Defendant leaving his residence on My 2, 2018, and traveling towards Middletown, where Mr. McCove was working at the time.

Additionally, Detective Lamon testified that on May 11, 2018, Mr. McCove communicated with two individuals about a drug transaction, which would require Mr. McCove to purchase drugs from a supplier. Detective Levere testified that Mr. McCove met with Defendant on the morning of May 12, 2018 at Mr. McCove's job. Detective Krogh also testified that Defendant met with Mr. McCove again later on May 12, 2018 at Defendant's residence where they had a brief interaction outside by their cars. Detective Lamon later testified that Defendant met with the two individuals he communicated with on May 11, 2018, soon after he left his residence.³

On appeal, Castro argues that he could not be convicted of drug dealing on May 1-2 and May 11-12, 2018 because the police did not recover any cocaine on those dates and the trial testimony of the middleman, Lamont McCove, was that he only met with Castro on those days to deliver money to Castro for prior cocaine transfers. But, Castro's focus is too narrow and ignores the other substantial trial evidence of Castro's continuing contraband drug activity.

³ *Id.*, at * 2 (footnotes omitted).

Lamont McCove had already pled guilty to four criminal offenses involving Castro and been sentenced to 5 years imprisonment. (A-474, 477-79, 488-89). McCove testified at trial that in 2018, McCove was selling drugs including cocaine (A-430), and he was acquainted with Castro (A-430-31), who was one of his drug suppliers. (A-431). McCove explained that he was a middleman (A-433), who got money from street level drug dealers, gave the money to Castro for a supply of drugs, and delivered the drugs to McCove's customers. (A-431, 433). At the end of his direct examination, McCove was asked: "Just so we're clear, Mr. McCove, the days that you met with Mr. Castro and didn't get drugs, you were paying him for prior transactions for those drugs?," and McCove answered, "Yes." (A-451).

Based upon McCove's trial testimony about the continuing contraband drug activity involving Castro as the cocaine supplier (A-431, 433), a rational trier of fact could reasonably conclude that Castro was involved in an ongoing drug dealing enterprise with McCove on the specified dates in May 2018. Castro's jury heard multiple telephone conversations, viewed numerous text messages, and heard police testimony about the surveillance of both McCove and Castro that established the contraband drug activity alleged in the indictment. Considering the totality of this incriminatory trial evidence the jury could find Castro guilty beyond a reasonable doubt of drug dealing on May 1-2 and May 11-12, 2018, whether or not McCove said he was only delivering money when McCove met with Castro on

May 1 and 12 at the Middletown construction site where McCove was working (A-359-64, 439-42), and a second May 12 evening meeting between McCove and Castro at Castro's Dover home. (A-346-49).

From the evidence produced at trial, Castro's jury knew that Barry Haith wanted to purchase 9 ounces of cocaine on May 1, 2018 (A-255-65). McCove collected \$9,000 from Haith for the early May cocaine purchase (A-262-63) and delivered the cocaine to Haith on the evening of May 2 at a Dover barbershop. (A-265, 308-14).

On May 11, 2018 Brandon McClain also contacted McCove by text requesting to purchase an ounce of cocaine. (A-315-20). McCove picked up money from McClain near Cheswold on May 12 for the cocaine purchase. (A-318-21). Dover Police surveillance on the evening of May 12 resulted in eyewitness observation of Castro and McCove meeting at Castro's home, Castro going inside his house and then returning to meet with McCove. (A-346-49). Following the May 12 meeting with Castro, McCove drove to a Dover restaurant parking lot to deliver cocaine and marijuana to two waiting purchasers. (A-350-54, 444).

Given all the surrounding evidence about McCove's activities on May 1-2 and 11-12, 2018, and the continuing relationship with Castro at that time, there was sufficient evidence for the jury to conclude that Castro was involved as the drug

supplier to McCove at those times. Accordingly, the defense motion for a judgment of acquittal as to Castro's two drug dealing convictions was properly denied.

Castro also argues that there was no evidence he possessed "a Tier 3 quantity" of 25 grams or more of cocaine. (Op. Brf. at 14). An ounce is approximately 28 grams. (A-564). The May 1-2 transaction involved 9 ounces of cocaine. (A-261-63). On May 11, McClain wanted to purchase one (1) ounce of cocaine. (A-316). Both May cocaine deliveries by McCove exceeded 25 grams. Thus, the trial evidence was sufficient to establish the 25-gram minimum weight.

**II. THE EVIDENCE WAS SUFFICIENT
TO CONVICT CASTRO OF TWO
COUNTS OF SECOND DEGREE
CONSPIRACY**

QUESTION PRESENTED

Did the trial judge correctly deny the defense motion for a judgment of acquittal as to the defendant's two convictions for second degree conspiracy?

STANDARD AND SCOPE OF REVIEW

Appellate review of a trial judge's denial of a defense motion for judgment of acquittal (A-504-05, 520-21) [*State v. Castro*, 2020 WL 2557142 (Del. Super. May 20, 2020)] is *de novo* to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the essential elements of second degree conspiracy (A-547-48) beyond a reasonable doubt.⁴

MERITS OF ARGUMENT

11 *Del. C.* § 512(2) defines second degree conspiracy as “A person is guilty of conspiracy in the second degree when, intending to promote or facilitate the commission of a felony, the person: . . . (2) Agrees 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.” There are three

⁴ See *Wiggins v. State*, 227 A.3d 1062, 1065 (Del. 2020); *Ways v. State*, 199 A.3d 101, 106 (Del. 2018).

statutory elements for the offense of second degree conspiracy as defined in 11 *Del. C.* § 512(2): (A) an agreement; (B) an overt act; and (C) an intentional state of mind.

The evidence presented at Castro's Jury trial was sufficient, viewed in the light most favorable to the State, for a rational trier of fact to find that Castro intentionally agreed with McCove to commit the felony offense of drug dealing on May 1-2 and May 11-12, 2018, and that Castro or McCove committed an overt act to further the commission of the agreed upon offense as described in Counts 6 and 9 of the indictment. (A-534-36). Accordingly, the Superior Court properly denied the defense motion for a judgment of acquittal as to Castro's two convictions for second degree conspiracy. (A-598-99).⁵ The 1973 Delaware conspiracy statutes follow ". . . the former Delaware law in making conspiracy a separate and distinct offense from the crime contemplated by the conspirators. Under other provisions of this Criminal Code, it is clear that conspiracy does not merge with the substantive offense even when the latter is complete; this makes it possible to impose a more severe penalty upon persons who carry on criminal activities in

⁵ *State v. Castro*, 2020 WL 2557142 (Del. Super. May 20, 2020).

groups than upon single criminals by convicting them both of conspiracy and of the completed offense.”⁶

Furthermore, “The conspiracy need not aim at a completed crime. It is enough that the objective amounts to an attempt or solicitation to commit a crime.”⁷ Thus, McCove’s trial testimony that he did not get drugs on May 2 and 11, 2018, and only gave his supplier Castro money on those two days (A-445) is enough activity to establish the second degree conspiracy on those dates.

A conspiracy is a combination of persons attempting to commit a crime, but a formal advance agreement is unnecessary.⁸ The evidence convicting Castro of two counts of drug dealing on May 1-2 and 11-12, 2018 is sufficient for a rational trier of fact to conclude that Castro was also participating in a conspiracy on those dates.

The ongoing drug activity involving Castro as supplier and McCove as the middleman was a sufficient enough agreement to satisfy the first requirement for a conspiracy. The overt act was McCove’s admitted deliveries of cash to Castro on May 2 and 11, 2018 (A-445) to obtain contraband drugs for redistribution to street level cocaine dealers. Finally, a rational jury could reasonably conclude that Castro was acting intentionally by receiving cash from McCove and then supplying

⁶ 11 *Del. C.* §511 (1973) (comm.) (footnote omitted).

⁷ *Id.*

⁸ *See Bender v. State*, 253 A.2d 686, 687 (Del. 1969).

McCove with cocaine for redistribution to third parties⁹. Given the more than sufficient incriminatory trial evidence, the Superior Court correctly denied the defense motion for a judgment of acquittal as to Castro's two second degree conspiracy convictions.

⁹ 11 *Del. C.* § 306(c)(1) (Statutory intent permissive inference).

III. DENIAL OF THE PRETRIAL MOTION TO SUPPRESS WIRETAP EVIDENCE WAS NOT AN ABUSE OF DISCRETION

QUESTION PRESENTED

Was Castro's intercepted cellular telephone communications pursuant to a court issued wiretap order lawfully acquired?

STANDARD AND SCOPE OF REVIEW

The Superior Court's denial of a pretrial defense wiretap evidence suppression motion [*State v. Castro*, 2019 WL 3321888 (Del. Super. July 24, 2019)] is reviewed on appeal for an abuse of discretion.¹⁰ A trial court's legal conclusions are reviewed *de novo*.¹¹

MERITS OF ARGUMENT

As part of the Operation Old School (A-201) contraband drug distribution enterprise investigation, the Delaware State Police on April 19, 2018 obtained a Superior Court wiretap order for McCove's cell phone number (917) 644-5531. (A-95). During the drug investigation, the State Police learned that McCove was also using a cell phone number (302) 542-6023, and a federal subpoena for these cell phone toll records revealed calls to (302) 358-0876, a cell phone belonging to

¹⁰ See *Brown v. State*, 117 A.3d 568, 570 (Del. 2015); *Stafford v. State*, 59 A.3d 1223, 1227 (Del. 2012).

¹¹ See *Jenkins v. State*, 970 A.2d 154, 157 (Del. 2009); *Loper v. State*, 8 A.3d 1169, 1172 (Del. 2010).

Castro. (A-96). As the drug investigation continued the State Police on June 4, 2018 (A-116) applied for another State court order for a wiretap of Castro's phone. (A-85-116).

Following his October 2018 arrest (A-1-2), Castro on May 20, 2019 (A-5) filed a motion to suppress the wiretap evidence obtained by the police after the June 4, 2018 Kent Superior Court wiretap order. (A-72-116). On May 31, 2019, the State filed a response to Castro's pretrial wiretap evidence suppression motion. (A-117-22).

At a July 12, 2019 Superior Court pretrial evidence suppression hearing (A-167-72), both parties did not present any witnesses (A-168) and were content to rely upon the prior written submissions concerning the issue. (A-168, 170). On July 24, 2019, the court issued a written Order denying Castro's pretrial wiretap evidence suppression motion.¹² There was no abuse of discretion by the Superior Court in denying Castro's 2019 wiretap evidence suppression motion.

The Superior Court properly applied the law in ruling: "... after a four corners review of the respective affidavit, the Court finds the intercepted communications of 0876 were lawfully acquired...."¹³ The Superior Court also correctly concluded that probable cause existed for issuance of the June 4, 2018 wiretap order for Castro's phone, and stated:

¹² *State v. Castro*, 2019 WL 3321888 (Del. Super. July 24, 2019).

¹³ *Id.*, at *8.

Regarding probable cause in the present case, the Defendant asserts probable cause does not exist to support the authorized wiretap application. He specifically contends that the evidence against him, telephone calls and text messages placed and/or made on May 3, 2018 and May 11, 2018 from one of the other targeted individuals to the 0876 number, is insufficient to establish probable cause. The Defendant also asserts that a text message exchange between the 0876 number and a targeted individual on June 1, 2018 is also insufficient to establish probable cause. The June 1, 2018 text exchange was documented as follows:

Targeted individual: “Yo Gucci”

Defendant: “Yep at work”

Targeted individual: “Ok Fam got to Holla at you”

Targeted Individual: “Pick it up like you said”

Defendant asserts that this “scant evidence” is insufficient to further establish probable cause. However, the Court disagrees.

The Court finds these communications, including the June 1, 2018 text message exchange, are enough to establish probable cause. In this case, the affiants’ affidavit sufficiently recites the affiants’ experience and training, and the Court notes that all affiants have past experience in wiretap investigations and are familiar with coded language that drug dealers utilize. The Court is entitled, and so chooses, to give “considerable weight” to these affiants’ conclusions based on their stated experience and training. Moreover, the affiants’ affidavit provides specific information that further establishes probable cause that: (1) the Defendant is currently committing drug crimes, and (2) the communications regarding these drug crimes will be intercepted on the 0876 phone line. Furthermore, a pen register and telephone tolls confirmed that the 0876 line had high usage with another targeted individual in the investigation.

After considering the affidavit as a whole, in a flexible and practical manner, the Court finds that the issuing Judge properly found probable cause at the time the wiretap order was issued.¹⁴

The Superior Court correctly determined that the State had met the “necessity requirement” of 11 *Del. C.* § 2407(c)(1)c, and that the wiretap order for Castro’s phone was properly granted in 2018.¹⁵ The probable cause and necessity requirements of the statute were both satisfied by the detailed police affidavit submitted in conjunction with the Castro wiretap authorization application.¹⁶ Accordingly, there was no abuse of discretion in denying Castro’s 2019 wiretap evidence suppression motion.

Finally, since Castro’s wiretap order was not issued until June 4, 2018 (A-116), and Castro was only convicted of criminal conduct on May 1-2 and 11-12, 2018, it is not apparent how any post-June 4 information had any logical connection to earlier conduct in May 2018. Castro does not explain any relevance of intercepted phone information in June 2018 to Castro’s prior May 2018 criminal convictions.

At worst, any possible error in the Superior Court’s July 24, 2019 denial of the defense pretrial wiretap evidence suppression motion is harmless beyond a

¹⁴ *Id.*, at * 5-6 (footnotes omitted).

¹⁵ *Id.*, at * 6-7.

¹⁶ *Id.*, at * 4.

reasonable doubt under the circumstances of this prosecution.¹⁷

¹⁷ D.R.E. 103(a); Del. Super. Ct. Crim. R. 52(a); *Chapman v. California*, 386 U.S. 18, 24 (1967). See generally *Drummond v. State*, 51 A.3d 436, 441 (Del. 2012); *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012).

CONCLUSION

The judgment of the Superior Court should be affirmed.



John Williams (#365)

JohnR.Williams@delaware.gov

Deputy Attorney General

Delaware Department of Justice

102 West Water Street

Dover, Delaware 19904-6750

(302) 739-4211, ext. 3285

Dated: January 26, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICARDO CASTRO,)
)
 Defendant Below-)
 Appellant,)
 v.) **No. 318, 2020**
)
 STATE OF DELAWARE,)
)
 Plaintiff Below-)
 Appellee.)

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 26th day of January 2021, 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 January 26, 2021, she did serve electronically the attached State's Answering Brief properly addressed to:

Brian J. Chapman, Esquire
300 Creek View Road, Suite 103
Newark, DE 19711



Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

John Williams

Notary Public


Member of the Delaware Bar
authorized to act as a Notary Public
pursuant to 29 Del. C. 54323(a)(3)

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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 5,103 words, which were counted by Microsoft Word 2016.



John Williams (#365)
JohnR.Williams@delaware.gov
Deputy Attorney General
Delaware Department of Justice
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Dover, Delaware 19904-6750
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