**[J-99-2005]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**WESTERN DISTRICT**

**CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.**

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| COMMONWEALTH OF PENNSYLVANIA, | : | No. 5 WAP 2005 |
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| Appellee | : | |
| | : | Appeal from the Order of the Superior |
| | : | Court entered on July 8, 2004 at No. |
| v. | : | 178WDA2002 reversing the Order of the |
| | : | Court of Common Pleas of Jefferson |
| | : | County entered on November 14, 2001 at |
| SPEER RUEY, | : | No. 573-1999CR. |
| | : | |
| Appellant | : | |
| | : | ARGUED: September 14, 2005 |

## CONCURRING OPINION

**MR. JUSTICE SAYLOR** **DECIDED: MARCH 6, 2006**

I respectfully differ with the lead Justices' conclusion that the warrant first obtained by police to secure Appellant's medical records comported with Fourth Amendment requirements. The Fourth Amendment requires that the government establish a nexus among the four factors of time, crime, objects, and place. See generally 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE §3.7(d) (4th ed. 2004). In the present case, the Commonwealth acknowledges as a "glaring flaw" in the first affidavit of probable cause the affiant officer's failure to attest that Appellant was ever transported to, or treated at, the University of Pittsburgh Medical Center, Brief for

Appellee at 4 n.1, thus, facially omitting the essential connection to place.[1] I therefore believe that it is necessary to address the arguments on the terms presented by the parties.

In this regard, I agree with the Commonwealth's argument that the concerns present in seminal decisions of this Court that have tightened the independent source exception to the exclusionary rule, such as unjustified and/or forcible entry into a residence, see, e.g., Commonwealth v. Melendez, 544 Pa. 323, 333-34, 676 A.2d 226, 231 (1996); Commonwealth v. Mason, 535 Pa. 560, 571, 637 A.2d 251, 257 (1993), simply are not present here. Additionally, as the Commonwealth emphasizes, the

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[1]In its probable cause evaluation, the lead opinion amply develops the various circumstances that support the conclusion that UPMC was identified to the district justice as the place to be searched. See Opinion Announcing the Judgment of the Court, slip op. at 12-13; cf. id. at 21 (reflecting similar observations relative to compliance with Pa.R.Crim.P. No. 206(6)). What is lacking, however, is an assessment concerning whether specific facts or circumstances were communicated to the district justice from which she reasonably could infer that evidence of a crime could be found at UPMC. In this regard, the record does not reflect that any facts were presented to the district justice to establish such connection, since there is no evidence that the affiant officer communicated that Appellant had been taken to UPMC after the fatal accident.

While certainly it may be argued that, as a matter of common sense, the officer would not select a hospital that he did not believe would possess records deriving from Appellant's contemporaneous treatment, such analysis transcends the permissible boundaries of the probable cause inquiry in connection with the authorization of a search warrant. The object of the warrant requirement is to assure that sufficient facts and circumstances are put before the magistrate to permit her to make an independent judgment concerning the likelihood that evidence of a crime is present (or illegal activity is occurring) at the place to be searched. See Commonwealth v. Edmunds, 526 Pa. 374, 409, 586 A.2d 887, 905 (1991). Thus, permissible inferences in this context are to be drawn from the facts and circumstances put before the magistrate, and not from assumptions concerning the affiant's motivations and/or good faith. See id.

Accordingly, I agree with the position of both parties to this appeal that the submission to the district justice was insufficient to establish the necessary probable cause to believe that evidence of a crime was located at UPMC.

evidence at issue (hospital records) is not evanescent, as was also the case in the decisions in which the "time" nexus factor has assumed particular importance. Moreover, the "independent investigative team" requirement that has arisen as a specific restriction on recourse to the independent source doctrine in Pennsylvania, focuses on foreclosing any advantage to the government arising from police misconduct and/or tainted evidence. See Melendez, 544 Pa. at 334, 676 A.2d at 231 ("[A]pplication of the 'independent source doctrine' is proper only in the very limited circumstances where the 'independent source' is truly independent from both the tainted evidence and the police or investigative team which engaged in the misconduct by which the tainted evidence was discovered." (quoting Mason, 535 Pa. at 573, 637 A.2d at 257-58 (emphasis in original))). Here, as the lead Justices observe, inadvertence rather than police misconduct is involved, and the police had ample grounds to believe that Appellant's medical records reposited at the University of Pittsburgh Medical Center contained incriminating evidence, without any resort to the records obtained pursuant to the defective affidavit and warrant.[2]

In such circumstances, the Commonwealth argues, persuasively, that neither the Fourth Amendment nor Article I, Section 8 should be read as forever foreclosing it from access to records that are maintained by a treatment provider and that are otherwise

[2] Appellant's position appears to be that, by virtue of the deficiencies in the initial warrant, all of the legitimate evidence supporting probable cause (for example, the evidence of Appellant having crossed the center line into an opposing lane of traffic; the arresting officer's observation of liquor and wine bottles in and around Appellant's vehicle; and the officer's interviews with emergency medical personnel who conveyed their observations concerning Appellant's unusual conduct, his inebriated appearance, and the smell of alcohol arising from his presence) must be viewed as tainted. I would reject this position, however, as I believe that the taint referenced in the cases narrowing the independent source doctrine refers to evidence that has been obtained by unlawful or unjustified police conduct, and none of the above evidence was so garnered.

preserved in the ordinary course of the provider's business. Instead, the Commonwealth advocates applying the independent source exception to the exclusionary rule to permit the issuance of a second warrant, subject to the following constraints:

> [W]hen a search warrant is issued based upon a faulty application and when: 1) the officer had abundant probable cause to make his warrant request, 2) the officer did not act in bad faith in any way in obtaining the warrant and underlying evidence, 3) the evidence to be sought by a second valid warrant is not evanescent, but rather, is extant and permanent, and 4) probable cause continues to exist to believe the evidence will be found in the place to be searched, then the Commonwealth should not be precluded from obtaining that evidence by obtaining a new search warrant in which the flaws of the initial application have been corrected.

Brief for Appellee at 18-19.[3]

This frame of reference obviously is not material under federal constitutional law, since the exclusionary rule as applied at the federal level is subject to a generalized good faith exception. I believe that it is both necessary and appropriate in Pennsylvania, however, in light of the absence of a good faith exception as such. See supra note 3. I would therefore take this opportunity to adopt the Commonwealth's formulation to approve the issuance of a second warrant in the limited circumstances as delineated above, as a facet of our independent source doctrine.

Finally, on the matter of the role of credibility assessments in affidavits of probable cause, I join Mr. Justice Castille's concurring opinion.

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[3] While certainly this analysis contains a good faith component as an additional limiting factor and safeguard, I do not regard it as in conflict with this Court's decisions eschewing a generalized good faith exception to the exclusionary rule. See, e.g., Commonwealth v. Edmunds, 526 Pa. 374, 410-11, 586 A.2d 887, 905-06 (1991).

Mr. Justice Castille joins this concurring opinion.

Former Justice Nigro did not participate in the decision of this case.