

June 26, 2003

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**RE: State of Delaware v. John H. Bengé, Jr.
I.D. 0210012355**

Dear Counsel:

This is the Court's decision on Defendant John H. Bengé, Jr.'s ("Bengé") Motion to Suppress. For the reasons stated herein, the motion is granted in part and denied in part.

Nature and Stage of Proceedings

The grand jury indicted Bengé on January 13, 2003 on four counts of Possession of a Firearm During the Commission of a Felony, one count of Attempted Murder in the First Degree, one count of Assault in the Second Degree, one count of Burglary in the Second Degree, one count of Possession of a Firearm by a Person Prohibited, and two counts of Attempted Kidnaping in the First Degree. The Indictment subsequently was amended to include two counts of Criminal Contempt.

Bengé has filed a Motion to Suppress certain pieces of evidence obtained by the State of Delaware (the "State"). The State opposes his motion. A hearing was held on this matter and this is the Court's decision.

Facts

During the early morning hours of October 20, 2002, Bengé surreptitiously gained access to and entered the Grove Motor Court Inn (the “Inn”). Bengé went to the Inn to confront Donna Bengé (“Donna”), his former wife, and Stacey Smith (“Smith”). After entering the Inn, Bengé placed a bag (the “Bag”) in the Inn’s office area and proceeded to Donna’s living quarters.¹ Bengé encountered Donna in a room behind the office and asked her Smith’s whereabouts. When Donna failed to respond to Bengé’s query, he doused her with mace. Donna screamed and Smith, who heard the commotion, came into the room. Bengé and Smith began to struggle. During this altercation a handgun brought to the Inn by Bengé discharged and a projectile entered Smith’s shoulder. Smith proceeded to use the handgun to beat and subdue Bengé. Smith and Bengé were separated by officers of the Rehoboth Beach Police Department (the “Police”), who had been alerted to the incident by a bystander who saw the men fighting outside of the Inn. Bengé was subsequently arrested.

After the Police investigated the scene, Donna and her family noticed the Bag sitting on the Inn’s office floor. The Police had noted the Bag’s presence but did not consider it relevant to their investigation. Unsure of the Bag’s ownership, Cindy (“Cindy”), Donna’s sister-in-law, took it into the kitchen for inspection. Cindy’s inspection was cursory, as she terminated her inquiry upon finding a liquor bottle. Since the liquor bottle’s presence indicated to Cindy the Bag

¹Donna’s living quarters were connected to the Inn’s office by a hallway.

belonged to Benge, the Police were notified.² After the Bag was removed from the Inn, the Police searched it and discovered a metal pick, plastic wire ties, papers, a bottle of whiskey, a can of lemonade, a cup, a cassette player, binoculars, a hex key set, a towel, fabric strips, a clock, a flashlight, a cell phone, two pens, two sets of pliers, and wire cutters.

The Police executed a search warrant on the family's home in New Castle County (the "House"), which was owned by Donna but inhabited solely by Benge.³ Also, Donna contacted Detective Parsons ("Parsons") to discuss the case against Benge. During this conversation, Donna agreed to contact Parsons if she discovered anything relevant to the case. In mid-November Donna began to prepare the House for sale, a process that included going through the House's contents, including Benge's effects. Donna did not have Benge's permission to examine his property or to open his mail, but she discovered a motel receipt in Benge's name, Benge's bank statement showing withdraws in Rehoboth,⁴ Benge's unopened telephone bill,⁵ and other documents (the "Documents") she regarded as relevant to the case against her husband. Donna contacted Parsons and, as directed, sent the Documents to him.

Discussion

I. The Validity of the Police's Warrantless Search of the Bag.

²The parties dispute whether the bag was zipped. Benge argues Cindy had to unzip the bag, while the State contends the Bag was unzipped and Cindy peered inside. Donna testified the Bag was "unzipped at the top. It was open. It wasn't zipped up."

³As of May 2002, the House belonged to Donna, but Benge had exclusive use of it through November 15, 2002.

⁴The bank account was in Benge and Donna's names, but Donna did not use it.

⁵Donna testified that she usually paid the House's telephone bill.

A. Bengé's Standing to Contest the Search.

The Constitution protects reasonable expectations of privacy in property. See Gibbs v. State, 479 A.2d 266 (Del. 1984) (citing Smith v. Maryland, 442 U.S. 735 (1979)). Any expectation of privacy is destroyed when an item is abandoned. State v. Huether, 453 N.W.2d 778, 781 (N.D. 1990). Thus, agents of the government may search an abandoned item without a search warrant. Vick v. State, Del. Supr., Cr. No. 289, 1984, 19, 1985, 76, 1985, Walsh, J. (Dec. 20, 1985), at 4-5. Abandonment is a question of intent. United States v. Thomas, 864 F.2d 843, 846 (D.C. Cir. 1989). All relevant circumstances must be examined, including “words spoken, acts done, and other objective facts.” Id. (citing United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1971)); see also State v. Dixon, Del. Super., Id. 007020249, Slight, J. (Feb. 15, 2001). Placing a bag or container on the ground is not per se abandonment. Thomas, 864 F.2d at 846; see also State v. Dixon, Del. Super., Id. 007020249, Slight, J. (Feb. 15, 2001); State v. Cooke, 282 S.E.2d 800, 806 (N.C. Ct. App. 1981). To abandon an item, the suspect or defendant must “voluntarily discard[] the property, [leave] it behind, or otherwise relinquish[] his interest therein under circumstances indicative of his foregoing any further reasonable expectation of privacy with regard to it at the time of the search.” State v. Philbrick, 436 A.2d 844, 854 (Me. 1981); see Viridin v. State, 780 A.2d 1024, 1030 (Del. 2001). The State bears the burden of proof where the defendant challenges the validity of a warrantless search. Hunter v. State, 783 A.2d 558, 560 (Del. 2001).

Bengé asserts an expectation of privacy in the Bag's contents, an intent he demonstrated by partially zipping the container.⁶ Bengé believes the Police had to secure a search warrant prior

⁶Bengé does not contest the propriety of Cindy's cursory search of the Bag.

to their examination of the Bag. The State contends Benge abandoned the Bag when he deposited it in the Inn's office. According to the State, Benge's plan to retrieve the Bag is inconsequential because he left the Bag in a public area.⁷ Benge denies that he voluntarily left the Bag at the Inn. If Benge had not been interrupted by the victims and the Police, he would have recovered the Bag prior to his departure. Furthermore, little time elapsed between the deposit of the Bag in the office and Benge's arrest and Benge was never far from the Bag. Lastly, the Inn's office was not a public place.

The primary issue is whether Benge abandoned the Bag when he placed it in the Inn's office. Benge intended to retrieve the Bag, not abandon it, as the Bag's contents would have assisted Benge's alleged criminal scheme. Also, the Inn's office was not a public area at the time Benge left the Bag. See generally United States v. Thomas, 864 F.2d 843, 847 (D.C. Cir. 1989) (The suspect's ability to retrieve the bag "would depend on the fortuity that other persons with access to the public hallway would not disturb [the] bag while it lay unattended.") The office was closed and locked when Benge entered. No customers could be expected for hours. Although the parties dispute the extent to which the Bag was sealed, Donna and Benge agree that the Bag was at least partially zipped closed. Benge clearly intended for the contents of the Bag to remain private and he did not show a desire to discard the Bag or cede its ownership. Quite

⁷The State also argues the "inevitable discovery" exception to the exclusionary rule supports a warrantless search. The "inevitable discovery" exception "provides that evidence, obtained in the course of illegal police conduct, will not be suppressed if the prosecution can prove that the incriminating evidence 'would have been discovered through legitimate means in the absence of the official misconduct.'" Cook v. State, 374 A.2d 264, 268 (Del. 1977). This exception, however, does not "validate warrantless searches where a warrant could have been obtained." State v. Brooks, Del. Super., IK94-04-05-09 - IK94-04-0512, Ridgely, P.J. (July 28, 1994). The Police could have secured a warrant for the Bag and their failure to bypass the proper procedures renders the "inevitable discovery" exception invalid in this circumstance.

simply, Bengé did not abandon the Bag. Therefore, Bengé has standing to contest the search of the Bag.

B. The Scope of the Police Search.

If a container is discovered and searched by a private party, a subsequent warrantless search by the State is valid unless it represents a “significant expansion” of the scope of the original examination. See State v. Pennell, Del. Super., Cr. A. Nos. IN88-12-0051, IN88-12-0053, Gebelein, J. (Sept. 12, 1989), at 10-11. The “significant expansion” rule provides “where a private search occurs, the police may not do a search more extensive than the private one unless the police first obtain a warrant or a specific exception to the warrant requirement applies.” Pennell, at 10. For example, evidence left at a motel by a suspect, provided to the police by the motel’s management, and subsequently searched by the police was suppressed under the “significant expansion” rule. State v. Premone, 792 A.2d 487 (N.J. Super. 2002). Specifically, the Court held:

the investigator’s search of the bag could not exceed the scope of the private search previously conducted by the motel owner and his employees. The bag was closed when the motel owner handed it to the investigators, and Sergeant Burke had to open the zipper to gain access to its contents, including the pants with the victim’s bloodstains. This search of the bag exceeded the scope of any invasion of defendant’s privacy by the motel owner and his employees and therefore required a warrant unless the circumstances of the search fell within an exception to the warrant requirement.

Premone, 792 A.2d at 492. Cindy admits she opened the Bag and saw the bottle of alcohol. She

does not claim to have conducted an extensive search of the Bag's contents. Thus, without a warrant or other exception to the warrant requirement, the Police search was limited to the scope of Cindy's cursory search. In this case, a "significant expansion" of Cindy's search occurred when the Police dug deep into the Bag. Therefore, evidence obtained through the warrantless search of the Bag must be suppressed.

II. Donna as an Agent of the Police.

While preparing to sell the House, Donna discovered a receipt from a motel in Lewes, Delaware, an envelope containing Benge's telephone records indicating phone calls to Donna's private message recovery service, and Donna's telephone bill which Benge had secured from the Internet. According to Benge, Donna became an agent of the Police when she agreed to send evidence to Parsons. The State argues that Donna found the documents while cleaning the House, not as part of a search directed by Parsons.

Private searches are generally immune from the Fourth Amendment restrictions. See United States v. Jacobsen, 466 U.S. 109, 115 (1984); see also United States v. Issod, 508 F.2d 990, 994 (7th Cir. 1974); Viridin v. State, 780 A.2d 1024, 1030 (Del. 2001). A search conducted by a private person may be regarded as government action and implicate Fourth Amendment protections if: (a) "the government knew of and acquiesced in the intrusive conduct, and (b) . . . the party performing the search intended to assist law enforcement efforts or to further its own ends."⁸ State v. Hammond, Del. Super., Nos. IK92-08--0410, IK92-08-0144, IK92-08-0145,

⁸Another formulation of this rule provides: "The circumstances to be considered include the citizen's motivation for the search or seizure, the degree of governmental advice and encouragement, the government's knowledge about the nature of the citizen's activities, and the legality of the conduct encouraged by the police." 68 AM. JUR. 2D *Searches and Seizures* § 42 (2000).

IK92-08-0146, IK92-08-0147, IK92-08-0174, IK92-08-0175, IK92-08-0176, IK92-08-0177, Ridgely, P.J. (May 11, 1993), at 2; see also United States v. Attson, 900 F.2d 1427, 1431 (9th Cir. 1990) (“it is necessary for us to evaluate whether such conduct has as its purpose the intention to elicit a benefit for the government in either its investigative or administrative capacities.”). Cooperation with the police is not synonymous with acting as an instrument or agent of the government. Hammond, at 2; see generally Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (If a wife searches her husband’s belongings and “then take[s] them to the police station to be used as evidence against him, there can be no doubt under existing law that the articles would later have been admissible in evidence.”). The defendant bears the burden of proving the private party performed the search as an agent of the government. Viridin, 780 A.2d at 1031.

_____ Donna testified:

- Q . . . By the time November 15th had come, what kind of communication had you had with the police regarding what if you should find anything that had any evidentiary value?
- A I just - - that if we found anything that would be appropriate to let them know, and they would let me know if they needed to collect it . . .
- Q And what did Detective Parsons tell you you should do if you found anything . . .
- A To contact him.
- Q What words did he use to describe this category of things that you might want to talk to him about if you came across them?
- A I’m not sure that he did. He didn’t categorize at all.
- Q What words did he use to communicate to you what kinds of things if you came across you would contact him about?
- A Guns, ammunition, anything that might - - those types of things.
- Q . . . he communicated to you that if you came across anything that you thought had any importance of

significance in this prosecution you should contact him about it?

A Yes.

Q But even though he said that, is it your testimony that you did not set out to go and look for things that might be pertinent to the prosecution?

A Set out and look for them, I'm not - - we just went through everything in the house. I've been through almost everything in the house . . . I didn't set out to find things, but if I found things that I thought were appropriate, I would have called Detective Parsons.

Q Because he had talked to you about that?

A Yes . . .

Q When you went into the house after November, didn't that curiosity in some part, although I know you were cleaning the place up, getting things ready to give to the family members of the Bengé family, wasn't there also a component of curiosity to see if there was anything in there that might be pertinent to what he had tried to do or had done?

A Sure . . .

Q Did you call Detective Parsons before sending them, or did you just send them to him?

A I called him, I believe . . .

Q How many different conversations did you have with Detective Parsons regarding your transmitting any or all of these items to him?

A Probably only one or two. I don't remember. I spoke with him a good bit in the very beginning . . .

Q Did he encourage you after you told him what it was that you had found? . . .

A I'm not quite sure. I believe so. He, I believe, he said to send it . . .

A I looked through everything when I was packing up his things to go to [Bengé's] Dad's. We looked at everything to see what was in it to see what was there and how to deal with everything.

Q Was any part of your reason to see what was there and, quote, how to deal with everything, close quote, to determine if there might be something to give Detective Parsons?

A That was not my goal. If I found something that I thought he should be aware of, I would call him.

Q Would you agree with me that if you are simply returning John's clothing to his father, there was no reason for you to go into the internal pockets of his jackets and his pants to turn things over to his father?

A I don't know that I had no reason.

_____ Donna was not acting as an agent of the Police when she searched Benge's belongings. Parsons did not direct Donna to search the House for incriminating evidence nor was there any indication Parsons had advance notice of Donna's "cleaning." The discussions between Donna and Parsons related to what Donna should do in the event evidence was discovered, not that she should search the House for incriminating items. Donna's behavior appears to be prompted by a curiosity surrounding Benge's activities, an understandable reaction to this situation. See generally Virdin, 780 A.2d at 1031 (mother's search of house with police was guided by her "maternal motivation" to find her pregnant and missing daughter). Any desire Donna had to seek incriminating evidence against Benge was conducted without law enforcement's guidance. Thus, Donna's search did not implicate the exclusionary rule and the Documents are admissible.

Conclusion

In summary, Benge's Motion to Suppress the contents of the Bag is granted because the search exceeded the proper bounds for a warrantless search and the Motion to Suppress the Documents discovered in the House is denied because the evidence was gathered by a private, non-governmental party.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

ESB:tl

cc: Prothonotary's Office