IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
v.	)	ID#: 0501015557A
THOMAS LeGRANDE, Defendant	)	

Submitted: July 29, 2008
Decided: October 20, 2008
Date Corrected: October 31, 2008

CORRECTED **ORDER**

Upon Remand from the Supreme Court – CHARGES DISMISSED and SENTENCE ORDER VACATED

After the court denied his motion to suppress, a jury convicted Defendant on two counts of Possession of a Firearm During the Commission of a Felony, Possession with Intent to Deliver Cocaine, Possession with Intent to Deliver Marijuana, Maintaining a Dwelling for Keeping Controlled Substances, and Possession of Drug Paraphernalia. Defendant appealed. Based on an invalid search warrant, the Delaware Supreme Court reversed and remanded.[1]

To overcome the defective search warrant and support the evidence obtained in the search of Defendant's room, the State now posits an alternate theory

[1] *LeGrande v. State*, 947 A.2d 1103 (Del. 2008).

not previously presented – consent. Defendant claims the State's theory of consent is waived because the State failed to present it when Defendant originally challenged the search. For the reasons discussed below, the Court finds the State waived its right to pursue a new theory now.

I.

In its order reversing Defendant's convictions, the Supreme Court set out the facts.[2] In summary, while Defendant was on probation, an unidentified informant told Defendant's probation officer that Defendant possessed marijuana and weapons in his room at a Wilmington boarding house. The probation officer told the Wilmington Police Department and, after an administrative search in Defendant's absence, the officers obtained a search warrant for Defendant's room. When they executed the warrant, the officers seized two handguns, ammunition, marijuana, cocaine, drug paraphernalia and cash.

Defendant was initially tried and convicted in October, 2005. Due to trial counsel's ineffectiveness, the court granted Defendant's motion for a new trial.[3] Before the second trial, through new counsel, Defendant filed a motion to suppress based upon inadequate probable cause to support the search warrant. The court denied that motion and, on October 6, 2006, Defendant was again convicted.

---

[2] *Id.*

[3] *State v. LeGrande*, 2006 WL 515453 (Del. Super. Feb. 28, 2006).

Defendant filed a timely motion for a new trial, which the court denied.[4] Defendant then appealed.

On appeal, the Supreme Court decided that "[s]ince there was no corroboration by independent police work of the anonymous tipster's assertion of illegality...the totality of the circumstances did not provide the issuing magistrate a substantial basis for concluding there was probable cause that evidence or contraband would be found on the premises."[5] The Court reversed and remanded for further proceedings.

When the mandate was received, this court asked counsel to tell it about the case's posture, going forward. In response, the State announced it intended to offer Defendant's consent as an alternate theory justifying the search. The State now asserts that when LeGrande obtained parole status, he signed a Conditions of Supervision form and by doing so, he consented to warrantless searches. Basically, the State now claims that the defective warrant was beside-the-point because Defendant, by accepting release from prison, consented to the search, regardless of whether the authorities had a search warrant. As mentioned, Defendant argues that the State waived its right to advance an alternate theory when it failed to present that theory in prior proceedings.

---

[4] *State v. LeGrande*, 2007 WL 625358 (Del. Super. Feb. 28, 2007).

[5] *LeGrande*, 947 A.2d at 1111.

II.

This is not the first time State has attempted to advance an alternate theory following an appellate reversal and remand. In *Pierson v. State*, after remand with instructions to hold another suppression hearing, the State offered a new theory to overcome a warrantless search.[6] The State had initially argued that the search of Pierson's home was based on exigent circumstances. After losing on appeal, the State attempted to argue consent. The court refused to allow the State to substitute a theory not presented at the original suppression hearing and the State appealed.[7] *Pierson* held that "[w]hether or not the State may switch to a new rationale is...a matter of discretion with the Trial Court."[8]

This case's current posture is not very different from that in *Pierson*. Here, the State could have easily and quickly presented the Consent-to-Search form when Defendant initially challenged the search and it does not explain why it did not argue consent then.

The court does not take the remand as foreclosing the State's attempt to interpose a new theory to justify the search. But, the court has not been presented

---

[6] 363 A.2d 442, 443 (Del. 1976).

[7] *Id.* ("To allow otherwise in this case would permit the State to wilfully mislead the trial court in the presentation of the facts.").

[8] *Id.* (finding no abuse of discretion with that determination).

with a reason why litigants should be encouraged to present arguments piecemeal. By the time of the suppression hearing, this case had been to trial once and the second trial was impending. Presumably, the State did not contemplate a second suppression hearing and a third trial in this case. And so, it was obligated to fully litigate the suppression question when the issue was joined. Having passed-up the opportunity to argue consent when it had the chance, the State waived that argument. The State has not justified the court's holding a second suppression hearing after two trials and a direct appeal.

Without the evidence that should have been suppressed, the State has no case. Therefore, the charges are **DISMISSED.** Defendant was sentenced on March 23, 2007. The operative sentence order was issued April 23, 2007. That order is hereby **VACATED.**

IT IS SO ORDERED.

_____
Judge

OC: Prothonotary (Criminal Division)
PC: Brian J. Robertson, Deputy Attorney General
Kevin M. Carroll, Deputy Attorney General
Christopher D. Tease, Esquire