

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE, )  
 )  
 v. ) ID No. 1003022582  
 )  
 LUIS GENTIEU, )  
 )  
 Defendant. )

Submitted: September 3, 2010  
Decided: November 9, 2010

On Defendant's Motion to Suppress and Motion Seeking a *Franks* Hearing  
**DENIED**

Barzilai Axelrod, Esquire, Deputy Attorney General, Department of Justice,  
Attorney for the State

Joseph Hurley, Esquire, Wilmington, Delaware, Attorney for Defendant

**JOHNSTON, J.**

On June 7, 2010, defendant Luis Gentieu was indicted for Delivery of a Non-Narcotic Schedule I Controlled Substance, Possession with Intent to Deliver a Non-Narcotic Schedule I Controlled Substance, Maintaining a Dwelling for Keeping or Delivering Controlled Substances, Possession of Narcotic Schedule II Controlled Substance, and Possession of Drug Paraphernalia. The indictment stems from a March 30, 2010 search of defendant's apartment, where the police discovered marijuana, \$1310.00 in cash, narcotics, and drug paraphernalia.

On August 31, 2010, Defendant filed a Motion to Suppress and a Motion Seeking a *Franks* Hearing. The State initially challenged defendant's standing. The testimony at the hearing, however, clearly demonstrated that defendant had a constitutionally protected interest in the property searched.

### **FACTUAL CONTEXT**

On March 29, 2010, Corporal Eric Huston of the Delaware State Police was conducting surveillance on two individuals suspected of illegal drug activity, Robert Shivery and Louis Lattanzio. At 7:10 p.m., Huston observed the suspects leave the residence at 159 Fairway Road, Newark, Delaware, and drive to the residence at 701 Village Circle, Apartment B,

Newark, Delaware (“Apartment B”). The suspects entered Apartment B. Ten minutes later, the suspects left and returned to their vehicle.

Huston, along with other officers, stopped and searched the suspects’ vehicle. The search revealed one pound of marijuana and a digital scale. Shivery and Lattanzio were arrested. Subsequently, Huston examined the suspects’ cell phones.

Huston discovered three text messages sent from Lattanzio’s cell phone to Shivery’s cell phone on March 29, 2010, between 3:56 p.m. and 4:20 p.m.:

- (1) Yo nigga remember that Mexican dude the we got the pound from that one nite, Well he said he got a pound for u rite now for lime green all buds no shake or stems 1250 right now he said u can throw it on the scale look at it and everything before you buy it.
- (2) yo I called him and said that you wanted to look at it first and he said ight that’s cool just call me. So call me when your done bugning nigga!
- (3) And we only gotta meet him rite down the road from ur pop crib.

Additionally, Shivery told Huston that he purchased the marijuana for \$1250 from an individual who lived in the Salem Village Apartment Complex, where Apartment B is located.

Huston testified that the content and timing of the text messages -- together with the pre-arrest observations, the post-arrest discovery of

marijuana, and Shivery's statement -- led Huston to believe that the suspects purchased the marijuana from whomever resided at Apartment B.

The suspects were detained at Delaware State Police Troop 2 in Newark, Delaware. Huston testified that he believed that the suspects might be released around 4:30 a.m. on March 30, 2010. Huston explained that "in [his] experience with a Possession With Intent to Deliver Marijuana, the vast majority of the times the defendants are released on unsecured bails." Huston feared that if released, the suspects would warn whomever resided at Apartment B, and that evidence such as cash, drugs, or paraphernalia would be destroyed. Huston sought an immediate search of Apartment B. Because it was between the hours of 10:00 p.m. and 6 a.m., a nighttime search warrant was deemed necessary.<sup>1</sup>

At 1:22 a.m. on March 30, 2010, Huston secured a nighttime search warrant. In the Search Warrant Application and Affidavit ("Affidavit"), Huston asserted his belief that the suspects would be released and warn whomever resided at Apartment B, and that there was a "likely possibility" that the evidence within Apartment B would be destroyed. At 2:46 a.m., the warrant was executed, and the police discovered marijuana, \$1310.00 in cash, narcotics, and drug paraphernalia. Defendant resided in Apartment B.

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<sup>1</sup> 11 *Del. C.* § 2308.

## ANALYSIS

### *Probable Cause for the Search Warrant*

Defendant argues that the facts alleged in the Affidavit do not establish probable cause to secure a search warrant for Apartment B. Defendant contends that the relationship between Shivery and Lattanzio's activity and Apartment B was, at best, attenuated. Additionally, defendant asserts that the ten minute visit to Apartment B was consistent with "normal social activity," and Shivery and Lattanzio did not leave Apartment B carrying a package or other item that would indicate that they were transporting marijuana. From these observations, defendant argues, it could not be deduced that there was contraband in Apartment B; therefore, the Affidavit lacked probable cause.

The State relies upon Huston's observation of Shivery and Lattanzio entering Apartment B, leaving ten minutes later, and Huston's subsequent discovery that they possessed marijuana. These acts were consistent with the suspects' goal that was identified through their text messages—purchasing marijuana. Additionally, the State argues, Shivery stated that he bought the marijuana from an individual in the Salem Village Apartment Complex. The State asserts that the totality of these circumstances, which

were included in the Affidavit, amounted to probable cause that there was contraband in Apartment B.

Before issuing a search warrant, a magistrate is required to evaluate the totality of the circumstances inside the “four corners” of the affidavit of probable cause to determine whether there is a “fair probability that contraband or evidence of a crime will be found in a particular place.”<sup>2</sup> Because reasonable minds may differ on the issue of probable cause, great deference should be given to the magistrate’s decision to sign a warrant when more than bare bones justification is presented in the affidavit.<sup>3</sup>

After observing Shivery and Lattanzio enter Apartment B and leave ten minutes later, Huston discovered marijuana in the suspects’ vehicle. Shivery and Lattanzio’s text messages indicated that the marijuana transaction was imminent, and were sent roughly three hours before Huston observed Shivery and Lattanzio enter Apartment B. Further, Shivery stated that he purchased the marijuana from the Salem Village Apartment Complex. Huston had just observed Shivery and Lattanzio leave Apartment B, which is located in the Salem Village Apartment Complex. Huston included these facts in the Affidavit, which constitute substantially more than a bare bones justification of probable cause. Huston established a

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<sup>2</sup> *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983).

<sup>3</sup> *United States v. Leon*, 468 U.S. 897, 914 (1984).

nexus between his observations and Apartment B. The totality of the circumstances, as set forth in the Affidavit, amounted to probable cause that there was contraband in Apartment B.

### ***The Necessity of a Nighttime Search Warrant***

Defendant argues that the facts alleged in the Affidavit did not establish that a nighttime search was necessary to prevent Shivery and Lattanzio from warning defendant of the impending search of Apartment B. Defendant attacks Huston's assertion that there was a "likely possibility" that Shivery and Lattanzio would be released on unsecured bail. Defendant contends that the SENTAC Bail Guidelines require that Shivery and Lattanzio would have received secured bail. Therefore, defendant claims, it was not reasonably possible that Shivery and Lattanzio would be released before 6:00 a.m., eliminating the necessity of a nighttime search warrant.

The State responds that it was possible that Shivery and Lattanzio could be released before 6:00 a.m. and warn defendant. The State relies upon Huston's "knowledge of the detention and booking process, likely bail conditions, and possible behavior by the drug subjects upon their release." Therefore, the State argues, the Affidavit established that a nighttime search was necessary to avoid the destruction of evidence.

A nighttime search warrant must not be issued unless “it is necessary in order to prevent the escape or removal of the person or thing to be searched for . . . .”<sup>4</sup> The language of 11 *Del. C.* § 2308 is “clear and unambiguous and requires more than probable cause.”<sup>5</sup> To make this determination, the Court’s review is limited to the facts on the face of the affidavit presented to the judicial officer.<sup>6</sup>

In *Dixon v. State*,<sup>7</sup> the Delaware Supreme Court held that a nighttime search was necessary given the possibility that the defendant could make bail during the night, and subsequently destroy evidence.<sup>8</sup> The defendant was arrested for Robbery 1st Degree and Conspiracy 2nd Degree.<sup>9</sup> The police sought a nighttime warrant, asserting that the defendant “may be able to make bail and could therefore respond to the residence of 1802 West Street, Apartment L and destroy or tamper with [] evidence . . . .”<sup>10</sup> A judicial officer authorized a nighttime search warrant.<sup>11</sup> The Court recognized the possibility that the defendant could make bail, and held that

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<sup>4</sup> 11 *Del. C.* § 2308.

<sup>5</sup> *Mason v. State*, 534 A.2d 242, 251 (Del. 1987).

<sup>6</sup> *Caldwell v. State*, 780 A.2d 1037, 1053 (Del. 2001) (citing *Henry v. State*, 373 A.2d 575, 577 (1977) (“[S]ufficient facts showing that a nighttime search is necessary to prevent the escape or removal of the person or thing to be searched for must appear on the face of the affidavit before such a search may be authorized.”)).

<sup>7</sup> 567 A.2d 854 (Del. 1989).

<sup>8</sup> *Id.* at 856-57.

<sup>9</sup> *Id.* at 855.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*



the “police had a reasonable basis to believe that if the search warrant were not executed that evening the evidence would be destroyed.”<sup>12</sup> As a result, the Court found that the police alleged sufficient facts for a judicial officer to find probable cause that a nighttime search was necessary.<sup>13</sup>

In the Affidavit, Huston established that there was a possibility that Shivery and Lattanzio could be released, warn defendant, and that as a result, defendant might destroy evidence. Huston stated:

[T]here is a likely possibility that both subjects will be released on unsecured bails. . . . [T]heir release is scheduled for approximately 0430 hrs. . . . Your affiant believes that once the two subjects are released, they will be able to warn the unknown Hispanic male of their arrest and Law Enforcement (sic) knowledge of the illegal drug transaction at his residence, . . . namely, illegal drugs, drug paraphernalia and United States Currency . . . .

As in *Dixon*, Huston asserted a reasonable basis to believe that Shivery and Lattanzio could be released and subsequently cause evidence to be destroyed. Therefore, the statements in the Affidavit established probable cause that a nighttime search was necessary to avoid the destruction of evidence.

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<sup>12</sup> *Id.* at 856.

<sup>13</sup> *Id.*; see also *State v. Jenson*, 482 A.2d 105, 113 (Del. 1984) (The Court held that a nighttime search was necessary because “the State submitted that since the defendant was presently in police custody and therefore aware of police involvement in the incident, he likely would *seek to remove or destroy any evidence* linking him to the crime” if released.)

### ***Defendant's Motion for a Franks Hearing***

Defendant argues that in the Affidavit, Huston made a statement with reckless disregard for the truth. Defendant contends that Huston had no basis to believe that Shivery and Lattanzio would be released on unsecured bail. Defendant points to the SENTAC Bail Guidelines, which provide for secured bail.

The State responds that Huston, in making the assertion, relied upon his past experience with individuals facing marijuana charges, and upon his general familiarity with bail hearings. Huston testified that he believes that individuals charged with possession with intent to deliver marijuana often receive unsecured bail. Therefore, the State contends, the statement was not made with reckless disregard for the truth.

The *Franks v. Delaware*<sup>1</sup> test for challenging a search warrant requires that the defendant: (1) make “a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit”; and (2) that “the allegedly false statement [was] necessary to the finding of probable cause....”<sup>2</sup> If both prongs of the test are met:

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<sup>1</sup>438 U.S. 154, 155-56 (1978).

<sup>2</sup>*Id.* at 155-56.

[T]he Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.<sup>14</sup>

In this case, the police officer was present at the suppression hearing, and trial was scheduled to begin within a few days.<sup>15</sup> In the interest of judicial economy, the Court determined to proceed as if defendant had established both prongs of the *Franks* test. The Court heard testimony during the September 3, 2010 suppression hearing on the issue raised by defendant's Motion for a *Franks* hearing. Huston testified:

In my experience with Possession With Intent to Deliver Marijuana, the vast majority of the times the defendants are released on unsecured bails....The very vast majority, unless there is an extenuating circumstance involving criminal history or violence, I will [not recommend secured or unsecured bail and will] leave it to the Court's discretion....I deal directly with the Court on a nightly basis with the matters. It doesn't matter what the guidelines are, it matters what actually occurs....Unless there's weapons or an extensive history [, secured bail] usually doesn't come into play....I deal with arraignments on this almost on a nightly basis....So I had a very good opinion, yes, of what the probabilities are.

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<sup>14</sup> *Id.* at 155-56.

<sup>15</sup> Subsequently, the trial date was continued.

Huston also stated that he was “extremely” surprised that the magistrate imposed secured bail for Shivery and Lattanzio.

Having observed Huston’s demeanor during the hearing, and having considered his experience and the totality of the circumstances, the Court finds Huston credible and his statement reasonable. The fact that Shivery and Lattanzio in fact received secured bail, and were not released before 6:00 a.m., does not alter the Court’s conclusion that Huston made the statement in the good faith belief of its truth and accuracy.

Defendant requested that the Court permit the Justice of the Peace Court Magistrate, who set bail, to be subpoenaed for the purpose of rebutting Huston’s testimony. The Court declines to compel the testimony of a judicial officer under these circumstances. Such testimony would be unnecessary and irrelevant. The issue is the subjective intent of the affiant. The Court finds that Huston’s statement in the Affidavit was reasonably based upon his extensive experience, and was neither intentionally false, nor made with reckless disregard for the truth.

Based on his personal experience, Huston believed that Shivery and Lattanzio could be released on unsecured bail. The Court declines to mandate that an affiant consult the SENTAC Bail Guidelines before drafting

an affidavit. Therefore, Huston did not make this statement with reckless disregard for the truth.

### **CONCLUSION**

The totality of the circumstances, identified in the Affidavit, established probable cause that there was contraband in defendant's residence. The Affidavit established that a nighttime search warrant was necessary. The affidavit did not contain a false statement made with reckless disregard for the truth.

**THEREFORE**, Defendant's Motion to Suppress and Motion Seeking a *Franks* Hearing are hereby **DENIED**, after an evidentiary hearing serving as the functional equivalent of a *Franks* hearing.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston