

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)
)
 v.) I.D. No. 1506014357
)
STEVEN KELLAM)
)
 Defendant.)

Submitted: March 31, 2016
Decided: June 29, 2016

Upon Defendant's Motion to Suppress Wiretap Evidence - **DENIED.**

OPINION AND ORDER

Christopher M. Hutchison, Esquire, Martin Cosgrove, Esquire and Casey Ewart, Esquire, Deputy Attorneys General, Department of Justice, Georgetown, Delaware, Attorneys for the State.

Patrick J. Collins, Esquire, Collins & Associates, Wilmington, Delaware, and Jenna Stayton, Esquire, Woloshin Lynch & Natalie, P.A. Attorneys for Defendant.

WHARTON, J.

1. INTRODUCTION

Before the Court is Defendant Steven Kellam's ("Kellam") Motion to Suppress Wiretap Evidence ("Motion") seeking suppression of any and all evidence obtained as a result of court ordered interceptions of communications derived from cellular telephone numbers 302-864-4691 and 302-236-0019.¹ Kellam also seeks suppression of "all other communications from other wiretaps in which he is an aggrieved party within the statute."² Generally, he alleges that the interception orders should not have been authorized because the State failed to demonstrate "necessity" in the affidavits of probable cause in support of the interception applications.³ The State opposes the Motion and asserts that the affidavits demonstrate that the necessity requirement was satisfied.⁴ After carefully reviewing the Motion, the State's Response, Kellam's Reply and the applications for interception of wire communications, including the supporting affidavits, the Court concludes that the affidavits contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed, why such procedures reasonably appear to be unlikely to succeed if tried, or why such procedures would be too dangerous if tried."⁵ The Court further concludes that the issuing judge did not abuse his discretion in determining that the

¹ Mot. to Supp. Wiretap Evidence.

² *Id.*

³ *Id.*

⁴ State's Resp. to Def.'s Mot. to Supp.

⁵ See 11 *Del. C.* § 2407(a)(3).

“necessity” requirement was met. Accordingly, Kellam’s Motion to Suppress Wiretap Evidence is **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

Kellam is charged with two counts each of Murder First Degree and Racketeering, 49 counts of Possession of a Firearm During the Commission of a Felony, Conspiracy First Degree, five counts of Home Invasion, three counts of Robbery First Degree, five counts of Conspiracy Second Degree, Possession of a Firearm by a Person Prohibited, two counts of Assault Second Degree, two counts of Reckless Endangering First Degree, three counts of Wearing a Disguise During the Commission of a Felony, three counts of Attempted Robbery First Degree, Assault Third Degree and Attempted Murder First Degree.⁶ The charges are the result of a lengthy investigation, during which the Superior Court authorized the Delaware State Police (“DSP”) to intercept Kellam’s cellular telephone communications on two telephones: 302-864-4691 and 302-236-0019.⁷ The initial authorization was granted on March 13, 2015 with an extension granted on April 16, 2015.⁸ Wire interceptions were terminated on May 1, 2015.⁹ In addition to the above two telephones, the Superior Court issued interception orders in this investigation for several telephones purportedly being used by other individuals.¹⁰

⁶ Mot. to Supp. at ¶ 1.

⁷ *Id.* at ¶ 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

All, or nearly all, of the Superior Court judges who sit in Sussex County approved either the interception order in this case or in related orders. For that reason, this judge was assigned to decide suppression motions challenging the interception orders.

THE PARTIES' CONTENTIONS

Kellam seeks suppression of communications intercepted pursuant to the interception orders because, in his view, “[n]ormal investigative procedures were not continued nor (sic) exhausted.”¹¹ He alleges that the averments regarding the particular investigative techniques contained in the applications – surveillance, use of the Attorney General, interviews of suspects, interviews of witnesses, pen register and telephone calls and search warrants - failed to establish that law enforcement exhausted those techniques before resorting to requests for interception orders.¹²

In response, the State argues that it is not required to exhaust all means of investigation, but rather, 11 *Del. C.* § 2407(a)(3) only requires that normal investigative techniques be attempted, and that a statement be provided to show why these techniques have failed, or why they appear reasonably unlikely to succeed if tried.¹³ The State says that the “necessity” requirement was satisfied by

¹¹ *Id.*

¹² *Id.* at ¶ 11.b

¹³ State’s Resp. to Def.’s Mot. to Supp. at ¶ 11.

the information set forth in the affidavits addressing the above investigative techniques.¹⁴

STANDARD OF REVIEW

In order to obtain an interception order, the application shall include a “full and complete statement as to whether or not other investigative procedures have been tried and failed, why such procedures reasonably appear to be unlikely to succeed, or why such procedures would be too dangerous if tried.”¹⁵ In *State v. Perry*, the Superior Court laid out how compliance with the necessity requirement is determined:

When reviewing the application and accompanying affidavits for compliance with these sections, it is enough if the affidavit explains the prospective or retroactive failure of several investigative techniques that reasonably suggest themselves. The government’s burden of establishing compliance is not great. Compliance is tested in a practical and common sense fashion and subject to the broad discretion of the judge to whom the wiretap application is made. The purpose of the “necessity” requirement is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques. Each case is to be determined on its own facts and factors to be considered are the type of crime involved and the relationships between the suspected defendants. Finally, a wiretap order should not be invalidated simply because defense lawyers are able to suggest post factum some

¹⁴ *Id.*

¹⁵ 11 *Del. C.* § 2407(a)(3).

investigative technique that might have been used and was not.¹⁶

The question of whether a full and complete statement of necessity for a wiretap was made in the application is reviewed *de novo*.¹⁷ Once it is determined that the statement was made, the Court will review the judge's determination of "necessity" for an abuse of discretion.¹⁸

DISCUSSION

Both the affidavit in support of the initial Kellam interception application and the affidavit in support of the application for an extension of the interception order contain an identical statement that, "...the following investigative procedures, which are usually employed in the investigation of this type of criminal case, have been tried and have failed, reasonably appear unlikely to succeed if they are tried, or are too dangerous to employ."¹⁹ What follows the above "necessity" statement are lengthy descriptions of the normal investigative efforts that were taken and had failed prior to the application for the inception order and extension application, reasonably appeared likely to fail if they were to be tried, or were too dangerous to employ.²⁰ The efforts described in detail were physical surveillance, use of the Attorney General, interview of suspects, interview of witnesses, Pen

¹⁶ *State v. Perry*, 599 A.2d 759, 764 (Del.Super,1990) (citations and internal quotation marks omitted).

¹⁷ *United States v. Phillips*, 959 F.2d 1187, 1189 (3d Cir.1992).

¹⁸ *Id.*

¹⁹ Mot. to Supp., Ex. A, Aff. at 22 and Ex. B, Aff. at 38.

²⁰ *Id.* at Exs. A and B.

Register and telephone tolls, undercover law enforcement activity and search warrants.²¹ After a careful review of both the initial application and affidavit and the extension application and affidavit, the Court finds that both applications contain a full and complete statement as to whether or not other investigative procedures have been tried and failed, why such procedures reasonably appeared unlikely to succeed if tried, or why such procedures would be too dangerous if tried.

The Court next turns to the question of whether there was an abuse of discretion by the judge who approved the interception orders in determining that the statement of “necessity” was sufficient. Here, as in *United States v. Hellman*²² and *State v. Dollard*,²³ the interception applications make clear that the police were investigating Kellam as part of a large organized criminal conspiracy.

The affidavit in support of the original interception application identifies six individuals, including Kellam, who the affiants allege were involved in, or had knowledge of, a home invasion resulting in two murders and nine other home invasion robberies.²⁴ The affidavit contains brief profiles of each of the six individuals suspected of being involved in, or

²¹ *Id.*

²² 377 F. App'x 157 (3d Cir.2010).

²³ 2013 WL 4080311 (Del.Super. July 30, 2013).

²⁴ *Id.*, Ex. A, Aff. at 6-9 .

having knowledge of, the crimes.²⁵ Profiles of four confidential informants who are alleged to have provided background information on the organizational structure of an alleged criminal enterprise, the targets of that enterprise, the manner of execution of the alleged criminal plan, the weapons used and the distribution of the proceeds of the enterprise's activities are also provided in the affidavit.²⁶

The affidavit then turns to a detailed explication of the investigation and probable cause offered in support of the warrant.²⁷ To be sure, Kellam does not challenge the sufficiency of the probable cause for the issuance of the interception orders. Rather, he challenges the necessity for the wire interceptions. Nevertheless, it is useful to review the probable cause set out in the original affidavit.

The investigation began with an attempted murder occurring on September 16, 2011 in Frankford, Delaware.²⁸ The victim, who was shot in the hand and abdomen, identified Brian Upshur and Jerry Henry as possible suspects.²⁹ During November and December of 2011, investigators received information that Henry and other individuals were committing home invasion style robberies of drug dealers.³⁰

²⁵ *Id.* at 6-9.

²⁶ *Id.* at 9-11.

²⁷ *Id.* at 11-21.

²⁸ *Id.* at 12.

²⁹ *Id.*

³⁰ *Id.*

In January, 2012, Henry was arrested on drug charges and was interviewed in connection with the attempted murder in September.³¹ He confessed to being involved in the incident as a driver and that Kellam and another unknown individual were the actual perpetrators while he waited in the car.³² During a subsequent interview, Henry provided more details, some of which corroborated information learned on the night of the incident.³³ Kellam was arrested, but denied any involvement.³⁴ Henry was interviewed a third time and identified the third individual as Brian Upshur.³⁵ When Upshur was interviewed he also denied involvement, but acknowledged that he was aware of the incident and identified the third individual as Henry's brother, Nathan.³⁶ Ultimately, the charges against Kellam were dropped due to issues with Henry's credibility.³⁷

The affidavit detailed a series of similar home invasion robberies of suspected drug dealers beginning with a second similar home invasion robbery on December 14, 2013 in Laurel, Delaware.³⁸ A third incident occurred January, 14, 2014 in Millsboro, Delaware during which Cletis

³¹ *Id.*

³² *Id.*

³³ *Id.* at 12-13.

³⁴ *Id.* at 13.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

Nelson and William Hopkins were shot to death.³⁹ A fourth home invasion robbery occurred on March 24, 2014 in Seaford, Delaware,⁴⁰ a fifth on May 18, 2014 in Millsboro,⁴¹ a sixth on August 24, 2014 in the Oak Orchard area of Millsboro,⁴² a seventh on September 21, 2014 in Greenwood, Delaware,⁴³ an eighth on December 11, 2014 in the Oak Orchard area of Millsboro,⁴⁴ a ninth on December 14, 2014 in Millsboro,⁴⁵ and a tenth on January 23, 2015 in Dagsboro, Delaware.⁴⁶ From 2012 through 2014, investigators had received information that Kellam was responsible for many reported and unreported home invasion robberies of known drug dealers.⁴⁷

Through a past proven reliable informant, it was learned that a New Jersey resident, Shamir Stratton, had been involved in two murders in southern Delaware.⁴⁸ During an interview, Stratton stated that he and his cousins Kellam, “Ramir” and “Rich” went to the homicide victims’ residence to rob them of drugs and money.⁴⁹ The plan was discussed beforehand at a motel in the presence of two females,⁵⁰ one of whom later confirmed that such a meeting had occurred, including that Nelson and

³⁹ *Id.*

⁴⁰ *Id.* at 14.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 14-15.

⁴⁵ *Id.* at 15.

⁴⁶ *Id.*

⁴⁷ *Id.* at 13.

⁴⁸ *Id.* at 16.

⁴⁹ *Id.*

⁵⁰ *Id.*

Hopkins were the intended victims.⁵¹ Stratton maintained that he remained outside during the actual home invasion murders.⁵²

During the last two weeks of January 2015, investigators met with a confidential informant who regularly interacted with Kellam.⁵³ That informant advised investigators that: Kellam has commented about a number of home invasions he has committed in Sussex County⁵⁴; Kellam uses approximately four men from Philadelphia for the home invasions;⁵⁵ Richard Robinson and Rhamir Waples were two of the people who accompanied Kellam during the robberies;⁵⁶ Kellam and his associates will announce “State Police” when entering a victim’s residence in order to minimize the risk of armed resistance (in fact many of the victims reported the assailants announcing themselves as police);⁵⁷ and Kellam will contact his associates in Philadelphia by telephone when planning a robbery.⁵⁸ Historical telephone call information confirmed that, prior to a home invasion, Kellam made frequent calls to numbers in Pennsylvania and southern New Jersey.⁵⁹ In addition, the informant described a number of home invasions

⁵¹ *Id.* at 17.

⁵² *Id.* at 16.

⁵³ *Id.* at 17.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 18.

⁵⁸ *Id.*

⁵⁹ *Id.* at 20.

corresponding to the ones reported to the police.⁶⁰ Finally, an additional informant who had provided some information was reluctant to provide further information out of fear of retribution.⁶¹

The affidavit then turned to a description of normal investigative techniques that have been tried and failed, reasonably appear unlikely to succeed if tried, or are too dangerous to employ. First the affidavit discussed physical surveillance.⁶² The affidavit asserted that physical surveillance had been tried but had been proven futile due to Kellam's use of counter-surveillance⁶³ and his frequent change of residence, making it difficult to know his whereabouts.⁶⁴ Cameras did not provide any useful information.⁶⁵ Surveillance of co-conspirators was deemed unlikely to provide evidence of historical crimes.⁶⁶ Finally tracking devices were thought to be of limited utility due to Kellam frequently changing vehicles.⁶⁷

Investigators discussed what assistance the Attorney General could provide by the use of Attorney General's subpoenas with an experienced Deputy Attorney General.⁶⁸ It was thought that subpoenaing those involved in the crimes or with knowledge of the crimes would likely result in those

⁶⁰ *Id.* at 18-19.

⁶¹ *Id.* at 20-21.

⁶² *Id.* at 22-24.

⁶³ *Id.* at 22.

⁶⁴ *Id.* at 23.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 23-24.

⁶⁸ *Id.* at 24-25.

people being uncooperative.⁶⁹ Immunizing members of the conspiracy might result in foreclosing prosecution of culpable members of the conspiracy.⁷⁰

Next the affidavit addressed interviewing suspects.⁷¹ Investigators believed that interviewing current local suspects would be unproductive because they would either be untruthful, or refuse to talk.⁷² It was feared that attempting to interview out of state suspects would alert them to the current state of the investigation, causing them to be more cautious, flee, or threaten the lives of law enforcement officers or cooperating individuals.⁷³

The affidavit explained why interviewing witnesses would be futile.⁷⁴ None of the witnesses identified in the affidavit were able to provide information conclusively identifying the roles of the various suspects in the murders of Nelson and Hopkins.⁷⁵ Targets of the home invasions had been involved in unsavory activities themselves and their cooperation has and would likely continue to be questionable.⁷⁶

⁶⁹ *Id.* at 24.

⁷⁰ *Id.*

⁷¹ *Id.* at 25.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

Pen Registers had been used in the investigation on telephone facilities used by Kellam.⁷⁷ However Pen Registers are of limited value because they do not reveal the identities of the parties to the conversation or the substance of the conversation.⁷⁸ In addition, subscriber information on accomplice telephones has proven unobtainable due to the use of telephones that do not require registration of personal information.⁷⁹

Finally, search warrants have been executed for telephone records for numerous people.⁸⁰ Those records, while helpful to a degree, did not provide sufficient, detailed information about past crimes.⁸¹

A 30 day extension of the original interception order was sought and obtained on April 16, 2016.⁸² The affidavit in support of the extension contains all of the probable cause set out in the original affidavit plus substantial additional useful information obtained as a result of the original interception.⁸³ The statement of “necessity” is identical to the one in the original application.⁸⁴

Kellam argues that the applications failed to establish that the investigators had exhausted normal investigative techniques before seeking

⁷⁷ *Id.* at 26.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 26-27.

⁸² Mot. to Supp., Ex. B.

⁸³ *Id.*, Ex. B at 23-37.

⁸⁴ *Id.* at 38-42.

the interception orders.⁸⁵ Kellam discusses the various specific techniques employed by the investigators and concludes generally that either they were working in fact and would have proved successful if tried longer or their effectiveness was discounted unnecessarily.⁸⁶ Kellam also argues, without citation to authority, that it was somehow improper for investigators to seek additional evidence to prove guilt beyond a reasonable doubt when they already had sufficient probable cause to charge him.⁸⁷

The Court is not persuaded. Kellam takes a blinkered view of the investigation and fails to appreciate that it had been ongoing for 3½ years by the time the first application for an interception order was made. In the time since the initial home invasion was reported on September 16, 2011, two people had been murdered and eight other *reported* home invasions had occurred. Solving those historical crimes was the focus of the investigation. Nothing Kellam suggests would have been likely to have produced additional evidence of those crimes, his conclusory predictions to the contrary notwithstanding.

Moreover, the Court is unaware of any rule of law that limits the quantum of evidence investigators may seek to obtain in an investigation to evidence sufficient to establish probable cause. Probable cause is the floor beneath which a court may not authorize a warrant. It is not a ceiling.

⁸⁵ Mot. to Supp. at ¶ 11.

⁸⁶ *Id.*

⁸⁷ Def.'s Reply to State's Ans. to Mot. to Supp.


Further, the State's burden in establishing "necessity" is not to "exhaust" all conceivable investigative techniques as Kellam seems to suggest, but rather, "simply inform the issuing judge of the difficulties involved in the use of conventional techniques."⁸⁸ As to those techniques the investigators elect not to pursue, they need only explain why those investigative techniques "reasonably appear unlikely to succeed."⁸⁹ This requirement is not the same as explaining why a specific technique will not succeed.

The Court concludes that the information provided in the applications meets the requirement of establishing "necessity." The Court further concludes that the issuing judge did not abuse his discretion in reaching that same conclusion.

CONCLUSION

Therefore, Defendant's Motion to Suppress Wiretap Evidence is **DENIED**.

IT IS SO ORDERED.



Ferris W. Wharton, J.

⁸⁸ *Perry, supra*, at 764.

⁸⁹ 11 *Del. C.* § 2407(a)(3).