

**SUPERIOR COURT
OF THE STATE OF DELAWARE**

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: February 24, 2005
Decided: May 31, 2005

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Re: State v. Tyrone Williams, ID# 0403004264

Dear Counsel:

As you know, the court dismissed this case on October 13, 2004, after the State refused to disclose the location from which the police allegedly saw Defendant doing drug-related crimes. The court, however, granted leave for the State to present authorities supporting its argument that Defendant would receive a fair trial even if the State were not forced to reveal the police officers' vantage point. Of course, Defendant was granted leave to respond to the State's submission. Both sides filed helpful letters.

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The State relies heavily on *People v. Knight*.¹ The State contends that because Defendant could cross-examine about the distance, weather, lighting, and the surveillance officers' sight lines, Defendant's Sixth Amendment right to confront his accusers would be adequately protected. The State justifies non-disclosure here by relying on either the "surveillance location privilege" or the "official information privilege," which are part of a few states' common law or their evidence rules.

Furthermore, according to the State, the public's interest in preserving the surveillance location justifies keeping it secret from Defendant and the jury. The police intend to keep using the location. More importantly, the State argues that officers might be endangered if they attempt to use the location in the mistaken belief that it is secret. The State appreciates, however, that even where a privilege is recognized, the court still must consider the "fundamental" issue of fairness, which turns on "the ability for the defendant to effectively cross-examine the police witness."

While the court understands that in different procedural contexts, e.g. suppression hearings, preliminary hearings, etc., prosecutors might be allowed to keep surveillance locations secret,² this case involves a criminal trial. At trial,

¹ 753 N.E.2d 408 (Ill. App. 2001); *see also United States v. Harley*, 682 F.2d 1018, 1020 (D.C. Cir. 1982)(to compel disclosure of surveillance location where prosecution showed jury videotape made by surveillance team and surveillance testimony otherwise corroborated, appellant must "show that he needs the evidence to conduct his defense and that there are no other adequate alternative means of getting at the same point"); *Commonwealth v. Jennings*, 630 A.2d 1257, 1262-1263 (Pa.Super. 1993)(where surveillance made "from a distance of from five to seven feet," defendant required to show that disclosure of surveillance site is "material to the defense").

² *See, e.g. United States v. Raddatz*, 447 U.S. 667, 679 (1980)(" [T]he process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at trial itself.");

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Defendant has a fundamental right to confront and cross-examine the police. Accordingly, the court must focus on the use of undisclosed surveillance locations at trial.³

The State's authority, *People v. Knight*, holds:

In finding that a qualified privilege exists at trial, we stress that where a defendant's need for the location information is so great that the case against him turns almost exclusively on an officer's testimony, disclosure must almost always be ordered.⁴

The basic rule in Delaware is that relevant evidence is admissible. The court cannot find any common law privilege or Delaware evidence rule that shields the State's witnesses from cross-examination.⁵ The surveillance officers'

²(...continued)

United States v. Green, 670 F.2d 1148, 1157 n.14 (U.S. App. D.C. 1981)(" Because of the distinction between suppression hearings and criminal trials ... and because of the more extensive procedural protections associated with the latter, our holding does not suggest that the nondisclosure of a police surveillance location would be proper at trial."); CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FED. PRAC. & PROC. EVID. § 5431 (3d ed. 2005); *but see Weaver v. Commonwealth*, 955 S.W.2d 722, 726-27 (Ky. 1997); *State v. Darden*, 41 P.3d 1189, 1196-97 (Wash. 2002).

³ *Knight*, 753 N.E.2d at 416 ("We hold that the surveillance privilege should be treated differently when raised at a suppression hearing as opposed to when it is raised at trial."); *see also Green*, 682 F.2d 1018.

⁴ *Id.* at 417.

⁵ *Cf. State v. Garcia*, 618 A.2d 326, 329, 334 (N.J. 1993)(Discussing

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observations go to this prosecution's core.⁶ Defendant is accused of participating in drug transactions on a city street. When he was arrested, Defendant was not holding. The State intends to prove Defendant's guilt through the surveillance officers' testimony that, from a distance, they saw Defendant doing hand-to-hand transactions and going to and from what they later confirmed was a drug stash. In other words, the only link between Defendant and the drugs is through the surveillance officers' testimony.

The court appreciates the State's willingness to allow cross-examination about some specifics. Even so, unless defense counsel knows where the surveillance officers were when they allegedly saw Defendant "in the act," the court cannot see how Defendant can test the surveillance officers' observations meaningfully. For example, asking a witness if his sight line was clear is pointless if the answer cannot then be challenged by specific questions based on the actual sight line. This point is demonstrated colorfully in "My Cousin Vinnie."⁷

If the jury's belief in the officers' testimony cannot be shaken by cross-

⁵(...continued)

New Jersey's *Evidence Rule 34*, commonly known as the "official information privilege," and allowing non-disclosure where "the State presented a substantial amount of corroborating evidence"; further holding, in *dicta*: "In certain instances, particularly those in which the only evidence offered against a defendant is the testimony of the surveillance officer, a court may determine that disclosure is warranted.")

⁶ See *State v. Harris*, 819 So.2d 844, 845 (Fla. App. 2002)("Unlike *Harley*, the witness claiming the privilege was crucial to the prosecution ... The more important the witness to the government's case, the more important the defendant's right, derived from the Confrontation Clause of the Sixth Amendment, to cross-examine the witness").

⁷ MY COUSIN VINNIE (Twentieth Century Fox 1992).

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examination, Defendant is fated. Conversely, if Defendant casts doubt on the testimony he must be acquitted. Thus, using *People v. Knight*'s words, "the case against Defendant turns almost exclusively on an officer's testimony." Therefore, even under *People v. Knight*, the location must be revealed.

The court finds that the State's reasons for keeping the surveillance officers' location secret are important. Were the surveillance location revealed, it would compromise further investigations. Worse, it may endanger police officers who use the location in the future, some of whom may not be aware that the location has been revealed through this litigation. Nevertheless, there is no exigent circumstance or important reason exception to the United States and the Delaware Constitutions' confrontation clauses.⁸ In this case, if Defendant cannot cross-examine his accusers thoroughly, he will not be able to confront them effectively, and by our system of justice's high standards he will not receive a fair trial.

For the foregoing reasons, what is in effect the State's motion for reargument is ***DENIED*** and the case's prior dismissal is now final. This decision does not reach the case's ultimate merit. The dismissal turns on the evidentiary ruling and the State's inability to proceed based on that ruling. The court makes this finding for purpose of 10 *Del. C.* § 9902(b).

IT IS SO ORDERED.

Very truly yours,

FSS/lah
oc: Prothonotary (Criminal Division)

⁸ U.S. Const. amend. VI; Del. Const. art. I, §7; *Crawford v. Washington*, 541 U.S. 36 (2004).