IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	Case No. 0503005535
	)	
ANTHONY KINARD,	)	
	)	
Defendant.	)	

Submitted: July 22, 2005
Decided: September 28, 2005

Upon Defendant's Motion to Exclude Suppressed Evidence From Consideration During Hearing on Violation of Probation

MEMORANDUM OPINION

John Barber, Esquire, Department of Justice, Wilmington, Delaware, Attorney for the State of Delaware

Charles E. Butler, Esquire, Wilmington, Delaware, Attorney for Defendant

JOHNSTON, J.

On May 24th, 2005, a suppression hearing and a violation of probation hearing for Defendant Anthony Kinard were scheduled. The suppression hearing was held first. Immediately after the Court granted Defendant's Motion to Suppress, the State requested to go forward on the violation of probation hearing, and argued that the suppressed evidence was nonetheless admissible for the purposes of the violation of probation hearing. The defense objected, and the Court requested that the parties provide written memoranda of law stating their respective arguments on the issue of whether the State is precluded from introducing evidence at Defendant's violation of probation hearing that would otherwise be suppressed at trial. The Defendant and the State timely filed their briefs. This is the Court's opinion in this matter.

FACTS

On March 8, 2005, in the 500 Block of North Rodney Street, Trooper McColgan of the Delaware State Police ("McColgan") was involved in a joint investigation with the Wilmington Police Department. The operation involved police officers from multiple jurisdictions, as well as members of the Governor's Task Force. The Governor's Task Force included members of the Delaware State Police and the Office of Probation and Parole. Some of the officers were assigned to surveil the area for loitering and drug-related activity. Their job was to advise the 8-10 member "jump-out" squad, whose assignment was to make contact with the

individuals allegedly involved in those activities. McColgan was a member of the jump-out squad.

Defendant Anthony Kinard was inside a Chinese take-out restaurant. The jump-out squad was advised that loitering and possible drug activity were occurring in the Chinese take-out restaurant, and the jump-out squad entered the restaurant. A total of 8-10 officers confronted the customers. The room was described as approximately the size of a bedroom. Virtually all of the customers in the restaurant were subject to a frisk. During the suppression hearing, the testimony was in conflict as to the scope of the frisk.

McColgan approached Defendant and asked to speak with him and Defendant agreed. McColgan then asked if Defendant had any weapons on his person, and Defendant replied in the negative. McColgan asked if he could search Defendant, and Defendant again agreed. McColgan checked Defendant's outside pockets, and then asked if he had any inside pockets to his jacket, which was zipped all the way up to the neck. Defendant did not reply and looked away from McColgan. McColgan partially unzipped the front of Defendant's jacket, and inside the jacket, McColgan saw a large clear plastic bag containing a 1/4 pound of marijuana. Defendant then was placed under arrest.

While in the restaurant, the officers were obviously dressed as law enforcement, wearing bullet-proof vests and displaying weapons. Defendant testified that he consented to the search because the officer "made me cooperate." It was later learned that Defendant was on Level III probation. Discovery of the contraband led the officers to conduct a warrantless administrative search of Defendant's family residence. During the administrative search, the Probation & Parole officers found an unloaded handgun among the possessions in a bedroom identified by Defendant's mother as Defendant's bedroom.

The Court granted Defendant's Motion to Suppress. The Court found that considering the totality of the circumstances, reasonable persons in Defendant's position would not have perceived that they were free to leave. Therefore, the Defendant was deemed to be in custody and should have been Mirandized at the time of the search.

Immediately following the Court's ruling, the State requested to proceed with a violation of probation hearing. The State argued that the suppressed evidence was nonetheless admissible for the purposes of the violation of probation hearing. Witnesses from Probation & Parole testified that other technical violations of probation could have justified an administrative search. Defendant objected, and the Court requested that the parties provide written memoranda of law stating their legal

arguments on the issue of whether the State is precluded from introducing evidence at the defendant's violation of probation hearing that would be suppressed at trial.

DISCUSSION

The Delaware Supreme Court has not specifically decided the issue of whether the exclusionary rule applies to violation of probation hearings.[1]

The State argues that the exclusionary rule is a judicially created means of deterring illegal searches and seizures.[2] As such, the rule does not preclude the use of illegally obtained evidence in all proceedings against persons.[3] In *Pennsylvania Board of Probation & Parole v. Scott*, the United States Supreme Court has held that the exclusionary rule does not apply to parole revocation hearings.[4] The Delaware Supreme Court has recognized the *Scott* case as controlling, and declined to extend the exclusionary rule to parole revocation hearings in Delaware.[5]

The State argues that in *Scott*, the Supreme Court balanced the costs versus the benefits of applying the exclusionary rule in determining that the exclusionary rule does not apply to parole revocation hearings. In evaluating the costs, the

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[1] *Fuller v. State*, 844 A.2d 290, 293 (Del. 2004).

[2] *United States v. Calandra*, 414 U.S. 338, 348 (1974).

[3] *Stone v. Powell*, 428 U.S. 465, 486 (1976).

[4] *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 364 (1998).

[5] *Bruton v. State*, 781 A.2d 692 (2001) (Order).

exclusionary rule could preclude consideration of reliable, probative evidence, which could impose significant costs, and detract from the truth-finding process by allowing those who would otherwise be incarcerated to escape the consequences of their actions.[6] Like parole, the State contends that probation is similar to imprisonment of convicted criminals. The defendant is accorded a limited degree of freedom in return for the assurance of compliance with the often strict terms and conditions of release. The exclusion of evidence establishing a probation violation, however, would hamper the State's ability to ensure compliance with these conditions by permitting the probationer to avoid the consequences of noncompliance.[7] The State asserts that the analysis in *Scott* leads to the conclusion that the exclusionary rule should not apply in probation revocation hearings.

The benefit of deterrence is minimal. The "likelihood that illegally obtained evidence will be excluded from trial" provides the necessary deterrence against Fourth Amendment violations.[8] In the instant case, McColgan, the officer responsible for the seizure and search of the defendant, was unaware that Defendant was a probationer. There is no evidence that McColgan knowingly violated Defendant's

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[6] *Scott*, 524 U.S. at 364-65.

[7] *Cf. Scott,* 524 U.S. at 364-65.

[8] *Scott*, 524 U.S. at 367.

rights based on an assumption that the exclusionary rule would not apply in Defendant's violation of probation hearing.

Defendant contends that the issue before the Court is whether law enforcement, having violated Defendant's constitutional right to be free from unreasonable searches and seizures, may nonetheless use that unlawfully obtained evidence at a subsequent violation of probation hearing. Defendant argues that because the search yielding the evidence was a direct result of an illegal search of Defendant while in the restaurant, all the evidence relating to criminal charges against Defendant must be suppressed.

Defendant claims that there is one critical factual distinction between parole hearings and violation of probation hearing. Parole boards are composed primarily of citizens and/or corrections professionals. Judges do not preside over parole boards. As a result, a parole board is not particularly qualified to determine suppression issues that frequently require sensitive judgments about the legality of police conduct. Probation hearings, on the other hand, are presided over by judges, who regularly decide such legal issues.

Defendant also claims that the constitutional protections of personal freedoms and liberty are broader under the Delaware Constitution than the U.S. Constitution.[9] Thus, the exclusionary rule should apply in this case because probation officers have the same powers of coercion as police officers, but few constitutional restraints. Defendant argues that this is one reason that the Governor's Task Force routinely pairs probation officers with police officers.

Defendant emphasizes that he was charged with a criminal offense and that this was the basis upon which he was brought to the Court. Thus, the exclusion he seeks is collateral to the criminal charge, not for consideration as part of a "technical" violation of his probation.

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[9] *See, e.g., State v. Dorsey*, 761 A.2d 807, 821 (Del. 2000)(refusing to apply a "good faith exception" to the probable cause requirement under the Delaware Constitution notwithstanding the U.S. Supreme Court's decision in *United States v. Leon*, 468 U.S. 897 (1984)); *Jones v. State*, 745 A.2d 856, 863, n.29 (Del. 1999)(determination of whether an individual was "seized" under Delaware Constitution would not depend upon U.S. Supreme Court decision on the same issue for Fourth Amendment purposes); *Hammond v. State*, 569 A.2d 81, 86 (Del. 1989) (State's duty to preserve evidence is broader under Delaware Constitution than U.S. Constitution); *Van Arsdall v. State*, 524 A.2d 3, 6-7 (Del. 1987)(scope of permissible cross-examination is broader under Delaware Constitution than U.S. Constitution); *Bryan v. State*, 571 A.2d 170, 177 (Del. 1990)(right to counsel during questioning is broader under Delaware Constitution than U.S. Constitution); *Claudio v. State*, 585 A.2d 1278, 1301 (Del. 1991)(right to jury trial broader under Delaware Constitution than U.S. Constitution).

CONCLUSION

The weight of existing authority is against application of the exclusionary rule in violation of probation hearings. All nine United States Circuit Courts of Appeal that have addressed the issue have held that the exclusionary rule does not apply in probation revocation hearings.[10] Additionally, a significant majority of state courts that have considered this issue also have declined to extend the exclusionary rule to probation revocation proceedings.[11]

In *Bruton v. State*,[12] the Delaware Supreme Court considered the reasoning of the U.S. Supreme Court in *Scott*.[13] The *Bruton* Court recognized that the United States Supreme Court declined to extend the exclusionary rule to proceedings other than criminal trials. The Delaware Supreme Court found that application of the

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[10] *See, e.g., United States v. Armstrong*, 187 F.3d 392, 393 (4th Cir. 1999); *United States v. Finney*, 897 F.2d 1047, 1048 (10th Cir. 1990); *United States v. Bazzano*, 712 F.2d 826, 830-34 (3rd Cir. 1983); *United States v. Frederickson*, 581 F.2d 711, 713 (8th Cir. 1978); *United States v. Winsett*, 518 F.2d 51, 53-55 (9th Cir. 1975); *United States v. Farmer*, 512 F.2d 160, 162-63 (6th Cir. 1975); *United States v. Brown*, 488 F.2d 94, 95 (5th Cir. 1973); *United States v. Hill*, 447 F.2d 817, 819 (7th Cir. 1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970).

[11] *See* 77 A.L.R.3d 636, §3 (2005).

[12] 2001 WL 760842 (Del. Supr.).

[13] *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998).

exclusionary rule "would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings."[14]

The analysis is even more compelling with regard to violation of probation hearings. Unlike parole board members, judges presiding over violation of probation hearings are trained and experienced at considering evidence not admissible for purposes of a jury trial Trial judges regularly are called upon to give such evidence the weight it deserves in the context of the nature and stage of the proceedings.

Defendant has made a number of arguments in favor of exclusion that deserve serious consideration. However, having considered the existent legal precedent and the State's compelling arguments, the Court finds that the State is not precluded from introducing evidence at Defendant's violation of probation hearing that would otherwise be suppressed at trial.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston

ORIGINAL: PROTHONOTARY

[14]*Bruton*, 2001 WL 760842, at **1, *citing Scott,* 524 U.S. at 364.