

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)
)
 v.) **CRIMINAL ACTION NUMBERS**
)
) **IN-05-03-0927 IN-05-03-0928**
ALIPIO RODRIGUEZ) **IN-05-03-0929 IN-05-03-0930**
)
 Defendant) **ID NO. 0503003130**

Submitted: May 13, 2005

Decided: June 30, 2005

MEMORANDUM OPINION

*Upon Motion of Defendant to Suppress Evidence -
GRANTED, in part, and DENIED, in part*

Brian J. Chapman, Esquire, Deputy Attorney General, Department of Justice, for the State of Delaware

Raymond D. Armstrong, Esquire, Wilmington, Delaware, for the defendant

HERLIHY, Judge

Defendant Alipio Rodriguez has moved to suppress evidence seized from a residence in Elsmere. The residence was searched pursuant to a search warrant which he argues lacks probable cause. The warrant was obtained after Rodriguez left the residence and drove away. When stopped after a short distance by the police, Rodriguez denied any association with the residence and he could only show a Dominican Republic driver's license. He was arrested and the search warrant was obtained.

As a result of items seized from the residence, Rodriguez has been indicted for trafficking in cocaine, possession with intent to deliver cocaine, use of a dwelling to keep cocaine, and possession of drug paraphernalia.

There are two issues. One, as a result of his denial of association with the residence, does Rodriguez have standing to challenge the search warrant for it? Assuming he does, does the affidavit establish probable cause? With a limited exception unimportant to these drug charges, the Court holds Rodriguez has standing but that the affidavit is insufficient to establish probable cause.

If Delaware recognized the good faith exception, this Court would deny Rodriguez's motion. But Delaware has chosen to deviate from the United State Supreme Court holding in this area and does not recognize that exception.¹ As a consequence, as to the items seized relating to or supporting the drug charges, the suppression motion is **GRANTED**. It is **DENIED** as to those items relating to his illegal presence in the United States.

¹ *Dorsey v. State*, 761 A.2d 807, 821 (Del. 2000).

Facts

According to a confidential informant, Alipio was living at 19B Elsmere Boulevard in Elsmere. The same informant told the affiant police officers that Rodriguez was delivering cocaine in a black Honda Accord. The informant also said Alipio is a Dominican residing illegally here and does not have a valid U.S. driver's license.

As a result of this information, the police initiated an investigation. That investigation is recited in the affidavit of probable cause used to obtain the search warrant now under review:

2. That your Affiants can truly state that a confidential informant contacted these officers in reference to a Dominican male subject known as "Alipio" described as being approximately 50 years old, 5'6" tall, medium build, with a bald head living at 19B Elsmere Blvd, Elsmere, Delaware 19805. The informant went on to state that "Alipio" is delivering cocaine in a black Honda Accord bearing Delaware 151463 to buyers in the City of Wilmington's West Side.
3. That your Affiants can truly state that the confidential informant further advised "Alipio" is a resident of the Dominican Republic and has resided illegally in the United States for several months. Further, the informant believes that the subject does not possess a valid driver's license to operate a vehicle in the USA.
4. That your Affiants can truly state that these affiants conducted surveillance at 19B Elsmere Blvd and observed the above described subject exiting 19 Elsmere Blvd, Elsmere, Delaware and entering the described Honda Accord.
5. That your Affiants can truly state these detectives along with other members of the Wilmington Department of Police Drug Unit conducted surveillance at 19 Elsmere Blvd, Elsmere, Delaware on the 5th of March 05. Said surveillance was video taped. At approximately 1039

hours a black Honda Accord bearing Delaware 151463 being operated by the above described subject (“Alipio”) pulled in front of 19 Elsmere Blvd., Elsmere, Delaware. At approximately 1227 hours, the same subject was observed exiting 19 Elsmere Blvd, and entering the Honda.

6. That your Affiants can truly state that a motor vehicle stop was subsequently conducted on the Honda in reference to a motor vehicle violation. At that time the driver did not initially stop the vehicle and continued on for a period of time. Once stopped the driver produced a Dominican Republic operators license in the name of Alipio Mercedes Rodriguez DOB 8/15/51. Said license does not grant Rodriguez privileges of driving in the USA. It should be noted at the time of the stop, two cellular telephones were observed activated on the front passenger seat of the vehicle.
7. That your Affiants can truly state Detective Cuadrado spoke with Rodriguez in Spanish who stated he was coming from his home located at 1724 W. 4th Street, Wilmington, Delaware. He further denied being at 19 Elsmere Blvd, Elsmere, Delaware at any time this date. He also advised that the was legally in the United States on a visa but could not produce same.
8. That your Affiants can truly state that Rodriguez and the Honda were transported to Central for further investigation. At that time Officer Vice and K-9 Rick examined the Honda for the presence of controlled substances in the vehicle. At that time K-9 Rick provided a positive reaction to the presence of controlled substances in the vehicle.
9. That your Affiants can truly state officers subsequently responded to 19B Elsmere Blvd, Elsmere, Delaware with keys that were attached to the key to the Honda out of concern that Rodriguez placed phone call to the apartment prior to the stop.
10. That your Affiants can truly state as officers approached the apartment with the keys (that opened the front door and apartment door) to secure same, a subject observed inside the apartment observed the officers and fled into a back room of the apartment.

11. That your Affiants request a search be made of 19B Elsmere Blvd, Elsmere, Delaware 19805 and 1990 Honda Accord bearing Delaware registration 151463 based on the past proven confidential informants information, the positive indication for controlled substances by K-9 Rick, Rodriguez's untruthful statements to Detective Cuadrado, and his legal residency status (as to locating documentation of legal status).

The search warrant was for 19B Elsmere Blvd and the Honda. All items seized were found at the residence.

Parties' Claims

Rodriguez argues that the affidavit used to obtain the search warrant does not establish probable cause. It lacks probable cause, he asserts, to show he was involved in drug activity or a nexus of any drug activity and the 19B Elsmere Blvd residence.

The State at the hearing on the motion raised for the first time that Rodriguez lacks standing to challenge the search warrant. The basis for that argument is Rodriguez's denial, when stopped in his Honda, that he lived at 19B or had any association with it. The State also contends that should Rodriguez have standing, the affidavit establishes probable cause.

Discussion

When ruling on a motion to suppress evidence, the Court must conduct a two-prong test.² First, the Court must determine whether the proponent of the motion has a right to

² *Richter v. State*, 704 A.2d 262, 265 (Del. 1977)(citing *Hanna v. State*, 591 A.2d 158, 162 (Del. 1991)).

contest the search or seizure.³ Only if the Court determines that the movant has standing to contest the search or seizure will the Court then assess the validity of the search or seizure.⁴

In order to have standing to challenge a search warrant on Fourth Amendment grounds, Rodriguez must show that he has a legitimate expectation of privacy in the area to be searched and a possessory interest in the items seized.⁵ Thus, Rodriguez bears the burden of establishing that the challenged search or seizure violated his Fourth Amendment rights.⁶ In addition, Rodriguez must prove by a preponderance of the evidence that he is entitled to relief.⁷

A

Standing to Raise Fourth Amendment Challenge to Search

“The law uses the term standing to define a class of persons entitled to challenge the legality of a search or seizure and to demand suppression of any evidence seized under the exclusionary rule.”⁸ Thus, standing determines access to the exclusionary rule

³ *Hanna v. State*, 591 A.2d 158, 162 (Del. 1991).

⁴ *Id.*

⁵ *State v. Hedley*, 593 A.2d 576, 579 (Del.Super. 1990)(citing *United States v. Salvucci*, 448 U.S. 83, 93, 100 S.Ct. 2247, 2553, 65 L.Ed.2d 619, 629 (1980)).

⁶ *State v. Ivins*, 2004 WL 1172351, at *2.

⁷ *State v. Backus*, 2002 WL 31814777, at *2.

⁸ *Hanna v. State*, 591 at 162.

provided for illegal searches or seizures.⁹ To have standing to raise a Fourth Amendment challenge to search or seizure, a person or class of persons is required to show a “legitimate expectation of privacy in the invaded place.”¹⁰ The expectation of privacy must be “one that society is prepared to recognize as reasonable.”¹¹

The person need not be an owner or tenant of the premises in order to have standing to object to a search and/or seizure.¹² The person need only show that he has a possessory interest in the items seized and a legitimate expectation of privacy in the premises to be searched in order to have standing to bring a Fourth Amendment challenge to the search or seizure.¹³

Rodriguez was stopped while driving the Honda. He stated he was coming from 1724 West 4th Street while denying being at 19B Elsmere Blvd. At no time in his motion for suppression or during the suppression hearing did Rodriguez admit to residing at 19B Elsmere Blvd. Other than the contents of the affidavit and some items seized in the residence, nothing has been presented to the Court indicating that Rodriguez resided at 19B Elsmere Blvd.

⁹ *Id* at 163.

¹⁰ *Thomas v. State*, 467 A.2d 954, 958 (Del. 1983)(citing *Rakas v. Illinois*, 439 U.S. 128, 148, 99 S.Ct. 421, 433, 58 L.Ed.2d 387 (1978)).

¹¹ *Righter v. State*, 704 A.2d 262, 265 (Del. 1997) (quoting *Rakas v. Illinois, Supra*, 493 U.S. at 493, n. 12, 99 S.Ct. at 430, n. 12)..

¹² *Pierson v. State*, 311 A.2d 854, 855 (Del. 1973).

¹³ *State v. Hedley*, 593 A.2d 576, 579 (Del.Super. 1990).

The keys taken from Rodriguez at the time of his arrest, however, opened the door of 19B Elsmere Blvd. as well as the padlock on a bedroom door. Three pill bottles bearing Rodriguez's name were seized from the top of the dresser in that bedroom. In addition, the police observed Rodriguez entering and exiting 19B Elsmere Blvd on two different days.

The Court finds that Rodriguez, despite his prescient denial of association with 19B, has standing to contest the legality of the search and seizure as he can assert a possessory interest in the residence and an expectation of privacy in the residence. As it has been determined that Rodriguez has standing to contest the search and seizure, the Court will now assess the validity of the search and seizure at 19B Elsmere Blvd.¹⁴

B

Sufficiency of Affidavit

Probable cause for a search warrant may be established through the use of hearsay evidence such as an undisclosed informant's information.¹⁵ A tip may form the basis of probable cause where the "totality of the circumstances" would lead one to conclude that the information provided in the tip is reliable.¹⁶ An affidavit may be based on hearsay

¹⁴ *Hanna v. State*, 591 at 162.

¹⁵ *State v. Miller*, 449 A.2d 1065, 1071 (Del.Super. 1982).

¹⁶ *Tatman v. State*, 494 A.2d 1249, 1251 (Del. 1985)(citing *Illinois v. Gates*, 462 U.S. 213, 233, 103 S.Ct. 2317, 2329, 76 L.Ed.2d 527 (1983)).

consisting of an informant's tip and not the direct personal observations of the affiant.¹⁷ An informant's reliability can be established by the affiant's statement of his own knowledge of factual circumstances which demonstrate to the affiant that his informant is a reliable source of information.¹⁸ The test for determining reliability of an undisclosed informant is whether his information has ever been verified in the past, not his record in aiding arrests or convictions.¹⁹

A "tip from the past proven reliable confidential informant, coupled with the detectives' observations at the scene, clearly (may) establish(ed) probable cause to arrest."²⁰ The affidavit supporting the search warrant is "considered as a whole and not on the basis of separate allegations."²¹ The test for probable cause in support of a search warrant is much less than that governing the admission of evidence at trial.²² When there is probable cause, a search warrant is directed at the property where the instrumentalities or evidence of crime are to be found.²³ To establish probable cause, it is not necessary to

¹⁷ *Sexton v. State*, 397 A.2d 540, 546 (Del. 1979).

¹⁸ *Id* at 546.

¹⁹ *State v. Miller*, 449 A.2d 1065, 1068 (Del.Super. 1982).

²⁰ *King v. State*, 193 WL445484 (Del), at *2.

²¹ *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984), citing *Dunfee v. State*, 346 A.2d 173, 175 (Del. 1975)).

²² *Id*, at 112.

²³ *United States v. Conley*, 4 F.3d 1200, 1207 (3d. Cir. 1993).

have firsthand knowledge that the items listed are actually located in the place to be searched.²⁴

The Four Corners of the Affidavit

The Court will next turn its attention to whether there was sufficient information contained within the “four corners” of the affidavit from which one could conclude that it was more probable that Rodriguez was engaged in the drug trade at 19B Elsmere Blvd. and that drugs were likely to be found on that property on March 5, 2005.²⁵ There, however, are a series of defects in the probable cause affidavit starting with the recitation of the confidential informant’s information. First, there is no mention that the informant, even in the conclusory sense, has been “reliable.” Without that, of course, there is no statement showing in some objective fashion how the informant’s information on prior occasions has been shown to be reliable.

Second, the affidavit goes on to state that the informant said “Alipio” is delivering cocaine out of a black Honda Accord. But that, too, is conclusory, and in no way tells how the informant gained this information; no reference to seeing it, being a buyer, etc. Therefore, not only is this informant’s reliability not shown, there is no information to show how he got the information of drug delivering.

²⁴ *Dorsey v. State*, 761 A.2d at 813.

²⁵ *Gardner v. State*, 567 A.2d 404, 409-10 (Del. 1989).

And the defects in the affidavit do not stop there. The only corroborative information remotely relating to alleged drug dealing is that the police saw “Alipio” in a black Honda Accord, the vehicle out of which he was allegedly dealing. But they observed Alipio doing nothing in that vehicle which could be interpreted as drug dealing. The informant also mentions Alipio living at 19B Elsmere Blvd. But again, the police surveillance showed no activity whatsoever that was suspicious or could be interpreted along or in conjunction with other facts as consistent with drug dealing. And the informant did not say any drugs were stashed or sold at 19B.

All of the activities which the police observed are innocent whether viewed singly or as a whole. The only circumstance potentially a sign of drug dealing is the reference to a K-9 alert to drugs when sniffing the car. It stands alone. Even if taken together with the informant’s conclusory tip of drug dealing in the car, it still does not rise to the level of probable cause to search for drugs at 19B.

The Court finds that the facts set forth in the affidavit of probable cause are not sufficient to form a nexus between the residence at 19B Elsmere Blvd and the items sought by police used or any drug activity which would provide the necessary nexus to search that residence. Rodriguez’s motion to suppress is **GRANTED** in relation to items 1,3,4,5,6, and 7 (all the drug items) on the list of property to be seized.

The search warrant also sought documents indicating legal residency in the United States as well as indicia of occupancy or residency at 19B Elsmere Blvd. The reliable

informant stated that Rodriguez was Dominican and in the United State illegally. When stopped for a motor vehicle violation, Rodriguez could not produce either a valid driver's license from any jurisdiction in the United States or a valid visa permitting his entry into the country. However, he produced a driver's license from the Dominican Republic. He denied having been at 19B Elsmere Blvd. There was corroboration of information not readily available to anyone residing near 19B Elsmere Blvd.

The Court finds the facts set forth in the affidavit of probable cause are sufficient to form a nexus between the residence at 19B Elsmere Blvd. and the documentation indicating legal residency status in the United States. Rodriguez's motion to suppress is **DENIED** in relation to items 2 and 8 on the list of property to be seized.²⁶

Conclusion

The Court finds that the facts set forth in the affidavit of probable cause are insufficient to form a nexus relating to drug activity between the items sought by the police and 19B Elsmere Blvd. Therefore, Rodriguez's motion to suppress is **GRANTED** as to items 1,3, 4, 5, 6, and 7 on the list of property to be seized. As related to the illegal residency of Rodriguez ID NO. 0503003130 and documents at 19B Elsmere Blvd,

²⁶ PROPERTY TO (BE) SEIZED (SIC):

2. Indicia of occupancy or residency of the described premises, including, but not limited to, utility and telephone bills, canceled envelopes and keys.
8. Documentation indicating legal residency status in the USA.

Rodriguez's motion to suppress is **DENIED** in relations to items 2 and 8 on the list of property to be seized.

Rodriguez's motion to suppress is **GRANTED** in part and **DENIED** in part for the reasons stated herein.

IT IS SO ORDERED.

J.