

**IN THE COURT OF COMMON PLEAS
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH	:	
	:	
v.	:	No.: 04-10,402
	:	
KEITH TONER,	:	
Defendant	:	
<hr/>		
COMMONWEALTH	:	
	:	
v.	:	No.: 04-10,408
	:	
AMY TONER,	:	
Defendant	:	

OPINION AND ORDER

Before the Court is the Defendant's Motion to Suppress Evidence, filed April 15, 2004. Defendants' issues are twofold: one, the lack of a signature on the search warrant equates to a lack of a valid search warrant for the Defendant's residence and, two, the Affidavit of Probable Cause submitted with the application for search warrant fails to establish sufficient probable cause to search the Defendant's residence.

On August 12, 2003, Trooper James A. Wool of the Pennsylvania State Police presented a search warrant application to this Court for approval. Trooper Wool alleged in the Affidavit accompanying the search warrant that probable cause existed for the issuance of a search warrant. Included in the Affidavit was wiretap information obtained from the New Jersey State Police. The Affidavit also includes parts of the intercepted conversations allegedly involving Defendant Keith Toner. Trooper Wool's conclusions are supported by his interpretations of coded communications and street slang of a type used by drug traffickers. Based on the

affidavit, the Court issued the search warrant and on August 12, 2003, officers of the Pennsylvania State Police conducted a search of the Defendant's residence and seized various items.

The Defendants first issue is that the failure to sign the appropriate line on the search warrant equates to no warrant being issued. However, since this issue is presently on appeal, the Court relies on its opinion and order dated February 5, 2004.

Defendants also argue that the warrant was issued despite insufficient probable cause. "Before an issuing authority may issue a constitutionally valid search warrant, he or she must be furnished with information sufficient to persuade a reasonable person that probable cause exists to conduct a search." *Commonwealth v. Baker*, 532 Pa. 121, 126, 615 A.2d 23, 25 (1992), citing *Commonwealth v. Davis*, 466 Pa. 102, 351 A.2d 642 (1976), see also Pa.R.Crim.P. 2003(a). Additionally, the issuing authority's decision must be based on the four corners of the affidavit. See *Commonwealth v. Dennis*, 421 Pa.Super. 600, 617, 618 A.2d 972, 981 (1992), see also Pa.R.Crim.P. 2003(b).

Specifically, the Defendants' first argue that the information obtained by electronic surveillance from the New Jersey State Police was not adequately shown to have been legally obtained under New Jersey and Federal law in the Affidavit of Probable Cause. It has been established in this Commonwealth that a search warrant can be supported by probable cause based upon information obtained through electronic surveillance ordered in a foreign jurisdiction. *Commonwealth v. Bennet*, 245 Pa.Super. 457, 369 A.2d 493 (1977). However only those searches conducted lawfully may supply probable cause. *Commonwealth v. Black*, 2000 PA Super 253,

758 A.2d 1253 (2000). The search warrant in the present case was issued largely on the basis of electronic surveillance information obtained from New Jersey State Police. However, within the four corners of the affidavit, this information is not adequately presented as having been obtained in compliance with federal or New Jersey law and thus should not have been considered in the probable cause analysis.

Defendants also argue that within the four corners of the affidavit there is insufficient probable cause to search the residence. The Defense asserts that even if the surveillance and intercepted communications were accurately captured and interpreted by police, that there was at no time a sufficient nexus between that information and the residence of the defendants. “Probable cause to believe that a man has committed a crime on the street does not necessarily give rise to probable cause to search his home.” *Commonwealth v. Kline*, 234 Pa. Super. 12, 17, 335 A.2d 361, 364 (1975); *Commonwealth v. Way*, 342 Pa. Super. 341, 492 A.2d 1151 (1985). The affidavit supporting the search warrant alludes to surveillance of Defendant Keith Toner revealing an interaction that involved a black duffel bag transferred to Mr. Toner’s vehicle. However, this bag at no time was seen at the Toner residence and so the affidavit states, “Surveillance was not sure if TONER actually removed the object from the vehicle and placed it into his residence or not.” “Affidavit of Probable Cause,” pg. 6. The affidavit attempts to draw from observing the duffel in the defendant’s car an inference to records he might keep in his home concerning drug trafficking. *Id.* Upon reviewing the four corners of the affidavit, there is at no point a sufficient link between the duffel observed in the defendant’s car to the likelihood of evidence in the defendants’ residence. Thus, the affidavit does not

establish sufficient probable cause to search the residence of the defendants. Further, this flaw is more damaging to the Commonwealth's assertion of probable cause as per Defendant Amy Toner since none of the above-described bases involve actions undertaken by her, nor does the Affidavit sufficiently establish a connection to her. Because of the foregoing analysis, the Court need not address both Defendants' arguments concerning the "bootstrapping" of types of items and the excessive number of items seized.

In support of their position, the Defendants also argue that the "staleness" of the information in the affidavit weighs heavily against a finding of probable cause based on the four corners of the Affidavit. The closest reference to a drug transaction involving the defendant was thirty-one days prior to the application for the search warrant and the closest reference to guns was twenty-one days. It is clear that probable cause must exist at the time of issuance of a search warrant. *Commonwealth v. Way*, 342 Pa.Super. 341, 492 A.2d 1151 (1985). It has also been decided that truly "stale" information cannot supply the probable cause necessary for the issuance of a search warrant, rather there must be a showing of "continuing criminal activity." *Commonwealth v. Eazer*, 455 Pa. 320, 312 A.2d 398 (1973). The court agrees that the considerable passage of time between the significant events in the affidavit and the application for the warrant weighs in favor of a finding of insufficient probable cause. The Court would note again that with regard to Defendant Amy Toner, the problem of staleness of information and failure to show continuing criminal activity is further exacerbated by the fact that the Affidavit presents only the actions of Keith Toner.

The Defendants also argue that within the four corners of the affidavit, there is insufficient proof of the identification of Keith Toner from the telephone intercepts and insufficient support for the findings and interpretations of the intercepting officers. The original source of much of the information in the Affidavit came from Detective Hampton of the New Jersey State Police. Beyond his role as member of the Street Gang Unit, no specific credentials or expertise is supplied and could not be added at the time of the hearing because it is beyond the four corners of the Affidavit. Further, the intercepted calls were concluded to be those of Keith Toner, but no voice recognition or other identifying information in support of this conclusion was set forth within the four corners of the affidavit.

In Summary, the Affidavit of Probable Cause supplied in application for search warrant fails to establish probable cause to search the residence of Defendant Keith Toner. The information acquired from the New Jersey State Police surveillance should not have been considered since there was no confirmation within the four corners of the Affidavit that the information was obtained legally pursuant to New Jersey and Federal laws. In addition, the Affidavit fails to form a satisfactory nexus between the activities monitored and the residence of Keith Toner. The Affidavit at no point sufficiently ties the Defendants activities in and around his vehicle and at various locations to the Defendants home. The Affidavit is further weakened by the remoteness in time of the significant activities and the application for search warrant. Finally, the four corners of the Affidavit contain insufficient foundations on which the Commonwealth based its identifications of the Defendant's voice, the interpretations of intercepted language, and the credentials and expertise of

the analysts. For the above-stated reasons, the Affidavit fails within its four corners to establish probable cause to search the residence of Defendant Keith Toner.

The Affidavit likewise fails to establish probable cause to search the residence of Amy Toner. Amy Toner is insufficiently linked within the Affidavit to any of the actions of Keith Toner to establish probable cause. Consequently, the Affidavit's attempt to sufficiently link Keith Toner's activity to the residence and to show continuing criminal activity is only more tenuous when applied to Amy Toner.

Accordingly, the Court issues the following Order.

ORDER

AND NOW, this ____ day of November, 2004, for the reasons set forth above, the Court GRANTS the Defendant's Motion to Suppress. It is ORDERED and DIRECTED that the evidence obtained pursuant to the Search Warrant be SUPPRESSED.

By the Court,

_____J.

Nancy L. Butts, Judge

xc: DA (KO)
Peter Campana, Esquire
Kyle W. Rude, Esquire
Hon. Nancy L. Butts
William Becker
Gary Weber, Esquire