

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : **CP-41-CR-681-2018**
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 JEROMEY A. DRUMMOND, : **MOTION TO SUPPRESS**
 Defendant : **EVIDENCE**

OPINION AND ORDER

Jeromey Drummond (Defendant) was arrested by the Pennsylvania State Police on April 16, 2018 on three counts of Possession with the Intent to Deliver a Controlled Substance,¹ two counts of Delivery of a Controlled Substance,² two counts of Criminal Use of a Communication Facility,³ two counts of Possession of a Controlled Substance,⁴ one count of Possession of a Small Amount of Marijuana,⁵ and one count of Possession of Drug Paraphernalia.⁶ The charges arise out of a two controlled buys and a search of Defendant's residence at 1415 E. 3rd St., Loyalsock Twp., Lycoming County, PA. Defendant filed a timely Motion to Suppress Evidence on July 19, 2018. Hearing on the motion was held by this Court on August 30, 2018.

In his Motion, Defendant submits that: (1) the anticipatory search warrant issued did not establish a fair probability that contraband would be found at the place to be searched and that the triggering event would occur, (2) the search warrant issued six days after the first controlled buy in the Affidavit of Probable Cause would not establish probable cause because of staleness, (3) there is nothing in the affidavit to corroborate the confidential informer

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780-113(a)(30).

³ 18 Pa. C.S.A. § 7512.

⁴ 35 P.S. § 780-113(a)(16).

⁵ 35 P.S. § 780-113(a)(31)(i).

⁶ 35 P.S. § 780-113(a)(32).

provided accurate and reliable information, and (4) the items listed to be seized in the search warrant were overly broad. Defendant contends this is in violation of his Fourth Amendment rights under the United States Constitution and his Article 1 Section 8 rights provided under the Pennsylvania Constitution. The majority of Defendant's claims rest upon the fact that the suspected cocaine from the controlled buy was never field tested.

Background

Parties relied upon argument and the contents of the search warrant without testimony. On April 10, 2018, Trooper Tyler Morse (Morse) met with a State Police Confidential Informant (CI) to conduct a controlled buy with Defendant. Search Warrant 04/16/18, at 3. CI showed Morse and Trooper Thomas Wool Defendant's residence, 1415 E. 3rd St. and told them the phone number Defendant uses. *Id.* at 4. Morse had CI text message Defendant's for "two balls," a quarter ounce of cocaine, which was agreed to. *Id.* Investigators witnessed Defendant leaving the residence pointed out by CI, go to the store and then returning to the residence. *Id.*

That afternoon, CI was searched for contraband (none was located), he was given \$400 in prerecorded bills, and entered the residence. *Id.* After he left the residence, he gave Morse two bags of suspected cocaine. *Id.* CI informed Morse that he/she gave Defendant the \$400, Defendant then told CI he could sell him an ounce in the future for \$1000, and that he was getting crack cocaine soon as well. *Id.* Following this Morse contacted Agent Matthew Kieski who verified the 1415 E. 3rd St. address was Defendant's address on file. *Id.* at 5.

A search warrant was then drafted with the stated anticipatory event being another controlled buy for either crack or powder cocaine by CI on April 16, 2018. *Id.* A case note

was added to show the cocaine was not field tested due to the potential presence of Fentanyl, but it was sent to a lab so it could be analyzed safely. *Id.* On April 16, 2018, CI contacted Defendant at the same number for “a whole one,” referencing an ounce of cocaine, which was agreed to at a price of \$1050. Affidavit of Probable Cause 04/16/18, at 8. CI was searched to verify he had no contraband prior to entering the residence at 1415 E. 3rd St. *Id.* CI, upon leaving the residence, gave Morse one bag of suspected cocaine. *Id.* CI stated he/she handed Defendant prerecorded currency, Defendant was taking apart “8 balls” and putting contents into bag for CI, and Defendant told CI twenty-six (26) grams were in the bag. *Id.* Following the controlled buy, the anticipatory search warrant was conducted. *Id.* at 9. The search yielded the prerecorded currency from Defendant’s pants pocket, 1.094 ounces of suspected crack cocaine, a small amount of marijuana, plastic bags, a digital scale, and a cell phone. *Id.* One of the troopers called the cellphone number that was provided by CI and cellphone began ringing. *Id.*

Discussion

“The ultimate issue in a suppression hearing is whether the police officer affiants had probable cause at the time they applied for a search warrant.” *Commonwealth v. Luton*, 672 A.2d 819, 821 (1996). The Commonwealth has the burden of demonstrating that the facts before the magistrate support a finding of probable cause with deference given to the issuing magistrate. *Id.* at 821-22. The standard for evaluating probable cause for the issuance of a search warrant is the “totality of the circumstances” test established in *Illinois v. Gates*, 462 U.S. 213 (1983). *Commonwealth v. Gray*, 503 A.2d 921, 925 (1985). In making their evaluation a magistrate must make a “practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of

knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 925.

For an anticipatory search warrant to establish probable cause two requirements must be met: "(1) there is probable cause to believe the triggering condition will occur; and (2) if the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Commonwealth v. Wallace*, 42 A.3d 1040, 1049 (Pa. 2012). Defendant cites to *Wallace*, as well as *Commonwealth v. Manuel* in support of his position. In *Wallace*, police received information from a confidential informant that the defendant was selling narcotics from a gold colored Mercedes. *Id.* at 1043. The confidential informant gave officers a cellphone number, a telephone number, and a house address and informed them he could purchase narcotics from the house at a specified time. *Id.* Police verified the defendant lived at that address and was registered with the one telephone number. *Id.* A warrant was then issued and police met with the confidential informant and gave him buy money. *Id.* He then entered the residence and returned with two bags of cocaine prior to police executing the search warrant. *Id.*

The Court found that there was not sufficient information to show probable cause that the triggering event would occur. *Id.* at 1045. It specifically distinguished *Commonwealth v. Coleman*, 830 A.2d 554 (Pa. 2003) based on the fact *Coleman* involved a prior buy from the defendant's residence by the confidential informant a month earlier. *Id.* at 1046. Not enough facts and allegations were established showing how the confidential informant knew the house was being used for drug activity. *Id.*; see also *Commonwealth v. Manuel*, -- A.3d --, 2018 WL 4079472 (Pa. Super. Aug. 23, 2018) (fact confidential informant has been reliable in the past is not sufficient, on its own, to establish probable cause). The only information

provided was the defendant's address, phone number, and information about his car, which is all public knowledge that anyone could obtain. *Wallace*, 42 A.3d at 1045. The only averments made regarding narcotics transactions were that the defendant was distributing from his car, not his residence. *Id.* at 1046. The presence of previous controlled buys to establish the first prong of an anticipatory search warrant seems to be the deciding factor for the courts. *See Coleman*, 830 A.2d 554; *Commonwealth v. Aichele*, 2016 WL 1458310 (Pa. Super. 2016) (unreported); *Commonwealth v. Katona*, -- A.3d --, 2018 WL 2986892 (Pa. Super. June 14, 2018).

As for the items to be seized, it is well established that the "totality of the circumstances test is satisfied where the police officers have a reasonable belief that the items to be seized are related to criminal conduct." *Commonwealth v. Watson*, 724 A.2d 289, 292 (Pa. 1988). Search warrants in cases involving Possession with the Intent to Deliver commonly list "any records of occupancy and/or ownership of property, any controlled substances, any drug paraphernalia, and any records, documents or photos related to drug trafficking" as items to be seized. *Id.* at 293. Although general searches are proscribed, search warrants need to be "read in a common sense fashion and should not be invalidated by hypertechnical interpretations. This may mean, for instance, that when an exact description of a particular item is not possible, a generic description may suffice." Pa. R. Crim. P. Rule 205 cmt.

Analysis

First, the Court will address Defendant's contention that because the suspected cocaine was not field tested probable cause did not exist to execute a search warrant. This Court disagrees. Although the higher courts have yet to address this issue, a well known

current issue in law enforcement is the danger of field testing suspected narcotics due to the potential existence of Fentanyl. To the extent many agencies and departments have discontinued the practice. *See Jim Salter, Opioids Dangers Force Police to Abandon Drug Field Tests*, US NEWS, Feb. 21, 2018 (“field testing has been banned by the DEA, state police in Oregon, Arizona, Michigan and Missouri, and several big-city departments, including New York and Houston”). Probable cause is established by a “totality of the circumstances.” As such in absence of a field test, probable cause that Defendant had in his possession contraband or narcotics may still be established through Morse’s training and experience, the circumstantial evidence surrounding the transactions, and CI’s averments as to the contents. Probable cause is commonly found without field testing for arrests and a “totality of the circumstances” test was good law prior to the wide spread implementation of field testing in law enforcement. Therefore this Court will not find an absence of field testing is *per se* grounds to find there is no probable cause as the Commonwealth is not required the suspected cocaine is a narcotic beyond a reasonable doubt until trial.

Defendant alleges that the search warrant did not establish a fair probability contraband would be found in the residence following the triggered event and/or that the event would occur. At the time of investigation, Morse had been with the Pennsylvania State Police for almost six years, was assigned to the vice/narcotics unit, had been involved in over one hundred (100) narcotics investigation, including in an undercover capacity purchasing narcotics, had participated in numerous consensual intercepts, had managed and utilized confidential informants in successful narcotics investigations, and was a member of the Pennsylvania State Police Clandestine Laboratory Response Team. On April 10, 2018, CI gave Morse a number and address for Defendant. Defendant was seen leaving the residence

going to the store before returning to the residence. Morse met with CI to arrange the purchase of powder cocaine and gave him \$400 in prerecorded money to make the buy. CI text messaged Defendant for “two balls” or a quarter (1/4) ounce of cocaine, and entered the residence. CI gave Morse the two bags, containing what Morse through his experience and training believed was cocaine. CI stated that Defendant told him next time he could get an ounce of cocaine and was also getting crack cocaine. It was at this point the suspected cocaine was then preserved and entered into evidence and Morse verified the residence was actually Defendant’s. Then Morse applied for a search warrant anticipating that on April 16, 2018, CI would assist him in procuring either powder or crack cocaine in the same manner from the same residence.

Unlike *Wallace* and similar to *Coleman* here there is a controlled buy from a residence to be searched. CI not only gave investigators an address, telephone number, and name, which on its own would be insufficient, but also made the controlled buy with investigators nearby. Additionally, investigators on their own accord witnessed Defendant entering and leaving the residence and verified it was his residence. The “totality of the circumstances” shows that based on CI and Morse’s beliefs and the surrounding circumstances the substance can be believed to cocaine to an extent to satisfy probable cause. Additionally, the “totality of the circumstances” shows enough evidence to establish a fair probability the anticipatory event was going to take place and once the anticipatory event occurred, it was also fairly probable that the contraband to be seized would be located within the residence. Therefore, the Court finds for the Commonwealth and against Defendant’s first contention.

Defendant alleges the six days in between the original controlled buy and the issuance of the search warrant refutes probable cause due to staleness. This contention is incorrect. The

anticipatory event still needed to occur in order for the search warrant to become active and so it was not yet stale, because it was not yet ripe. Here there is only a six day window whereas in *Coleman* there was a month gap, therefore Defendant's second argument is misplaced. 830 A.2d at 563.

As discussed above, there is information to establish CI provided accurate and reliable information. Defendant specifically argues that "since the substances that were allegedly purchased by the informer prior to April 16, 2018, were not field tested, there was no way for the police to corroborate that the informer provided correct and reliable information." Defendant's Motion to Suppress Evidence 07/19/18, at 3. The absence of a field test does not *per se* disallow probable cause, instead the "totality of the circumstance" can and here does establish that the substance is likely cocaine. Officers were also present for all buys, interactions, and independently verified Defendant was living and acting out of this residence, therefore the information was corroborated by police to be accurate and reliable.

The items to be seized were: any and all controlled substances, drug paraphernalia, any and all records in any form depicting either "transportation, ordering, purchasing, sending, receiving, or distributing a controlled substance" or transactions "which may have been purchased or acquired from the proceeds of controlled substance(s) sales," monies or items to conceal monies or currency in any form, electronic items "utilized to aid in illicit trafficking," address/telephone books, and indicia of Defendant's occupancy. Search Warrant 04/16/18, Attachment B "Items to be Searched for and Seized." All the items to be seized were construed narrowly to the crime of Possession with the Intent to Deliver and the other charged crimes to the extent possible. This Court finds the description was not overbroad based upon the charges and the underlying factual situation.

Conclusion

The anticipatory search warrant was drafted based on reliable and corroborated facts from CI. It met both prongs to establish probable cause under *Wallace* and the “totality of the circumstances” supports a probable cause finding that the suspected cocaine was cocaine, and the search warrant was not overbroad in construction or execution. Therefore, Defendant’s Motion to Suppress Evidence is denied.

ORDER

AND NOW, this _____ day of October, 2018, based upon the foregoing Opinion, the Defendant’s Omnibus Pretrial Motion is DENIED.

By the Court,

Nancy L. Butts, President Judge

cc: DA
Peter Campana, Esquire