

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : **CP-41-CR-600-2018**
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 :
 KEVIN LATTIE, : **MOTION TO SUPPRESS**
 Defendant : **EVIDENCE**

OPINION AND ORDER

Kevin Lattie (Defendant) was arrested by the Pennsylvania State Police on April 4, 2018 on seven counts of Manufacturing, Delivering, or Possession with the Intent to Manufacture or Deliver a Controlled Substance,¹ three counts of Criminal Use of a Communication Facility,² four counts of Possession of a Controlled Substance,³ one count of Possession of a Small Amount of Marijuana,⁴ one count of Possession of Drug Paraphernalia,⁵ two counts of Possession of a Firearm Prohibited,⁶ and two counts of Endangering the Welfare of Children.⁷ The charges arise out of a three controlled buys and a search of Defendant's residence at 638 Market St., Williamsport, Lycoming County, PA. Defendant filed a timely Motion to Suppress Evidence on June 15, 2018. A hearing on the motion was held by this Court on July 19, 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 in fact occur, (2) the search warrant issued twelve days after the last controlled buy in the Affidavit of Probable Cause and fourteen days after the first

¹ 35 P.S. § 780-113(a)(30).

² 18 Pa. C.S.A. § 7512.

³ 35 P.S. § 780-113(a)(16).

⁴ 35 P.S. § 780-113(a)(31)(i).

⁵ 35 P.S. § 780-113(a)(32).

⁶ 18 Pa. C.S.A. § 6105(a)(1).

⁷ 18 Pa. C.S.A. § 4304(a)(1).

controlled buy would not establish probable cause because of staleness, (3) there is nothing in the affidavit to corroborate the confidential informer 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 crack cocaine from the controlled buys was never field tested.

Background

At the hearing, parties agreed to rely upon solely argument and the contents of the search warrant without testimony. On March 21, 2018, Trooper Tyler Morse (Morse) met with a State Police Confidential Informant (CI) to conduct a controlled buy with Defendant. Search Warrant 4/4/18, at 3. CI informed Morse that he/she knew Defendant by his street name "Bop" and that he utilizes a particular cellphone number. *Id.* at 3-4. CI indicated that Defendant's residence was 638 Market St. *Id.* at 4. Morse had CI call Defendant for a "bean," a gram of crack cocaine, which was agreed to for \$100. *Id.*

That afternoon, CI was searched for contraband, after none was located he/she was given \$100 in prerecorded bills, and Trooper Edward Dammer (Dammer) witnessed CI enter the residence's fenced in back yard and then a door on the east side of the building. *Id.* Dammer observed CI leave the same way and walk back down the street to Morse's vehicle approximately two minutes later. *Id.* CI gave Morse a plastic bag containing suspected crack cocaine and informed Morse that he/she placed the \$100 on Defendant's countertop, Defendant came downstairs and gave CI the suspected crack cocaine, and took the money off of the countertop. *Id.*

On March 23, 2018, Morse again met with CI to conduct another controlled buy of crack cocaine. CI called Defendant at the same number as previously, asked if he/she could come by to purchase a “bean,” to which Defendant said he/she could. *Id.* at 4-5. CI was again searched, no contraband was found, and then was given \$100 in prerecorded bills. *Id.* at 5. Dammer again witnessed CI enter through the fenced in backyard and exit the same way approximately two minutes later. *Id.* CI relinquished a plastic bag of suspected crack cocaine to Morse. *Id.* CI again told Morse he/she put the \$100 on the countertop, Defendant handed CI the suspected crack cocaine, and then he/she left the residence. *Id.*

An anticipatory search warrant was then drafted with the stated anticipatory event being another controlled buy of suspected crack cocaine by CI on April 4, 2018. *Id.* A case note was added to show the crack cocaine from the previous controlled buys was not NIK tested (field tested) due to the potential presence of Fentanyl, but it was sent to a lab so it could be analyzed safely. *Id.* at 6. On April 4, 2018, CI contacted Defendant at the same number for the purchase of crack cocaine for the agreed upon price of \$100. Affidavit of Probable Cause 4/4/18, at 11-12. CI was searched to verify he/she had no contraband prior to entering the residence at 638 Market St. *Id.* at 12. CI, upon leaving the residence, gave Morse one bag of suspected crack cocaine. *Id.* CI stated after entering through the fenced in backyard, he/she saw the door was open. *Id.* CI entered and placed the \$100 on the countertop and Defendant handed him/her a plastic bag of suspected crack cocaine. *Id.* CI stated a young male child and young female child were within the residence at the time. *Id.* Following the controlled buy, the anticipatory search warrant was conducted. *Id.* The search yielded the prerecorded currency from Defendant’s pants pocket, a Savage .22 Hornet Rifle, a Remington 11-87 12-gauge shotgun, ammunition for both firearms, four cellphones, approximately one

gram of suspected crack cocaine, approximately two grams of suspected marijuana, eighteen strips of suboxone, and two metal spoons with residue. *Id.* One of the troopers called the cellphone number that was provided by CI and one of the cellphone began ringing. *Id.* Additionally, a young female child approximately two years old and a young male child only several months old were present in the residence during the search warrant's execution.

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 (Pa. 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 (Pa. 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* 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 by the courts. *See Coleman*, 830 A.2d 554; *Commonwealth v. Aichele*, 2016 WL 1458310 (Pa. Super. 2016) (unreported); *Commonwealth v. Katona*, 191 A.3d 8 (Pa. Super. 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 crack cocaine was not field tested, the requisite probable cause was not established to execute a search warrant. This Court disagrees. As discussed by an earlier Opinion and Order of this Court:

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 [the officer]’s training and experience, the circumstantial evidence surrounding the transactions, and [the confidential informant]’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 [narcotic] is such beyond a reasonable doubt until trial.

Commonwealth v. Drummond, CP-41-CR-681-2018, at 6 (Oct. 3, 2018).

The Court maintains this same rationale and holding in the present case and finds probable cause established by a totality of the circumstance is all that is required to establish the crack cocaine was in fact crack cocaine.

Defendant alleges that the search warrant did not establish a fair probability that 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 March 21, 2018, CI gave Morse a number and address for Defendant. Morse met with CI to arrange the purchase of crack cocaine and gave him/her \$100 in prerecorded money to make the buy on two separate occasions. CI, each time, would call Defendant asking for a “bean,” a gram of crack cocaine, enter the residence through the fenced in backyard, and leave shortly thereafter with suspected crack cocaine. CI gave Morse the plastic bag, each time, containing what Morse through his experience and training believed was consistent with crack cocaine. The suspected crack cocaine was then preserved and entered into evidence. Morse based on these two consistent previous controlled buys applied for a search warrant anticipating that on April 4, 2018, CI would assist him in procuring crack cocaine in the same manner from the same residence.

Unlike *Wallace* and similar to *Coleman* here there are two previous controlled buys 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, Dammer witnessed CI entering and leaving the residence the same way on both buys. The “totality of the circumstances” shows that based on CI and Morse’s beliefs and the surrounding circumstances the substance can be believed to crack 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. The anticipatory event was constructed to occur identically to the last two buys, which both yielded the same results. Therefore, the Court finds for the Commonwealth and against Defendant’s first contention.

Defendant alleges the time span in between the original controlled buys 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 twelve to fourteen 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 4, 2018, were not field tested, there was no way for the police to corroborate that the informer provided correct and reliable information regarding the substances purchased on those dates.” Defendant’s Motion to Suppress Evidence 6/15/18,

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 crack cocaine. Officers were also present for all buys and the buys all occurred within the same residence, using the same cellphone number, and all yielding results, 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 4/4/18, 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 crack cocaine is in fact crack cocaine, and the search warrant was not overbroad in its construction or execution. Therefore, Defendant’s Motion to Suppress Evidence is denied.

ORDER

AND NOW, this _____ day of November, 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