

COMMONWEALTH OF PA : No. CP-41-CR-0000751-2018
:
vs. :
:
DOMINEEK CARTER : Opinion and Order re:
: Defendant's Omnibus Pretrial Motion

OPINION AND ORDER

Defendant is charged by Information filed on May 31, 2018 with delivery of heroin, deliveries of cocaine and related charges. Defendant filed an Omnibus Pretrial Motion on December 5, 2018. The hearing was eventually held on March 6, 2019. Defendant's Omnibus Pretrial Motion consists of a motion to suppress, a motion for disclosure of informant, a motion to disclose promises, a motion for Rule 404 (b) disclosure, a motion to compel discovery, a petition for writ of habeas corpus and a motion to reserve right. No testimony was presented but the parties advanced legal arguments regarding the motions. Testimony, if determined to be required, shall be taken at a hearing scheduled for April 25, 2019.

With respect to Defendant's motion to suppress, defendant argues first, that the affidavit failed to establish probable cause to believe that evidence of drugs and/or drug dealing would be found in the residence.

Both the Fourth Amendment to the United States Constitution as well as Article I, Section 8 of the Pennsylvania Constitution protect citizens from unreasonable searches and seizures. *Commonwealth v. Glass*, 200 A.3d 477, 482-483 (Pa. Super. 2018). The Fourth Amendment has a strong preference for searches conducted pursuant to warrants. *Commonwealth v. Leed*, 186 A.3d 405, 413 (Pa. 2018). Search warrants may only issue upon probable cause and the issuing authority may not consider any evidence outside of the

affidavits. Pa. R. Crim. P. 203 (B). The affidavit of probable cause must provide the magistrate with a substantial basis for determining the existence of probable cause. *Leed*, supra (quoting *Illinois v. Gates*, 462 U.S. 213, 239 (1983)).

Accordingly, in deciding Defendant's first claim, the court will, as the Commonwealth argues, restrict its analysis to the four corners of the affidavit. At the April 25, 2019 hearing, the Commonwealth shall submit the affidavit as well as the search warrant as an exhibit, and the court will hear argument on the probable cause issue.

"Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted." *Leed*, supra (quoting *Commonwealth v. Johnson*, 42 A.3d 1017, 1031 (Pa. 2012)). In other words, the "task of the issuing magistrate is simply to 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." *Commonwealth v. Clark*, 28 A.3d 1284, 1288 (Pa. 2011)(quoting *Commonwealth v. Gray*, 503 A.2d 921, 925 (Pa. 1985)). The Commonwealth bears the burden of establishing that probable cause existed by a preponderance of the evidence. *Leed*, supra.

Secondly, Defendant claims that the affidavit contained hearsay from the informant that was uncorroborated. As a part of this argument, Defendant also claims that the affidavit contained material omissions of relevant information regarding the veracity and reliability of the informant. Specifically, the defendant challenges omissions of fact in the affidavit.

A defendant has a right to challenge omissions in the affidavit of probable cause. *Commonwealth v. James*, 69 A.3d 180, 189 (Pa. 2013); *Commonwealth v. Taylor*, 850 A.2d 684 (Pa. Super. 2004). Challenges of this nature must be resolved with evidence beyond the affidavit's four corners. *James, Id.* The task of the court is to determine whether the omitted facts need to be included in determining probable cause. *James, Id.*

Where omissions are the basis for a challenge to an affidavit of probable cause, the following test is applied: “(1) whether the officer withheld a highly relevant fact within his knowledge, where any reasonable person would have known that this was the kind of thing the judge would wish to know; and (2) whether the affidavit would have provided probable cause if it would have contained a disclosure of the omitted information.” *Taylor*, 850 A.2d at 689 (Pa. Super. 2004)(internal quotation marks omitted).

The only method to effectively probe the omission of relevant facts is to allow a defendant meaningful cross-examination of the police officer affiant at the suppression hearing. *Commonwealth v. Hall*, 302 A.2d 342, 345-346 (Pa. 1973). “The burden is on the Commonwealth to establish the validity of the search warrant and the burden is not carried by merely introducing the search warrant and affidavit with no supporting testimony because then the only way for the defendant to challenge the veracity of the information is to call witnesses himself and this effectively shifts onto him the burden of disproving the veracity of the information, an almost impossible burden.” *Commonwealth v. Patrick Ryan*, 442 A.2d 739, 743 (Pa. Super. 1982)(quoting *Commonwealth v. William Ryan*, 407 A.2d 1345, 1348 (Pa. Super. 1979)).

However and on the other hand, a defendant's attack on the affidavit must be more than conclusory and must be supported by more than the mere desire to cross-examine.

Franks v. Delaware, 438 U. S. 154, 171 (1978). In essence the defendant must allege the omissions accompanied by an offer of proof. *James*, 69 A.3d at 188 (citing *Franks, id.*).

The defendant has failed to make any offer of proof other than arguing that he is entitled to test the veracity, reliability and basis of knowledge. His conclusion is without merit. Defendant may not engage in a fishing expedition simply for the purpose of cross-examining the officer. Defendant's motion argues that the affidavit used to support the search warrant contained material omissions of relevant information regarding the veracity and reliability of the informant. In order to obtain a hearing in this matter, the defendant must provide more and hasn't.

Accordingly, Defendant's request for a hearing in connection with his second claim shall be DENIED.

Defendant next asserts that he is entitled to "the identity" of the Confidential Informant (CI) who was utilized in this case. The incidents leading to the charges allegedly occurred on December 14, 2017, March 1, 2018, March 6, 2018 and March 12, 2018. The Commonwealth alleges that the CI successfully purchased from Defendant, heroin on December 14, 2017, crack cocaine on both March 1, 2018 and March 6, 2018, and cocaine on March 12, 2018.

Defendant argues that the CI is an eyewitness to the transactions, that the CI's information was utilized to establish probable cause in the search warrant and that the identity must be disclosed because it "has meaning and value to the defense."

In refusing to provide the identity of the CI, the Commonwealth asserts that it will do so closer to the trial, likely at the Call of the List, but "not right away." While the Commonwealth concedes that there are no specific safety concerns with respect to this

Defendant and the CI, the Commonwealth argues that it always has safety concerns for CI's in drug transaction cases.

Unfortunately, neither party presented any evidence in support of their respective arguments. Had evidence been presented, the court would have been in a much better position to weigh the respective interests and balance the required factors. In the vacuum of no evidence, the court must however agree with the Commonwealth.

Contrary to Defendant's claim, he is not entitled to a presumption of disclosure. No law whatsoever supports such a presumption. In fact, the Commonwealth enjoys a qualified privilege to withhold the identity of a confidential source. *Commonwealth v. Marsh*, 997 A.2d 318, 321 (Pa. 2010). In order to overcome this privilege and obtain disclosure, defendant must first establish that the identity is material to the preparation of the defense and that the request is reasonable. *Id.* If defendant shows that the identification is material to the defense, the trial court must exercise its discretion to determine whether the information should be revealed by balancing relevant factors. *Id.*

The determination depends on "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informant's testimony and other relevant factors" such as the safety of the Confidential Informant. *Id.* (quoting *Commonwealth v. Carter*, 233 A.2d 284, 287 (1967)). Defendant has made no offer as to how exactly the informant's identification or testimony could possibly be helpful to him.

The court will not guess, nor will it create a record for either party. The court cannot fully or logically evaluate the factors necessary to arrive at the proper balance under the

law. Accordingly, Defendant's motion fails and the Commonwealth's privilege will be maintained.

With respect to Defendant's motion to disclose leniency or preferential treatment, said motion will be granted. The specifics with respect to the motion shall be set forth in the Order below.

With respect to Defendant's motion for 404 (b) notice, such will be GRANTED with the specifics set forth below.

With respect to Defendant's motion to compel, any and all surveillance videos and the photo lineup shall be provided to defense counsel.

Defendant's request with respect to expert witnesses including possession with intent to deliver is GRANTED. The disclosure and requested information shall be provided no later than thirty (30) days prior to trial.

With respect to Defendant's petition for writ of habeas corpus, Defendant claims that the evidence is insufficient as a matter of law to establish a prima facie case. Based on the averments of Defendant's petition, however, the court will DENY said petition.

The information set forth in the affidavit attached to the criminal complaint clearly establishes a prima facie case against Defendant.

The court will grant Defendant's motion to reserve right within the limits set forth below.

ORDER

AND NOW, this ___ day of March 2019, following a hearing and argument, the court directs as follows:

- (1) A further hearing in this matter is scheduled for **April 25, 2019 at 9:00 a.m. in Courtroom No.4** of the Lycoming County Courthouse.
- (2) At that hearing, the Commonwealth shall introduce the affidavit of probable cause and the search warrant. The court will hear argument on whether, within its four corners, it establishes probable cause.
- (3) The court will not take any testimony in connection with Defendant's motion to suppress based on uncorroborated or material omissions. The objection is improperly vague and cannot be addressed. Accordingly, said motion to suppress based on that ground is **DENIED**.
- (4) The court **DENIES** the defendant's motion for disclosure of informant although the informant's name shall be provided to the defendant no later than the date of the call of the list.
- (5) Defendant's motion to disclose is **GRANTED**. But for the name and other identifying information of the informant, Defendant shall be provided with the names and addresses of all persons who have been offered immunity, favorable consideration, leniency or favorable treatment, express or tacit in this case. As well, the Commonwealth shall provide all evidence in its

possession or available to them of any prior arrests or convictions of all persons the Commonwealth intends to call as a witness at trial.

- (6) The court **GRANTS** Defendant's motion for a specific written 404 (b) notice. No later than thirty (30) days from today's date, the Commonwealth shall provide to Defendant a specific 404 (b) written notice setting forth the general nature of any evidence of a crime, wrong or other act that the Commonwealth intends to introduce at trial with respect to the defendant.
- (7) The court **GRANTS** in part Defendant's motion to compel discovery. The Commonwealth shall provide to Defendant no later than thirty (30) days from today's date copies of all video surveillance, the photo lineup and the specific information requested with respect to any and all expert witnesses including, but not limited to, any possession with intent to deliver experts.
- (8) Defendant's petition for writ of habeas corpus is **DENIED**.
- (9) Defendant's motion to reserve right is **GRANTED**, but only to the extent that any motion is based on information or discovery provided by the Commonwealth after March 6, 2019.

By The Court,

Marc F. Lovecchio, Judge

cc: Edward J. Rymsza, Esquire
Nicole Ippolito, Esquire, ADA
Gary Weber, Lycoming Reporter
Work File