

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

v.

POSTELL RAHEEM GOGGANS,  
Defendant

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:  
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No. 549 CR 2008

Cynthia A. Dyrda-Hatton, Esquire  
Assistant District Attorney

Counsel for the Commonwealth

Brian J. Collins, Esquire

Counsel for the Defendant

Criminal Law - Search Warrant - Finding of Probable Cause -  
Staleness - Reliability of Confidential Source -  
Custodial Statements - Suppression - Redacting  
Tainted Information From Affidavit of Probable  
Cause

1. A magistrate's finding of probable cause to support the issuance of a search warrant is to be afforded deference by the reviewing court. In making his determination, the function of the magistrate is simply to make a practical, common-sense decision whether the information contained in the affidavit sets forth a fair probability that contraband or evidence of a crime will be found in a particular location.
2. Because probable cause must exist at the time a search warrant is issued, "stale" information will not support a finding of present probable cause. Whether information is stale takes into account not simply the passage of time, but also the nature of the crime and the type of evidence involved.
3. Where an affidavit of probable cause recites a history of continuing criminal activity for drug dealing, the time delay between the most recent reported incident for possessing an illegal controlled substance and the issuance of a warrant is less likely to support a finding of staleness as compared to an affidavit evidencing a single isolated incident of drug usage.
4. In determining probable cause to support the issuance of a search warrant, the veracity and basis of knowledge of persons supplying hearsay information must be examined. An

informant's tips may support a finding of probable cause where the police independently corroborate specific facts demonstrating "inside information" provided by an anonymous source, where the informant has provided accurate information of criminal activity in the past, or where the informant himself participated in the criminal activity.

5. Absent being advised of his *Miranda* rights, statements given by an accused while in custody are presumptively involuntary and must be suppressed. This extends to custodial statements given in response to police conduct which is reasonably likely to elicit incriminating information albeit not involving direct questioning.
6. A search warrant issued on the basis of a probable cause affidavit which contains tainted information - here, an incriminating custodial statement made without benefit of *Miranda* warning - is not invalid where, if the illegally obtained information is redacted, the remaining, untainted information supplies the necessary probable cause to validate the search.

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POSTELL RAHEEM GOGGANS,	:	
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Assistant District Attorney		Counsel for the Commonwealth
Brian J. Collins, Esquire		Counsel for the Defendant

MEMORANDUM OPINION

Nanovic, P.J. - December 30, 2010

Before us is Defendant Postell Raheem Goggans' Omnibus Pretrial Motion. In this Motion, Defendant seeks to suppress

approximately 66 grams of "crack" cocaine found in the engine compartment of the vehicle he was operating at the time of his arrest. This vehicle was searched pursuant to a warrant which the Defendant claims was improperly issued because (1) it relied upon information from a confidential informant which was stale; (2) it relied upon information from an unidentified informant with no history of reliability; and (3) it relied upon incriminating information taken from the Defendant in response to an unlawful custodial interrogation. For the following reasons, we deny Defendant's motion to suppress physical evidence and grant his motion to suppress the statement made while Defendant was in custody.

#### PROCEDURAL AND FACTUAL BACKGROUND

For more than a year prior to August 1, 2008, the date on which Defendant was arrested on the present charges,<sup>1</sup> Agents Kirk F. Schwartz and Aaron T. Laurito of the Pennsylvania Office of Attorney General, Bureau of Narcotics Investigation and Drug Control (the "Bureau"), have been investigating cocaine trafficking in Carbon County. As part of this investigation, Agents Schwartz and Laurito learned from a trusted confidential

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<sup>1</sup> Defendant has been charged with possession of a controlled substance, 35 P.S. § 780-113(a)(16), a misdemeanor; possession of a controlled substance with intent to deliver, 35 P.S. § 780-113(a)(30), a felony; and conspiracy to possess with intent to deliver, 18 Pa.C.S.A. § 903 (a)(1), a felony.

informant that a black male known as Raheem Mills, a/k/a Marcus,<sup>2</sup> transports and sells cocaine in Carbon County. The reliability of this informant is not in dispute in these proceedings.<sup>3</sup>

The confidential informant described Defendant as a black male, approximately twenty-five years-of-age, of stocky build, and balding. The confidential informant further advised Agents Schwartz and Laurito that Defendant travels to the Lehigh area several times a month to sell cocaine, that he drives both a white-colored Mercedes Benz and a red-colored Jaguar, and that he places the cocaine inside of a black-colored sock kept under the hood of his vehicle while traveling. The confidential informant also stated that Defendant uses an apartment located on East Alley in Lehigh, Carbon County, and the residence of Travis Solomon located on Main Road in Weissport, Carbon County, to sell cocaine. Both locations were kept under surveillance by the Agents who observed a white and grey colored Mercedes parked in a public parking lot adjacent to

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<sup>2</sup> Agent Schwartz testified at the omnibus hearing that Defendant has many aliases.

<sup>3</sup> The affidavit in support of the search warrant avers that this informant has worked with the Bureau for eight years and that the information he has provided has led to the arrest of at least five subjects, all of whom were convicted or pled guilty to narcotics-related offenses, as well as the seizure of substantial quantities of controlled substance, firearms, United States currency, and vehicles. As recited in the affidavit in support of the search warrant, the confidential informant has previously made purchases of cocaine, marijuana, and other controlled substances, with Agents Schwartz and Laurito, as well as other law enforcement officers and agents, and the information provided by the informant in this investigation has been independently verified through other investigative techniques, including surveillance and controlled purchases of cocaine.

the Main Road address on numerous occasions. In addition, the confidential informant informed the Agents that Defendant kept numerous Pennsylvania and New Jersey vehicle registration plates in the trunk of both the Jaguar and Mercedes.

During the four to six week period preceding August 1, 2008, the confidential informant reported that he had observed Defendant with substantial quantities of cocaine on numerous occasions. On June 16, 2008, the Agents arranged for the confidential informant to make a controlled purchase of cocaine from Defendant at the East Alley apartment. This purchase was monitored by the Agents who observed Defendant's red Jaguar parked in the rear parking lot of the property. The Jaguar was noted to have Pennsylvania plates with license number GXJ-7955.

On August 1, 2008, Agent Schwartz was with Jeffrey Aster, another agent of the Bureau, when Agent Aster received information from a confidential source<sup>4</sup> that a person by the name

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<sup>4</sup> At the time of the suppression hearing, this confidential source was identified as Travis Solomon, the occupant of the Main Road property in Weissport previously identified by the confidential informant in conjunction with Defendant's sales of cocaine in Carbon County. Near midnight on July 31, 2008, Solomon came in person to the Franklin Township Police Station where he reported to the on-duty officer, Officer Lorah, that Defendant would be coming to his home early the next morning with a large quantity of drugs and possibly weapons. Solomon was scared and told Officer Lorah that Defendant had been using his home from which to deal drugs. At the suppression hearing, Officer Lorah testified that although he knew Solomon beforehand, Solomon had never previously provided the police with information on Defendant.

After hearing what Solomon had to say, Officer Lorah contacted Agent Aster, who, in turn, instructed Officer Lorah to begin surveillance at the Main Road address and to be on the lookout for a white Mercedes. At this point Officer Lorah also had Solomon speak directly with Agent Aster about what he was told.

of Marcus would be arriving in the Lehigh area at approximately 6:00 A.M. operating a white and gray Mercedes and that he would be in possession of a large amount of cocaine and possibly an assault weapon. That same day, Agents Schwartz and Aster were again contacted by the confidential source who told them that Defendant had arrived in the Lehigh area at approximately 5:50 A.M. operating a white and grey Mercedes, that he was accompanied by his cousin "T" and two unknown black females, and that Defendant was in possession of a large quantity of powder and crack cocaine. The confidential source was uncertain whether Defendant possessed an assault weapon. The confidential source further told the Agents that for several months Defendant had been using a house on Main Road in Weissport from which to sell cocaine and that the Defendant secretes the cocaine he transports in a black sock under the hood of his vehicle while traveling. The Agents drove to this location where they observed the white and grey Mercedes parked

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Early on August 1, 2008, Agents Aster and Schwartz met and interviewed Solomon. Prior to this meeting, Officer Lorah again contacted Agent Aster and reported that the white Mercedes had arrived at approximately 6:00 A.M. When Solomon met with the Agents, he identified the Mercedes as Defendant's car, told the Agents that Defendant had a substantial amount of cocaine which he kept under the hood in a black sock while traveling, and related that Defendant had arrived with his cousin and two females.

Solomon's identity as the confidential source is not disclosed in the affidavit, nor is much of the information stated in this footnote. To the extent such information is not within the four corners of the affidavit it may not be considered by us in determining whether the warrant was supported by probable cause. Commonwealth v. James, 12 A.3d 388, 392 (Pa.Super. 2010); see also Pa.R.Crim.P. 203(B), (D). Nevertheless, the affidavit is clear that the confidential source is a different person from the confidential informant who is separately referred to in the affidavit.

unattended in a public parking lot adjacent to the property. The Mercedes carried Pennsylvania license plates with Registration Number GXJ-7955.

While at this location the Agents again received information from the confidential source that Defendant would be leaving the Main Road address within minutes and would be taking the cocaine which he had brought with him. Within minutes of receiving this information, the Agents observed Defendant, a second unidentified black male, and two unidentified black females exit the Main Road address and enter the Mercedes. After a short pause, Defendant popped open the hood of the vehicle, exited the vehicle, and then removed an item from his front pants pocket which he placed in an unknown location in the engine compartment of the vehicle. At this point, after Defendant was back in the car, Defendant and his three passengers were arrested. A search of Defendant revealed no cocaine on his person.

Defendant was taken to the Franklin Township Police Station. While there, and before he was read his *Miranda* rights, in response to a comment from Agent Schwartz that he believed Defendant had placed cocaine under the hood of the Mercedes, Defendant stated, "That shit ain't mine. That belongs to Trav." This exchange between Agent Schwartz and Defendant was contained in the affidavit used to obtain the search

warrant, as was the other information contained in the forgoing text. It is this statement which Defendant seeks to suppress. As previously indicated, a subsequent search of the Mercedes produced the 66 grams of cocaine which Defendant also seeks to suppress.

#### DISCUSSION

"Where a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible." Commonwealth v. Ruey, 892 A.2d 802, 807 (Pa. 2006); see also Pa.R.Crim.P. 581(h). This burden is not met by simply offering the search warrant and affidavit at a suppression hearing with no supporting testimony. Commonwealth v. Ryan, 407 A.2d 1345, 1348 (Pa.Super. 1979). Instead, the Commonwealth must present evidence which the defendant is entitled to cross-examine. Id.

In Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the United States Supreme Court defined the standards for issuing and reviewing a search warrant. Therein the Court stated:

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. And the duty of a reviewing court is simply to ensure that the

magistrate had a "substantial basis for ...  
conclud[ing]" that probable cause existed.

Id. 238-39, 103 S.Ct. 2317 (citation omitted), quoted with approval in Commonwealth v. Housman, 986 A.2d 822, 843 (Pa. 2009). Furthermore, in its review, the reviewing court is to afford deference to the magistrate's finding of probable cause. Id.

#### Staleness

Because probable cause in support of a search warrant must exist at the time the warrant is issued, "stale" information will not support a finding of present probable cause. Commonwealth v. Nycz, 418 A.2d 418, 420 (Pa.Super. 1980); see also Sgro v. United States, 287 U.S. 206, 210 (1932). Defendant claims that the information provided by the confidential informant is stale and will not support a finding of probable cause. Specifically, Defendant argues that the controlled purchase from Defendant occurred almost six weeks prior to Defendant's arrest and that no specific dates have been provided for when the confidential informant claims to have witnessed Defendant's possession of cocaine during the four to six week period preceding his arrest. Cf. Commonwealth v. Novak, 335 A.2d 773, 774 (Pa.Super. 1975) ("Generally when the courts are forced to make an assumption as to when transactions occurred 'within' a given period, for purposes of determining

probable cause, it must be assumed that the transactions took place in the most remote part of the given period.").

Whether information is stale is not simply a question of the passage of time. The nature of the crime and the type of evidence must be examined. United States v. Harvey, 2 F.3d 1318, 1322 (1993). For instance, when a search warrant is grounded on information concerning the possession of child pornography obtained online through the use of a computer, the information is less likely to become stale since not only are pedophiles known to retain child pornography for long periods of time, but also, even if such information had been deleted or not even downloaded by the defendant, it can be retrieved from a defendant's computer by any trained forensic examiner. Commonwealth v. Gomolekoff, 910 A.2d 710, 714 (Pa.Super. 2006).

With respect to the sale or use of narcotics, ordinarily a delay of thirty days is considered too long. See Commonwealth v. Novak, 335 A.2d at 775. Indeed, "[i]f the issuing officer is presented with evidence of criminal activity at some prior time, this will not support a finding of probable cause as of the date the warrant issues, unless it is also shown that the criminal activity continued up to or about that time." Nycz, 418 A.2d at 420; Commonwealth v. Shaw, 281 A.2d 897, 899 (Pa. 1971).

In Commonwealth v. Montavo, the Pennsylvania Superior Court further stated:

While the information obtained from the confidential informants related to events occurring more than a month before the search warrant was requested, as the information indicates continuous drug activity, this passage of time becomes less significant. See Commonwealth v. Ryan, 300 Pa.Super. 156, 170, 446 A.2d 277, 284 (1982) ("Properly recited facts indicating activity of a protracted and continuous nature make the passage of time less significant") (citation omitted).

653 A.2d 700, 703 (Pa.Super. 1995); see also Commonwealth v. Klinedinst, 589 A.2d 1119, 1122 (Pa.Super. 1991) ("a showing that the criminal activity is likely to have continued up to the time of the issuance of the warrant will render otherwise stale information viable."), *appeal denied*, 600 A.2d 534 (Pa. 1991).

Here, the affidavit in support of the warrant cited that Defendant had been traveling to the Lehigh area several times per month over a one-year period for the sole purpose of selling cocaine. Defendant did not live in Carbon County; he came here solely to deal drugs. In addition to the controlled purchase which occurred approximately six weeks prior to execution of the warrant, the confidential informant reported having observed Defendant with substantial quantities of cocaine on numerous occasions during the four to six week period immediately preceding the issuance of the warrant. That Defendant was still dealing drugs was also confirmed by the

information received from the confidential source which itself was sufficient to overcome a staleness challenge. When considered as a whole, a fair reading of the affidavit supports a finding of continuing criminal conduct over a sustained period of time up until and including the time when the warrant issued. Commonwealth v. Housman, 986 A.2d at 843 (noting that an affidavit in support of a search warrant "must be viewed in a common sense, non-technical, ungrudging and positive manner"). As such, all incidents of Defendant's drug trafficking disclosed in the affidavit are relevant to a finding of probable cause. See Nycz, 418 A.2d at 423-24.

#### Reliability of Confidential Source

Defendant also contends that the affidavit submitted to the magistrate failed to establish that the confidential source was reliable and that his information was credible. Consequently, Defendant contends that the information in the affidavit attributable to the confidential source was not sufficient to establish probable cause for issuance of a search warrant.

A determination of probable cause based upon information received from a confidential informant depends upon the informant's reliability and basis of knowledge viewed in a common sense, non-technical manner. An informant's tip may constitute probable cause where police independently corroborate the tip, or where the informant has provided accurate

information of criminal activity in the past, or where the informant himself participated in the criminal activity.

Commonwealth v. Luv, 735 A.2d 87, 90 (Pa. 1999).

"Unlike information obtained from a known informant whose reputation can be assessed and who can be held responsible if his allegations prove to be fabricated, information from an anonymous source can only be considered reliable if it provides specific facts, which are sufficiently corroborated by the officer." Commonwealth v. Zhahir, 751 A.2d 1153, 1165 (Pa. 2000) (Zappala, J., dissenting). The nature of the corroboration required was further elaborated upon in In Interest of O.A. as follows:

Since the time of Draper and Gates, the Court has expanded upon what it intended by "corroboration of detailed and accurate predictions" first introduced in Gates. When police are relying on an informant's tip, it is important that the tip provide information that demonstrates "inside information," a special familiarity with the defendant's affairs. If the tip provides inside information, then police corroboration of this inside information can impart additional reliability to the tip. If the facts that are supplied by the tip itself are no more than those easily obtained, then the fact that the police corroborated them is of no moment. It is only where the facts provide inside information, which represent a special familiarity with a defendant's affairs, that police corroboration of the information imparts indicia of reliability to the tip to support a finding of probable cause. Thus, police corroboration of an informant's tip enhances the indicia of reliability and thereby strengthens the determination that the facts and

circumstances surrounding the tip warrant a finding of probable cause.

717 A.2d 490, 498 (Pa.1998) (plurality opinion) (citations omitted); see also Commonwealth v. Whitters, 805 A.2d 602, 606 (Pa.Super. 2002), *appeal denied*, 814 A.2d 677 (Pa. 2003).

In the instant case, the confidential source's statements were corroborated in several respects. First, the source told the Agents in advance that Defendant would be arriving in the Lehigh area on August 1, 2008, operating a white and grey Mercedes with a large amount of cocaine and later, on the same date, contacted the Agents after Defendant arrived and told them where the Defendant was, that he was accompanied by his cousin and two unknown black females, that he was in possession of a large quantity of cocaine, and that when he traveled, he placed the cocaine in a black sock under the hood of his vehicle. The Agents went to the designated location and observed a white and grey Mercedes parked unattended in a public parking lot adjacent to the given address. While at this location, the confidential source again contacted the Agents and told them that within minutes the Defendant would be leaving and would be in possession of the cocaine he brought with him to sell. As stated, within minutes of receiving this information, the Agents observed Defendant with an unidentified black male and two unidentified black females exit the property and, after

opening the hood of the Mercedes, place an item from his pants pocket into an unknown location in the engine compartment of the vehicle.

The information the Agents received from the confidential source was not only predictive and verified, it was so recent it could only come from someone with a special knowledge and familiarity with Defendant's affairs. The information was further corroborated, or at least reinforced, in that the information provided coincided strongly with that which the Agents had received from the confidential informant, a source whose reliability has not been questioned, and the license number which the Agents observed on the Mercedes on August 1, 2008, was the same license number which had been observed on the red-colored Jaguar during the week of June 15, 2008.

#### Statements

Statements made during a custodial interrogation are presumptively involuntary, unless the accused is advised of his *Miranda* rights prior to the making of the statement. Commonwealth v. DiStefano, 782 A.2d 574, 579 (Pa.Super. 2001), *appeal denied*, 806 A.2d 858 (Pa. 2002). A custodial interrogation occurs when "questioning is initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [his] freedom of action in any

significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966). "Interrogation occurs when the police know that their words or actions are reasonably likely to elicit an incriminating response from the suspect." Commonwealth v. Ingram, 814 A.2d 264, 271 (Pa.Super. 2002).

Here, there is no dispute that Defendant was in custody and had not been advised of his *Miranda* rights prior to the statement which he now seeks to suppress. Further, following his arrest, Defendant made clear to Agent Aster that he did not want to give a statement. Instead, whether intentionally or knowingly, the police obtained by indirection what they could not do directly: the solicitation of information from Defendant. Such conduct is prohibited and the statement must be suppressed. Rhode Island v. Innis, 446 U.S. 291 (1980).

Although this statement was included in the affidavit offered in support of the search warrant, it was not critical to a finding of probable cause. "In deciding whether a warrant issued in part upon information obtained through exploitation of illegal police conduct is valid, [the reviewing court] must consider whether, absent the information obtained through the illegal activity, probable cause existed to issue the warrant." Commonwealth v. Shaw, 383 A.2d 496, 502 (Pa. 1978). When Defendant's statement is so redacted from the affidavit, the remaining, untainted information supplies the necessary probable

cause to validate the search. Accordingly, since this statement can be severed from the affidavit without destroying the validity of the issuance of the search warrant, the search warrant is independently valid notwithstanding the inclusion of the statement. Commonwealth v. West, 937 A.2d 516, 529-30 (Pa.Super. 2007), *appeal denied*, 947 A.2d 737 (Pa. 2008); Commonwealth v. Hernandez, 935 A.2d 1275, 1283-84 (Pa. 2007).

#### CONCLUSION

The test used to determine if probable cause exists for issuing a warrant is whether under the totality of the circumstances "there is a fair probability that contraband or evidence of a crime will be found at a particular place." Commonwealth v. Glass, 754 A.2d 655, 661 (Pa. 2000). Similarly, probable cause to arrest exists when "the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." Commonwealth v. Williams, 2 A.3d 611, 616 (Pa.Super. 2010) (en banc). Absent some statutory provision to the contrary, a warrantless arrest must be supported by probable cause to believe that "(1) a felony has been committed; and (2) the person to be arrested is the felon."

Id. at 624 (Bender, J., dissenting). Because probable cause existed both to arrest Defendant and to support the issuance of the search warrant, Defendant's contention that the issuance of this warrant was unlawful is without merit.

Moreover, there is no basis for Defendant to contend that his car was unconstitutionally seized without a warrant when it was impounded by the police following his arrest pending the issuance of a search warrant. "It is reasonable . . . for constitutional purposes for police to seize and hold a car until a search warrant can be obtained, where the seizure occurs after the user or owner has been placed into custody, where the vehicle is located on public property, and where there exists probable cause to believe that evidence of the commission of a crime will be obtained from the vehicle." Commonwealth v. Holzer, 389 A.2d 101, 106 (Pa. 1978). Such a detention of the vehicle is permissible because of the mobile nature of vehicles and the possibility that a co-conspirator or acquaintance could move the vehicle and thus the evidence be lost or tampered with. See id. at 107. Although an arresting officer may secure such a vehicle, no search should be made until a warrant is obtained. See id. This is exactly what was occurred here. Cf. Commonwealth v. Williams, 2 A.3d at 618 (discussing different outcome when vehicle seized from private property).

In accordance with the foregoing, Defendant's motion to suppress the physical evidence seized from the search of his vehicle will be denied. His motion to suppress the statement given while in police custody will be granted.

BY THE COURT:

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P.J.

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ORDER OF COURT

AND NOW, this 30th day of December, 2010, upon consideration of the Defendant's Omnibus Pretrial Motion and after hearing, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED as follows:

1. Defendant's motion to suppress the physical evidence is hereby DENIED and DISMISSED.

2. Defendant's motion to suppress his statement is hereby GRANTED.

BY THE COURT:

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P.J.

