

STATE OF MAINE  
YORK, ss

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SUPERIOR COURT  
CRIMINAL ACTION  
Docket No. CR-12-2049

STATE OF MAINE

COURT REPORTERS CLERKS OFFICE

v.

ORDER ON PENDING MOTIONS

MARK W. STRONG,

Defendant

Before the court are the defendant's motion to dismiss, request for a Franks hearing, and motion to suppress. For the following reasons, the motions and the request are denied.

MOTION TO DISMISS

The defendant seeks a dismissal of all charges against the defendant "based on the State's failure to comply with its discovery obligations." (Def.'s Mot. at 1.) At the hearing on the motion to dismiss, the defendant argued the following: (1) a hard drive seized from the defendant has not been provided; (2) the Burpee report was provided after the discovery deadline; (3) because the alleged patrons of defendant Wright are still being charged, information continues to be generated and provided; and (4) the PowerPoint presentation for the State's motion to reconsider joinder could not be viewed by the defendant.

Rule 16(d) provides that the court may take appropriate action to remedy a discovery violation. M.R. Crim. P. 16(d). The test for the appropriateness of the court's action is "whether the remedy would be in furtherance of justice." State v. Reeves, 499 A.2d 130, 133 (Me. 1985). The dismissal of charges is "an extreme sanction that should be reserved for extreme cases." State v. Sargent, 656 A.2d 1196, 1199 (Me. 1995)

State's exhibit 2 from the motion hearing lists the discovery provided to the defendant. (State's Ex. 2.) The discovery deadline in this case was 11/26/12. The report from Detective Williams was provided by the State to the court on 11/15/12 with a cover letter, in which the State requested instructions regarding dissemination of the report. The report was provided to the defendant after the court's order dated 12/4/12.

#### Hard Drive

The defendant argued at the hearing that a report from either Detective James or Detective Jamieson identified the hard drive at issue, Hitachi GST XL Desk 2TB (terabytes) External Hard Drive (HXSDNB20001BBB) (0S02485), as having been seized from the defendant and the hard drive has not been provided to the defendant. After the 12/12/12 hearing, Attorney Nadeau provided to the court three reports, including a report from Detective Terry James from the Maine State Police.<sup>1</sup> In his report, Detective James does not reference the hard drive identified by Attorney Nadeau in her e-mail dated 12/14/12. This hard drive is not listed on any inventory of items seized. The State argued that the hard drive had not been seized and that "[a]ll computers and hard drives that were seized were imaged and copies were provided to Attorney Lilley." (McGettigan e-mail of 12/14/12.) The record supports the State's position.

#### Burpee Report

As the report from Lieutenant Anthony Burpee provides, there was an e-mail exchange between Lieutenant Burpee and the defendant in September 2011. Lieutenant Burpee contacted the State on 11/30/12 about the "recently located email correspondence between Mark Strong and me in September 2011." (State's Ex. 1 at 2.)

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<sup>1</sup> Reports from Detective Herbert Leighton and Detective Mark Holmquist were also provided. A report from Detective E. Ross was included in the James report. There was no report from Detective Jamieson. A summary of an interview of David Jamieson was included in the Holmquist report. David Jamieson did not discuss the hard drive at issue during this interview.

At the request of the York County District Attorney's Office, Lieutenant Burpee prepared the report on 12/4/12, after the 11/26/12 discovery deadline. The report was provided to the State and then to the defendant. (Id.) Any information in the report of Lieutenant Burpee that was not provided to the defendant in other discovery will not be used by the State at trial. M.R. Civ. P. 16(d).

#### Ongoing Charges

The defendant complains that alleged patrons of defendant Wright continue to be charged and discovery continues to be generated. During the 11/2/12 conference, in response to the court's question regarding the amount of time needed for the Strong trial, counsel for the defendant stated:

But if we go with Mr. Strong, it's not going to be – you know – I mean, as I understand what – at least what the State is presenting to the news media, you have got people coming into court into 2013 and onward. I mean, I don't know – I'm not waiting for their interviews of these so-called johns - - I can call those folks to the trial, to my trial, without waiting for their – 2000 – I mean, they have got months to go from what they are telling the media, if the media is right. I don't want to wait until 2013 to try this case. I don't think I have to wait until they interview everybody so . . .

We don't have much for motions. We are going to be ready to go and ready to go fast. As far as we are concerned, all of the – whatever baggage Ms. Wright has, God bless her but, you know, that's hers. And whatever the johns are doing, that's theirs. But we have the list of their names and I assume that some of them have been interviewed, some haven't. But we would have – we would call a fair number of those folks probably in our defense . . . .

(Transcript of 11/2/12 Conference.) If counsel's position regarding this ongoing discovery and his demand for a speedy trial has changed, he should request a conference with the court and the State.

#### PowerPoint Presentation on Motion for Reconsideration

As the State represented at the hearing and as the court knows from viewing the evidence filed by the State to support the motion to reconsider joinder, the PowerPoint

presentation was an illustrative aid. The State's memorandum and attachments, including the discs, contained the information included in the PowerPoint presentation.

The State also provided additional information on 12/7/12, the day after the evidence on the motion to reconsider joinder was given to the court and defendant:

It is my understanding from Attorney Lilley's e-mail that he cannot view the power point presentation of the evidence. The power point is only one half of an hour. The videos on the power point were taken from the DVDs that were also provided. Further, my written Offer of Proof references exactly where in each video the relevant clip is located. The entire video has been offered into evidence for completeness, however, the actual portions the State refers to in its Offer of Proof total less than 30 minutes (viewing all videos in their entirety would take approximately 7 - 10 hours). These DVDs can be viewed without the need of specialized equipment or software. I note that according to Attorney Lilley's prior e-mail, his staff person was able to view the DVDs. Further, all that material has been previously provided to both defense counsel. I copied everything again so that the Court and the attorneys would have the material to reference easily while reading the offer of proof.

(Gordon e-mail of 12/7/12.) The State also offered on 12/7/12 to make arrangements for defense counsel to view the PowerPoint. (McGettigan e-mail of 12/7/12.)

#### REQUEST FOR FRANKS HEARING

The defendant argues "the law enforcement officer who swore to the facts' reliability did so with reckless disregard for the truth, thereby misleading the Court to the facts' authenticity. Defendant Strong hereby requests a *Franks* hearing to investigate the recklessness by which the investigating officer presented misleading information to the Court." (Def.'s Mem. at 1; see also id. at 3; 5; 6, n.1; 8.) In Franks v. Delaware, the Supreme Court stated:

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should

be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

Franks v. Delaware, 438 U.S. 154, 171 (1978). Even assuming the defendant has standing to challenge the affidavit and search warrant in the Wright case, as discussed below, the defendant has not provided any affidavits or statements and has not provided a satisfactory explanation for the absence of affidavits or statements. Accordingly, the “substantial preliminary showing that a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit” required to obtain a Franks hearing with regard to any affidavit or warrant has not been made. See id., 438 U.S. at 155-56; State v. Dickinson, 2005 ME 100, ¶¶ 8-9, 881 A.2d 651; State v. Hamel, 634 A.2d 1272, 1273-74 (1993); State v. Van Sickle, 580 A.2d 691, 693 (1990).

#### MOTION TO SUPPRESS

The defendant challenges the affidavit and request for search warrant signed by Kennebunk Police Department Patrol Officer Audra L. Presby and dated 2/10/12. He argues that the “fruits of this illegal search<sup>2</sup> serve as the basis for information added by Officer Presby in her subsequent applications for search warrants” and he “challenges the probable cause determination of the warrants issued against him, which stem from the initial invalid warrant against Defendant Wright.” (Def.’s Mem. at 2, 11; Ex. A. attached to Def.’s Mem.) The defendant also challenges the affidavits supporting requests for his records, the affidavit in support of an arrest warrant, and the affidavits in support of the search warrants. (Exs. E-J, attached to Def.’s Mem.)

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<sup>2</sup> See LeFave, Search and Seizure, § 11.4 (4<sup>th</sup> ed.)

### Defendant Wright Warrants

In order to challenge the admission of evidence, the defendant "must first establish that he has standing to make that challenge. When the issue is an alleged Fourth Amendment violation, 'the defendant must demonstrate that his own reasonable expectation of privacy was violated by the action of the State.'" State v. Fillion, 2009 ME 23, ¶ 11, 966 A.2d 405, quoting State v. Maloney, 1998 ME 56, ¶ 6, 708 A.2d 277, 279 and citing Rakas v. Illinois, 439 U.S. 128, 133-34 (1978).

The defendant has made no showing that he had a reasonable expectation of privacy with regard to defendant Wright's business location, residences, or motor vehicle. The defendant, therefore, lacks standing to challenge the 2/10/12 affidavit and resulting 2/14/12 search warrant and the other affidavits and search warrants involving defendant Wright. (Exs. B – D, attached to Def.'s Mem.).

### Defendant Strong Warrants

For a search warrant, "[p]robable cause is established when, 'given all the circumstances set forth in the affidavit before [the magistrate], 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. Courts must give the affidavit a positive reading and review the affidavit with all reasonable inferences that may be drawn to support the magistrate's determination.'" State v. Rabon, 2007 ME 113, ¶ 22, 930 A.2d 268 (citations omitted). For an arrest warrant, the information, complaint, or affidavit must show that there is "probable cause to believe that a crime has been committed and that the defendant committed it." M. R. Crim. P. 4(b)(2); see State v. Smith, 277 A.2d 481, 486 (Me. 1971).

A review of the affidavits in support of the warrants involving defendant Strong shows sufficient probable cause to justify issuance of the warrants. (Exs. E-J, attached

to Def.'s Mem.) In addition to some of the information contained in the affidavits supporting the warrants in the Wright case,<sup>3</sup> the affidavits supporting the warrants in the Strong case contain information about electronic data, videos, phone records, and other documents that establish probable cause.

The entry is

The Defendant's Motion to Dismiss is DENIED. Any information in the report of Lieutenant Anthony Burpee dated 12/4/12 that was not provided to the defendant in other discovery will not be used by the State at trial. M.R. Civ. P. 16(d).

The Defendant's Request for a Franks hearing is DENIED.

The Defendant's Motion to Suppress is DENIED.

Dated: December 31, 2012



Nancy Mills  
Justice, Superior Court

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<sup>3</sup> See, e.g., United States v. Scalia, 993 F.2d 984, 987 (1<sup>st</sup> Cir. 1993).