IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	:	**CASE NO: 0212014675**
Vs.	:	
CHARLES R. ELLIOTT	:	
Defendant	:	

Veronica Faust, Esquire, Deputy Attorney General
John M. Sandy, Esquire attorney for Defendant

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

Defendant Charles R. Elliott (hereinafter "Defendant") has brought a Motion to Suppress evidence before this Court. In his Motion to Suppress, Defendant argues that the Officers' warrantless searches of Defendant's rented stable were not accomplished pursuant to a valid exception to the warrant requirement[1], and thus in violation of the Fourth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 6 of the Delaware Constitution and Delaware statutory law. Therefore, Defendant claims, the fruits of the illegal searches and seizure should be suppressed from use as evidence by the State in trial. For the reasons stated below, this Court grants Defendant's motion.

[1] "[S]earches and seizures are presumptively 'unreasonable' unless they are authorized by warrants, issued upon probable cause, and supported by oath or affirmation before a neutral judicial officer, subject to a few exceptions justified by absolute necessity." Mason v. State, 534 A.2d 242, 248 (Del. 1987), *citing* Coolidge v. New Hampshire, 403 U.S. 443, 449-84 (1971).

Statement of Facts

Defendant Charles Elliott owns Tucson Blondie, a bay standard bred broodmare, and housed it from May through December, 2002, in a stable located on Shane Long Farms, which is located on Bull Pine Road, in Georgetown, Delaware. The stables are located approximately 200 yards off the public roadway and are accessed by entering Long's property via a private lane. To reach the stable area, one must drive past the Long residence. The stables are not open to the public and only the renters and their invitees are permitted on the property. Defendant occupied rental space in one of two separate stables on the property. Tucson Blondie occupied one of Defendant's rented stalls during the events in question.

On November 21, 2002, the SPCA received a complaint from Jim James concerning the welfare of Tucson Blondie. The complaint was not specific, however, and on November 26, 2002, the SPCA investigated the complaint at the Defendant's home, but Tucson Blondie was not there. Mr. James then approached two SPCA Officers at J.P. Court No. 3 on December 5 and told them that Tucson Blondie was not located where that investigation had taken place but was stabled at the Long Farm on Bull Pine Road. The Officers encouraged Mr. James to file another complaint, which was accomplished via telephone the next day, on December 6, 2002.

On December 8, the SPCA received a call from the Delaware State Police notifying the former that the latter had received a complaint that Tucson Blondie was "in dire need of assistance."

According to Lt. Linkerhof's testimony on December 9, 2002, the SPCA arrived at Shane Long Farms to investigate the complaints they had received. As stated previously, the residence of the owner/lessor of the property, Shane Long, is located between Bull Pine Road and the stables in question. The SPCA did not attempt to obtain Mr. Long's consent to search the stable on this or any of the occasions they entered the property to search. Furthermore, the SPCA knew that Defendant Elliott was the owner of the horse in question due to the earlier investigation on November 26, 2002. The SPCA also knew where Defendant lived as they had been to his residence on the November 26, 2002 complaint. Despite this knowledge, the evidence presented at the hearing demonstrates that the SPCA did not obtain Defendant's consent to enter or investigate the rented stable.

Officers Nock and Linkerhof looked around the farm, then proceeded to Stall No. 3, where Tucson Blondie was located. The top door to the stall was open, while the 4-foot high bottom door was closed and locked. A curtain was hanging down in front of the stall, effectively preventing a person standing directly in front of the stall from looking in through the open

top door, but allowing an inside view of the stall from a different angle or perspective. However, the only way that the SPCA Officers could see the horse was by going around the curtain that blocked stall #3 and entering the shed row area which is under roof and part of the stable structure. Once they entered the structure the testimony was that the Officer had to peek over the 4-foot bottom door to obtain a view of the horse that was lying prone on the floor. Lt. Linkerhof observed that the horse was lying down in feces, unable to stand up. There was no testimony presented as to how Lt. Linkerhof came to the conclusion on this date that the horse was incapacitated or unable to rise, nor was this blanket conclusion explained in the search warrant application.

The next morning, on December 10, 2002, Lt. Linkerhof returned to the stall with Officer Langerak and videotaped the investigation. The Officers entered the stall and observed that the horse was still lying down, unable to access water and feces was present. The Officers contacted an equine veterinarian, Dr. Tanis MacDonald, for the purpose of making findings that could be used to effect a seizure warrant for Tucson Blondie.

On the afternoon of December 10, 2002, Dr. MacDonald arrived with other Officers and entered the stall to examine the horse and assess its condition. Jim Atkinson, who rented a separate stable at Shane Long Farms, appeared after the Officers and Dr. MacDonald had already entered Tucson

Blondie's stall. Mr. Atkinson had gratuitously cared for the horse in late November, just prior to the commencement of the SPCA investigations. After examining Tucson Blondie's condition, Dr. MacDonald concluded that the horse was neglected. Her recommendation was that the SPCA seize the horse. Lt. Linkerhof then obtained a warrant to seize Tucson Blondie on December 11, 2002 and the warrant was executed on the following day. The basis of the search warrant application was the information obtained through the visits of December 9, the morning of December 10, and afternoon of December 10.

Analysis

In ruling on a Motion to Suppress, the Court must first determine whether the movant has a right to challenge the legality of the search. Righter v. State, 704 A.2d 262, 265 (Del. 1997).

Standing

The issue of a movant's right to challenge the legality of the search necessarily involves an inquiry into whether the alleged search or seizure infringed an interest of the Defendant which the Fourth Amendment was designed to protect. Rakas v. Illinois, 439 U.S. 128, 140 (1978). In turn, the capacity to claim the protection of the Fourth Amendment depends upon whether the person who claims protection of the Amendment has a reasonable expectation of privacy in the invaded place. Katz v. United

States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The Defendant bears the burden of establishing that he had a legitimate expectation of privacy. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980). To sustain this burden, the Defendant must prove: (1) actual (subjective) expectation of privacy, and (2) that the expectation is one that society is prepared to recognize as objectively reasonable. State v. Howard, 728 A.2d 1178, 1181 (Del. Super. 1998), *citing* Katz, *supra*. The first prong involves an issue of fact; the second, an issue of law. Howard, *supra*, *citing* United States v. Clark, 22 F.3d 799, 801 (8th Cir. 1994).

First, the testimony presented at trial established that Defendant had an actual subjective expectation of privacy in the rented stall occupied by Tucson Blondie. Mr. Long testified as to the existence and details of his rental agreement with Defendant. Clearly, then, Defendant had a property interest in the rented stall at the time the events set forth above took place. A curtain was found hanging in front of Defendant's rented stall, which had the effect of increasing the tenant's amount of privacy in the property. Moreover, Mr. Long's testimony indicated that a person couldn't view an animal lying down inside of the stall from outside the barn area. Finally, while the top half of the door to the stall was left open to allow the horse to access fresh air, the bottom half of the door was closed and locked. Thus, Defendant has presented sufficient evidence that he had an actual subjective

expectation of privacy in the stall. Even if relatively limited in scope, that expectation consisted of, at the very least, the belief that uninvited visitors would not enter the stall.

Second, Defendant's expectation of privacy in the rented stall was objectively reasonable as a matter of law. Courts in other jurisdictions have held that privacy interests can arise in a wide variety of properties and contexts: "Simply stated, a person can have a protected expectation of privacy in buildings (i.e., *barns*, garages, boathouses, *stables*, etc.) that are located far outside the area of the curtilage of the home." United States v. Hoffman, 677 F.Supp. 589, 596 (E.D. Wis. 1988) (emphasis added). It is also well established that the Fourth Amendment protects privacy interests in commercial premises. Oliver v. United States, 466 U.S. 170, 178 (1984). Since "[a] barn is as much a part of a rancher's business as a warehouse or outbuilding is part of an urban merchant's place of business," "[i]t is and ought to be constitutionally protected from warrantless searches if the owner or occupier takes reasonable steps to effect privacy." United States v. Dunn, 480 U.S. 294, 315 (1987) (Brennan, J., dissenting). See also, e.g., United States v. Wright, 991 F.2d 1182 (4th Cir. 1993) (holding that one may have a reasonable expectation of privacy in a barn). Since the occupier here has in fact taken such steps to effect privacy, Defendant has met the burden of

establishing a legitimate expectation of privacy in the stall. See State v. Vincent, 1990WL 74295, Steele, J. (Del. Supr.).

Validity of Police Conduct

For purposes of this analysis, this Court will assume without deciding that the December 9 visit was constitutionally valid. At issue, therefore, is the constitutionality of the December 10 morning and afternoon visits. The United States and Delaware Constitutions protect the right of persons to be secure from "unreasonable searches and seizures." U.S. Const. amend. IV; Del. Const. art. I, § 6. Since the Delaware constitutional provision is substantially similar to the Fourth Amendment, a violation of the latter is necessarily a violation of the former. State v. Prouse, 382 A.2d 1359, 1362 (Del. 1978), *aff'd*, 440 U.S. 648 (1979). A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. United States v. Jacobsen, 466 U.S. 109, 113 (1984).

The December 10 Morning Visit

Objects falling in plain view of an Officer who has a legal right to be in position to have that view are subject to seizure or may be introduced in evidence. Harris v. United States, 390 U.S. 234, 236 (1968). However, it is an "essential predicate" to any valid warrantless seizure of incriminating evidence under the plain view doctrine that an Officer not violate the Fourth Amendment in arriving at the place from which the evidence could be

plainly viewed. Horton v. California, 496 U.S. 128, 136 (1990). The burden of proof in establishing the applicability of all exceptions to the warrant requirement, including the plain view doctrine, rests squarely on the prosecution. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). The State argues that the December 10 morning visit falls within the plain view exception to the warrant requirement.

Even assuming that the Officers had a legal right to be standing immediately outside the stall where Tucson Blondie was located on the morning of December 10, they had no right to enter the stall without the authority of a warrant or circumstances constituting an exception to the warrant requirement. The State argues only that the plain view exception applies to this particular search. While this exception may arguably cover the Officers' observations made on that morning from outside the stall, it cannot justify the evidence obtained once the Officers were inside. The act of entering Tucson Blondie's stall violated Defendant's expectation of privacy in his rented property. Based on the credibility of the witnesses' testimony and the Affidavit of Probable Cause, the Court finds that all observations made that morning were made from within the constitutionally protected area of the interior of stall #3. The fruits of this illegal search, which includes observations and a videotape, are suppressed.

The December 10 Afternoon Visit

A recognized exception to the warrant requirement is for searches conducted pursuant to valid consent. Schneckloth v. Bustamonte, 412 U.S. 218, 221-22 (1973). Again, the burden of establishing the applicability of an exception to the warrant requirement lies with the prosecution. Coolidge, *supra*. The State argues that the December 10 afternoon visit falls within the consent exception to the warrant requirement. The State has attempted to submit with its Brief an affidavit by Lt. Linkerhof alleging that the Defendant's consent was obtained prior to the searches that occurred on December 10, 2002. Despite that fact that Lt. Linkerhof was thoroughly questioned under oath in both direct and cross-examination, the State did not establish this assertion in the hearing. The Court will not consider this affidavit as the State had ample opportunity to develop this at the hearing. To permit this additional evidence at this juncture would deny the Defendant the ability to cross-examine this witness and would be legally inappropriate. In the alternative, the State argues that Mr. Atkinson consented to the search of Defendant's rented stall on the afternoon of December 10.

To be valid, consent to search must be voluntary. Id. The person giving consent must have the authority to do so. United States v. Matlock, 415 U.S. 164, 171 (1974). Moreover, in cases involving issues of third party consent, Delaware law is well settled. The United States Supreme Court has

stated that the resolution of this issue "does not rest upon the law of property, ... but rests rather on mutual use of the property by persons generally having joint access or control for most purposes." Id. at 172. The Supreme Court of this State has recognized this formulation by requiring that third party authority to consent must include both possession and equal or greater control (in relation to the owner) over the area to be searched. Ledda v. State, 564 A.2d 1125, 1128 (Del. 1989). Typically, this "joint access or control" requirement has been satisfied by evidence of the existence of a marital, co-tenant, joint business venturer, or some other type of close relationship between the consenting and nonconsenting parties to a search. See, e.g., Jenkins v. State, 230 A.2d 262, 271 (Del. 1967). However, the consenting party's right of control and possession must not be inferior to that of the nonconsenting party. Id.

Clearly, the evidence presented does not support the State's contention that Mr. Atkinson validly consented to the search of Defendant's rented stall. While Mr. Atkinson was present during the December 10 afternoon search and apparently had no objection to the Officers' presence in the stall, he did not in fact have authority to consent to the search. Testimony was presented tending to establish that Mr. Atkinson gratuitously cared for the horse during the period from October through December, 2002. However, this evidence does not satisfy the "joint access or control"

requirement. Mr. Atkinson was not a co-tenant of Defendant's rented stall, nor did he rent any space in the stable in question. His business partnership with Defendant did not extend to ownership of Tucson Blondie. The mere fact that he briefly cared for Defendant's horse does not establish that Mr. Atkinson had either possession or control over Defendant's rented stall. Since Mr. Atkinson's even arguable right of control and possession is clearly inferior to that of Defendant, the former had no authority to consent to the search. Nor does the record support that consent was obtained from Atkinson even if he may have had authority to consent. The Affidavit of Probable Cause clearly shows that the State had entered the stall and the vet's examination was well under way at the time Atkinson arrived that afternoon. Consequently, the Officers violated Defendant's Fourth Amendment rights during the afternoon search as well.

The Exclusionary Rule

Having already determined that both the morning and afternoon searches were constitutionally invalid, the remaining issue concerns whether the warrant obtained by the Officers to seize Tucson Blondie, as well as the fruits of that seizure, may be used as evidence at trial. The exclusionary rule, as fashioned in Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961), excludes from a criminal trial any evidence seized from a Defendant in violation of his/her Fourth Amendment rights.

Alderman v. United States, 394 U.S. 165, 177 (1969). If Officers illegally obtain evidence of criminal conduct and then use that information in an affidavit that causes a warrant to issue for a search or seizure, the ostensibly legal, warranted invasion of privacy falls under the exclusionary rule. Id. *Accord*, Prouse, *supra*., State v. Vincent, *supra.*

Tainted and Untainted Evidence

The task now before this Court, therefore, is clear: "The ultimate inquiry on a Motion to Suppress evidence seized pursuant to a warrant is... whether, putting aside all tainted allegations, the independent and lawful[ly obtained] information stated in the affidavit suffices to show probable cause." United States v. Giordano, 416 U.S. 505, 555 (1974) (Powell, J., concurring in part and dissenting in part), *citing* United States v. Cantor, 470 F.2d 890, 893 (3d Cir. 1972). In Delaware, this inquiry has been given expression in what has become known as the "four corners" test. For a court undertaking this analysis, "sufficient facts must appear on the face of the affidavit [(that is, within the 'four corners' of the document)] so that [it] can verify the factual basis for the judicial Officer's determination regarding the existence of probable cause." See Dorsey v. State, 761 A.2d 807, 811 (Del. 2000).

While here it is clear that the evidence obtained from both the morning and afternoon searches on December 10 are excluded from trial, it

is not quite as clear as to exactly what evidence was obtained during a "search," and what evidence was obtained while the Officers were standing outside the stall (and hence not arguably engaged in a "search"). Any evidence falling into the former category ("tainted evidence") must be excluded from consideration at trial, but information belonging to the latter ("untainted evidence") may be considered for purposes of probable cause analysis.

A critical determination that must be made here is whether evidence of the horse's inability to access water may be considered as evidence at trial. The remaining information appearing on the face of the affidavit, in the judgment of this Court, clearly constitutes either tainted or untainted evidence. The record is not so clear, however, regarding Tucson Blondie's ability to access water. The testimony does not support the fact that such an observation was made by any of the Officers from outside the stall on any of the visits to the property. This omission concerning the horse's lack of access to water was noted when the prosecutor asked Lt. Linkerhof, ostensibly for the purpose of summarizing the testimony to that point, what he had observed during his December 9 visit (in which he did not enter the stall), and his reply was as follows: "A horse laying down, in feces, unable to get up." Perhaps the most critical evidence that the Officers could not make this observation concerning water access from outside the stall appears

in the record where the prosecutor questions Lt. Linkerhof about the morning search on December 10:

> STATE: And what did you do?
>
> WITNESS: Myself and Officer Lagerak went out there and started the videotape. The thing was that the bucket was frozen over solid from and the horse was not able to get up to get any water so *we thought the horse was definitely in dire need of water so I turned around and broke the ice and I gave the horse water*, which it drank half the bucket. (emphasis added)…….
>
> STATE: And when you entered the stable where was the water bucket?
>
> WITNESS: It was up on the side of the wall there when you first go in.

Insufficient facts were given in the search warrant application to support Officer Nock's conclusion that the horse could not access water on December 9, 2002. In fact, Lt. Linkerhof's testimony indicates that this fact would not have been discovered without entering the stall. Thus, it is apparent that the Officers did not recognize that the horse could not access water until they were already inside the stall. Any such information is tainted and must therefore be excluded from trial, as well as from the probable cause determination.

Probable Cause

After the tainted information is excluded from consideration for purposes of the probable cause determination, the remaining untainted information on the affidavit reads as follows:

> On [December 6, 2002] the Delaware SPCA received a complaint regarding a horse located at Shane Long Farms in Georgetown, Delaware in Sussex County. Affiant arrived at farm belonging to Shane long located at 20753 Bull Pine road to find a bay standardbred broodmare With a freezeband on right side of neck "N0510" that was lying down in stall #3 in her own feces. Said horse name is Tucson Blondie and belongs to Mr. Charles Elliott. Affiant went over with Lt. Jerry Linkerhof and spoke to Mrs. Elliott at her residence at 20489 Piney Grove Rd. and left notice for Mr. Elliott to contact.

The author and affiant of the search warrant application, Officer Nock, did not testify at the Suppression hearing. Officer Nock stated on the search warrant application that the first search of the stable occurred on December 6, 2002. Lt. Linkerhof testified that the first search of the stable occurred on December 9, 2002. Unfortunately, without Officer Nock's testimony, the discrepancy between the warrant and Lt. Linkerhof's testimony was not explained, calling into question the accuracy of both witnesses. This Court, left with only a mention of a prior complaint regarding the horse and a visual observation of a horse lying down in feces on December 9, 2002, is unable to conclude that this limited untainted evidence is sufficient to support a finding of probable cause to believe a crime had been committed. Certainly,

as with all animals, especially those caged or boarded in a confined area, one can reasonably infer that during the course of a day some animal waste will be present in the confined area. This alone does not establish probable cause to believe that an animal is being subjected to cruel neglect due to unsanitary conditions or is injurious to the animal's health, as defined in 11 Del.C. §1325. The testimony of the State's lead witness, Lt. Linkerhof, would apparently be in agreement. When questioned as to the content of the search warrant application, the Officer replied, "The bulk of the application for a search warrant was based on Dr. Tanis MacDonald's findings."[2] Of course, Dr. MacDonald's findings were made during her examination of the horse in the course of the December 10 afternoon search, which has been invalidated (see above) based on the Officers' entry into the stall, and can be used neither as evidence at trial nor for probable cause. Therefore, the warrant granting authority to the Officers to seize Tucson Blondie must be invalidated, and all evidence obtained as a result of that seizure is excluded from trial.

[2] The SPCA Officer testified that the SPCA does not "need a search warrant ... [but] [w]e go the extra mile because the animal is so large. We have the right to go ahead and take an animal right off someone's property for health and well-being." "I didn't need one[warrant] per se but we do it as a courtesy." While the officer may have been under that impression, it bears noting that this impression is mistaken. Delaware law does not give such a blanket right to law enforcement agencies, nor is the propriety of obtaining a search warrant measured by the size of the animal to be seized. Rather, searches and seizures performed by agents of the State are subject to constitutional scrutiny under the Fourth Amendment of the United States Constitution and Article I, Section 6 of the Delaware Constitution, and must be carried out in conformity with those provisions, as well as any other applicable provisions under the Delaware law. See 11 *Del. C.* § 2301, *et seq*.

Conclusion

All evidence obtained as a result of both the morning and afternoon searches on December 10, as well as that obtained from the seizure of Tucson Blondie, is hereby excluded from trial. Defendant's motion to suppress is granted.

IT IS SO ORDERED this 18th day of July, 2003

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Judge Rosemary Betts Beauregard