

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	C.A. Nos: 0904020336
)	0904023868
JULIE PETTINGILL)	0904023993
AND SAMANTHA PETTINGILL)	

Submitted: December 12, 2011
Decided: January 12, 2012

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ORDER GRANTING DEFENDANTS' MOTION TO SUPPRESS

Defendants, Julie and Samantha Pettingill (“Defendants”) have filed Motions to Suppress (the “Motion”) with the Court. On June 24, 2011, an evidentiary hearing was held on Defendants’ Motion. At the conclusion of the hearing, the Court ordered the parties to submit post-hearing memoranda on the Motion. This is the Court’s decision after consideration of the record developed by the parties.

FACTS

On April 5, 2009 at 2:00pm, New Castle County Police dispatch received a 911 call from Steven Steamer (“Steamer”) that his sister, Julie Pettingill (“Julie”), was suicidal. Steamer informed dispatch that Julie lived at 107 Savannah Drive, in Bear, Delaware (“107 Savannah

Drive” or the “home”). Cherie Morehead (“Morehead”), a New Castle County Police officer, received a radio transmission from New Castle County Police dispatch informing her of the possible suicide, and responded to 107 Savannah Drive.

Morehead was the first New Castle County Police Officer to arrive at 107 Savannah Drive. Morehead’s testimony presented these facts: She testified that she could not recall precisely when she arrived at 107 Savannah Drive, but that it was between 2:00pm and 3:00pm. When she arrived she knocked on the front door and looked inside the windows of the home to see if anyone was inside. There was no response to the knocking and she did not see anyone inside the home. She did not try to enter the home at this time. She did not detect any unusual smell outside the home.

Shortly after Morehead knocked on the front door and peered in the windows, New Castle County Police officers Cole, Lewicki, and Martinez arrived at 107 Savannah Drive. She could not recall the precise time these three officers arrived, but it was probably shortly after 3:00pm. When the other three officers arrived, all four officers knocked on the outside doors of the home and looked through the windows. During this second attempt to make contact with Julie, the officers did not observe anyone inside the home. The officers checked with neighbors to see whether Julie was at home, but the neighbors were not sure whether Julie was in the home. Also, Officer Cole called Steamer. Morehead did not testify regarding the contents of Cole and Steamer’s conversation. Neither she nor any of the other officers detected an unusual smell outside of the home at this time.

Morehead testified that Martinez made the decision that the officers would forcibly enter the home. Martinez made the decision because he was the supervisor. Lewicki used his baton to break the window located on the side door of the home, then reached inside to unlock the door.

All four officers entered the home. The officers entered the home to make sure Julie was alive and uninjured. Accordingly, the officers limited the scope of their subsequent search of the home to places where a person could possibly be located.

Morehead testified that as soon as the officers entered the home, they encountered a dog inside the side door to the home. She believed that the dog was a “sheep dog” that stood approximately two feet tall. The dog’s fur was matted and clumped to the dog’s body. The dog was friendly. As soon as the officers entered the home, she immediately noticed that the residence smelled like animal waste. The smell was “awful.” There were animal feces on the floor inside the entryway of the side door to the home.

As the officers moved through the home they encountered some cats and birds. The cats were scattered throughout the home, but were primarily located in the living room, and the birds were in cages scattered throughout the home, but most of the cages were located in the dining room. There was a small dog and one cat in an upstairs bedroom. The officers searched the entire home for Julie, but she was not inside the home.

Morehead estimated that there were more than four cats in the home. She could not describe any of the cats. Nonetheless, she distinctly remembered two cats in particular. These two cats were similar in appearance and had “weepy” and “wet” noses and faces. One of the cats was lying down and the other was standing up. Morehead admitted on cross examination that she could not remember the color of either cat, and admitted that she did not touch either cat or crouch low to the ground to examine them, but rather observed the cats while she was standing.

Morehead did not testify as to the number of birds in the home. In her opinion, the bird cages were not clean because there were bird feces in the water and food. She could not describe

any of the birds except that one of the birds was a large multi-colored bird similar in appearance to a parrot. There was only one bird in each cage.

Morehead further testified as to the condition of the interior of the home. The house was cluttered. Paper, clothing, and boxes were strewn across the floor. This made it difficult for her and the other officers to move through the home. There were animal feces on the floor of the home. After conducting the search for Julie, all four officers left the home to decide how to proceed. Morehead could not physically remain in the home because of the smell.

The officers decided to call the Delaware SPCA "shortly after entry was made." Morehead was unable to recall exactly when the decision to call the SPCA was made. However, since her shift was over at 5:00pm, she likely did not remain at the scene after 5:00pm, and the decision to call the SPCA was definitely made when she was present. Further, the SPCA arrived while she was still at 107 Savannah Drive. On cross-examination, Morehead conceded that it was possible that the SPCA arrived at approximately 4:48pm.

Further testimony showed that at approximately 4:19pm, the Kent County SPCA received a phone call from the New Castle County Police Department. Brandon Jarboe ("Jarboe"), a Kent County SPCA officer, initially responded to 107 Savannah Drive in response to the New Castle County Police Department phone call. On cross examination, Jarboe testified that the Kent County SPCA dispatch logged the complaint in as an animal "cruelty" complaint, but could not recall whether dispatch informed him of this before he responded to 107 Savannah Drive.

Jarboe's testimony developed these facts: Jarboe testified extensively regarding the jurisdiction of the Kent County SPCA. On April 5, 2009, despite the title as "Kent County SPCA," the Kent County SPCA had statewide jurisdiction. However, animal cruelty cases were not within the scope of this statewide jurisdiction. Rather, the Delaware SPCA, a wholly distinct

and separate agency, possessed jurisdiction over animal cruelty cases in New Castle County, Delaware. The Kent County SPCA had jurisdiction over “husbandry” cases. Husbandry cases are cases where there are concerns that an owner may not be properly cleaning up after their animals or providing adequate medical care. The Kent County SPCA had jurisdiction if an animal needed grooming or shots, but the Delaware SPCA had jurisdiction over “neglect and cruelty cases.” Specifically, the jurisdiction of the Kent County SPCA at this time was strictly limited to three types of cases -- inoculations, loose animal cases, and “bite cases.”

At this time there was rampant confusion between Delaware police agencies regarding the jurisdiction of the Delaware and Kent County SPCA agencies, and as a result Kent County SPCA frequently erroneously received referrals in animal cruelty cases. However, whenever the Kent County SPCA dispatch erroneously received a complaint, the reporting police agency labeled as a “cruelty case,” the dispatch center would instruct the reporting agency to call the Delaware SPCA, because the Delaware, not Kent County SPCA, had jurisdiction over cruelty cases. Nonetheless, at this time it was Kent County SPCA’s “typical protocol” to respond to cruelty complaints anyway, knowing the agency did not possess jurisdiction over these complaints. The responding officer would respond to the scene, investigate, call a Kent County SPCA supervisor, apprise the supervisor of the facts revealed in the investigation, and then the supervisor would make the determination whether the case qualified as a “cruelty” case. If the supervisor determined the case was a “cruelty” case, then Kent County SPCA would refer the case to Delaware SPCA.

Additionally, Jarboe testified as to the level of training required to become a Kent County SPCA officer. The only qualifications required at this time to become a Kent County SPCA officer were a high school diploma and valid drivers’ license. Kent County SPCA officers did

not attend the police academy or any equivalent training or even some cursory level of veterinary training before they began working. Rather, Kent County SPCA officers were trained entirely on the job by “shadowing” an experienced officer for two to three weeks. At the conclusion of this “shadowing” period, the officer was given a patrol car, radio, digital camera, handcuffs and was sent out on patrol alone. Before each officer was permitted to go on patrol alone, they were not given any training in evidence or criminal procedure.

Jarboe testified that before he became a Kent County SPCA officer, he worked as a “kennel tech” at the Kent County SPCA for approximately one and one half years. He was hired for this position shortly after graduating high school. His primary job responsibilities while working as a kennel tech were cleaning kennels, feeding the animals, and occasionally helping the “vet techs” restrain aggressive animals. During his time working as a kennel tech, he received on the job instruction from vet techs on the signs of animal neglect and cruelty. During this on the job instruction he learned that matted fur was a sign of neglect, but could be cured by shaving the afflicted animal. Further, he learned that weepy or “gunk” filled eyes combined with troubled breathing, wheezing and coughing are all signs of upper respiratory infections in cats. It is his understanding that this type of upper respiratory infection in cats is akin to the common cold in humans and is only life threatening if left untreated. Jarboe admitted on cross examination that cats that have received medical treatment for this type of upper respiratory infection continue to exhibit similar symptoms to untreated cats for an unspecified period of time after receiving treatment. Sick animals are usually not sociable. Jarboe admitted that he had no experience working with animals before starting work as a kennel tech.

Jarboe has been working as a Kent County SPCA officer for approximately five years. During these five years he has not received or attended any continuing education classes or

further training. In his five years as a Kent County SPCA officer he has responded to approximately one thousand cases of reported animal cruelty. Only about thirty percent of cases reported as animal cruelty cases are ultimately determined to be animal cruelty cases. Only about five percent of that thirty percent of cruelty cases involved animals with matted fur. Not one of the roughly three hundred cruelty cases he has responded to have involved rusty bird cages.

Jarboe testified that he arrived at 107 Savannah Drive at approximately 4:48pm on April 5, 2009. Before arriving at the home, Kent County SPCA dispatch had not told him much about the case, except that police needed assistance because of the "condition" of the animals. Jarboe was the first and only Kent County SPCA officer to visit and enter 107 Savannah Drive. When he arrived at 107 Savannah Drive, he spoke with Martinez. He spoke with Martinez for approximately ten minutes, and during this conversation, Martinez told him that the conditions inside the home were poor and unsuitable for animal safety, and some of the animals inside the home had matted fur and/or appeared sick. However, on re-direct examination, Jarboe clarified that Martinez only told him to enter the home to examine the conditions, and that Martinez never said whether he was concerned with the animals' safety. Even though other New Castle County Police officers were present, Jarboe only spoke with Martinez. He and Martinez did not discuss whether Martinez had a warrant to enter the home.

After discussing the facts of the case with Martinez, Martinez escorted him into the home through the side door. This door had not been closed since Lewicki initially opened the door. Immediately upon entering, Jarboe detected the strong odor of pet waste. Jarboe testified that he observed approximately thirty cats, six dogs, two rabbits, a lizard and a chinchilla inside the home. He estimated that he observed between twelve and twenty three piles of dog or cat feces, which were located primarily in the kitchen, with some in the dining room. In his opinion, more

than half of the cats inside the home were suffering from upper respiratory infections. He admitted that he did not include anything about observing upper respiratory infections in the cats in the report he prepared after the investigation. Jarboe testified further that he observed six birds, each in its own cage in the dining room. These cages were rusted and there were “excessive feces” in the cages. It is his understanding that rusty bird cages can cause birds living in the cages to suffer from respiratory infections. There were bird feces in the birds’ water and food bowls. Jarboe formerly owned birds, and in his experience as a bird owner, the cages looked like they had not been cleaned in approximately two days. Based on his experience as an SPCA officer, the amount of animal feces in the home could have accumulated if the animals in the home were left unattended for a matter of hours.

After examining the ground floor of the home, Jarboe went to the second level of the home. While Martinez had accompanied him throughout his examination of the ground floor, Martinez stayed downstairs when Jarboe went to the second floor. Jarboe found a chinchilla in a clean cage inside one of the upstairs bedrooms. There was one other bedroom upstairs, but there were no animals located in this bedroom. He observed two bird cages in the second floor hallway that were in similar condition to the other bird cages in the dining room. Jarboe admitted that generally, all of the animals in the home appeared to be well fed, nourished, and none of the animals exhibited symptoms of dehydration.

Jarboe took photographs with his digital camera while he was inside 107 Savannah Drive. He admitted that Martinez watched him take numerous photographs inside the home and said nothing. On cross-examination Jarboe admitted that one of the reasons he took photographs inside the home was for “evidence gathering in the case,” to give to the Delaware SPCA and or

New Castle County Police. Jarboe said it was “common knowledge” that the Kent County SPCA would make these photographs available to the agency that ultimately made an arrest.

After he examined the second floor of 107 Savannah Drive, Jarboe and Martinez left the home. Jarboe was in the home for a total of twenty five or thirty minutes. At this time, he was unsure whether Kent County SPCA or Delaware SPCA had jurisdiction over the case, so he called his supervisor, Lieutenant Warburton (“Warburton”). After he told Warburton what he had observed inside the home, Warburton decided that the case should be referred to Delaware SPCA. Warburton called Delaware SPCA and made the referral.

At approximately 6:24pm, Officer Brown (“Brown”) of the Delaware SPCA arrived at 107 Savannah Drive. When Brown got there, Jarboe spoke with him for approximately ten to fifteen minutes concerning the conditions inside the home. Jarboe told Brown that there were excessive feces in the home, and both rust and feces in the bird cages. After speaking with Jarboe, Brown entered the home without a warrant and took pictures. After leaving the residence, Brown prepared a police report. In the report, Brown wrote that based after searching the home, he did not believe the animals were in immediate danger.

The record shows that on April 6, 2009, at approximately 7:00pm, more than twenty four hours after Jarboe initially entered 107 Savannah Drive, Delaware SPCA requested a search warrant for 107 Savannah Drive. The warrant was not executed until 9:14pm that night.

DISCUSSION AND FINDINGS

Julie and Samantha Pettingill (“Defendants”) concede that the initial entry into 107 Savannah Drive was legally justified by exigent circumstances based on Steamer’s report that Julie Pettingill was suicidal. Defendants only challenge the legality of Martinez and Jarboe’s second search of 107 Savannah Drive. The State concedes that Martinez and Jarboe did not have

a search warrant when they entered the home, but argues rather that the search was lawful for two reasons: (1) the second search was justified by the exigent circumstances exception to the warrant requirement; and (2) even if the second search was not justified by exigent circumstances related to the health of the animals, the second search of 107 Savannah Drive was merely a lawful “continuation” of the first admittedly lawful search. For the following reasons, the Court finds that the second search was not justified by the exigent circumstances exception to the warrant requirement, and the second search was not a lawful continuation of the first lawful search. Therefore, Defendants’ Motion to Suppress should be granted.

- a. **The second search was not justified by exigent circumstances because during the initial search the officers did not observe sufficient facts to justify their alleged belief that the animals in the home were in imminent danger.**

The Fourth Amendment to the United States Constitution provides that “[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]”¹ Article 1, subsection 6 of the Delaware State Constitution provides that “[t]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures.”²

Under both United States and Delaware law, searches inside a home without a warrant are presumptively unreasonable.³ The Delaware Supreme Court has elaborated that:

the history of constitutional provisions limiting searches and seizures leaves little doubt that searches 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.⁴

¹ US Const. amend. IV.

² Del Const. art. I, § 6.

³ US Const. amend. IV; Del Const. art. I, § 6; *Payton v. New York*, 445 U.S. 573, 586 (1980); *Mason v. State*, 534 A.2d 242, 247 (Del. 1987).

⁴ *Mason*, 534 A.2d at 248.

Further, the United States Supreme Court has opined that:

[t]he presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.⁵

The exigent circumstances exception to the warrant requirement is one of the few recognized exceptions.⁶ The burden is on the State to demonstrate the existence of exigent circumstances.⁷ The burden of proof to support a motion to suppress is by a preponderance of the evidence.⁸ The Delaware and United States Supreme Courts agree that law enforcement must secure and use search warrants whenever it is reasonably practicable to obtain a warrant.⁹ Whether exigent circumstances exist is measured by the totality of the circumstances known to police at the time of the warrantless search.¹⁰ Exigent circumstances exist where a reasonable person would believe the entry was necessary to prevent physical harm to police officers or others, to prevent the destruction of relevant evidence, to prevent a suspect from escaping, or to prevent “some other consequence improperly frustrating law enforcement efforts.”¹¹

As such, in *Patrick v. State*, the victim’s employer found the victim lying in his bed, badly beaten and bloody.¹² The employer called the police and told the police that he was not

⁵ *McDonald v. United States*, 335 U.S. 451, 455-56 (1948).

⁶ *Mason*, 534 A.2d at 248 (citing *Patrick v. State*, 227 A.2d 486, 489 (Del. 1967)).

⁷ *Id.* (citations omitted).

⁸ *State v. Seward*, 2007 WL 1784188, *4 (Del. Super. Apr. 11, 2007).

⁹ *Id.* at 250.

¹⁰ *Id.* at 249-50.

¹¹ *United States v. Gonzales-Barrera*, 288 F. Supp. 2d 1041, 1051 (D. Ariz. 2003); *Williams v. State*, 331 A.2d 380, 382 (Del. 1975).

¹² *Patrick v. State*, 227 A.2d 486, 487 (Del. 1967).

sure whether the victim was alive or dead.¹³ The police responded to the scene, entered the home without a warrant to check on the welfare of the victim.¹⁴ The police determined that the victim was dead, and observed evidence of the crime, including the suspected murder weapon.¹⁵ Then the police took photographs of the room where the victim was located, removed the body, and seized other evidence of the crime from the home.¹⁶ The Court upheld the search based on the exigent circumstances exception to the warrant requirement.¹⁷ The Court held that “an emergency may be said to exist, within the meaning of the ‘exigency’ rule, whenever the police have credible information that an unnatural death has, or may have, occurred.”¹⁸ Further, the Court noted that the “reasonableness” of such a search is measured according to the reasonableness of the belief of police that an emergency existed, rather than the existence of an emergency in fact.¹⁹

While under *Patrick*, it is clear that imminent threats to human life constitute exigent circumstances, whether imminent threats to animal life constitute exigent circumstances justifying departure from the warrant requirement is an issue of first impression in Delaware. However, courts in other jurisdictions have examined this issue, and the Court finds their analysis helpful in deciding this issue.

In *State v. Stone*, the Montana Supreme Court held that exigent circumstances exist when law enforcement officers are presented with evidence that there is an imminent threat to animal

¹³ *Patrick*, 227 A.2d at 488.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 489.

¹⁸ *Id.*

¹⁹ *Id.*

life.²⁰ In so holding, the court conducted a survey of decisions from other jurisdictions reaching the same conclusion. In each case cited, prior to conducting the search later held to be justified by the exigency of imminent danger to animals, law enforcement observed animals in the following severe and deplorable conditions: (1) a puppy and rabbit in an unventilated store display window exposed to the sun during 103 degree weather²¹; (2) a dead horse that an animal specialist informed officers had died of starvation²²; (3) reports that a dog was in a cage so small that he could not stand, the bottom of the cage was covered in urine and feces, the dog was thin and had blood on its paws, and was continuously shaking and whimpering²³; and (4) several animals had bones and ribs showing and a young horse was so weak it could not stand.²⁴ The *Stone* court upheld a warrantless search because a young boy told law enforcement that he observed numerous dead and dying animals without food and water, and observed some of the living animals feeding off of the dead.²⁵

In *State v. Davis*, a Tennessee Court of Criminal Appeals case, police responded to a complaint that a dog was loose and was behaving aggressively towards children.²⁶ The officers saw the dog run into the defendant's home through the open front door.²⁷ As they approached the home, the officers smelled the extremely potent smell of animal waste and observed feces in the front door.²⁸ The officers were so appalled by the smell that they believed that someone could be

²⁰ *State v. Stone*, 92 P.3d 1178, 1184 (Mont. 2004). See also, *Tuck v. United States*, 477 A.2d 1115 (D.C. 1984); *State v. Bauer*, 379 N.W.2d 895 (Wis. 1985); *Pine v. State*, 889 S.W.2d 625 (Tex. App. 1994); *People v. Thornton*, 676 N.E.2d 1024 (Ill. 1997).

²¹ *Tuck*, 477 A.2d 1115.

²² *Bauer*, 379 N.W.2d 895.

²³ *Thornton*, 676 N.E.2d 1024.

²⁴ *Pine*, 889 S.W.2d 625.

²⁵ *Stone*, 92 P.3d at 1180.

²⁶ *State v. Davis*, 2005 WL 2255968, *1 (Tenn. Crim. App. Sept. 15, 2005).

²⁷ *Davis*, 2005 WL 2255968 at *2.

²⁸ *Id.*

dead inside, and they observed animals that looked “sick” and acted “scared.”²⁹ The officers entered the home to determine whether the owner was dead or in need of assistance.³⁰ The officers did not see any water left out for the animals.³¹ Then they left the home and waited for twenty to twenty five minutes before animal control officers arrived.³² When the animal control officers arrived they discovered almost one hundred dead animals throughout the home, and many animals with runny, green mucus in their eyes.³³ The Court held that the first search was justified by the exigent circumstances exception to the warrant requirement.³⁴ The Court noted that this entry was justified because the facts known to the officers at the time of their initial entry gave rise to a justifiable belief that someone in the home might be in need of assistance.³⁵

The Court agrees with the analysis by the Montana Supreme Court in *Stone* and holds that imminent threats to animal life or safety may constitute exigent circumstances justifying departure from the warrant requirement. Moreover, after considering the various decisions from other jurisdictions that have examined this issue, the Court holds that in order for animal safety to give rise to exigent circumstances, law enforcement must have observed objective evidence

²⁹ *Davis*, 2005 WL 2255968 at *2.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at *3.

³⁴ *Id.* at *4-8.

³⁵ *Id.* at *6. The State and Defendants relied heavily on *Davis* in their memoranda discussing the legal issues before the Court on this Motion. It is important to note that in *Davis*, the defendant challenged two entries: the initial entry into the home to check on the defendant’s safety, and a later entry made by animal control officers to check on the welfare of animals observed during the initial entry. The court held that the initial entry was justified by the exigency of danger to human life, and that the second entry was a mere continuation of the initial entry. As such, *Davis* is not helpful in determining whether the second entry into 107 Savannah Drive was justified by the exigency of imminent danger to animal life, because the court did not undertake that analysis. However, the Court finds that *Davis* is an extremely helpful case with respect to whether the second entry into 107 Savannah Drive was a continuation of the initial entry. Therefore, *Davis* will be examined at length in the continued exigency portion of this opinion.

justifying their belief that animals are in immediate physical danger. The Court believes that such a requirement is necessary because in each decision cited in *Stone*, law enforcement observed objective evidence that animals were in immediate physical danger such as obvious signs of malnourishment including exposed ribs and bones, dead animals and animals so weak they could not stand, animals in conditions constituting obvious health risks such as being left in unventilated rooms in direct sunlight during 103 degree heat.³⁶

Simply put, the second entry into 107 Savannah Drive was not justified by exigent circumstances because the officers who conducted the initial search did not observe similar evidence that the animals in the home were in imminent physical danger. The only testimony in the record concerning danger to the animals known to police after the initial entry was that two cats had weepy eyes, one dog had matted fur, six birds were housed in cages with accumulations of bird feces and urine, there were several piles of dog and cat feces on the floor, and the home smelled like animal feces and urine. Conditions need not rise to the severity of the facts in *Stone*, where starving animals were eating other animals that had died from starvation, for there to be an exigency justifying a warrantless search. However, *Stone* and the cases it relies upon require that police observe or otherwise learn that animals are plainly suffering from some commonly known serious physical ailment such as heat stroke, starvation, open wounds, or severe exhaustion.³⁷ Jarboe corrected his testimony and stated that Martinez never expressed concern for any of the animals' safety. While the conditions in 107 Savannah Drive were not the best, there is no testimony in the record indicating that any of the animals in the home were in the level of imminent physical danger justifying dispensing with the warrant requirement.

³⁶ *Stone*, 92 P.3d at 1184; *Tuck*, 477 A.2d 1115; *Bauer*, 379 N.W.2d 895; *Pine*, 889 S.W.2d 625; *Thornton*, 676 N.E.2d 1024.

³⁷ *Stone*, 92 P.3d at 1184

This conclusion is further buttressed by the fact that there is no record evidence that any animals were removed from 107 Savannah Drive until over twenty four hours after both Kent County and Delaware SPCA officers had searched 107 Savannah Drive for evidence of animal cruelty. In other words, the State's argument that second search was necessary to protect the safety of the animals located in the home is not persuasive because neither SPCA agency that responded to 107 Savannah Drive took any action to treat the argued physical ailments or remove the animals from the environment allegedly constituting an imminent health risk until over twenty four hours after they observed the animals in the home. Therefore, the State has failed to meet its burden to establish that the alleged exigency of physical danger to animal life justified the second warrantless search by a preponderance of the evidence.

- b. The second search of 107 Savannah Drive was not a lawful continuation of the initial search because police knew that Julie Pettingill was not inside the home and waited two hours before conducting the second search.**

Defendants concede that exigent circumstances existed at the time of the first search of the home conducted by Morehead, Cole, Lewicki, and Martinez based on Steamer's report that Julie was in the home and suicidal. As discussed, the second warrantless search was not lawful because it was not justified by the exigency of imminent danger to animals. The State argues in the alternative that the second search conducted by Martinez and Jarboe was merely a continuation of the first, admittedly lawful search. The Court finds that the second search was not a lawful continuation of the initial lawful search because the second search was not sufficiently connected to the initially lawful search in either purpose or temporal proximity.

In *Michigan v. Tyler*, the United States Supreme Court first concluded that under certain circumstances, warrantless searches may be deemed to be continuations of prior lawful

searches.³⁸ In *Tyler*, the fire department responded to a call at nighttime that a building was on fire and put out the fire.³⁹ When the embers were still smoldering, and there was smoke and steam still in the building, a fire investigator arrived, found containers of flammable liquid, and took photographs of the containers.⁴⁰ The investigator testified that his purpose for being in the building was to determine the cause of the fire.⁴¹ Shortly thereafter, the fire department left the scene.⁴² Fire investigators returned five hours later when the sun rose and discovered more evidence of arson.⁴³

The Court held that a burning building was an exigent circumstance justifying dispensing with the warrant requirement, and firefighters in a building to put out a fire could seize evidence of arson in plain view.⁴⁴ The Court explained that:

Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished.⁴⁵

The Court held that this “reasonable time” extended to the search five hours later, because the contents of the building were not visible during the initial entry because it was nighttime, steamy and smoky.⁴⁶ However, the Court held that all searches conducted after the search five hours

³⁸ *Michigan v. Tyler*, 436 U.S. 499 (1978).

³⁹ *Id.* at 501-02.

⁴⁰ *Id.* at 502.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 509.

⁴⁵ *Id.* at 510.

⁴⁶ *Id.* at 511.

after the fire had been extinguished were not continuations of the initial exigency because they were not in any way connected to the initial exigency in temporal proximity or purpose.⁴⁷

Similarly, in *State v. Passerin*, a fire marshal conducted a warrantless search of a locked rental unit immediately after a fire in the building containing the unit was extinguished.⁴⁸ The Delaware Supreme Court held this initial search was justified by the exigent circumstances exception to the warrant requirement because the purpose of the search was to determine the cause of the fire and the building was still smoldering such that the fire could easily re-ignite.⁴⁹ However, the fire marshal then conducted one search per day over the next three days despite making no attempt to obtain a warrant, even though the landlord locked the gate surrounding the area and posted a guard immediately after the fire marshal concluded the initial, lawful search.⁵⁰ The Court held that the exigency justifying the initial search did not continue to justify the subsequent searches because there was no danger that someone could be injured or evidence destroyed because the fire was wholly extinguished, and the area was empty and secured by a gate and guard.⁵¹ In other words, the subsequent searches were not continuations of the initially lawful search because they were too far removed in time and purpose from the initial search.

In *United States v. Echegoyen*, the 9th Circuit Court of Appeals found that an initial warrantless entry of a home was justified by exigent circumstances when officers suspected that a home was being used to process drugs, fire department officials smelled explosive chemicals outside the home, there were limited firefighting resources available at the time, and the officers

⁴⁷ *Tyler*, 436 U.S. at 511.

⁴⁸ *State v. Passerin*, 449 A.2d 192, 194 (Del. 1982).

⁴⁹ *Id.* at 194-96.

⁵⁰ *Id.*

⁵¹ *Id.*

believed that the drug traffickers inside the home could be armed and dangerous.⁵² When the officers entered the home they arrested the suspects and eliminated any immediately apparent fire hazards.⁵³ They then called specialized narcotics officers, because the officers that made the initial entry did not believe they had the expertise to completely and safely eliminate the fire hazard.⁵⁴ The Court held that later entry by the specialized narcotics officers was a mere continuation of the initial lawful search because both searches were made to address the same exigency, the risk caused by the explosive chemicals.⁵⁵

In *State v. Magnano*, police received a complaint that a burglary was in progress in a home.⁵⁶ When police responded, they found a critically injured person in the home.⁵⁷ Thirty five minutes after the home had been secured, three police detectives returned without a search warrant and photographed and took measurements of the crime scene.⁵⁸ The Connecticut Supreme Court found that the second entry was a continuation of the first lawful exigency because the subject of the photographs and measurements was the crime scene that the initial officers had already observed during their initial lawful entry a mere thirty five minutes earlier, and therefore were part of the on-going criminal investigation.⁵⁹

Finally, in *State v. Davis*, a Tennessee Court of Criminal Appeals case, police responded to a complaint that a dog was loose and was behaving aggressively towards children.⁶⁰ The officers saw the dog run into the defendant's home through the open front door. As they

⁵² *United States v. Echevoyen*, 799 F.2d 1271, 1278-80 (9th Cir. 1986).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *State v. Magnano*, 528 A.2d 760, 761 (Conn. 1987).

⁵⁷ *Id.* at 761-62.

⁵⁸ *Id.*

⁵⁹ *Id.* at 765-67.

⁶⁰ *Davis*, 2005 WL 2255968 at *1.

approached the home, the officers smelled the extremely potent smell of animal waste and observed feces in the front door.⁶¹ The officers were so appalled by the smell that they believed that someone could be dead inside, and they observed animals that looked “sick” and acted “scared.”⁶² The officers entered the home to determine whether the owner was dead or in need of assistance.⁶³ The officers did not see any water left out for the animals. Then they left the home and waited for twenty to twenty five minutes before animal control officers arrived.⁶⁴ When the animal control officers arrived they discovered almost one hundred dead animals throughout the home, and many animals with runny, green mucus in their eyes.⁶⁵

The Court held that the first search was justified by the exigent circumstances exception to the warrant requirement.⁶⁶ The Court held that the second entry was merely a continuation of the first lawful entry because the officers observed horrible conditions during the initial search, were not equipped to handle the problem because they did not have gloves and cages, they closed the door of the home while waiting for animal control to prevent any animals from escaping, and animal control arrived at most twenty five minutes after the initial lawful search had concluded.⁶⁷ In short, the Court found that the subsequent entry was a continuation of the first lawful entry because they were close in time, and justified by the same purpose – controlling the animals within the home and determining why the animals were running loose.

⁶¹ *Davis*, 2005 WL 2255968 at *2.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at *3.

⁶⁶ *Id.* at *4-8.

⁶⁷ *Id.* at *8-10.

In the cases discussed regarding continuations of exigent circumstances, courts have consistently looked to the temporal proximity between the justified and allegedly continued searches, and whether the searches have a common purpose.

In *Tyler* and *Passerin*, the courts looked to whether the building was at risk of re-igniting, whether the searches were necessary to preserve evidence, and whether the circumstances were such that police could have attempted to obtain a warrant prior to conducting the searches sought to be brought under the continued exigency justified search umbrella. In *Echegoyen*, the Court looked to similar considerations, albeit in the context of a home where explosive chemicals were present, but not burning.⁶⁸ In all three cases, the exigency the fire or risk that a fire or explosion would occur, and the purpose of the continued search -- to eliminate the original exigency and preserve evidence in the event a new fire started -- were inextricably related.

Similarly, in *Magnano*, the original exigency, a complaint that a burglary was in progress in a home while the victim/defendant was at home, was closely related with the purpose of the continued search -- determining the veracity of the burglary complaint.⁶⁹ Further, the continued search was conducted a mere thirty five minutes after the initial search.⁷⁰

Similarly, in *Davis*, the two searches shared a common purpose because throughout the entirety of the two searches, police were investigating complaints related to the care of animals.⁷¹ Before the initial search the front door to the home was left open and feces were visible.⁷² Then, during the initial search, the officers smelled animal waste, decomposition, and observed visibly

⁶⁸ *Echegoyen*, 799 F.2d 1271.

⁶⁹ *Magnano*, 528 A.2d 760.

⁷⁰ *Davis*, 2005 WL 2255968.

⁷¹ *Id.*

⁷² *Id.*

sick and scared animals.⁷³ Moreover, the searches were conducted close in time because the officers only waited twenty five minutes for animal control officers to arrive, and while they were waiting closed the door so that animals would not escape.⁷⁴

In the instant case, the second search had a different purpose and was not within close temporal proximity with the initially lawful search supported by exigent circumstances.

First, the exigency giving rise to the initial search was Julie's welfare. This exigency was extinguished when Morehead, Cole, Martinez, and Lewicki searched the home and did not find Julie. The State argues that the search is supported by exigent circumstances because the conditions of the home justified the officers in believing that the animals in the home were in imminent danger. Unlike *Tyler*, *Passerin*, *Echegoyen*, *Magnano*, and *Davis*, this is a completely new and distinct alleged exigent circumstance from the admitted exigent circumstances that initially brought law enforcement to the home. There can be no "continuation" of an alleged exigent circumstance when it is undisputed that these exigent circumstances no longer existed after the initial search of the home. The purpose for the second search was to determine the welfare of the animals, while the purpose of the initial search was to determine the welfare of Julie. Therefore, the two searches in this case are not connected by a common exigent circumstance or common purpose.

Further, Jarboe and Martinez conducted a search that was far more invasive a search than the initial search the officers were justified in performing. Jarboe admitted that he took numerous photographs with his digital camera during this search and that the purpose of these photographs was to collect evidence to use in prosecution of this case. Martinez watched Jarboe take these photographs, and guided Jarboe through the first floor of the home, showing Jarboe what he had

⁷³ *Davis*, 2005 WL 2255968.

⁷⁴ *Id.*

seen during the initial entry to the home. Jarboe testified that he has never been trained in criminal procedure or evidence. The officers were initially justified in searching the residence for Julie, not conducting a warrantless exploratory search for evidence of animal cruelty.

Second, the searches in this case were not sufficiently connected in time because searches were separated by an unexplained and unjustified two hour delay. Kent County SPCA Officer Jarboe did not arrive until 4:48, nearly two hours after the initial search of 107 Savannah Drive. The State argues that because other courts have found that subsequent warrantless searches were continuations of prior searches supported by exigent circumstances, that this two hour gap is not consequential. The Court disagrees.

In *Tyler*, the Court upheld a search five hours after the initial search because the fire marshal was unable to complete his initial investigatory search because it was nighttime, steamy, and smoky.⁷⁵ Further, the Court suppressed evidence recovered in subsequent searches because similar impediments were not present.⁷⁶ Similarly, in *Passerin*, the Court suppressed evidence recovered in a subsequent search conducted the day after the initially justified search because the area was secured by a gate and guard such that there was no risk of imminent destruction of evidence, and there was no danger the fire would re-ignite.⁷⁷ In *Magnano* and *Davis*, the court found that the later search was justified by the continuing exigency because the later searches were so close in time (thirty five and twenty five minutes, respectively) to the original searches.⁷⁸

In the instant case, unlike *Tyler* the State has proffered no justification whatsoever for the two hour delay between the searches, such as being unable to safely observe the evidence at the time of the initial search or shortly after. There was no danger that any alleged evidence of

⁷⁵ *Tyler*, 436 U.S. 499.

⁷⁶ *Id.*

⁷⁷ *Passerin*, 449 A.2d 192.

⁷⁸ *Davis*, 2005 WL 2255968; *Magnano*, 528 A.2d 760.

animal cruelty could have been destroyed while police attempted to obtain a warrant. Police could have simply closed the door to the home, left one officer at the home in case Julie returned, and attempt to obtain a warrant. The burden on motion to suppress is on the State. The United States and Delaware Constitutions agree that police must secure and use search warrants whenever reasonably practicable. It was reasonably practicable to obtain a warrant before making the second search because there was no danger evidence of a crime would be destroyed, and the initial exigency justifying the initial entry was no longer present.

Finally, much ink was spilled in briefing comparing the observations made by the officers in the initial search in *Davis* to those made in the initial search here. Considering the other differences between this case and *Davis* previously examined in this opinion, the mere fact that this case and *Davis* have more factual and contextual similarities than the other cases does not bind this Court to an identical outcome. In *Davis*, the court held that the second search was a continuation of the first lawful search because the same exigent circumstances -- risk of harm to the homeowner's animals -- continued to exist, and because the searches were conducted extremely close in time to each other. As previously discussed at length, the exigent circumstances justifying the initial search in this case no longer existed after Martinez, Morehead, Lewicki, and Cole performed their initial sweep of the home, and the State has offered no evidence or argument explaining the two hour gap between the two searches.

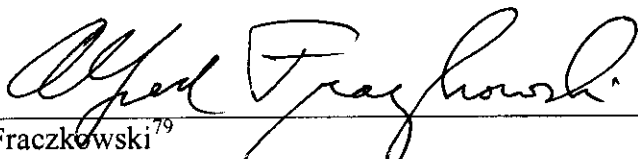
Therefore, the second search of 107 Savannah Drive was not a continuation of the initial search conducted because the subsequent search was not sufficiently linked to the initial search in either purpose or temporal proximity.

CONCLUSION

Based on these findings of fact and conclusions of law, the Court concludes that the State has failed to meet its burden to establish by a preponderance of the evidence that the second search of 107 Savannah Drive was justified by the exigent circumstances exception to the warrant requirement.

Defendants Motion to Suppress is hereby **GRANTED**. As a result, all evidence observed and collected by Jarboe during his warrantless entry into 107 Savannah Drive, and all evidence observed and collected during other warrantless searches conducted after Jarboe's search is hereby excluded from evidence in this case. Moreover, all evidence observed and collected during the execution of the warrant is excluded from evidence because the warrant was granted based on evidence collected and observed during the unlawful warrantless searches of 107 Savannah Drive.

IT IS SO ORDERED



Alfred Fraczkowski⁷⁹
Associate Judge

⁷⁹ Sitting by appointment pursuant to Del. Const. Art. IV, § 38 and 29 *Del. C.* § 5610.