
STATE OF NEW JERSEY,

v.

KE WANG

Defendant.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
LAW DIVISION: CRIMINAL

INDICTMENT NO.: 23-06-00080-S
PG NO.: 21-5422

OPINION AND ORDER DENYING
DEFENDANT’S MOTION TO
DISMISS THE INDCTMENT AND
GRANTING DEFENDANT’S MOTION
TO SUPPRESS

DATE OF DECISION: May 20, 2024

JOEL S. SILBERMAN, ESQ.

Attorney for Defendant, Ke Wang

AMY SIEMINSKI, ESQ., DEPUTY ATTORNEY GENERAL

Office of the Attorney General

Division of Criminal Justice

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter comes before the Court upon Ke Wang’s (hereinafter “Defendant”) Motion to dismiss the Indictment and Motion to suppress. I have carefully considered the parties’ submissions, including Defendant’s brief, testimonial hearings, oral argument, and for good cause shown, Defendant’s Motion to dismiss the Indictment is **DENIED** and Defendant’s Motion to suppress is **GRANTED**.

In September 2021, Detective Anthony Eggert (hereinafter “Det. Eggbert”) of the New Jersey State Police Internet Crimes Against Children Unit launched an investigation into child sex abuse material (“CSAM”) to link the IP address connected to 132 Tuers Avenue in Jersey City, NJ

with the distribution to CSAM. (1T31:23-1T32:24; 1T38:16-41:6)¹ On November 5, 2021, police officers obtained and executed a search for 132 Tuers Avenue and described the distribution as “the left side of a two family, three-story home, divided vertically.” (1T44:7-16; 1T48:1-14)

At the time of the execution of the search warrant, Det. Eggert was the lead investigator. (1T48:16-21) As the lead investigator, Det. Eggert was not part of the initial entry into the dwelling but entered only after the TEAMS unit deemed the premise secure and safe. (1T49:1-13) At this point, Det. Eggert entered and conducted his search for evidence. (1T49:1-13) Det. John Barnett (hereinafter “Det. Barnett”) of the New Jersey State Police was a member of the TEAMS unit that executed the search warrant at 132 Tuers to ensure the dwelling was safe. (1T75:22-1T76:2; 1T78:25-1T79:9) While Det. Barnett was part of the security team that was responsible for making entry, he was not, however, one of the first people to enter 132 Tuers. (1T79:23-1T80:15) There were other officers ahead of him. (1T87:18-23)

Upon making entry, the TEAMS unit encountered a staircase that went straight to a second-floor apartment that had three occupants and a kitchen. (1T82:16-18; 1T91:6-24) The kitchen had a door that led to a downward staircase. (1T87:24-1T88:24) When the TEAMS unit went down the stairs, they found a door leading to another area that was locked and assumed that door went into 130 Tuers. (1T100:18-22; 1T101:3-9) Across from the kitchen door was another door that contained a staircase that continued up to the third floor where there was a small kitchen which Defendant’s room and a second bedroom adjoined. (1T90:1-1T91:5) The doored staircase leading from the second to the third floor was on the opposite side (right side) of the dwelling from the front door for 132 Tuers. (1T98:19-22) Det. Barnett was not the first to go up to the third floor and

¹ “1T” refers to the October 13, 2022 transcript.

could not recall whether there was a door leading from the second floor to the third floor because by the time he “got on the train” it was already open. (1T97:14-1T98:9) After the tactical team deemed the premises safe, Det. Eggert entered the dwelling through the left door marked 132 Tuers. (1T51:11-17) Det. Eggert observed a small foyer and staircase leading to the second floor where there were multiple bedrooms and a kitchen upon entering the dwelling. (1T51:18-25) By the time Det. Eggert had entered the dwelling the tactical team had taken everyone out of their rooms and put them in one group for safety purposes. (1T58:20-1T59:4; 1T60:23-25) At that point, Defendant’s electronics were seized and he was placed under arrest. (1T55:15-1T57:4; 1T71:1-1T72:5)

On June 22, 2022, Defendant filed a pre-indictment motion to suppress. On January 1, 2023, the Court, after conducting a testimonial hearing, denied Defendant’s motion to suppress. On February 13, 2023, Defendant filed a motion for reconsideration. On May 11, 2023, the Court denied Defendant’s motion for reconsideration.

On September 12, 2023, Defendant filed the instant motion for reconsideration of the suppression to allow the court to consider the newly discovered evidence. The newly discovered evidence includes a statement from Defendant’s former landlord Jean Haedrich (hereinafter “Ms. Haedrich”) as well as the opinion of retired police Captain Robert Hovan (hereinafter “Captain Hovan”). On August 7, 2023, Captain Hovan took a statement from Ms. Haedrich. See Certification of Robert Hovan. Ms. Haedrich stated that: (1) Defendant’s apartment was part of 130 Tuers and only accessible from the rear entrance of the dwelling; (2) the front door to Defendant’s apartment, along with other doors, were broken open by the officers who executed the search warrant; and (3) the officers had a large metal tool that she believes was used to open the doors. Additionally, Captain Hovan reviewed the crime scene photograph that was taken of the

door to Defendant's apartment. Captain Hovan noted that the door was damaged in the area where the door's locking mechanism is located and that there was fresh wood and paint directly under the damage on the floor. Hovan recognized the damage to Defendant's door to be consistent with a Halligan Tool that is commonly used by law enforcement to gain access to locked doors.

On December 15, 2023, this Court held a testimonial hearing where Det. Barnett again testified, Sergeant Josphe Villalta-Moran (hereinafter "Sgt. Villalta-Moran") testified, and Ms. Haedrich testified. Det. Barnett testified that the door to Defendant's third floor apartment is closed and unlocked. (2T12:24-13:4)² This is consistent with his prior testimony where he had also stated that the same door to Defendant's third floor apartment was closed and unlocked. (1T103:8-15) Sgt. Villalta-Moran additionally testified that the door to Defendant's apartment was never breached because the door was unlocked, open, and there was no need to breach it. (2T81:21-23;112:23-113:1) Later on in the testimony, Sgt. Villalta-Moran testified that Defense counsel is missing notes. (2T125:3) Sgt. Villalta-Moran stated, "[t]here is always notes, sir. Typically, I don't – typically, whoever is in charge of doing that operation or does the advance – who prepares the advance will have the line-up." (2T125:8-11) He further testified, "...whoever wrote the report probably took the notes" and then stated, "It says here received by Barnett, so he should have taken the notes. Yes, sir" (2T126:5-13)

Subsequent to this testimony, for the first time, the State submits they received Det. Barnett's notes regarding the search warrant of Defendant's residence which was turned over to Defense counsel on January 4, 2024. Det. Barnett's notes clearly state, "[c]loset door outside kitchen was breached. No indication it was separate from residence. Door led to third floor loft."

² "2T" refers to the December 15, 2023 transcript.

On January 6, 2024, Defendant filed this Motion to dismiss the Indictment. Defense counsel argues the State withheld Det. Barnett's notes in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963). The State argues that they were not aware of, nor in possession of any notes from the tactical team and promptly turned them over when they came in possession. Moreover, the State also argues that there is no violation of Brady because Det. Barnett's notes are not plainly favorable to the Defendant and are not material to the outcome of this case. Furthermore, the State argues that the proper remedy is not dismissal of the Indictment, but rather asks this court to reopen testimony to determine whether Det. Barnett's notes are actually favorable to the Defendant.

LEGAL STANDARD AND ANALYSIS

I. DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

The Sixth Amendment to the United States Constitution and Article I, Section 10 of the New Jersey Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." State v. Harris, 316 N.J. Super. 384 (App. Div. 1998) (citing Davis v. Alaska, 415 U.S. 308, 315 (1974); State v. Maben, 132 N.J. 487, 496 (1993)). "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). When the reliability of a given witness may be determinative of guilt or innocence, nondisclosure of evidence affecting their credibility falls within the Brady rule. Giglio v. United States, 405 U.S. 150, 154 (1972).

The Supreme Court stated that the three elements of Brady violation include: "[t]he evidence must be favorable to the accused; it must be suppressed by the prosecution; and it must be material." State v. Nelson, 155 N.J. 487, 497 (1998) (citing Moore v. Illinois, 408 U.S. 786,

794-95 (1972). Evidence is material if there is not “a reasonable probability that a different result would have been obtained, had the evidence been disclosed.” Nelson, 155 N.J. at 500 (citing United States v. Bagley, 473 U.S. 667, 682 (1985))

The first element requires that the evidence at issue must be favorable to the accused. The State argues that Det. Barnett’s notes are neither exculpatory nor impeachment material and thus are not favorable to Defendant. Last year, on May 11, 2023, this Court denied Defendant’s Motion for reconsideration. In denying the motion, this Court stated there are pertinent factual issues that were not addressed during the testimonial hearing. Specifically, the Court stated, “[t]he only fact that may make a difference here truthfully is whether the door was locked and they broke into it. That’s the only fact that would be dispositive, that would make a difference to this court.” Therefore, the sole question before the Court is whether the door to Defendant’s third floor apartment was breached. This Court conducted two testimonial hearings, on October 13, 2022, and December 15, 2023, to determine whether the door to Defendant’s third floor apartment was in fact breached.

During both testimonial hearings, Det. Barnett stated that the door in question was closed and unlocked. (1T103:8-15; 2T12:24-13:4) During the first testimonial hearing, Det. Barnett stated that it was his belief that no internal door was breached because no call was made. (1T104:3-19) Det. Barnett explained that if there is an internal door within the structure the standard procedure is to call and that on this day a call was not made. (1T104:3-19) During the second testimonial hearing, Det. Barnett again testified that the door was closed and unlocked. (2T12:24-13:4) However, Det. Barnett’s own notes make clear that the door in question was breached. The notes clearly state, “[c]loset door outside kitchen was breached. No indication it was separate from the residence. Door led to 3rd floor loft.”

Therefore, Det. Barnett's notes are at the very least impeachment material as Defendant would be able to cross-examine Det. Barnett on the differences between his testimony and his own notes. Furthermore, the second element under Brady, that the State must have suppressed the evidence, is not contested. The State submits that Det. Barnett's notes were inadvertently suppressed. The notes were not disclosed to Defense counsel until January 4, 2024, approximately two years after Defendant was charged and approximately eighteen months after Defendant filed his first Motion to suppress. Thus, the second element is met under Brady.

Lastly, the third element requires that the evidence must be material. "Whether evidence is material and thus subject to disclosure under the Brady rule is a mixed question of law and fact." State v. Marshall, 148 N.J. 89, 185. The court must "examine the circumstances under which the nondisclosure arose' and '[t]he significance of a nondisclosure in the context of the entire record." State v. Brown, 236 N.J. at 518-19 (quoting Marshall, 123 N.J. at 199-200, (1991). "[W]e consider the strength of the State's case, the timing of disclosure of the withheld evidence, the relevance of the suppressed evidence, and the withheld evidence's admissibility." Ibid. The significance of nondisclosure "depends primarily on the importance of the [evidence] and the strength of the State's case against [a] defendant as a whole." Marshall, 123 N.J. at 200.

Det. Barnett's notes are material. Had the Court known this information at the time of the original motion to suppress, the Court would have likely come to a different conclusion. For example, the warrant describes the structure as:

...the left side of a two family, three-story home, divided vertically. The house consists light gray siding. There is a brick front porch leading to both doors of the residence. When facing from the street, address 132 Tuers Avenue would be the left door and 130 is the right door. Also on the porch are three windows with black metal bars. Both doors are covered by white metal awnings. A white metal fence surrounds the porch and another separates the sidewalk from the

property. The back of the residence has a wood porch on the ground level with a door and large window covered by a metal guard.

See VM-HUD-7165-SW-21 at 1.

As the TEAMS unit is going through the structure they are proceeding through unlocked doors. At the point in question, they are clearly on the other side of the structure (the right side of the house) and are faced with two locked doors. The first is on the stairs going down which they determine is not part of the warrant, the second, without further inquiry, is determined to be a part of the warrant. At that point, a breach of entry is made. The State's argument that it is of no moment because there is no further information they could have obtained is unpersuasive. To begin with, they could have knocked on the door. Next, they could have spoken to the occupants and secured the apartment. At the very least, all the information should have been properly presented to the Court. The prosecutor was required to disclose Barnett's notes so long as there was a "reasonable probability" that the result would be different. United States v. Bagley, 473 U.S. 667, 682 (1985) The Court made clear that a breach of Defendant's door would be a significant consideration. The timing of the State's disclosure of Det. Barnett's notes is also highly problematic. Det. Barnett's notes only came to light after Sgt. Villalta-Moran's admission of them during cross-examination at a reconsideration hearing.

Presumably at the inception of this case, Det. Barnett turned over a report to the State regarding the execution of a search warrant at Defendant's residence. This report makes a reference to an "attached diagram" in Det. Barnett's report, but that diagram was never attached. This reference should have alerted the State that it was not in possession of all of Det. Barnett's notes. Moreover, on September 12, 2023, Defense counsel served a supplemental discovery request on the State. Defendant's supplemental discovery request sought the identities of all the officers that made up the TEAMS unit, the identity of the officer who breached Defendant's door, and the

identity of any officers that possessed a Halligan tool. These specific requests were in response to Defendant's expert witness' opinion that Defendant's door was breached with a Halligan tool.

On September 18, 2023, the State responded to Defendant's supplemental discovery requests by letter. The State's response simply redirected Defendant to Det. Barnett's narrative report for "pertinent details of the TEAMS entry on the date of the search warrant." Therefore, the State had multiple opportunities to produce Det. Barnett's notes throughout the years since the inception of this case.

As to the question of remedy, the court must determine whether a dismissal of the Indictment is warranted. "[I]n the context of a Brady violation, the remedy of dismissal of an indictment with prejudice is utilized when 'the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" Brown, 236 N.J. at 528 (quoting United States v. Russell, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973))(emphasis added).

It is clear that Det. Barnett testified twice before the court that Defendant's door to his third-floor apartment was closed and unlocked. It is also now clear, from Det. Barnett's own notes, that Defendant's door to his third-floor apartment was breached. The Court is troubled by the fact that Det. Barnett's notes only came to light after Sgt. Villalta-Moran's admission of them during his testimony. This provides further evidence that Det. Barnett's nondisclosure was at the very least negligent as they were his notes and he on one occasion under oath stated that there was no breach. This court cannot allow the State to withhold information from a Defendant that goes directly to the issue this Court has stated it finds dispositive to prevent an unfavorable outcome.

While the circumstances are certainly concerning, a dismissal of the Indictment is not warranted. The Court cannot say that the conduct was willful or outrageous. Furthermore, the State

initially argued that the detective could explain how he defined breached. After discussion at argument, the State decided not to proceed with testimony, inter alia, as it would not matter because no information would change the outcome. Indeed, no explanation would clarify the difference between breach and no breach. Considering the palpable negligence in this case, Defendant must have a remedy. Therefore, Defendant's Motion to suppress must be granted.

II. DEFENDANT'S MOTION TO SUPPRESS

In the alternative, the breach of Defendant's third floor apartment was outside the lawful bounds of the search warrant. In State v. Marshall, 199 N.J. 602, 611 (2009), the police did not know in which of the two apartments at a certain address the criminal activity was taking place, and the warrant was issued in violation of this requirement. The court found the search warrant invalid and held that when a multi-unit building is involved, the affidavit in support of the search warrant must exclude those units for which the police do not have probable cause. Id.

In Maryland v. Garrison, 480 U.S. 79, 89 (2007) the Supreme Court noted, in a footnote, that if the police know a single address might contain multiple units, but do not know which one contains illegal activity, then "[a] search pursuant to a warrant authorizing a search of the entire floor... would present quite different issues" than if they only learn of the multiple units upon entry. In U.S. v. Ritter, 416 F.3d 256, 267 (3d Cir. 2005), the court held that "once the officers discovered that the house had multiple dwelling units, they could no longer rely on the warrant to justify their search of the building" and that the only evidence that can be admitted is that which was recovered before the officers exceeded the bounds of the warrant.

In this case, the search warrant in question particularly described the premises to be searched as:

The residence to be searched the left side of a two family, three-story home, divided vertically. The house consists light gray siding.

There is a brick front porch leading to both doors of the residence. When facing from the street, address 132 Tuers Avenue would be the left door and 130 is the right door. Also on the porch are three windows with black metal bars. Both doors are covered by white metal awnings. A white metal fence surrounds the porch and another separates the sidewalk from the property. The back of the residence has a wood porch on the ground level with a door and large window covered by a metal guard.

See VM-HUD-7165-SW-21 at 1.

The State argues that the search warrant was for the execution of the second and third floors of 132 Tuers, but this is incorrect. The plain language of the search warrant authorizes the search of the entirety of 132 Tuers. What it does not authorize is the search of 130 Tuers, the right side of the dwelling.

During the execution of the warrant for 132 Tuers, when the TEAMS unit reached the second-floor door off the kitchen they came to a landing area. (2T48:20-24) The landing area had an egress down and a closed door. (2T48:20-24) The TEAMS unit then asked Sgt. Villalta-Moran whether they should proceed beyond this second-floor door. (2T118:13-29; 2T128:4-129:12) Sgt. Villalta-Moran further testified that he then cleared the unit to proceed beyond the door. (2T78:11-80:11)³

The TEAMS unit first proceeded down the stairs where they came to a locked door. (1T100:18-22; 1T101:3-9; 2T50:16-18, 2T128:21-129:12) The TEAMS unit did not breach this locked first-floor door as it was assumed to be 130 Tuers and thus outside the lawful bounds of the search warrant. (2T50:16-18; 2T81:8-82:10; 2T128:4-129:3) The TEAMS unit next proceeded

³ The Court notes that, at this point in testimony, Sgt. Villalta-Moran believed he was being questioned about the door that led to Defendant's third floor apartment. (2T118:11-25) Later on in the testimony, however, Sgt. Villalta-Moran clarified that the TEAMS unit actually asked him about the second-floor door that led to the landing area. (2T118:11-25) This confusion provides further evidence of the officers' palpable negligence in providing their testimony under oath.

back up the stairs to the second-floor landing where the door to Defendant's third floor apartment was locked and then breached. (2T81:8-82:10) The Court notes that the doored staircase leading from the second to the third floor was on the opposite side (right side) of the dwelling from the front door of 132 Tuers. (1T98:19-22)

Both the first-floor door and the door to Defendant's third floor apartment were locked and did not have any identifiable markings. Both appeared to be on the other side of the dwelling from the front door of 132 Tuers. Yet, the TEAMS unit declined to breach the first-floor door, but then proceeded to breach the door to Defendant's third floor apartment with no additional inquiry. (2T81:8-82:10) This Court questions why the first-floor door, with no identifiable markings, was not breached and Defendant's third-floor door, also with no identifiable markings, was breached. Therefore, the Court finds that when the TEAMS unit reached the locked door to Defendant's third-floor apartment, a further inquiry was necessary to determine whether the door was within the bounds of the search warrant.

Additionally, Det. Barnett's own notes and Ms. Haedrich's testimony make clear that the door to the third-floor apartment was in fact breached. Ms. Haedrich testified that multiple interior doors were damaged including the door to the third floor which had scratch marks on the frame and was damaged in the lock area. (2T:149:5-151:21) Ms. Haedrich further testified that she charged Defendant \$2,000 to fix the damage the police caused. (2T:149:5-151:21) Sgt. Villalta-Moran also testified that the door to Defendant's third-floor apartment would require a Halligan tool to breach. (2T119:9-15) Therefore, the evidence shows that Defendant's door was breached.

When considering the officer's palpable negligence in providing testimony under oath, how the TEAMS unit declined to breach the first-floor door as it was outside the lawful bounds of the search warrant and then proceeded to breach Defendant's third-floor door when both doors

were locked and are physically similar, and that no additional inquiry was made before breaching Defendant's door, this Court finds that the breach of Defendant's third-floor door was outside the lawful bounds of the search warrant.

Therefore, under the totality of the circumstances, Defendant's Motion to suppress is granted.

CONCLUSION

Accordingly, for the foregoing reasons, Defendant's Motion to dismiss the Indictment is **DENIED** and Defendant's Motion to suppress is **GRANTED**.

SO ORDERED.

/s/Mitzy Galis-Menendez
HON. MITZY GALIS-MENENDEZ, P.J.Cr.

R. 1:6-2(a): The within matter was ____X____ opposed _____ unopposed.

R. 1:6-2(f): The Court made (__ oral _X_ written) findings of fact and conclusions of law explaining its disposition of the Motion on May 20, 2024.