

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CRIMINAL DIVISION
Docket No. 1306-4-16 Cncr

State of Vermont

v.

Dylan D. Mortman,
Defendant

DECISION ON MOTION

The Court heard Defendant’s Motion to Suppress on December 9, 2016. Defendant, Dylan Mortman, appeared with attorney Bob Katim and Justin Jiron appeared for the State. Officer Aaron Dince testified for the State. Based on the evidence provided, the Court issues the following findings and order.

Findings:

Officer Dince works for the University of Vermont (“UVM”) Police Department. He was on duty the evening of April 10, 2016. That evening, UVM staff notified Officer Dince that drugs were discovered in Room 310 in Harris Hall. Defendant is the sole occupant of that room.

Based on the above information, Officer Dince applied for a search warrant. Prior to seeking judicial authorization, the officer spoke with a State’s attorney, who advised the officer to seek an afterhours warrant. The officer did not want to use staff time to secure the room until 6 AM. UVM had two patrol officers and a Sargent working the night shift on April 10th. Other than seeking to save staff time, no evidence was presented that exigent circumstances justified a nighttime search.

After speaking with the State’s Attorney, Officer Dince sought a search warrant by phone with a judicial officer at 10:34 PM on April 10, 2016. The officer knew Defendant was not present in Vermont and was not expected to return from New Jersey until the evening of the next day. The judge authorized the search warrant, but limited the search between the hours of 6:00 AM and 10 PM. No exception was noted. The warrant was issued on April 10, 2016 at 11:24 PM.

The officer conceded he did not orally request a nighttime warrant, nor did the written warrant application request an afterhours warrant. The officer assumed the judge would understand he sought a night time search warrant because he was calling at night. The officer never checked the warrant itself to confirm what hours the search was authorized. After the warrant was authorized, the officers immediately conducted the search, entering Room 310

at 11:54 PM on April 10th and concluding the search at 2:13 AM on April 11, 2016.

The officer later realized, when processing the evidence, that the warrant did not authorize a nighttime search and the search was conducted after the 10 PM limit.

Conclusion:

A search warrant may only be authorized by a judicial officer upon request of a law enforcement officer. V.R.Cr.P. 41(a). In general, the warrant shall command the officer to search the place named and to serve the warrant between the hours of 6:00 AM and 10:00 PM unless the judicial officer for reasonable cause shown authorizes execution at other times. V.R.Cr.P. 41(b)(5)(A)(ii). A judicial officer may, by appropriate provision in the warrant, and for reasonable cause shown, authorize a warrant's execution at other times. A night time search is justified when information in the warrant indicates that there is a danger the evidence sought will be disposed of absent a nighttime search. State v. Weiss, 587 A.2d 73, 76 (1990)

Under the Fourth Amendment, people are protected "against unreasonable searches and seizures." U.S. Const. amend. IV. This right is echoed in the Vermont Constitution, which protects people's right to be "free from search or seizure." Vt. Const. ch. I, art. 11. "Absent exceptional circumstances, the federal and state constitutions instruct executive officers to conduct searches pursuant to a warrant issued by an impartial magistrate." State v. Quigley, 2005 VT 128, ¶11, 179 Vt. 567, 892 A.2d 211 (mem.)

The warrant did not provide the police with authority to seize the items at the time they did. It is clear the officer did not provide reasonable cause to the judicial officer for the warrant to be executed after hours. Nor, did the application seek this request. No reasonable cause existed in this case, as Defendant was not in the State of Vermont and not expected to return until later the next day. The officer executed the warrant after hours, assuming the warrant gave him such authority when no such authority existed.

Under the Fourth Amendment, a search executed outside the timeline set out in the warrant, violates the Fourth Amendment. Jones v. Kirchner, 14-5257, 15-5088 (D.C. Cir. August 26, 2016). A warrant is "dead," and a search undertaken pursuant to a warrant invalid if executed at a time not authorized by the warrant. Id.

The Vermont Constitution generally provides a defense against privacy invasions that is greater than that afforded by the Fourth Amendment. See State v. Pitts, 978 A.2d 14, 23 (2009) (Chapter 1, Article 11 of the Vermont Constitution provides a defense against privacy invasions equal to or, in some cases, greater than the Fourth Amendment in order to place reasonable restrictions on police authority to search citizens.) Enforcing a judicial officer's

directions ensure the warrant is meaningful and effective. In re Search Warrant, 2012 VT 102; 71 A.3d 1158, 1164 ¶12 (2012). Thus, for example, a failure to abide by the warrant's time restrictions may be cause for suppression of evidence obtained in the search pursuant to the warrant. Id.

The police executed a search not authorized by a warrant. This is akin to a warrantless search. The Court does not accept the State's argument that although the search exceeded that allowed by the warrant, the search did not prejudice Mr. Mortman or substantially violate his constitutional rights. The State essentially seeks an exception to the warrant requirement in the absence of a showing of prejudice to the Defendant. Warrantless searches are per se unreasonable "except in a few jealously and carefully drawn exceptional exceptions," State v. Meunier, 409 A.2d 583, 584 (1979). The Court declines to create an exception here.

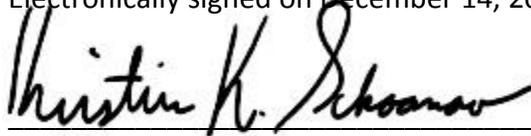
Accordingly, Defendant's Motion to Suppress must be granted.

Order

The Defendant's Motion to suppress is GRANTED. All evidence obtained in the search pursuant to the warrant shall be SUPPRESSED.

So Ordered.

Electronically signed on December 14, 2016 at 02:22 PM pursuant to V.R.E.F. 7(d).



Kirstin K. Schoonover
Superior Court Judge