IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN THE INTEREST OF:	:	
M.J.,	:	**NO. JV-178-2024**
	:	
A minor,	:	

OPINION and ORDER

Presently before the Court is an oral Motion to Dismiss made by Matthew Diemer, Esquire on behalf of the accused juvenile (MJ). A hearing was held August 22nd, 2024 at which time M.J. was present and represented by Matthew Diemer, Esquire. Also present was Blake Marks, Esquire on behalf of the Commonwealth.

This matter was brought to the attention of law enforcement following a report of shots fired July 22, 2024 in the city of Williamsport. The Williamsport Bureau of Police (WBP) responded to 2119 King Street on that date and found a single .380 brass casing in the parking lot of the Diamond Street Christian Church. Agent Benjamin Hitesman (Hitesman) was assigned the case and identified MJ fleeing the area of the church parking lot. Hitesman's initial identification of MJ was the result of Hitesman viewing a video that the WBP obtained subsequent to the shot(s) fired. Following Hitesman's review of a home security camera where two juveniles can be seen running in an alley, Hitesman applied for a search warrant of MJ's residence.

Per the Search Warrant Affidavit of Probable Cause sworn to by Hitesman July 23, 2024, Hitesman states, among other things "Video surveillance of the shooting was obtained….This video shows a male who was later identified as [MJ] wearing a white hoodie and blue jeans and another unidentified male wearing a black hoodie and black pants…..[MJ] is seen running back

towards [the] entrance of the lot ….. [MJ] calmly walks back…..Video from Good Alley was obtained that shows [MJ] running with a white hoody and jeans on, the hoody appears to have a logo on the front of it. [MJ] is running with his left hand free and his right hand in his hoody pocket which is indicative of [MJ] possessing a firearm." The warrant requested seizure of a white hoody, guns, ammo and MJ's cellphone. The warrant was signed by the District Attorney's Office and approved by a judge. MJ's home was subsequently searched and located within a pillowcase of MJ's bedroom was a .380 pistol.

MJ was arrested on July 25, 2024 and immediately placed in detention by the Lycoming County Juvenile Probation Office. A seventy-two (72) hour detention hearing was held July 26 where the Commonwealth presented the testimony of Agent Salisbury. Agent Salisbury confirmed the identity of MJ by stating that both he and Hitesman reviewed the video that was obtained. Also providing testimony during the 72-hour detention hearing was MJ's probation officer Nate Hill. Over objection of MJ's counsel, the Court detained the juvenile pending the evidentiary hearing.

Prior to the 72-hour detention hearing and unbeknown to the court during the hearing, on July 24 Hitesman provided officers of the juvenile probation office with photographs and video requesting their assistance with the identification of the *two* (emphasis added) juveniles depicted in the video. Juvenile probation officer Kaitlin Lunger responded to Hitesman that the juvenile identified by Hitesman as MJ appeared to her office to be JB, a juvenile known to JPO and currently on supervision with the JPO Office. JPO Lunger and JPO Hill conducted a home visit of JB's house on July 25 and during a check of his room, JPO Lunger identified a sweatshirt hanging in JB's room as the sweatshirt in the video worn by the juvenile identified by Hitesman as MJ. Also during the room check of JB, JPO Lunger observed that JB was wearing the

identical white wash pants worn by the juvenile in the video provided to them by Hitesman. JPO Lunger sent Hitesman a text to make him aware that the sweatshirt worn by the juvenile featured in the video was hanging in JB's room and that JB was currently wearing the identical white wash pants worn by the juvenile in the video. Hitesman responded to JPO Lunger's text message with an explanation point. None of this information was shared with the court during the 72-hour hearing.

On August 5 at the time scheduled for the evidentiary hearing in this matter, counsel for the juvenile requested a continuance because he had not yet received all discovery from the Commonwealth. Defense counsel also requested that MJ be released pending the rescheduling of the evidentiary hearing. The Court granted the continuance and over the objection of defense counsel, detained MJ for another ten (10) days pending the rescheduling of the evidentiary hearing. Also, during the time of the evidentiary counsel, counsel for the juvenile indicated that he will be filing a Notice of Alibi. Hitesman was present during this hearing and, for whatever reason, despite receiving information from the juvenile probation office that Hitesman misidentified MJ, Hitesman remained silent when the Court determined that MJ should remain detained pending the rescheduled evidentiary hearing.

On August 21, approximately sixteen (16) days following the Court's Order of August 5 that Ordered the evidentiary hearing be continued and MJ remain detained, it was brought to the Court's attention that no evidentiary hearing was held. The Court immediately called a conference with a representative of the Commonwealth, the juvenile probation office as well as defense counsel to appear and address why a hearing did not occur and to discuss why the juvenile remained in detention. During the August 21 conference, counsel for MJ brought to the attention of the Court various emails received by the Commonwealth approximately one day

prior to the conference that significantly called into question the identification of MJ by Hitesman. The emails were only brought to the attention of the District Attorney's Office approximately one day prior to August 21. Recognizing that the emails did constitute *Brady* material, the First Assistant District Attorney immediately provided the emails to defense counsel.

In light of the misidentification issue, Defense counsel asked whether a formal motion to dismiss need be filed with the court or whether the motion could be raised by oral motion. The Court ordered that MJ be immediately released on a GPS monitor and placed on house arrest and scheduled a hearing on Defense Counsel's oral motion to dismiss on grounds that MJ's due process rights were violated as a result of outrageous governmental conduct. Counsel's outrageous governmental conduct argument specifically cited Agent Hitesman's intentional withholding of *Brady* information.

The hearing on defense counsel's oral motion to dismiss was held the morning of August 22. During this hearing, Hitesman was extensively questioned on his identification of the juvenile as well as when he learned from juvenile probation that he misidentified MJ. Defense counsel also submitted various exhibits for the Court's review.

On direct examination, Hitesman testified that he identified the juvenile by utilizing a video that captured MJ along with another juvenile running north on an alley in Williamsport near the shots fired incident. This video was later submitted into evidence by defense counsel and labeled 'Good Alley'. Hitesman testified that he knew MJ from other investigations involving juveniles but was not familiar with MJ and never had much prior personal interaction with him, even at the Williamsport High School where Hitesman was previously assigned as the school resource officer. At the time Hitesman viewed the video, he believed it was MJ based on

his hair as he thought he could see dreads. Hitesman stated that upon viewing the video, he instantly thought it was MJ. Based on this, Hitesman applied for a search warrant of MJ's residence. The warrant was drafted, approved and executed July 23, 2024.

During cross examination, Hitesman testified that he identified MJ based on what he believed were dreads when he paused the video. Hitesman also acknowledged that MJ was wearing a surgical mask over his face and that his hood was pulled up. In response to whether the hood covered MJ's hair, Hitesman responded that he could still see a little of MJ's forehead and this is how he thought it was dreads. Again, Hitesman said that although he likely saw MJ in passing during his time at the high school, there was nothing that stood out to him about MJ and MJ did not have dreads at that time.

As previously mentioned, following execution of the warrant on July 23, Hitesman made inquiry with Officers of the Lycoming County Juvenile Probation Office requesting the Officers' assistance with identification of both juveniles captured on video. Also, as previously stated, Hitesman was informed on July 24 that the juvenile in question was not MJ, but another juvenile known to JPO as JB. On July 25, pursuant to a home visit of JB's residence, JPO observed in the juvenile's room the sweatshirt and pants worn by the juvenile in the video. Although this information was immediately provided to Hitesman, no warrant was executed on JB's room to seize the clothing.

At the conclusion of the August 22 hearing, this Court dismissed Count One of the juvenile petition, Felony One Aggravated Assault, with prejudice as it was clear that under no circumstances could the Commonwealth cure the misidentification of MJ. Despite the dismissal of Count One, the issue remained whether Hitesman's independent identification of MJ as presented in the search warrant and prior to being informed of the misidentification was

sufficient to deny Defense Counsel's oral motion to dismiss on the grounds of outrageous government conduct and fruit of the poisonous tree. Accordingly, this Court reserved judgment and provided the Commonwealth with an opportunity to brief the issue.

Prior to the Court's receipt of the Commonwealth's brief, yet another issue was brought to this Court's attention regarding Agent Hitesman's knowing misidentification of MJ. At the Commonwealth's suggestion, the court scheduled a closed-door deposition of Agent Bonnell who is also employed with the WBP. The deposition was held August 28 with both the Commonwealth and defense counsel present. During the deposition Agent Bonnell testified that sufficient information was received by her to draft a search warrant for the residence of the juvenile identified by JPO as the suspect depicted in the video, JB. When Agent Bonnell advised Agent Hitesman of this information on August 18, his response was "that will hurt my case" (i.e. the case currently before this Court). At the conclusion of the deposition the Court again discussed with the Commonwealth and defense counsel the remaining issues that required a decision by this Court. Specifically, the Court confirmed with both attorneys that defense counsel's oral motion to suppress included a "*Frank's*" analysis of Agent Hitesman's search warrant as well as a fruit of the poisonous tree analysis and that the Commonwealth was on notice of these issues. The attorney for the Commonwealth and counsel for MJ both answered in the affirmative.

Outrageous Government Conduct:

Following counsel for MJ receiving emails from the Commonwealth that Hitesman was made aware the day following execution of the search warrant that Hitesman had misidentified the juvenile and withheld this information from both the Commonwealth and defense counsel for approximately 25 days, defense counsel adamantly argued that all counts in the juvenile petition

should be dismissed due to outrageous governmental conduct. Although true that "police involvement in criminal activity may be so outrageous that a prosecution will be barred on due process grounds," the "establishment of a due process violation 'generally requires proof of government over involvement in the charged crime…" *Commonwealth v Benchino*, 399 Pa. Super. 521, 525-526 (1990). Furthermore, the conduct of law enforcement officials or government agents will be found to have violated due process only after it is established that "police conduct was 'so grossly shocking and so outrageous as to violate the universal sense of justice.'" *Id.* At 526. The "conduct of the government in conducting criminal investigations will be found to violate due process 'only in the rarest and most outrageous circumstances.'" *Id.* At 527.

It is indisputable that Hitesman failed to disclose to either the Commonwealth or defense counsel that he obtained independently corroborated information that he misidentified the juvenile following his drafting and execution of the search warrant and prior to both the 72-hour detention hearing and the first scheduled evidentiary hearing. As a result, the lead count of the juvenile petition not only significantly increased the MJ's Risk Assessment Score, it was a factor in this Court's analysis of whether MJ should be detained pending the evidentiary hearing not only for the MJ's safety but for the community's safety and welfare as well. The ripple effect of Hitesman not disclosing this information is that a very dark cloud may be cast not only over the professionalism of other members of the Williamsport Bureau of Police, it also compromises the very definition of what should underscore every criminal case that is presented before the court, justice. A further ripple effect of Hitesman's decision to not disclose this information will likely result in his credibility forever being called into question when he appears before a finder of fact or other issuing authority that is in a position to assess his credibility.

Moreover, Hitesman's withholding of this information is a significant contributing factor as to why countless recent national surveys reflect that the general public's trust in law enforcement, the prosecution and the court is discredited. This incredibly disconcerting decision by Hitesman to withhold very relevant information contributed to this Court's decision to dismiss with prejudice the Aggravated Assault count contained within the juvenile petition. But for the integrity and wherewithal of the District Attorney's Office after learning of the *Brady* information and immediately alerting defense counsel, it is not unreasonable to imagine that a very different and unfortunate outcome for MJ may have been realized. Despite the egregious decision by Hitesman to withhold this information, his conduct does not meet the incredibly high and well-established threshold that is required to dismiss the remaining counts due to outrageous governmental conduct. Accordingly, the juvenile's motion to dismiss the remaining counts on the basis of outrageous government conduct is denied.

Franks Motion to Dismiss:

A defendant may challenge the validity of a warrant based on false statements and omissions in the affidavit *Franks v Delaware*, 438 U.S. 154 (1978). The suppression court must conduct a *Franks* hearing "where the defendant makes a preliminary showing that the affiant knowingly and intentional, or with reckless disregard for the truth, included a false statement in an affidavit." *Id*. At 155-156; *Commonwealth v James*, 69 A.3d 180, 188 (Pa. 2013). The burden is on the defendant to provide allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. *Franks*, 438 U.S. at 171. If the defendant meets this burden, then the affidavit's false material is disregarded; however, the search warrant will only be voided, and the fruits thereof excluded, if the remaining content is not sufficient to establish probable cause. *James*, 69 A.3d at 188.

With respect to omissions, a defendant has the right to challenge omissions in the affidavit of probable cause. *Id.* at 189. Challenges of this nature must be resolved with evidence beyond the affidavit's four corners. *Id*. The task of the court is to determine whether the omitted facts need to be included in determining probable cause.

Where omissions are the basis for the challenge to an affidavit of probable cause, the following test is applied: "(1) whether the officer withheld a highly relevant fact within his knowledge, or any reasonable person would have known that this was the kind of thing the judge would wish to know; and 2) whether the affidavit would have provided probable cause if it would have contained a disclosure of the omitted information." *Commonwealth v Taylor*, 850 A.2d 684, 689 (Pa. Super. 2004).

This Court concludes that Hitesman omitted from the search warrant affidavit highly relevant information within his knowledge that a judge would wish to know and because this omitted information would have significantly called into question the affidavit's probable cause, the juvenile is entitled to suppression of the seized firearm. The only information relative to Hitesman's identification within the search warrant's affidavit of probable cause was that "video was obtained of the shooting that showed a *male*, *later identified as MJ*." (emphasis added). During the hearing of August 22, however, Hitesman testified that the "Good Alley" video revealed that the juvenile's face was concealed with both a hood and a surgical mask and that only the juvenile's forehead could be observed. Per Hitesman, although only the juvenile's forehead was visible, he thought he could discern the presence of "dreads".

If Hitesman had disclosed in his affidavit that he could observe only the juvenile's forehead and what he thought was a dread or dreads because the juvenile was wearing a surgical mask and had his hoodie pulled up, the issuing authority would have most certainly questioned

whether sufficient information was available to Hitesman at that time regarding the identification of the juvenile. Additionally, Hitesman's actions after swearing to the information in his search warrant affidavit call into question the reliability of his identification as it was only mere hours after "positively" identifying MJ that Hitesman requested of JPO their assistance with identifying both juveniles in the "Good Alley" video. Any judge would want to know and should have known that Hitesman's identification of the juvenile in the search warrant was speculative at best and absolutely wrong at worst. By his own concession, Hitesman acknowledged that he should have included additional detail in his search warrant regarding the manner in which he identified MJ. Had the omitted information been disclosed, it is more likely than not that the affidavit would not have provided probable cause. Moreover, had the omitted information been included in the affidavit, this Court is confident that the District Attorney's Office would have never signed the warrant, let alone the judge that issued the warrant. Accordingly, in the absence of probable cause, the warrant would not have been issued and all evidence seized as a result thereof shall be suppressed.

Fruit of the Poisonous Tree:

Lastly, Defendant contends that the search warrant obtained for the search stems from the fruit of the poisonous tree. The United States Supreme Court held that "evidence constitutes poisonous fruit, and thus, must be suppressed, if, 'granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Commonwealth v. Shabezz*, 166 A.3d 278, 289 (Pa. 2017) (quoting *Wong Sun v. Untied States*, 371 U.S. 471, 488 (1963). "The fruit off the poisonous tree doctrine excludes evidence obtained

from, or acquired as a consequence of, lawless official acts; it does not exclude evidence obtained from an independent source." *Commonwealth v. Brown*, 700 A.2d 1310, 1318 (Pa. Super. 1997) (internal quotations omitted); see *Commonwealth v. Ariondo*, 580 A.2d 341, 347 (Pa. Super. 1990). "The burden rests on the Commonwealth to demonstrate that the secondary evidence was gathered by means sufficiently distinguishable from any illegality so as to be 'purged of its primary taint' rather than deriving from exploitation of the illegality." *Id.* At 1319; See *Wong Sun*, 371 U.S. at 488.

This Court has determined that the search was conducted after the omission of highly relevant facts in the search warrant. The Commonwealth is not able to purge the primary taint of the search warrant used to obtain the evidence. Therefore, the search warrant is the result of fruit of the poisonous tree that cannot be established through an independent source and any evidence seized pursuant to the search warrant must be suppressed.

ORDER

AND NOW, this ____ day of **September 2024**, for the reasons stated above, it is **ORDERED** and **DIRECTED** that all evidence seized pursuant to the search warrant issued July 23, 2024 shall be suppressed. This matter remains scheduled for an evidentiary hearing October 18, 2024.

By the Court,

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Ryan C. Gardner, Judge

RCG/kbc

Cc: DA(Blake Marks, Esq.)
Matthew Diemer, Esq,
JPO
Gary Weber Esq.