

**STATE OF MAINE
PENOBSCOT, ss.**

**SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO: PEN-24-36**

**STATE OF MAINE,
Appellee**

v.

**RICHARD KELLEY,
Appellant**

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE

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PROCEDURAL HISTORY

On May 26, 2021, the Penobscot County Grand Jury returned an indictment charging Richard Kelley (“Kelley”) with one count of Aggravated Trafficking of Scheduled Drugs, Class A¹, and one Criminal Forfeiture. (*State of Maine v. Richard Kelley*, PENCD-CR-2021-00670, A. 25). On March 29, 2022, Kelley filed a motion to suppress three search warrants and their resulting searches.

On December 20, 2022, a hearing was held on the motion to suppress. The State conceded that the Defendant had standing for the purposes of the motion to suppress. (M. Tr. 12). The record was fully developed, including the issue of standing, with testimony by Kelley, as well as testimony by Special Agent Timothy Frost.

On January 18, 2023, the motion court issued an order finding sua sponte that Kelley lacked standing, and denied the motion on that basis. (A. 10). On January 29, 2023, Kelley filed a motion to reconsider that order. That motion was denied by order dated April 18, 2023. (A. 17).

On January 5, 2024, Kelley entered a conditional guilty plea to the indictment, with an agreed sentence imposed of 10 years all but five years and

¹ 17-A M.R.S. §§ 1105-A(1)(M) (2017).

one day suspended, four years probation, and a \$400 fine. (A. 19). The sentence was stayed pending the outcome of this appeal. (A. 8). On January 23, 2024, Kelley timely appealed. (A. 8).

STATEMENT OF FACTS

In 2020, MDEA was investigating Keith Wedge for drug trafficking. (Motion Transcript 14, December 20, 2022, hereinafter cited as “M. Tr. __.”). On November 24, 2020, Special Agent Timothy Frost (“SA Frost”) presented an application for a search warrant to install a tracking device on a white Dodge Challenger belonging to Keith Wedge, which was granted. (A. 29). A subsequent warrant was obtained to continue tracking the same vehicle on January 21, 2021. (A. 39). Based on his investigation and information obtained from the trackers, SA Frost applied for and received a search warrant to search the same vehicle and Keith Wedge, which was issued February 22, 2021. (A. 49). That search warrant was then executed in good faith. (M. Tr. 16).

At the hearing, Kelley testified that the Dodge Challenger was owned by Keith Wedge, and that Wedge had only had it for a few months. (M. Tr. 7-8). Kelley testified that he had never driven the vehicle, but had been a passenger in it for at least five round trips from Bass Harbor to Bangor, and perhaps four round trips to Massachusetts. (M. Tr. 9-10). He also testified that he left a “sea bag” in the Charger for about a month which contained clothes. (M. Tr. 10-11).

STATEMENT OF THE ISSUES

- I. Is a stipulation to standing binding upon a trial court?**
- II. Is the trial court's conclusion justifiable on the record?**
- III. Should this Court deny the motion on the merits based upon the pleadings and record as developed in the hearing?**

SUMMARY OF ARGUMENT

1. The motion court was free to disregard a stipulation as to standing and reach its own independent conclusions based upon the record.
2. Given the testimony of Kelley, the motion court's ruling that he had no independent reasonable expectation of privacy in the vehicle is supported by relevant case law.
3. If the Court grants Kelley standing, the record is nonetheless complete and ripe to decide upon the merits of the motion. The warrants were supported by probable cause. Monitoring a tracking device outside the state which was installed pursuant to a warrant inside the state is authorized by black letter law.

ARGUMENT

I. A stipulation as to standing is not binding upon a motion court.

A. Standard of Review

The Court reviews determination of standing de novo. *Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶ 8, 221 A.2d 554.

B. The motion court is free to independently analyze standing.

The State agrees that it conceded standing at the motion hearing. (M. Tr. 12). Notwithstanding, the motion court noted in its order that standing, “is a threshold issue and Maine courts are only open to those who meet this basic requirement.” *State v. Lovett*, 2015 ME 7, ¶ 7, 109 A.3d 1135 (quoting *Lindemann v. Comm’n on Governmental Ethics & Election Practices*, 2008 ME 187, ¶ 8, 961 A.2d 538). Courts may raise the issue of standing sua sponte, as it is jurisdictional. *Collins v. State*, 2000 ME 85, ¶ 5, 750 A.2d 1257.

Kelley’s reliance on the *Blanchard* decision is misplaced as that court found that a concession of standing by a party is not binding on the Court. *Blanchard v. Bar Harbor*, 2015 ME 7, ¶ 7, 109 A.3d 1135. There, despite treating the issue of standing as having been conceded, the court still conducted its own analysis and found that a party had no standing based on the record in that case. *Id.* ¶ 14. Kelly cites no caselaw supporting the proposition that a concession of standing is binding upon the courts.

II. The motion court's holding is justifiable on the record presented.

The question of Kelley's standing hinges on whether he had a reasonable expectation of privacy in Keith Wedge's Dodge Challenger. This Court has held that a mere passenger without a possessory interest in a vehicle does not have a reasonable expectation of privacy in the vehicle. *Lovett*, 2015 ME 7, ¶ 8, 109 A.3d 1135. Federal jurisprudence has held the same. *See Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (stating that to establish standing to challenge a vehicle search, a defendant must demonstrate a "possessory interest" in the vehicle or "an interest in the property seized"); *United States v. Symonevich*, 688 F.3d 12, 19 (1st Cir. 2012) (holding a passenger who has asserted no property or possessory interest in the vehicle or property seized does not have a legitimate expectation of privacy). Additionally, simply being on a lengthy, extended car trip does not confer a reasonable expectation of privacy either. *Symonevich*, 688 F.3d at 20.

Kelley presented evidence regarding standing at the motion hearing and developed the issue. He testified that it was owned by Keith Wedge, and claimed no possessory interest in the vehicle. He also testified to being a passenger on multiple occasions.² (M. Tr. 7-10). The motion court's holding

² Kelley did testify to the existence of a 'sea bag,' which was ultimately not relevant to the motion or charge.

that Kelley did not demonstrate a reasonable expectation of privacy in the vehicle is entirely consistent with the state of the law. Based on that lack of reasonable expectation of privacy, the court properly held that Kelley lacked standing.

III. The motion to suppress should be denied on the merits.

A. The Court may decide this motion on the merits.

If this Court finds that Kelley has standing, it may nonetheless resolve this motion on the merits; there is no need to remand.³ This Court has the benefit of a full record where the issues have already been litigated, and the motion is largely a four-corners challenge to affidavits within the appendix, plus a legal argument as to data collection from a vehicle when it traveled out of the state. If a court's ruling is proper under the law, this Court may affirm it based on grounds other than those stated by the trial court. *State v. Watson*, 2016 ME 176, ¶ 10, 152 A.3d 152.

B. Standard of Review

When reviewing the denial of a motion to suppress, the trial court's factual findings are reviewed for clear error, and the legal conclusions are reviewed de novo. *State v. Nunez*, 2016 ME 185, ¶ 18, 153 A.3d 84. This Court

³ The State is filing a Supplemental Appendix pursuant to M.R. App. P. 8(k)(1). Although the parties consulted regarding the Appendix, both parties missed the omission of the search warrant, which is mandatory given the issues raised on appeal. M.R. App. P. 8(e)(7)

reviews the finding of probable cause for a search warrant made by the magistrate with great deference to the issuing magistrate and must give the affidavit a positive reading with all reasonable inferences that may be drawn to support the magistrate's determination. *Id.* The Court must not make a *de novo* determination of probable cause. *Id.*

C. The warrants are supported by probable cause.

Probable cause exists when, based on the totality of the circumstances made known to the judge, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Roy*, 2019 ME 16, ¶12, 201 A.3d 609. This is a non-technical inquiry where the judge or justice considers the probability that incriminating evidence will be found in the specified place and makes a practical, common-sense decision, taking into account the "factual and practical considerations of everyday life on which reasonable and prudent people, not legal technicians, act." *State v. Warner*, 2019 ME 140, ¶20, 216 A.3d 22.

Much of the information in the November 20 affidavit is derived from three confidential sources. (A. 34-35). The first source stated that Keith (Wedge) was buying fingers of heroin⁴ and residing on Bernard Road in

⁴ "Fingers" refers to a common bulk-packaging form for heroin or fentanyl powder, consisting of 10 grams of compressed powder. *See* A. 42.

Tremont, that he charges \$200 per gram, and that the most the informant had ever purchased from Keith was seven grams. (A. 34). The second source stated that they had received heroin from Wedge in payment for a debt, which they later overdosed on. *Id.* The third source stated they had delivered “4k down to the drugs” (sic) to 31 Bernard Drive and dealt with a man with red curly hair and a beard (consistent with Keith Wedge). (A. 35). The information provided by these sources is consistent in salient facts and mutually corroborative about Keith Wedge’s involvement with drug trafficking in Tremont, which allows the magistrate to make an inference as to their reliability. *See State v. Thompson*, 2017 ME 13, ¶17, 154 A.3d 614. The Challenger was registered to Wedge, at that location, and observed stopping at multiple locations for brief intervals, including a residence being investigated for drug and gun trafficking. (A. 35-36). There was probable cause to believe that the vehicle’s movements would reveal further evidence of trafficking activity.

The January 2021 warrant includes all the original information, plus significant additional information. Paragraph 13 includes limited information obtained from the November 2020 tracking warrant, indicating that Wedge’s vehicle traveled to Bangor 1-3 times per week, and had been stopping at locations known for drug distribution. (A. 44). Paragraphs 14-17 describe another confidential informant who corroborated the information about

Wedge's involvement in drug trafficking, including making a controlled purchase of heroin from Wedge. (A. 44-45). The information from this confidential informant also included a statement from Wedge wherein he bragged that he had managed to hide drugs in the Challenger without an officer noticing during a previous arrest. (A. 45). Even if the November 2020 warrant were suppressed, only paragraph 13 would be excised, and the remaining information would fully justify a finding of probable cause.

D. The tracking warrant was not outside the scope of authority.

Kelley argued in the motion to suppress that tracking a vehicle outside the State of Maine exceeds the scope of authority, which is contradicted by the applicable statute. "A court empowered to issue a search warrant or other order for the installation of a tracking device may authorize the use of that device within the jurisdiction of the court and outside that jurisdiction if the device is installed within the jurisdiction of the court." 16 M.R.S. § 639(3) (2019). There is no evidence the device was installed outside the jurisdiction of the court. As the device was authorized and installed inside the jurisdiction of the court, it was proper for monitoring to continue outside that jurisdiction.

CONCLUSION

For the foregoing reasons, the State respectfully asks that the conviction be affirmed.

Respectfully submitted,

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Dated: June 3, 2024

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CERTIFICATE OF SERVICE

I, Jason Horn, Assistant Attorney General, certify that I have sent a native PDF and mailed two copies of the foregoing “BRIEF OF APPELLEE” to Quirion’s attorney of record, Hunter Tzovarras, Esq.

Dated: June 3, 2024

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v.

**RICHARD KELLEY,
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ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

SUPPLEMENTAL APPENDIX

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STATE OF MAINE
PENOBSCOT, ss

UNIFIED CRIMINAL DOCKET
BANGOR

)
)
STATE OF MAINE)
)
v.)
)
RICHARD KELLEY)

DOCKET NO. CR-21-670

DEFENDANT'S MOTION TO
SUPPRESS

The Defendant, Richard Kelley, moves to suppress the November 24, 2020 warrant authorizing the attachment of an electronic tracking device on Keith Wedge's Dodge Challenger because the warrant lacked probable cause that the car was being used to facilitate drug activity.

The Defendant, Richard Kelley, moves to suppress the January 21, 2021 warrant because its probable cause was based on information obtained from the November 24, 2020 warrant that should be suppressed for the reasons set forth above.

The Defendant, Richard Kelley, moves to suppress the out-of-state searches conducted as a result of the November 24, 2020 and January 21, 2021 warrants because the warrants

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did not authorize searches outside the State of Maine, and the Court lacked authority to authorize out-of-state searches.

The Defendant, Richard Kelley, moves to suppress the February 22, 2021 search warrant for the Dodge Challenger because it was obtained as a result of the above illegal searches.

Therefore, the Court should suppress all evidence obtained as a result of the November 24, 2020 search warrant, including the subsequent warrants obtained on January 21, 2021 and February 22, 2022.

I. PROCEDURAL BACKGROUND

On November 24, 2020 MDEA applied for a warrant to attach an electronic tracking device to Keith Wedge's Dodge Charger. (11/24/20 Warrant Attached). The warrant alleged probable cause Mr. Wedge was trafficking in illegal drugs and used the Dodge Challenger to facilitate the offenses. The warrant authorized the use of the tracker for 60 days. The warrant was granted and the tracking device attached.

On January 21, 2021, MDEA applied for a second warrant for an additional 60 days of electronic tracking. The January

2021 warrant included tracking information obtained as a result of the November 2020 warrant. (1/24/2021 Warrant Attached).

On February 22, 2021, MDEA obtained a search warrant for the Dodge Challenger based on the information obtained as a result of the electronic tracking device and two warrants mentioned above. (2/22/2021 Warrant Attached). After the warrant was granted, the MDEA stopped the Dodge and searched it resulting in the pending charges.

II. LAW & ARGUMENT

1. Richard Kelley has standing to challenge the warrants because he has a privacy interest as a regular passenger of the Dodge Challenger.

Richard Kelley has standing to challenge the search warrants of the Dodge Challenger he was a passenger in because he had an expectation of privacy as a regular passenger within that vehicle.

The Supreme Court in *Brendlin v. California*, 551 U.S. 249, 255 (2007), held that all occupants of a stop car are seized for Fourth Amendment purposes. In *Brendlin*, the Court held a passenger stopped in a vehicle is seized under the Fourth

Amendment even if the driver was the object of the intended stop. The Supreme Court in *U.S. v. Jones*, 565 U.S. 400 (2012), held using a tracking device on a vehicle was a search under the Fourth Amendment and violated the operator's right to privacy. As a regular passenger of the Challenger, Richard had an expectation of privacy that was violated by the illegal searches.

"If the motion to suppress asserts a violation of the Fourth Amendment, 'the defendant must demonstrate that his own reasonable expectation of privacy was violated by the action of the State.' *State v. Maloney*, 1998 ME 56, ¶ 6, 708 A.2d 277 (emphasis added); *see also State v. Ayers*, 464 A.2d 963, 968 (Me.1983)." *State v. Lovett*, 109 A. 3d 1135, 1137 (Me 2015).

For the purposes of this motion only, Richard Kelley would assert a privacy interest in the Dodge Challenger *See Simmons v. U.S.*, 390 U.S. 377, 394 (1968) (testimony or assertions at suppression hearing for purposes of establishing constitutional violations cannot later be used against defendant at trial.)

During the months of November through February, Richard was a regular passenger in the Challenger. He would travel out

of state several times in the Challenger. He would spend several hours inside the Challenger during these long road trips. As a regular passenger and occupant of the Challenger, Richard had a reasonable expectation of privacy within the vehicle. *See Jones*, 565 U.S. 400. Therefore, he has standing to challenge the search warrants of the challenger.

2. The November 24, 2020 search warrant lacked probable cause the Dodge Challenger was used by Keith Wedge for drug activity.

The November 24, 2020 warrant application sets forth no nexus between the alleged illegal drug activity of Keith Wedge and the Dodge Challenger.

In determining whether probable cause exists, the Court looks to the totality of the circumstances set forth in the affidavit. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). "To meet the standard for probable cause, the warrant affidavit must set forth some nexus between the evidence to be seized and the locations to be searched." *State v. Samson*, 916 A. 2d 977, 981 (Me 2007).

While the affidavit establishes, at best, probable cause Keith Wedge was involved in illegal drug activity, it provides no nexus to that illegal activity and the Dodge Challenger.

- The affidavit provides no information the Dodge Challenger is used to transport illegal drugs or that any illegal activity occurred within the Challenger.
- There is no information in the affidavit Keith used the Challenger to facilitate drug activity. The information is he would receive rides from others. The source of information in Paragraph Three indicates: "he [Keith] will ask for rides when he's out [of heroin]."
- The affidavit provides information about the Challenger traveling around Bass Harbor (where Keith lives) and to Bangor, including the Dollar Tree store.¹ There is no information provided that Keith Wedge is ever identified as the driver or passenger during these times.

The affidavit fails to provide any nexus between Keith and his alleged drug activity and the Dodge Challenger. Absent this

¹ The application mentions the Dodge stopping at a house on Union Street under investigation for drug activity. None of the sources of information in the affidavit connect Keith to this location for drug activity, and the affidavit provides no information drug activity occurred when the Dodge stopped at this location.

nexus, there is no probable cause to attach a GPS tracker to the car and the search warrant should be suppressed.

3. The January 21, 2021 warrant is the fruit of the illegal November 2020 warrant and should be suppressed.

The subsequent warrant obtained on January 21, 2021 should be suppressed because its probable cause is based on the tracking data obtained as a result of the previous illegal warrant.

Under Supreme Court, and Law Court, precedent, the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, *Weeks v. United States*, 232 U.S. 383 (1914), but also evidence later discovered and found to be derivative of an illegality or “fruit of the poisonous tree.” *Nardone v. United States*, 308 U.S. 338, 341 (1939). It “extends as well to the indirect as the direct products” of unconstitutional conduct. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Johndro*, 2013 ME 106, ¶ 21, 82 A.3d 820 (“[A]ny evidence obtained through the exploitation of police illegality must be excluded as fruit of the poisonous tree.”).

Removing the tracking information obtained as a result from the November 2020 warrant, this subsequent warrant lacks probable cause the Dodge Challenger was used in illegal drug activity, and therefore the warrant should be suppressed.

4 Law enforcement conducted a search beyond the scope of the authorized warrants.

Law enforcement searched the Dodge Challenger outside-the-state of Maine. The warrant did not authorize a search outside of Maine, and the Court lacked authority to grant such a search.

“If the scope of the search exceeds that permitted by the terms of a validly issued warrant . . . [the search and any] subsequent seizure [are] unconstitutional.” *Horton v. California*, 496 U.S. 128, 140 (1990).

It is clear after *U.S. Jones*, 132 S.Ct. 945 (2012), that the GPS tracking of a vehicle’s locations constitutes a search of the vehicle protected under the Fourth Amendment.

The officers in this case continually searched the vehicle's location while outside Maine. This search exceeds the scope of the warrant authorized by the Court.

The Maine Courts are limited by statute to issuing search warrants only within the State of Maine. “A justice of the Superior Court, a judge of the District Court or a justice of the peace shall issue search warrants for any place in the State for such purposes as the Constitution of the United States and the Constitution of Maine permit...” 15 M.R.S.A. § 55.

Other courts have consistently limited a court’s authority to issue warrant’s outside of its home state. *See e.g., State v. Mello*, 27 A.3d 771 (N.H. 2011) (“the district court did not have jurisdiction to issue a warrant to an out-of-state corporation”).

The Sixth Circuit Court of Appeals has suppressed evidence obtained from a search warrant issued by a magistrate that authorized a search beyond the magistrate’s jurisdiction. *U.S. v. Master*, 614 F.3d 236 (6th Cir. 2010). The Sixth Circuit held, “when a warrant is signed by someone who lacks the legal authority necessary to issue search warrants, the warrant is void ab initio.” *Id.* at 239.

The Ohio appellate court has suppressed evidence obtained from a warrant issued to search property located outside of the state. *State v. Jacob*, 185 Ohio.App. 3d 408 (Ohio 2nd App.

Dist. 2009). “[A] magistrate who acts beyond the scope of his authority ceases to act as a magistrate for Fourth Amendment purposes.” *Id.* at 414.

In an unpublished opinion, the Michigan appellate court found a state court was authorized to issue a warrant for telephone records stored in Texas. *People v. Wilson*, 2013 WL 2360239 (Mich.App. May 30, 2013). The court distinguished this search from the search in *Jacob* because it involved records of communications in Michigan not Texas.

The cases above all demonstrate that a court cannot issue a search warrant beyond its jurisdiction. The warrants in this matter were issued in Maine and silent as to the locations of the search. However, Maine statute limits the authority and scope of the search "to any place in the State." 15 M.R.S.A. § 55. By searching the location of the car beyond the State of Maine, the officers exceeded the lawful authority of the order.

The State cannot rely on the good faith exception to continuing the search beyond Maine. Relying on the GPS warrant to track the vehicle beyond Maine was not “objectively

reasonable.” *State v. Diamond*, 628 A.2d 1032, 10 (Me.1993) (quoting *United States v. Leon*, 468 U.S. 897, 922 (1984)). The warrant did not expressly authorize a search beyond Maine. Maine law expressly limits a court’s authority to searches within Maine, 15 M.R.S.A. § 55, and Supreme Court precedent established GPS tracking is a search, *Jones supra*.

The Sixth Circuit has held the good faith exception does not apply to warrant void abinito. *US v. Scott*, 260 F. 3d 512 (6th Cir. 2001). The Ohio appellate court in *Jacob* rejected any “good faith” reliance on the invalid warrant finding an “objectively reasonable” officer would know a state court lacks jurisdiction to issue a search for out-of-state property. *Jacob*, 185 Ohio.App. 3d at 415-17.

The appropriate remedy in this case is to suppress and exclude all evidence obtained as a result of the search outside of the State of Maine. Therefore all the January and February 2021 warrants should be suppressed.

Dated: March 29, 2022

Respectfully Submitted,



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ORDER

Upon consideration, the above motion is hereby GRANTED / DENIED.

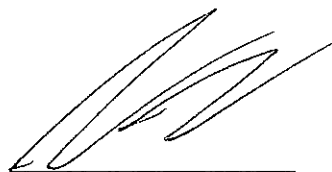
Dated:

Justice / Judge

CERTIFICATE OF SERVICE

I hereby certify the above motion was sent on March 29, 2022
to:

Jason Horn
97 Hammond Street
Bangor, ME 04401

A handwritten signature in black ink, appearing to read 'Hunter J. Tzovarras', written over a horizontal line.

Hunter J. Tzovarras
Bar. No 004429