

# Franklin County Legal Journal

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Vol. 33, No. 11

September 11, 2015

Pages 65 - 78

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*Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.*

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**COMMONWEALTH OF PENNSYLVANIA,**

**vs. Vamar Franklin, Defendant**

Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch, CRIMINAL ACTION No. 957-2014

**HEADNOTES**

*Criminal Law- Suppression of Evidence due to Defect in Search Warrant*

*Criminal Law; Burden of Proof and Motion to Suppress*

1. The Commonwealth has the burden of proving that the evidence that is being challenged in a Defendant's Motion to Suppress is admissible. Commonwealth v. Smith, 784 A.2d 182, 186 (Pa. Super. Ct. 2001) (citing Commonwealth v. James, 486 A.2d 376 (Pa. 1985)).

*Criminal Law; Probable Cause*

1. Pursuant to the Fourteenth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, in deciding whether a search warrant is supported by probable cause, the Court must confine its analysis to the four corners of the affidavit. Commonwealth v. Coleman, 830 A.2d 554, 560 (Pa. 2003) (citing Commonwealth v. Stamps, 427 A.2d 141, 143 (Pa. 1981) and Pa. R. Crim. P. 203(B)).

2. Probable cause has been defined as "a practical, non-technical conception requiring a consideration of the totality of the circumstances." Commonwealth v. Coleman, 830 A.2d 554, 560 (Pa. 2003) (citing Commonwealth v. Glass, 754 A.2d 655, 661, 663 (Pa. 2000)).

3. Probable cause must exist at the time the warrant is issued. Commonwealth v. Coleman, 830 A.2d 554, 562 (Pa. 2003) (quoting Commonwealth v. Glass, 754 A.2d 655, 662-663 (Pa. 2000)).

4. The United States Supreme Court has outlined two requirements that an affidavit of probable cause in support of an anticipatory search warrant must meet: (1) "there is probable cause to believe the triggering condition will occur;" (2) "if the triggering condition occurs 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" United States v. Grubbs, 547 U.S. 90, 96-97 (2006).

5. The supporting affidavit of probable cause must provide sufficient facts for the magistrate to analyze both aspects of the probable cause determination. United States v. Grubbs, 547 U.S. 90, 97 (2006).

6. Probable cause exists, according to the Pennsylvania Supreme Court, "where the facts and circumstances within [an] officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed." In re O.A., 717 A.2d 490, 493 (Pa. 1998).

*Criminal Law; Duty of an Issuing Magistrate*

1. The issuing magistrate's task is to simply "make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Commonwealth v. Coleman, 830 A.2d 554, 560 (Pa. 2003) (quoting Commonwealth v. Gray, 503 A.2d 921, 925 (Pa. 1985); Illinois v. Gates, 462 U.S. 213, 238-39 (1983)).

2. The issuing magistrate, after being presented with facts, "must determine or anticipate whether there is a fair probability that evidence of a crime 'will be found' in a particular

place when the warrant is executed.” Commonwealth v. Coleman, 830 A.2d 554, 562 (Pa. 2003) (quoting Commonwealth v. Glass, 754 A.2d 655, 662-663 (Pa. 2000)).

3. The magistrate’s determination if probable cause exists and whether a search warrant should issue, is “distinctly forward-looking.” Commonwealth v. Coleman, 830 A.2d 554, 562 (Pa. 2003) (quoting Commonwealth v. Glass, 754 A.2d 655, 662-663 (Pa. 2000)).

### *Criminal Law; Duty of a Court Reviewing the Issuance of a Search Warrant*

1. The duty of the search warrant reviewing court is to ensure that the magistrate had a substantial basis for finding that probable cause existed. Commonwealth v. Coleman, 830 A.2d 554, 562 (Pa. 2003) (quoting Commonwealth v. Gray, 503 A.2d 921, 925 (Pa. 1985); Illinois v. Gates, 462 U.S. 213, 238-39 (1983)).

### *Criminal Law; Search Warrant and Reliability of an Informant’s Tip*

1. “Where police are acting solely on the basis of an informant’s tip and the reliability of the confidential informant is not established by objective facts, it is essential that the tip provide adequate indication that the informant has actual knowledge that criminal conduct is occurring or has occurred at the time the warrantless arrest is made.” In re O.A., 717 A.2d 490, 497 (Pa. 1998).

2. An affidavit of probable cause must provide information for a magistrate to find that a confidential informant is reliable. Commonwealth v. Smith, 784 A.2d 182, 187-88 (Pa. Super. Ct. 2001).

3. When an informant’s reliability is questionable, then the facts and circumstances around the informant’s tip must provide sufficient evidence of reliability. Commonwealth v. Smith, 784 A.2d 182, 188 (Pa. Super. Ct. 2001).

4. When police corroborate aspects of a tip that demonstrate a unique familiarity with a defendant’s affairs, it may show that the tip is reliable. Commonwealth v. Smith, 784 A.2d 182, 188 (Pa. Super. Ct. 2001).

5. When a confidential informant’s tip is incorrect about multiple material allegations and the Commonwealth could not produce evidence to show that the confidential informant is reliable, a defendant’s Motion to Suppress should be granted. Commonwealth v. Smith, 784 A.2d 182, 188 (Pa. Super. Ct. 2001).

6. The mere claim that a confidential informant has “provided reliable information in the past” without objective facts to justify such a claim is not enough to support a finding that the confidential informant’s statement is reliable. In re O.A., 717 A.2d 490, 496 (Pa. 1998).

7. When relying on a confidential informant’s tip, it is crucial that the tip evidences that the informant has “inside information” or “a special familiarity with the defendant’s affairs.” In re O.A., 717 A.2d 490, 498 (Pa. 1998) (citing Alabama v. White, 496 U.S. 325, 332 (1990)).

8. If the confidential informant’s tip evidences a special familiarity with the defendant’s affairs, then police corroboration of the tip can show that the tip is worthy of additional reliability. In re O.A., 717 A.2d 490, 498 (Pa. 1998) (citing Alabama v. White, 496 U.S. 325, 331 (1990)).

9. If the confidential informant’s tip includes nothing except readily available facts, then it is to no effect that the police were able to corroborate those facts. In re O.A., 717 A.2d 490, 498 (Pa. 1998).

### *Criminal Law; Curing a Search Warrant Lacking in Probable Cause*

1. Where the affidavit does not sufficiently establish an informant’s veracity, reliability, or basis of knowledge, it is possible to cure a search warrant that is otherwise lacking in probable cause with “a strong showing with respect to . . . the existence of some other indicia of reliability.” Com. v. Wallace, 42 A.3d 1040, 1050-51 (Pa. 2012) (citing Illinois v. Gates, 462 U.S. 213, 233-34 (1983)).

2. Probable cause could not be found where a confidential informant corroborated public information of a suspect, such as his address and home phone number as the knowledge of such “very public” and “general” information does not “reveal a particular familiarity . . . which would bolster the reliability of the confidential informant’s tip.” Com. v. Wallace, 42 A.3d 1040, 1052 (Pa. 2012) (citing Com. v. Torres, 764 A.2d 532, 540 n. 8 (Pa. 2001)).

### *Criminal Law; Staleness of Information in a Search Warrant*

1. Under Pennsylvania law, “probable cause must be based on facts closely related to the time of the issuance of the warrant.” Com. v. Novak, 335 A.2d 773, 775 (Pa. Super. Ct. 1975).

2. The “age of the information supporting a warrant application is a factor in determining probable cause. If too old, the information is stale, and probable cause may no longer exist. Age alone, however, does not determine staleness. The determination of probable cause is not merely an exercise in counting the days or even months between the facts relied on and the issuance of the warrant. Rather, [the court] must also examine the nature of the crime and the type of evidence.” Com v. Janda, 14 A.3d 147, 158-59 (Pa. Super. Ct. 2011) (quoting United States v. Harvey, 2 F.3d 1318, 1322 (3d Cir. 1993)).

3. Evidence related to narcotics can become stale quicker than other evidence as narcotics can be easily disposed of. Com. v. Novak, 335 A.2d 773, 775-776 (Pa. Super. Ct. 1975).

### Appearances:

E. Edward Qaqish, *Attorney for Defendant*  
Franklin County District Attorney’s Office

## **OPINION**

Before Meyers, J.

Defendant alleges that a May 10, 2014 search warrant obtained by police lacked probable cause, thus, the search of his premises violated Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution.

### **Factual and Procedural Background**

On May 9, 2014, Officer Bryan Chappell of the Waynesboro Police Department was monitoring an individual named Paul Pryor, who was a known distributor of narcotics. Pryor entered a garage for approximately five minutes and left. A vehicle that Pryor was riding in as a passenger was later stopped for violating the motor vehicle code. According to Defendant, in his *Brief in Support of Motion to Suppress*, “[v]arious types of drugs

were found in [Pryor's] possession and he stated that he purchased some of those drugs, the heroin, from Defendant.” Defendant’s Brief in Support of Motion to Suppress, Page 2.

Defendant’s Motion to Suppress was filed on July 7, 2014. The motion was left undecided until Defendant was able to be appointed counsel following a change of staffing at the Public Defender’s Office. At the November 12, 2014 Call of the List, the parties stipulated that the matter could proceed without a hearing and be decided on briefs as the motion only challenged “the four-corners of the warrant.” Id.

Defendant alleges that there are two infirmities with the search warrant. First, Defendant alleges that the Commonwealth failed to prove the reliability of Pryor’s hearsay information and failed to corroborate Pryor’s tips. Id. P.3 Second, Defendant states that the information supplied in the warrant became stale. Id. P. 7.

### **Legal Analysis**

Under the Fourteenth Amendment to the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution, the analysis of “whether a warrant was supported by probable cause . . . is confined to the four corners of the affidavit.” Commonwealth v. Coleman, 830 A.2d 554, 560 (Pa. 2003) (citing Commonwealth v. Stamps, 427 A.2d 141, 143 (Pa. 1981) and Pa. R. Crim. P. 203(B)). Probable cause is defined as “a practical, non-technical conception requiring a consideration of the totality of the circumstances.” Id. (citing Commonwealth v. Glass, 754 A.2d 655, 661, 663 (Pa. 2000)). “The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Id. (quoting Commonwealth v. Gray, 503 A.2d 921, 925 (Pa. 1985); Illinois v. Gates, 462 U.S. 213, 238-39 (1983)). “Presented with a series of factual averments, the magistrate must determine, or anticipate, whether there is a fair probability that evidence of a crime ‘will be found’ in a particular place when the warrant is executed.” Coleman, 830 A.2d at 562. (quoting Glass, 754 A.2d at 662-663). “Although probable cause unquestionably must exist at the time the warrant is authorized ..., the magistrate’s assessment of probable cause, as well as the ultimate question as to whether the warrant should issue, is distinctly forward-looking.” Id. (quoting Glass, 754 A.2d at 662-663). “And the duty of a reviewing court is simply to ensure that the magistrate had a ‘substantial basis ... for conclud[ing] that probable cause existed.’” Id. (quoting Gray, 503 A.2d at 925; Gates, 462 U.S. at 238-39).

“Where police are acting solely on the basis of an informant’s tip and the reliability of the confidential informant is not established by objective facts, it is essential that the tip provide adequate indication that the informant has actual knowledge that criminal conduct is occurring or has occurred at the time the warrantless arrest is made.” In re O.A., 717 A.2d 490, 497 (Pa. 1998). “Where a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible.” Commonwealth v. Smith, 784 A.2d 182, 186 (Pa. Super. Ct. 2001) (citing Commonwealth v. James, 486 A.2d 376 (Pa. 1985)).

The United States Supreme Court announced a two-part test that an affidavit of probable cause in support of an anticipatory search warrant must meet: (1) “there is probable cause to believe the triggering condition will occur;” (2) “if the triggering condition occurs ‘there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” United States v. Grubbs, 547 U.S. 90, 96-97 (2006). “The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination.” Id. at 97.

#### Failure to State Reasons for Truthfulness of Hearsay Information and Failure to State Reasons Corroborating Evidence

Defendant first alleges that “the hearsay evidence of informant Paul Pryor used in the affidavit of probable cause was insufficient because the affidavit is devoid of any indications as to why Pryor was a truthful source, and the affidavit lacks any indication of corroboration.” Defendant’s Brief in Support of Motion to Suppress, Page 3.

This Court finds the opinion issued by the Superior Court in Com. v. Smith to be factually similar in this matter. In Smith, the defendants were charged with possession of MDMA with intent to deliver and criminal conspiracy. Smith, 784 A.2d at 184. In the process of seeking an anticipatory search warrant in the matter, the Pennsylvania State Police Trooper wrote in his affidavit of probable cause that he “received information from a confidential informant that an individual known as ‘Dwayne’ travels to the Philadelphia area to purchase drugs, specifically ‘ecstasy’ and returns to the York County area to distribute the drugs.” Id. The informant also stated that “Dwayne” would be accompanied by Brandi Smith who would assist in buying and selling the drugs. Id. The informant stated that “Dwayne” or Brandi would make a trip to purchase MDMA or other drugs on February 9, 2000. Id.

On February 9, 2000, police set up surveillance and noticed that a blue Volkswagen, registered to a Brandi Smith, was entering a mortgage company’s parking lot. Id. Two males left the Volkswagen to meet with

an individual in the parking lot for three minutes. Id. The two males then proceeded to head back to the Volkswagen. Id. The Volkswagen was seen headed to the Pennsylvania Turnpike toward Philadelphia. Id.

A search warrant was issued for when the car returned to York County. Id. at 185. The search warrant was eventually executed on the car and 150 MDMA pills were found in the car. Id. Defendants filed omnibus pretrial motions, which were granted by the trial court. Id.

In upholding the trial court's suppression, the Superior Court found "that there was not sufficient probable cause to justify the issuance of the warrant either based on the facts known to [the trooper] at the time the warrant was issued or based on information regarding future events that would occur later that evening." Id. at 186-87. In addition, the Court held "that the affidavit lacked sufficient indicia of reliability to support a finding of probable cause to issue the warrant." Id. at 187.

The Court stated that the trooper also "provided no information to support that the confidential informant was reliable. He gave no indication of the informant's past history of reliability or where the informant obtained the information provided regarding the meeting at the mortgage company, the trip to Philadelphia, or the return to York County with drugs." Id. at 187-88. The Court found that there was no "objective facts" present in the affidavit to establish this information. Id. at 188.

The trooper also failed to show that the confidential informant has been used before "and has been correct in [past] information provided." Id. at 188. The Court clarified that "when the reliability of the informant is not established, then the facts and circumstances surrounding the tip must provide sufficient indicia of reliability." Id. The Court stated that "police corroboration of aspects of a tip which demonstrate a special familiarity with the defendants' affairs may impart an indicia of reliability to the tip." Id. The Court found that since the confidential informant was not correct regarding "several material facts[,] and the confidential informant's reliability was not established, the evidence should be suppressed. Id.

Likewise, in Com. v. Wallace, the Pennsylvania Supreme Court suppressed evidence related to a controlled purchase by a confidential informant. Com. v. Wallace, 42 A.3d 1040 (Pa. 2012). A magistrate issued a search warrant based on information from a criminal informant. Id. 1042-43. A police officer supplied the informant with \$3,800 dollars and observed the informant enter the residence. Id. at 1043. Two to three minutes later, the informant exited the house with two bags of cocaine. Id. The police then proceeded to execute the search warrant and enter the house. Id. The police recovered the buy money with other drugs, drug paraphernalia, and keys to the house. Id.

The Court found that suppression was proper. Id. at 1052. The Court noted that the affidavit of probable cause stated that a man named “Greg” was making cocaine sales and was using his gold Mercedes to make deliveries. Id. at 1049. The Court, however, also stated that the informant failed to make even one “allegation that drugs were being sold by ‘Greg’ at [his] home.” Id. The informant also failed to provide a time and place of “Greg’s” prior cocaine sales and how he knew of “Greg’s” cocaine activity. Id. The informant’s various statements also did not show that drugs were being sold or stored from “Greg’s” home. Id. There was no description of how the informant came to know that “Greg” used his car to deliver the heroin. Id. at 1050. In addition, there was no evidence in the affidavit to establish that the informant’s allegations were truthful. Id. Moreover, “[t]here was no factual basis in the affidavit which established that the confidential informant had any past relationship with ‘Greg,’ ever witnessed ‘Greg’ in possession of drugs, or, critically, had been inside of [‘Greg’s’ house].” Id. In addition, the affidavit did not discuss if the informant had, “at any time, personally purchased drugs from ‘Greg,’ or witnessed ‘Greg’ selling drugs at **any** location, let alone at [‘Greg’s’] home.” Id. The Supreme Court, thus, held that “[t]here [was] nothing in th[e] affidavit which would establish any nexus between [‘Greg’s’] house and the sale or storage of drugs.” Id.

The Pennsylvania Supreme Court also found that “[t]he police had not observed any criminal activity nor were they informed of any prior criminal activity involving” either [‘Greg’] or his residence. Id. at 412. The affidavit merely stated that the affiant conducted an investigation of the premises but did not state what that investigation was. Id.

The Wallace Court noted that the United States Supreme Court “recognized that, in instances where the affidavit is deficient in establishing the informant’s veracity, reliability, or basis of knowledge, a strong showing with respect to . . . the existence of some other indicia of reliability- may compensate . . .” to cure a search warrant that is otherwise lacking probable cause. Id. at 1050-51 (citing Gates, 462 U.S. at 233-34 (citations and footnote omitted)).

However, the Pennsylvania Supreme Court still found that the affidavit at issue had a “dearth of detail indicating the informant’s basis of knowledge for his information [that cannot be] offset by the meager facts contained in the affidavit regarding the informant’s reliability and veracity.” Id. at 1051. The affidavit only discussed the informant’s involvement with a single previous criminal case which, according to the affidavit, yielded a quantity of cocaine and drug paraphernalia but there is no additional information about the informant’s role in the case. Id. Thus, there is no



showing that the informant possessed “unusual” reliability nor did the affidavit evidence that the informant is a person whose veracity could not be challenged. *Id.*

Lastly, the Supreme Court held that probable cause could not be met by mere adequate corroboration of public information provided by the informant to police— i.e. “Greg’s” address and home phone number. *Id.* at 1052. The Court found that this information is very public information “of a general nature” and therefore failed to “reveal a particular familiarity with [‘Greg’s’] affairs which would bolster the reliability of the confidential informant’s tip.” *Id.* (citing *Com. v. Torres*, 764 A.2d 532, 540 n. 8 (Pa. 2001)). Therefore, the Court held that suppression was proper. *Id.*

The Pennsylvania Supreme Court has outlined when a confidential informant’s tip is sufficient to establish probable cause. *In re O.A.*, 717 A.2d at 493. In *O.A.*, a police lieutenant received a phone call from an informant who had previously provided information that led to about fifty arrests. *Id.* The informant notified police that there were two individuals selling drugs in an abandoned garage and one of those individuals, O.A., had drugs for sale in his possession. *Id.*

Under the *Gates* totality of the circumstances test, the Pennsylvania Supreme Court stated that “probable cause exists where the facts and circumstances within the officer’s knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed.” *Id.* at 495 (citing *Com. v. Gibson*, 638 A.2d 203, 206 (Pa. 1994)). The Pennsylvania Supreme Court confirmed that “[w]here . . . the officers [sic] actions resulted from information gleaned from an informant, in determining whether there was probable cause, the informant’s veracity, reliability and basis of knowledge must be assessed.” *Id.* (citing *Gates*, 462 U.S. at 233).

The *O.A.* Court held that the mere assertion that an informant has “provided reliable information in the past” is not enough on its own to support a finding of reliability. *Id.* at 496. In addition, while the officer in *O.A.* had claimed that the informant had provided tips that led to fifty arrests, there was no discussion in the affidavit of probable cause as to how many of the arrests led to convictions nor was there any identifying information in the record as to who the arrestees were. *Id.* The Pennsylvania Supreme Court, thus, held “that an assertion by a police officer as to an informant’s reliability with no objective facts to substantiate his assertion, is [in]sufficient to support a finding of probable cause.” *Id.*

Further, the Court held that the informant’s tip did “not disclose a sufficient basis of knowledge to support the police officers’ belief that a crime had been or was being committed at the time they entered the garage.”

Id. For instance, the only claim that the informant made that was relevant in determining how the informant knew of O.A.'s illegal activity was that he witnessed O.A. selling "drugs" that were in his possession while he (O.A.) was in an abandoned garage. Id. at 496-97. The Court found that the informant's statement did not provide enough detail as to how the informant knew that the spotted items were actually drugs. Id. at 497. In addition, "there was no assertion that this informant had provided information leading to any prior narcotics arrests or any other information which would establish the informant's familiarity with narcotics." Id. Therefore, the Pennsylvania Supreme Court held that further investigation was needed. Id.

The Pennsylvania Supreme Court has also held that "[w]hen police are relying on an informant's tip, it is important that the tip provide information that demonstrates 'inside information' a special familiarity with the defendant's affairs." Id. at 498 (citing Alabama v. White, 496 U.S. 325, 332 (1990)). If an informant's tip provides inside information, then police corroboration of the tip "can impart additional reliability to the tip." Id. (citing White, 496 U.S. at 331). Therefore, "[i]f the facts that are supplied by the tip itself are no more than those easily obtained, then the fact that the police corroborated them is of no moment." Id. In short, "[o]nly where the [informant's tip] provides inside information, which represent[s] a special familiarity with a defendant's affairs, that police corroboration of the information imparts indicia of reliability to the tip to support a finding of probable cause." Id. Therefore, since the only information corroborated was readily available, such as a physical description of O.A., the Supreme Court held that the evidence should be suppressed. Id. at 499.

Here, it appears that the Commonwealth has not met their burden in proving that the search warrant is supported by probable cause. The affidavit of probable cause alleges the following: Officer Bryan P. Chappell Jr. was monitoring "a known drug courier" [Sic] who was identified as Paul Adam Pryor. Affidavit of Probable Cause, Page 1. While conducting the surveillance of Pryor, Officer Chappell witnessed him leave the passenger side of a 1999 Ford Escort and enter a garage at 245 Church Street. Id. Pryor was inside the garage for approximately five minutes. Id.

According to the Affidavit, Pryor then got back into the vehicle and it eventually stopped again "in the unit block of South Church Street." Id. At this location, Pryor allegedly stopped and met a white male for about two minutes. Id. Pryor then returned to the vehicle. Id. Shortly after, a traffic stop was initiated on the vehicle because the vehicle was swerving out of its lane of travel. Id.

During the traffic stop, Officer Chappell interviewed the driver of the vehicle. Id. at 2. The driver stated that she and Pryor were selling

heroin and that Pryor “probably” still had heroin on him. Id. The driver also stated that there was a large amount of cash in the vehicle. Id.

Officer Chappell subsequently interviewed Pryor, who confirmed what the driver previously stated. Id. Pryor was then placed under arrest and read his Miranda rights. Id. The Ford was searched and 9 grams of heroin, a pill container with 21 oxycodone hydrochloride pills, a cellophane wrapper with 8 Alprazolam pills, a clear plastic bag with 6 buprenorphine hydrochloride pills, a digital scale, two cell phones, \$676.08 in U.S. currency, and a roll of aluminum foil that was hand torn into pieces were all subsequently seized from the vehicle. Id.

Pryor, during the course of an interview that took place at Waynesboro Police Department after his arrest, stated that he sold ten grams of heroin a day and sometimes forty grams per day. Id. Pryor stated that he was getting the heroin from 245 South Church Street. Id. He stated that he was purchasing heroin for \$140.00 per gram from a “black male” known as “Dunnie” who lived at 245 South Church Street. Id. at 2-3. Pryor claimed that he could call “Dunnie” at any time to pick up 10 more grams of heroin. Id. at 2. According to Pryor, “Dunnie” would have at least 40 grams of heroin inside of the residence. Id. Pryor alleges that he knew this to be true because he could always go to “Dunnie’s” residence to pick up 10 grams without having to wait. Id.

Pryor claimed that he would pick up the heroin by parking to the rear of 245 South Church Street. Id. at 3. “Dunnie” would then exit his house with the heroin and would meet Pryor in his garage to give him the heroin. Id. Pryor also indicated that he actually entered the residence on a few occasions and noticed that there were usually 4 adults and 4 children inside of the residence. Id.

Pryor stated that he met with “Dunnie” that day to provide him with some “Subutex” and to buy heroin from “Dunnie.” Id. According to Pryor, “Dunnie” was selling the heroin for \$10 a bag. Id.

Officer Chappell performed a records check on “245 South Potomac Street” and found that “Dunnie” was the Defendant. Id. In addition, Defendant’s driver’s license was also issued to the 245 South Church Street address. Id. Moreover, Pryor provided a physical description of “Dunnie” and the police cross-referenced it with a prior police incident that identified “Dunnie” as Vamar A. Franklin from 245 South Church Street. Id. It remains unclear what that prior police incident was. Id.

In light of the above, like the affidavit in Smith, the facts and circumstances surrounding Pryor’s tip here did not provide an indicia of reliability. The affidavit is without evidence that Pryor is a reliable witness.

Further, there is not even one assertion in the affidavit that Pryor was used in the past or is trustworthy.

In addition, like the Wallace affidavit, the affidavit here included no evidence to establish that Pryor's accusations were truthful. While, unlike the affidavit in Wallace, the affidavit here did include an allegation that drugs were being sold by Defendant at his home, there is no other evidence that Defendant was in fact selling drugs; no one else, including the police, can corroborate that Defendant had heroin on his person. Pryor also stated that he personally purchased drugs from Defendant at his (Defendant's) home. Pryor attempts to establish that there is a connection between Defendant's 245 South Church Street residence and the storage of drugs as Pryor claimed that Defendant would have at least 40 grams of heroin inside of his house at all times. However, the affidavit of probable cause never alleges that drugs were seen entering or leaving the 245 South Street Residence.

The affidavit also states that Pryor was inside of Defendant's residence and the residence usually has four adults present inside of it, along with four children. Moreover, Pryor also claimed that Defendant kept at least 40 grams of heroin inside of his house and he (Pryor) could pick up heroin at the residence as often as he needed. Affidavit of Probable Cause, Page 2. Again, however, the affidavit does not corroborate this inside information. If this information was corroborated, it would "impart additional reliability to the tip" and assist in establishing probable cause. In re O.A., 717 A.2d at 498. The affidavit does not even explain who these seven other individuals who are allegedly usually inside of the 245 Church Street residence are believed to be.

Moreover, Officer Chappell witnessed Pryor enter a garage at Defendant's residence at 245 South Church Street for five minutes. Affidavit of Probable Cause, Page 3. Pryor claimed that he met with Defendant to supply him with Subutex and to buy heroin for \$10 a bag. Id. Officer Chappell also witnessed Pryor meet with another male for two minutes. Id. Subsequent to these meetings, Officer Chappell found nine grams of heroin in Pryor's car. Id. However, as Defendant's *Brief in Support of Motion to Suppress* notes, "[t]here is no observation listed in the affidavit that Pryor's vehicle contained no drugs prior to his entering the garage [and there is] no observation that Pryor left the garage with a package" or with drugs. Defendant's Brief in Support of Motion to Suppress, P. 5.

In addition, like the defendant in O.A., the only information corroborated by police in this case was "readily available." In re O.A. 717 A.2d at 499. For example, the affidavit states that the police performed a records check of 245 South Church Street and found that "Dunnie" was

Vamar A. Franklin. Affidavit of Probable Cause, Page 3.<sup>1</sup> The affidavit does not outline what this “records check” consisted of and how the police came to the conclusion that “Dunnie” was Defendant. While the police found that Defendant’s license was issued to the 245 Church Street address, Pryor alleges that four adults total are usually present at the address. The affidavit does not describe the other three adults and thus it is difficult to determine how one can assume that the other three adults are not “Dunnie.” In other words, the affidavit of probable cause does not explain in adequate detail how it became suspected that Defendant, and not the three other individuals, was “Dunnie.” Similarly, the police did not outline the nature of the “prior police incident” that was used to cross reference Pryor’s physical description and that was used to identify “Dunnie” as Defendant. See In re O.A. 717 A.2d at 498 (holding that information such as addresses and physical descriptions are readily available and do not import additional reliability to an informant’s tip).

While the Commonwealth argues that Pryor should be deemed reliable as his tips were against his interest and given during a post-arrest police interview, the Court disagrees. Pryor may be attempting to protect another party or may have a negative history with Defendant; the Court does not have enough facts in the affidavit of probable cause to know either way. In addition, Pryor “has an extensive criminal history[,]” which is also relevant in determining Pryor’s reliability. Defendant’s Motion to Suppress, Page 2; Defendant’s Brief in Support of Motion to Suppress, Page 4.

In addition, Defendant is correct in asserting that common investigatory tools, such as controlled buys, could have been and were not utilized to corroborate Pryor’s tips that were lacking in reliability. Thus, since there is little showing that Pryor has a history of reliability and because his tips were not sufficiently corroborated, this Court cannot find that the Commonwealth has met its burden in showing that the May 10, 2014 search warrant was supported by probable cause as required by Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution.

#### Staleness of Information in Warrant

Next, the Defendant argues that the information in the warrant is stale.

Under Pennsylvania law, “probable cause must be based on facts closely related to the time of the issuance of the warrant.” Com. v. Novak, 335 A.2d 773, 775 (Pa. Super. Ct. 1975).

#### Moreover,

<sup>1</sup> The affidavit of probable cause states that the records check was performed on 245 Potomac Street and showed that “Dunnie” was Vamar A. Franklin. The Court assumes that this is a typographical error as the Court cannot find any previous mention of a 245 Potomac Street in the record.

age of the information supporting a warrant application is a factor in determining probable cause. If too old, the information is stale, and probable cause may no longer exist. Age alone, however, does not determine staleness. The determination of probable cause is not merely an exercise in counting the days or even months between the facts relied on and the issuance of the warrant. Rather, we must also examine the nature of the crime and the type of evidence.

Com v. Janda, 14 A.3d 147, 158-59 (Pa. Super. Ct. 2011) (quoting United States v. Harvey, 2 F.3d 1318, 1322 (3d Cir. 1993)). The Superior Court has stated that narcotics evidence can become stale faster than other evidence as narcotics are easily disposed of. Novak, 335 A.2d at 775-776.

In light of the above, this Court finds that information in the warrant was not stale. As the Commonwealth notes in its Answer to Defendant's Motion to Suppress, Pryor indicated that he would arrive at 245 Church Street and enter the garage to purchase drugs from Defendant. Commonwealth's Answer, Page 4. The same day that Pryor outlined to police how he would purchase heroin from Defendant, Officer Chappell observed him arrive at 245 South Church Street and enter the garage for approximately five minutes. Id. at 5. Pryor later indicated that he purchased heroin at that time. Id. Therefore, since Pryor was seen at the garage at 245 Church Street during the same day that he indicated to Officer Chappell that he purchases drugs from that garage, the information in the warrant is not stale.

Defendant claims that the warrant is stale because Pryor stated that he had been in the 245 Church Street residence "on a few occasions." Defendant's Brief in Support of Motion to Suppress, Page 6. Defendant argues that it is not possible to measure when these occasions occurred and thus the information in the warrant is stale. However, as stated above, case law is clear that age of the information is not the only factor used to determine if information in a search warrant is stale. Janda, 14 A.3d at 158-59. The Court must also look at the type of evidence and information supplied in determining if the information in the search warrant is stale. Id.

Moreover, the amount of times Pryor was allegedly in Defendant's residence is helpful in assisting a magistrate in determining if Pryor and the Defendant had a past relationship. See Wallace, 42 A.3d at 1051. The inquiry as to if Defendant and Pryor had a past relationship can assist in determining the reliability of Pryor and how well he knew Defendant. In addition, this information will not become stale as quickly as evidence of narcotics possession. In sum, the information Defendant objects to is

relevant and still timely in making the Gates probable cause “totality of the circumstances” determination. Further, the information Defendant objects to, does not, in itself, allege that Defendant is engaged in illegal narcotics activity, evidence of which would become stale more quickly. See Novak, 335 A.2d at 775-776. On the contrary, it only alleges that there are 4 adults and 4 children in the 245 South Church Street residence and that Pryor alleges that he has a past relationship with Defendant. As a result of the above, the information in the warrant is not stale.

### **Conclusion**

In light of the above, the Defendant’s *Motion to Suppress* is granted pursuant to the attached Order.

### **ORDER OF COURT**

**AND NOW**, this 23rd day of January, 2015, upon review and consideration of Defendant’s *Motion to Suppress* and *Brief in Support of Motion to Suppress* and the Commonwealth’s Answer thereto;

**IT IS HEREBY ORDERED** that Defendant’s *Motion* is **GRANTED** as follows:

1. All items found pursuant to a search warrant issued and executed at 245 South Church Street, Waynesboro, Pennsylvania on May 10, 2014 shall be suppressed.

*Pursuant to the requirements of Pa .R.Crim.P. 114 (B)(1), (2) and (C)(1), (2), the Clerk shall promptly serve this Order or court notice on each party’s attorney, or the party if unrepresented; and shall promptly make docket entries containing the date of receipt in the Clerk’s office of the Order or court notice; the date appearing on the Order or court notice; and the date and manner of service of the Order or court notice.*