

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

R.E.L.,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 154 MDA 2012

Appeal from the Judgment of Sentence Entered December 7, 2011  
In the Court of Common Pleas of Luzerne County  
Criminal Division at No(s): CP-40-0004044-2007

BEFORE: BENDER, J., SHOGAN, J., and FITZGERALD, J.\*

MEMORANDUM BY BENDER, J.:

**FILED MAY 24, 2013**

Appellant, R.E.L.,<sup>1</sup> appeals from the judgment of sentence of 25 to 50 years' incarceration, imposed after a jury convicted him of numerous sexual offenses including rape, incest, and aggravated indecent assault. Appellant challenges the court's denial of his pretrial motion to suppress evidence. We affirm.

Appellant was arrested and charged with numerous offenses after his biological sister, N.L., accused him of sexually abusing her over a ten-year period from 1993 to 2003. N.L. claimed that two children to whom she gave birth during that time were fathered by Appellant. Based on N.L.'s

---

\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> We have changed Appellant's name to initials in order to protect the identity of the victim, who is Appellant's biological sister.

allegations, Pennsylvania State Trooper Gerald Williams applied for and obtained a search warrant to seize a sample of Appellant's DNA, which subsequently verified that Appellant was the father of N.L.'s children.<sup>2</sup>

Prior to his trial, Appellant filed a motion to suppress the DNA sample, challenging the validity of the search warrant. After a hearing, the trial court denied the motion, and Appellant's case proceeded to a jury trial. At the close thereof, the jury found Appellant guilty of eight counts of aggravated indecent assault, two counts of indecent assault, four counts of rape, two counts of incest, six counts of involuntary deviate sexual intercourse, three counts of sexual assault, and one count of corrupting a minor. Appellant was subsequently sentenced to an aggregate term of 25 to 50 years' incarceration. He filed a timely notice of appeal, as well as a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(a). Herein, he raises one issue for our review:

Whether the trial court erred in denying [Appellant's] motion to suppress evidence based upon a search warrant for [Appellant's] DNA, for which [] the supporting affidavit failed to include relevant facts known to the affiant concerning the veracity of the complainant and not disclosed to the magisterial district judge, which if known by the judge would have negated the existence of probable cause and would have been something that the judge would have wanted to know[?]

---

<sup>2</sup> The younger of N.L.'s two children, a son, died at the age of seven months from Zellweger Syndrome. However, his DNA profile had been obtained prior to his death and was used to determine that Appellant was his biological father. **See** N.T. Trial, 7/27/11, at 99-100, 143-145.

Appellant's Brief at 2.

Initially, we note our standard of review of Appellant's issue:

In reviewing an order from a suppression court, we consider the Commonwealth's evidence, and only so much of the defendant's evidence as remains uncontradicted. We accept the suppression court's factual findings which are supported by the evidence and reverse only when the court draws erroneous conclusions from those facts.

***Commonwealth v. Hoopes***, 722 A.2d 172, 174-75 (Pa. Super. 1998).

Appellant contends that Trooper Williams, as the affiant of the affidavit of probable cause, omitted pertinent information from that document. In ***Commonwealth v. Taylor***, 850 A.2d 684 (Pa. Super. 2004), this Court explained:

[W]here omissions are the basis for a challenge to an affidavit of probable cause in an arrest warrant, we apply the following test: (1) whether the officer withheld a highly relevant fact within his knowledge, where "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 had contained a disclosure of the omitted information.

***Id.*** at 689 (citations omitted).<sup>3</sup>

---

<sup>3</sup> We acknowledge that ***Taylor*** involved omissions in an arrest warrant while, here, it is a search warrant that is at issue. However, both types of warrants must be supported by probable cause, which is assessed using a "totality of the circumstances" test, discussed in further detail *infra*. **See *Commonwealth v. Huntington***, 924 A.2d 1252, 1255 (Pa. Super. 2007) ("In this jurisdiction, the question of whether probable cause exists for the issuance of a search warrant must be answered according to the 'totality of the circumstances' test...."); ***Taylor***, 850 A.2d at 686-87 ("The test in this Commonwealth for determining whether probable cause exists for the issuance of an arrest warrant is the 'totality of the circumstances.'").  
(Footnote Continued Next Page)

Appellant contends that the “highly relevant fact” omitted by Trooper Williams from the affidavit of probable cause was that N.L. told the trooper that Appellant had also abused their biological sister, S.L., but when the trooper interviewed S.L., she denied that she had been abused by Appellant. Trooper Williams did not disclose S.L.’s denial of abuse in the affidavit of probable cause, even though he knew this information prior to applying for the search warrant. Appellant maintains that, “had the issuing authority been apprised that at least one other person ([S.L.]) indicated that [N.L.] had lied about a material fact concerning sexual assaults allegedly committed by [Appellant], the issuing authority may have found that none of [N.L.’s] statements were credible and no probable cause would have existed to issue the search warrant.” Appellant’s Brief at 8. Thus, Appellant contends that Trooper Williams’ omission of this information invalidated the search warrant.

We disagree with Appellant in several regards. However, before delving into our discussion, we must set forth the facts averred by Trooper Williams in the affidavit of probable cause. That document states, in relevant part:

It is alleged that [Appellant], who is the biological brother of the victim, [N.L.] has repeatedly raped the victim over a ten

*(Footnote Continued)* \_\_\_\_\_

Therefore, the test set forth in **Taylor** for assessing an omission in an affidavit of probable cause for an arrest warrant is equally applicable to an omission in an affidavit of probable cause underlying a search warrant.

year period (1993 through 2003). It is also alleged that [Appellant] fathered two children by the victim. One child is age four and resides with the victim[,] ... while the other child ... died at age seven months. These incidents are alleged to have occurred at ... the home of ... the father of both the suspect and the victim. Suspect, [Appellant] and the victim [N.L.] are not married.

On 04/09/2005 at 1430 hours, [N.L.] was interviewed at PSP Wyoming.

[N.L.] related that at age 9 (1993), while in the 5<sup>th</sup> grade, she was molested by her brother, [Appellant].<sup>[4]</sup> She related that during the summer of 1993 [Appellant] had called her to the upstairs of their parents [*sic*] home ... in Plymouth Township. He told her that he wanted to show her something. She recalled it was a nice day because she was dressed in a bathing suit. She said she followed [Appellant] to the upstairs bedroom when he pulled his penis out of his pants. She said he had her take off her bathing suit and he began to perform oral sex on her. He then stuck his fingers inside her vagina. After having his fingers inside her vagina, he then stuck his penis inside her vagina. She said she felt pain, but could not recall if she bled. She did not recall if he ejaculated inside of her. She said [Appellant] had told her that he would kill her if she told anyone.

[N.L.] said [Appellant] would rape her approximately 4 to 5 separate times a month from age 9 to age 13. (This is approximately 300 times over the course of 5 years).

[N.L.] related that her brother [Appellant] would baby-sit her and her siblings when her parents were out of the house either running errands or visiting others. [N.L.] said that [Appellant] would also provide her with alcohol (beer) and marijuana. [N.L.] said that if she did not want to participate in sex with [Appellant], he would hit her, pull her hair, punch her in the chest or make her carry books with her arms extended until they fell. When the books fell, he would hit and punch her. She said after she submitted he would take her up to the bedroom and make her touch his penis or he would place his fingers inside her vagina.

---

<sup>4</sup> Appellant was approximately 16 years old at the time he first abused N.L.

[N.L.] said at approximately age 14 (approximately 1998), [Appellant] was dating a person .... She said while [Appellant] dated her, he would still come to her for sex, but the sex became less frequent. She said on average that he would have sex with her between 2 and 3 times a month up to age 18. (this averages out to approximately 180 times over the course of 5 additional years).

[N.L.] related that [Appellant] continued to have sexual intercourse with her, perform oral sex on her and made her perform oral sex on him. She said there was no anal intercourse. She said it was typical as she got older that when [Appellant] wanted to have sex with her that he would begin by rubbing her shoulders in a massage type fashion and to provide her with alcohol and/or marijuana to "relax" her and make her feel better. She said she also recalled that he made her have sex with him while her sister [S.L.] watched and then he made her watch as he had sex with her sister.

[N.L.] stated [Appellant] had continued to sexually assault and abuse her until she became pregnant at age 15 (1999). [N.L.] said due to being exposed to sex at a very young age by [Appellant], she had become sexually active with other males as well. She stated that at age 15, she had been dating another boy. She said when she became pregnant she thought that he was the father. She said a DNA test was performed by Domestic Relations, Luzerne County, but the test confirmed that he was not the father. She said that she also had sex with another boy. She said he also participated in providing a DNA sample. She said DNA results also proved he was not the father of the child. She said the only other person that she had sex with was [Appellant]. However, she did not have a DNA test performed on [Appellant] because she was afraid. She said that [Appellant] had threatened her in the past that if she had ever told anyone about the sex, he would kill her. She said she constantly lived in "fear" of [Appellant].

[In March of 2001], [a daughter] was born to N.L. In June of 2001, [Appellant] had a conversation with [N.L.] and asked if [her daughter] was his child. [N.L.] told him no because she was fearful about what [Appellant] might do to her or her daughter. She said he then apologized to her and said he was sorry for sexually abusing her and he promised that he would not do it to her again.

[N.L.] reports that there is no genetic defects with her daughter as of now and that her daughter is a healthy individual.

[N.L.] noted that her mother had died and they were all living at the house with their father.

[N.L.] said during this time, [Appellant] had moved in with his girlfriend.

[N.L.] was eventually asked to leave her father's home so she then moved in with her brother [(not Appellant)].

[N.L.] said approximately 2 months after moving in with him (August of 2003), they were evicted from the house. She said she again had no where [*sic*] to go so [Appellant] offered to let her move in with [him], his girlfriend and his children .... [N.L.] said about 2 years had passed since [Appellant] had assaulted her last and that he had a family of his own, so she did not believe it would happen to her again. However, after about three weeks in the house, she returned home from work one day. She said she just finished showering and [was] on her way back to her bedroom in a robe when [Appellant] saw her in the hallway and started to massage her back. She said he would massage her back before he would have sex with her in the past, so she did not want him to do that to her. She said she told him to stop, but he pulled her into his room and had her lay down on the bed. She said his girlfriend was a work and his two children were in the downstairs. She said he continued to massage her back, but then placed his fingers inside her vagina. She said he attempted to grab her breasts, but she tried to cover up with her robe. She said he then placed his penis inside her vagina. She said she didn't fight him because she was afraid. [N.L.] said she recalled [Appellant's] son [], who was approximately 4 years of age at the time, walking down the hallway when Appellant yelled at him to get back downstairs or he would spank him. She said [the child] went back downstairs and [Appellant] continued to have sex with her until he ejaculated. She said after he ejaculated he told her to keep quiet about the sex or he would kill her. [N.L.] said she was emotionally upset after this incident. She said she could not stay at [Appellant's] home after that. She said she moved out.

[N.L.] said after this rape she became pregnant with her second child. Three weeks after this rape she decided to tell her father that [Appellant] had been raping her for years. She told her father and he then allowed her back into the home [in] ...

Plymouth Township. She said prior to telling her father about the rapes, she did not believe that he knew what was going on. She also said that she was not molested by her father.

[N.L.] said that prior to the rape at [Appellant's] home; she had been sexually active with a boy named Matthew. [N.L.] said her son ... was born on [in March of 2004]. She said [Matthew] was given a DNA test by Luzerne County Domestic Relations and the results came back negative. He was not the father of [N.L.'s son]. [N.L.] said other than Matthew, [Appellant] was the only other person that she had sexual intercourse with during that time period.

[N.L.] related that [her son] was born ... with genetic abnormalities. She noted that [her son] had Zellweger Syndrome whereby a person does not develop muscular content in its body. She said he was blind and deaf and was on a heart monitor and had a feeding tube. She also noted [her son] was born with hydrocephalus which is an abnormal amount of cerebrospinal fluid in the brain.

[N.L.'s son] died approximately seven months later .... His remains were cremated ....

[N.L.] related that [Appellant] had also raped her in numerous rooms inside [her father's home in] Plymouth Township. She said it happened in the cellar, laundry room, attic, bedrooms, ... and a downstairs apartment where [Appellant] stayed. [N.L.] said she also sought psychological counseling through Head Start. She said she did not report the incidents earlier because she was a young child living in fear and shame.

On 06/10/2005, this Trooper went to the Luzerne County Domestic Relations Office and did verify that [N.L.] did in fact have three paternity tests conducted on three males mentioned above. This Trooper notes that all three males were excluded as the fathers of her two children.

Based on the aforementioned information, a search warrant is being requested to search for and seize a saliva sample using the Buccal method from [Appellant] in order to perform a paternity/DNA analysis to determine whether [Appellant] is the biological father of [N.L.'s daughter].

Affidavit of Probable Cause, 11/21/05, at 1-2.

After reviewing the affidavit of probable cause, we are not convinced that S.L.'s denying that Appellant abused her amounted to a "highly relevant fact" that was necessary for Trooper Williams to disclose. Whether S.L. was abused by Appellant was not related to the underlying offenses being investigated by Trooper Williams, *i.e.* Appellant's sexual abuse of N.L. Furthermore, S.L.'s denial was not definitive proof that N.L. "lied" about Appellant abusing S.L., as there could have been various reasons for S.L. to deny that Appellant abused her other than that the abuse never occurred.

In any event, even if S.L.'s denial had been included in the affidavit, it would not have negated the probable cause to issue the search warrant. This Court recently declared:

In this jurisdiction, the question of whether probable cause exists for the issuance of a search warrant must be answered according to the "totality of the circumstances" test articulated in ***Commonwealth v. Gray***, 509 Pa. 476, 503 A.2d 921 (Pa. 1985), and its Pennsylvania progeny, which incorporates the reasoning of the United States Supreme Court in ***Illinois v. Gates***, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). ***See [Commonwealth v.] Murphy***, 916 A.2d [679], 681-682 [(Pa. Super. 2007)] (discussing the Pennsylvania standard for issuing a search warrant). The task of the magistrate acting as the issuing authority is to make a "practical, common sense assessment" of whether, "given all the circumstances set forth in the affidavit," a "fair probability" exists that contraband or evidence of a crime will be found "in a particular place." [***Murphy***, 916 A.2d] at 682. A search warrant is defective if the issuing authority has not been supplied with the necessary information. ***Id.*** The chronology established by the affidavit of probable cause must be evaluated according to a "common sense" determination. ***Id.***

**Huntington**, [924 A.2d at] 1255. Further, “probable cause is based on a finding of the probability, not a prima facie showing[,] of criminal activity, and [ ] deference is to be accorded a magistrate's finding of probable cause.” **Commonwealth v. Jones**, 506 Pa. 262, 484 A.2d 1383, 1387 (1984) (citations omitted). “We must limit our inquiry to the information within the four corners of the affidavit submitted in support of probable cause when determining whether the warrant was issued upon probable cause.” [ ] **Taylor**, 850 A.2d [at] 687 ... (citation omitted).

**Commonwealth v. Arthur**, 62 A.3d 424, 432-433 (Pa. Super. 2013).

Furthermore, we note that “it is well-established that ‘the uncorroborated testimony of the complaining witness is sufficient to convict a defendant of sexual offenses.’” **Commonwealth v. Castelhun**, 889 A.2d 1228, 1232 (Pa. Super. 2005). If the statement of a sexual assault victim is sufficient, in and of itself, to prove a defendant’s guilt beyond a reasonable doubt, a victim’s statement alone may also be adequate to provide probable cause to issue a search warrant.

With this legal framework in mind, we easily conclude that there was probable cause to issue the warrant in this case, even considering S.L.’s denial of N.L.’s claim that Appellant abused S.L. N.L. provided Trooper Williams with explicit details of the abuse committed against her by Appellant. She stated the approximate time when the abuse began, indicating that it was in 1993 and was warm outside because “she was dressed in a bathing suit.” Affidavit of Probable Cause, 11/21/05, at 1. She discussed the frequency of Appellant’s abuse, and how the regularity of his assaults lessened in 1998 when Appellant was dating a woman. N.L. also

described the tactics Appellant used when instigating his sexual assaults, *i.e.* massaging her neck, and the threats he made which compelled her to keep his abuse secret for many years. Moreover, N.L. gave thorough details about the last time that Appellant raped her in August of 2003 at the home he shared with his girlfriend and children.

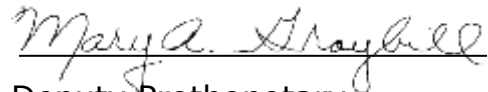
Finally, and most compellingly, N.L. told Trooper Williams that Appellant fathered her two children. She candidly admitted that she had been intimate with other men as well as Appellant at the time she got pregnant, and told the trooper that the Domestic Relations Office of Luzerne County conducted paternity tests of her other paramours. N.L. stated that the paternity tests came back negative, but “she did not have a DNA test performed on [Appellant] because she was afraid” due to his past threats that he would kill her if she revealed the abuse. Affidavit of Probable Cause, 11/21/05, at 1. Trooper Williams confirmed that N.L. did have paternity tests conducted on “three males,” and that those tests had confirmed that none of the men fathered N.L.’s children. ***Id.*** at 2. Therefore, in this way, the trooper corroborated a portion of N.L.’s statement, thus bolstering her credibility and the truth of her allegations against Appellant.

Considering the totality of these circumstances, there was ample probable cause to issue the search warrant for Appellant’s DNA. While Trooper Williams omitted the fact that S.L. denied that Appellant abused her, that omission did not diminish the probable cause established by N.L.’s statement as a whole. This is especially true in light of Trooper Williams’

corroboration of N.L.'s claims regarding the paternity tests. Accordingly, the trial court did not err in denying Appellant's motion to suppress.

Judgment of sentence affirmed.

Judgment Entered.

  
Deputy Prothonotary

Date: 5/24/2013