15-0008

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

PRISTINE PRE-OWNED AUTO INC.
A West Virginia Corporation,
PLAINTIFF

VS.

CIVIL ACTION NO. 14-C-137
Judge Lynn A. Nelson

JAMES W. COURRIER, JR.
PROSECUTING ATTORNEY for
MINERAL COUNTY, WEST VIRGINIA

And

TROOPER M.L. TRAVELPIECE, Individually and
In his official capacity as a
West Virginia State Trooper,
DEFENDANTS

ORDER

On this 1st day of December 2014 came the Plaintiff by its counsel, James E. Smith, II and came James W. Courrier, Jr and Trooper M.L. Travelpiece, with his counsel, Virginia Grottendieck-Lanham. This matter was brought before the Court this date pursuant to the Plaintiff's Motion for Writ of Mandamus and Request for Injunction.

At the outset of the hearing, the Court summarily dismissed the Plaintiff's Motion for Contempt. The Defendants subsequently moved the Court to dismiss this action as an improper remedy. Defendants confirmed that there are presently no pending criminal charges against the Plaintiff. Inasmuch as no other legal proceedings are presently under way regarding this search to allow the issue of property return to be contemplated, the Court DENIED Defendant's oral motion to dismiss.

J. Smith
J. Courrier
WV St Police

The Plaintiff called the Defendant, Trooper Travelpiece, and the Plaintiff's Chief Operating Officer, Fernando M. Smith. Both of whom were duly sworn and subject to cross-examined by counsel. The Plaintiffs introduced nine (9) exhibits and rested. The Defendants presented no evidence.

During the course of the Plaintiff's case-in-chief, Counsel wished to call Magistrate Carolyn S. Roby to the stand to ask if she would have granted the search warrant in hindsight, which Motion was DENIED by the Court as not necessary to the Trier of Fact.

After hearing the evidence, the Court would make the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. Pristine Pre-Owned Auto Inc., has operated in Keyser, Mineral County, West Virginia since 2006.

2. Since 2006 the Plaintiffs have been involved in substantial litigation including both criminal and civil cases in the Courts of Mineral County.

3. Law enforcement has received numerous complaints against the Plaintiff since 2006.

4. James W. Courrier, Jr. is the duly elected Prosecuting Attorney for Mineral County, West Virginia and has been since January 2009.

5. Trooper M.L. Travelpiece has been a member of the Mineral County Detachment of the West Virginia State Police since March 2014.

6. On October 23, 2014, Trooper Travelpiece applied for a Search Warrant before Magistrate Carolyn Roby to search the property located at 474 S. Mineral St., Keyser, West Virginia, for evidence relating to the crimes of false pretenses and grand larceny regarding the sale and later removal of a Ford Freestyle automobile from the complaining witness and

additional complaints from unnamed witnesses regarding possible misrepresentations of car condition at sale. Magistrate Roby issued the search warrant and the search warrant and the return are attached hereto and made a part hereof.

7. Upon execution of the search warrant, the Plaintiff did not cooperate with or assist law enforcement in locating the items they were searching for at the property. Accordingly, law enforcement seized a considerable volume of paperwork, records, computer equipment, and other materials during the search of the property.

8. Rule 41(e) of the West Virginia Rules of Criminal Procedure allow for the pre-indictment petition to the Circuit Court by "[a] person aggrieved by an unlawful search and seizure may move the circuit court for the county in which the property was seized for the return of the property on the ground that he or she is entitled to lawful possession of the property."

9. W.Va. Code §62-1A-6 addresses searches and seizure and provides:

> A person aggrieved by an unlawful search and seizure may move for the return of the property and to suppress for use as evidence anything so seized on the ground that (1) the property was illegally seized without a warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. If the offense giving rise to the issuance of the warrant be one which a magistrate has jurisdiction to hear and determine, the motion may be made to him. If the offense is cognizable only before a court of record the motion shall be made to the court having jurisdiction. The judge or magistrate shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be returned unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion may be made before trial or hearing upon three days' notice, or, the motion may be made or renewed at the trial or hearing.

The West Virginia Supreme Court examined this statute in State ex rel. White v. Melton, 166 W.Va. 249, 273 S.E.2d 81 (1980). In White, the Court held that currency which was seized from

two individuals who were arrested and later had their charges dismissed by the magistrate after a preliminary hearing, were entitled to have their currency returned inasmuch as the charges had been resolved making the continued seizure of the property inappropriate. Subsequently, the West Virginia Supreme Court dealt with an issue of a requested return of items seized pursuant to a search warrant where no charges had been filed. In the memorandum decision[1] of In re: Brining, Docket Number 12-1409 (October 4, 2013), the Court affirmed the denial of a request for the return of property finding that the request was "premature because the investigation is ongoing".

10. In light of the differences between Rule 41(e) and W.Va. Code §62-1A-6 (as highlighted in In Re: Brining), it would appear that W.Va. Code §62-1A-6 contemplates a motion being filed post-charge while Rule 41(e) contemplates and allows a motion to be filed by any person aggrieved by a unlawful search and seizure regardless of whether charges are filed. Accordingly, the Court will consider this issue under Rule 41(e). The federal courts have examined this issue and recognized that:

> From Rule 41(e) cases, several general principles emerge. First, while the government is "clearly permitted to seize evidence for use in investigations and trial ... the government may not by exercising its power to seize effect a *de facto* forfeiture by retaining the property seized indefinitely." *United States v. Premises Known as 608 Taylor Ave., Apartment 302,* 584 F.2d 1297, 1302 (3d Cir.1978) (citations omitted). Instead, courts must balance the government's interests in holding the property against the owner's right to use the property. *Id.; see also Sovereign News Co. v. United States,* 690 F.2d 569, 577 (6th Cir.1982), *cert. denied,* *205 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983). In striking this balance, courts need not order the return of lawfully seized property where the government has a "continuing interest" in the property. And, in this regard, an ongoing criminal investigation is an appropriate "continuing interest." *Sovereign News,* 690 F.2d at 577. Even then, the government is not permitted to hold

[1] Memorandum Decisions have been previously unpublished by the West Virginia Supreme Court of Appeals, however, this rule has recently changed and this Court finds this decision to be relevant to the case at bar and in line with the federal cases addressing Rule 41(e) of the Rules of Criminal Procedure.

property for an "unreasonable time" without taking some action with regard to the property. *Id.; Premises Known as 608 Taylor Ave.,* 584 F.2d at 1302.

United States v. Carter, 859 F. Supp. 202, 204-05 (E.D. Va. 1994) aff'd, 139 F.3d 424 (4th Cir. 1998).

11. The Rule 41(e) analysis requires, at the outset, a determination of whether a lawful search of the property and seizure of the items in question was conducted. Upon review of the search warrant application, affidavit, all attachments, and the actual warrant itself, this Court finds that the search of the property was lawful for the following reasons:

a. The issuing magistrate had jurisdictional control over the property to be searched inasmuch as 474 S. Mineral Street, Keyser, West Virginia is situate within Mineral County, West Virginia and Magistrate Roby is a duly elected Magistrate in and for Mineral County, West Virginia.

b. A showing of probable cause did exist upon which a warrant was properly issued to search 474 S. Mineral Street, Keyser, West Virginia upon the information provided by under oath by Trooper Travelpiece as contained in attachment "C" of the warrant. In his statement, he presented that he was contacted by Shelley Jackson regarding the repossession of her vehicle while payments on same were not in default. The Trooper contacted the West Virginia Department of Motor Vehicles and confirmed that they were investigating the same issue and based upon his investigation, he concluded that the repossession was illegal. Trooper Travelpiece likewise located the Jackson vehicle on Pristine's auto sales lot. Additionally, the Department of Motor Vehicles was investigating Pristine for selling salvaged vehicles with clean titles. Trooper Travelpiece also represented that he had received complaints from other individuals regarding their

belief that they had unknowingly purchased a reconstructed vehicle and that Pristine would not transfer title to a vehicle upon retirement of the lien against it. In light of these facts, Magistrate Roby found probable cause and issued a search warrant for 474 S. Mineral Street, Keyser, West Virginia.

This "determination of probable cause by a neutral and detached magistrate is entitled to substantial deference." U.S. v. Hodges, 705 F.2d 106, 108 (4th Cir.1983) *citing* U.S. v. Ventresca, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965). Probable cause simply means that a "probability, and not a prima facie showing, of criminal activity" be established. U.S. v. Hodges, 705 F.2d at 108 *quoting* Spinelli v. U.S., 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969). Certainly the amount of information presented was sufficient to establish probable cause to conduct the search.

c. Finally, to be valid, the warrant must indicate with particularity the items to be seized and identify the area permitted to be searched. In this case, the Trooper identified 474 S. Mineral Street, Keyser, West Virginia as the property to be searched describing same more particularly as "a two-story structure, with the lower half being brick, and the top half with white siding, also to include a detached two-story structure with the lower half being brick and top half being white siding, and two (2) brown in color wooden sheds." *Plaintiff's Exhibit A,* page 1 (December 1, 2014). Plaintiff has argued that it was inappropriate for the officers to search the two apartments located in the top-half of the structure inasmuch as they have their own addresses – 474 ½ 1 and 474 ½ 2 respectively. The Court finds this argument without merit. Testimony presented indicated that while these apartments have separate numbers, they are under the control of Pristine and are for the use of their employees and designees. Furthermore, the Trooper testified that it was

not readily apparent from his investigation that these apartments even existed at the time of the application for the search warrant. Under these facts, the search of these apartments as part of a full search of the premises was not in error.

As to the issue of particularity, this Court finds that the description of the property to be seized was stated with sufficient particularity given the nature of the offenses under investigation. The offenses the Trooper was investigating coupled with the nature of Pristine's business – that being the sale and service of automobiles, require extensive paperwork. There is nothing vague about the warrant which would leave it open-ended enough to allow the Trooper to take into evidence anything involving Pristine's business. For example, there are allegations of the sale of reconstructed cars; however, the Trooper did not seize the tools which may have made these repairs.

The evidence the Trooper was seeking were financial and business records. Obviously, in paper form those records are quite voluminous and proved difficult to locate given the Trooper's unfamiliarity with the organizational habits of Pristine. While the Court recognizes that Mr. Smith did not have to cooperate with the Trooper during the search, his refusal to do so helped create the issue of "overtake" of which he now complains.

12. Having found the search to be lawful, the remaining Rule 41 (e) analysis requires this Court to determine if the State has a continuing interest in the property seized. Inasmuch as Trooper Travelpiece indicates that his investigation is ongoing, the State has a continuing interest in the property it seized from 474 S. Mineral Street, Keyser, West Virginia. The State did indicate that it is in a position to return items of property in which it no longer has a continuing

interest. Accordingly those items shall be returned. Furthermore, given that the Plaintiff is a business and balancing its needs with that of the State, this Court will direct the State to make further determinations of whether it has a continuing interest in the property it retains in a timely manner.

ACCORDINGLY, it is hereby ORDERED:

1. The Plaintiff's Complaint is DENIED. Objections are saved.

2. Trooper Travelpiece and Prosecutor Courrier shall coordinate the return of any items in which the State does not have a continuing interest to Plaintiff's Counsel or his designee forthwith.

3. This matter shall be removed from the docket and placed among the actions ended.

ENTERED this 12 day of December 2014.

JUDGE

TESTE COPY

Clerk Circuit Court of Mineral County, W. Va.