

11-0120

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA.

STATE OF WEST VIRGINIA,

VS.

INDICTMENT NO. 10-F-302-OA

PAULA D. HOSTON.

ORDER

This matter comes on this day for disposition. There appearing are the State of West Virginia by Kelli Harshbarger, her Assistant Prosecuting Attorney; and the defendant being led to the bar of the Court in the custody of the Sheriff, and by counsel, Henry L. Harvey.

Thereupon, the Court having received the report of the pre-sentence investigation from the Probation Department of this County and Court, and after considering said report and the statements of counsel and the defendant, the Court finds that the defendant is not a fit and proper person for probation because: (1) there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge; (2) probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime; (3) the public good would not be served by placing the defendant on probation, and (4) the public good would be served by the Court imposing a sentence of incarceration.

Whereupon, the Court inquired of the defendant if anything for herself she had or knew to say why the Court here should not now proceed to pronounce judgement against her, and nothing being offered or alleged in delay of judgement, it is the **ORDER** and **DECREE** of this Court that

the said Paula D. Hoston be and is hereby adjudged guilty of the offense of "Delivery of a Schedule II Controlled Substance, to-Wit: Cocaine" as the State in Count 1 of its Indictment herein hath alleged and by her plea she hath admitted and the lesser included offense of "Delivery of a Non-Narcotic Schedule II Controlled Substance" as the State in Count 2 of its Indictment herein hath alleged and by her plea she hath admitted. Therefore, it is the ORDER and DECREE of this Court that the defendant be taken from the bar of this Court to the Southern Regional Jail and therein confined until such time as the warden of the penitentiary can conveniently send a guard for her and that she be taken from the Southern Regional Jail to the penitentiary of this State and therein confined for the indeterminate term of not less than one (1) nor more than fifteen (15) years as provided by law for the offense of "Delivery of a Schedule II Controlled Substance, to-Wit: Cocaine" as the State in Count 1 of its Indictment herein hath alleged and by her plea she hath admitted and not less than one (1) nor more than five (5) years as provided by law for the offense of "Delivery of a Non-Narcotic Schedule II Controlled Substance" as the State in Count 2 of its Indictment herein hath alleged and by her plea she hath admitted; that these sentences run consecutively with one another; that the defendant be given credit for nine (9) days on her sentence for which she has served in jail; that she be dealt with in accordance with the rules and regulations of that institution and the laws of the State of West Virginia; and that she pay all court costs within one (1) year following her release from incarceration.

Upon motion of the State, it is the **ORDER** and **DECREE** of this Court that the remaining charges contained in the indictment be dismissed.

And the defendant is remanded to the Southern Regional Jail pending her placement in the penitentiary.

The Clerk shall forward a copy of this Order to counsel for the defendant, the probation

department, and the Southern Regional Jail.

Dated the 20th day of December 2010.

ENTER:



OMAR ABOULHOSN, JUDGE

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

CASE NO.: 10-F-302

PAULA D. HOSTON.

ORDER DENYING MOTION TO SUPPRESS

This matter came before the Court on November 19, 2010, for hearing on Defendant Paula D. Hoston Motion to Suppress Evidence. The State appeared by assisting prosecuting attorney of Mercer County, West Virginia, Kelli Harshbarger. The defendant appeared in person and by counsel, Tim Harvey.

The defendant seeks to suppress all evidence obtained as a result of an Order issued by a magistrate pursuant to W.Va. Code §62-1F-1, *et seq.* authorizing law enforcement to electronically intercept conduct and/or oral communications in his home. Ms. Hoston's main contention is that W.Va. Code §62-1F-1, *et seq.* conflicts with W.Va. Code 62-1D-1, *et seq.*, thereby rendering magistrates powerless to issue Orders for electronic interceptions. As such, the defendant argues that the evidence obtained through the execution of said Order was illegal and should be suppressed as "fruit of the poisonous tree." A

After due and careful consideration of the motion and memorandum of law, arguments of counsel, and pertinent legal authorities, the Court denies the motion to suppress.

Discussion

The Statutes, generally

West Virginia Code §62-1D-1, *et seq.* entitled the "Wiretapping and Electronic Surveillance Act," pertains to wiretapping and electronic surveillance conducted with a

variety electronic surveillance and interception techniques, devices, and equipment. It predicates wiretapping and other electronic surveillance on strict procedural compliance by prosecuting attorneys, who are the sole persons authorized to apply for orders allowing interception. Additionally, Article 1D limits judicial authority to issue such orders to five specially designated circuit court judges. These five judges, selected by the Supreme Court, are the only persons permitted to hear and rule upon applications for orders authorizing the interception of wire, oral or electronic communication under this Article.

In contrast, W.Va. Code §62-1F-1, *et seq.*, entitled "Electronic Interception of Person's Conduct or Oral Communications in Home by Law Enforcement," permits law enforcement officers or investigators to use an informant or undercover agent to record oral communications and/or conduct occurring in a non-consenting party's home in certain circumstances, e.g., drug transactions. Article 1F empowers both magistrates and circuit court judges to authorize this type of electronic interception upon proper application by

a member of the State Police or an officer assigned to a multijurisdictional task force authorized under section four, article ten, chapter fifteen of this code also may be authorized by the supervisor of that member or officer if the supervisor holds a rank of a sergeant or higher.

§62-1F-3(a)(1).

A critical and determinative distinction between Articles 1D and 1F in the case at bar is that W.Va. Code §62-1D-3 criminalizes interceptions of communications that W.Va. Code §62-1F-1, *et seq.*, permits. In recognition of this disparity, the legislature specifically excepted Article 1F from the strictures of Article 1D. Specifically, W.Va. Code §62-1D-3(f) states

[n]otwithstanding the provisions of this article or any other provision of law, an electronic interception as defined by section one, article one-f of this chapter, is regulated solely by the provisions of article

one-f of this chapter, and no penalties or other requirements of this article are applicable.

Further demonstrating the lack of statutory conflict between Articles 1D and 1F is the legislative history of W.Va. Code §62-1F-1, *et seq.* The history establishes that the legislature contemplated and intended Articles 1D and 1F to operate independently: W.Va. Code §62-1F-1, *et seq.*

...“an act to amend and reenact §62-1D-3 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new article, designated § 62-1F-1, § 62-1F-2, § 62-1F-3, § 62-1F-4, § 62-1F-5, § 62-1F-6, § 62-1F-7, § 62-1F-8 and § 62-1F-9, all relating to electronic interception of a nonconsenting party's conduct or oral communications in his or her home by an investigative or law enforcement officer or an informant invited into said home; excepting electronic interceptions of a nonconsenting party's conduct or communications occurring in his or her home from the wiretapping and electronic surveillance act...

WV LEGIS 2ES 11 (2007). Thus, through the explicit exclusionary language of §62-1D-3(f), the legislature implemented its intent for independent statutory construction and independent application of Articles 1D and 1F. Moreover, the language of §62-1D-3(f) unequivocally removes Article 1F from the dictates and constraints of Article 1D, thereby fully employing the provisions of Article 1F.

Legal Analysis

In the instant case, the defendant premises the legal basis for suppression on alleged statutory conflicts rather than on law enforcement's execution of said Orders. Specifically, the defendant contends that the provisions of W.Va. Code §62-1F-2 directly contravene W.Va. Code §62-1D-7 and §62-1D-8 because the provisions establishing which judges possess authority to issue Orders allowing electronic surveillance are different. Additionally, the defendant relies on differences in the Articles' provisions designating which persons may

file an application for electronic interception and the procedure for pursuing said application. The defendant cites and discusses cases related to wiretapping devices and W.Va. Code §62-1D-1, *et seq.*, in attempt to persuade the court that an Order issued pursuant to W.Va. Code §62-1F-1, *et seq.*, violates Article 1D and is unconstitutional. However, the defendant's arguments are meritless.

First, as discussed above, Articles 1D and 1F operate independently and address different types of electronic interception. Second, the plain, unambiguous language of West Virginia Code §62-1D-3(f), *supra*, establishes that no statutory conflict exists because it explicitly excepts Article 1F from its purview. Thus, applying the long-held principal that "[a] statute is to be applied as written, not construed, where the intention thereof is made clear by the language used when considered in its proper context and as it relates to the subject matter dealt with," the two statutes at issue are not in conflict. Syllabus Point 1, *Appalachian Electric Power Co. v. Koontz*, 138 W.Va. 84, 76 S.E.2d 863 (1953). As such, the magistrate had statutory authority per Article 1F to issue the Order allowing electronic interception against the defendant, and the resulting evidence was not "fruit of the poisonous tree."

Lastly, the defendant erroneously relies on *State v. Mullens*, 221 W.Va. 70, 650 S.E.2d 169 (2007) to support her argument that W.Va. Code §62-1D-1, *et seq.* and W.Va. Code §62-1F-1, *et seq.*, are in conflict and/or unconstitutional. In *Mullens*, the West Virginia Supreme Court of Appeals ("our Court"), recognizing the sanctity afforded a person in his own home, directly addressed the constitutionality of police using an informant with an electronic surveillance device while in the home of a suspect. After a detailed analysis of

State and Constitutional law, our Court held such surveillance unconstitutional unless it had been *judicially authorized*. Our Court pronounced:

[o]ur ruling today merely limits the one-party consent provision of the Act from being used to send an informant into the home of a suspect to record communications therein without having obtained a search warrant authorizing such conduct. Therefore we hold that, Article III, § 6 of the West Virginia Constitution prohibits the police from sending an informant into the home of another person under the auspices of the one-party consent to electronic surveillance provisions of W. Va.Code § 62-1D-3(b)(2) (1987) (Repl.Vol.2005) where the police have not obtained prior authorization to do so pursuant to W. Va.Code § 62-1D-11 (1987) (Repl.Vol.2005).

Mullens, 221 W.Va. 70, 650 S.E.2d 169. Significantly, the Legislature enacted W.Va. Code §62-1F-1, *et seq*, in direct response to the *Mullens* decision. Through the provisions implemented in Article 1F, the legislature cured the constitutional issues articulated by our Court in *Mullens*. Furthermore, *Mullens* did not outright declare the electronic surveillance provisions of W.Va. Code §62-1D-3 to be unconstitutional; rather, our Court premised the constitutionality on whether a judge had issued a search warrant authorizing an informant to enter a suspect's home with a recording device. For these reasons, the electronic surveillance conducted in the instant matter pursuant to a warrant issued under W.Va. Code §62-1F-1, *et seq.*, was constitutionally valid under the statutory provisions as well as the *Mullens* standard.

Conclusion

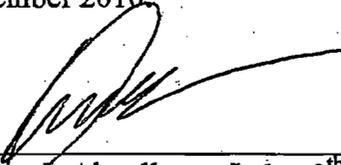
Accordingly, the Court finds that the electronic surveillance conducted in the instant case was properly approved by a magistrate, conformed to the requirements set forth in Article F, and passed constitutional muster under both the *Mullens* decision and the pertinent statutory provisions.

RULING

It is hereby Order and Adjudged:

1. The Motion to Suppress Evidence is **DENIED**.
2. The circuit clerk shall provide a copy of this Order to all counsel of record.

ENTERED the 2nd day of November 2010



Omar J. Aboulhosn, Judge 9th Circuit