

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

STATE OF OREGON,
PLAINTIFF,

-VS-

CONAN WAYNE HALE,
DEFENDANT

CASE NO. 10-96-04830

MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO SUPPRESS (SEARCH
WARRANTS)

SUMMARY OF ARGUMENT

The Oregon and U.S. Constitutions both protect the right to be secure in one's "papers, and effects, against unreasonable searches and seizures." OR Const., Art. 1, Sec. 9; U.S. Const., Amds. IV & XIV.

The defense argues that officers executing the first search warrant at Defendant's house on December 26, 1995, exceeded the scope, intensity and duration of the search reasonably authorized by that warrant, by seizing and searching at that time the items for which the two warrants of December 27, 1995, were later issued. The general rule is that items not named in the warrant may be seized or searched on probable cause, *provided* that the scope, intensity and duration of the search authorized by the warrant was not exceeded in acquiring that probable cause. If those limits are not met, then the evidence is subject to suppression.

The defense argues in the alternative that an analysis of the affidavits for the warrants issued on December 27th, regardless of how the Court rules on the companion motion to controvert, establishes a lack of probable cause for issuance of

these warrants. An affidavit for a search warrant must establish probable cause within its "four corners." The affiant's training and experience alone cannot establish probable cause. Probable cause must be established not only for the place to be searched, but also for the items to be seized. See, e.g., *State v. Beagles*, 143 OrApp 129, 135 (1996); *State v. Maxfield*, 134 Or App 542 (1995).

The general rule is that there must be a nexus between the item to be seized and criminal behavior, and that nexus cannot be a mere suspicion but must rise to the level of probable cause. See, e.g., *Maxfield, supra*, 134 OrApp at 544. There was no nexus between the items seized and what was known of the criminal behavior involved in the burglaries and homicides in the case at bar, at the time of the seizure. The types of objects which police may lawfully seize are (1) evidence or information concerning the commission of a criminal offense; and (2) contraband, the fruits of crime, or things otherwise criminally possessed. See ORS 133.535. The items seized did not fall into these categories.

Finally, as to the Pathways journals, the defense contends those items are outside the scope of the warrants, and further that no other lawful basis for their seizure existed at the time. The affidavit must particularly describe the objects to be searched for and seized. Seizure of items not described in the affidavit or particularly authorized by the warrant are outside the scope of the warrant, and cannot be lawfully seized unless such items are contraband or evidence of a crime. See, *State v. Allen*, 126 Or App 553 (1994).

STATEMENT OF FACTS

Mr. Hale resided at 4283 E. 20th, Eugene, Oregon, at the time of the homicides and continued to reside there until his arrest. Three search warrants were issued and executed at Mr. Hale's residence. Police executed the first search warrant (Exhibit 3,

attached to Motion to Suppress) at Hale's residence on December 26, 1995. The defense is not contesting probable cause for the issuance of that warrant.

The supporting affidavit for the first warrant detailed factual allegations concerning Hale's involvement in residential burglaries related to the homicides, as well as the triple homicide. Nothing in the affidavit speaks to "Dungeons and Dragons," or wizards or fantasy role-playing games, or costumes or literature related to such games, at all, much less in connection with the crimes under investigation. That warrant only allowed the seizure of:

[T]he unrecovered stolen property described in a copy of Exhibit "D" which is attached hereto and incorporated by this reference, and items of identification including, utility bills, credit cards, drivers' licenses, pawn receipts and other similar identifiers, and a navy blue fleece jacket, a University of Oregon baseball cap with tan bill, plastic bags containing clothing, floormats and garbage, a machete knife, a yellow and red baseball bat, .38 cal. shell casings, .38 cal hand loaded ammunition with semi wadcutter slugs and a green plastic ammunition box, a black trench coat and brown leather gloves. [emphasis supplied].

This search warrant was signed by Judge Hodges on December 26, 1995 at 8:45 a.m.

EPD Det. Dennis Williams prepared an affidavit for a second search warrant based on items observed during execution of the first warrant which were outside the scope of that warrant. (Copy attached to Motion to Suppress as part of Exhibit 1). His affidavit requested authorization to seize literature, writings and drawings, and costume items related to Dungeons and Dragons or similar fantasy role-playing games. Based on that affidavit, Judge Hodges signed a search warrant on December 27, 1995 at 2:15 p.m. The warrant authorized seizure of the following items:

[L]iterature on Dungeons and dragons and Wizards, a questionnaire on rule playing, a shield, a kilt, magic cards, two (2) spiral notebooks and handwritten drawings and writings relating to fantasy, and miscellaneous

paperwork on Dungeons and Dragons and Wizards, fantasy and role playing.

The defense contends the affidavit for that warrant failed to establish probable cause that these items were evidence of the crime of murder, so as to support issuance of the warrant. In essence, Det. Williams' affidavit alleged that:

(1) The items had been observed by police during the execution of the first search warrant;

(2) The author of the handwritten materials could be determined by handwriting comparisons, i.e., that it could later be determined whether Hale had authored any of the writings;

(3) He, Det. Williams, has received detailed information concerning the homicides from other investigators, including having viewed a videotaped re-enactment of the crimes as recounted by co-defendant Susbauer; and

(4) He "know[s] based on my training and experience" that Dungeons and Dragons involves acting out fantasies which involve play killings of game participants, and that this type of game playing may indicate a predisposition to violence, including ritualistic acts, which may be relevant to Hale's mental state during the events related to the homicides, and that mental state of a suspect is relevant evidence regarding criminal responsibility.

The Pathways journals are seized during execution of this second warrant. The journals are handwritten and dated at the top of almost every page, and encompass the time periods of June 15, 1993 through June 21, 1994, ending about 1.5 years before the crimes under investigation. The defense does not waive any rights or privileges protecting those writings from disclosure, and requests that the Court review them *in*

camera and/or allow the parties to submit written argument about their content as it relates to a factual basis for seizure or suppression, to be filed under seal.

Det. Williams submitted a third affidavit on December 27, 1995, which led to Judge Hodges signing a third search warrant at 6:00 p.m. on the 27th. (Copy attached to Motion to Suppress as part of Exhibit 2). That affidavit asks permission to seize "a light weight fantasy sword wrapped with duct tape, clothing consistent with role playing fantasy games, and 'death metal' type music recordings," as being materials observed during execution of the second warrant and "of the same type and consistent with articles used to role play and fantasize Dungeons and Dragons and Wizard type games."

This third affidavit attaches and incorporates the second search warrant and affidavit to establish probable cause. Thus, if probable cause is lacking for issuance of the second warrant, it is lacking for the third warrant.

THE POLICE EXCEEDED THE SCOPE, INTENSITY AND DURATION OF THE SEARCH REASONABLY AUTHORIZED BY THE FIRST SEARCH WARRANT

Article 1, section 9 of the Oregon Constitution was motivated by the fear of general warrants, giving unlimited authority to search and seize. *State vs. Reid*, 319 Or 65, 71 (1994). A warrant may not authorize a search that is broader than the supporting affidavit supplies probable cause to justify. *Id.*

Police seized Hale's residence and occupied it for two or more days in the process of conducting the search purportedly authorized by this warrant. Police videotaped the residence and took numerous photographs. They seized approximately 50 items, and in the course of those seizures, seized and searched numerous other items which were left behind.

During the course of this general search of Hale's residence and all personal property therein, where the only writings they were authorized to search for and seize were "items of identification" such as "utility bills, credit cards, drivers' licenses, pawn receipts and other similar identifiers," the police seized and searched notebooks and journals and computer discs and the other items described in the two subsequent search warrants. See *Arizona v. Hicks*, 480 US 321, 107 SCt 1149 (1987)(officer's movement of stereo equipment to read serial numbers constituted search, which was unlawful because no probable cause existed to believe the item was stolen property).

The warrant did not authorize police to scrutinize every writing, book or journal within the Hale residence. Cf. *United States v. Kow*, 58 Fed 423 (9th Cir. 1995)(warrant which authorized seizure "of virtually every document and computer file" at business too broad); *United States v. Fullbright*, 69 F3d 1468 (9th Cir. 1995)(warrant for "any and all" records related to certain organization too broad, as it "not shown to be a pervasively criminal organization"). Thus, the "observation" of the so-called "Dungeon and Dragon" writings and drawings, and the Pathways journals, resulted from officers exceeding the scope, intensity and duration of the reasonable search authorized by the warrant, and those "observations" cannot be used to obtain warrants to seize those objects.

THE AFFIDAVITS FAIL TO ESTABLISH PROBABLE CAUSE FOR ISSUANCE OF THE SEARCH WARRANTS

One of the themes which runs through the decisions on the Fourth Amendment probable cause requirement is that mere conclusions will not suffice. A magistrate may give weight to the expression in a supporting affidavit of an officer's knowledge when it is based on training and experience, so long as there are other facts in the affidavit that

provide a nexus for concluding that particular items are subject to seizure. *State v. Beagles, supra*, 143 OrApp at 136 (and see also cases cited therein). To be lawfully subject to seizure, the items must fall within the categories set forth on ORS 133.535, which in pertinent part require the items to be "evidence or information concerning the commission of a criminal offense" or "contraband, the fruits of crime, or things otherwise criminally possessed."

Probable cause must be shown from the facts or "four corners" of the affidavit. *E.g., State v. Metler*, 6 OrApp 356, 360-61 (1971).

Nothing in the affidavit provides objective facts to support a conclusion that these items related to Dungeons and Dragons or similar fantasy role-playing games may be evidence concerning the homicide. There are no objective facts to establish the required nexus between these items and criminal behavior. All the affidavit contains are (1) conclusory assertions about what Dungeons and Dragons may prove about a suspect's character and mental state, based on the officer's undisclosed "training and experience," (2) the fact that items of that type were observed at Hale's residence, and (3) that Hale is a suspect in the triple homicide.

The affidavit is barren of facts, independent of what the officer claims to know based on training and experience, which even hint at a link or "nexus" between the events which occurred during the course of the homicides, and fantasy role-playing games.

At best, the affidavit establishes that Det. Williams had a suspicion, based on his training and experience, that whoever would commit a triple homicide might be the type of person who would play Dungeons and Dragons, since that game involves acting out battles and homicides; and since Hale was a suspect in the triple homicide, Dungeons and Dragons related items might be evidence suggestive of a murderous intent.

Assuming *arguendo* that his suspicions were reasonable, they still do not rise to the level of probable cause and cannot support the seizure of the contested items.

**THERE WAS NO PROBABLE CAUSE TO SEIZE THE CONTESTED ITEMS,
WITH OR WITHOUT A WARRANT**

As the Supreme Court has emphasized, the mere fact that some objects are lawfully discovered by an officer within premises does not provide a legal basis for the seizure of those objects. *Soldal v. Cook County*, 113 SCt 538 (1992)(in the absence of consent or a warrant permitting the seizure of items, probable cause is required). Were it otherwise, it would be possible for police to make wholesale seizures of an untold number of items which would of necessity be observed while the police were lawfully carrying out their arrest or other duties in the premises.

What is required to justify the seizure of an object is probable cause to believe that the object is a fruit, instrumentality or evidence of a crime. See, *Coolidge v. New Hampshire*, 403 US 443, 91 SCt 2022 (1971); ORS 133.535 (setting forth similar categories of objects subject to seizure). See also *United States v. Washington*, 782 F2d 807 (9th Cir. 1986)(probable cause to seize papers with names of women officer knew were prostitutes working with defendant, but not all papers with names of women); *State v. Maxfield, supra*, 134 Or App at 544-45(photograph of marijuana plant, by itself, not seizable evidence when no person in the photograph and no evidence concerning who took the pictures, where they were taken or when they were taken).

The *Maxfield* court notes that ORS 133.535 is based upon the U.S. Supreme Court decision in *Warden v. Hayden*, 387 US 294, 307, 87 SCt 1642 (1967):

There must, of course, be a nexus . . . between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. *Id.*

Probable cause is required when the object is outside the scope of the warrant, such as the Pathways journals in the case at bar, or as would be the case for all the items at issue, if the second and third warrants fail for lack of probable cause.

The arguments regarding lack of probable cause for the so-called "Dungeons and Dragons" items have been set forth above. Turning to the Pathways journals, it should be clear they do not fall within the types of materials for which seizure was authorized by warrant. See, e.g., *United States v. Hill*, 19 F3d 984 (5th Cir. 1994)(when determining whether certain records fell within the scope of the warrant, the question is whether the seized items were "the functional equivalent" of the records described in the warrant, not the "nomenclature assigned to these items by the defense).

In determining what unnamed items may be seized as evidence of the crime for which the search warrant issued, it is necessary to consider what the executing officers knew concerning the nature of that crimes, its elements, and possible means of proving those elements. *Andresen v. Maryland*, 427 US 463, 96 SCt 2737 (1976).

In *State v. Farrar*, 309 Or 132, 151-52 (1990), the defendant argued that police exceeded the scope of the warrant by seizure of a rent receipt, an unnamed item. The Supreme Court rejected that claim, noting "[t]he affidavit supporting the search warrant mentioned that defendant had used or was using an alias. The rent receipt was important to establish identity and to link defendant to the apartment where incriminating evidence was found," *id.*

The Pathways journals, authored about 1.5 years before the crimes under investigation, were written in a treatment setting and should be accorded a high degree of privacy. See, e.g., OEC 504 (psychotherapist-patient privilege). No probable cause existed at the time of the seizure of those journals to believe they were evidence of the crimes under investigation. That the State may be able to advance an arguable basis

for the usefulness of those writings in prosecuting Hale now is of no significance: "The hindsight of success cannot assist the State." *State v. Metler*, 6 OrApp 356, 361 (1971).

For the reasons stated herein, and such other grounds as may be advanced through supplemental memorandum and pleadings, the Motion to Suppress should be granted.

Submitted this ____ day of March 1997.

TERRI WOOD OSB 88332
Attorney for Defendant

CERTIFICATE OF SERVICE

I CERTIFY that on ____ March 1997, I served a true, exact and full copy of the within MOTION TO SUPPRESS AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS on the Lane County District Attorney, attorney of record for the plaintiff, by leaving a copy at his office at the Lane County Courthouse with his clerk or person apparently in charge thereof, or, if there was no one in charge, by leaving it in a conspicuous place therein.

Dated: ____ March 1997.

TERRI WOOD, OSB 88332