



FILED

NOV 13 2024

Clerk of Courts
Cuyahoga County, Ohio

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,
Plaintiff

V

QEYEON TOLBERT,
Defendant

) CASE NO. 689572
)
) JUDGE TIMOTHY McCORMICK
) JUDGE RICHARD McMONAGLE
) SITTING BY ASSIGNMENT
)
) DEFENDANT TOLBERT'S MOTION TO
) SUPPRESS SEARCH WARRANT AND
) ALL EVIDENCE COLLECTED
) (FRANKS ORAL HEARING REQUESTED)
) AND MOTION FOR A DAUBERT
) HEARING

Now comes the defendant, by and through his assigned counsel, and hereby moves this court for an oral hearing on a motion to suppress the search warrant affidavit for 403 E. 152nd street, Cleveland, Ohio sworn to by Det. Michael Legg #2198 of the Cleveland Police Department on February 20, 2024. The defendant requests a Franks hearing pursuant to Franks v. Delaware (1978), 438 U.S. 154, 98 S. Ct. 2674, 2683, 57 L. Ed. 2nd 667, based on misleading information contained in the affidavit, and as more fully set forth in the attached memorandum of law. The defendant also requests a Daubert hearing on the facial recognition or artificial intelligence evidence to be put forth by the prosecution.

Respectfully submitted,
/s/ Brian M. Fallon /
Brian M. Fallon, OSB# 0011862
Attorney for the Defendant
P.O. BOX 26267
Fairview Park, Ohio 44126
Tel. 440-734-5000
FAX 440-734-3700
Co4394@sbcglobal.net

SERVICE

The above motion to suppress was filed this 13 day of November, 2024 via the Cuyahoga County Clerk of Courts electronic portal and served on the Cuyahoga County Prosecuting Attorney via the same portal on this same date.

Respectfully submitted,
/s/ Brian M. Fallon /
Brian M. Fallon

22

MEMORANDUM OF LAW

On February 20th, 2024, Det. Legg #2198 of the Cleveland Police Department obtained a search warrant for 403 E. 152nd St., Cleveland, Ohio, apartment #1, the residence of the defendant in the present case. The affidavit for the search warrant contained 24 numbered paragraphs outlining the “facts” upon which the affiant based his beliefs. See Ex. #A attached. The defendant is referred to as the “unidentified male” from paragraphs 10-19 in the affidavit. Then in paragraph 20 it is sworn as follows:

“20. Affiant avers that utilizing the Fusion center they received an identification of the, as of yet, unidentified male suspect, based on the recovered surveillance video, and it was learned this male was currently paroled to the address of 403 E. 152nd Steet, Apartment #1.”

This is the entire basis of how the police identified the defendant and were able to obtain a search warrant for his residence.

The above quoted paragraph 20 is entirely misleading if not an outright falsehood.

In point of fact, the report from the Fusion center (attached hereto as Ex B) is from Clearview AI, an artificial intelligence facial recognition software company. This company has such faith in its software that it prints the following on every page of its report:

“DISCLAIMER: Facial recognition search results are to be treated as investigative leads and should not be solely relied upon for making an arrest. Investigators are required to conduct thorough investigations, independently verify identifications, and adhere to applicable laws and agency policies regarding facial recognition search results. The information in this document is for internal use only and should not be shared outside the user’s agency. These search results are not intended or permitted to be used as admissible evidence in a court of law or any court filing.”

But wait, there is more. Clearview AI on its website also published a more detailed disclaimer (see Ex C attached):

“As with any search engine, search results established through Clearview and its related systems and technologies are indicative and should not be considered definitive. Clearview makes no guarantees as to the accuracy of its search-identification software. Clearview’s facial recognition algorithm has been tested by the National Institute of Standards and Technology’s Facial Recognition Technology Evaluation program, and was found to be highly accurate, but its performance under real world conditions can differ. The quality of a submitted probe image, the lack of

online images of a depicted individual in Clearview's Database, and other factors can impact and potentially reduce the accuracy of the Clearview search results. A set of search results produced by the Clearview search engine may contain a mix of images of the person depicted in the probe image and images of other similar looking individuals. Clearview is neither designed, nor intended, to search the internet for artificially generated images of faces to be used as a sole source system for conclusively establishing or determining an individual's identity. It is the responsibility of the Customer to corroborate any identifying information or other data discovered on third party sites using any Clearview system or included in Clearview search results by conducting additional research."

Given the above information, it is a complete falsehood to state under oath that, "...utilizing the Fusion center they received an identification..." This statement is false if not a material misstatement or omission. The Fusion center report clearly states, "These search results are not intended or permitted to be used as admissible evidence in a court of law or any court filing." Thus, the need for a *Franks* hearing.

The search of the defendant's residence produced a variety of items including clothing, a gun and statements, all of which need to be suppressed should this court find a violation, as they are the fruit of the poisonous tree.

Intentionally misleading statements or omissions, or statements or omissions made in reckless disregard of their tendency to mislead the magistrate, will support looking beyond the four corners of the affidavit. *Franks v Delaware, (1978), 438 U.S. 154, 170, 98 S. Ct. 2674, 2683, 57 L. ED. 2nd 667*. The defendant would submit that any person or magistrate reading the affidavit would believe that the Fusion center identified the defendant based on the recovered surveillance video. Clearly, this is misleading. No identification was made by the Fusion center as per the disclaimers, which the magistrate was never made aware of when reading the affidavit.

A defendant who claims that a warrant is flawed because it is based upon a false statement must prove by a preponderance of the evidence that the affiant made a false statement, either intentionally, or with reckless disregard for the truth. *State v. Tinsley, 2010-OHIO-1859, citing State v. Waddy, 63 Ohio St. 3rd 424(1992)*. Even if the affidavit contains false statements or omissions made intentionally or recklessly, a warrant based on the affidavit is still valid unless, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause. *State v. Perry, 8th District, Cuyahoga No. 97572, 2012-OHIO-4273, paragraph 15*.

Removing paragraph 20 from the affidavit renders the information contained in the affidavit insufficient to form probable cause that the defendant and the evidence would be found at his residence. Paragraphs 1-17 of the affidavit do not connect the defendant to 403 E. 152nd street. In fact, the police reports admit that the assailant goes out of frame and it can not be determined where the individual went. Paragraph 17 is also somewhat

misleading in that it states that the suspect, "...is then observed walking back and then running towards the address of 403 E. 152nd Street. " It doesn't say that the suspect is seen going into 403 E. 152nd Street. Merely the phrase "seen running towards". The assumption is that the suspect is running towards that address, yet the video does not definitely show that. The suspect can not be seen as he runs out of frame and there is no evidence that he ran into 430 E. 152nd Street.

The affidavit states in paragraph 18 that six days after the murder, on February 20, 2024 the police watch video from the fusion center and see a male walking from the area of 403 E. 152nd Street and the affidavit claims the male has the same build, hair style clothing and walking characteristics as the defendant. This is the video on the 20th taken from a convenience store that the police claim the Fusion Center identified the defendant, not from the surveillance video from the night of the shooting. As we now know, the Fusion center cannot use Clearview AI facial recognition to identify anyone definitively.

By removing paragraph 20, the only remaining paragraph in the entire affidavit that has any nexus to the defendant is paragraph 18. The information in paragraph 18 is not sufficient to identify the defendant. In fact, no identification of the defendant in paragraph 18 is made.

The prosecution cannot fall back on the ***United States v. Leon, 468 U.S. 897, 916, 104 S. Ct. 3405, 82 L.Ed. 2nd 677 (1984)*** good faith exception because it does not apply when an affidavit supporting the search warrant contains a knowing or reckless falsity.

"While search warrant affidavits will inevitably include undisclosed inferences, under Fourth Amendment analysis, there is a line between permissible police interpretation and usurpation of the magistrate's function. See the full discussion in ***State v Castagnola, 145 Ohio St 3rd. 1, 2015-OHIO-1565***. To withhold the disclaimer from the magistrate and to affirmatively claim an identification was made by the Fusion Center is clearly usurping the magistrate's function.

For the above reasons the defendant respectfully requests a Franks hearing on the search warrant affidavit and an granting of the motion to suppress and the exclusion of all evidence resulting from the execution of the warrant.

Finally, the defendant requests this court to conduct a ***Daubert*** hearing on the admissibility of any Artificial or Facial Recognition evidence to be put forth by the Fusion Center along with the production of all manuals and agreements from the software supplier Clearview. This Motion is made pursuant to Evid. R. 702 and ***Daubert v Merrill Dow Pharmaceuticals (1993), 509 U. S. 579, 113 S. Ct. 2786, 125 L. Ed. 2nd 469***. No such case has been found by defendant's counsel in Ohio that allows facial recognition identification into evidence.

Respectfully submitted,
/s/ Brian M. Fallon /
Brian M. Fallon

all evidence pertaining to the violations of the State of Ohio, to wit: R.C.
2903.01 Aggravated murder, R.C. 2903.02 Murder.

I am satisfied that there is probable cause to believe that the property described is being concealed in the above-described premises, vehicles under the custody and control of the suspects, the curtilage, common areas, basement, storage areas and persons therein and that the grounds for issuance of this search warrant exist.

THEREFORE: You are hereby commanded in the name of the State of Ohio, with the necessary and proper assistance, to serve this warrant and search the above described premises, 403 E 152nd Street, Apartment #1, City Cleveland, Cuyahoga County, Ohio forthwith for the property specified, making the search in the *day or night season*, and if the property or any part thereof be found there, you are commanded to seize it, leaving a copy of this warrant and a receipt for the property taken, to prepare a written inventory of the property seized, to return this warrant to the undersigned or any Judge of the Court of Common Pleas and to bring the property found on such search forthwith before said Judge, or some other judge or magistrate of the county having cognizance thereof.

Given my hand this 20 day of February, 2024.

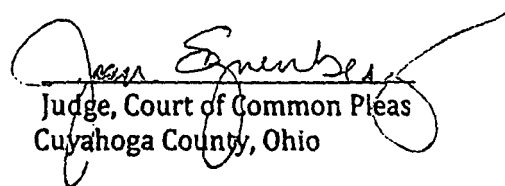

Judge, Court of Common Pleas
Cuyahoga County, Ohio

EXHIBIT A

STATE OF OHIO)
) SS: COURT OF COMMON PLEAS
COUNTY OF CUYAHOGA) CRIMINAL DIVISION

AFFIDAVIT FOR SEARCH WARRANT

Before me, a Judge of the Court of Common Pleas, Cuyahoga County, Ohio, personally appeared the undersigned Detective Michael Legg, Badge #2198 who, being first duly sworn, deposes and says that he has been a member of the Cleveland Police Department for over twenty seven (27) years, the past five (5) and a half years as a Detective with the Cleveland Police Department Homicide Unit, and that his training and experience include the investigation of felony and misdemeanor crimes, and has conducted several hundred criminal investigations, along with specialized training in the investigation of Homicides.

Affiant avers that he has reasonable cause to believe and does believe, that within the premises described as

- **403 E 152nd Street, Apartment #1, City Cleveland, Cuyahoga County, Ohio, more particularly described as Apartment #1 within a three story, multiple unit residential dwelling, with beige in color siding and white in color trim, and with the numbers "403" and "405" affixed to the north side column of the front porch, and the building being located on the east side of the street,**

there is now being unlawfully kept, concealed and possessed the following:

Bodily fluids, including but not limited to blood, tissue and saliva; hair follicles, fingerprints; firearms, firearm accessories, including, but not limited to ammunition, magazines or "clips", holsters, laser sights and any other instrument used with a firearm, and other weapons being illegally possessed therein; records of illegal transactions, articles of personal property and papers tending to establish the identity of the persons in control of the premises; camera systems, surveillance equipment, DVR recording device other contraband including, but not limited to U.S. currency, money, communications equipment including telephones, answering machines and

answering machine tapes, as well as computers, including but not limited to, computer hard drives and monitors and other hardware and software and weapons being illegally possessed therein, any and all safes; and/or any and all evidence pertaining to the violations of the State of Ohio, to wit: R.C. 2903.01 Aggravated murder, R.C. 2903.02 Murder.

The facts upon which Affiant bases such beliefs are as follows:

1. Affiant avers that On Thursday, February 15, 2024, Officers responded to the location of 15704 School Avenue for a male deceased.
2. Affiant avers that EMS Medic 40 responded to the scene and pronounced the victim deceased at 1325hrs.
3. Affiant avers that upon the arrival of Esposito Mortuary Services it was found that the victim had suffered, what appeared to be, a gunshot wound to the back.
4. Affiant avers that members of the Homicide unit responded to the scene and began their investigation.
5. Affiant avers that the Cuyahoga County Medical Examiner's Office confirmed the victim had suffered two (2) gunshot wounds upon completing a Preliminary Post Mortem Examination.
6. Affiant avers that he, along with other members of the Homicide unit, as well as the RTCC analyst, were able to view RTCC video and located the victim on video February 14, 2024.
7. Affiant avers that upon reviewing the surveillance video they observe the victim exiting the plasma center located at E 156th and Lakeshore Blvd at 1900hrs.
8. Affiant avers that the victim walks west on Lakeshore Blvd and continues south on E 152nd Street.
9. Affiant avers that a male walks from in between the apartment buildings located at 375 and 371 E 152nd Street and begins walking in front of the victim.
10. Affiant avers that in the area of 403 E 152nd Street, the unidentified male walks into a driveway located on the east side of the street, the same side the victim was still walking south on and allows the victim to pass by him.
11. Affiant avers that the unidentified male then begins walking behind the victim as they continue south on E 152nd Street.

12. Affiant avers that the unidentified male, wearing a dark colored Adidas sweatshirt and dark colored Adidas pants, approached the victim from the back as they neared Upton Avenue.
13. Affiant avers that the unidentified male suspect then produced a firearm and pointed it at the side of the victim while holding onto the victim with his other hand.
14. Affiant avers the suspect male then shot the victim twice and the victim fell to the ground at which time the suspect begins running north on E 152nd Street.
15. Affiant avers that the suspect ran south on E 152nd Street and then went northeast onto Shiloh Avenue. The victim then gets up from the ground and continues walking south on E 152nd Street and is believed to have walked to his residence located at 15704 School Avenue.
16. Affiant avers that the suspect returned to the scene of the shooting approximately five (5) to ten (10) minutes later after having changed his pants and appeared to be looking for something on the ground.
17. Affiant avers that the suspect is then observed walking back and then running towards the address of 403 E 152nd Street
18. Affiant avers that on February 20, 2024, while watching live video of 403 E 152nd Street, believed to be the address where the unidentified suspect ran into, he observed a male matching the description of the suspect walking from the area of 403 E 152nd Street and continue to the store located at 15208 Lakeshore Blvd. This male having the same build, hair style, clothing and walking characteristics as observed on the suspect on February 14, 2024.
19. Affiant avers that he, along with other members of the homicide unit, as well the Cleveland Division of Police video specialist, Tom Ciula, responded to the Lake shore food Market at 15208 Lakeshore Blvd and downloaded surveillance video showing the suspect male enter the store at approximately 1053hrs.

what? 77

20. Affiant avers that utilizing the Fusion center they received an identification of the, as of yet, unidentified male suspect, based on the recovered surveillance video, and it was learned this male was currently paroled to the address of 403 E 152nd Street, Apartment #1.

21. Affiant avers that this same male suspect was observed, in real time, on February 20, 2024, exiting and re-entering the front (west) entrance of 403 E 152nd Street, located at the northeast corner of the dwelling.

22. Affiant believes that evidence may still be present inside of the residence based on interviews conducted after the premises was sealed by law enforcement personnel on November 13, 2022.

23. Affiant avers that it is necessary for members of the Cleveland Division of Police to conduct an in-depth search of the residence located at 403 E 152nd Street, Downstairs first floor, for any evidence pertaining to the homicide of Blake Story in violation of Ohio Revised Code 2903.01, Aggravated murder and/or any offense against the Ohio Revised code which may be related to this investigation.

24. Based on the above facts, Affiant has probable cause to believe and does believe that the above-described items and/or persons will be found within the above premises.

FURTHER AFFIANT SAYETH NAUGHT

Det. Michael Legg #2198
Cleveland Division of Police
Homicide Unit.

Sworn to me and subscribed in my presence this 20 day of February, 2024.

Judge, Court of Common Pleas
Cuyahoga County, Ohio

Face Search Results

Internal Use Only

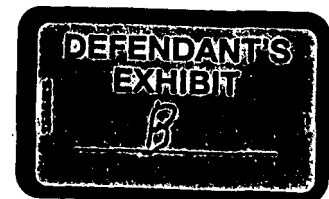
Report prepared on: Feb 20, 2024

Original search date: Feb 20, 2024

Created by Elaine Wisnieski <ewisnieski@neorfc.us>

For use by <vpiscitello@clevelandohio.gov>

Original search image

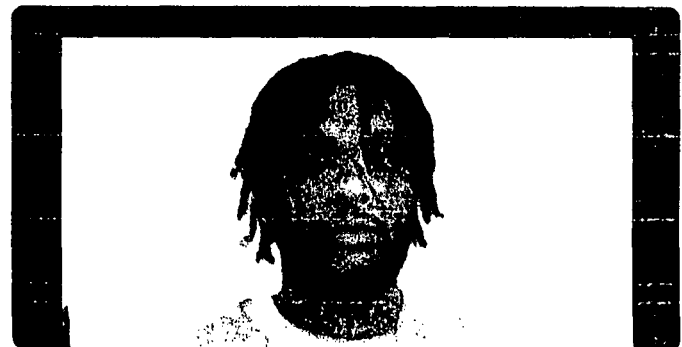
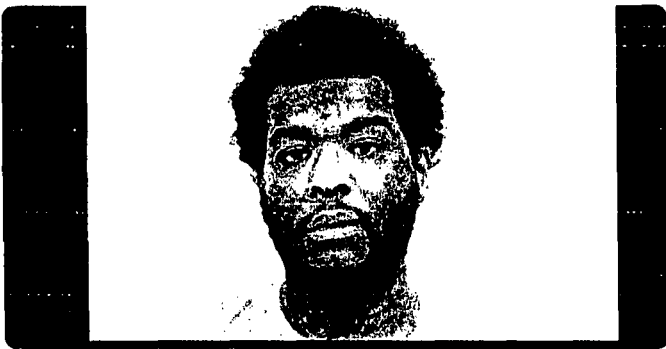


Disclaimer: Facial recognition search results are to be treated as investigative leads and should not be solely relied upon for making an arrest. Investigators are required to conduct thorough investigations, independently verify identifications, and adhere to applicable laws and agency policies regarding facial recognition search results. The information in this document is for internal use only and should not be shared outside the user's agency. These search results are not intended or permitted to be used as admissible evidence in a court of law or any court filing.

Probe Image



Results



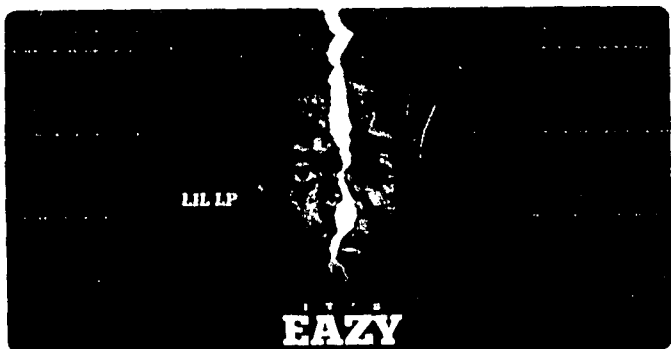
- 1.. <https://app.clearview.ai/app/galleries/f76fbd5b-0f45-490a-a5a8-cb9485ecc785/200e8b83-0faa-42b8-b9a6-10f103bd093c>
- 2.. <https://www.instagram.com/p/CwtJhxnM11V> (MD5: 37369a3245abe2d6fe693dfd352cd651)
- 3.. <https://www.instagram.com/p/CwtJhxnM11V> (MD5: 7c5c2a2f0fcf4a88458c892f6d9f6a71)
- 4.. <https://app.clearview.ai/app/galleries/f76fbd5b-0f45-490a-a5a8-cb9485ecc785/e74909bc-940b-409d-b764-077da1d1bce8a>

Disclaimer: Facial recognition search results are to be treated as investigative leads and should not be solely relied upon for making an arrest. Investigators are required to conduct thorough investigations, independently verify identifications, and adhere to applicable laws and agency policies regarding facial recognition search results. The information in this document is for internal use only and should not be shared outside the user's agency. These search results are not intended or permitted to be used as admissible evidence in a court of law or any court filing.

Probe Image



Results



5



6



7



8

- 5. <https://instagram.com/mrgetitoff> (MD5: f19767ee887a6ebf90f13b593484d5f6)
- 6. <https://www.youtube.com/v/z1ZxNrjUALU?version=3> (MD5: 599d573c6103cd7b992126e2c0b135b7)
- 7. <https://www.youtube.com/watch?v=Ly8I1Vn5EY> (MD5: cf511ad08aebae8705fba7c4a40a00d2)
- 8. https://www.youtube.com/v/BkEEv_EbvjY?version=3 (MD5: fce8bf7e754dc3f81c35d0bbf0afb31e)

Disclaimer: Facial recognition search results are to be treated as investigative leads and should not be solely relied upon for making an arrest. Investigators are required to conduct thorough investigations, independently verify identifications, and adhere to applicable laws and agency policies regarding facial recognition search results. The information in this document is for internal use only and should not be shared outside the user's agency. These search results are not intended or permitted to be used as admissible evidence in a court of law or any court filing.

cell. 1/1/11



Impact Solutions Products Resources Company

CREATE AN

Accepted and accepted to Customer. By ordering Products or Services or accessing or using the Products or Services, Customer agrees to be bound by these Terms. Clearview and Customer are sometimes referred to individually as "party", and collectively as "parties". If there is a conflict between the Order Form and this Agreement (as updated from time to time in accordance with Section 15 below), the Order Form will prevail. If You, as the Customer, already agreed to a Terms of Service or an End User License Agreement before the published/last updated date set forth in these Terms, any clauses in Your prior agreement pertaining to local laws or applicable to Your specific jurisdiction, including a Location Specific Addendum, will continue to be valid and enforceable. These local law specific provisions remain unchanged and will continue to apply to You after the published/last updated date of these Terms.

DISCLAIMER: As with any search engine, search results established through Clearview and its related systems and technologies are indicative and should not be considered definitive. Clearview makes no guarantees as to the accuracy of its search-identification software. Clearview's facial recognition algorithm has been tested by the National Institute of Standards and Technology's Facial Recognition Technology Evaluation program, and was found to be highly accurate, but its performance under real-world conditions can differ. The quality of a submitted probe image, the lack of online images of a depicted individual in Clearview's Database, and other factors can impact and potentially reduce the accuracy of the Clearview search results. A set of search results produced by the Clearview search engine may contain a mix of images of the person depicted in the probe image and images of other similar looking individuals. Clearview is neither designed, nor intended, to search the internet for artificially generated images of faces or to be used as a sole-source system for conclusively establishing or determining an individual's identity. It is the responsibility of the Customer to corroborate any identifying information or other data discovered on third party sites using any Clearview system or included in Clearview search results by conducting additional research.

The parties incorporate by this reference the above clauses, and agree as follows:

1. DEFINITIONS.

The following definitions will apply in this Agreement, and any reference to the singular includes a reference to the plural and vice versa.

1.1. "Authorized Credentials" means the necessary security keys, secrets, tokens, and other credentials to access the Clearview APIs. The Access Credentials enable Clearview to associate Customer's API Program with Customer's use of the Clearview APIs.

1.2. "Affiliate" means an entity that directly or indirectly controls, is controlled by, or is under common control with Clearview, whereby control means owning 50% or more of Clearview's voting stock.

DEFENDANT'S EXHIBIT
C

