

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	:	No. CR-2034-2016
	:	
vs.	:	
	:	
	:	
KEDAR BEST, Defendant	:	Omnibus Pretrial Motion Nunc Pro Tunc
	:	

OPINION AND ORDER

Defendant is charged by Criminal Complaint filed on September 19, 2016 with driving under the influence of alcohol and related offenses. Defendant not only waived his preliminary hearing but waived his arraignment scheduled for December 5, 2016.

Defendant’s written waiver of arraignment specifically noted that he was advised in accordance with the Rules of Criminal Procedure as to his rights to timely file an Omnibus Pretrial Motion.

Having waived his arraignment, Defendant scheduled a guilty plea for February 10, 2017. Prior to his scheduled guilty plea, however, Defendant decided not to plead guilty, and his case was scheduled for call of the list on April 18, 2017. Defendant failed to appear for call of the list on April 18, 2017, and a bench warrant was issued for his arrest.

Defendant was eventually arrested on the bench warrant which was vacated on August 10, 2017. Defendant was sanctioned to seven days incarceration for contempt. Further, Defendant was ordered to pay the costs of extradition.

On September 11, 2017, Defendant filed an omnibus pretrial motion, nunc pro tunc. An argument on the timeliness of the motion was held before the court on October 9,

2017.

The motion, filed on September 21, 2017, approximately 9 ½ months after it should have been filed, asserts that the blood taken from Defendant following his arrest should be suppressed, because it was allegedly obtained without his consent and without a warrant. More specifically, even though the arresting officer noted that Defendant consented to the blood test, Defendant denies that he consented and claims that he was “unconscious due to medications given to him by hospital staff.”

In support of Defendant’s argument that his motion should be heard despite it being untimely, Defendant argued that he and his prior attorney did not “have the greatest attorney/client relationship.” When asked to elaborate, current defense counsel noted that there were “issues with the lines of communication.” Other than defense counsel’s vague assertions regarding the attorney/client relationship, no other facts were presented to the court. Defendant did not testify.

Rule 581 (B), which governs the suppression of evidence, states:

Unless the opportunity did not previously exist, or the interest of justice otherwise require, such motion shall be made only after a case has been returned to court and shall be contained in the omnibus pretrial motion set forth in Rule 578. If timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived.

Pa. R. Crim. P. 581 (B). The time limits for filing the omnibus pretrial motion are set forth in Rule 579, which states in relevant part:

Except as otherwise provided in these rules, the omnibus pretrial motion for relief shall be filed and served within 30 days after arraignment, unless opportunity therefor did not exist, or the defendant or defense attorney... was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown.

Pa. R. Crim. P. 579 (A).

Defendant contends that his motion should be heard “in the interests of justice.” Whether the interests of justice require an untimely omnibus pretrial motion or motion to suppress evidence be heard is a matter for the discretion of the trial judge. *Commonwealth v. Long*, 753 A.2d 272, 279 (Pa. Super. 2000). In making this decision, the judge should consider several factors, including: (1) the length and the cause of the delay; (2) the merits of the suppression claim; and (3) the courts ability, considering the complexity of the issues and the availability of the witnesses, to hold the hearing promptly. *Commonwealth v. Brown*, 378 A.2d 1262, 1266 (Pa. Super. 1977).

A trial judge should exercise discretion to hear an untimely motion where the merit of counsel’s motion is so apparent that justice requires it to be heard. *Long*, 753 A.2d at 280; *Commonwealth v. Williams*, 723 A.2d 867, 866 (Pa. Super. 1974).

Under the circumstances in this particular case, the court declines to conclude that the interests of justice require that the suppression hearing be heard at this time. The length of the delay is significant. Not only have several months passed, but the case is presently on the pretrial list and scheduled for call of the list. Defendant has continued to be represented by the Public Defender’s office throughout.

The cause of the delay is vague at best. Alleged communication difficulties with Defendant’s prior counsel do not excuse the delay, especially since the motion was based on information solely within Defendant’s knowledge. Indeed, it is not a motion that is dependent upon the receipt of discovery or any information to be provided by the Commonwealth. The Commonwealth’s allegations regarding consent were contained in the

Affidavit of Probable Cause. Defendant's allegations regarding non-consent were known to him the day of the incident and certainly at the time he was charged.

Of particular concern to the court are the four months Defendant was on absconding status and a bench warrant had been issued for his arrest. Certainly Defendant should not gain favorable treatment because he decided to abscond. In fact, the delay in the filing of the motion could be attributed directly to Defendant's failure to appear and failure to participate in a timely manner in his own defense.

Defendant acknowledged in his waiver of arraignment that he was aware of the time limits within which an omnibus pretrial motion must be filed. Defendant not only ignored those time limits but essentially waived any right to assert the protection of the law when he absconded.

Finally, the merits of the suppression motion are not so apparent that the motion must be heard.

The Pennsylvania Supreme Court has eschewed per se rules and has clearly held that no one fact or circumstance can be talismanic in the evaluation of the validity of a person's consent. *Commonwealth v. Smith*, 77 A.3d 562, 572 (Pa. 2013). Contrary to what Defendant claims, a search warrant is not needed as long as defendant's consent is knowing and voluntary. *Commonwealth v. Myers*, 164 A.3d 1162, 1173 (Pa. 2017); *Commonwealth v. Cleckley*, 738 A.2d 427 (Pa. 1999); *Commonwealth v. Bell*, 167 A.3d 744 (Pa. Super. 2017).

While the court would certainly consider a consent involuntary if a defendant were unconscious, as consistent with existing Pennsylvania law, other than the statement set

forth in Defendant's motion, which was not even verified by Defendant, there is no evidence whatsoever to even support Defendant's argument. No documents are attached with respect to medications allegedly given to Defendant nor are there any documents supporting Defendant's alleged "unconscious" mental state.

ORDER

AND NOW, this ___ day of October 2017, following a hearing and argument, Defendant's Omnibus Pretrial Motion, nunc pro tunc is **DENIED** as untimely.

By The Court,

Marc F. Lovecchio, Judge

cc: Scott Werner, Esquire (ADA)
Matthew Welikovitch, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file