

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**SHAKOOR JOHNSON,
Defendant**

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CR-1231-2016

OMNIBUS PRETRIAL

OPINION AND ORDER

On September 14, 2016, Defendant's Counsel, filed an Omnibus Pretrial Motion. The Court originally scheduled testimony and argument on the Motion for November 4, 2016; however, at that date and time Defendant was not present. The hearing was continued to January 5, 2017, and the Court received briefs prior to testimony and argument.

Background

Shakoor Johnson (Defendant) is charged with Recklessly Endangering Another Person¹, Resisting Arrest or Law Enforcement², Fleeing or Attempting to Elude a Police Officer³, Criminal Conspiracy⁴, Delivery of a Controlled Substance⁵, Possession of a Controlled Substance⁶, and Criminal Use of a Communication Facility⁷. The charges stem from an alleged incident on May 29, 2016. On that date, Pennsylvania State Trooper Tyson Havens (Havens) was on uniformed duty in a patrol vehicle when he identified a passenger of a black Chrysler 200 as a possible suspect in an investigation by the Pennsylvania State Police (PSP) F Vice/Narcotics Unit.

¹ 18 Pa.C.S. § 2705.

² 18 Pa.C.S. § 5104.

³ 75 Pa.C.S. § 3733(a).

⁴ 18 Pa.C.S. § 903(a)(1).

⁵ 35 P.S. § 780-113(a)(30).

⁶ 35 P.S. § 780-113(a)(16).

⁷ 18 Pa.C.S. § 7512.

Testimony of Trooper Tyson Havens

Havens testified that he has been with the PSP for twenty-three (23) years. He has been a vice officer, tactical officer, and a narcotics officer in Philadelphia. In 2003, he worked undercover in organized crime. In 2005, he returned as a uniformed officer and worked with the drug interdiction unit. From 2011-2015, he worked crime generally and then in 2015, returned to interdiction. He has made thousands of arrests and worked with hundreds of confidential informants. He has been trained by the Pennsylvania State Police, the Federal Bureau of Investigation, the Drug Enforcement Agency and local district attorneys.

On May 29, 2016, Havens was on stationary patrol in the area of East Third Street and Clayton Avenue in Loyalsock Township in Lycoming County. Havens was in full uniform in a marked vehicle. He observed an individual who he believed to be a suspected drug dealer being sought by the Pennsylvania State Police Troop F Vice/Narcotics Unit and was a passenger in a black Chrysler 200. Havens turned east on Third Street to follow the vehicle. The vehicle turned left (north) on Tinsman Avenue. The vehicle was traveling at an apparent high rate of speed and as Havens attempted to catch up with the vehicle he observed it fail to stop at a stop sign at Tinsman Avenue and Sheridan Street. Havens had already activated his emergency lights while trying to catch up with the vehicle on Tinsman Avenue. The vehicle did not stop for Havens and traveled through the stop sign at Westminster Drive and then travelled south on Westminster Drive. The vehicle turned right on Reed Street (west) and again failed to stop at the stop signs at Reed Street, Tinsman Avenue, and Clayton Avenue. The vehicle then traveled north on an unnamed alley just west of Clayton Avenue and

entered the property of the former Becht Elementary School at 1225 Clayton Avenue. The vehicle struck a utility pole on that property and became disabled. The passengers proceeded to run from Havens on foot. Havens caught up with Defendant in the backyard of 1949 Sheridan Street and took him to the barracks. While there a telephone call came from a Justin Winters of 1945 Sheridan Street to report that he found an iPhone in his backyard that was constantly ringing. Upon recovering the phone, Havens began to respond to callers and text messages and arranged for each to meet him at the Lycoming Mall. Ten different people contacted the cellular telephone and then arrived at the arranged location to purchase heroin. All ten were taken into custody and de-briefed. All ten admitted to utilizing (570) 974-6925 to arrange for heroin purchases. One of the ten advised that on that same day, just prior to when Havens observed Defendant and Co-Defendant traveling eastbound on Third Street, he met with the Co-Defendants at the Mini Mart on Northway Road, just south of Four Mile Drive and purchased seven bags of heroin for \$80.00. He told Havens that they arrived and departed in a black Chrysler 200. He further advised that he arranged the transaction with them through the cellular telephone listed above.

Discussion

I. Motion to Suppress Identification

Whether phone meets the legal definition of abandoned property.

The Court finds that the phone is abandoned property. The legal definition of abandoned property, cited by Defense Counsel in its Memorandum of Law in support of its Omnibus Pretrial Motion and the Commonwealth at oral argument, is from the

decision in Commonwealth v. Shoatz, in which the Supreme Court of Pennsylvania stated

The theory of abandonment is predicated upon the clear intent of an individual to relinquish control of the property he possesses. Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. All relevant circumstances at the time of the alleged abandonment should be considered. Police pursuit or the existence of a police investigation does not of itself render abandonment involuntary. The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.

469 PA. 545, 366 A.2D 1216, 1220 (PA. 1976) (INTERNAL CITATIONS OMITTED).

The Court went on to say that, no one has standing to complain of a search or seizure of property that he has voluntarily abandoned. Id. Both parties here agree that Defendant has no standing to pursue suppression in the search of the telephone based upon the theory of a reasonable expectation of privacy in the phone by the Defendant. SEE COMM. BRIEF AT 5 AND DEF. MEMO. AT 5. The Commonwealth comes to this conclusion based upon the belief that the Defendant voluntarily abandoned the property pursuant to a lawful police chase. Defense Counsel comes to this conclusion based upon Defendant's disavowal of a possessory interest in the phone but argues Defendant can object based on the police's unlawful search of the phone (see discussion regarding that issue below). In Commonwealth v. Dowds⁸, the Supreme Court found that a Defendant's disavowal of ownership alone constituted abandonment reasoning there was no basis for treating disavowal differently than an act from which an intention to abandon may be inferred i.e. concluding that the act of

⁸ 761 A.2d 1125, 1131 (Pa. 2000).

dropping luggage and fleeing sufficiently indicated abandonment of privacy expectation.

This case differs from other abandonment cases in that the distance between the property and of its alleged owner is much greater. Havens did not see Defendant use the phone. It is disputed whether the location where the phone was found was in the flight path of the Defendant. Moreover, the Commonwealth has not established that this was indeed Defendant's phone in the traditional manner one owns a phone. Rather this phone is associated with a telephone number which was being called to set up drug transactions. One of the parties to the drug transaction identified Defendant through the use of the phone. Defendant seeks to suppress this identification.

The Court sitting as the finder of fact here determines that under the facts and circumstances of this case, the phone is abandoned property. No objection has been raised to Havens' pursuit of Defendant so the question of voluntary versus involuntary abandonment of the phone is not an issue before the Court. Mr. Winters found the iPhone in his backyard; ringing constantly. Havens had just been pursuing a criminal suspect in that neighborhood that he was holding in custody at the time the phone was retrieved by police. Regardless of who owns the phone in the traditional property sense, the phone was abandoned property as no rightful owner is claiming it; Defendant and Co-Defendant deny ownership. Since it is abandoned property, the person prejudiced by the search of it (i.e. Defendant) no longer retains a reasonable expectation of privacy with regard to the iPhone.

Whether seizure of phone's contents, without a warrant, was an illegal search and seizure and thus the fruits of the search should be suppressed.

The Court does not reach the question of whether Havens search of the phone contents without a search warrant was illegal because Defendant does not have a privacy interest in the phone. In Commonwealth v. Sell, the Supreme Court of Pennsylvania held that defendants charged with possessory crimes have automatic standing to bring a motion to suppress because “the charge itself alleges an interest sufficient to support a claim under Article I, § 8”.⁹ Defendant is charged with a possessory crime i.e. Possession of a Controlled Substance, and therefore has standing to file a motion to suppress. But, in Commonwealth v. Enimpah, 630 Pa. 357, 106 A.3d 695 (Pa. 2014), the Supreme Court of Pennsylvania explained that automatic standing is not equivalent to a privacy interest and that each is a “different concept serving different functions”:

Standing is a legal interest that empowers a defendant to assert a constitutional violation and thus seek to exclude or suppress the government’s evidence pursuant to the exclusionary rule under the Fourth Amendment of the United States Constitution or Article 1, Section 8 of the Pennsylvania Constitution. It ensures a defendant is asserting a constitutional right of his own. The expectation of privacy is an inquiry into the validity of the search or seizure itself; if the defendant has no protected privacy interest, neither the Fourth Amendment nor Article I, § 8 is implicated. In essence, while a defendant’s standing dictates when a claim under Article I, § 8 may be brought, his privacy interest controls whether the claim will succeed – once a defendant has shown standing he must, in short, having brought his claim, demonstrate its merits by showing of his reasonable and legitimate expectation of privacy in the premises.

Id. AT 699. (INTERNAL CITATIONS AND PUNCTUATION REMOVED).

Enimpah held that the burden of production i.e the burden of “going forward with the evidence” is upon the Commonwealth, Id. AT 701, meaning that the

⁹ 470 A.2d 457, 468 (Pa. 1983).

Commonwealth must present evidence that the Defendant's constitutional rights were not infringed. In any suppression hearing, the Commonwealth does have the burden of production. In the underlying factual scenario in Enimpah, similar to the one here, the item searched was not claimed by either Defendant and the Commonwealth failed to present any evidence reasoning that it was not required to as the Defendant first had to establish a privacy interest in the item searched. The Supreme Court of Pennsylvania disagreed, finding that both parties have a duty to present evidence to the suppression court. Enimpah held that if the evidence of the Commonwealth, the party with the burden of production, shows the defendant lacked a privacy interest, the burden of establishing the contrary is on the defendant. Id. In the case at bar, the Court is satisfied with the Commonwealth's evidence that the police action was lawful in this case and the Defendant lacked a privacy interest in the iPhone searched.

Defense Counsel alleges that the police search of the phone was illegal. But the evidence shows that there was no expectation of privacy in the iPhone as it was a piece of property without an owner¹⁰. Whether Havens needed to acquire a search warrant before searching the phone is irrelevant because a constitutional error cannot inure to the benefit of the expectation-less accused. To overcome that result, the Defendant would have to show that he had an expectation of privacy in the phone's contents. If he did, the search would again be at issue and the Commonwealth would need to prove its constitutionality.

¹⁰ Riley v. California, 134 S. Ct. 2473 (2014), held that the police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

II. Motion for Additional Discovery

In the Omnibus Pretrial Motion filed September 14, 2016, Defendant's Counsel requests the videotaped interview of Randall Moon, Property Record F1-21719E, a legible copy of the Enterprise Rental Company document, the criminal record of Randall Moon, and the terms of any plea agreement, deals or promises made to Randall Moon in exchange for his testimony. If the Commonwealth has not already provided this information to Defense Counsel, it should at this time.

ORDER

AND NOW, this 31st day of March, 2017, based upon the foregoing Opinion, the Motion to Suppress is DENIED. The Motion for Additional Discovery is GRANTED.

The Commonwealth, within 14 days from the filing date of this Order, shall produce the requested discovery to Defense Counsel if it has not yet done so.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Nicole Ippolito, Esq. ADA
Robert Hoffa, Esq. Defendant's Counsel
Gary Weber, Esq. Lycoming Law Reporter
S. Roinick, Law Clerk