

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**ZACHARIAH ROGERS,
Defendant**

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CR-1415-2016

OMNIBUS PRETRIAL

OPINION AND ORDER

Defense Counsel filed an Omnibus Pretrial Motion on November 22, 2016, and argument and testimony were heard on January 12, 2017.

Factual Background

Zachariah Rogers (Defendant) is charged in a criminal information filed August 26, 2016, with two counts of Possession with Intent to Deliver¹, both ungraded felonies; three counts of Possession of a Controlled Substance², all ungraded misdemeanors; and three counts of Possession of Drug Paraphernalia, all ungraded misdemeanors.³ The charges arise from an incident on July 6, 2016, where probation officers made a home visit to Defendant's brother, Nathan Forney (Forney).

At the time of the home visit, Defendant was temporarily staying at Forney's residence. After entering the residence, the probation officers observed items of drug paraphernalia in plain view in the main room of the residence and in Forney's bedroom.

The probation officers then contacted Detective Cassandra McCormack (McCormack) of the Lycoming County District Attorney's Narcotics Enforcement Unit.

¹ 35 Pa.C.S. §780-113(a)(30).

² 35 Pa.C.S. § 780-113(a)(16).

³ 35 Pa.C.S. § 780-113(a)(32).

She obtained a search warrant for the premises and various items of drugs and drug paraphernalia were located therein.

On July 19, 2016, McCormack filed a Criminal Complaint against the Defendant. An arrest warrant was issued and the Defendant was arrested and taken before the MDJ and committed to the Lycoming County Prison in lieu of bail. On August 11, 2016, the Defendant appeared before the MDJ, represented by a Public Defender and waived his right to a preliminary hearing in exchange for being released on bail.

At the omnibus hearing, the Commonwealth presented the testimony of two Lycoming Adult Probation officers who made contact with Defendant on July 6, 2016.

Testimony of Erick Fortin, Probation Officer

Fortin is an adult probation officer with 18 years of experience including three years as a juvenile probation officer. As a probation officer, he has made many house visits and has confiscated drug and drug paraphernalia from supervisees' homes. He testified to having hundreds of encounters with marijuana in the home visit environment.

Fortin testified that Forney had been on probation periodically from 2005 through 2014. He had completed probation for one year and a half when he was again put on probation for possession of drug paraphernalia, the supervision that justified Fortin's home visit on the date in question.

Fortin had been supervising Forney for about a year and in that time, Forney had five to six positive urine screens. Forney had been participating in the reentry program and receiving counseling regarding marijuana and cocaine use. Forney was

terminated from counseling at Crossroads Counseling in June of 2016. On June 30, 2016, Forney failed to report.

As a result of the failure to report and Forney's history of drug and alcohol use, Fortin and his colleague (Schriner) went to the residence to check on Forney. Since Forney's residence was located in a secure building Fortin contacted Forney's landlord and requested entrance to the building explaining his concerns to the landlord regarding a possible overdose. Fortin testified to what he shared regarding the extent of Forney's past history of marijuana, cocaine and alcohol use and the landlord allowed them access to the building.

Fortin, along with Schriner, knocked on the door. He testified that he waited five (5) minutes and then knocked hard and noted that the door was unlocked. As Fortin pushed the door open and announced who he was, he asked if anyone was there. He saw another person (Defendant) about 10-12 feet into the apartment. When asked whether Forney were there the Defendant responded "no".

Fortin peered into the apartment and could see Forney hiding behind a corner to the right. Both probation officers then entered the apartment. Fortin testified that Defendant said "no" to probation's request to search the premises. Fortin handled Forney while Schriner handled Defendant. Fortin went with Forney to the bedroom where he saw paraphernalia i.e. a pipe and a G-cap (both used to smoke marijuana) and the items smelled like marijuana. Once he saw the paraphernalia, he handcuffed Forney.

Testimony of James Schriener, Probation Officer

Schriener accompanied Fortin on the day in question. He has worked with Adult Probation in Lycoming County for twenty-four years. He has had formal training, has worked with addicts and he is certified in ARIDE.

Schriener went with Fortin to make contact with Fortin's probationer Forney, a tenant at 339 Pine Street. Schriener understood that given Forney's history of drug and alcohol use, Forney's failure to report, and Forney's termination from treatment Fortin was concerned for Forney's welfare. This home visit was a welfare check.

Defendant was present on the day of the welfare check. Defendant indicated to the probation officers that Forney was not at home. Schriener testified that when Defendant said Forney was not there it made him suspicious because of his reaction. Both probation officers walked in and spoke with Defendant. Schriener told Defendant to sit on a metal chair. Schriener noted the Defendant's belongings in the room i.e. comforter, blanket, pillows, backpack, clothes, musical stuff, guitar, table and chair. There were beer cans next to the couch where Defendant appeared to be sleeping and Schriener testified that he also observed drug paraphernalia. He asked Defendant why he lied regarding Forney's presence in the apartment. He testified that Defendant said it was "because he knows Forney is on probation".

Schriener asked Defendant if there was any other evidence of illegal drug use in the apartment. Defendant indicated drawers, which when searched revealed scales, marijuana and a bong. At this point, Fortin came out of Forney's bedroom with Forney in handcuffs. Both Defendant and Forney were given their Miranda warnings and the probation officers proceeded to contact the Narcotics Enforcement Unit.

Discussion

I. HABEAS CORPUS

Defendant argues that because he waived his right to a preliminary hearing on the advice of a Public Defender who had an inherent conflict in giving him that advice (as he represented a co-Defendant in the case) he should now be allowed to challenge the Commonwealth's evidence at the Common Pleas level. Pa.R.Crim.P. 541 (waiver of a preliminary hearing) provides that defendants represented by counsel may waive their right to preliminary hearing. Defendants who waive this right lose their right to raise the sufficiency of the Commonwealth's *prima facie* case unless

1) The parties have agreed at the time of the waiver that the defendant may later challenge the sufficiency; or,

2) If the defendant waives the preliminary hearing by way of an agreement, made in writing or on the record, and the agreement is not accomplished.

The Commonwealth asked the Court to preclude the habeas as Defendant has already waived his right to a preliminary hearing. The Court granted the Commonwealth's Motion to Preclude Habeas. The Court finds that because Defendant was released from pretrial incarceration in exchange for the waiver of the preliminary hearing he has received the benefit of his waiver of preliminary hearing bargain and thus the agreement was accomplished. The Court did not accept the Defendant's position that the Public Defender had not fully represented the Defendant's interests at the preliminary hearing.

II. MOTION TO SUPPRESS

Defendant argues that the evidence obtained against him in this case was seized in violation of his rights under Article 1 Section 8 of the Pennsylvania Constitution and under the Fourth Amendment of the United States Constitution.

First, the Defendant submits that the probation officers came to the residence in search of controlled substances. The Court does not agree with that statement, finding the probation officers credible in their testimony that the purpose of the home visit was to perform a safety check on Forney and not using the visit as a pretense to search.

Secondly, the Defendant argues that the probation officers did not have reasonable suspicion to conduct a warrantless search of the residence at the time that they entered the residence. The officers did not need reasonable suspicion to visit Forney's home on the date in question as unannounced home visits are a condition of supervision. Items of contraband were found in plain view of the probation officers; no search was performed by the officers. After seeing contraband items in plain view, the probation officers then contacted the Narcotics Enforcement Unit. A search warrant was obtained by police to search the residence which resulted in the criminal charges filed against Defendant.

The Court determines that the probation officers in this case first conducted an unannounced "home visit" of Forney's residence, in accordance with Forney's probation regulations. Commonwealth v. Parker, 2016 PA Super 280, 152 A.3d 309 (Pa. Super. 2016). Their observations of contraband in plain view gave them cause to contact the Narcotics Enforcement Unit, who had probable cause to seek a search warrant of the residence.

The 'plain view' doctrine renders a search and seizure permissible where: "(1) the [government officials] have not violated the Fourth Amendment in arriving at the location from which the item could be viewed; (2) the item is in plain view; (3) the incriminating character of the item is immediately apparent; and (4) the [government officials] have a lawful right of access to the item itself.

COMMONWEALTH V. SMITH, 2014 PA SUPER 14, 85 A.3D 530, 537 (PA. SUPER. 2014) CITING COMMONWEALTH V. JONES, 605 PA. 188, 988 A.2D 649, 656 (PA. 2010).

After review of the evidence, the Court finds that the probation officers did not violate the Fourth Amendment or Article 1 Section 8 of the Pennsylvania Constitution in coming to Forney's home; they were executing their duties as probation officers "to assist the offenders in their rehabilitation and reassimilation into the community and to protect the public". 42 PA.C.S. § 9912. The contraband items were found in plain view. The incriminating nature of the contraband items was readily apparent to probation. Rather than seizing the contraband items, the probation officers followed protocol and contacted the Narcotics Enforcement Unit who with the necessary probable cause sought a search warrant for the residence.

ORDER

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

BY THE COURT,

Nancy L. Butts, P.J.

cc: Pete Campana, Defense Counsel
Nicole Ippolito, ADA
Gary Weber, Lycoming Law Reporter
S. Roinick, Law Clerk