

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
COMMONWEALTH**

vs.

**RASHEEN STURGIS,
Defendant**

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: No. CR-563-2017

OPINION AND ORDER

Defendant is charged with possession with intent to deliver, possession of a controlled substance, possession of drug paraphernalia, and criminal use of a communication facility. These charges arose out of an incident that allegedly occurred on March 5, 2017. Officer Joshua Bell of the Williamsport Bureau of Police was dispatched to the 600 block of Fourth Avenue in Williamsport, following a report of a blue sedan occupied by two black males allegedly involved in narcotics activities.

On May 1, 2018, Defendant filed motion to suppress nunc pro tunc as a result of the March 5, 2017 incident, during which Officer Bell reached into Defendant's pants and retrieved the alleged illegal controlled substances. This Court held a hearing on May 17, 2018 on the timeliness of Defendant's motion.

The Commonwealth argued that Defendant's Motion should be dismissed as untimely. Defendant concedes that the Motion was untimely filed but argues the Court should nonetheless consider the Motion in the interests of justice.

Rule 581 of the Pennsylvania Rules of Criminal Procedure governs the timeliness of suppression motions. Rule 581(B) states:

Unless the opportunity did not previously exist, or the interests 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:

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).

Applying the law to the facts at hand, Defendant's motion to suppress should have been filed within 30 days of Defendant's arraignment unless an exception would apply or the interests of justice otherwise require.

At the hearing in this matter, the defense argued that Defendant was previously represented by Greta Davis, Esquire. Defendant's arraignment was April 17, 2017. Defense counsel received discovery the week of May 8, 2017. Previous counsel for Defendant filed a Motion for Extension of Time to File Omnibus Pretrial Motion for an additional 30 days on May 11, 2017. The Court granted the motion on May 16, 2017.

On August 1, 2017, prior defense counsel also requested and was granted a continuance of the trial term because of outstanding discovery from the Commonwealth. Then again on September 27, 2017, defense counsel requested and was granted a continuance of the trial term because of outstanding discovery, specifically a "missing CFS report."

Defendant's present counsel, Kirsten Gardner, Esquire, entered her appearance on behalf of Defendant on October 19, 2017. On December 6, 2017, defense

counsel requested and was granted another continuance due to the recent switch in counsel for Defendant and the need for additional time to review discovery and the pretrial issues of the case.

On March 7, 2018, an argument and factual hearing was held upon the Commonwealth's Motion to Amend Information. The Commonwealth requested that one count of Possession of a Controlled Substance (to wit: Marijuana), 35 P.S. §780-113(a)(31) be added to the criminal information. After hearing arguments, the Court denied the motion, because the case was scheduled for call of the list in approximately two weeks, if not less, from the hearing date; the Commonwealth was uncertain whether the substance was ever tested to confirm that it was, in fact, marijuana; and the delay which would result from the amendment would be unfair to Defendant.

Counsel argued that Defendant was adamant about filing the nunc pro tunc motion, regardless of the late nature of the submission. There was some disagreement of opinion regarding whether the motion to suppress should have been submitted to the Court. In the interests of preserving the attorney-client relationship, counsel filed the motion and asked the Court to hear the motion in the interests of justice. Defendant argued that Officer Bell's detection of a marijuana odor on Defendant and Defendant shifting his hands toward his waistband did not provide sufficient cause for Officer Bell to reach into Defendant's waistband in order to find the source of the odor and seize the evidence.

The Commonwealth argued that, due to Officer Bell's solitary status in investigating Defendant's allegedly reported narcotics activity in a high crime area known

for drug trafficking, Officer Bell had sufficient cause to be concerned for his safety, therefore permitting the pat down. Additionally, it was argued that there was a concern just two days prior of narcotics dealing stemming from the same reported vehicle.

The Motion to Suppress was filed on May 1, 2018, slightly more than one year after Defendant's arraignment date of April 17, 2017. The Motion was filed well beyond the time limits contained in the Rules of Criminal Procedure.

A trial judge may excuse a defendant's tardy presentation of a motion for suppression when required in the interests of justice. *Commonwealth v. Johonoson*, 844 A.2d 556, 561 (Pa. Super. 2004).

Under the circumstances in this particular case, the Court concludes that Defendant's motion is patently untimely.

First, Defendant clearly had knowledge of the facts in support of the Motion by the week of May 8, 2017 at the latest. Defendant would have received the affidavit of probable cause at the time he received a copy of the criminal complaint. Defendant and his prior counsel were also present for Officer Bell's testimony at the preliminary hearing. Furthermore, other than a "missing CFS report," Defendant's counsel received discovery during the week of May 8, 2017.

Second, the Court gave prior counsel an extension until approximately mid-June 2017 to file any omnibus pretrial motion. The Court also granted various continuances and gave ample time to both prior and current counsel to review the discovery and investigate any pretrial issues.

Third, as early as the arraignment date of April 17, 2107, it became apparent that Defendant would be fighting the case. Moreover, once the case was placed on the call of the list in March of 2018, the defense and the Commonwealth began preparing for trial, disregarding any further motions regarding the evidence in the case.

Finally, and perhaps determinatively, the merits of the underlying motion to suppress are not readily apparent.

According to the affidavit of probable cause and the preliminary hearing transcript attached to Defendant's motion, Officer Bell, in full-duty uniform, was on patrol in a marked police vehicle in the City of Williamsport on March 5, 2017. At 9:35 a.m., he was dispatched and advised that there was a blue sedan without Pennsylvania state registration plates occupied by two males parked on the 600 block of Fourth Avenue involved in narcotics activities. Officer Bell noted that two days prior to March 5, 2017, he recalled that he had also been advised of a blue sedan occupied by two males conducting narcotics transactions at former Weis Markets located at 620 West Third Street. Upon arrival to the area, Officer Bell located the sedan, a blue Toyota Camry, bearing a Maryland registration and verified it was a rental vehicle. The operator of the vehicle was outside of the vehicle and speaking to a female nearby at a residence on the west side of Fourth Avenue. The front passenger was identified as Defendant, Rasheen Sturgis, of Philadelphia.

After approaching the vehicle and advising Defendant of the reports of narcotics transactions stemming from his vehicle, Officer Bell noticed that Defendant possessed multiple cell phones. Defendant was utilizing one phone and had a second phone

in his hand or on his lap. A third phone was in the center console area. Officer Bell requested that Defendant exit the vehicle.

Officer Bell detected the odor of marijuana emanating from Defendant's person when Defendant exited the vehicle. At this time, Officer Bell handcuffed Defendant for safety reasons. Defendant then shifted his hands from the back toward the front of his side and began reaching into his waistband. Based on a concern that Defendant was reaching for a concealed item such as a weapon, Officer Bell conducted a pat down of Defendant. Upon patting the zipper area of Defendant's pants, Officer Bell felt what he immediately recognized as bundles of heroin. At that point Officer Bell turned Defendant around and retrieved from within Defendant's pants what appeared to be four bundles of suspected heroin which were banded together. After field testing, the suspected heroin was determined to be forty white bags of Fentanyl.

Defendant contends that there was insufficient reasonable suspicion to believe that he was armed and dangerous; therefore, the pat down administered by Officer Bell was illegal. Accordingly, Defendant argues that the evidence seized must be suppressed as violating his rights to be free from unreasonable searches and seizures pursuant to the Fourth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment and Article I, Section 8 of the Pennsylvania Constitution.

If, during an investigatory detention, "an officer observes unusual and suspicious conduct on the part of the individual which leads him to believe that the suspect may be armed and dangerous, the officer may conduct a pat-down of the suspect's outer

garments for weapons.” *Commonwealth v. E.M.*, 558 Pa. 16, 735 A.2d 654, 659 (1999). In order to justify a frisk, the officer “must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.” *Id.* (quoting *Sibron v. New York*, 392 U.S. 40, 64, 88 S.Ct. 1889, 1903, 20 L.Ed.2d 917 (1968)).

Based on the facts recited herein, Officer Bell’s pat down of Defendant was lawful, as there was an articulated and reasonable suspicion that criminal activity was afoot and Defendant could be armed and dangerous. Officer Bell was dispatched to investigate a call regarding narcotics dealing occurring from the vehicle in which Defendant was seated. Defendant possessed multiple cell phones, including a flip phone, which in Officer Bell’s experience was consistent with drug dealing. Preliminary Hearing Transcript, at 6. When Defendant exited the vehicle at Officer Bell’s request, Officer Bell noticed an odor of marijuana emanating from Defendant’s person. Preliminary Hearing Transcript, at 6. Officer Bell handcuffed Defendant for safety reasons because he was alone in a high crime area investigating two individuals for possible drug trafficking activities and he smelled an odor of marijuana coming from Defendant’s person. Despite being handcuffed, Defendant brought his hands around his side to the front and began to reach inside his waistband as if he were trying to conceal an item, presumably a weapon. Preliminary Hearing Transcript, at 7.

Officer Bell began to frisk Defendant for weapons. During the pat down, however, Officer Bell felt, based on shape and contour, what he immediately recognized as packets of heroin in the area of Defendant’s zipper. Preliminary Hearing Transcript, at 7. Once Officer Bell felt what he immediately recognized as contraband, he turned Defendant

around and reached in to retrieve the bundles from Defendant's pants. Preliminary Hearing Transcript, at 7. The item looked like a standard brick of heroin, but it actually was forty white bags of Fentanyl.

The Court finds that the pat down was conducted, not as a search for illegal drugs, but to safeguard Officer Bell against any harmful weapons. Once Officer Bell felt what he immediately recognized as bundles of narcotics, he was authorized by the plain feel doctrine to seize them. *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993)(articulating the plain feel doctrine under the United States Constitution); *Commonwealth v. Graham*, 554 Pa. 472, 721 A.2d 1027, 1081-82 (1998)(adopting plain feel doctrine as part of Pennsylvania jurisprudence).

Defendant's motion to suppress was filed nearly one year late. The late motion does not fall within any exception and is not required to be heard in the interests of justice, particularly where, as here, Defendant's claims are belied by the transcript of his preliminary hearing. Accordingly, the court will deny Defendant's motion to suppress nunc pro tunc.

ORDER

AND NOW, this ___ day of May 2018, the Court DENIES Defendant's Motion to Suppress Nunc Pro Tunc filed on May 1, 2018.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)

Kirsten Gardner, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work File