

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 1736-05
 :
 ROMERO GORDY, : CRIMINAL ACTION - LAW
 :
 Defendant :
 : MOTION TO SUPPRESS EVIDENCE

DATE: July 5, 2006

OPINION and ORDER

Before the court for determination is the Motion to Suppress Evidence of Defendant Romero Gordy filed February 17, 2006. The motion will be denied.

I. BACKGROUND

A. Facts

On December 2, 2004, a call came into the Williamsport Bureau of Police that shots had been fired in the 600 block of 2nd Street in the city of Williamsport, Pennsylvania. Officer Edward Lucas was on duty that day. He was responding to the scene of the reported shooting when other officers of the Williamsport Bureau of Police radioed that they were following a car speeding away from the scene of the shooting. Officer Lucas went to join those officers following the speeding vehicle to provide backup.

The speeding vehicle arrived at the Williamsport Hospital emergency room around 11:30 p.m. Officer Lucas observed the emergency room staff wheel a black male from the vehicle into a curtained area inside the emergency room. Officer Lucas followed the emergency room staff and the black male into the curtained area. As part of standard operating procedure, Officer Lucas

remained in the curtained area with the emergency room staff and the black male in order to get information and to collect the black male's clothing.

Mary Jo Kuhn is an emergency room technician employed by the Williamsport Hospital. She was on duty in the emergency room of the Williamsport Hospital on the night of December 2, 2004. The black male that was brought in around 11:30 p.m. had suffered a gunshot wound. So as to enable the emergency room staff to treat the black male, Kuhn removed his clothing and placed each article of clothing in a separate paper bag. It was standard operating procedure at the Williamsport Hospital to place an individual's clothing in paper bags. This was done because, normally, the police would take custody of the clothing. On this night, Kuhn followed that procedure and set the clothing aside with the intent of turning it over to the police.

The emergency room staff repeatedly asked the black male for his name, but he refused to provide it. At the request of one of the nurses treating the black male, Kuhn began to look in the paper bags containing his clothing so that she could examine the clothing for some source of identification. Kuhn pulled the black male's jeans from the paper bag and placed her hand inside a pocket of the jeans. She pulled out several cards that were similar to shopper's club cards and a plastic bag containing smaller plastic bags.

Officer Lucas was to the right of Kuhn and about five feet away when she pulled the plastic bag out of the black male's jeans. Officer Lucas had been focused on the black male as the emergency room staff was treating him and asking him questions. Officer Lucas had noticed out of the corner of his eye that Kuhn had pulled a plastic bag out of the black male's jeans. Officer Lucas has been with the Williamsport Bureau of Police for six years, prior to that with the Reading

Police Department for three years, and before that he was a military police officer for seven years. During the course of his law enforcement career, he has had the opportunity to observe narcotics on thousands of occasions and would recognize crack cocaine.

Officer Lucas observed that the large plastic bag Kuhn had removed from the black male's jeans contained smaller plastic bags that were darker in color compared to the larger plastic bag. Inside the smaller plastic bags, Officer Lucas observed a white crystal substance. Officer Lucas instantly recognized this substance as crack cocaine.

Officer Lucas approached Kuhn and told her to place the plastic bag back in the jeans. Officer Lucas then took over the search for the black male's identification. Officer Lucas found the black male's wallet in the rear pocket of the jeans. The black male who arrived at the Williamsport Hospital around 11:30 p.m. on December 2, 2004 and was being treated for a gunshot wound was Defendant Romero Gordy.

The jeans and the plastic bag were returned to the paper bag, and it, as well as, all the other clothing in the paper bags, was seized by Officer Lucas, taken to the Williamsport Bureau of Police's headquarters, and inventoried. A search warrant was never obtained for the clothing seized on December 2, 2004.

B. Gordy's Argument

Gordy contends that the evidence seized from his clothing should be suppressed, because it was obtained as a result of an unlawful search. Gordy argues that Kuhn was acting as an agent of the government when she searched his clothing at the Williamsport Hospital emergency room. As such, he argues that Kuhn was bound by the requirements of the Fourth Amendment of the United

States Constitution and Article I, Section Eight of the Pennsylvania Constitution. Gordy argues that Kuhn's search violated the Fourth Amendment and Article I, Section Eight because Kuhn did not have a search warrant and none of the exceptions to the warrant requirement applied. Therefore, Gordy argues that the evidence which was uncovered because of this search must be suppressed.

Gordy's argument does not assert that Officer Lucas's seizure of his clothing and the alleged contraband did not comply with the plain view doctrine. Officer Lucas seized the suspected contraband and Gordy's clothing after seeing Kuhn remove the suspected crack cocaine from Gordy's jeans. Under the plain view doctrine, the warrantless seizure of a piece of evidence is permissible when two criteria are met: (1) the evidence must be seen from a lawful vantage point and (2) it must be immediately apparent to the observer that the object is contraband or incriminating evidence. *Commonwealth v. Harris*, 888 A.2d 862, 869 (Pa. Super. 2005); *Commonwealth v. McCree*, 857 A.2d 188, 190 (Pa. Super. 2004), *app. granted*, 876 A.2d 394 (Pa. 2005). Gordy's argument is that Kuhn's illegal search created Officer Lucas's plain view. This is a fruit of the poisonous tree argument. Under the fruit of the poisonous tree doctrine, evidence obtained from, or acquired as a consequence of, lawless official acts will be excluded. *Commonwealth v. Brown*, 700 A.2d 1310, 1318 (Pa. Super. 1997). Evidence will be suppressed as the fruit of the poisonous tree if it has come to light by way of exploiting the illegal action. *Commonwealth v. Cunningham*, 370 A.2d 1172, 1176 (Pa. 1977); *Commonwealth v. Cephas*, 291 A.2d 106, 109 (Pa. 1972); *Commonwealth v. Abbas*, 862 A.2d 606, 610 (Pa. Super. 2004). Gordy

is arguing that Officer Lucas's plain view came to light due to Kuhn's illegal search of his clothing.

II. ISSUE

The issue before the court is whether the evidence Officer Lucas seized from Gordy's clothing must be suppressed as the fruit of an illegal search conducted by Kuhn?

III. DISCUSSION

In order to determine if the cocaine seized by Officer Lucas was the fruit of an illegal act, the court must first determine whether Kuhn was acting as a government agent when she conducted the search of Gordy's clothing, and was bound by the requirements of the Fourth Amendment and Article I, Section Eight. If she was not acting as a state agent, then her search would not have been in violation of the Fourth Amendment or Article I, Section Eight. As such, it would not taint Officer Lucas' plain view and seizure of the suspected contraband.

A. Standard of Review

When a motion to suppress evidence has been filed, the Commonwealth bears both the burden of production and persuasion to prove that the challenged evidence was not obtained in violation of the defendant's rights. Pa.R.Crim.P. 581(H); *Commonwealth v. West*, 834 A.2d 625, 629 (Pa. Super. 2003), *app. denied*, 889 A.2d 1216 (Pa. 2005). The Commonwealth bears the burden of establishing by a preponderance of the evidence that the challenged evidence is admissible. *Commonwealth v. Lindblom*, 854 A.2d 604, 605 (Pa. Super. 2005), *app. denied*, 868 A.2d 1198 (Pa. 2005); *Commonwealth v. Smith*, 784 A.2d 182, 186 (Pa. Super. 2001).

B. General Rules and Principles Regarding State Action and the Fourth Amendment and Article I, Section Eight

A primary purpose of both the Fourth Amendment to the United States Constitution and Article I, Section Eight of the Pennsylvania Constitution "...is to protect citizens from unreasonable searches and seizures.'" *Commonwealth v. Smith*, 835 A.2d 5, 9 (Pa. 2003) (quoting *In re D.M.*, 781 A.2d 1161, 1163 (Pa. 2001)). The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. Article I, Section Eight provides that:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. Art. I, § 8.

The proscriptions of the Fourth Amendment and Article I, Section 8 do not apply to searches and seizures conducted by private individuals. *Commonwealth v. Harris*, 817 A.2d 1033, 1047 (Pa. 2002), *cert. denied*, 540 U.S. 1081 (2003); *Commonwealth v. Elmobdy*, 823 A.2d 180, 183-84 (Pa. Super. 2003), *app. denied*, 847 A.2d 58 (Pa. 2004). In determining whether a search is to be considered private, the critical factor is whether, in light of all the circumstances, the private individual acted as an instrument or agent of the government. *Elmobdy*, 823 A.2d at 184;

Commonwealth v. Cieri, 499 A.2d 317, 321 (Pa. Super. 1985). To determine this, a court must consider the purpose of the search, the party who initiated it, and whether the government acquiesced in or ratified it. *Elmoby*, 823 A.2d at 184; *Commonwealth v. Ellis*, 608 A.2d 1090, 1091 (Pa. Super. 1992), *app. denied*, 620 A.2d 489 (Pa. 1993).

C. Kuhn was not Acting as a Government Agent when She Conducted the Search of Gordy's Clothing

Kuhn was not acting as a government agent when she searched Gordy's clothing at the Williamsport Hospital emergency room. The purpose of the search was to locate Gordy's identification. Gordy had refused to provide the hospital staff with his name. The hospital staff needed Gordy's identification to better treat him. For instance, having Gordy's name would allow the hospital staff to locate Gordy's medical history and determine if anything in his medical history may affect his treatment. Thus, the purpose of Kuhn's search was for medical treatment and not done for law enforcement purposes or to collect evidence against Gordy.

Kuhn did not search Gordy's clothing at the request of law enforcement. At no time did Officer Lucas or any member of a law enforcement agency request Kuhn to search Gordy's clothing. Kuhn searched Gordy's clothing at the instruction of one of the nurses treating Gordy. Thus, Kuhn's search of Gordy's clothing was done at the request of a private individual and not law enforcement.

The fact that Officer Lucas later seized Gordy's clothing and the alleged contraband does not transform Kuhn's private search into action by an agent of the state. "Individual acts do not become governmental action merely because they are later relied upon and used by the government in furtherance of its objectives." *Elmoby*, 823 A.2d at 184. "The mere use by police and

prosecutors of an individual's actions does not serve to 'ratify' those actions as conduct of the state.'" *Id.* at 185 (quoting *Commonwealth v. Corley*, 491 A.2d 829, 832 (Pa. 1985)). Therefore, Officer Lucas' seizure of Gordy's clothing and the alleged contraband did not ratify Kuhn's search of Gordy's clothing.

Gordy cites two relevant cases in support of his argument that Kuhn was acting as a government agent when she searched his clothing. The first is *Commonwealth v. Borecky*, 419 A.2d 753 (Pa. Super. 1980). In *Borecky*, a Pennsylvania State Trooper applied for and obtained a search warrant for a residence where it was believed a large quantity of drugs was located. 419 A.2d at 754. The basis of this knowledge was a confidential informant who had gained his knowledge of the location of the drugs by entering and searching the residence. *Ibid.* While searching the residence, the confidential informant located drying marijuana in the attic. The confidential informant obtained a sample and brought it back to the trooper for testing. The sample tested positive for marijuana. *Ibid.* The defendant challenged the search warrant arguing that the information in the affidavit supporting the search warrant was obtained by a prior unlawful search. *Ibid.* The Superior Court agreed.

The Superior Court determined that the confidential informant was acting as a government agent when he conducted the search of the defendant's residence and was bound by the proscriptions of the Fourth Amendment. *Borecky*, 419 A.2d at 756. Prior to the search, the trooper met with the confidential informant at a pre-determined location and searched him before the confidential informant entered the defendant's residence. *Id.* at 755. The Superior Court found that the trooper knew that the confidential informant was going to surreptitiously enter and search

the defendant's residence. Despite this prior knowledge, the trooper acquiesced in the confidential informant's covert activity. The Superior Court held that "... the state trooper's admitted prior knowledge of the warrantless search, and acquiescence therein, was sufficient to constitute ratification of the informant's illegal activity on behalf of the Commonwealth." *Id.* at 757.

Borecky is distinguishable from the present case. Here there is no acquiescence on the part of the police. Officer Lucas had no prior knowledge that Kuhn was going to search Gordy's clothing. He did not request or instruct Kuhn to search Gordy's clothing. The instruction to search Gordy's clothing came from a nurse engaged in Gordy's treatment. Officer Lucas did not know of the instruction and only became aware of the search after he observed Kuhn out of the corner of his eye already searching Gordy's pants. Thus, under *Borecky*, Officer Lucas could not have acquiesced in Kuhn's activity because he did not have prior knowledge of it.

The second case Gordy cites is *Commonwealth v. Franz*, 634 A.2d 662 (Pa. Super. 1993). In *Franz*, a Pennsylvania State Trooper responded to a two car accident. 634 A.2d at 662. The trooper determined that the defendant had crossed the dividing line and collided head-on with the other vehicle. The defendant was taken to the hospital for treatment. *Ibid.* The driver of the other vehicle died in the crash. The trooper went to the hospital hoping to interview the defendant, but was unable to because the defendant was being taken into surgery. *Ibid.* At that point, the trooper requested that a blood sample be taken from the defendant. Hospital personnel informed the trooper that a sample of the defendant's blood had already been taken for medical purposes. *Ibid.*

Several days later, the trooper attempted to obtain the defendant's blood test results. *Franz*, 634 A.2d at 662. The trooper requested defendant's blood test results from the floor

supervisor of the hospital where defendant was convalescing. *Ibid.* The supervisor told the trooper that the test showed a blood serum of .171%. The trooper was told how to convert this result to obtain a blood alcohol content, which he did back at the state police barracks. *Ibid.* The trooper calculated that the defendant's blood alcohol content was .141%. The defendant was charged with driving while under the influence of alcohol, homicide by vehicle, and homicide by vehicle while driving under the influence of alcohol. *Ibid.* A few weeks prior to the preliminary hearing in the case, the trooper went to the hospital and requested the written record of the defendant's blood tests. At no time did the trooper have a search warrant to obtain the information. *Ibid.*

At issue on appeal was:

Whether the taking and testing of [the defendant's] blood and the securing of the results was a private search and seizure not subject to the protection of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution?

Franz, 634 A.2d at 663. The Superior Court determined that the search regarding the defendant's blood tests occurred in two separate stages that had to be analyzed individually. *Ibid.* The first stage was the blood draw from the defendant's person. The Superior Court held that this was a private search. The blood was drawn at the hospital's initiative and before the arrival of the trooper. *Ibid.* Accordingly, the blood draw did not implicate the Fourth Amendment or Article I, Section Eight. The second stage was when the hospital staff disclosed the results of the blood tests to the trooper. The Superior Court held that the hospital staff acted as an instrument or agent of the government when they acted upon the trooper's request to have the defendant's blood test

results released. *Id.* at 664. In this instance, the Superior Court held that the defendant's Fourth Amendment and Article I, Section Eight rights were triggered by the state action. *Ibid.*

Franz is applicable to the present case in that the search of Gordy's clothing is similar to the blood draw as it was done at the initiative of the Williamsport Hospital emergency room's staff. Like the blood draw, the search of Gordy's clothing was done as part of his medical treatment. *See also, Commonwealth v. Ellis*, 608 A.2d 1090 (Pa. Super. 1992), *app. denied*, 620 A.2d 489 (Pa. 1993) (blood draw was a private search when not done at the request of the police, but as part of the hospital's standard operating procedure and for independent medical purposes); *Commonwealth v. Hipp*, 551 A.2d 1086 (Pa. Super. 1988) (same); *Cieri, supra* (same). The emergency room staff requested Gordy's name as part of providing him medical treatment, but he refused to give it. Kuhn searched Gordy's clothing at the instruction of a treating nurse in order to obtain his identification. The search of Gordy's clothing was done by the emergency room staff on its own accord to facilitate Gordy's medical treatment. Therefore, similar to the blood draw in *Franz*, Kuhn's search of Gordy's clothing was not subject to the requirements of the Fourth Amendment or Article I, Section Eight.

Frantz, however, is inapplicable to the present case as would relate to the disclosure of the blood tests results by hospital personnel. Firstly, unlike the disclosure in *Franz*, Kuhn's search of Gordy's clothing was done at the request of the hospital staff not the police. Secondly, the Williamsport Hospital staff's eventual relinquishment of Gordy's clothing to Officer Lucas is not the same as the disclosure of the blood test results in *Franz*. When Kuhn's search of Gordy's clothing brought the obvious cocaine into Officer Lucas' plain view he acted immediately and

appropriately to seize it. Lucas had the right, even the obligation, to seize this obvious contraband. The Williamsport Hospital staff was merely complying with Officer Lucas's lawful directive when they relinquished Gordy's clothing to him.

IV. CONCLUSION

Accordingly, the evidence obtained by Officer Lucas from Gordy's clothing is not the fruit of an illegal search. Kuhn's search was a private search not subject to the requirements of the Fourth Amendment or Article I, Section Eight. As such, Officer Lucas' plain view of the alleged contraband was not created by a violation of Gordy's Fourth Amendment or Article I, Section Eight rights. Therefore, Gordy's Motion to Suppress Evidence is denied.

ORDER

It is hereby ORDERED that the Motion to Suppress Evidence of Defendant Romero Gordy filed February 17, 2006 is DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: Charles G. Brace, Esquire
Mary Kilgus, Esquire
Judges
Gary L. Weber, Esquire (Lycoming Reporter)
Christian J. Kalas, Esquire