

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 1295-05
 :
 KENNETH WIMBERLY, : CRIMINAL ACTION - LAW
 :
 Defendant :
 : MOTION TO SUPPRESS EVIDENCE

DATE: May 23, 2006

OPINION and ORDER

Before the court for determination is the Omnibus Pretrial Motion of Defendant Kenneth Wimberly filed January 17, 2006, which seeks to suppress evidence seized from his person and discovered in the room in which he was searched. The motion will be granted.

I. BACKGROUND

A. Facts

On February 3, 2006, an evidentiary hearing was held before the court. Based upon the testimony received at the hearing, the court makes the following findings of fact. On August 5, 2005, the Lycoming County Drug Task Force (hereafter “the DTF”) was conducting a drug investigation. Notes of Testimony, 6 (February 3, 2006). Fred Gilmore (hereafter “Gilmore”) was the target of that investigation. Ibid. On August 5, 2005, a surveillance unit of the DTF took up position in the area of 316 High Street, Williamsport, Pennsylvania. The DTF had information that Gilmore resided at 316 High Street. Id. at 6-7. The basis of that information was that the DTF had made controlled buys of drugs from Gilmore at the 316 High Street address. Id. at 7.

The DTF made two controlled buys from Gilmore on August 5, 2005. The first was in the morning. The second was in the early afternoon and involved the delivery of cocaine. *Id.* at 6. Following the second controlled buy, the DTF arrested Gilmore. The arrest took place in the 400 block of Park Avenue, Williamsport, Pennsylvania. *Ibid.* A search incident to arrest of Gilmore's person revealed the approximate sum of \$100 of prerecorded buy money that the DTF had provided to a confidential informant to make the second controlled buy from Gilmore. *Id.* at 7. Members of the DTF then transferred Gilmore to the Williamsport Police Department for processing. *Ibid.*

Following Gilmore's arrest, Corporal Dustin Kreitz (hereafter "Corporal Kreitz"), an Officer Brown, and two other unidentified members of the DTF went to 316 High Street. Corporal Kreitz and the other members of the DTF went there to locate Gilmore's apartment and secure it while a search warrant was obtained. N.T., 12 (2/3/06). The DTF did not know in which of the apartments located at 316 High Street Gilmore resided. Upon entering the first floor of 316 High Street, Corporal Kreitz made contact with an individual and inquired as to what apartment Gilmore resided. *Id.* at 9. Following that conversation, Corporal Kreitz and the other members of the DTF traveled to the third floor of 316 High Street and knocked on a door. *Ibid.* Corporal Kreitz and the other members of the DTF who accompanied him did not know who, if anyone, they would encounter in the third floor apartment. *Id.* at 21.

A female named Bobbie Bell (hereafter "Bell") answered the door. N.T., 9 (2/3/06). Corporal Kreitz identified himself as a police officer and informed Bell that he and the other officers were there to secure the premises while a search warrant for the apartment was obtained.

Id. at 9, 23. Corporal Kreitz then asked Bell if he and the other members of the DTF would be allowed to enter the apartment. Id. at 9. Bell allowed Corporal Kreitz and three members of the DTF into the third floor apartment. Ibid. Corporal Kreitz and the three members of the DTF who entered the third floor apartment were dressed in plain clothes. Id. at 17, 20. Corporal Kreitz and the other members of the DTF were armed and had their badges on them, but no one's sidearm nor badge was visible. Id. at 20, 21. Officer Brown had been one of the DTF members that had entered the third floor apartment. He left the third floor apartment at some point after the entry into the apartment so that he could obtain the search warrant. Officer Brown was the affiant of the search warrant that was eventually obtained for the third floor apartment. Id. at 19.

The entrance of the third floor apartment opens into a foyer area. N.T., 22 (2/3/06). Turning left upon entering the foyer area, the living room of the apartment is located. Ibid. Crossing through the living room, one comes to a short hallway that leads into a large bedroom. Ibid.

Corporal Kreitz and Bell stepped into the living room of the third floor apartment. N.T., 22 (2/3/06). Corporal Kreitz again advised Bell that he and the other officers were there to secure the apartment while a search warrant was obtained. Id. at 23. At no point did Corporal Kreitz ask Bell, in any shape or form, for consent to search the third floor apartment. Id. at 23. At some point, Corporal Kreitz asked Bell to consent to a search of her person. Id. at 9. Bell consented, and a search of her person revealed nothing. Id. at 9-10.

While in the living room, Corporal Kreitz turned and saw an individual lying on a bed in the bedroom. N.T., at 22, 23 (2/3/06). From his vantage point in the living room, Corporal Kreitz

could only observe the legs of the individual lying in the bed. Id. at 24. Corporal Kreitz and another officer then proceeded immediately through the living room and down the hallway toward the bedroom and the unidentified individual. Id. at 23. Corporal Kreitz and the other officer proceeded down the hallway without saying anything or drawing their weapons. Id. at 23, 24. The officers proceeded in this manner despite Corporal Kreitz's concern that only the individual's legs were visible and they still had no idea who this individual was. Id. at 37. Corporal Kreitz did not know if the individual had a weapon or if he had overheard what Corporal Kreitz had told Bell regarding the search warrant that was being obtained for the apartment. Ibid. Corporal Kreitz wanted to make contact with this individual to find out who he was, what he was doing in the apartment, and to advise him why the police were there. Id. at 25.

Upon entering the bedroom, Corporal Kreitz identified himself as a police officer. N.T., 24 (2/3/06). Neither Corporal Kreitz nor the other officer had their weapons drawn as they entered the bedroom. Id. at 25, 27. From the doorway of the bedroom, Corporal Kreitz observed that the individual was lying in bed watching television. Id. at 24. The individual was lying there with his hands at his sides. Ibid. Corporal Kreitz did not observe any firearm or weapon in the individual's possession or his immediate area. Id. at 24-25. Corporal Kreitz also did not observe any contraband on or about the individual. Id. at 25. The individual lying on the bed was identified as Defendant Kenneth Wimberly (hereafter "Wimberly"). In addition to Wimberly laying on the bed, Corporal Kreitz observed material typically used to package drugs for sale laying on top of the television located approximately five feet away from Wimberly's position. Id. at 18.

Corporal Kreitz walked further into the bedroom and advised Wimberly that they were in the process of obtaining a search warrant for the apartment and that he would have to leave the residence. N.T., 28 (2/3/06). Corporal Kreitz was standing beside the bed on which Wimberly was laying when he said this. Id. at 42. Corporal Kreitz was positioned between Wimberly and the doorway, such that if Wimberly had wanted to leave the bedroom he would have had to go around Corporal Kreitz. Id. at 13, 28. Once Corporal Kreitz had advised Wimberly that a search warrant was being obtained and that he would have to leave the apartment, Wimberly stood up and began to leave. Id. at 25, 29. As he was doing this, Corporal Kreitz stepped aside to allow him an egress out of the bedroom. Id. at 29-30. Before Wimberly could exit the room, Corporal Kreitz asked Wimberly if he would mind if Corporal Kreitz searched his person. Id. at 28. Wimberly responded, "No, go ahead," or something to that effect. Ibid.

Corporal Kreitz began the search of Wimberly's person by patting down his shoulders. N.T., 30 (2/3/06). Corporal Kreitz then moved downward and patted down Wimberly's legs. Ibid. While patting down Wimberly's legs, Corporal Kreitz felt two bulges in Wimberly's front pants pockets. Id. at 32. In the right front pants pocket, Corporal Kreitz felt a plastic bag which contained smaller plastic ziplock bags. Id. at 33. Based upon his training and experience, Corporal Kreitz determined that the smaller bags would contain cocaine, as this was the usual manner in which cocaine was packaged for sale. Id. at 34, 35. Corporal Kreitz then reached into Wimberly's right front pocket and removed the plastic bag containing the small plastic ziplock bags. Id. at 32. In the left front pants pocket, Corporal Kreitz discovered \$358 worth of United States currency, \$80 of which was prerecorded buy money. Id. at 10, 32, 35. Corporal Kreitz completed the search

of Wimberly's person by running his fingers along the cuffs of Wimberly's shoes and pulling up Wimberly's pants legs. *Id.* at 30-31. Following the search, Corporal Kreitz placed Wimberly under arrest. *Id.* at 35.

B. Wimberly's Argument

Wimberly asserts that the physical evidence seized as a result of Corporal Kreitz's search of the third floor apartment and his person must be suppressed. Specifically, he seeks to suppress the packaging material found on the television in the bedroom and the cocaine and buy money found on his person. Wimberly argues that Corporal Kreitz did not have justification to conduct the search of the third floor apartment or his person for two reasons. Firstly, Wimberly argues that Corporal Kreitz did not have consent to search the third floor apartment or his person. Secondly, Wimberly argues that the Commonwealth has failed to present evidence establishing that exigent circumstances existed justifying Corporal Kreitz's entry into the bedroom, such as a belief that Wimberly was armed and dangerous or that evidence was about to be destroyed. Consequently, Wimberly argues that the packaging material, the cocaine, and the buy money must be suppressed as the fruit of illegal searches.

II. ISSUES

There are two main issues before the court:

1. Whether the packaging material found on the television in the bedroom of the third floor apartment must be suppressed as the fruit of an illegal search?
 - (a) Whether Bell consented to a search of the third floor apartment when she permitted members of the DTF to enter the apartment?

- (b) Whether exigent circumstances existed to justify Corporal Kreitz and the other member of the DTF conducting a protective sweep into the bedroom of the third floor apartment?
 1. Whether there existed facts justifying a reasonable belief that evidence would have been destroyed?
 2. Whether there existed facts justifying a reasonable belief that the individual in the bedroom posed a risk to the safety of the officers or others?
2. Whether the cocaine and buy money found on Wimberly's person must be suppressed as the fruit of an illegal search?

III. DISCUSSION

The discussion section of this opinion will be divided into four main parts:

1. The standard of review with regard to a motion to suppress;
2. The text as well as the applicable general rules and principles of the Fourth Amendment of the United States Constitution and Article I, Section Eight of the Pennsylvania Constitution which apply to this case;
3. Why the seizure of the packaging material found on the television in the bedroom was illegal;
4. Why the seizure of the drugs and buy money found on Wimberly's person was illegal.

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. Fourth Amendment and Article I, Section Eight General Rules and Principles

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 Fourth Amendment and Article I, Section Eight do not prohibit all searches and seizures only unreasonable ones. *Commonwealth v. Beaman*, 880 A.2d 578, 582 (Pa. 2005). "Thus, the central question in any litigation challenging a particular search or seizure is whether that search or seizure was constitutionally "reasonable." *Ibid.*

Except for a few established exceptions, warrantless searches and seizures are considered to be unreasonable. *Commonwealth v. Hughes*, 836 A.2d 893 (Pa. 2003); *Commonwealth v.*

Cleckley, 738 A.2d 427, 429 (Pa. 1999). One such exception is when a person consents to a search. *Cleckley*, 738 A.2d at 429; *Commonwealth v. Blasoili*, 685 A.2d 151, 156 (Pa. Super. 1996), *aff'd*, 713 A.2d 1117 (Pa. 1998). In order for the consent to be valid, it must be unequivocal, specific, and voluntary. *Commonwealth v. Gibson*, 638 A.2d 203, 207 (Pa. 1994); *Commonwealth v. Edwards*, 735 A.2d 723, 725 (Pa. Super. 1999). The Commonwealth bears the burden of proving that consent was given to a warrantless search. *Commonwealth v. Acosta*, 815 A.2d 1078, 1083 (Pa. Super. 2003), *app. denied*, 839 A.2d 350 (Pa. Super. 2003).

The expectation of privacy protected by the United States and Pennsylvania Constitutions has been held to be greatest in one's home. *Commonwealth v. Richter*, 791 A.2d 1181, 1184 (Pa. Super. 2002). Absent consent or exigent circumstances, a private home may not be entered and searched without a warrant, even if probable cause exists. *Commonwealth v. Walker*, 836 A.2d 978, 981 (Pa. Super. 2003); *Commonwealth v. Santiago*, 736 A.2d 624, 631 (Pa. Super. 1999), *app. denied*, 749 A.2d 470 (Pa. 2000). Exigent circumstances arise where the need for prompt police action is imperative. *Commonwealth v. Griffin*, 785 A.2d 501, 505 (Pa. Super. 2001); *Commonwealth v. Peterson*, 596 A.2d 172, 179 (Pa. Super. 1991), *aff'd*, 636 A.2d 615 (Pa. 1993).

The Commonwealth bears the burden of establishing by clear and convincing evidence that circumstances surrounding the search were truly exigent and that the exigency was in no way attributable to the decision to forgo obtaining a search warrant. *Commonwealth v. English*, 839 A.2d 1136, 1141 (Pa. Super. 2003); *Commonwealth v. Rispo*, 487 A.2d 937, 940 (Pa. Super. 1985). “ ‘Moreover, all decisions made pursuant to the exigent circumstances exception must be made cautiously, for it is an exception which by its nature can very easily swallow the rule unless

applied in only restricted circumstances.” *English*, 839 A.2d at 1141 (quoting *Commonwealth v. Weik*, 521 A.2d 44, 47 (Pa. Super. 1987)); *see also*, *Commonwealth v. Conn*, 547 A.2d 768, 770 (Pa. Super. 1998), *app. denied*, 557 A.2d 721 (Pa. 1989). Also, “[i]t is well established that police cannot rely upon exigent circumstances to justify a warrantless entry [and search] when the exigency derives from their own actions.” *Commonwealth v. Demshock*, 854 A.2d 553, 557 (Pa. Super. 2004); *see also*, *Walker*, 836 A.2d at 981; *Commonwealth v. Winfield*, 835 A.2d 365, 369 (Pa. Super. 2003).

The determination of whether exigent circumstances exists requires an examination of all the surrounding circumstances of a particular case. *Griffin*, 785 A.2d at 505. This determination requires that a number of factors be considered. Among those factors are:

- (1) the gravity of the offense;
- (2) whether there is a reasonable belief that the suspect is armed;
- (3) whether there is a clear showing of probable cause;
- (4) whether there is a strong showing that the suspect is within the premises to be searched;
- (5) whether there is a likelihood that the suspect will escape;
- (6) whether the entry was peaceable;
- (7) the time of entry, i.e., day or night;
- (8) whether the officer was in hot pursuit of a fleeing felon;
- (9) whether there is a likelihood that evidence may be destroyed;
- (10) whether there is a danger to police or others.

Commonwealth v. Roland, 633 A.2d 269, 270-71 (Pa. 1994); *Demshock*, 854 A.2d at 555-56; *Griffin*, 785 A.2d at 505. These factors are to be balanced against one another to determine whether the warrantless intrusion was justified. *Roland*, 633 A.2d at 271; *Demshock*, 854 A.2d at 555-56. Not all of these factors will be present in every particular case, but that does not render the situation non-exigent. *Commonwealth v. Stewart*, 740 A.2d 712, 718 (Pa. Super. 1999), *aff'd*, 798 A.2d 697 (Pa. 2002).

“Under exigent circumstances, protective sweeps are a well-recognized exception to the warrant requirement.” *Commonwealth v. Witman*, 750 A.2d 327, 335 (Pa. Super. 2000), *app. denied*, 764 A.2d 1053 (Pa. 2000), *cert. denied*, 534 U.S. 815 (2001).¹ A protective sweep is a quick and limited search of the premises conducted to protect the safety of the police officers and others. *Maryland v. Buie*, 494 U.S. 325, 327 (1990); *Commonwealth v. Crouse*, 729 A.2d 588, 592 (Pa. Super. 1999), *app. denied*, 747 A.2d 364 (Pa. 1999). A protective sweep is envisioned as a search for persons. *Witman*, 750 A.2d at 336. The protective sweep may not be lengthy or unduly disruptive, and it must be swift and target only those areas where a person could reasonably be expected to hide. *Ibid*. A protective sweep is not a full search of the premises, but must be confined to a visual inspection of those places in which an individual may be hiding. *Crouse*, 729 A.2d at 592.

C. The Packaging Material Found on the Television in the Bedroom

Corporal Kreitz saw the packaging material on the television when he entered the bedroom of the third floor apartment. At the time Corporal Kreitz entered the bedroom and saw the

¹ “[P]roperly conducted protective sweeps violate neither the Fourth Amendment of the United States Constitution nor Article I, Section 8 of the Pennsylvania Constitution.” *Witman*, 750 A.2d at 335.

packaging material, a search warrant had not been obtained. Under the plain view doctrine, evidence which is in plain view may be seized absent a search warrant if two criteria are met. *Commonwealth v. McCree*, 857 A.2d 188, 190 (Pa. Super. 2004), *app. granted*, 876 A.2d 394 (Pa. 2005). “First, the evidence must be seen from a lawful vantage point. Second, it must be immediately apparent to the viewer that the object in question is contraband or incriminating evidence.” *Ibid.* (quoting *Commonwealth v. Ellis*, 662 A.2d 1043, 1049 (Pa. 1995)). There is no dispute that the packaging material was immediately apparent to be contraband/incriminating evidence. The issue is whether Corporal Kreitz viewed the packaging material from a lawful vantage point. Therefore, the crucial inquiry is whether Corporal Kreitz was lawfully permitted to be in the bedroom. There are two possible theories which would justify Corporal Kreitz being in the bedroom without a search warrant: consent and exigent circumstances.

1. Bell did not Consent to a Search of the Third Floor Apartment

For purposes of this discussion, the court will assume that Bobbie Bell had the authority to consent to a search of the apartment². The Commonwealth has not carried its burden of establishing that Bell consented to a search of the third floor apartment and entry by Corporal Kreitz into the bedroom. The testimony established that Corporal Kreitz knocked on the door of the third floor apartment and Bell answered it. Corporal Kreitz identified himself as a police officer, informed Bell that a search warrant for the apartment was being obtained, and asked if they could come in. Bell allowed Corporal Kreitz and the other members of the DTF to come into the apartment and enter the foyer area. These facts establish that Bell consented to Corporal

² The Commonwealth did not introduce any evidence as to the age of Bell nor as to her authority to consent to

Kreitz and the other members of the DTF entering the third floor apartment. However, consent to enter the apartment is not the same as consent to search the apartment.

The evidence presented does not establish that Bell unequivocally consented to a search of the third floor apartment. There is no evidence that Bell explicitly stated that Corporal Kreitz and the members of the DTF could search the third floor apartment and enter the various rooms. In fact, Corporal Kreitz testified that in no way, shape, or form did he even ask Bell for her consent to search the third floor apartment. Thus, the evidence presented fails to establish that Bell gave Corporal Kreitz her unequivocal consent to search the apartment and enter the rooms therein.

Bell's act of permitting Corporal Kreitz and the DTF members to enter into the third floor apartment cannot be construed as her consenting to a search of the third floor apartment. In *Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996), the Supreme Court, in establishing the criteria to be used in determining if a consent was unequivocal, ruled that acquiescence did not establish consent. The factual scenario in *Melendez* was one in which the Philadelphia Police Department had been conducting a three week investigation into possible drug activity at 5155 Pennway Street. The police had the residence under surveillance, and observed the defendant, Patricia Melendez, exit the residence and get into her vehicle. Melendez drove away from the residence and was stopped by the police after a short distance. *Melendez*, 676 A.2d at 227. The police removed her from the vehicle and searched her purse. The search revealed a .25 caliber handgun, a large amount of cash, and a suspected drug tally sales sheet. *Ibid.* The police informed Melendez that they were getting a search warrant for her residence and asked if she would go there with them. *Id.* at 230. The police then transported Melendez back to 5155

Pennway Street and used her keys to gain entry to the residence. *Id.* at 227. Upon entering the residence, the police observed Melendez's co-conspirator holding a bag of cocaine. The police then secured the residence and its occupants while waiting for approval of their search warrant application. The search warrant arrived about an hour later. The search conducted pursuant to the warrant revealed drugs, cash, and other evidence. *Ibid.*

Melendez sought the suppression of the items seized from the 5155 Pennway residence asserting that the warrantless entry was illegal. The Commonwealth argued that Melendez had consented to returning to the residence with the police and to their use of her keys to enter the residence. The Pennsylvania Supreme Court found that Melendez had not consented to the police entering her residence and that this warrantless entry violated her rights under the Fourth Amendment of the United States Constitution and Article I, Section Eight of the Pennsylvania Constitution. *Melendez*, 676 A.2d at 230.

The Supreme Court stated, "There is no evidence of record that [Melendez] consented to accompany police or to have them enter her house." *Melendez*, 676 A.2d at 230. There was no evidence establishing that Melendez gave her express consent for the police to enter her residence. *Ibid.* n. 8. While Melendez did not tell the police that they could not enter her residence or protest their entry in some manner, the Supreme Court determined that her acquiescence did not establish consent on her part. *Ibid.* The Supreme Court noted that the Commonwealth has the burden of proving consent, and that "[t]his burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Ibid.* (quoting *Commonwealth v. Davenport*, 308 A.2d 85, 88-89 (Pa. 1973)).

Similar to *Melendez*, the Commonwealth here has, at most, established acquiescence by Bell. There is no evidence that Bell told Corporal Kreitz or the other members of the DTF that they could not move from the living room to the bedroom or otherwise objected to their movement in the apartment. But, there also is no evidence that Bell gave her express consent to Corporal Kreitz or the other members of the DTF so that they could move about the apartment and go into the bedroom. As in *Melendez*, Bell's acquiescence is insufficient to establish consent.

The fact that Bell consented to Corporal Kreitz and the other members of the DTF's entry into the apartment and allowed them to come into the living room does not equate to consent to search other parts of the apartment. In *Commonwealth v. Guerrero*, the Allentown Police Department was conducting a drug investigation. 646 A.2d 585 (Pa. Super. 1994). The police had reason to believe that a drug courier was on board a bus heading to Manhattan that was scheduled for a stop at the Allentown bus terminal. One of the five individuals that disembarked the bus was the defendant, Juan Guerrero. *Id.* at 586. One of the police officers approached Guerrero and identified himself and showed Guerrero his badge. Guerrero had little comprehension of English, so he and the officer communicated through gestures. *Ibid.* Through gestures, the officer communicated to Guerrero that he wanted to look inside of his camera bag.

Guerrero opened the bag for the officer. He showed the officer the empty side pockets, and then opened the top flap. *Guerrero*, 646 A.2d at 586. Guerrero then took items out of the camera bag one at a time and showed them to the officer. The only item Guerrero did not take out was a lunch bag size brown paper bag. *Ibid.* The officer reached into the camera bag that Guerrero was

holding and opened the brown paper bag. *Ibid.* The brown paper bag contained 400 individual packets of heroine.

Guerrero sought to have the heroine suppressed on the basis that he had not consented to the search of his bag by the officer. *Guerrero*, 646 A.2d at 585. The trial court denied his suppression motion. It found that Guerrero had consented to the search of his camera bag, and that this consent necessarily included the consent to examine the nature and content of whatever was in the bag. *Id.* at 586. The Pennsylvania Superior Court disagreed and found that the officer's act of reaching into the camera bag to seize the brown paper bag violated Guerrero's Fourth Amendment and Article I, Section Eight rights thereby necessitating suppression of the heroine. *Id.* at 588.

The Superior Court found that Guerrero had given limited consent to search his camera bag. *Guerrero*, 646 A.2d at 586. The Superior Court found that "[t]here was no verbal grant of consent to search; no license given for the officer to reach into the bag." *Ibid.* The Superior Court determined that Guerrero's course of conduct with regard to the contents of the camera bag delineated his scope of consent. *Id.* at 587. Guerrero retained control of the camera bag and its contents throughout the interaction with the officer. *Id.* at 586. Guerrero reached into the bag and displayed the contents to the officer item by item and then returned each item before displaying the next. *Ibid.* Guerrero's specific and carefully controlled course of conduct demonstrated that he was only consenting to a search of what he was willing to show the officer. Thus, the Superior Court determined that the officer's act of reaching into the camera bag and seizing the brown paper bag was non-consensual because Guerrero had not given an express consent to such an act and the act was contrary to Guerrero's prior actions limiting the scope of his consent. *Id.* at 587.

If Bell's actions are to be interpreted as her giving consent to a search, then, similar to *Guerrero*, those same actions limited the scope of her consent. Bell permitted the members of the DTF to enter the third floor apartment, come into the foyer area, and then enter the living room. Bell thereby limited the DTF's access to two rooms in the third floor apartment. There is no testimony from which it could be inferred that Bell intended to grant the DTF more access than this. There is no testimony that Bell was shepherding the members of the DTF through the various rooms of the third floor apartment. In fact, she was not asked for permission to search, rather, upon viewing the legs of Wimberly, Officer Kreitz immediately went to the room where Wimberly was. Bell and Corporal Kreitz's entry into the living room was more likely the result of five people being present in a confined foyer area than Bell's desire to guide members of the DTF through the rooms of the apartment. As such, if Bell's acts are to be interpreted as consent to a search, then her conduct delineated the scope of consent to only two rooms in the third floor apartment and those two rooms did not include the bedroom.

Accordingly, the Commonwealth has failed to present evidence to establish that Bell consented to a search of the third floor apartment, which would have thereby permitted Corporal Kreitz to enter the bedroom without a search warrant. The court must now determine whether exigent circumstances existed to justify Corporal Kreitz's entry into the bedroom.

2. Exigent Circumstances did not Exist to Justify the Protective Sweep into the Bedroom

The evidence presented fails to establish that exigent circumstances existed so as to justify Corporal Kreitz and the other member of the DTF entering the bedroom as part of a protective sweep.

a. Protective Sweep to Prevent the Destruction of Evidence

The destruction of evidence may create an exigency sufficient to justify a warrantless entry and search. *Conn*, 547 A.2d at 771. A warrantless entry and search would be justified if the police officer had probable cause to believe that contraband is present and, based on the surrounding circumstances, reasonably believed that the evidence would be destroyed before a search warrant could be secured. *Ibid*. In determining whether that belief was reasonable, several factors must be looked at:

- (1) the degree of urgency involved and the amount of time necessary to obtain a warrant;
- (2) a reasonable belief that the contraband is about to be removed;
- (3) the possible danger to police officers guarding the site of the contraband while a search warrant is sought;
- (4) information indicating the possessors of the contraband are aware that police are on their trail;
- (5) the ready destructibility of the contraband; and
- (6) whether the police have fully availed themselves of an earlier opportunity to obtain a search warrant.

Ibid. “However, ‘mere speculation that evidence **may** be destroyed because suspects **may** learn of police activity is inadequate to justify a warrantless entry ...’” and search. *Walker*, 836 A.2d at 981 (quoting *Melendez*, 676 A.2d at 231) (emphasis in original).

The evidence presented fails to establish a reasonable belief by Corporal Kreitz that the alleged contraband and evidence located in the third floor apartment was in danger of being destroyed by the occupants. The occupants of the third floor apartment were alleged to have been in the business of narcotics trafficking. The participants in this business endeavor would not destroy their product and source of income without a reason. The occupants of the third floor apartment would have had a reason to destroy the drugs that were in the apartment if the police knew that the drugs were there and were on their way to seize the drugs and arrest the occupants. However, the evidence fails to establish facts from which a reasonable belief could be had that the occupants of the third floor apartment had or could have had this knowledge.

One possible way that the occupants of the third floor apartment could have gained such knowledge is if they were aware of Gilmore’s arrest. Once Gilmore was arrested, it would not be long before the police connected him to the third floor apartment. In fact, the DTF already suspected he resided at the 316 High Street address . The DTF had made controlled buys from 316 High Street on prior occasions, but there was no testimony presented that the purchases were made from Gilmore or that they were made in the third floor apartment. In fact, after arresting Gilmore and going to 316 High Street, the DTF did not know in which apartment at 316 High Street Gilmore lived.

After connecting Gilmore to the third floor apartment, the police would then want to search the apartment in the hopes of discovering Gilmore's drug supply. Gilmore's arrest would set in motion a chain of events that would likely bring the police right to the front door of the third floor apartment. As such, Gilmore's arrest would provide a reason for the occupants of the third floor apartment to destroy the drugs located in the apartment. But, the evidence fails to establish that the occupants of the third floor apartment were or were likely aware of Gilmore's arrest.

Gilmore was arrested in the 400 block of Park Avenue. The Commonwealth did not provide any testimony which specified the distance between that location and 316 High Street. Nevertheless, the court by common knowledge is aware that Gilmore's arrest location is approximately three blocks away from the third floor apartment at 316 High Street. The DTF arrested Gilmore in broad daylight on a public street, but the arrest took place outside of the sight and sound of the third floor apartment. The distance of the arrest makes it unlikely that the occupants of the third floor apartment would have learned of Gilmore's arrest from a sensory observation of it. *Compare, Commonwealth v. Frank*, 605 A.2d 356 (Pa. Super. 1992) (Exigent circumstances existed when there was a reasonable risk that an individual had observed his co-conspirator's arrest when the arrest took place outside of the apartment building where the individual lived.).

The evidence presented fails to demonstrate that any individual was or could have been in contact with the occupants of the third floor apartment and informed them that Gilmore had been arrested and/or that the DTF was on its way to the apartment. There is no evidence that a witness to the arrest made or attempted to make contact with the occupants of the third floor apartment.

There is no evidence that anyone who had seen the DTF approach 316 High Street attempted to make contact with the occupants of the third floor apartment. *Compare, Commonwealth v. Lopez*, 612 A.2d 520 (Pa. Super. 1992), *app. denied*, 622 A.2d 1375 (Pa. 1993) (Exigent circumstances existed when there was a reasonable risk that the occupants of a residence had been informed of police presence when an individual who had just exited the residence looked in the direction where two officers were in an unmarked cruiser conducting surveillance of the residence, returned to the front door of the residence, paused momentarily, and then ran from the residence); *Commonwealth v. Williams*, 602 A.2d 350 (Pa. Super. 1992) (Exigent circumstances existed where there was a reasonable risk that an undercover officer's cover was revealed to individuals in a residence where had had just made a controlled buy when an individual passing him on the street at a distance of approximately three to five feet from the residence greeted him by saying, "Hello, Officer."). There is no evidence which would support a conclusion that there was a danger that the occupants of the third floor apartment had been tipped off about Gilmore's arrest and the impending search such that there was a reasonable risk that the evidence would be destroyed, thereby justifying a warrantless protective sweep. To the contrary, Wimberly was simply lying on a bed apparently unaware of all police activity until he was confronted by Corporal Kreitz.

The evidence in the third floor apartment was not in danger of being destroyed until the DTF knocked on the door. The evidence presented demonstrates the occupants of the third floor apartment would not have been aware of law enforcement's interest in the apartment until this point. Once the DTF knocked on the door and made their presence known, the occupants of the third floor apartment would have had a reason to destroy the drugs and the evidence was in danger.

But, the danger to the evidence was created by the DTF's arrival ahead of the search warrant, and the DTF cannot be allowed to create their own exigency and then use it to justify a protective sweep to prevent the destruction of evidence. *See, Demshock*, 854 A.2d at 557; *Walker*, 836 A.2d at 981; *Winfield*, 835 A.2d at 369.

Accordingly, the evidence presented fails to establish that Corporal Kreitz was justified in conducting a protective sweep into the bedroom to prevent the destruction of evidence.

b. Protective Sweep for the Safety of the Officers and Others

The evidence presented fails to establish a reasonable belief that the individual in the bedroom was a threat which would justify Corporal Kreitz conducting a protective sweep into the bedroom. The purpose of the protective sweep is to protect the police officers, but it must be justified by the circumstances. *Crouse*, 729 A.2d at 592. The protective sweep "... must be supported by articulable facts and inferences giving rise to reasonable suspicion that the area to be swept harbors an individual posing a danger to the police." *Witman*, 750 A.2d at 336; *Crouse*, 729 A.2d at 598. In deciding whether the facts justify a protective sweep, the court must consider all of the facts objectively and from the position of the reasonably prudent police officer. *Buie*, 494 U.S. at 327.

The testimony presented does not establish that there were articulable facts that would allow a reasonably prudent officer to believe that the individual in the bedroom posed a threat to the safety of the officers and others. There was no testimony that Gilmore had been carrying a weapon when he was arrested. There was no testimony that on prior occasions Gilmore or his associates had been known to carry weapons. There was no testimony that Gilmore or his

associates had been known to be violent. Also, there is no testimony that the DTF knew that the individuals in the third floor apartment were armed or that weapons were likely to be found there. In fact, Corporal Kreitz testified that he was not sure who, if anyone, he would even find there. Furthermore, Officer Kreitz's description as to how he and the second officer approached Wimberly without drawing any weapons nor taking any other safety precautions is verification the officers did not perceive Wimberly's presence to create a threat to their safety.

The fact that an individual is present in an apartment suspected of being a base of operations for a drug selling business is insufficient, in and of itself, to create a reasonable belief that the individual poses a threat to the safety of the officers and others. In *Commonwealth v. Zahir*, the Pennsylvania Supreme Court rejected a "guns follow drugs" presumption that would justify a pat down search of an individual detained as part of a drug investigation as contrary to the rule that the concern for the officer's safety must be based upon the totality of the facts and circumstances of the particular case. 751 A.2d 1153 (Pa. 2000); *see also, Commonwealth v. Grubb*, 595 A.2d 133, 135-36 (Pa. Super. 1991) (Fact that search was to be of suspected drug dealer's base of operations did not, in and of itself, justify the police disregarding the knock and announce rule for safety reasons.); *Commonwealth v. Dean*, 693 A.2d 1360, 1363 (Pa. Super. 1997), *app. denied*, 702 A.2d 1058 (Pa. 1997) (Police could dispense with the knock and announce rule for safety reasons when executing a warrant at a suspected drug trafficker's residence when they had credible information from a confidential informant who had been in the defendant's residence two days prior to the execution of the search warrant that defendant possessed a handgun.). It is not reasonable to conclude that an individual is a danger to the safety of the

officers and others just by his mere presence at a location. Additional facts are needed to justify a conclusion that an individual is a threat and thereby permit a protective sweep. Here, those facts were lacking.

Accordingly, the evidence presented fails to establish that Corporal Kreitz was justified in conducting a protective sweep into the bedroom out of a concern that the individual laying in the bed was a threat to the safety of the officers or others.

3. The Packaging Material Found on the Television Must be Suppressed

The packaging material must be suppressed because the Commonwealth has failed to satisfy the two part test under the plain view doctrine. The Commonwealth has failed to establish that Corporal Kreitz viewed the packaging material from a lawful vantage point. In order to view the packaging material, Corporal Kreitz had to be in the bedroom. Corporal Kreitz did not have justification to be in the bedroom when he viewed the packaging material; therefore, he was not at a legal vantage point when he viewed it. Accordingly, the packaging material must be suppressed.

D. The Drugs and Buy Money Found on Wimberly's Person

The drugs and buy money found on Wimberly's person must be suppressed as the fruit of the illegal protective sweep into the bedroom. "The "fruit of the poisonous tree" doctrine excludes evidence obtained from, or acquired as a consequence of, lawless official acts" *Commonwealth v. Brown*, 700 A.2d 1310, 1318 (Pa. Super. 1997). The fruit of the poisonous tree doctrine does not require suppression of all evidence that comes to light but for the illegal actions of the police. *Commonwealth v. Cunningham*, 370 A.2d 1172, 1176 (Pa. 1977); *Commonwealth v. Cephas*, 291 A.2d 106, 109 (Pa. 1972). Evidence will be suppressed as the fruit of the

poisonous tree if it has come to light by way of exploiting the illegal action. *Cunningham*, 370 A.2d at 1177; *Cephas*, 291 A.2d at 109; *Commonwealth v. Abbas*, 862 A.2d 606, 610 (Pa. Super. 2004).

The drugs and buy money came to light because of Corporal Kreitz's illegal protective sweep into the bedroom. Corporal Kreitz exploited the illegal protective sweep in that it placed him in a position to interact with Wimberly. It is through this interaction that he obtained Wimberly's consent to search. Without this interaction there would have been no consent and no search. As such, without the protective sweep into the bedroom there would have been no consent and no search.³

Accordingly, the drugs and buy money found on Wimberly must be suppressed.

IV. CONCLUSION

Wimberly's motion to suppress evidence is granted.

³ This court is concerned that the Commonwealth has not submitted a brief in support of its position as to why the evidence seized during this search should be deemed to have been lawfully seized and not subject to suppression even though the court granted the Commonwealth a continuance to obtain the transcript so it could properly brief its contentions. It might be presumed that the Commonwealth would have argued that the evidence seized is admissible under the "inevitable discovery" rule. *See, Melendez, supra; Commonwealth v. Mason*, 637 A.2d 251 (Pa. 1993). However, the Commonwealth introduced no testimony in support of the factual criteria necessary to determine if the rule should be applied to this case and has chosen not to submit argument in support of that or any other theory. Although this failure by the Commonwealth may have well justified this court in granting Wimberly's motion, we nevertheless have endeavored to decide the case based upon our determination of the facts from the testimony presented and the applicable law.

ORDER

It is hereby ordered that the Omnibus Pretrial Motion of Defendant Kenneth Wimberly filed January 17, 2006 is GRANTED.

The packaging material found on the television set located in the bedroom of the third floor apartment at the 316 High Street address is SUPPRESSED.

All evidence seized as a result of the search of Defendant Kenneth Wimberly's person is SUPPRESSED.

BY THE COURT,

William S. Kieser, Judge

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