

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 1295-2005
 :
 KENNETH WIMBERLY, :
 :
 Defendant : 1925(a) OPINION

Date: August 10, 2006

**OPINION IN SUPPORT OF THE ORDER OF MAY 24, 2006 IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

The Commonwealth has charged Defendant Kenneth Wimberly with numerous violations of the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §§ 780-101 - 144. The charges arise from the evidence seized by members of the Lycoming County Drug Task Force (hereafter “the DTF”) that was found in the bedroom of the apartment where Wimberly was located and upon his person.

On June 23, 2006, the Commonwealth filed a notice of appeal stating that it was appealing this court’s May 24, 2006 order granting Wimberly’s motion to suppress. On June 26, 2006, this court issued an order in compliance with Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure directing the Commonwealth to file a concise statement of matters complained of on appeal. On July 12, 2006, the Commonwealth filed its statement of matters.

In the statement of matters, the Commonwealth asserts two issues. They are:

1. Did the court err in granting the defendant (sic) motion to suppress evidence on the basis the police had no consent to search or conduct a protective sweep of the apartment when the defendant did not raise this issue in his motion to suppress or prior to the commencement of the hearing on the motion.

2. Did the Court err in finding consent was not given by an occupant of the apartment searched to conduct a search or protective sweep of the premises where the occupant consented to the police entering the premises in order to secure the premises until a search warrant was obtained.

Commonwealth's Concise Statement of Matters Complained of on Appeal. The second issue asserted by the Commonwealth has been addressed by this court's May 24, 2006 Opinion and Order. The court hereby relies upon and reasserts the reasoning set for in that Opinion and Order in response to the second issue. The following opinion will address the first issue.

On August 5, 2005, members of the DTF went to 316 High Street, Williamsport, Pennsylvania, in anticipation of the issuance of a search warrant, to secure the suspected apartment of the individual they had just arrested. Notes of Testimony, 6, 12 (2/3/06). That individual was involved in two controlled buys of drugs earlier in the day. *Ibid.* The members of the DTF gained entry into the apartment with the consent of Bobbie Bell, the individual who answered the door when the DTF knocked. *Id.* at 9. While inside the apartment, Corporal Dustin Kreitz, a member of the DTF, noticed an individual lying on a bed in the bedroom of the apartment. *Id.* at 22, 23. Corporal Kreitz and another member of the DTF proceeded toward the bedroom and the unidentified individual. *Id.* at 23. It was upon entering the bedroom that Corporal Kreitz observed material typically used to package drugs for sale laying on top of the television located approximately five feet away from the individual lying in the bed. *Id.* at 18. The individual lying in the bed was Wimberly. Before Wimberly exited the bedroom, Corporal Kreitz asked him if he would consent to a search of his person. *Id.* at 28. Wimberly gave his consent, and Corporal Kreitz conducted a search of Wimberly's person. *Id.* at 28, 30. The search revealed a plastic bag containing smaller plastic ziplock bags holding suspected cocaine

and \$358 worth of United States currency, \$80 of which was prerecorded buy money. *Id.* at 11, 32-35.

On January 17, 2006, Wimberly filed an Omnibus Pre-trial Motion asserting, *inter alia*, a motion to suppress evidence. On February 3, 2006, this court held an evidentiary hearing regarding the Omnibus Pre-trial Motion. Following the evidentiary hearing, the court, at Wimberly's request, permitted the filing of legal memorandum in support of each side's respective position. Wimberly's brief was due February 22, 2006. The Commonwealth's brief was due March 6, 2006. Wimberly filed his brief on February 23, 2006. The Commonwealth did not file a brief.

On May 24, 2006, this court issued an Opinion and Order granting Wimberly's motion to suppress evidence. The court determined that the packaging material found in the bedroom where Wimberly was located and the cocaine and buy money that was found on his person had to be suppressed as the fruit of an illegal search. The court found that the search of the apartment by members of the DTF violated Wimberly's right to be free from unreasonable searches under the Fourth Amendment of the United States Constitution and Article I, Section Eight of the Pennsylvania Constitution. The court determined that while Bobbie Bell consented to an entry into the apartment she did not give the members of the DTF consent to search it and that exigent circumstances did not exist so as to permit a warrantless search of the apartment. On June 20, 2006, the Commonwealth filed a Motion to Reconsider Grant of Motion to Suppress. The court denied that motion in a June 23, 2006 order.

In the first issue on appeal, the Commonwealth is asserting that the evidence seized as a result of the search of the apartment and Wimberly's person should not have been suppressed

on the basis that the members of the DTF did not have consent to conduct a search or protective sweep of the apartment. The Commonwealth is asserting that Wimberly waived the argument regarding lack of consent because it was not raised in the Omnibus Pre-trial Motion. An omnibus pre-trial motion, like any other motion must “... state with particularity the grounds for the motion, the facts that support each ground, and the type of relief or order requested.” Pa.R.Crim.P. 575(A)(2)(c); *see also*, Pa.R.Crim.P. 581(D) (A motion to suppress evidence “... shall state specifically and with particularity the evidence sought to be suppressed, the grounds for suppression, and the facts and events in support thereof.”). Generally, if a motion fails to state a ground for relief, then that ground is waived. Pa.R.Crim.P. 575(A)(3). In reviewing Wimberly’s Omnibus Pre-trial Motion, the Commonwealth is partially correct.

Wimberly’s motion to suppress evidence was titled “Motion to Suppress Fruits of a Search Warrant.” Wimberly’s Omnibus Pre-trial Motion, 3. But the allegations in the motion to suppress do more than challenge the search warrant. First, Wimberly alleges that a search of the apartment where he was located and of his person was conducted. *Id.* at ¶13. Next, Wimberly alleges that these searches were in violation of his rights under the Fourth Amendment of the United States Constitution and Article I, Section Eight of the Pennsylvania Constitution. *Id.* at ¶14. These two allegations make it clear that the thrust of Wimberly’s motion to suppress evidence was a challenge to the legality of the search of the apartment and his person. As to the legal theories supporting Wimberly’s allegation that the searches were in violation of the Fourth Amendment and Article I, Section Eight, Wimberly alleged that the search warrant and the affidavit of probable cause in support of the search warrant were deficient, that the Pennsylvania Rules of Criminal Procedure Rules 200 to 210 were not

complied with, that there were no exigent circumstances to justify the search, and that Wimberly did not voluntarily consent to a search. *Id.* at ¶¶ 16 – 21. It is this last legal theory in which Wimberly raises the issue of consent to search. *Id.* at ¶21. Therefore, Wimberly did raise the issue of his consent to search in the Omnibus Pre-trial Motion.

However, the issue of consent was only raised as to Wimberly’s consent. No where in the motion to suppress evidence is it alleged that Bobbie Bell did not give the members of the DTF consent to search the apartment or that the DTF exceeded the consent she may have given. In this regard, the Commonwealth is correct that the Omnibus Pre-trial Motion did not raise the issue of Bobbie Bell’s consent. Even so, this failure does not result in a waiver of the issue.

A *de facto* motion to amend the suppression motion occurred at the February 3, 2006 suppression hearing. At the hearing, Wimberly clarified the issues in the Omnibus Pre-trial Motion that remained unresolved and the grounds for relief under the motion to suppress. Wimberly informed the court that the motion for additional discovery had been resolved. N.T., 3 (2/3/06). The motion *in limine* regarding other crimes evidence was quickly disposed of by the parties. *Ibid.* Then, Wimberly withdrew the motion to suppress statements. *Ibid.* The only matter remaining before the court was the motion to suppress evidence related to the search of the apartment and Wimberly’s person.

As to the motion to suppress, Wimberly, through counsel, brought into focus what was at issue and what he was challenging throughout the suppression hearing. First, Wimberly stated that the motion to suppress included evidence seized as a result of the search of his person and was not limited to evidence seized as the result of a search conducted pursuant to a search warrant despite the motion to suppress’ title of “Motion to Suppress Fruits of a Search

Warrant.” N.T., 4 (2/3/06). Wimberly stated, “... [the motion to suppress] may be mischaracterized by just saying suppress the fruits of the search warrant.” Ibid. Here, Wimberly made it clear to the court and the Commonwealth that the motion to suppress evidence entailed more than its title disclosed.

Although, Wimberly stated that the motion to suppress before the court was broader than its title in the Omnibus Pre-trial Motion he narrowed the scope of the motion to suppress as testimony was presented. Wimberly stated that he was not challenging the entry of the members of the DTF into the apartment. N.T., 18 (2/3/06). Wimberly also stated that he was not challenging the search warrant itself or the affidavit of probable cause in support thereof. Id. at 43, 44. Following the close of testimony, Wimberly stated on the record what issues his memorandum of law would be based upon. Id. at 58. Wimberly stated:

... the issues that I would be addressing in my motion would be: Did the police exceed the scope of their permission to be in the home? Did the police place Mr. Wimberly under investigatory detention without reasonable suspicion? Was his freedom restricted? Did he voluntarily agree to a pat down or a consent to search? Was there a second and subsequent search for which there was no reasonable suspicion, and was the plain feel law violated?

Id. at 53-54. The first issue recited by Wimberly directly placed Bell’s consent and scope of consent regarding a search of the apartment at issue.

The fact that Wimberly’s statement of this issue came at the close of testimony is not fatal. The statement of the issue characterized and put into context the evidence that was presented at the suppression hearing. The Commonwealth elicited from Corporal Kreitz that he knocked on the door of the third floor apartment and made contact with Bell. N.T., 9 (2/3/06). Corporal Kreitz testified that he asked Bell if he and the other members of the DTF would be

allowed to come into the apartment. Ibid. Corporal Kreitz testified that Bell allowed him and the other members of the DTF to enter the apartment. Ibid.

On cross examination, Wimberly elicited from Corporal Kreitz a description of the interaction he had with Bell. First, Corporal Kreitz provided a description of the apartment. He testified that the entrance of the third floor apartment opens into a foyer area. N.T., 22 (2/3/06). Corporal Kreitz then testified that if one was to turn left upon entering the foyer area one would come upon the living room of the apartment. Ibid. Crossing through the living room, one would then come to a short hallway that leads into a large bedroom. Ibid. Next, Corporal Kreitz testified as to his encounter with Bell. Corporal Kreitz testified that he and Bell stepped into the living room of the apartment. Ibid. He testified that he again advised Bell that he and the other members of the DTF were there to secure the apartment while a search warrant was obtained. Id. at 23. Wimberly then asked Corporal Kreitz point blank if he had in any way, shape, or form requested Bell's permission to search the premises. Ibid. Corporal Kreitz responded that he had not. Ibid. Corporal Kreitz further testified that it was while he was interacting with Bell in the living room that he observed the individual lying in the bed in the bedroom. Id. at 22-24. Upon making this observation, Corporal Kreitz testified that he and another officer proceeded immediately toward the bedroom and the individual. Id. at 23.

The point of this testimony was to determine whether Bell gave Corporal Kreitz and the DTF consent to search the apartment and if so the scope of this consent. By having Corporal Kreitz recount his interaction with Bell, Wimberly was trying to establish whether Bell had provided any verbal consent, as well as, whether Bell's conduct could have been interpreted to provide her consent. The testimony Wimberly presented on cross examination

demonstrates that Bell's consent to a search of the apartment was an issue Wimberly was raising. When Wimberly stated this issue at the close of testimony all he did was put a label on the testimony that was presented, nothing more.

The significance, or lack thereof, of Wimberly's recitation of the consent issue at the close of testimony is demonstrated by the Commonwealth's course of conduct in response to this issue. When the testimony concerning Corporal Kreitz's interaction with Bell was elicited on cross examination, the Commonwealth did not object to it as being irrelevant to the issues before the court. Specifically, the Commonwealth failed to object to Wimberly's specific question as to whether Corporal Kreitz had asked Bell for her permission to search the apartment. Nor did the Commonwealth object when the issue was set forth in Wimberly's recitation of the issues at the close of testimony. This is in contrast to the Commonwealth's conduct when it felt that an irrelevant issue was raised. For example, when Wimberly was questioning Officer Kreitz on cross examination regarding the actual conduct of the pat down search of his person the Commonwealth objected that it was not an issue as the issue before the court was whether Wimberly voluntarily consented to a search of his person. N.T., 31 (2/3/06). The Commonwealth had several opportunities at the suppression hearing to raise an objection to the introduction of the consent issue, but did not. The Commonwealth also had the opportunity to assert an objection to the court considering the consent issue by filing a brief setting forth its arguments as to why suppression of the evidence was not required. Again, the Commonwealth failed to take advantage of this opportunity. The Commonwealth's course of conduct in this matter demonstrates an understanding that the consent issue had been raised and was an issue before the court.

Accordingly, the Commonwealth's appeal should be denied and the May 24, 2006 order be affirmed.

BY THE COURT,

William S. Kieser, Judge

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