

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. CR – 1063 - 2006
	:
vs.	: CRIMINAL DIVISION
	:
ANDRE TARIQ KING,	:
Defendant	: Omnibus Pre-trial Motion

OPINION AND ORDER

Before the Court are Defendant's Motion to Suppress and Petition for Writ of Habeas Corpus, contained in Defendant's Omnibus Pre-trial Motion, filed September 8, 2006. A hearing on the motions was held December 12, 2006.

Defendant has been charged with possession of a controlled substance, escape, resisting arrest and theft and receiving stolen property, in connection with his detention and arrest on June 2, 2006, which followed police response to a caller who indicated three men outside her house were discussing drugs and one was threatening to shoot one of the others. Defendant contends the police did not have probable cause to arrest him, and the evidence and his subsequent actions should therefore be suppressed, and that the evidence is insufficient to support the charges.

With respect to the motion to suppress, the Commonwealth presented the testimony of three of the officers who participated in the investigation and arrest of Defendant. According to the officers, there was broadcast over the radio a report of three black males arguing over drugs and one threatening to shoot the other. The report included a specific location and gave a description of their clothing. After officers arrived at the scene and arrested one of the individuals, the search of whom revealed packets of heroin but no weapon, Lieutenant Bailey returned to his vehicle and radioed a request of County Communications to call back the original reporting person to ask whether any of the individuals were still in the area. Lieutenant Bailey was told yes, one of them "was getting into the bus right at this time." N.T. June 13, 2006, at p. 12. At that time he could see Defendant getting on the bus, and another officer blocked the bus from proceeding further by parking his car in front of it. Lieutenant Bailey then boarded the bus and instructed Defendant, who was the only male on the bus, "to get his

hands up where I could see them.” Id. at p. 13. According to Lieutenant Bailey, Defendant did not comply with that request but kept his hands hidden, “he at the same time was trying to conceal his hands. I don’t know if he was trying to dump something or going for a weapon. I wasn’t going to find out by not taking control of him. I immediately handcuffed him with a struggle.” Id. at p. 14. Defendant contends this “arrest” was not supported by probable cause, seeking to suppress the marijuana discovered in the search of his person which immediately followed.

An investigative detention is appropriate when police can articulate reasonable suspicion of criminal activity. Commonwealth v. DeHart, 745 A.2d 643 (Pa. Super. 2000). Further, for their safety, police officers may handcuff individuals during an investigative detention without it being considered an “arrest”. Commonwealth v. Rosas, 875 A.2d 341 (Pa. Super. 2005). In the instant case, the Court finds the officers had a reasonable suspicion that Defendant was involved in criminal activity: a witness had reported a discussion of drugs and a threat involving a weapon, detention of one of the individuals had revealed drugs but no weapon, the witness indicated that another of the individuals involved was at that very moment getting on the bus, Lieutenant Bailey saw Defendant getting on the bus at that same moment, and he matched the general description of one of the individuals. Further, the Court finds Lieutenant Bailey was justified in placing handcuffs on Defendant out of fear for his safety as well as the safety of others on the bus. The report indicated that one individual threatened to shoot another, no weapon had yet been found, and Defendant refused to show his hands, instead concealing them in such a manner as to cause Lieutenant Bailey to think he might be “going for a weapon”. Thus, Defendant was not subject to an arrest at the point he was handcuffed, but merely the continuation of a valid investigative detention.

With respect to the discovery of the marijuana, since such was not pursuant to a search incident to an arrest, it must be supported on some other basis. According to the officers’ testimony, after he was handcuffed, Defendant was escorted off the bus and an officer attempted to do a pat-down search for weapons. Defendant’s struggle made that difficult, but he was patted down and five bags of marijuana were discovered in his right front pants pocket. Since an officer may seize contraband during a lawful pat-down search for weapons if the

officer readily perceives, without further search, that what he is feeling is contraband, *See Commonwealth v. Moultrie*, 870 A.2d 352 (Pa. Super. 2005), the Court finds the seizure of the marijuana in the instant matter to be in conformance with the law, and thus not subject to suppression.

The Petition for Writ of Habeas Corpus challenges the sufficiency of the evidence to support the charges. While the Court has no problem finding sufficient evidence to support the charges of possession of a controlled substance, escape and resisting arrest, the charges of theft and, consequently, receiving stolen property, cannot stand.

The challenge to the charge of possession of a controlled substance is based on Defendant's assumption the evidence of the marijuana should be suppressed. Since that is not the case, the Court will address this issue no further.

With respect to the charge of escape, Officer Douglas testified that after the marijuana was discovered, Defendant was arrested and transported to the police station. Once they arrived at the station, Defendant, still in handcuffs, was instructed to stand at the back of the vehicle while the officer locked the doors, but Defendant "took off running like a shot" and had to be chased and tackled to be taken back into custody. Defendant thus clearly "unlawfully remove[d] himself from official detention", 18 Pa.C.S. Section 5121(a), and the charge is appropriate. Further, Defendant's contention the detention was not "official" because the arrest was not supported by probable cause is without merit, as explained *supra*.

With respect to the charge of resisting arrest, the evidence indicated that while an officer was attempting to do a pat down search for weapons, Defendant was "thrashing and struggling to avoid being patted down" and that "he was placed onto the ground...and enough people put enough weight on him that he was held still enough finally." N.T. June 13, 2006, at p. 26. In addition, an officer testified that when Defendant was lifted up off the ground and attempted to be placed in a police car he was still struggling, that he was "trying to get away from us", that he was "swinging his head around", and that he "head butted [him] in [his] left cheek", but that they "had enough man power there [they] were finally able to get him into the car". *Id.* at p. 27. The Court believes this evidence sufficient to support a finding that Defendant, with the intent of preventing the police from effecting a lawful arrest or from

discharging a duty, employed means which required substantial force to overcome the resistance. 18 Pa.C.S. Section 5104. *See also Commonwealth v. Miller*, 475 A.2d 145 (Pa. Super. 1984). The charge is thus appropriate. Again, Defendant's contention the arrest was not lawful is without merit, as explained *supra*.

The charge of theft, however, appears to be misplaced. Such a charge requires a showing that the actor "unlawfully [took], or exercise[d] unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa.C.S. Section 3921(a). Here, the Commonwealth is charging Defendant with theft of the handcuffs, but clearly he neither took them nor exercised control over them, as they were placed on him involuntarily. Likewise, Defendant cannot be charged with receiving stolen property as such a charge requires a showing that the actor "intentionally receive[d], retain[ed], or dispose[d] of moveable property of another knowing that it ha[d] been stolen, or believing that it ha[d] probably been stolen". 18 Pa.C.S. Section 3925(a). Defendant did not intentionally receive the handcuffs, nor would he have had any reason to think of them as "stolen". These two charges will therefore be dismissed. The remaining charges, however, will stand.

ORDER

AND NOW, this 13th day of December 2006, for the foregoing reasons, Defendant's Motion to Suppress is hereby DENIED. The Petition for Writ of Habeas Corpus is hereby granted in part and denied in part. The charges of theft and receiving stolen property, as contained in counts 4 and 5 of the information respectively, are hereby dismissed.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
PD
Gary Weber, Esq.
Hon. Dudley Anderson