IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1278-2008**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
STEVEN LYNN BLAGMAN,	**:**	
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's judgment of sentence dated July 28, 2009, and docketed July 31, 2009. The relevant facts follow.

On July 2, 2008, Pennsylvania State Police stopped a vehicle being driven by John Pearsall, because they knew his operating privilege was suspended. Appellant Steven Blagman was the front seat passenger in the vehicle. While talking to the driver, the police noticed Appellant attempting to place something beside him by the center arm rest. The police asked Appellant to exit the vehicle, whereupon they saw a plastic baggie containing white powder and chunks.

The police realized the white powder and chunks were probably cocaine. When the police began to take Appellant into custody, he kicked his sneaker off his foot. The sneaker contained additional crack cocaine. When Appellant kicked the sneaker off his foot, some of the cocaine was crushed into the ground and some of it dispersed into the air. The police subdued Appellant and placed him on the ground. The police retrieved as much of the cocaine from the sneaker and the ground as they could.

Appellant was arrested. A search of Appellant's person revealed $450.00 in assorted currency, a cell phone and additional bits of cocaine pieces and powder in Appellant's pants pocket. The police did not find a pipe or any other implement to smoke the crack cocaine.

The substances tested positive for cocaine; the total weight was 4.7 grams.

The police took the drugs, money and cell phone back to the State Police barracks so it could be logged into evidence. On the way back to the barracks, Appellant's cell phone rang and Trooper Tyson Havens answered it. The caller asked for S, who was later identified as Appellant. Trooper Havens said he was not S; he identified himself as T and asked what the caller wanted. The caller indicated he wanted to buy a "heavy ball," meaning an eight ball of crack cocaine. Trooper Havens made arrangements to meet the caller at the rear of the Shamrock bar. The caller described himself to Trooper Havens as a white male with a pink cast on his arm.

Trooper Havens went to the Shamrock bar and saw an individual meeting the caller's description. Trooper Havens arrested the caller, who was in possession of $180.00. After being advised of his ***Miranda*** rights, the caller agreed to talk with Trooper Havens.

The caller was identified as Lonnie Hoey. Mr. Hoey related he was there to purchase cocaine and that was what the $180.00 was for. Mr. Hoey identified S as Appellant and told Trooper Havens he had purchased crack cocaine from him in the past.

On July 10, 2008, a criminal complaint was filed against Appellant charging him with possession with intent to deliver cocaine and possession of drug paraphernalia.

Appellant's formal court arraignment was scheduled for September 8, 2008. At that time, he was represented by the Public Defender's office.

On January 23, 2009, James Protasio was appointed to represent Appellant. Due to the change in counsel, the pre-trial conference scheduled for February 5, 2009 was continued to April 9, 2009.

On April 22, 2009, a jury was selected in this case and the trial was scheduled for May 19, 2009.

On April 23, 2009, Attorney Protasio filed a Motion to suppress, claiming Trooper Havens conducted an illegal search when he answered Appellant's cell phone. In an Order dated April 28, 2009, the Court denied Appellant's Motion to Suppress because it was untimely.

A jury trial was held May 19, 2009. The jury found Appellant guilty of possession with intent to deliver a controlled substance and possession of drug paraphernalia.

On July 28, 2009, the Court sentenced Appellant to incarceration in a state correctional institution for 2 to 5 years for possession with intent to deliver a controlled substance and a consecutive 1 to 12 months for possession of drug paraphernalia.

Appellant filed his notice of appeal on August 26, 2009.

Appellant's only issue asserted in this appeal is that the trial court erred in denying the Motion to Suppress where Appellant's previous counsel failed to file such a motion and new counsel was assigned after the time for filing motions has passed. The Court cannot agree. Rule 581 of the Pennsylvania Rules of Criminal Procedure, which governs suppression motions, states in relevant part:

> 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.Cr.P. 581(B). The time limit for filing an omnibus pretrial motion is controlled by Rule 579(A), 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, or the attorney for the Commonwealth, 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.Cr.P. 579(A).

Appellant's arraignment was September 8, 2008. Appellant's motion to suppress evidence should have been contained in an omnibus pre-trial motion and it should have been filed on or before October 8, 2008. Instead, it was not filed until April 23, 2009. Appellant and his attorneys should have been aware of the grounds for the motion because the fact that Trooper Havens answered Defendant's cell phone was contained in the affidavit of probable cause that was filed with the criminal complaint. Neither original counsel nor current counsel asked for extension; therefore the time for filing was not extended by the court for cause shown. There was ample opportunity for defense counsel to file a suppression motion well prior to jury selection, but the motion was not filed until the day after jury selection.

The Court also does not believe the interests of justice required allowing Appellant to litigate his suppression motion. The jury was already selected by the time the motion was filed. Other than a change in counsel that occurred approximately 3 months before jury selection, there were no reasons stated in the motion to explain why it could not have been filed earlier. The Court's calendar is booked anywhere between one and two months in advance. As a practical matter, the motion could not have been heard between the

time it was filed and the jury trial in this case, because the Court's schedule was already full. In Lycoming County, the courts generally do not hear suppression motions or omnibus motions at the time of trial, in part so the jury is not sitting around waiting for a trial that may or may not occur depending on the results of the motion. To hear the motion in this case, the Court would have had to release the jury, hear the motion after May 19, and select another jury in June. Such a result would be unfair to the Commonwealth, as it had subpoenaed its witnesses, was ready for trial and had the same constitutional right to a jury trial as the accused. See Pa.Const., Art. 1 §6. Moreover, Appellant is not without a remedy, because he can raise this issue as an ineffective assistance of counsel claim in a Post Conviction Relief Act (PCRA) petition.

The Court finds this case is similar to ***Commonwealth v. Johnson***, 358 Pa.Super. 435, 443, 517 A.2d 1311, 1315 (1986), a case in which the Superior Court found the trial court did not abuse its discretion in denying as untimely appellant's pro se motion to suppress evidence when the motion was not brought to the court's attention until immediately prior to *voir dire* and for nearly a month prior to trial appellant was represented by counsel different from the counsel that he had employed at arraignment. Here, the motion was filed after *voir dire* and new counsel represented Defendant for nearly three months prior to jury selection.

In the alternative, the Court does not think Appellant would be successful on the merits. The police stopped the vehicle because they knew the driver had a suspended license. Appellant was the front seat passenger. During the stop, Appellant was reaching in the area of the center armrest. The police ordered him from the vehicle. The police observed a substance that appeared to be crack cocaine in the area where Appellant was reaching.

Based on their observations, the police had sufficient information to seize the substance and detain Appellant. During the investigatory detention, Appellant kicked off his shoe and the police saw more cocaine and seized it. The substances field tested positive for cocaine. At that point the police had probable cause to arrest Appellant for possession of a controlled substance. The police searched Appellant and seized drugs, cash and a cell phone from Appellant's person incident to his arrest. While the police had lawful custody of Appellant's cell phone, it rang and Trooper Havens answered it.

Only unreasonable searches and seizures violate the United States Constitution and the Pennsylvania constitution. The police have the authority to order occupants from a vehicle during a traffic stop. ***Maryland v. Wilson***, 519 U.S. 408, 117 S.Ct. 882, 886 (1997); ***Commonwealth v. Pratt***, 930 A.2d 561 (Pa.Super. 2007); ***Commonwealth v. Brown***, 439 Pa.Super. 516, 654 A.2d 1096 (Pa. Super. 1995). Case law decided under the Pennsylvania constitution provides more protection in some instances than the United States Constitution; however the Pennsylvania constitution permits warrantless searches if the police have probable cause and there are exigent circumstances. *See* ***Commonwealth v. Hernandez***, 594 Pa. 319, 935 A.2d 1275 (2007). The police clearly had probable cause to believe Appellant was engaged in drug activity given his possession of crack cocaine. Drug dealers commonly use cell phones to set up their drug transactions. Telephones only ring for a matter of seconds. It would be impossible for the police to get a search warrant for a ringing phone. By the time the police completed the paperwork and obtained a search warrant, the phone would have stopped ringing.

The Court also notes Appellant does not have a privacy interest in other people's phone conversations. Although Trooper Havens answered Appellant's phone, he

did not claim to be Appellant. Appellant was neither a party to nor part of Trooper Havens conversation with Mr. Hoey. Trooper Havens clearly told Mr. Hoey he was not S, he was T. Despite knowing that he was not dealing with S, Mr. Hoey placed his order for a "heavy ball" anyway. A risk that criminals take is that those they are dealing with may rat them out to the police to save their own skin.

DATE: _____ By The Court,

_____
Kenneth D. Brown, President Judge

cc: Kenneth Osokow, Esquire (ADA)
James Protasio, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)