IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	**CR-955-2008**
	:	**CRIMINAL DIVISION**
SHAWN BRISTER,	:	
Defendant	:	

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	**CR-918-2008**
	:	**CRIMINAL DIVISION**
CORY RINGKAMP,	:	
Defendant	:	

OPINION AND ORDER

Before this Honorable Court is Defendant Shawn Brister's (Brister) Omnibus Pre-Trial Motion filed September 8, 2008 and Defendant Cory Ringkamp's (Ringkamp) Omnibus Pre-Trial Motion filed September 9, 2008. A hearing on the Motions was held on November 3, 2008. Counsel was given an opportunity to brief the issues before the Court. Defense Counsel timely filed their briefs and the Commonwealth failed to file a brief.

Background

The following is a summary of the facts presented at the Preliminary Hearings for Shawn Brister (Brister) on June 20, 2008 and October 24, 2008, the Preliminary Hearing for Cory Ringkamp (Ringkamp) on May 30, 2008 and the Suppression hearing. On April 29, 2008, around 6:00 p.m., Trooper Tyson Havens (Havens) and Corporal Michael Simpler (Simpler) of the Pennsylvania State Police (PSP) were on aggressive patrol in the area of Hepburn Street and Locust Street. While engaged in conversation with four individuals on the street corner, the

Troopers observed a white Chevy Impala operated by Brister with Ringkamp as the passenger, travel north on Hepburn Street and park near the Troopers. Both Brister and Ringkamp exited the vehicle and walked over to the Troopers general location and then sort of walked away. The Troopers noted that both had their hands in their packets and Brister had the hood of his sweatshirt up. At this time, the Troopers noted both Defendants' presence and found it to be suspicious.

After speaking with the four individuals, the Troopers drove their police cruiser to the 700 block of Louisa Street where they encountered six individuals playing basketball in the street, blocking traffic. The Troopers got out of the cruiser and started to talk to the individuals. One of the individuals made a call and within seconds Brister and Ringkamp showed up in the Chevy Impala, parked the vehicle, and exited. Brister still had his hood up and both individuals still had their hands concealed in their pockets as they walked over and started talking to one of the six individuals the Troopers were talking to. Again the Troopers noted the presence of both Brister and Ringkamp and felt it was suspicious.

Following the second stop, the Troopers observed a vehicle with an expired inspection in the 600 block of Locust Street where they conducted a third traffic stop. The traffic stop was conducted on two individuals, Michael Ballard and Devon Grissom, with the latter being a known Bloods' gang member. Within minutes of conducting the traffic stop, Brister and Ringkamp came walking up beside the Troopers, again with their hands in their pockets and Brister's hood still up. This time Havens also noticed a bulge in Brister's sweatshirt pocket. Havens testified he was very concerned as they were on a traffic stop with a known gang member, they were in a high crime area, the Defendants had shown up for the third time on a traffic stop, and Brister had a bulge in his sweatshirt pocket. Simpler ordered Brister and

Ringkamp to stop, but they continued on and went and sat down on a porch nearby. Havens approached them and ordered both down onto the porch; Havens then conducted a pat down in which he did not find any weapons, but believed Brister had baggies in his pockets and Ringkamp money.

Havens then asked both Brister and Ringkamp for permission to search their pockets. The Defendants told Havens it was okay as they had nothing illegal. Havens uncovered fifty-six empty glassine baggies with dollar signs on them and $115 in cash in Brister's pants pockets. In Ringkamp's pants pockets was $670 in cash. Havens related Brister stated the bags were used for the jewelry he sells and the money came from his mother. Ringkamp stated the money was from a recently cashed check from his employer, Richard Hibler Painting.

After the pat down, Havens asked the Defendants where the vehicle was located and was informed it was around the corner. Havens went to the vehicle and looked in the driver's window, where he observed a small bud of marijuana on the seat and a handle of what he believed to be a machete protruding from the front passenger seat. Havens summoned a K-9 unit and then had the vehicle towed to the police barracks. Trooper William Langman of the PSP responded with his dog Sarik to perform a sniff of the exterior of the vehicle. Sarik alerted positive to the presence of illegal drugs. Havens then obtained a search warrant for the vehicle. A machete was found under the passenger seat of the vehicle, and in the glove box were four large bags, three medium sized bags, and five small bags of marijuana and on top of the marijuana was a replica firearm or pellet gun, and a camera. The marijuana field tested positive. Havens also determined the vehicle was registered to Ringkamp and his significant other, Emma Thompson. Havens also spoke with Richard Hibler regarding Ringkamp's employment and was informed he only worked for one week and had never picked up his check.

At Brister's Preliminary Hearing on June 20, 2008, Magisterial District Judge James Carn dismissed the Conspiracy count and the remaining charges were held over for Court. On August 13, 2008, Havens re-filed the Conspiracy charge. On October 24, 2008, at a Preliminary Hearing before Magisterial District Judge (MDJ) Allen Page III, wherein no additional evidence was presented, the Conspiracy Count was held over for Court. At Ringkamp's Preliminary Hearing on May 30, 2008 before MDJ Page all charges were held over for Court.

Discussion

The Troopers lacked reasonable suspicion to conduct a Terry stop and frisk

Defendants allege the Troopers did not have reasonable suspicion that the Defendants were engaged in criminal activity. Specifically, they assert their presence at each of the traffic stops and a bulge in Brister's pocket did not give Havens reasonable suspicion to conduct a Terry stop and frisk.

According to the Pennsylvania Supreme Court, '"where a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible.'" Commonwealth v. Bryant, 866 A.2d 1143, 1145 (Pa. Super. Ct. 2005) (quoting Commonwealth v. DeWitt, 608 A.2d 1030, 1031 (Pa. 1992)).

According to the Pennsylvania Superior Court, "the Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." Bryant, 866 A.2d at 1146 (citing Commonwealth v. Dennis, 433 A.2d 79, 82 (Pa. Super. 1981)). "On the contrary, Terry and its progeny recognize that the essence of good police work is for the police to adopt an

intermediate response where they observe a suspect engaging in 'unusual and suspicious behavior."' Bryant, 866 A.2d at 1146 (citing Dennis, 433 A.2d at 81 n.6, 82).

The analysis used in determining whether reasonable suspicion exists for an investigatory stop, is the same under both Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution. See Commonwealth v. Lynch, 773 A.2d 1240, 1244 (Pa. Super. Ct. 2001). The standard is whether the officers "'observed unusual and suspicious conduct by such person which may reasonably lead [them] to believe that criminal activity is afoot.'" Dennis, 433 A.2d at 81 n.5, (quoting Commonwealth v. Galaydna, 375 A.2d 69, 71 (Pa. Super. Ct. 1977)); See also Lynch, 773 A.2d at 1245.

The Court finds the Troopers had reasonable suspicion for an investigatory stop of the Defendants. Havens testified the Defendants had shown up in a high crime area, at three of their traffic stops, with the third involving a known gang member, and this time, Havens noticed a bulge in Brister's sweatshirt pocket. The Court further finds the Troopers legitimately feared for their safety as it was very unusual and suspicious for the Defendants to keep appearing at their traffic stops and now the bulge in Brister's sweatshirt pocket. Therefore, under the totality of the circumstances, the Court finds the Troopers had reasonable suspicion to stop and frisk the Defendants in order to ensure their safety.

The subsequent search of the Defendants was the result of an illegal seizure

Defendants allege that the subsequent consent to search is invalidated because it was the result of an illegal seizure.

"Under both the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, a search . . . which is conducted without a warrant, is

deemed to be per se unreasonable." Commonwealth v. Witman, 750 A.2d 327, 338 (Pa. Super. Ct. 2000). However, valid consent "may render an otherwise illegal search permissible." Id. "To establish a valid consensual search, the prosecution must first prove that the consent was given during a legal police interaction, or if the consent was given during an illegal seizure, that it was not a result of the illegal seizure; and second, that the consent was given voluntarily." Commonwealth v. Newton, 943 A.2d 278, 283-84 (Pa. Super. Ct. 2007) (quoting Commonwealth v. Reid, 811 A.2d 530, 545 (Pa. 2002).

The Court has already determined that the Defendants were not illegally seized and now finds the Defendants voluntarily consented to the search. According to Havens testimony at both the Preliminary Hearings and the Suppression Hearing, both Defendants told Havens he could search, because they did not have anything illegal. Based upon Havens testimony regarding the search and the legal seizure of the Defendants, the Court finds the search of both Defendants was valid.

The search warrant was not supported by adequate probable cause

Defendants next contend that the search warrant was tainted by the initial illegal seizure. Further, Defendant Brister alleges the search warrant was deficient because Havens did not state the alleged bulge looked like a weapon, failed to conduct any inquiry before or after the stop, and failed to provide any information regarding the reliability or degree of accuracy of the canine in drug detection or whether his alert was active or passive.

"In order to secure a valid search warrant, an affiant must provide a magistrate with information sufficient to persuade a reasonable person that there is probable cause for a search." Commonwealth v. Zimmerman, 422 A.2d 1119, 1124 (Pa. Sup. Ct. 1980) (quoting

Commonwealth v. Tucker, 384 A.2d 938 (Pa. Super. Ct. 1978)). Misstatements of fact invalidate a search warrant and require suppression of the fruits of the search if the misstatements are both deliberate and material. Id. "A material fact is defined as 'one without which probable cause to search would not exist.'" Id. (quoting Commonwealth v. Jones, 323 A.2d 879, 881 (Pa. Super. Ct. 1974). When there is a misstatement in the affidavit of probable cause, the Court should omit that statement in determining whether the affidavit supports probable cause. See Commonwealth v. Gullett, 329 A.2d 513, 515 (1974).

The Court has already determined that the seizure of the Defendants was legal; therefore, the search warrant was not tainted. Next, the Court finds the search warrant was not deficient. In the Affidavit of Probable Cause, Havens alleged that while using a flashlight, he observed through the closed driver's window, on the driver's seat, a small bud of marijuana and the handle of a machete protruding from under the passenger's seat. Based upon his observations inside the vehicle, Havens summoned a drug certified K-9 unit, Sarik, which alerted positive to the presence of illegal drugs. Havens observations combined with Sarik's positive alert provided adequate probable cause for the search warrant. The Court finds Havens failure to state he did not believe the bulge was a weapon and include whether the alert was active or passive does not invalidate a search warrant, as there was sufficient information to find probable cause. See Zimmerman, 422 A.2d at 1124 (concluding that any flaws in the affidavit of probable cause were minimal and immaterial and therefore, valid.) Therefore, under the totality of the circumstances, the Court finds the search warrant was valid.

Habeas Corpus/Motion to Dismiss

In both Defendants' Habeas Corpus/Motion to Dismiss, they ask the Court to dismiss all of the charges and specifically allege as to the Possessing Instruments of Crime charge, there was no evidence the machete or BB gun were used to facilitate a crime or intended to be employed criminally. They also allege there was insufficient evidence for the Conspiracy of Possession with the Intent to Deliver charge.

The burden the Commonwealth bears at the Preliminary Hearing is they must establish a prima facie case; the Commonwealth must present sufficient evidence that a crime has been committed and that the accused is the one who probably committed it. Commonwealth v. Mullen, 333 A.2d 755, 757 (Pa. 1975). See also Commonwealth v. Prado, 393 A.2d 8 (Pa. 1978). The evidence must demonstrate the existence of each of the material elements of the crimes charged and legally competent evidence to demonstrate the existence of the facts which connect the accused to the crime. See Commonwealth v. Wodjak, 466 A.2d 991, 996-97 (Pa. 1983). Absence of any element of the crimes charged is fatal and the charges should be dismissed. See Commonwealth v. Austin, 575 A.2d 141, 143 (Pa. Super. 1990). "A person violates 18 Pa. C.S. § 907(a) "if he possesses any instrument of crime with intent to employ it criminally." That section also defines instruments of crime as "(1) Anything specially made or specially adapted for criminal use [or] (2) Anything used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have" Id.

The Court finds that sufficient evidence was presented to establish a prima facie case of Possessing Instruments of Crime. Havens testimony reveals that he observed a small bud of marijuana on the seat and a handle of what he believed to be a machete protruding from the front passenger seat of Ringkamp's vehicle. Following the execution of a search warrant, Havens

discovered a machete under the passenger seat of the vehicle, and in the glove box were four large bags, three medium sized bags, and five small bags of marijuana and a replica firearm or pellet gun. The machete was found in a vehicle containing a large amount of drugs and it is well known that weapons are often carried by those possessing and/or selling large amounts of drugs. Therefore, it can be presumed that the weapon was to be used as part of a criminal operation. As such, the Commonwealth presented sufficient evidence for the charge of Possessing Instruments of Crime.

The Court also finds there was sufficient evidence to establish a prima facie case of Criminal Conspiracy to Possess with Intent to Deliver a Controlled Substance.

> A person violates 18 Pa. C.S. § 903(a)(1) and
>
> is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime[.]

The evidence reveals that Havens uncovered fifty-six empty glassine baggies with dollar signs on them and $115 in cash in Brister's pants pockets and $670 in cash in Ringkamp's pants pockets. Havens also uncovered four large bags, three medium sized bags, and five small bags of marijuana from the glove box of the vehicle owned by Ringkamp and driven by Brister. Although, Ringkamp stated the money was from a recently cashed check from his employer, Richard Hibler Painting, Hibler told Havens, Ringkamp only worked for him for a week and never picked up the check. The Court finds that the Defendants conspired to posses the marijuana with the intent to deliver. Both Defendants were in the vehicle, Brister carried glassine bags with markings consistent with those used in the distribution of drugs, and both carried large sums of cash. Based upon the evidence obtained on both Defendants persons and in the vehicle,

the Court finds there is sufficient evidence for the charge of Criminal Conspiracy to Possess with Intent to Deliver a Controlled Substance.

ORDER

AND NOW, this ____day of January 2009, based on the foregoing Opinion, it is ORDERED and DIRECTED as follows:

I. Defendants' Brister and Ringkamp's Motion to Suppress evidence is DENIED.

II. Defendants' Brister and Ringkamp's Habeas Corpus/Motion to Dismiss is DENIED.

By the Court,

Nancy L. Butts, Judge

cc. DA (HM)
PD (NS)
Edward J. Rymsza, Esq.
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber (LLA)