IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
v.	**:**	**No. 968-2008**
	:	**CRIMINAL**
NATHAN CROWDER,	**:**	
Defendant	**:**	

OPINION AND ORDER

On August 5, 2008, Defendant filed an Omnibus Motion. A hearing on the Motion was held on December 9, 2008.

Background

The following is a summary of the facts presented at the Suppression hearing. On May 5, 2008, around 10:00 p.m., Officer Jeremy Brown (Brown) of the Williamsport Bureau of Police (WBP) and Trooper Tyson Havens of the Pennsylvania State Police were working for the Special Operations Group Crime Suppression Team, in a high crime area. The Officers were in a marked (PSP) cruiser, in the 600 Block of Memorial Avenue when they observed Nathan (Defendant) talking on his cell phone and walking with another individual. Brown recognized the Defendant from previous contacts involving narcotics and knew he needed to be served with a Protection from Abuse (PFA) Order. Brown related that on every shift the WBP provides him with a "hot sheet" to notify the Officers of relevant information such as PFA Orders that need to be served.

Brown informed Havens the Defendant needed to be served with the PFA so he stopped the vehicle. Brown yelled to the Defendant that he needed to talk to him (Defendant) and when Brown did so the Defendant began to walk towards the police cruiser. Brown got out of the vehicle, told the Defendant that he had a PFA to serve him (Defendant) with, asked him if he had

any weapons, and upon agreement of the Defendant, conducted a frisk. Brown informed the Defendant that he was not under arrest but, was not free to go until served with the PFA. Brown then called for another Officer to bring the PFA to him so he would not have to transport the Defendant to the Police Station. Brown informed the other individual he was free to leave, but he continued to stay in the area. Brown testified that he had not tried to serve the Defendant with the PFA at his house or try to call the Defendant. He also related that he did not carry the PFA with him as other Officers may have come in contact with the Defendant that evening.

Brown found it suspicious that the Defendant had approached the police cruiser as Defendants do not normally approach the police, so after the pat down, he went over to the sidewalk where Defendant was previously standing. On the ground, Brown observed a napkin, from which, when he kicked it with his foot, two small bags of suspected crack cocaine fell. As Brown went to arrest the other individual and tell Havens to arrest the Defendant, the Defendant looked at the cocaine and then ran. Defendant was apprehended and charged with Possession With the Intent to Deliver, Possession of a Controlled Substance, Possession of Drug Paraphernalia, and Escape.

Discussion

Defendant alleges that the police had the authority to serve the PFA, but did not have the authority to frisk and detain the Defendant in order to do so. Defendant also asserts that the Officers could have served the PFA on the Defendant by telephone. Finally, Defendant alleges that because the frisk and detention were illegal the drugs found in the napkin have to be suppressed. The Commonwealth asserts in opposition that the stop was lawful, that the Officers

could detain the Defendant until they could serve the PFA as it states the Defendant is to be served with a copy of the Petition, and therefore, the drugs should not be suppressed.

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)).

The Officers did not have the authority to frisk the Defendant

The Defendant alleges the Officers did not have the authority to frisk him in order to serve the PFA as he was not involved in any criminal activity.

"[C]onsent to a search obviates the need for any level of suspicion on the part of the police. Commonwealth v. Shelly, 703 A.2d 499, 502 (Pa. Super. Ct. 1997) (citing Florida v. Bostick, 501 U.S. 429 (1991)). The voluntariness of consent is determined by evaluating the totality of the circumstances. Commonwealth v. Gillespie, 821 A.2d 1221, 1225 (Pa. 2003). Some factors to consider are:

> 1) the defendant's custodial status; 2) the use of duress or coercive tactics by law enforcement personnel; 3) the defendant's knowledge of his right to refuse to consent; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel.

Gillespie, 821 A.2d at 1225 (quoting Commonwealth v. Cleckley, 738 A.2d 427, 433 n.7 (Pa. 1999)).

The Court finds that the Officers had the authority to frisk as the Defendant validly consented. According to Brown's testimony, from the cruiser, he asked the Defendant to stop. Defendant did stop and then without direction to do so, walked towards the police cruiser. Brown

then asked the Defendant if he had any weapons and if he (Brown) could frisk the Defendant. The Defendant agreed to the frisk. The Defendant willingly walked towards Brown, was not in custody, said he did not have any weapons, and knew he did not have to consent because of his previous contacts with the system. Therefore, the Court finds under the totality of the circumstances that the consent was valid.

The Officers did not have the authority to detain the Defendant

The Defendant alleges that the Officers did not have the authority to detain the Defendant in order to serve him with the PFA as service could have been effectuated via the telephone. Defendant relies on Commonwealth v. Padilla, 885 A.2d 994 (Pa. Super. Ct. 2005), for his assertion. In Padilla, the victim notified the police of the issuance of a PFA order because the Defendant had been making threatening phone calls. Id. at 996. The Officer called the Defendant and explained the existence of the PFA; however, the Defendant continued to harass the victim. Id. Later that same day, the Defendant was served with a copy of the order and the harassing calls ceased. Id. Following a hearing, the Defendant was found guilty of indirect criminal contempt for violating the PFA order. Id. The Superior Court held that the verbal explanation provided to the Appellant over the telephone was adequate to convey notice that PFA order had been entered against him, and that violation of that order placed him at risk of criminal penalty." Id. at 997.

The Court finds the Defendant's reliance on Padilla is misplaced. While, the Superior Court in Padilla found that a verbal explanation of the PFA Order via the telephone was sufficient to put the Defendant on notice of the PFA Order, the Court did not hold that PFA Orders do not have to be personally served. The Court also did not hold that the police are to

attempt to serve Defendant's over the telephone first rather than via personal service. Under Pennsylvania law, PFA Orders are to be served by the sheriff or other designated agency or individual when the Court orders. 23 Pa.C.S. § 6106(f). Subsection (g) further states the "orders are to be served upon the defendant, and orders shall be served upon the police departments and sheriff with appropriate jurisdiction to enforce the orders." 23 Pa.C.S. § 6106. As Section 6106(g) specifically states the order is to be served upon the Defendant, the Officers had the authority to serve the Defendant with the Order.

Further, the Court finds the Officers had the authority to detain the Defendant in order to serve him with the PFA Order. When a Defendant is pulled over for a traffic violation, the Officers are giving the authority to detain a Defendant while writing a citation, checking for warrants, checking to see if the car is stolen, etc. The Court finds that because Officers have the authority detain a Defendant while on a traffic stop, Officers also have the authority to detain a Defendant to serve him with a PFA Order.

The fruits of the detention should be suppressed

The Defendant asserts that the drugs found on the ground where the Defendant was standing prior to the frisk must be suppressed as the fruits of an illegal frisk and detention.

According to the Pennsylvania Superior Court, "a defendant has no standing to contest the search and seizure of items which he has voluntarily abandoned." Commonwealth v. Tillman, 621 A.2d 148, 150 (Pa. Super. Ct. 1993). The Supreme Court has determined that abandonment is a question of intent, which

> may be inferred from words spoken, acts done, and other objective facts. All relevant circumstances existing at the time of the alleged abandonment should be considered. Police pursuit or the existence of a police investigation does not of itself render

> abandonment involuntary. The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.

Commonwealth v. Shoatz, 366 A.2d 1216, 1220 (Pa. 1976) (and cases cited therein). In Pennsylvania the theory of abandonment has been adopted only "when it is shown that the seized evidence was not discarded as a result of unlawful police coercion." Id. at 1220.

The Court finds that the drugs found in the napkin on the ground were abandoned by the Defendant. The testimony reveals that Brown asked the Defendant to stop so he could be served with a PFA Order. The Defendant willingly stopped and walked towards the police cruiser. Brown found the Defendant's actions in walking towards the police cruiser to be suspicious as Defendants do not normally approach the police. Based upon the Defendant's actions, Brown went to the area where the Defendant had previously been standing and observed the napkin. Brown had not witnessed the Defendant discard any drugs nor did he coerce the Defendant to do so. Therefore, the Court finds the drugs were voluntarily abandoned.

The Court also finds that even if the detention and frisk were determined to be illegal, that the drugs would still have been discovered. Under the plain view doctrine, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." Minn. v. Dickerson, 508 U.S. 366, 375 (U.S. 1993). See also Commonwealth v. McCree, 924 A.2d 621, 624 (Pa. 2007) (police may seize objects in plain view when the incriminating nature of the object is immediately apparent). The testimony shows that Brown walked over to the location where the Defendant was previously because of his suspicions. Laying on the ground in plain view was a napkin which Brown kicked with his foot

and the drugs fell out. Therefore, the drugs would have been discovered even if Brown had only told the Defendant to stop, because the Defendant willingly walked towards the police cruiser. As such, the Defendant's motion shall be denied.

ORDER

AND NOW, this ____day of January 2009, based on the foregoing Opinion, it is ORDERED and DIRECTED that Defendant's Omnibus Motion is hereby DENIED.

By the Court,

Nancy L. Butts, Judge

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