

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**FAKARADEEN LEE,
Defendant**

:
:
:
:
:
:
:

**No. 977-2009
CRIMINAL DIVISION**

OPINION AND ORDER

Defendant filed an Omnibus Pre-Trial Motion on August 26, 2009. A hearing on the Motion was held on October 29, 2009. At the time of the hearing, many of the issues raised in the Omnibus Motion had been resolved as outlined in the Order following this Opinion. The remaining issue before the Court is the Motion to Suppress.

Background

The following is a summary of the facts presented at the Suppression Hearing. On May 9, 2009, Officer Thomas Bortz (Bortz) of the Williamsport Bureau of Police (WBP) received a report that Fakardeen Lee (Defendant), for whom WBP had a Simple Assault and Domestic Violence arrest warrant, was spotted in a stolen vehicle leaving the IBOPE club. Bortz observed a subject matching the description of the Defendant near the IBOPE club at 635 Park Avenue. Bortz identified the Defendant and placed him into custody. In a search incident to arrest, Bortz discovered in the Defendant's right cargo pocket, three cell phones, \$2,300 in cash, and two small bags of suspected marijuana. Defendant was placed into the rear of the patrol unit and transported to City Hall.

At City Hall, Defendant was taken into the back booking room where he was strip searched. Bortz explained that a strip search is a very detailed search where the Defendant

removes every article of clothing and each is inspected as it is removed. Bortz testified that when he had the Defendant lift his testicles, he saw a plastic bag which contained five individual bags or an eight ball of suspected cocaine.

Bortz further explained that the number one rule when a search incident to arrest is conducted and contraband or a weapon found, is that you do not stop searching. Therefore, he strip searches every person on which he finds narcotics. Bortz explained that police cannot strip search someone in public and that is why the Defendant was transported to City Hall prior to such a search. Bortz related that the underlying reason for the strip search is the danger narcotics pose to someone in custody, as often those individuals try to swallow bags of narcotics which often break, leading to an overdose.

Discussion

Motion to Suppress

Defendant alleges that the body cavity/strip search at City Hall was illegal because it was not contemporaneous with the arrest at Park Avenue and therefore all fruits of the illegal search must 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)).

Both the United States Supreme Court and the Pennsylvania Supreme Court “have held that the scope of a search incident to arrest extends not only to the arrestee's person, but also into the area within the arrestee's ‘immediate control.’” Commonwealth v. Taylor, 771 A.2d 1261,

1271 (Pa. 2001) (citing Chimel v. California, 395 U.S. 752, 763, (1969); Commonwealth v. Shiflet, 670 A.2d 128, 130 (Pa. 1995)). “Inventory searches are properly conducted as part of the booking process after an individual has been placed under arrest.” Commonwealth v. Knoche, 678 A.2d 395, 397 (Pa. Super. Ct. 1996). The Pennsylvania Supreme Court in Commonwealth v. Zook, 615 A.2d 1, 7 (1992), cert. denied, 507 U.S. 974, (1993),

outlined the parameters and purpose of an inventory search:

It is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station house incident to booking and jailing the suspect. The justification for such searches does not rest on probable cause, and hence the absence of a warrant is immaterial to the reasonableness of the search.

Knoche, 678 A.2d at 397-98.

The Court finds the body cavity/strip search of the Defendant was a legal search. The testimony presented reveals that Bortz had an arrest warrant for the Defendant and conducted his initial search incident to the Defendant’s arrest. That initial search revealed three cell phones, a large amount of cash, and two bags of suspected marijuana. Defendant was then placed into custody and transported directly to City Hall where a more thorough search was performed. This Court believes the body cavity/strip search is reasonable as part of the routine booking procedure as officers are permitted to search the personal effects of a person, which would ultimately include an exhaustive search of the arrested person. In this situation, the Court believes the strip search was justified as the contraband found on Defendant can be easily concealed within the body cavities or specific regions of the body. Additionally, the search could be justified as being for Defendant’s safety for Defendants often consume drugs they swallow in an effort to conceal them upon arrest.

Although the Defendant asserts the search was improper because it was not contemporaneous with and at the place of arrest, the Court finds this argument without merit. Ultimately, the Court finds the search at City Hall was an extension of the search incident to arrest, as the Defendant was not released between the time of the on scene search and the more thorough search. The Defendant was merely transported to City Hall to conduct the search in a more private location than a public street. The Court believes it is not acceptable to require officers to conduct a body cavity/strip search on a public street.

Motion for Disclosure of Other Crimes, Wrongs, or Acts Pursuant to Pa. R.Evid. §404(b)

The Defendant requests the Court require the Commonwealth to disclose to him evidence which may be admissible at trial pursuant to Pa.R.Evid. § 404(b), which includes the Defendant and any potential witnesses' entire criminal history. The Commonwealth has repeatedly asserted that it is not required to provide Defense Counsel with anything more than a criminal summary of Defendant's or any witnesses' criminal history.

The Criminal History Record Information Act (Act) provides, in relevant part:

(b) Dissemination to noncriminal justice agencies and individuals.--Criminal history record information shall be disseminated by a State or local police department to any individual or noncriminal justice agency only upon request

(1) A fee may be charged by a State or local police department for each request for criminal history record information by an individual or noncriminal justice agency.

(2) Before a State or local police department disseminates criminal history record information to an individual or noncriminal justice agency, it shall extract from the record all notations of arrests, indictments or other information relating to the initiation of criminal proceedings where:

- (i) three years have elapsed from the date of arrest;
- (ii) no conviction has occurred; and

(iii) no proceedings are pending seeking a conviction.

18 Pa.C.S. § 9121(b).

In Commonwealth v. Copeland, the Pennsylvania Superior Court determined that § 9121 is “wholly inapplicable in the context of discovery in a criminal case.” 723 A.2d 1049, 1051 (Pa. Super. Ct. 1998). As a result, the District Attorney’s Office cannot rely on the Act as a basis for refusing to turn over criminal history record information requested by the Defense. The Court held that under Brady v. Maryland, 373 U.S. 83 (1963), the District Attorney has a duty to provide the criminal history information to a criminal defendant. Id. The Court explained that “a criminal defendant is entitled to know about any information that may affect the reliability of the witnesses against him. Any Commonwealth challenge to the discovery sought by [a Defendant] should be based only on an application of *Brady* or Rule 305. Id.”

The Court finds that based upon the holding of the Copeland Court, the District Attorney’s Office is required to provide Defense Counsel with a complete criminal history under Pa.R.Evid. 404(b) for both the Defendant and all witnesses. Therefore, the Defendant’s Motion shall be granted.

ORDER

AND NOW, this 18th day of December, 2009, based on the foregoing Opinion, it is ORDERED and DIRECTED as follows:

1. The Defendant's Motion to Suppress is hereby DENIED;
2. Defendant's Motion for Disclosure of Other Crimes, Wrongs, or Acts Pursuant to Pa. R. Evid. 404(b), is hereby GRANTED. The Commonwealth is to provide to Defense Counsel the Defendant's entire criminal history along with the criminal history of any potential witnesses;
3. Defendant's Motion for Discovery is moot as discovery has been received;
4. As to Defendant's Motion to Compel Disclosure of Existence of and Substance of Promises of Immunity, Leniency or Preferential Treatment and Criminal History, the Commonwealth asserted to this Court that there are no confidential informants and have been no promises of immunity, leniency or preferential treatment; and
5. The Motion to Reserve Right is also not at issue as Defense Counsel has received Discovery and therefore does not need additional time within which to file his Omnibus Pretrial Motions.

By the Court,

Nancy L. Butts, Judge

xc: DA (AMK)
Edward J. Rymza, Esq.
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber (LLA)