

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**RAHEEM TURNER,
Defendant**

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**No. 1202-2008
CRIMINAL**

OPINION AND ORDER

On September 22, 2008, Defendant filed a Motion to Suppress. A hearing on the Motion was held on November 17, 2008.

Background

The following is a summary of the facts presented at the Suppression hearing. On May 1, 2008, Raheem Turner (Defendant) was arrested by Trooper Tyson Havens (Havens) of the Pennsylvania State Police (PSP) for Person Not to Possess Firearms and the cash found on Defendant's person was subject to a dog scan; the dog alerted positive for narcotics. Following his arrest, Defendant was released on signature bail. While out on bail, Defendant was also being supervised by Lycoming County Adult Probation Officer Brad Shoemaker for a felony drug conviction.

After the Defendant's arrest, Havens became aware of the Defendant's residence through the Adult Probation Office (APO). On every shift Havens drove by the residence multiple times and never saw the Defendant, any activity, any lights on, or cars parked in the area. On June 19, 2008, Havens received information from a Confidential Informant (CI) that the Defendant was selling drugs out of his residence at 320 Bridge Street, Apt. 5. On that same date, Havens relayed the information he received from the CI and that the Defendant never appeared to be present at

the residence to Lycoming County Adult Probation Officer James Schriener (Schriener). Schriener had been previously asked by Brad Shoemaker to make contact with the Defendant if he could. Schriener went to the Defendant's stated residence as Schriener believed the Defendant was in violation of his probation by not living there. Havens who was in the area of Defendant's residence, met Schriener there and the two first shined a flashlight into what they believed to be Defendant's apartment¹ window and noted it appeared to be vacant. Then Havens and Schriener went upstairs to the apartment where they pounded on the door and asked the Defendant to come out, but received no answer.

On June 23, 2008, Defendant was arraigned on his outstanding set of criminal charges. Following the arraignment, Havens contacted Schriener and told him the Defendant was at the MDJ's office. Schriener requested Havens bring the Defendant to his (Schriener's) office. After speaking with the Defendant, Schriener felt the Defendant may have a 72-hour violation, which is when the probationer is away from his approved residence for more than 72 hours without permission. At this point, Schriener asked Havens to give him and the Defendant a ride to the Bridge Street residence, as no other probation officers were available to accompany them. When they arrived, Defendant did not have keys to the apartment and stated he gave them to his friend, Poo, who was at the arraignment. The Officers called Poo and she said she would bring the keys down, but after twenty to twenty-five minutes she still had not arrived. The Officers called another friend of the Defendant's who never answered the phone. Defendant then suggested they check out a residence on High Street, which is another place where he could live. Schriener got the impression the Defendant suggested this other residence because he did not want them to go into the Bridge Street apartment.

¹ Schriener later stated that they were shining the flashlight into the wrong apartment.

While Defendant was secured in the police cruiser, Schriener decided to check to see if anyone else was home who could let them into the apartment. He went to the apartment and found the door unlocked. Schriener then requested that Havens accompany him into the apartment. After conducting a sweep for other persons, the Officers brought the Defendant into the apartment and then Schriener conducted a plain view search, while Havens stayed in the living room with the Defendant. On a stand in the kitchen, Schriener found a prescription bottle with part of the label removed, but still containing the letters "ox." Believing he now had probable cause to conduct a search, Schriener went to the bedroom and noticed the closet doors were wide open. On a shelf, he found in a saran wrapped type bag containing pills with the number 512 on them. The Defendant advised that the pills were Percocet for his tooth and that he obtained them off the streets. On the floor of the closet was a clear shoe bag, Schriener squeezed the bag and believed it contained sandwich bags. Upon opening the bag, he pulled out glassine bags. Defendant told Schriener he did not know if they were his. Based upon Schriener's findings, Havens arrested the Defendant and a search warrant was later obtained for the residence. Defendant was also incarcerated at the Lycoming County Prison on a Probation Violation.

Discussion

Defendant alleges the evidence seized from his residence should be suppressed because Schriener did not have reasonable suspicion to search the residence, had not obtained prior supervisory approval to conduct the search, and was acting as an agent of the police or "stalking horse." Further, Defendant asserts that any statements resulting from Schriener and Havens improper conduct should also be suppressed. The Commonwealth asserts in opposition that

Schriner had reason to believe a violation of probation was occurring before going to the residence.

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)).

“County probation and parole officers may execute a warrantless search of an offender's residence, personalty and person if reasonable suspicion exists to believe that ‘the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision.’” Commonwealth v. Scott, 916 A.2d 695, 696 (Pa. Super. Ct. 2007) (quoting 61 P.S. § 331.27a(d)(2)). While personal searches require no approval, “[p]rior approval of a supervisor shall be obtained for a property search absent exigent circumstances.” 61 P.S. § 331.27a(d)(3). The following factors should be considered when determining if reasonable suspicion existed:

- (i) The observations of agents.
- (ii) Information provided by others.
- (iii) The activities of the offender.
- (iv) Information provided by the offender.
- (v) The experience of agents with the offender.
- (vi) The experience of agents in similar circumstances.
- (vii) The prior criminal and supervisory history of the offender.
- (viii) The need to verify compliance with the conditions of supervision.

61 P.S. § 331.27a(d)(6). Courts must also determine whether parole officers “switch hats” and were in essence agents or “stalking horses” of the police when they conduct searches of parolees without a warrant. Commonwealth v. Altadonna, 817 A.2d 1145, 1153 (Pa. Super. Ct. 2003).

The Court finds that Schriener did not “switch hats” and become a “stalking horse” for Havens. Although Havens provided Schriener with the CI information, informed Schriener the Defendant was never present at his residence, and was present during the search, the reason for going to the residence was Schriener’s belief that the Defendant was in violation of his probation. The testimony reveals that Schriener only requested Havens to escort the Defendant and himself to the Defendant’s residence because another Adult Probation Officer was not available. Schriener also only requested Havens presence to conduct the search for Officer safety. The testimony further reveals that while Schriener was conducting the search, Havens stayed with the Defendant, rather than assisting in the search.

The Court also finds Schriener had reasonable suspicion to believe the Defendant was in violation of his supervision by not living at the approved residence. The testimony presented showed that Schriener needed to confirm the Defendant’s residence. On June 19th, Schriener went to the Defendant’s residence and he mistakenly believed the Defendant’s apartment to be vacant. Schriener then spoke with the Defendant on June 23rd at which time the Defendant alleged he was home on the 19th when Schriener had attempted to make contact with the Defendant at his residence. Based upon Defendant’s comments, Schriener decided to go to the residence. Once at Defendant’s residence, Defendant said he did not have keys to the residence and after waiting for almost twenty-five minutes for keys to be brought, Defendant told Schriener that he could provide another residence. Further, Havens informed Schriener that the PSP had received a tip from a CI that the Defendant was selling drugs out of the Bridge Street residence. Based upon these factors, the Court finds that Schriener did have reasonable suspicion to conduct a property search.

Although Schriener had reasonable suspicion, the statute requires that absent exigent circumstances, a probation officer must obtain the approval of his supervisor for a property

search. According to the Pennsylvania Supreme Court, “[a]bsent probable cause and exigent circumstances, the entry of a home without a warrant is prohibited under the Fourth Amendment.” Commonwealth v. Roland, 637 A.2d 269, 270 (Pa. 1994) (citing Payton v. New York, 445 U.S. 573, 583-90 (1980)). The factors to be considered in determining whether exigent circumstances exist are:

(1) the gravity of the offense, (2) whether the suspect is reasonably believed to be armed, (3) whether there is above and beyond a clear showing of probable cause, (4) whether there is strong reason to believe that the suspect is within the premises being entered, (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended, (6) whether the entry was peaceable, and (7) the time of the entry, i.e., whether it was made at night. These factors are to be balanced against one another in determining whether the warrantless intrusion was justified.

Roland, 637 A.2d at 270-71. Other factors may also be considered, “such as whether there is hot pursuit of a fleeing felon, a likelihood that evidence will be destroyed if police take the time to obtain a warrant, or a danger to police or other persons inside or outside the dwelling,” Roland, 637 A.2d at 271. See generally Commonwealth v. Wright, 2008 Pa. LEXIS 2316, p.31 (Pa. 2008).

The Court finds that no exigent circumstances existed for the search of the Defendant’s residence. Schriener entered the Defendant’s residence to confirm whether the Defendant was in fact living there. The Defendant was at the location with Schriener and Havens; he was unarmed, not in a position to flee, there was no concern for officer safety or others inside or outside the residence, and there was no concern for the destruction of evidence as the Defendant was in the Officer’s presence and they both testified they believed the apartment to be vacant.

As the Court can find no exigent circumstances existed, Schriener had to either obtain Defendant’s consent or prior approval from his supervisor in order to conduct a search of the Defendant’s residence. According to the Pennsylvania Supreme Court, the totality of the

circumstances must be evaluated when determining the voluntariness of consent.

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)).

Based upon the testimony of both Havens and Schriener, there is no evidence to suggest the Defendant consented to a search of his residence. Schriener also did not obtain prior approval of his supervisor to conduct a search. Since Schriener did not obtain the Defendant's consent or prior approval, the Court finds the search was improper.

ORDER

AND NOW, this ____day of January 2009, based on the foregoing Opinion, Defendant's Motion to Suppress is hereby GRANTED. It is ORDERED and DIRECTED that all evidence seized from the Defendant's residence as a result of the improper search are hereby SUPPRESSED.

By the Court,

Nancy L. Butts, Judge

cc. DA (KO)
PD (WM)
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber (LLA)