

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH OF PA** :  
**vs.** : **No. CR-300-2010**  
:   
**DELORES ELLEN BRYANT,** :   
**Defendant** :

**OPINION AND ORDER**

Defendant is charged by Information filed on March 22, 2010 with one count of conspiracy to possess with intent to deliver a controlled substance, two counts of possession with intent to deliver controlled substances, two counts of possession of controlled substances and one count of possession of drug paraphernalia.

Defendant filed an Omnibus Pretrial Motion on April 21, 2010. The Omnibus includes a Motion to Suppress all evidence seized from the Defendant's residence on October 21, 2009 and a Petition for Habeas Corpus with respect to all the counts of the Information. A hearing was held before the Court on June 2, 2010.

With respect to the Motion to Suppress, Defendant makes three different arguments. First, Defendant claims that her landlord did not have authority to consent to a warrantless search of her residence. Second, Defendant argues that the Pennsylvania State Police (PSP) did not have reasonable cause to conduct a protective sweep of the premises. Third, Defendant argues that the scope of the protective sweep was beyond that allowed by law and in fact, constituted an evidentiary search.

With respect to the consent issue, the Commonwealth presented the testimony of Christy Leinbach, an employee of Lycoming Housing Authority ("Authority") and a Manager of the Pennvale site where the Defendant resides in a unit owned by the Authority. Ms. Leinbach testified that on the date in question, she was contacted by Trooper Tyson

Havens of the PSP who informed her of suspicious activity in the area involving an alleged acquaintance of the Defendant. Trooper Havens informed Ms. Leinbach that he recently spoke with an individual by the name of Izone Jackson who provided Trooper Havens with contradictory information about visiting with the Defendant. Mr. Jackson had been driving an automobile that was identified as being in the area previously and possibly connected to drug activity. Moreover, Trooper Havens became aware of the fact that the Defendant had previously requested, without success, that Mr. Jackson be added as an approved occupant to the residence.

Ms. Leinbach went to Defendant's unit with Trooper Havens. They both knocked on the door and identified themselves. Soon thereafter, the door opened slightly and then was suddenly shut by an individual inside the unit. Ms. Leinbach became concerned because she believed the Defendant was at work and if the Defendant was at home, the Defendant certainly would have answered and opened the door. Trooper Havens and Ms. Leinbach continued to knock on the door until Ms. Leinbach decided, in conjunction with Trooper Havens, to open the door with her key. Ms. Leinbach explained that she opened the door and let Trooper Havens in because, given all of the circumstances, she believed there was a danger to "other residents" and/or the Defendant.

As part of the Defendant's lease obligation with the Authority, Defendant signed a written Lease and a written Authorization Disclosure. These documents, signed as well by a representative of the Authority, specifically gave the Authority permission to enter the unit "when there was reasonable cause to believe an emergency existed," "or at the request of law enforcement officials."

Trooper Havens also testified. He explained that upon initially confronting Mr. Jackson in an outside area near the unit, he was told among other things by Mr. Jackson, that Mr. Jackson was visiting with the Defendant at her residence, the Defendant was not there, that Mr. Jackson did not have a key but that his “buddy” Raymond Jones was in the residence, and that he was on his way to the unit. Significantly, Mr. Jackson denied having any criminal record. Trooper Havens verified that Mr. Jackson had an extensive criminal record which included felony drug offenses and what can best be described as assault crimes. Trooper Havens released Mr. Jackson but followed behind him. Surprisingly, Mr. Jackson walked past Defendant’s unit. Becoming increasingly concerned, Trooper Havens contacted Ms. Leinbach who he had spoken to previously, to advise her of the most recent developments. Ms. Leinbach came to the residence along with other troopers who were called as backups and at that point knocked on the door.

Trooper Havens testified consistent with Ms. Leinbach regarding the events at the door of the unit. He explained that he continued knocking on the door for five to ten minutes. Ms. Leinbach advised him that she believed the Defendant was at work. Given all of the circumstances, Trooper Havens was concerned that there was either a home invasion or burglary in process. He noted that Ms. Leinbach gave specific consent to enter the residence and that he opened the door with her.

Corporal Mike Simpler of the PSP also testified. He went to Defendant’s unit on the date in question to back up Trooper Havens. He too observed the suspicious behavior of Mr. Jackson who actually told Corporal Simpler that he was not going to Defendant’s residence but rather to a “day care” to pick up his child. Corporal Simpler noted that the

intended daycare was in the opposite direction of where Mr. Jackson was traveling. Corporal Simpler confirmed the concerns of both Ms. Leinbach and Trooper Havens that “something illegal” was going on in the unit.

Regarding the protective sweep issue, Trooper Havens testified that upon entering the premises he immediately began to look for individuals who may be present. Within a very brief period of time, he entered the kitchen and identified an individual by the name of Raymond Howard who Trooper Havens knew from past dealings involving criminal matters. Mr. Howard indicated he was in the unit “to visit” but was detained immediately. Given the circumstances which included all of the aforementioned suspicious activity and the fact that Mr. Howard was present in the unit and had not been identified by anyone as having permission to be there, Trooper Havens immediately conducted a protective sweep of the remainder of the unit. Trooper Havens explained that the sweep was conducted in a quick manner and targeted those areas in the unit where a person could reasonably be expected to hide. He explained that the sweep was a check of the unit to determine if other individuals were present that might either pose a danger to the police or others.

When Trooper Havens was “clearing” the unit, he entered a bedroom later identified as the master bedroom. To the left of the doorway was a bed. While walking around the bed looking for individuals who might be hiding between the bed and an adjacent bedroom wall, Trooper Havens noticed in plain view what appeared to be two bags of crack cocaine that were laying in a pair of men’s Timberland boots. He explained that the bags of crack cocaine looked “like someone dropped them in there.”

Below a window directly opposite of the bedroom door, he also saw shoeboxes that were stacked up. The one shoebox was open and had currency in plain view. The box immediately below the top open box also contained currency which could be seen through “half-dollar size” holes in the side of the box.

As a result of the protective sweep of the unit, Trooper Havens found no other individuals to be present. Based upon what he observed, the unit was secured by other PSP personnel while Trooper Havens submitted an application for a search warrant. The search warrant was approved, and Trooper Havens subsequently returned to execute it.

Corporal Simpler also testified with respect to the protective sweep. Specifically, he noted that he assisted in clearing the rooms. He confirmed the items that were viewed in plain sight in the master bedroom and testified consistent with Trooper Havens.

With respect to the Habeas Corpus issue, Trooper Havens testified that upon executing the search warrant numerous items of controlled substances and paraphernalia were seized from the unit. In addition to the items of crack cocaine found in the master bedroom, four bags of crack cocaine were found in a cardboard box that was apparently utilized as a trash receptacle in the corner of the kitchen. The four bags of crack cocaine were lying on top of the trash. Further, varied items of marijuana paraphernalia and marijuana were located in different kitchen drawers and cabinets. The controlled substances and paraphernalia were in immediately apparent once the drawers/cabinets were opened.

Items of “indicia of occupancy” or “ownership” were also retrieved from the unit. Mr. Jackson’s wallet was located in the kitchen. In the master bedroom the PSP seized a wallet of the Defendant, a photo of the Defendant and Mr. Jackson together, the crack cocaine

found in the men's Timberland boots and the cash, totaling \$830.00, from the shoeboxes. In the master bedroom, the PSP observed items that indicated the bedroom was used by the Defendant. They also observed men's clothing on the floor and in a blue tote container that, in addition to the boots, indicated a male was visiting or staying at the residence.

Corporal Simpler also testified with respect to the seizure of the items. He confirmed the testimony of Trooper Havens with respect to the indicia of occupancy and/or ownership. The Commonwealth referenced an envelope addressed to Izone Jackson from T-Mobile Corporation with the address of the unit: 1814 Hazel Drive, Williamsport, PA.

The first issue to be determined by the Court is whether the PSP's entry into Defendant's unit violated her constitutional rights of privacy. Warrantless searches of a residence are per se unreasonable unless justified by a specific exception to the warrant requirement. Commonwealth v. Davis, 743 A.2d 946 (Pa. Super. 1999).

Exceptions to the warrant requirement include: (1) valid consent; and (2) probable cause and exigent circumstances. See Commonwealth v. Hughes, 575 Pa. 447, 836 A.2d 893, 900 (2003) ("When police officers obtain the voluntary consent of a third party who has the authority to give consent, they are not required to obtain a search warrant based on probable cause."); Commonwealth v. Wright, 599 Pa. 270, 961 A.2d 119, 137 (2008) ("Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a warrantless search).

Under the circumstances in this case, the Court finds that the Authority properly consented to the entry. The written lease and lease related documents signed by the Defendant specifically granted to the Authority the right to enter the home without advance notice when

there was reasonable cause to believe that an emergency existed. Given the information provided to Ms. Leinbach, it was certainly reasonable to believe that an emergency existed. Specifically, and as testified to by her, it was reasonable to believe that the Defendant and/or her son could be in danger or there could be a home invasion or burglary in progress. Therefore, Ms. Leinbach's consent was valid and sufficient justification for the police to enter the residence.

In the alternative, the Court finds the police had probable cause to believe criminal activity was afoot and there were exigent circumstances that justified a warrantless entry. Mr. Jackson gave conflicting and false statements to the police. Mr. Jackson told Trooper Havens that he was on his way to the Defendant's unit, but surprisingly walked past the unit. Mr. Jackson told Corporal Simpler he was going to a daycare to pick up his child, but the daycare facility was in the opposite direction of where Mr. Jackson was traveling. Mr. Jackson also told Trooper Havens that he did not have a criminal record, but Trooper Havens verified that Mr. Jackson had an extensive criminal record that included felony drug offenses and personal injury crimes. When Ms. Leinbach and the police went to the residence and knocked on the door, the door opened slightly then was suddenly shut by an individual inside the unit. Given the facts and circumstances of this case, a reasonably prudent person would believe criminal activity was afoot. Additionally, this was not a case in which the troopers simply should have secured the premises and obtained a warrant. Real and potentially life threatening exigencies existed which allowed the law enforcement officers and Ms. Leinbach to open the door and enter the premises.

The next issue to be determined by the court concerns the protective sweep. A protective sweep is authorized if it is supported by articulable facts and inferences giving rise to a reasonable suspicion that the area to be swept harbors an individual posing a danger to the police. Commonwealth v. Crouse, 729 A.2d 588, 592 (Pa. Super. 1999). Where the safety of arresting officers may be jeopardized, their safety outweighs the minimal intrusion a properly executed sweep may have upon an individual's privacy. Id.

In this matter, the protective sweep was clearly supported by articulable facts and inferences giving rise to a reasonable suspicion that the unit harbored individuals posing a danger to the police. The police were confronted with a situation in which an individual who allegedly had no connection to the unit was not only in it but earlier refused, for a period of at least five to ten minutes, to allow either the police or the landlord to enter. The individual located in the residence was known to the police from his prior criminal activities. Thus and in conjunction with the suspicious activity of Mr. Jackson, the police had to make a quick decision what they needed to do to protect themselves under the circumstances. Accordingly, they conducted a protective sweep of the unit in order to determine if other individuals might be present who might either pose a danger to the police or possible unknown victims. The Court concludes that the officers took reasonable steps to ensure their safety as well as the safety of others.

Defendant further challenges the scope of the protective sweep. It is clear that a protective sweep cannot be used as a pretext for an evidentiary search. It cannot be lengthy or unduly disruptive. It must be swift and target only those areas where a person could reasonably be expected to hide. Crouse, supra.



There is nothing in the record to support the contention that the protective sweep was anything other than what it was intended to be. The Court cannot conclude that it was used as a pretext for an evidentiary search. It was not unduly lengthy or disruptive. It targeted only those areas where persons could be located.

While Defendant's argument regarding the scope of the protective sweep may appear to have some basis on its face, the facts belie any argument that the sweep was an evidentiary search. The items that were seized were in plain view laying in the pair of men's Timberland boots as if "someone had just dropped them in." This fact was confirmed by both Trooper Havens and Corporal Simpler. Moreover, it would be illogical to expect the police to ignore contraband that appeared in their plain view during a protective sweep.

The Court now turns to Defendant's Petition for Habeas Corpus. Defendant's argument on all of the charges is that possession cannot be proven.

A Petition for Habeas Corpus attacks the sufficiency of the evidence. The Commonwealth must present a prima facie case that a crime has been committed and the Defendant was the one who probably committed it. Commonwealth v. Mullen, 460 Pa. 336, 333 A.2d 755, 757 (Pa. 1975). The evidence must demonstrate the existence of each of the material elements of the crimes charged. Commonwealth v. Wodjak, 502 Pa. 359, 466 A.2d 991, 996 (Pa. 1983).

It is undisputed that an essential element with respect to all of the charges against the Defendant is possession of either the controlled substances or paraphernalia. Because no controlled substance or paraphernalia were found on the Defendant's person, the Commonwealth must satisfy the burden of proving possession by proof of constructive

possession. Commonwealth v. Valette, 531 Pa. 384, 613 A.2d 548, 549-50 (Pa. 1992).

Constructive possession of controlled substances or paraphernalia “requires proof of the ability to exercise conscious dominion over the illegal substance, the power to control the contraband, and the intent to exercise such control.” Commonwealth v. Perez, 931 A.2d 703, 708 (Pa. Super. 2007), quoting Commonwealth v. Bricker, 882 A.2d 1008, 1014 (Pa. Super. 2005). Constructive possession may be established by the totality of the circumstances. Id.

Defendant argues that the Commonwealth is unable to present evidence to show that the Defendant had both the power to control the contraband and the intent to exercise such control. Defendant submits that because other individuals had equal access to the area where the contraband was found, the Defendant cannot be said to have either the power to control or the intent to control such items. Commonwealth v. Chenet, 473, Pa. 181, 373 A.2d 1107 (Pa. 1977). “Where more than one person has equal access to where drugs are stored, presence alone in conjunction with such access will not prove conscious domain over the contraband”. Commonwealth v. Rippy, 732 A.2d 1216, 1220 (Pa. Super. 1999).

While Defendant’s argument at first blush may appear to have merit, where the Commonwealth introduces evidence connecting a Defendant to a specific area where the drugs were kept, constructive possession despite equal access, is established. Commonwealth v. Bricker, 882 A.2d 1008, 1016 (Pa. Super. 2005). While other individuals clearly had access to Defendant’s unit, their access was limited to their status as guests or perhaps trespassers. The testimony established that only the Defendant and her minor son resided in the premises. The Defendant was the only permissible tenant of the unit. While Mr. Jackson may have received some mail at the premises, he was not permitted as an occupant. Furthermore, while there was

some evidence that a male may have stayed over or visited the premises, the testimony established that the master bedroom was utilized primarily, if not solely, by the Defendant. The Commonwealth presented sufficient evidence connecting the Defendant to the specific rooms where the controlled substances were found. While Mr. Howard was found in the kitchen, he had no legal connection to it and the fact remains that the items were found in Defendant's drawers, cabinets and trash box. In that there is prima facie evidence to support constructive possession, Defendant's Petition for Habeas Corpus will be denied.

The final issue to be determined by the Court is whether the Commonwealth proved a prima facie case with respect to the conspiracy charge.

In order to establish a prima facie case of criminal conspiracy, the Commonwealth must establish that the Defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons; (2) with a shared criminal intent; and (3) an overt act done in furtherance of the conspiracy. See Commonwealth v. Jones, 874 A.2d 108, 121 (Pa. Super. 2005).

Of course circumstantial evidence may be sufficient to prove the elements of a conspiracy. The requisite agreement, criminal intent and overt act may be inferred from the totality of the circumstances. Bricker, supra.; Jones, supra.

Under the circumstances, the Court concludes that the Commonwealth has failed to present a prima facie case with respect to conspiracy. Other than the illegal substances and paraphernalia being found in the Defendant's bedroom and kitchen, no evidence has been presented upon which an agreement can be inferred between the parties. There was absolutely no relationship whatsoever between the Defendant and Mr. Howard. There was no testimony

presented that the Defendant even knew Mr. Howard let alone entered into some type of an agreement with him regarding possessing drugs with the intent to deliver them. While the Defendant obviously knew Mr. Jackson, there was insufficient evidence to support a conclusion that she had entered into an agreement with him to possess drugs with the intent to deliver them. Indeed, the only evidence with respect to Mr. Jackson and the Defendant consisted of the presence of a few small bags of cocaine in Mr. Jackson's boots. The testimony clearly established that Mr. Jackson was a short-time guest of the Defendant.

While items of controlled substances and paraphernalia were found in areas "occupied" by the Defendant, the conduct of the alleged co-conspirators consisted of either their presence or proximity to the drugs and Mr. Howard's evasive conduct regarding the police. If anything, the conduct and circumstances point toward criminal activity of the alleged co-conspirators outside the knowledge of the Defendant. Finally, there was clearly insufficient evidence to establish that the controlled substances were possessed with intent to deliver them. There was no evidence presented regarding the amount or weight of the controlled substances. They were described in general and vague terms at best. There was no evidence presented that either the Defendant or any of the alleged co-conspirators were observed engaging in drug transactions. There was no paraphernalia discovered that may be concluded to be commonly found in the distribution of crack or marijuana. There was no evidence of the Defendant was without a source of income or lacked sufficient funds to have in her possession \$830.00. There were only two cell phones found in the unit. Finally, the Commonwealth presented no expert testimony opining that the items were possessed with intent to deliver.

Accordingly, Count 1 criminal conspiracy to commit possession with intent to deliver will be dismissed.

**ORDER**

**AND NOW**, this 30<sup>th</sup> day of June, 2010, following a hearing, the Court denies the Defendant's Motion to Suppress. As well, the Court denies the Defendant's Petition for Habeas Corpus with respect to Counts 2, 3, 4, 5 and 6 of the Information. The Court grants Defendant's Petition for Habeas Corpus with respect to Count 1, criminal conspiracy, and accordingly dismisses said Count.

BY THE COURT,

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Marc F. Lovecchio, Judge

cc: PD (RB)  
DA  
Gary Weber, Esquire (Lycoming Reporter)  
Work File