

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-986-2010
vs. :
:
GARY COLEMAN, :
Defendant :

OPINION AND ORDER

Defendant is charged by Information filed on July 30, 2010 with Possession with Intent to Deliver Crack Cocaine, Possession of a Small amount of Marijuana, Possession of Cocaine and Possession of Drug Paraphernalia. Defendant's arraignment, which was waived by his counsel, was set for August 2, 2010. Defendant's counsel entered her formal written appearance on behalf of Defendant on August 3, 2010. On the same date, defense counsel submitted her written request for pretrial discovery.

On October 22, 2010, Defendant filed a Motion to Suppress. On October 25, 2010, the Commonwealth filed a Motion in Opposition to Defendant's Motion to Suppress requesting the Court to dismiss Defendant's Motion to Suppress as untimely. On October 25, 2010, Defendant also filed a Petition for Modification of Bail.

The hearing on all three Motions was scheduled for November 12, 2010. Immediately prior to the scheduled hearing, however, the Commonwealth orally requested a continuance due to the unavailability of a material witness. The Defendant did not object.

The parties agreed, however, to address the Petition to Modify Bail and the Motion in Opposition to the Motion to Suppress. The Court addressed the Petition to Modify Bail in a separate Order. This Opinion and Order shall address the Motion in Opposition to the Motion to Suppress.

Rule 581 of the Pennsylvania Rules of Criminal Procedure governs the timeliness of Suppression Motions. Unless the opportunity did not previously exist, or the interests of justice otherwise require, a Suppression Motion must be made in an Omnibus Pretrial Motion as set forth in Rule 578. If a timely Motion is not made, the issue of suppression is deemed to be waived. Pa. R.Crim. P. 581 (B). An Omnibus Pretrial Motion must be filed within 30 days after arraignment unless the opportunity therefore did not exist or the Defendant, defense attorney or the attorney for the Commonwealth is not aware of the grounds for the Motion or unless the time for filing has been extended by the Court for cause shown. Pa. R. Crim. P. 579 (A). A Trial Judge may excuse a Defendant's tardy presentation of a Suppression Motion when required in the interests of justice. Commonwealth v. Johonoson, 844 A.2d 556, 561 (Pa. Super. 2004).

Defendant argues that the opportunity did not exist to file the Motion to Suppress until defense counsel received and reviewed the relevant requested discovery. Defendant further argues that the interests of justice require that the Motion be heard at this time.

Despite Defendant's request for discovery being filed on August 2, 2010, Defendant had still not received discovery as of September 20, 2010. Accordingly, defense counsel e-mailed the Commonwealth reminding it that discovery still needed to be provided. Apparently, there was some confusion between this case and another case involving the Defendant. The Commonwealth neglected to forward the discovery on the instant case while forwarding the discovery in the other matter.

The requested discovery was provided to defense counsel on September 21,

2010. Because defense counsel is assigned to preliminary hearings outside of the office every Tuesday and to treatment court every Wednesday, defense counsel did not have an opportunity to review the discovery until late Thursday, September 23, 2010.

In reviewing all of the circumstances, the Court concludes that the interests of justice require that the Suppression Motion be heard at this time. In lieu of filing a Motion to Compel Discovery and in conformance with the practice that has evolved between the Commonwealth and the Public Defender's office regarding discovery, defense counsel sent a written reminder. This reminder was sent well after the discovery was due. The Commonwealth promptly provided the discovery and defense counsel reviewed such as soon as her court schedule permitted. The Motion to Suppress was filed within thirty (30) days of the date that the discovery was reviewed. It cannot be said that the discovery was not reviewed in a timely manner.

Moreover, it cannot be concluded that all of the information upon which the Motion to Suppress was based, was set forth in the Affidavit of Probable Cause. Indeed, facts in support of the Motion were obtained only through a review of the discovery provided by the Commonwealth.

Next, the merits of the underlying Suppression Motion are such on their face that the interests of justice require it to be heard. Indeed, the Commonwealth has conceded that Miranda warnings should have been provided to the Defendant prior to him being asked whether he was addicted to any type of narcotics. The remaining two issues raised in the Suppression Motion are at the very least of arguable merit such that the Court is not willing to, in the interests of justice, put a Defendant in a position of proceeding to trial permitting the Commonwealth to utilize evidence against said Defendant which could have been

obtained in violation of his constitutional rights.

Finally, the Commonwealth has not articulated any prejudice as a result of the alleged untimeliness of the Motion.

ORDER

AND NOW, this ____ day of November 2010 following a hearing and argument, the Court **DENIES** the Commonwealth's Motion in Opposition to defense Motion to Suppress Evidence. A hearing on the Defendant's Motion to Suppress Evidence shall be scheduled by the Court Administrator's Office. Two Hours shall be allocated for this hearing.

By The Court,

Marc F. Lovecchio, Judge

cc: A. Melissa Kalaus, Esquire (ADA)
Nicole Spring, Esquire (APD)
CA
Work file
Gary Weber, Esquire (Lycoming Reporter)