IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	NO: CR-1741-2009
vs.	:	
JOEL L. GAINES, Defendant	:	

O P I N I O N

The Defendant is charged in a criminal Information with Possession of Marijuana and Possession of Drug Paraphernelia. The charges against the Defendant stem from an incident which occurred on March 19, 2009 in the 1100 block of Park Avenue in Williamsport. On April 23, 2010 the Defendant filed a Motion to Suppress Evidence. A hearing on the motion was held on June 4, 2010.

Background

The following is a summary of the facts presented at the suppression hearing. On March 19, 2009, Officers Damon Hagan and Jeremy Brown of the Williamsport Bureau of Police, were on bike patrol in Williamsport. While traveling westbound on Park Avenue, Officer Hagan smelled burning marijuana. Upon smelling the substance, Officer Hagan began to slow down and alerted Officer Brown, who also had noted the smell. Officer Hagan traced the odor as coming from the right, and observed a door close at 1138 Park Avenue. At the same time, Officer Brown observed the back of an individual going into the 1138 Park Avenue residence. While walking towards the residence the officers observed that the odor got stronger.

The officers observed an individual sitting on the porch at 1138 Park Avenue and asked him to identify himself. The individual on the porch identified himself as Stayson Cabrera. Mr. Cabrera denied having any knowledge of the presence of marijuana and denied that anyone was with him. Upon observing the smell of marijuana emanating from the screen door, Officer Brown asked Mr. Cabrera to get the individual that went inside the house.

Officer Brown knocked on the window, and motioned for the Defendant to come out to the porch. The Defendant exited the residence and identified himself as Joel Gaines. At this point Officer Brown conducted a pat down search of the Defendant. While patting him down, Officer Brown observed the smell of marijuana on Defendant Gaines' clothing. Mr. Gaines was advised by the officers as to why they were there, and told that his lack of cooperation would result in them being taken into custody and a search warrant obtained for the premises. Defendant Gaines was given a choice – to provide Officer Brown with the marijuana, or be taken into custody and a search warrant obtained to search the premises. Officer Brown proceeded to grab the Defendant's arm and as he did so, he reached for his handcuffs. At this point, the Defendant indicated that he would provide Officer Brown with the marijuana. Officer Brown then followed the Defendant into the residence, and the Defendant retrieved a marijuana joint from the basement steps and gave it to Officer Brown. No Miranda warnings were given to the Defendant at any time.

Discussion

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. 2005)(quoting Commonwealth v. DeWitt, 608 A.2d 1030, 1031 (Pa. 1992).

The Defendant seeks to suppress physical evidence, and incriminating statements made by him to the police. Specifically, the Defendant contends that the police entered the residence at 1138 Park Avenue and confronted the Defendant without a warrant and without probable cause to believe that the Defendant had violated the law. Following alleged illegal entry of the premises, the police seized the marijuana joint and illegally arrested the Defendant.

"Probable cause exists where the facts and circumstances within the officers' knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed." Commonwealth v. Gibson, 638 A.2d 203, 206 (1994). Pennsylvania courts have held that the smell of marijuana is sufficient to establish probable cause. Accordingly, entry onto the premises of 1138 Park Avenue was justified as there were circumstances to suggest that criminal activity was underway.

In Commonwealth v. Pullano, 440 A.2d 1226 (Pa.Super. 1982), Reading City police officers were present at 927 North Ninth Street in Reading for the purpose of executing a valid search warrant for an apartment consisting of the second and third floors of the building. While there, one of the officers smelled a strong odor of marijuana which he determined to be emanating from the first floor apartment. He also heard voices which led him to believe that a party was in progress in the apartment. After concluding their search of the upstairs apartment, police officers

went down to the first floor apartment to ascertain the names of the occupants. When police officers knocked on the door, the door opened to reveal a group of people surrounded by drug paraphernalia, marijuana cigarettes and butts. One of the officers announced his identity, entered the apartment, and approached one of the group who was holding plastic bags of marijuana. When two other officers entered they observed the appellant seated in a chair beside the door holding a plastic vial which contained a pill and a small plastic bag. When he saw the police, appellant attempted to drop the vial but was prevented from doing so by one of the officers. Appellant was then placed under arrest. A search of his person revealed a pipe containing marijuana residue. Appellant was charged with possession of marijuana and cocaine. In his motion to suppress, the appellant argued that an illegal, warrantless search took place that required suppression of the physical evidence found in his possession. In reviewing the legality of the search at issue, the Superior Court held:

> The officers at the scene had smelled a strong odor of burning marijuana and had heard noises suggesting that a party was in progress. These were circumstances suggesting that criminal activity was underway within their presence. They were not required to ignore that activity. To 'ignore the obvious aroma of an illegal drug with [they were] trained to identify' would have been a 'dereliction of duty.' Commonwealth v. Stoner, 236 Pa.Superior Ct. 161, 166, 344 A.2d 633, 635 (1975). By knocking on the door to make inquiry they were not acting unreasonably. They could properly and in the exercise of their duties investigate what was obviously a 'pot' party. See: Commonwealth v. Merbah, 270 Pa.Superior Ct. 190, 411 A.2d 244 (1979). Indeed, at this point they already had probable cause to make an arrest. Id. at 1227.
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> In affirming the appellant's sentence, the Superior Court additionally noted:
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> In State v. McGuire, 13 Ariz.App. 539, 479 P.2d 187 (1971), a police officer had been informed that the smell of burning marijuana was coming from an apartment. As he approached and knocked on the door, the officer was also able to detect the odor of marijuana and noted a commotion in the apartment. After the door had been opened and the officer admitted, he heard the flushing

> of a toilet and ran to the bathroom where he found a marijuana cigarette floating in the toilet. In holding that the officer had probable cause to enter and arrest without a warrant, the Court said, 'The weight of authority, and we believe the better rule, holds that the offense is committed in the presence of an officer when the officer receives knowledge of the commission of an offense in his presence through any of his senses.' 479 P.2d at 189. Similarly, in Vaillancourt v. Superior Court for County of Placer, 273 Cal.App.2d 791, 78 Cal.Rptr. 615 (1969), the Court held that police officers had probable cause to enter a hotel room and effect an arrest when, while walking down a hotel hallway, they detected the smell of burning marijuana. See also: State v. Means, 177 Mont. 193, 581 P.2d 406 (1978). Finally, this Court, in Commonwealth v. Stoner, *supra*, held that where a vehicle had been stopped for a traffic violation and the arresting officer smelled marijuana and observed marijuana seeds and leaves in the car's interior, the police had probable cause to believe that contraband was in the car and could make a warrantless search. Id. at 1228.

In Commonwealth v. Stainbrook, 471 A.2d 1223 (Pa.Super. 1984), township police officers drove into a bowling alley parking lot while on patrol. Upon observing a truck parked in the lot, one of the officers approached the vehicle, and while approaching, detected the odor of burning marijuana and observed an individual bend over abruptly as if to hide something under the seat. The officer asked for identification and then asked the appellant to lift up his jacket from the floor of the truck. Lifting the jacket revealed a plastic bag containing marijuana. The officer then read the appellant his rights and placed him under arrest. Upon arrival at the police station the appellant's jacket was searched and in it was found six small plastic bags, a pipe and a scale. The appellant filed a motion to suppress the marijuana and drug paraphernalia on the ground that such evidence was seized pursuant to an illegal search and arrest. In reversing the lower court's order granting the motion to suppress, the Superior Court held:

> We agree with the Commonwealth that Officer Laguna was justified in conducting a search of the appellant's truck. In addition to observing the furtive behavior of the appellant who appeared to be stuffing something under

> his seat, Officer Laguna detected the odor of burning marijuana. At the suppression hearing, he testified that it was part of his training at the police academy to be able to identify marijuana by its sight and smell. The Supreme Court of the United States has held that an odor may be sufficient to establish probable cause for the issuance of a search warrant. United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948), as cited in Commonwealth v. Stoner, 236 Pa.Super. 161, 344 A.2d 633 (1975). In Commonwealth v. Stoner, *Id*, this court stated that the rational used to establish probable cause in those Supreme Court cases applied equally well when determining the validity of a search of a movable vehicle. In Stoner, we analogized a "plain smell" concept with that of plain view and held that where an officer is justified in being where he is, his detection of the odor of marijuana is sufficient to establish probable cause." Id. at 1225.

Based upon the evidence presented at the hearing, this Court finds that Officers Brown and Hagan had probable cause to believe a crime had been or was being committed. Both officers were part of a special operations group designed to patrol known drug areas. Both had extensive training and experience in the area of drug offenses. Both officers testified that they individually detected the scent of marijuana and both traced it to the residence located at 1138 Park Avenue. Accordingly, this Court finds that the Officers had probable cause to believe that criminal activity was underway and their entry onto the premises was not illegal.

The Defendant additionally submits, however, that the Defendant did not knowingly, intelligently, or voluntarily waive his right to counsel and/or his right to remain silent prior to making incriminating statements and retrieving the marijuana. Miranda warnings must be given when a person is subjected to custodial interrogation. See Miranda v. Arizona, 384 U.S. 436 (1966) and Beckwith v. United States, 425 U.S. 341, 344 (1976). "Pennsylvania's test for custodial interrogation is 'whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action of

[sic] movement is restricted by such interrogation.'" Commonwealth v. Meyer, 412 A.2d 517, 521 (Pa. 1980)(quoting Commonwealth v. Romberger, 312 A.2d 353, 355 (Pa. 1973), *vacated*, 417 U.S. 964 (1974), *reinstated on remand*, 347 A.2d 460 (Pa. 1975)).

The Commonwealth argues that the Defendant was not in custody. As the Defendant obtained the marijuana himself, there was nothing to show his actions were involuntary. This Court does not agree. A suspect may be "in custody" even in instances where the police have not taken him to a police station or formally arrested him. Commonwealth v. Fento, 526 A.2d 784, 786 (Pa.Super. 1987), *citing* Commonwealth v. Fisher, 352 A.2d 26, 28 (Pa. 1976). A person is considered to be in custody for the purposes of Miranda when an officer's show of authority leads the person to believe that he is not free to decline an officer's request, or otherwise terminate the encounter. Commonwealth v. McCarthy, 820 A.2d 757 (Pa.Super. 2003).

In Commonwealth v. Ingram, 814 A.2d 264 (Pa.Super. 2002), the Superior Court held that for purposes of determining the necessity for Miranda warnings, the defendant was in police custody after officers approached the defendant, asked to speak to him regarding unauthorized use of a vehicle, and informed the defendant that one of the officers would need to conduct a pat-down prior to their discussion. In reaching this conclusion, the Superior Court held:

> Given these circumstances, Appellant could reasonably believe that his freedom of action was restricted. Accordingly, we find that for purposes of our analysis, Appellant was at that point within the custody of the police officers. Id. at 271.

In the case at bar, a uniformed officer knocked on the window and motioned for the Defendant to come out of the house. Upon coming out onto the porch area, the Defendant advised that the officers were there because they observed the smell of burning marijuana. The Defendant was then patted down by one of the officers. Pursuant to Commonwealth v. Ingram, *supra*, these actions by Officer Brown placed the Defendant in a situation in which he could reasonably believe that his freedom of action or movement was restricted, and necessitated the administration of Miranda warnings. Officer Brown then gave the Defendant a choice – to be arrested or turn over evidence. Upon grabbing the Defendant's arm and reaching for his handcuffs, the Defendant indicated that he would retrieve the marijuana. Officer Brown followed Defendant Gaines into the house, and the joint was given to Officer Brown. No Miranda warnings were issued.

In Commonwealth v. Ingram, *supra*, one of the officers questioned the defendant regarding an object in his pants pocket following the pat-down search. The defendant indicated that it was "chronic," a street name for marijuana. In reversing the trial court's denial of the defendant's motion to suppress, the Superior court held:

> We disagree with the trial court's conclusion that Appellant's statement was voluntary. Appellant's statement was made in response to Officer Magerl's direct question regarding the object in Appellant's pants pocket. *See Hoffman*, 403 Pa.Super. 530, 589 A.2d 737. Prior to this custodial interrogation, Appellant should have been given *Miranda* warnings. Because Appellant was not given *Miranda* warnings, Appellant's admission, and the contraband recovered based on that invalid admission, should have been suppressed. Id. at 271.

In In re D.H., 863 A.2d 562 (Pa.Super. 2004), the Superior Court held that a police officer's statement to a juvenile who was under arrest that the juvenile could help himself by returning an allegedly stolen firearm and that hopefully it would

benefit him later was the "functional equivalent of interrogation" for purposes of Miranda, as the officer should have been aware that his statement was likely to elicit an incriminating response. Similarly, Officer Brown's statement – that he could produce the marijuana or be arrested and a search warrant obtained, was designed to evoke an incriminating response, and therefore, the functional equivalent to an interrogation. Accordingly, evidence provided and statements made by the Defendant following these actions shall be suppressed.

O R D E R

AND NOW, this 23rd day of June, 2010, the Defendant's Motion to Suppress is hereby GRANTED and the marijuana joint and statements made by the Defendant regarding the marijuana joint shall be suppressed.

BY THE COURT,

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Richard A. Gray, J.

cc: Peter Campana, Esquire
District Attorney (HM)
Gary Weber, Esquire