

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
vs. : **No. CR-424-2010**
:
ZACHARY SCHEIDER, :
Defendant :

OPINION AND ORDER

Defendant is charged by Information filed on April 23, 2010 with one count of possession of a controlled substance (small amount of marijuana), and four counts of possession of drug paraphernalia. The charges arise out of a search that was conducted at Defendant's apartment on January 26, 2010 by the Penn College Police.

On May 26, 2010, Defendant filed a Motion to Suppress alleging that the search of Defendant's apartment during which the police seized numerous items of drug paraphernalia and marijuana, violated the Defendant's rights under the Federal and State Constitutions. More specifically, Defendant argues that the initial search of the apartment by the Coordinator of Residence Life (CRL) was without a warrant and was conducted while the CRL was acting as an agent of the State.

A hearing was held on July 1, 2010. Ashley Smith-Nicholas testified first for the Commonwealth. She is the Residence Life Coordinator for the Campus View Apartments. These apartments are utilized exclusively for students attending Penn College.

On January 26, 2010, she was contacted by a Resident Advisor who told her that the Resident Advisor smelled what she believed to be marijuana coming from Defendant's apartment. Ms. Smith-Nicholas, in accordance with campus protocol, called the Penn College Police and requested them to meet her at the room. The purpose in calling the police was to have them available for safety reasons. Ms. Smith-Nicholas intended on conducting an

institutional search and every time she conducts such, she calls the Penn College Police for backup.

She met the police and then went to the room. She confirmed the smell of marijuana coming from the room. She did not tell the police why she was intending to search the room.

When students are interested in obtaining an apartment, they are instructed to view the Penn College Website. The website refers the student to several relevant links including a housing contract; residence life policies, regulations and guidelines, and an electronic signature agreement.

The housing contract marked and admitted as Commonwealth Exhibit C-4 specifically notes as follows:

The college reserves the right to enter and search any area to inspect the facility for purposes of management, health, safety and compliance with applicable rules and regulations. Conditions for room entry and searches are outlines on the Residence Life Website.

The residence life policies, regulations and guidelines were marked and admitted as Commonwealth Exhibit C-2.

In relevant part, they note as follows:

Institutional searches are conducted, typically by residence life staff, after a decision on the potential search is obtained through the residence life staff from the director of Residence Life or designated appointee. Approval is given only after the reason for the search, the persons to search the room, and the object being sought or clarified. Searches of this type can be conducted with or without the occupants of the room being present.

Defendant agreed to be bound by the housing contract including the residence life policies, regulations and guidelines by executing an electronic signature agreement on

February 13, 2009. The electronic signature agreement, as well as Defendant's electronic signature, were marked and admitted as Commonwealth Exhibit C-3 and C-1 respectively.

Ms. Smith-Nicholas testified that she entered Defendant's apartment pursuant to the provisions of the contract and residence life policies, regulations and guidelines as set forth above. More specifically, she testified that she entered and was intending to search the room for the purposes of safety and compliance with applicable rules and regulations. She noted that smoking marijuana was, in addition to a safety hazard, a violation of the rules and regulations.

Upon entering the apartment, Ms. Smith-Nicholas began searching it. When she entered the bathroom, she noted several items of paraphernalia and suspected marijuana. She immediately left the apartment, advised the Penn College Police as to what she saw and then turned the matter over to the police.

Officer Norman Hager, II also testified on behalf of the Commonwealth. He is employed as a Penn College police officer. He received a call on the afternoon of January 26, 2010 from Ms. Smith-Nicholas in which Ms. Smith-Nicholas advised him that she was going to conduct an institutional search and requested that the Penn College police be present for her safety.

Officer Hager notified his supervisor of what was occurring and then left to speak with Ms. Smith-Nicholas. He met her at the "main gate" and they then both walked to the apartment. Ms. Smith-Nicholas did not advise Officer Hager of the specific purpose of the search nor did Officer Hager give Ms. Smith-Nicholas any directives.

When they arrived at the apartment, Officer Hager and another Penn College police officer stayed in the main hallway corridor while Ms. Smith-Nicholas entered the

apartment. A few minutes later she came out of the apartment and advised the officers that she had seen drug paraphernalia in the bathroom. The officers then obtained the oral and written consent of the three occupants of the apartment to search it. Before they searched Defendant's room, the Defendant showed up at the apartment. The officers spoke with him after which Defendant signed a consent to search. Defendant's written consent to search was marked and admitted as Commonwealth's Exhibit C-5. Officer Hager testified that when Residence Life conducts an institutional search, it is standard protocol for both the officers who accompany the Residence Life representative and the Residence Life representative not to discuss any aspects of the intended search. Only if illegal substances or activity is discovered will the police become involved.

As Defendant argues, to determine whether a school official acts as an agent of the police, the Courts look at the totality of the circumstances and consider the purpose of the search, the party who initiated the search and whether or not the police ratified or acquiesced in the search. In the Interest of: A.D. 844 A.2d 20, 24-25 (Pa. Super. 2004).

Contrary to what Defendant contends, however, the Court concludes that the CRL was not acting as an agent of the State at the time she entered the Defendant's apartment. The purpose of the search was to determine if a violation of the residence contract occurred and if so to remedy said violation. Not only did the CRL have the specific authority and consent of the Defendant to enter the apartment but she also had the obligation to do so to protect the safety of Penn College students. The fact that the CRL decided to enter the premises due to being notified of and actually smelling marijuana does not lead to the conclusion that the intended purpose of her search was to find evidence of a crime.

Secondly, the search was clearly initiated the CRL following a complaint by a Resident Advisor. The Penn College police had absolutely no role whatsoever in the initiation of the search.

Next, it cannot be said that the police ratified or acquiesced in the search. To the contrary, they were nothing more than spectators. They were conducting a role to protect the CRL in accordance with the same protocol that was used every time an institutional search is conducted. It is clear that institutional searches are conducted for a variety of reasons and not all institutional searches result in evidence of illegal activity. The Penn College Police were not aware of the reason for the search, had no input in how the search was to be conducted, did not direct the CRL in any manner regarding the search and had no role in overseeing it. To suggest that the police ratified or acquiesced in the search belies the facts. Indeed, they waited in the hallway knowing nothing other than the CRL requested their presence for safety reasons.

Alternatively, even if it can be concluded that the CRL was acting as an agent of the police, the Defendant consented to the search. Consent is an established exception to the warrant requirement.

Defendant clearly consented to the search of his apartment under the circumstances that existed on the date in question. A bilateral agreement was entered into between Penn College and the Defendant. This agreement contained terms and conditions regarding searches of student apartments.

Defendant agreed to comply with the terms and conditions of the housing contract. He specifically authorized the college to enter and search his room for purposes, including but not limited to, safety and compliance with the applicable rules and regulations.

He further agreed that the college could conduct an institutional search without his or any other occupants of the room being present.

While Defendant argues that the contract is essentially a contract of adhesion and does not sufficiently set forth terms and conditions waiving Defendant's State Constitutional rights to privacy, Defendant fails to provide any authority in support of this position. Moreover, the Court concludes that the contract is not one of adhesion. No testimony was presented upon which the Court could conclude that the Defendant was forced to live in the apartment or had no other housing alternatives.

ORDER

AND NOW, this ____ day of July, 2010, following a hearing and argument, the Court DENIES Defendant's Motion to Suppress.

BY THE COURT,

Marc F. Lovecchio, Judge

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