

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**MARCELLUS TURNER,
Defendant**

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**CR-548-2010
CRIMINAL DIVISION**

OPINION AND ORDER

The Defendant filed an Omnibus Motion on June 15, 2010. A hearing on the Motion was held August 5, 2010.

Background

On April 1, 2010, a black male informant approached Agent Leonard Dincher (Dincher) of the Williamsport Bureau of Police, at City Hall in Williamsport, PA, and stated that he had information related to Gary Coleman (Coleman). The informant stated that he saw Coleman with a handgun at Marvin Turner's (Mr. Turner) house located at 5th Avenue and Memorial Avenue. Dincher knew from previous investigations that Coleman was a prior felon not permitted to possess a firearm. Dincher then assembled other officers to go to Mr. Turner's residence to locate Coleman. When Dincher and the other officers arrived at Mr. Turner's residence, Dincher could see that no one was on the porch. Dincher then went to the back of the residence and saw Mr. Turner sitting at a picnic table. Dincher informed Mr. Turner who he was and asked Mr. Turner if anyone was in the house. When Mr. Turner responded that no one was in the house, Dincher asked if he himself could take a look in the house. Mr. Turner told Dincher to go ahead and look in the house. Mr. Turner requested to and was allowed to walk

with the officers throughout the search of the house. When the officers started up the stairs to the third floor, they heard a television. Agent Steve Sorage, Officer Damon Hagan, and Corporal Kris Moore went towards the east bedroom, where they saw people, and Dincher went to the west bedroom. Dincher saw a box spring and mattress in the bedroom and lifted up the box spring to find that no one was under the box spring. Dincher then lifted up the corner of the mattress and saw a large frame revolver and so he shouted "gun." At this point Dincher requested more manpower to come to the scene to lock the house down while he obtained a search warrant. A search conducted after the search warrant was served revealed drug paraphernalia and a bag of heroin in the bedroom where the revolver was found. Found in the room by Agent Sorage was indicia of occupancy of the room by the Defendant. The indicia of occupancy included a bag containing paperwork which identified the Defendant, including the Defendant's birth certificate, the Defendant's Social Security card, and a letter from the Pennsylvania Board of Probation and Parole addressed to the Defendant. Mr. Turner was then brought back to City Hall. Dincher asked Mr. Turner whose bedroom the gun was found in. Mr. Turner responded that the gun was found in Marcellus' (Defendant) bedroom. Also, the Defendant himself admitted in a Mirandized statement that the room where the gun was found was his room. A search using the serial number on the gun revealed that the firearm retrieved from the Defendant's bedroom was stolen from a Michael Shaheen of Loyalsock Township in late 2009. The Defendant was subsequently charged with 18 Pa.C.S. §6105 Persons Not to Possess a Firearm; 18 Pa.C.S. §3925(a) Receiving Stolen Property; and 35 P.S. §780-113(a)(16) Possession of a Controlled Substance.

Discussion

Petition for Writ of Habeas Corpus

The Defendant alleges that the evidence is insufficient to establish a prima facie case on the counts as charged as there is no testimony establishing that the Defendant knew or was aware of the whereabouts of a weapon or controlled substances, or that the Defendant possessed them directly or constructively.

It is well settled in this Commonwealth that "a petition for writ of habeas corpus is the proper vehicle for challenging a pre-trial finding that the Commonwealth presented sufficient evidence to establish a *prima facie* case." Commonwealth v. Carbo, 822 A.2d 60, 67 (Pa. Super. 2003) (citing Commonwealth v. Kohlie, 811 A.2d at 1013 (Pa. Super. 2002); see Commonwealth v. Hetherington, 311 A.2d 209 (1975); Commonwealth v. Fountain, 811 A.2d 24, 25 n.1 (Pa. Super. 2002); Commonwealth v. Saunders, 691 A.2d 946, 948 (Pa. Super. 1997), *appeal denied*, 705 A.2d 1307 (1997)). "While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal." Commonwealth v. Wojdak, 466 A.2d 991, 997 (1983) (See Commonwealth v. Prado, 393 A.2d 8 (1978); Commonwealth ex rel. Scolio v. Hess, 27 A.2d 705 (Pa. Super. 1942)). Courts define probable cause as "a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent man in the same situation in believing that the party is guilty of the offense." Kelley v. General Teamsters, Local Union 249, 544 A.2d 940, 942 (1987) (citing Miller v. Pennsylvania R.R. Co., 89 A.2d 809, 811 (1952)).

18 Pa.C.S. §6105 Persons Not to Possess a Firearm prohibits a person who has been convicted of certain offenses from possessing, using, controlling, selling, transferring or

manufacturing or obtaining a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth. As the Defendant was previously convicted of 35 P.S. §780-13(30), he qualifies as a person not to possess a firearm. See 18 Pa.C.S. §6105(c)(2). A firearm was found in the room Mr. Turner identified as belonging to the Defendant, multiple indicia of occupancy found in the bedroom tied the Defendant to the room, and the Defendant admitted in a Mirandized statement that the room where the gun was found was his room. These circumstances provide sufficient evidence to warrant the belief that the Defendant is in fact guilty of violating 18 Pa.C.S. §6105 Persons Not to Possess a Firearm.

A person violates 18 Pa.C.S. §3925(a) Receiving Stolen Property if that person intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner. The serial number on the gun retrieved from the Defendant's room was run and the gun was reported to the Pennsylvania State Police Montoursville on November 11, 2009, by the victim as the firearm and other possessions were stolen from the victim's vehicle. Since the gun was still reported as stolen from its rightful owner in April 2010, and as it does not appear there exists any lawful way the Defendant could have possession of the gun, by inference, it appears that the gun had to be stolen. These circumstances provide sufficient evidence to warrant the belief that the Defendant is in fact guilty of violating 18 Pa.C.S. §3925(a) Receiving Stolen Property.

A person violates 35 P.S. §780-113(a)(16) Possession of a Controlled Substance if the person knowingly or intentionally possesses a controlled or counterfeit substance by a person not registered under the Controlled Substance, Drug, Device and Cosmetic Act, or a practitioner not registered or licensed by the appropriate State Board, unless the substance was obtained directly

from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by the act. In this case, a bag of suspected heroin, that field tested positive, was found in the Defendant's room. These circumstances provide sufficient evidence to warrant the belief that the Defendant is in fact guilty of violating 35 P.S. §780-113(a)(16) Possession of a Controlled Substance.

Motion to Suppress Physical Evidence

The Defendant contends that the search was unlawful because it was conducted initially without a warrant, without consent, and/or beyond the scope of any consent that was given.

Dincher's testimony at the hearing held on August 5, 2010, reveals that the search was initially conducted with the consent of Mr. Turner. When the police arrived at the Turner residence, Dincher asked Mr. Turner if it was ok if he looked in the house as the officers were looking for Coleman. Mr. Turner responded positively that Dincher could search the house. Mr. Turner testified that he has owned the residence on 5th Avenue, the same residence he gave the officers consent to search, for about ten years. Dincher also testified that Mr. Turner requested to go with Dincher throughout the search of the house. Mr. Turner was allowed to go with Dincher throughout the search. As the residence was multiple stories high, Mr. Turner stayed on the floor below with Dincher until the officers cleared the floor above, then Mr. Turner was allowed to come up with Dincher. When the clearing officers got to the third floor they encountered people in the east bedroom. Therefore, Mr. Turner was directed to wait in the third floor stairway while all the officers, including Dincher, searched the third floor. In the west bedroom Dincher observed a mattress and box spring on the floor. Based on Dincher's past experience and training, he knew that it was possible for a person to hide in and/or under objects

such as a mattress and box spring. Therefore, Dincher lifted up the box spring and no one was there. Dincher then lifted up the mattress and observed the revolver. Based on these facts, this Court finds that the search was conducted with consent and within the scope of any consent given. It is clear that Mr. Turner gave consent for the officer's to search the house for Coleman, that Mr. Turner was allowed to go with the officer's throughout the search, and that the officer's search was limited to a search for Coleman.

ORDER

AND NOW, this ____day of August, 2010, based upon the foregoing Opinion, it is ORDERED and DIRECTED as follows:

1. As to the Defendant's Motion for Writ of Habeas Corpus, said Motion is hereby DENIED.
2. As to the Defendant's Motion to Suppress Physical Evidence, said Motion is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: Mary Kilgus, Esq.
Michael C. Morrone, Esq.
Amanda B. Browning, Esq. (Law Clerk)
Gary L. Weber (LLA)