

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

ERIC BILBAY,
Defendant

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CR-1455-2010
CRIMINAL DIVISION

OPINION AND ORDER

The Defendant filed an Omnibus Motion on May 20, 2010. A hearing on the Motion was held August 1, 2011. By way of a letter dated August 12, 2011, Defense Counsel requested that the Court make the preliminary hearing transcripts of March 17, 2011 part of the record as Defense Counsel believed that Officer Michael Crawford's testimony at the hearing differed from his testimony given during the August 1, 2011 hearing on the Omnibus Motion. While the Commonwealth did not oppose the transcripts being made a part of the record, the Commonwealth did contend that Officer Crawford's testimony was not contradictory. Having reviewed the March 17, 2011 transcript, the Court finds that Officer Crawford's testimony did **not** differ from that given on August 1, 2011, and upon agreement of the parties, incorporates the March 17, 2011 transcript as part of the record to be considered in contemplation of the current Omnibus Motion.

Background

In September of 2010, Officer Michael Crawford (Crawford) of the Tiadaghton Valley Regional Police Department began to investigate Eric Bilbay (Defendant) for the manufacturing of methamphetamine at the request of Detective Charles Shoemaker (Shoemaker) from the Lock Haven Police Department. Shoemaker informed Crawford that the Defendant could be involved in manufacturing activities similar to those of the recent Wayne Brewer case in which Crawford was also involved in the investigation. On September 23, 2010, at approximately 12:50 a.m. Crawford was on patrol in the area of 131 North Main Street in Jersey Shore, Lycoming County when he observed a light on in the garage of the Main Street residence and saw the Defendant inside of the garage. Upon seeing the Defendant in the garage, Crawford parked to the left of the Jiffy Market near the residence and turned his patrol vehicle so that he could video record the residence. Using the zoom on the camera on the dashboard of his vehicle, Crawford was able to more accurately follow the Defendant's movements.

Crawford observed the Defendant come out of the residence with a Gatorade or soda bottle and dump the contents of the bottle down the sewer drain in Cherry Alley located to the rear of the residence. Crawford testified that he was familiar with the use of such bottles during the process of manufacturing methamphetamine; however, Crawford admitted that the Defendant's actions up to that point did not appear to be criminal in nature. Crawford also saw the Defendant enter a Chevrolet Tahoe parked at the residence, remove objects from the vehicle, and place the items into the dumpster. Crawford watched the Defendant exit the residence with a white bag and place the bag into the dumpster. After Crawford observed the Defendant place several items into the dumpster, Crawford testified that this conduct seemed out of place as most people generally throw items into dumpsters rather than carefully placing them there. Crawford

then witnessed the Defendant go through a process which he recognized to be the “shake and bake” method for manufacturing methamphetamine; the Defendant came out of the residence with a bottle containing liquid and began to shake the bottle. Taking all of the Defendant’s actions into account, Crawford believed that the Defendant was manufacturing methamphetamine and called for other officers to come to the scene. Agent Andrew Sproat of the Attorney General’s Office and Chief Dave Winkelman of the Pine Creek Township Police Department arrived and began to remove items from the dumpster, many of which Crawford was able to identify as items placed in the dumpster by the Defendant: the white package which contained two empty packets of pseudoephedrine pills, and Gatorade and soda bottles with holes punched in them. Also found in the dumpster was a receipt for pseudoephedrine from a Weis pharmacy in Jersey Shore; Sergeant Dennis Gill of the Tiadaghton Police contacted the pharmacy and was able to confirm that the Defendant made a purchase from the store which corresponded in time with the receipt found in the dumpster. Based on the items removed from the dumpster, a search warrant was obtained for both the 131 ½ North Main Street residence, including the detached garage, and the Chevrolet Tahoe parked at the residence. A search of the residence and garage revealed a green tank containing anhydrous ammonia, two Power Aid bottles with a blue colored liquid in them believed to be Coleman fuel, a .5 ounce bottle containing a yellow liquid acid, a pickle jar containing an unknown liquid, a turkey baster, a container of five-away test strips, a lithium battery package, coffee filters, a 20 ounce plastic soda bottle containing an unknown substance, and two fluorescent lamps (found in the attic of the residence), and indicia of occupancy for the Defendant and Brenda Fenstermacher (Defendant’s girlfriend). In addition to the lamps, a large bin containing what appeared to be marijuana plants, along with a plastic Lasko fan, were also found in the attic. The police later

obtained and executed a search warrant for a blue Ford Taurus, which was parked to the rear of the residence, and found a silver scale, a camouflage jacket, an orange pill box with approximately 27 white pills, and indicia that the vehicle belonged to the Defendant. Due to the dangerous nature of manufacturing methamphetamine, a clandestine lab team was called to help with the collection and removal of the evidence found at the residence.

The Defendant was arrested and waived his Miranda rights given to him by Agent Sproat, signing a written notification of Miranda rights and waiver dated September 23, 2010.

Shoemaker and Crawford then interviewed the Defendant and the Defendant admitted to manufacturing methamphetamine and explained the eight-step manufacturing process he went through; the interview was video-taped and transcribed. The Defendant admitted that he was manufacturing methamphetamine during the time Crawford observed him on that date. The Defendant also admitted that the tank found at his residence was stolen by Brewer from the Crystal Beverage in Jersey Shore, and that the Defendant would give Brewer a ride towards Kemmerer Farms in Nippenose Township where Brewer would fill up the tank with anhydrous ammonia, following which the Defendant would pick Brewer back up.

At the hearing on the Omnibus Motion, the Defendant testified that he was not storing the items he placed in the dumpster, but was throwing them away. The Defendant also testified that he lived in the upstairs portion of the residence, but that the occupants of the downstairs part of the residence also had access to the dumpster.

Discussion

Motion to Suppress Physical Evidence

The Defendant contends that Crawford's use of a zoom lens to conduct surveillance of the Defendant's residence constitutes a search which was conducted without a warrant. The Defendant also contends that the Defendant maintained an expectation of privacy in the dumpster near his residence and that the officers violated his privacy by searching the dumpster without a warrant. Since the observations of Crawford and the officers who searched the dumpster were used to secure the search warrants in this case, the Defendant opines that once said observations are excised from the affidavit to secure the warrants, the affidavit will lack probable cause for the issuance of the warrants. Therefore, the Defendant requests that the Court suppress any evidence seized pursuant to the warrants.

As to the Defendant's contention that the use of the zoom lens constituted a search, the Court finds this argument to be without merit. The issue for the Court to determine is whether the Defendant maintained a reasonable expectation of privacy that was violated by Crawford's actions. The factors to consider in determining whether a reasonable expectation of privacy exists include: (1) whether, by his conduct, the person has 'exhibited an actual (subjective) expectation of privacy'; and (2) whether that expectation is 'one that society is prepared to recognize as reasonable'. Commonwealth v. Jones, 978 A.2d 1000 (Pa. Super. 2009) (citing Smith v. Maryland, 99 S.Ct. 2577, 2580 (1979)). Furthermore, "[i]t is well established that a person cannot have a reasonable or justifiable expectation of privacy in things or activities which are generally visible from some public vantage point." Commonwealth v. Lemanski, 529 A.2d 1085, 1091 (Pa. Super. 1987) (See California v. Ciraolo, 106 S.Ct. 1809, 1812 (1986)). It is likewise established that the use of a device to enhance what is apparent to the naked eye does

not constitute a search, provided the observation takes place from a public vantage point. See Jones, where the police' use of a spotlight from a lawful, non-intrusive vantage point, in order to illuminate activity in the curtilage of a home for closer observation, was not a Fourth Amendment violation. It is in situations where the use of a device to enhance observation is made from an intrusive vantage point that said observation constitutes an unconstitutional search. See Lemanski, where the police' actions in parting shrubbery along the property line of a house and then using binoculars to observe marijuana plants growing in a greenhouse was deemed unconstitutional.

As stated above, Crawford observed the Defendant from two blocks away where Crawford was parked near the Jiffy Market; the Court finds this was a lawful, non-intrusive vantage point. Furthermore, the fact that Crawford was two blocks away and able to see the Defendant, first without the use of the zoom, and then more clearly with the use of the zoom, is an indication to the Court that the Defendant's movements occurred in plain view and that the zoom provided Crawford with a closer view, much the same as the spotlight in Jones. No evidence was produced showing that the police intruded on the Defendant's property, such as the shrubbery parted in Lemanski, in order to observe the Defendant's actions. As such, the Court finds the Defendant's argument that the use of the zoom lens constituted a search to be without merit.

As to the Defendant's contention that he maintained an expectation of privacy in the dumpster near his residence and that the officers violated his privacy by searching the dumpster without a warrant, the Court finds this argument to also be without merit. As stated above, to determine whether the Defendant maintained a reasonable expectation of privacy in the dumpster, the Court must consider whether the Defendant exhibited an actual expectation of

privacy, and whether the expectation is one that society is prepared to recognize as reasonable. See Jones. In considering the notion of a reasonable expectation of privacy, the court is to consider all surrounding facts and circumstances. See Commonwealth v. Lawley, 741 A.2d 205 (Pa. Super. 1999). The accessibility of items to others is viewed as a critical factor “[i]n determining whether a reasonable expectation of privacy in the items exists.” See Lawley at 210. In Commonwealth v. Perdue, 564 A.2d 489, the Superior Court held there was no objectively reasonable expectation of privacy with respect to garbage in a can that was located in an area with public access and therefore open to public inspection. Similarly, in Lawley the Superior Court concluded that no reasonable expectation of privacy existed with respect to items located in a garage which was open and accessible to other tenants at anytime.

In the instant case, the Court cannot find that the Defendant in any way exhibited an actual expectation of privacy in his placement of various items into a dumpster. In fact the Defendant testified that he was not storing the items placed in the dumpster, but was throwing said items away. The Court also finds that no reasonable expectation of privacy existed in the dumpster, as the other tenants of 131 N. Main Street also had access to it. Taking these circumstances into account, the Court finds neither a subjective nor an objective expectation of privacy in the dumpster, and therefore finds the Defendant’s contention otherwise to be without merit.

Motion to suppress incriminating statements

The Defendant contends that the incriminating statements elicited from him by the police were the product of an illegal arrest as the arrest was made without probable cause. However, as the Court found above that neither the use of the zoom lens nor the investigation of the dumpster

were done in violation of the Defendant's rights, the information obtained from the investigations shall remain in the affidavit of probable cause. As the Court finds probable cause existed for the search warrants, the Court also finds that the arrest following the execution of the warrants was accomplished based upon sufficient probable cause.

Alternatively, assuming his arrest was lawful, the Defendant submits that he did not knowingly, intelligently, or voluntarily waive his right to remain counsel or right to remain silent prior to making incrimination statements. "It is the Commonwealth's burden to establish whether [a defendant] knowingly and voluntarily waived his Miranda rights. In order to do so, the Commonwealth must demonstrate that the proper warnings were given, and that the accused manifested an understanding of these warnings." Commonwealth v. Baez, 21 A.3d 1280 (Pa. Super. 2011)

At the Omnibus Motion hearing, the Defendant testified that after he was mirandized, he answered questions from the police in order to protect his girlfriend as he was told if the items in questions were not his, the police would take his girlfriend to jail. However, the Defendant admitted that the police did not threaten his girlfriend in any way. Shoemaker admitted that he did in fact tell the Defendant that if he was to cooperate with the police, there would be no arrest of his girlfriend. Shoemaker made this statement as the Defendant himself brought up his girlfriend and Shoemaker was aware that the apartment belonged to the girlfriend. As the apartment where the Defendant was found to be manufacturing methamphetamine belonged to his girlfriend, the Court can find nothing improper about the police notifying the Defendant of possible consequences to the girlfriend related to the manufacturing activities. Furthermore, the Commonwealth's presentation of the written notification of Miranda rights and waiver signed by the Defendant demonstrates to the Court that the Defendant received the proper warnings and

manifested an understanding of these warnings by signing the waiver and subsequently answering the police' questions. See Baez where it is evident that a defendant's physical manifestation of his waiver of Miranda rights can include a written waiver or a willingness to answer questions following an indication that he understands his rights. The Court also notes that the Defendant's personal motivations for speaking with the police are immaterial as to whether the Defendant knowingly, intelligently, or voluntarily waived his right to counsel or to remain silent. As such, the Court finds the Defendant did in fact knowingly, intelligently, and voluntarily waive his Miranda rights.

ORDER

AND NOW, this ____day of September, 2011, based upon the foregoing Opinion, it is ORDERED and DIRECTED as follows:

1. As to the Defendant's Motion to Suppress Physical Evidence, said Motion is hereby DENIED.
2. As to the Defendant's Motion to Suppress Incriminating Statements, said Motion is hereby DENIED.
3. As to the Defendant's Motion to Reserve the Right to file any additional pre-trial motions pursuant to Rule 579 of the Pennsylvania Rules of Criminal Procedure, said Motion is GRANTED and the Court will rule on any such motions as they arise.

By the Court,

Nancy L. Butts, President Judge

xc: Paul Petcavage, Esq.
Peter T. Campana, Esq.