IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	**:**	
	:	
v.	**:**	**No. 1373-2008**
	:	**CRIMINAL DIVISION**
RAYMOND HOWARD,	**:**	
Defendant	**:**	**PCRA**

OPINION AND ORDER

On January 7, 2011, Defense Counsel filed a Post Conviction Relief Act (PCRA) Petition. This Opinion follows the evidentiary hearing on the Petition held over several days in April and June of 2011.

Factual background

In May of 2008, Jack Howlett (Howlett) agreed to work as a confidential informant for the Pennsylvania State Police (PSP) after he was asked to do so by Trooper Brett Herbst (Herbst). Howlett then participated in a series of controlled purchases of drugs during the months of March, April and June of 2008, from an individual he knew as "P," later indentified as Raymond Howard (Defendant) and also from "A," later identified as Aaron Thompson (Thompson). Howlett relayed that "P" and "A" lived together in the same residence, and that he knew this as he previously worked at the residence for them. During the majority of the controlled purchases, Howlett's wife drove him to the Defendant's residence at 811 Hepburn Street in Williamsport, where the Defendant would get into the Howlett's vehicle. The Howletts would drive around the block and the drug transaction would take place inside of the vehicle. The Howletts would then let the Defendant out of the vehicle and go to meet the police to turn over the purchased cocaine. The police conducted surveillance of each of the controlled

purchases, meeting with the Howletts before the purchases and searching them and their vehicle, following the Howletts to the designated meeting location, following the vehicle as it traveled with the Defendant, and then meeting with the Howletts after the completion of each transaction to again search them and to retrieve the purchased controlled substances. Following a controlled buy on March 12, 2008, Officer Ken Maines of the Williamsport Bureau of Police observed "P" enter 811 Hepburn Street after meeting with the Howletts. Herbst, along with other members of the police, testified that the individual named "P" who met with the Howlett's to conduct the controlled purchases, was an individual with the same physical appearance of the Defendant, but due to the distance of their observations could not make a definitive identification. During a controlled purchase in April of 2008, Herbst was able to positively identify Raymond Howard, the Defendant, standing outside of 811 Hepburn Street, as he recognized the Defendant from past contact. Herbst saw that the Defendant was wearing a black top and black pants on that date, consistent with what the Howletts described "P" as wearing on the same date during the drug transaction.

Following the June 10, 2008 controlled purchase, the police obtained and executed a search warrant at 811 Hepburn Street. Corporal Kris Moore (Moore) of the Williamsport Bureau of Police testified that he assisted in the execution of the warrant, and that before entering, he knocked on the door of the residence and Agent Leonard Dincher (Dincher) announced their presence to any one who may have been inside the residence. Moore testified that after approximately fifteen to twenty seconds, when no one came to the door, the police entered the residence. Moore was the first to enter and encountered a black male (Defendant) seated on the couch about 10 to 12 feet inside the front door. Thomspon, who Moore testified was substantially larger than the Defendant, was apprehended in the upstairs portion of the residence.

Corporal Anthony Fritz (Fritz) of the Pennsylvania State Police also assisted in surveillance of the June 10, 2008 controlled buy and in the execution of the search warrant at the residence. Fritz testified that the individual he saw in the back seat of the Howlett's vehicle wearing a green t-shirt during surveillance of the controlled buy was the same individual taken into custody upon execution of the search warrant at 811 Hepburn Street. A search of the residence revealed seven (7) bags of cocaine in the couch in the living room where the Defendant was sitting upon the police' arrival, and three (3) digital scales. After the Defendant was placed under arrest, he was taken to the Montoursville barracks where a search incident to arrest revealed $751.00; $200.00 of the cash found on the Defendant matched the previously recorded money used in the controlled purchase of cocaine by Howlett.

Following a jury trial held before the Honorable Nancy L. Butts on April 19-20, 2010, the Defendant was found guilty of five (5) counts Possession with Intent to Deliver, five (5) counts Possession of a Controlled Substance, four (4) counts Delivery of a Controlled Substance, three (3) counts Criminal Use of a Communication Facility, and one (1) count Possession of Drug Paraphernalia.

Procedural background

Following a Court Conference with both parties concerning the Petition, the Court determined that an evidentiary hearing was needed relating to the Defendant's allegation of ineffective assistance of counsel for failure to file a suppression motion. At the conclusion of the hearing, the Court granted both parties the opportunity to submit briefs; the Court received the Defendant's brief on June 22, 2011, and the Commonwealth's brief August 15, 2011. As the Commonwealth's brief was untimely, it was not considered for purposes of this Opinion. The

Court notes that although the hearing concerned only the one (1) issue, this Opinion will address all four (4) of the issues initially raised in the Petition.

In his PCRA Petition, the Defendant alleges several grounds of ineffective assistance of trial counsel: 1) failure of trial counsel to file a motion to suppress evidence where the warrant executed to seize the evidence was issued based upon an affidavit which did not establish probable cause to search the residence in question; 2) failure of trial counsel to file a motion to suppress where the police violated the so-called "knock and announce" rule when they executed the warrant; 3) failure of trial counsel to object to the testimony of Harry Rogers where said testimony disclosed to the jury that the Defendant was under electronic surveillance supervision for unrelated criminal activity; and 4) failure of trial counsel to adequately advise the Defendant of his right to testify on his own behalf.

In order to establish a claim for ineffective assistance of counsel, a petitioner must establish:

> (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Reed, 971 A.2d 1216, 1221 (2009). See Commonwealth v. Pierce, 527 A.2d 973 (1987).

Discussion

Failure to file a motion to suppress based on insufficient probable cause for the warrant

The Defendant argues that trial counsel was ineffective for failure to file a motion to suppress the evidence seized as the warrant issued was based on an affidavit which did not establish probable cause to search the residence in question. The Defendant bases his argument on: a) the fact that the warrant fails to establish the informant's veracity, reliability, and basis of knowledge; b) that the information contained within the warrant was stale; c) that the facts in the Affidavit do not justify an inference that criminal activity occurred within the residence or that the residence was instrumental in that activity; and d) that the warrant was overbroad in its description of the items to be searched for and seized.

Joel McDermott, Esquire, was the Defendant's initial attorney, withdrawing from the case on February 5, 2009, the same date that G. Scott Gardner, Esquire, took over as counsel. The time for filing a suppression motion expired October 22, 2008. However, Attorney Gardner testified at the PCRA Hearing that while he did not believe a meritorious suppression issued existed, he was aware that he could have requested the Court to allow him to file said motion, even though the time for filing had expired. Regardless of which attorney failed to file the suppression motion, the analysis pertaining to the Defendant's allegation of ineffective assistance of counsel is interchangeable.

The Defendant first argues that the warrant fails to establish the informant's veracity, reliability, and basis of knowledge. In deciding whether to issue a search warrant, "[t]he task of the issuing magistrate is to consider the information contained within the warrant affidavit in a common sense, nontechnical manner and to determine whether there is a fair probability that

contraband or evidence of a crime will be found in a particular place." Commonwealth v. Cramutola, 676 A.2d 1214, 1216 (Pa. Super. 1996) (See Commonwealth v. Miller, 483 A.2d 498 (1984)). The standard to determine whether probable cause exists is the totality of the circumstances test. Cramutola at 1216. (See Illinois v. Gates, 462 U.S. 213 (1983)). The reliability and veracity of an informant are to be considered "relevant considerations in the totality of the circumstances analysis…." Gates at 233. (See Adams v. Williams, 407 U.S. 143, 146-147 (1972)). The information an informant provides can prove reliable if it is corroborated by police investigation. Cramutola at 1216 (See Commonwealth v. Silverman, 541 A.2d 9 (1988).

The Affidavit of Probable Cause in this case provided details of the controlled purchases of drugs by the confidential informants, and described how the police were able to corroborate through surveillance the information provided by the informants. The Affidavit relayed that "[d]uring this investigation the CI has made controlled purchases of controlled substances as well as provided the PA State Police with information about Raymond HOWARD and other individuals residing at 811 Hepburn ST that are selling crack cocaine." In addition, the Affidavit conveyed that although the controlled purchases did not take place within the 811 Hepburn Street residence, the informants pulled their vehicle to the rear of the residence to meet the suspect for the controlled purchase, and the police observed that suspects were seen either coming from or going into the residence prior to or after meeting with the informants. Based on his experience, Herbst stated in the Affidavit that controlled substances are commonly stored in residences and that individuals make deliveries away from the residence so as to not draw attention to the residence. The Affidavit further stated that several weapons, including an AK-47 were alleged to be inside the residence.

The Court finds that the Affidavit stated that the information provided by the informants was corroborated by police surveillance, establishing the informant's reliability. The Court finds that the information in the Affidavit, as outlined above, provided sufficient evidence to conclude there was a reasonable probability that evidence of drug transactions would be found in 811 Hepburn Street and finds the Defendant's contention otherwise to be without merit.

The Defendant next argues that the information included within the Affidavit concerning the controlled buys is "stale." The Defendant contends that during the last controlled purchase, the suspect was not seen coming from or entering 811 Hepburn Street, and that it was during the controlled purchases which took place months prior where suspects were seen coming and going from 811 Hepburn Street. The Court does agree that

> [i]n order for the issuance of a search warrant to be constitutionally valid, the issuing officer must reach the conclusion that probable cause exists at the time he issues the warrant. Such a decision may not be made arbitrarily and must be based on facts which are closely related in time to the date the warrant is issued.

Commonwealth v. Shaw, 281 A.2d 897, 899 (Pa. 1971). The Court also finds that

> [i]f the issuing officer is presented with evidence of criminal activity at some prior time, this will not support a finding of probable cause as of the date the warrant issues, unless it is also shown that the criminal activity continued up to or about that time.

Id. The Court also notes that the nature of the criminal activity can serve as a reasonable basis to infer that the activity is ongoing, "[w]here a series of illegal acts are observed over a period of time, this fact may serve as a sufficient basis from which to conclude that the activity is of a continuing nature." Commonwealth v. Suppa, 302 A.2d 357, 358 n.1 (Pa. 1973). In this case, the Affidavit clearly shows that the criminal activity continued up to or about the time the warrant was issued. The Affidavit relates that the controlled purchases took place within the three months prior to the Affidavit, and also states that the latest controlled purchase took place

within the past 48 hours of the time the Affidavit was written. The Affidavit states that the controlled purchases were made from individuals seen either coming from or going into 811 Hepburn Street prior to or after meeting with the informants. The Affidavit further relays that during the last controlled purchase on June 10, 2008, the informants went to 811 Hepburn Street to meet the suspect to purchase drugs, and that the suspect "[e]merged from a walkway between 815 Hepburn ST and 811/813 Hepburn ST…" Based on these facts, the Court finds that the warrant was not "stale" due to the continuing nature of the activity, leading to the Court to conclude there was a fair probability that evidence of a crime would be found in 811 Hepburn Street.

The Defendant also argues that the Affidavit does not establish facts sufficient to justify an inference that criminal activity occurred in the residence or that the premises to be searched were instrumental in that activity. In support of his assertion, the Defendant cites to Commonwealth v. Kline, 335 AA.2d 361 (Pa. Super. 1975), where the Superior Court upheld the suppression of a search warrant where the trial judge concluded that "[a]lthough the affidavit contained facts sufficient to establish that Morgan Arthur was indeed dealing in drugs and lived in the apartment described, it did not contain facts sufficient to establish the basis on which the several informants….had concluded that Arthur had gone to his apartment to get the drugs." In reaching this decision, the Superior Court reasoned that the affidavit failed to "[e]nable the magistrate independently to judge the validity of the informant's conclusion that the narcotics were where he said they were." Id.

The Court finds that this case is sufficiently distinct from the facts of Kline. The Affidavit clearly relayed to the magistrate how the affiant was able to conclude that narcotics would be found in 811 Hepburn Street: the informants met the Defendant at 811 Hepburn Street

to make a drug purchase and the individuals involved in the controlled purchases were seen either coming from or going into 811 Hepburn Street prior to or after meeting with the informants. See Affidavit of Probable Cause p. 2. Furthermore, the Affidavit admits that the controlled purchases did not take place within the residence, but as the suspects were seen either coming from or going to the residence prior to or after meeting with the informants, through the affiant's experience he believed that controlled substances would be in the residence. The Court finds that the information provided in the affidavit set forth sufficient information to conclude that drugs would be in the residence.

Finally, the Defendant alleges that the warrant was overbroad in its description of the items to be searched for and seized. A warrant is unconstitutional for its overbreadth when it "authorizes in clear or specific terms the seizure of an entire set of items, or documents, many of which will prove unrelated to the crime under investigation." Commonwealth v. Berry, 83 Pa. D. & C. 4th 562 (2006) (citing Commonwealth v. Bagley, 596 A.2d 811, 814 (Pa. Super. 1991)). A review of the Affidavit in this case does not reveal to the Court that the seizure of an entire set of items was authorized which would prove unrelated to the crime of drug trafficking. Therefore, the Court finds the Defendant's contention otherwise to be without merit.

Failure of trial counsel to file a motion to suppress where the police violated the so-called "knock and announce" rule when they executed the warrant

The Defendant contends that the police violated the knock and announce rule when they failed to wait an adequate amount of time before entering the residence and no exigent circumstances existed to justify the entrance. Pa.R.Crim.P. 207(A) and (B) require that an officer executing a search warrant give, or make reasonable effort to give, "[n]otice of the

officer's identify, authority, and purpose to any occupant of the premises specified in the warrant, unless exigent circumstances require the officer's immediate forcible entry" and that "[s]uch officer shall await a response for a reasonable period of time after this announcement…" In support of his assertion, the Defendant points to Commonwealth v. Newman, 614 A.2d 220 (Pa. 1992) where the Pennsylvania Supreme Court found that, absent exigent circumstances, a "[f]ive to ten-second delay is not a reasonable time for an occupant to respond to police officer's knocking and announcing their purpose." The Newman Court noted that the "[t]he fundamental constitutional concern implicated by the police officers' failure to comply with the 'knock and announce' rule is the prohibition against unreasonable searches and seizures under Article I, § 8 of the Pennsylvania Constitution." See Commonwealth v. Chambers, 598 A.2d 539, 542 (Pa. 1991). Furthermore, Courts generally recognize four (4) exceptions to the requirement of the knock and announce rule:

> 1) the occupants remain silent after repeated knocking and announcing;
> 2) the police are virtually certain that the occupants of the premises already know their purpose;
> 3) the police have reason to believe that an announcement prior to entry would emperil (sic) their safety; and
> 4) the police have reason to believe that evidence is about to be destroyed.

Newman at 222-223. (See Chambers).

At trial and during the PCRA hearing, Moore testified that he knocked on the door of the residence and Dincher announced the police' presence, and that they waited about fifteen to twenty seconds before entry into the residence was made. Moore testified that he knocked on the door loudly, and that Dincher yelled very loud so that "everyone in the 800 block of Hepburn Street should have heard him yell." Dincher testified at the PCRA hearing that Moore knocked on the door at least two (2) sets of four (4) knocks, and that he himself yelled out at least three

(3) times, and that by his estimate they waited about thirty seconds before entering. The police also acknowledged that they did not hear anything inside the residence after knocking and announcing, and that they were concerned that an AK-47 might be present in the residence as they had received information informing them of such.

The Court finds that the evidence establishes that the period of time testified to amounted to an adequate period of time before entry into the residence was made; the wait was distinct from the short period of five (5) to ten (10) seconds in Newman in that this Court finds that the execution of the warrant did not amount to an unreasonable search and seizure. Furthermore, the Court finds that at least two (2) exceptions to the knock and announce requirement were met in that the police did not hear any noises inside the residence after knocking and announcing, and that they had reason to fear for their safety as they had received information that there was an AK-47 present in the residence. For these reasons, the Court finds that the knock and announce rule was not violated and the Defendant fails to meet the first prong needed to prove ineffective assistance of counsel.

Failure of trial counsel to object to the testimony of Harry Rogers where said testimony disclosed to the jury that the Defendant was under electronic surveillance supervision for unrelated criminal activity

At the time of trial, trial counsel objected to Rogers' testimony on the basis that Rogers' lacked the qualifications to testify. However, the Defendant now contends that trial counsel should have objected to the testimony because said testimony disclosed to the jury that the Defendant was under electronic surveillance supervision for unrelated criminal activity and that said testimony was so prejudicial it would have been excluded had an objection been made.

Rogers' did testify that the Defendant was placed under the electronic monitoring system following a driving under suspension charge. However, the fact that the Defendant was under supervision for a driving under suspension charge was stipulated to by both parties and the jury was made aware of this information separate and apart from Rogers' testimony. N.T., 4/19/10, p. 112-113. As the jury was made aware of the circumstances surrounding the Defendant's electronic supervision apart from Rogers' testimony, the Court cannot find that trial counsel was ineffective for failing to object to Rogers' testimony on this basis. As the Defendant fails to present a claim of arguable merit, his contention fails the first prong needed to prove ineffective assistance of counsel.

Failure of trial counsel to adequately advise the Defendant of his right to testify on his own behalf

Lastly, the Defendant argues that trial counsel was ineffective for failing to advise the Defendant of his right to testify on his own behalf and in failing to advise him of the pros and cons of testifying on his own behalf. The Court finds the Defendant's contentions to be without merit as the following discussion took place at trial:

> THE COURT: Sir you may have a seat, you're fine. Okay, sir, you are Raymond Howard the defendant in this case?
>
> DEFENDANT: Yes, Ms. Butts.
>
> THE COURT: And when it came time for the defense to presents testimony or evidence your attorney, on your behalf, had indicated that the defense rested, that you did not intend to presents any testimony or evidence.
>
> DEFENDANT: Yes.
>
> THE COURT: And part of that testimony or evidence could have been your testifying in this case.

DEFENDANT: Yes.

THE COURT: Did you have an opportunity to speak with Mr. Gardner about whether or not you wished to testify?

DEFENDANT: Yes.

THE COURT: And apparently you've chosen not to testify?

DEFENDANT: Yes.

THE COURT: Whose decision was that?

DEFENDANT: Mine.

THE COURT: Did you have – I know I asked you this already, did you have a chance to speak with Mr. Gardner, but did you have a full opportunity to explore the benefits and weigh the positives and negatives as to whether or not you should testify?

DEFENDANT: Yes, before we came in the courtroom.

THE COURT: And you felt confident that you had sufficient time to talk to him about that?

DEFENDANT: Yes.

N.T., 4/20/10, p. 22-23. It is indubitably clear that the Defendant **was** aware of his right to testify on his own behalf **and** of the pros and cons of providing such testimony, as evidenced by his statements admitting such at trial. As such, the Court finds the Defendant claims of ineffective assistance of counsel on this issue to be without merit.

ORDER

AND NOW, this 1st day of September, 2011, upon consideration of the Defendant's Petition for Post Conviction Collateral Relief, it is ORDERED and DIRECTED that the Petition is DENIED and the Defendant and his attorney are hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907 (1), that it is the intention of the Court to dismiss the remainder of the PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.

By the Court,

Nancy L. Butts, President Judge

xc: DA
Peter T. Campana, Esq.