

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**EVAN R. NORDSTROM,
Defendant**

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**CR: 119-2011
CRIMINAL DIVISION**

OPINION AND ORDER

The Defendant filed a Motion to Suppress on April 28, 2011. A hearing on the Motion was held June 23, 2011.

Background

On June 26, 2010, at approximately 6:00 a.m. members of the Williamsport Bureau of Police heard a 911 broadcast signifying a triple tones priority call to 1111 Memorial Avenue in the city of Williamsport, as an armed suspect was struggling with one of the occupants of the residence. While the police were in route to the residence, a white male, later identified as Shawn Brown, flagged down the police and spoke with Corporal Kris Moore (Moore), informing him that he had observed two males run from the residence. Once the police arrived at the residence, Officer Jeff Paulhamus (Paulhamus), Officer Marlin Smith, Corporal Brian Womer, Officer Nathan Moyer, and Moore established a loose perimeter around the residence. Paulhamus testified that once the police approached the residence and ordered all of the occupants to step outside, one of the occupants, Christopher Hess (Hess), was already outside of the residence and across the street. Three white males, identified as Evan Nordstrom (Defendant), Brian Mitstifer (Mitstifer), and Timothy Redka (Redka) then came out onto the porch of the residence; the police observed that Mitstifer was injured and was bleeding from his

face. The police learned that the Defendant, Hess, Mitstifer and Redka all lived at the residence together, and that two assailants had entered the residence and assaulted and robbed Mitstifer. Upon seeing Mitstifer struggle with the intruders, Hess called 911. At least one of the residents then indicated to the police that the assailants had left the residence subsequent to the assault. However, Paulhamus testified that as the police knew that a violent crime had occurred at the residence, they not only needed to secure the residence to ensure the safety of the occupants and other people in the vicinity, but also needed to preserve any evidence that might have been present. Paulhamus also testified that the occupants of the house had just experienced a traumatic event that occurred in the early morning hours and were likely stressed and frightened, evidenced by the fact that the Defendant was visibly shaken upon the arrival of the police. Therefore, the police entered and systematically searched the residence and found no intruders present. While clearing the residence, the police found multiple items of drug paraphernalia and subsequently obtained a search warrant for the residence. Upon execution of the warrant, the police discovered a single barrel 12 gauge shotgun, 4 boxes of 12 gauge shotgun ammunition, a clear glass bong, \$245.00, plastic baggies containing 25.4 grams of marijuana, and a safe in the closet of the residence containing indicia belonging to the Defendant, currency, marijuana, a digital scale, calculator, shotgun tube wrench, and other drug paraphernalia.

Hess testified that he had been asleep in his bedroom for thirty to forty-five minutes when the intruders entered and attacked Mitstifer. Hess saw one intruder with a mask on the front porch with Mitstifer and then retreated upstairs to call 911. Hess could see the scuffle from the tops of the stairs, and learned from Redka that there were two intruders. Hess informed the 911 operator that his roommate was being attacked, but while he was still on the phone believed that the intruders had fled the residence, and informed the operator as such. The 911 operator

directed Hess to go outside the residence, cross the street, and remain there on the phone line until the police arrived. Hess remained outside until the police arrived, at which time he opened the door of the residence for them.

Redka testified that he was in his bedroom on the second floor of the residence when the intruders entered and attacked Mitstifer. Redka could see people rolling around downstairs, but could only make out legs and feet. While he observed the scuffle, Redka did not see either Hess or the Defendant; however, he testified that he heard the Defendant say that one of the intruders had a gun. Redka also heard someone say that there were “more upstairs” which he took to mean that an intruder knew there were more people in the upstairs of the residence. At that point, Redka returned to his bedroom and prepared himself to jump out of his window if he needed to escape. However, once he heard that the scuffle had calmed down, Redka returned downstairs where he took care of Mitstifer, who was covered in blood. Once the police arrived, Redka had to clear the residence and stay on the front porch.

The Defendant testified he was in a second floor bedroom at the time the scuffle occurred and that he did not see what was happening. However, the Defendant also testified that he saw two intruders from his bedroom window, that he thought the intruders had left at the time the police arrived, and that he was certain this fact was made clear to the police before they entered the residence.

Discussion

The Defendant contends that the police unlawfully entered the residence without a warrant and without consent when there was no reason to believe that the assailants or any injured persons were inside the residence. The Defendant further contends that as the police

entered the residence in an unlawful manner, the information contained in the affidavit of probable cause concerning the observations of the police upon their unlawful entrance should be excised from the warrant in determining whether the warrant was issued upon probable cause. When this information is excised from the affidavit, the Defendant contends that the affidavit would then lack probable cause to search for the items identified. Alternatively, the Defendant argues that even if the police did lawfully make their observations and this information need not be excised from the affidavit, the warrant was issued without sufficient facts to establish probable cause to believe that **all** of the items identified as items to be searched for and seized would be found on the premises.

Initially the Defendant argues that the police unlawfully entered the residence without a warrant and without consent when there was no reason to believe that the assailants or any injured persons were inside the residence. After reviewing the evidence presented by both sides, the Court disagrees and finds that several exigent circumstances existed which justified the warrantless entry by the police. The Superior Court in Commonwealth v. Richter, 791 A.2d 1181 (Pa. Super. 2002) cited several factors to consider in determining whether exigent circumstances justify the police proceeding without a warrant:

(1) the gravity of the offense, (2) whether the suspect is reasonably believed to be armed, (3) whether there is above and beyond a clear showing of probable cause, (4) whether there is a strong reason to believe that the suspect is within the premises to be searched, (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended, (6) whether the entry was peaceable, and (7) the time of the entry, i.e., whether it was made at night. These factors are to be balanced against one another in determining whether the warrantless intrusion was justified. Other factors may also be taken into account, such as whether there is hot pursuit of a fleeing felon, a likelihood that evidence will be destroyed if police take the time to obtain a warrant, or a danger to police or other persons inside or outside the dwelling.

See Commonwealth v. Santiago, 736 A.2d 624, 631-632 (Pa. Super. 1999).

In this case, the gravity of the offense was severe; Mitstifer was assaulted and had been robbed by two armed assailants. Evidence of the assault was clear to the police upon arrival as Mitstifer was injured and bleeding from his face. The Court finds that the police did have a strong reason to believe that the suspects were still within the premises to be searched. The police were called to the residence as two assailants had entered the residence, and once the police arrived at the house, the only individuals to come outside when requested were the occupants of the residence. Notwithstanding the fact that the police were informed by at least one of the residents that the assailants had already left the house, the Court finds that the circumstances of the case still justified the police entering the residence absent a warrant.¹ As Paulhamus testified, the occupants of the house had just experienced a traumatic event that occurred in the early morning hours and were likely stressed and frightened. In fact, Paulhamus testified that the Defendant was visibly shaken upon the arrival of the police. In light of this knowledge, the police recognized that the occupants may not have seen everything clearly and determined that entering the residence was appropriate. Furthermore, the testimony presented at the Suppression Motion from the four (4) residents of the house demonstrated inconsistencies and gaps in their individual accounts of the incident. At the time the assault began, the Defendant, Hess and Redka were all in the upstairs portion of the house and witnessed various parts of the assault. Redka testified that the Defendant informed them that one of the assailants had a gun. However, the Defendant testified that he did not actually see the scuffle between Mitstifer and the assailants; he was merely aware that the scuffle was going on. The only definitive statement the Defendant made was that he saw from his bedroom window what he

¹ An individual identified as Shawn Brown also informed the police that he saw two males run from the residence before the police entered and searched the residence. However, the police had no reason to believe this unknown witness or to know of any potential motive he may have had in relaying this information. The Court finds that relying on Mr. Brown's observations in determining whether to enter the residence would have been imprudent.

thought was one or two men running away from the residence, and that someone made it clear to the police that the assailants were no longer in the home at the time of the search. The Court finds that the inconsistent testimony provided by the four (4) residents further validates the officer's decision to enter the residence without a warrant. The Court also finds that there was a likelihood that the assailants would escape if not apprehended swiftly, as the assailants had apparently entered the residence of their own accord and could presumably have fled the residence from another entrance. Additionally, the entrance was made without force as the police were called to the residence when one of the occupants called 911 and no objection to the entrance was made by the occupants at the time it occurred. While the residents were precluded from entering the house before the search, this was done to prevent the destruction of evidence of the assault, and for the protection of the occupants and other individuals in the vicinity in the event that the assailants were still inside the house.

The Defendant further contends that as the police entered the residence in an unlawful manner, the information contained in the affidavit of probable cause concerning the observations of the police upon their unlawful entrance should be excised from the warrant in determining whether the warrant was issued upon probable cause. When this information is excised from the affidavit, the Defendant contends that the affidavit would then lack probable cause to search for the items identified. As the Court finds that the entrance into the residence was **lawful**, the observations of the police upon their entrance will not be excised from the warrant. Therefore, the Court finds that the officer's observations of the drug paraphernalia provided sufficient probable cause for the issuance of the search warrant.

Finally, the Defendant argues that even if the police did lawfully make their observations and this information is not excised from the affidavit, the warrant was issued without sufficient

facts to establish probable cause to believe that **all** of the items identified as items to be searched for and seized would be found on the premises; specifically, the police did not have probable cause to warrant the seizure and search of the Defendant's safe.

A review of the search warrant in this case establishes that the warrant listed the items to be searched for and seized as the following: 1) controlled substances; 2) drug paraphernalia; 3) currency and other items evidencing the obtaining, secreting, transfer, concealment, or expenditure of money; 4) electronic items used to aid in drug trafficking; 5) address and/or telephone books; 6) indicia of occupancy; and 7) firearms, ammunition and other exploding devices. Courts interpret the Pennsylvania Constitution to require that a warrant "describe the items as nearly as is possible." Commonwealth v. Berry, 83 Pa. D. & C. 4th 562 (Pa. D. & C. 4th 2006) (See Commonwealth v. Reese, 549 A.2d 909, 910 (Pa. 1988)). The Berry Court stated further that "[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.'" (quoting Commonwealth v. Bagley, 596 A.2d 811, 814 (Pa. Super. 1991)). Before applying for the search warrant, the police observed multiple items of drug paraphernalia inside of the residence, and confirmed with the occupants of the residence that there was a shotgun inside of the residence. Additionally, the police were aware that a firearm was used during the assault of Mitstifer; therefore, the possibility existed that the same firearm was still present inside of the residence. The Court finds that the warrant did not authorize the seizure of an entire set of items or documents, many of which would prove unrelated to the crime under investigation. The safe in this case was found to have inside of it indicia belonging to the Defendant, currency, marijuana, a digital scale, calculator, shotgun tube wrench, and other drug paraphernalia. As it appears to the Court that all of the items located in

the safe could prove to be related to the crime under investigation, the Court can see no reason why the safe would have been excluded from the search. Therefore, the Court finds that the warrant was not overbroad.

ORDER

AND NOW, this ____day of August, 2011, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Motion to Suppress is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: Aaron Biichle, Esq.
Peter T. Campana, Esq.