

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA

vs.

**THOMAS COBBS,
Defendant**

:
: **No. CR-626-2007**
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:
:

OPINION AND ORDER

Defendant was previously charged and following a jury trial, found guilty of a prohibited person not to possess a firearm in violation of 18 Pa. C.S.A. § 6105 (a) (1) and possession of a controlled substance (marijuana) in violation of 35 Pa. C.S.A. § 780-113 (a) (16). By Sentencing Order dated January 30, 2008, Defendant was sentenced to an aggregate term of incarceration in a State Correctional Institution the minimum of which was 58 months and the maximum of which was 11 years.

On June 29, 2010, Defendant filed a pro se Motion for Return of Property pursuant to Rule 588 of the Pennsylvania Rules of Criminal Procedure. Hearings were subsequently held with Defendant participating by video conferencing.

On October 12, 2010, the Commonwealth presented testimony from Detectives William Weber and Alberto Diaz. At the conclusion of the hearing, the Commonwealth agreed to return to Defendant some of the items that he requested in his Motion for Return of Property. An appropriate Order was entered and the items were subsequently returned to Defendant's designated agent.

The final hearing in this matter was held on March 14, 2011. At this hearing, the Defendant testified. While Defendant's Motion requests the return of the numerous items, Defendant testified that he was seeking the return of only the following:

Gray Brinks Safe, videotape from safe, jewelry from safe (returned via October 12, 2010 Order), papers from safe including checks, additional papers from safe including receipts and appraisals, \$1,000.00 found in bedroom dresser drawer, phone/address book and

documentary indicia of occupancy, rifle ammunition from bedroom, box of American Eagle ammunition and metal case bullet from bedroom, Canon Power Shot Digital Camera, Sony Digital Handicam with mini DV tapes, Sony DCR/TRV Handicam with black camera bag, Compaq laptop and power chords from bedroom, Dell computer tower, XXX VHS tapes (returned via October 12, 2010 Order), 15 homemade videotapes, 12 CD's, additional Dell computer tower, \$235.00 in cash found in living room coffee table drawer, another Dell computer tower, Gateway computer tower, roll of 35 millimeter film, Sony VHS recorder, two Sony remote control devices and one Realistic Universal remote control device.

Defendant testified that with respect to the above-referenced property, he was entitled to lawful possession of such in that: all of the items "belonged" to him; he lived in, occupied and rented the apartment in which the items were seized; and he had a personal, possessory and proprietary interest in all of the items.

Contrary to the Defendant's assertion that he was entitled to lawful possession of the requested items, the Commonwealth argued that the requested items were either derivative contraband or evidence of crimes yet to be charged.

Detective William Weber of the Lycoming County District Attorney's office testified regarding an investigation that he conducted regarding allegations of invasion of privacy and rape against the Defendant.

More specifically, he referenced and the Commonwealth introduced into evidence a search warrant and Affidavit of Probable Cause that were issued under Warrant Control No.: SW-2-06. In November of 2006, Detective Weber, then an agent with the Williamsport Bureau of Police, was approached by a female confidential informant who reported that she had been sexually assaulted by the Defendant. According to the affidavit, the

female confidential informant advised that the Defendant provided her with a drink which caused her to pass out, that the Defendant had a surveillance system set up with exterior cameras, and that she was at the Defendant's residence on more than one occasion and observed videotapes of the Defendant having sexual relations with a female 16 to 18 years of age.

Detective Weber along with Agent Stephen Sorage also of the Williamsport Police Department went to the Defendant's address and confirmed that there were exterior surveillance cameras with wires leading into the second floor of the structure. A search warrant was executed for video, photos, cameras, digital pictures, computers and digital storage media and tape storage media.

The search warrant was executed at the same time the search warrant was executed on the Defendant's residence with respect to the possession of marijuana and persons not to possess firearms charges.

Detective Weber testified regarding the execution of the search warrants, the items that were seized and the location that the items were in at the time they were seized. Detective Weber conceded that no sales of any illegal narcotics were made by the Defendant, no "drug selling paraphernalia" was found on the premises and that the marijuana "could have been for personal consumption."

Detective Alberto Diaz testified on behalf of the Commonwealth. Detective Diaz has extensive experience in controlled substance enforcement and interdiction and was qualified as an expert in the area of such. Detective Diaz testified that in his opinion the money that was seized from the Defendant was derived from marijuana sales. To support his opinion, Detective Diaz testified that there was an elaborate surveillance system, money that was

secreted in a sock, money that was in different amounts and denominations, and that a gun was loaded, readily accessible and in near proximity to the marijuana. He further testified that there were little, if any, indicia of personal consumption. There were no rolling papers, no loose leaves, no roaches in ashtrays, no pipes and no other smoking devices.

Detective Diaz further testified that the confidential informant advised law enforcement that the Defendant did, in fact, sell marijuana.

Based on the testimony of the detectives, the Commonwealth argued that the money that was seized from the Defendant was derivative contraband and accordingly should not be returned to the Defendant. The Commonwealth argued that it was not required to charge the Defendant with possession with intent to deliver. With respect to the computer and videotaping items, the Commonwealth argued that these items were needed for evidence in connection with the investigation of Detective Weber.

Defendant countered that it has been over four years and that no criminal proceedings whatsoever have been commenced against the Defendant in connection with the computer and/or videotapes. He further argued that contrary to what the Commonwealth contended, there was no proof whatsoever that he had sold any marijuana. According to the Defendant there were no scales, no direct sales to anyone, no baggies indicative of selling, no owe sheets; essentially nothing. Defendant argued that to deprive him of his monies was “tantamount” to charging him with possession with intent to deliver without ever actually charging him.

Pursuant to Rule 588 of the Pennsylvania Rules of Criminal Procedure, in order for a Defendant to be entitled to return of property he must establish that he was entitled to lawful possession. The Defendant’s testimony has met this burden.

In order for the Commonwealth to maintain the seized items despite a Defendant's entitlement to lawful possession, the Commonwealth would need to prove that the items constituted derivative contraband. Derivative contraband is innocent in and of itself but is used in the perpetration of unlawful activity. The Commonwealth must establish a nexus between the property seized and alleged criminal activity of the Defendant by a preponderance of the evidence. Commonwealth v. Fontanez, 739 A.2d 152, 154 (Pa. 1999); Petition of Koenig, 663 A.2d 725, 726 (Pa. Super. 1995).

While the Commonwealth argues that some of the seized items constitute evidence in connection with an ongoing investigation, the Court does not accept such an argument as credible under the circumstances. The alleged sexual assault occurred in 2005 approximately a year and a half before it was ever reported. The Commonwealth seized the "evidentiary" items from the Defendant in January of 2007. More than four years later, it begs logic to suggest that there is an ongoing investigation based on the seized items.

The items either contain evidence of a crime or they do not. The nature of the items is such that the Commonwealth could easily ascertain whether they constitute evidence of a crime. Moreover, the Commonwealth has not provided the Court with any legal authority whatsoever that would entitle it to retain property under the alleged circumstances.

The Court accepts as credible the Commonwealth's evidence of the derivative contraband nature of the money that was seized. The Court is not aware of any authority that requires the Commonwealth to file criminal charges in order to sustain an argument that seized items do in fact constitute derivative contraband. The Court finds particularly compelling the fact that there was no evidence whatsoever of personal use, a gun was present on the property, an elaborate electronic surveillance system was present and that there were numerous items of

cash in different denominations. The Court would note in addition that the Defendant did not present any testimony regarding an alternative source of the monies.

Accordingly, the Court will enter an Order directing that the Commonwealth return certain items to the Defendant's agent as designated by the Defendant. With respect to the derivative contraband items, the Court will deny Defendant's Motion for Return of Property.

ORDER

AND NOW, this 8th day of April 2011 following a hearing and argument, the Court grants in part and denies in part the Defendant's Motion for Return of property.

Within thirty (30) days of today's date, the Defendant is directed to provide to the Court and the Commonwealth the name and address of an individual designated by the Defendant as the Defendant's agent to accept property on his behalf.

Within thirty (30) days of the date the Defendant provides the name and address of the individual as referenced above, the Commonwealth shall return to the Defendant's designated agent the following items:

Gray Brinks Safe, videotape from safe of interior of house, bag containing papers from safe including checks and numerous papers and documents, papers from safe including Evens receipt and appraisal, envelope containing phone/address book and indicia of occupancy, envelope containing rifle ammunition, envelope containing box of American Eagle ammunition, 95 grain metal case bullet and Sauers price tag, Cannon Powershot A85 digital camera, Sony Digital Handicam, mini DV tapes, Sony DCR-TRV 280 Handicam, black camera bag, Compaq laptop and power cords, three Dell computer towers, box containing 15 homemade videos, 12 CD's, Gateway computer tower, roll of 35 millimeter film, Sony VHS

recorder and envelope containing two Sony remote control devices and one Realistic Universal remote control device.

Defendant's Motion for Return of Property is DENIED with respect to the money found in a gray sock in the bedroom dresser drawer and cash in various denominations in the living room coffee table drawer.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: DA (MK)
Thomas Cobbs
Inmate # HK 5886
SCI – Waymart
PO Box 256
Waymart, PA 18472-0256
Gary Weber, Esquire (Lycoming Reporter)
Work File