IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1616-2011**
vs.	**:**	
	:	**Opinion and Order re Defendant's**
TIMOTHY EASTER,	**:**	**Omnibus Pre-trial Motion**
Defendant	**:**	

OPINION AND ORDER

This matter came before the Court on Defendant's Omnibus Pre-trial Motion, which consisted of a motion to suppress physical evidence, a motion to suppress statements, a motion to disclose the existence and substance of any preferential treatment and the complete criminal histories of Defendant and any Commonwealth witnesses, a motion for disclosure of other crimes, wrongs or bad acts evidence pursuant to Rule 404(b) of the Pennsylvania Rules of Evidence, a motion to modify bail, and a motion to reserve right to make additional pre-trial motions. The relevant facts follow.

On November 2, 2011, at approximately 3:00 p.m., the police responded to a call from the landlord of the premises at 419 5th Avenue that she could smell an odor of marijuana coming from the second floor apartment. The landlord had a six pack store on the first floor and she smelled the odor when she was in the cooler area of the store.

Officer Jeremy Brown and Officer Robert Williamson responded to 419 5th Avenue. They went to the cooler area of the store and noticed an odor of marijuana that had been burned. The landlord told the police that the odor was coming from upstairs. Officer Brown confirmed that the odor was coming from the second floor apartment by sniffing the crack around the lower level outside door to the apartment.

Officer Brown pounded on the door for about a minute and a half, but no one

answered the door. He then went to look to see if anybody was looking out of the windows. While Office Brown was looking at the window, the landlord took out a key, unlocked the door and yelled for Ashley, the tenant of the second floor apartment.

Officer Brown heard the landlord calling for Ashley and heard the sound of someone on the stairs, so he came back to the door. When Ashley was about halfway down the stairs, Officer Brown stepped through the doorway and into the stairway. Officer Brown noticed the odor of marijuana even more. He told Ashley that he was with the Williamsport Bureau of Police and he needed to talk to her about the smell of marijuana that was coming from her apartment. Officer Brown asked Ashley if she had been smoking marijuana. Ashley initially denied smoking marijuana and claimed she just got home from college. At some time later in the investigation, however, Ashley admitted "we were smoking marijuana" but she did not indicate who the "we" consisted of.

While they were on the stairs, Officer Brown asked Ashley for consent to search her apartment. Ashley said no and started to go back upstairs to her apartment. Officer Brown told her to hold on, and said "that's fine; I'll get a search warrant then." Rather than immediately getting a search warrant, however, Officer Brown and Officer Williamson followed Ashley up the stairs and into the apartment.

Once inside the apartment, the officers observed four males and called for backup.

The officers did not observe any drugs, drug paraphernalia, or firearms in plain view. They also did not observe any bulges on any of the individuals that would lead

the officers to believe that any of the individuals were armed and dangerous. Nevertheless, Officer Brown ordered all the individuals to either sit down or remain seated, demanded that they provide identification cards or otherwise identify themselves, checked for outstanding warrants, and patted them down before having them leave the apartment.[1]

Defendant was one of the males inside the apartment. Although two of the other males were arguing or complaining and not remaining seated, Defendant was cooperative with the police. After Defendant was patted down and "allowed" to leave because no weapons or contraband were found on him, Defendant asked if he could get his shoes from another room. Since it was cold out, Officer Brown allowed Defendant to go into the bedroom and retrieve his shoes. Officer Williamson testified, however, that he still had Defendant's identification card, because he did not return identification cards until an individual was on his way out of the apartment.

Defendant went into Ashley's bedroom and put his shoes on. Another officer, who had arrived in response to the call for backup, however, followed Defendant to the bedroom and ordered Defendant to remove his shoes. When Defendant took off his shoes, the police observed packets of heroin in Defendant's left shoe.

Defendant was arrested and charged with possession of a controlled substance, possession with intent to deliver a controlled substance, and possession of drug paraphernalia.

DISCUSSION

Both the Fourth Amendment to the United States Constitution and Article 1,

[1] Officer Brown testified that he would not permit the four males to stay while he searched the apartment.

§8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures of their persons, houses, papers and property. U.S. Const., Amend. IV; Pa. Const., Art. 1, §8. A warrantless search and seizure is per se unreasonable unless it falls within a specifically enumerated exception. Payton v. New York, 445 U.S. 573, 586 n.25, 100 S.Ct. 1371, 1380 n.25 (1980); Commonwealth v. Wright, 599 Pa. 270, 961 A.2d 119, 137 (2008); Commonwealth v. Rowe, 984 A.2d 524, 526 (Pa. Super. 2009). A party asserting an exception from the requirement for a warrant bears the burden of establishing that his actions come within a recognized exception. Commonwealth v. Parker, 442 Pa. Super. 393, 619 A.2d 735, 740 (1993), citing Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, (1979). In other words, the Commonwealth bears the burden of proving that the circumstances of the search and seizure in this case fall within a recognized exception to the warrant requirement.

Before the Commonwealth presented testimony from Officer Brown and Officer Williamson, it asserted that a warrant was not required because the tenant, Ashley Wilson, consented to the warrantless entry into her apartment. The Commonwealth, however, failed to meet its burden of establishing this exception. Both officers clearly testified that when Officer Brown asked Ms. Wilson if she would consent to a search of her apartment, she refused.

The police did not even have consent to enter the apartment. The police knocked on the door, but no one answered. The landlord then took out a key, unlocked the door and yelled for the tenant. When the tenant began to come down the stairs to the outside door to her apartment, the police entered the stairway before they said a word to her. After

Officer Brown asked her for consent to search and she refused, he said, "That's fine; "I'll just get a warrant" and then he followed her up the stairs and into the apartment.

There is nothing in these facts that even remotely amounts to consent to enter the apartment or to search it. Case law is abundantly clear that a landlord does not have permission to consent to a search of the tenant's home. Commonwealth v. Davis, 743 A.2d 946 (Pa. Super. 1999). In fact, entry into a home or hotel room with the use of a pass key without the consent of the tenant or hotel guest is considered a forcible entry. Commonwealth v. Dean, 940 A.2d 514, 518 n.2 (Pa. Super. 2008). Furthermore, although Ms. Wilson did not say anything to the officers when they followed her up the stairs and into the apartment, a mere acquiescence does not discharge the Commonwealth's burden to show that consent was freely and voluntarily given. Commonwealth v. Maxwell, 505 Pa. 152, 477 A.2d 1309, 1314 (1984), citing Commonwealth v. Davenport, 453 Pa. 235, 308 A.2d 85 (1973), later app. 462 Pa. 543, 342 A.2d 67 (1975).

The Court also notes that Officer Brown conceded in his testimony that there were no exigent circumstances to justify the entry into the apartment.

Even if the Court thought that the entry into the apartment was somehow lawful, the Commonwealth still could not prevail because neither the frisk of the Defendant nor the search of his shoes were lawful.

In order to conduct a frisk, the police must be able to point to specific facts which support an objectively reasonable determination that a suspect is armed and dangerous. Commonwealth v. Grahame, 607 Pa. 389, 7 A.3d 810, 814 (2010).

Here, as in Grahame, there simply was no evidence that the Defendant engaged in furtive movements or other suspicious activity or that he had a criminal history of violent propensities. The mere fact that the police suspected that one or more of the occupants had, at some point, smoked marijuana inside the apartment, is insufficient to believe that the occupants were armed and dangerous. See Commonwealth v. Zhahir, 561 Pa. 545, 751 A.2d 1153, 1162 (2000)("as a general policy consideration, taking judicial notice that all drug dealers may be armed as in and of itself a sufficient justification for a weapons frisk clashes with the totality standard, as well as the premise that the concern for safety of the officer must arise from the facts and circumstances of the particular case.").

With regard to the search of the Defendant's shoes, the Commonwealth did not present testimony from the officer who ordered the Defendant to remove his shoes to establish the basis for that command. From the testimony presented at the hearing on this matter, it appears that the removal of the Defendant's shoes was just an extension of the frisk.

At the close of the evidence, the Commonwealth argued inevitable discovery, based on Officer Brown's testimony that the smell of burnt marijuana alone gave him probable cause to search and that he obtained two search warrants: one to search the apartment for drugs and another to seize a firearm that was discovered during the execution of the first search warrant. The Court cannot agree.

It is the Commonwealth's burden to prove that the searches and seizures in this case were lawful. In order to receive the benefit of the inevitable discovery rule, the

Commonwealth needed to prove that the search warrants were issued based on information that was discovered through an independent and uncorrupted source. As the Superior Court stated in Commonwealth v. Hernandez, 590 A.2d 325 (1991),

> The ultimate question, therefore, is whether the search pursuant to a warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agent's decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

590 A.2d at 329, quoting Murray v. United States, 487 U.S. 533, 542, 108 S.Ct. 2529, 2535-36, 101 L.Ed.2d 472, 483-84 (1988)(footnote omitted).

The search warrants were not admitted into evidence and there was no testimony or other evidence introduced to show that the search warrants were issued without reference to any information obtained as a result of the unlawful entry into the apartment, the frisk of the Defendant or the search of the Defendant's shoes. Therefore, the Commonwealth has not met its burden to show that the evidence would have been inevitably discovered in this case.

Even if the warrants had an independent and uncorrupted source, the Court still questions whether the evidence would have inevitably been discovered. The charges in this case are based on the packets of heroin found in the Defendant's left shoe. By the time the police obtained the search warrant in this case, the Defendant's shoes could have been on the Defendant's feet. The Court notes that the police did not see the in heroin in the Defendant's shoes when the shoes were sitting in Ms. Wilson's bedroom, but rather after he

had put his shoes on his feet and an officer, who was not called to testify at the suppression hearing, ordered him to remove his shoes. Unless the warrant obtained by the police contained a provision that permitted a search of "all persons present," the police would not have had the authority to search the Defendant's shoes or his person. Commonwealth v. Gilliam, 522 Pa. 138, 560 A.2d 140 (1989). Moreover, "all persons present" warrants are not favored. 560 A.2d at 142.

Based on the foregoing discussion, the Court finds that any evidence seized from the search of the apartment, the frisk of the Defendant or the search of the Defendant's shoes must be suppressed.[2]

Accordingly, the following Order is entered:

2 Defendant also sought suppression of statements. The Court does not know if the Defendant made any incriminating statements to the police but, if he did, such statements would also be subject to suppression as "fruit of the poisonous tree."

O R D E R

AND NOW, this ___ day of July 2012, the Court GRANTS the motions to suppress contained in Defendant's Omnibus Pre-trial Motion and the physical evidence and Defendant's statements shall not be utilized in the prosecution of this case. If the Defendant has not already posted bail in this case, the Court modifies Defendant's bail in this case to signature bail. If the Commonwealth fails to file an appeal from this Order with thirty (30) days, the charges shall be dismissed and any bail posted by the Defendant shall be returned, less poundage.

Since the evidence against the Defendant has been suppressed, the Court believes Defendant's remaining requests in his Omnibus Pretrial Motion are moot. If the either of the parties disagree, that party shall notify the Court and the other party in writing within seven (7) days of the date of this Order.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Edward J. Rymsza, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Prothonotary
Prison
Adult Probation
Work file