

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-72-2012
:
vs. : **Opinion and Order regarding**
: **Defendant's Omnibus Pretrial Motion**
:
CULLEN C. HARDY, :
Defendant :

OPINION AND ORDER

Before the Court is Defendant's Omnibus Pretrial Motion, which included a motion to compel discovery, a petition for writ of habeas corpus, and a motion to suppress evidence.

The Court held a hearing and argument on Defendant's motion on May 7, 2012. At the hearing, defense counsel indicated that he had received the requested discovery and he was withdrawing the motion to compel. With respect to the petition for writ of habeas corpus, the parties agreed that the Court would decide this portion of the Omnibus Motion based on the transcript from Defendant's preliminary hearing. The suppression motion would be decided on the combination of the preliminary hearing transcript and the additional testimony that the Commonwealth presented from Trooper Tyson Havens. The relevant facts follow.

Beginning as early as January 14, 2011, the police periodically had 948 West Third Street, Apartment 12 under surveillance because the landlord contacted them and informed them that she believed drug activity was going on inside the apartment.

On January 14, 2011, Officer Justin Snyder and Officer Thomas Bortz were conducting surveillance on Apartment 12 when they observed that a white male had just left

Apartment 12 and was walking north. Trooper Havens received this information and proceeded to the area to make contact with the white male. About two blocks north of the apartment, Trooper Havens approached the white male, who was identified as Defendant Cullen Hardy. During Trooper Havens encounter with Hardy, he consented to Trooper Havens conducting a search of his person. Trooper Havens discovered 12 heroin baggies, eight of which were empty and marked "man down."

On February 4, 2011, Officer Snyder again was conducting surveillance on Apartment 12. He observed three individuals – two females and one male – go into the apartment and leave about 20 minutes later in a vehicle. He radioed the description of the vehicle, which Trooper Havens then began to follow. When Trooper Havens observed a Vehicle Code violation, he conducted a traffic stop of the vehicle and asked its occupants what they were doing and where they had been. The occupants initially lied and said that they were at Apartment 12 to watch a movie. Subsequently, however, they admitted they had been at the residence to purchase heroin from Bridget Konan. Trooper Havens recovered four baggies of heroin marked "man down" from a female named Nicole and empty baggies and paraphernalia, such as needles, from the other female occupant. Nicole indicated that she had just purchased the heroin at Apartment 12, but she either did not know or did not say whether there were still baggies of heroin inside the apartment. Trooper Havens then went back to Apartment 12 to secure the premises so he could get a search warrant.

When Trooper Haven arrived at the apartment, he knocked on the door. Hardy, who Trooper Havens was familiar with from their encounter on January 14, lifted the blinds and looked out to see who was at the door. Trooper Havens, who was in full uniform,

identified himself as a police officer. Hardy's "eyes got as big as saucers," and he slammed the blinds down. Trooper Havens then heard footsteps, followed by the sounds of a toilet flushing more than once. Believing that Hardy was destroying evidence, Trooper Havens took the pass key the landlord had given him a few days or weeks earlier and opened the door to the apartment.

The apartment was a small efficiency that had a combined kitchen and living area and a small bathroom. As soon as Trooper Havens opened the apartment door, he could see Hardy standing over the toilet. Hardy stated that the toilet was clogged. Trooper Havens observed toilet paper, a plastic bag, and one or two glassine baggies inside the toilet bowl, with the glassine baggies floating on top. Trooper Havens handcuffed Hardy, secured the apartment and Trooper Havens left to make application for a search warrant.

While Trooper Havens was gone, a black female and black male arrived at the apartment. They were taken to the police barracks for questioning. Ultimately, the black female was identified as Bridget Konan and the black male was identified as Devon Darby.

Trooper Havens returned to the apartment with a search warrant. As a result of the search, the police found and seized a small amount of marijuana and hundreds of items of paraphernalia, including hundreds of glassine bags many of which were stamped "man down," needles, and Q-tips.

Hardy was arrested and charged with criminal conspiracy to deliver a controlled substance (heroin), possession of a controlled substance (heroin); possession of a small amount of marijuana, possession of drug paraphernalia, and tampering with physical evidence.

Bridget Konan testified at Hardy's preliminary hearing. Konan admitted that she sold four bags of heroin to her friend, Nicole. She stated that Nicole called her and asked her if she could get some heroin. Konan told her yes and to come on down to her apartment. Once Nicole and her friends were at the apartment, Hardy called Darby to arrange the purchase of heroin. Konan got \$80 from Nicole and \$40 of her own money, took the car in which Nicole and her friends arrived, and drove to Darby's apartment. Konan received eight bags of heroin in exchange for \$120 and returned to the apartment. Konan gave four bags of heroin to Nicole; she placed two bags on the kitchen table for Hardy; and she went into the bathroom and used the last two bags herself. When she exited the bathroom, the two bags were no longer on the table, but Konan did not know where Hardy put them. Konan stated that the marijuana and the paraphernalia to ingest it that were found in the apartment were hers. She also testified that Hardy lived with her at the apartment for about three months before this incident.

All of the charges were held for court, except possession of a small amount of marijuana.

Petition for Writ of Habeas Corpus

In the portion of his Omnibus motion that seeks habeas corpus relief, Hardy avers that the evidence was insufficient to establish a prima facie case that he possessed a controlled substance, i.e. the two baggies of heroin that Bridget Konan testified she left on the table for Hardy. The Court cannot agree.

When reviewing a request for habeas corpus relief, the Court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most

favorable to the Commonwealth. Commonwealth v. Santos, 583 Pa. 96, 876 A.2d 360, 363 (2005). At this stage of the proceedings, the Commonwealth must establish a prima facie case. “A prima facie case exists when the Commonwealth presents evidence of each of the material elements of the crimes charged and establishes sufficient probable cause to warrant a belief that the accused committed the offense.” Santos, supra, quoting Commonwealth v. Huggins, 575 Pa. 395, 836 A.2d 862, 866 (2003).

The Commonwealth needed to present evidence to show two elements: (1) that Hardy possessed heroin; and (2) that he did so knowingly or intentionally. 35 P.S. 780-113(a)(16); Pa.SSJI (Crim) §16.13(a)(16)A. Possession can be proven by showing either actual possession, i.e., a controlled substance found on a defendant’s person, or by showing a defendant constructively possessed the drug. Commonwealth v. Macolino, 503 Pa. 201, 469 A.2d 132, 134 (1983). Constructive possession has been defined as the ability to exercise a conscious dominion over the illegal substance, i.e., the power to control the contraband and the intent to exercise that control. Id.

The testimony presented at the preliminary hearing established that Hardy called Devon Darby to make sure he had heroin to sell, and then Konan took \$80 she got from Nicole and \$60 of her own money and purchased eight baggies of heroin from Darby. When Konan returned to her apartment, she provided four baggies of heroin to Nicole, placed two baggies of heroin on the table for Hardy, and then she went into the bathroom and used the other two baggies of heroin. When she exited the bathroom, the two baggies she left on the table were no longer there.

The individuals inside the apartment when Konan returned with the heroin were Konan, Hardy, Nicole, and the male and female that came to the apartment with Nicole. Nicole and her two companions were stopped by Trooper Havens shortly after they left the apartment. Nicole had four baggies of heroin, but no heroin or other drugs were found on her two friends.

Since the two baggies of heroin were taken off the table while Konan was in the bathroom, she did not take them. These two baggies also were not found in the possession of Nicole and her two friends. The reasonable inference from Konan's testimony and the fact that only four of the eight baggies were found on Nicole and her friends is that Hardy took the two baggies of heroin off of the table and those two baggies never left the apartment.

Since Hardy called Darby to make sure he had heroin to sell to Konan, Hardy knew that the baggies contained heroin. Furthermore, Hardy's reaction to seeing Trooper Havens outside the apartment door showed Hardy's consciousness of guilt. Finally, there were one or two glassine baggies floating on top of the water in the clogged toilet.

From all the evidence presented and the reasonable inferences to be drawn therefrom, one could reasonably conclude that Hardy possessed the two baggies of heroin that Konan left on the table for him and when he realized that Trooper Havens was outside his door Hardy panicked and tried to flush them down the toilet.

Motion to Suppress Evidence

Hardy also contends that all of the evidence seized from the apartment must be suppressed because Trooper Havens made a warrantless entry into the apartment without

being justified by a recognized exception to the warrant requirement. The Court cannot agree.

The Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect against unreasonable searches and seizures. “[A] warrantless search of a residence is *per se* unreasonable unless justified by a specific exception to the warrant requirement.” Commonwealth v. Gutierrez, 750 A.2d 906, 909 (Pa. Super. 2000), citing Payton v. New York, 445 U.S. 573, 586 n.25 (1980). One exception to the warrant requirement is exigent circumstances. Commonwealth v. Richter, 791 A.2d 1181, 1185 (Pa. Super. 2002).

In determining whether exigent circumstances exist, a number of factors are to be considered. Among the factors to be considered are: (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.

Id., quoting Commonwealth v. Santiago, 736 A.2d 624, 631-32 (Pa. Super. 1999).

Conspiracy to deliver heroin is a serious offense. Although the police had no reason to suspect that either Hardy or Konan were armed, there was above and beyond a clear showing of probable cause in this case. The police had the residence under surveillance. Trooper Havens had confirmation from his traffic stop of the vehicle in which

Nicole was a passenger that she had just purchased heroin inside the residence. Trooper Havens proceeded directly from the traffic stop to the residence. When Trooper Havens knocked on the door of the residence, Hardy lifted the blinds to see who was at the door. Trooper Havens immediately recognized Hardy from his contact with him two to three weeks earlier when Hardy was found in possession of baggies, some of which contained heroin and some of which were empty, marked “man down,” just like the baggies of heroin he seized from Nicole during the traffic stop. Hardy’s reaction to Trooper Havens presence – his eyes got big as saucer’s, he slammed down the blinds, and he repeatedly flushed the toilet – not only showed Hardy’s consciousness of guilt, but also a great likelihood that evidence regarding the drug activity occurring in the apartment was being destroyed. The entry also occurred during the daytime using the landlord’s pass key. While an unauthorized entry by means of the pass key may be considered equivalent to a “forcible entry,”¹ it certainly was more peaceable than breaking down the door.

Based on the totality of the facts and circumstances in this case, the Court finds that Trooper Havens warrantless entry into the residence was justified by exigent circumstances.

Accordingly, the following Order is entered.

¹ See Commonwealth v. Dean, 940 A.2d 514, 518 n.2 (Pa. Super. 2008), citing Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (Pa. Super. 1970).

ORDER

AND NOW, this ____ day of May 2012, the Court DENIES Defendant's
Omnibus Pre-trial Motion.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Donald F. Martino, Esquire
Work file