

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH**

v.

**NATHAN SWANK,  
Defendant**

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**CR: 533-2012  
CRIMINAL DIVISION**

**OPINION AND ORDER**

The Defendant filed An Omnibus Pretrial Motion on June 8, 2012. A hearing on the motion was held August 30, 2012 and was continued to September 18, 2012 for additional testimony.

***Background***

On February 13, 2012, the Adult Probation Office of Lycoming County (APO) received an anonymous phone call that Nathan Swank (Defendant) was dealing drugs/marijuana out of his apartment and drinking alcohol. The Defendant was currently on supervision with APO. The following night, on February 14, 2012, Adult Probation Officer Erick Fortin (Fortin) and Adult Probation Officer Jeffrey Whiteman (Whiteman) went to the residence of the Defendant, at 7 North Main Street, Picture Rocks, PA. Fortin and Whiteman were unable to locate the listed address, which was the address that the Defendant had provided to them as his residence. Fortin and Whiteman entered a nearby pizza place called Pappas Pizza to inquire about the address. According to both Fortin and Whiteman, when they entered Pappas Pizza they encountered the Defendant's mother, Kathryn Wezenavich (Wezenavich), and one of the Defendant's brothers. They were informed by Wezenavich that the Defendant had changed his address and that he now lived in the rear of the pizzeria with his girlfriend at 8 South Main Street. The mother of the

Defendant then directed them on how to reach the Defendant's new apartment, which was apartment five (5).

Fortin and Whiteman located the apartment, knocked on the door, and were told to "hold on." The Defendant answered the door and was asked if he lived there, to which he responded that he did. The Defendant told Fortin that he called him and left a message informing him of his new address. Fortin did not previously approve the address or the move and did not know he was living there. Further, the Defendant was asked if there was anything in the apartment that they should know about, to which the Defendant said there was not. Fortin and Whiteman were then given permission to enter the apartment by the Defendant. While they entered they noticed the Defendant's girlfriend, Brook Rose (Rose), exit a rear room in the apartment and another brother of the Defendant, Kyle Swank, sitting on a futon in the living room. Fortin asked the Defendant if he could talk to him privately and the Defendant escorted him to the rear room, which Rose had just previously exited. Whiteman stayed with Rose and Kyle Swank in the living room, customary procedure for APO in order to maintain safety for the officers within the apartment.

Fortin and the Defendant entered the rear bedroom and begin talking. As they were talking, Fortin noticed a large bong used to smoke marijuana located in a closet that did not have a door.<sup>1</sup> Fortin asked the Defendant what the bong was and he responded that it was his girlfriend's (Rose). Fortin then asked the Defendant if there was any more contraband in the apartment and in response the Defendant said there was marijuana in the kitchen and that it was his. At this time, Whiteman called police and Pennsylvania State Trooper Paul McGee (McGee) responded. While waiting for McGee, Fortin asked the Defendant if there were more drugs in

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<sup>1</sup> Fortin stated that he believed that the closet did not have a door. He stated on cross-examination, however, if there was a door on the closet it was wide open. He did not testify that he opened the closet door.

the apartment and he indicated that there was not. Fortin was suspicious of more drugs and opened a duffel bag in the rear bedroom and within it found a large amount of marijuana. The Defendant then subsequently stated that the marijuana and all other contraband was his.

McGee arrived on the scene and was led to the apartment by Whiteman. McGee stated that when he arrived a large amount of marijuana was located on the bed. Further, McGee asked the Defendant whether the apartment was a “tweaker pad,” which he stated is a term used to represent an apartment solely meant to sell drugs. The Defendant stated that it was not a “tweaker pad” and that he in fact stayed in the apartment.

The Defendant and his witnesses have a much different account of the events that occurred on February 14, 2012. The Defendant’s mother, Wezenavich, stated that when Fortin and Whiteman arrived at Pappas Pizza she only informed them that the Defendant was at his girlfriend’s apartment upstairs and that she did not give them any more information on where the apartment was or whether the Defendant moved into the apartment with his girlfriend. According to the Defendant’s witnesses Kyle Swank and Rose as well as the Defendant, Fortin and Whiteman knocked on the door and the Defendant answered. Fortin asked the Defendant if his mother had warned him that they were coming to see him and asked if there was anything in the apartment that they should know about. The Defendant stated that he was not informed by his mother and that there was nothing in the apartment that they needed to know about. While Rose exited the rear bedroom she saw Fortin and Whiteman walk into the apartment. According to the Defendant’s witnesses, Fortin went straight to the rear bedroom. Rose followed Fortin and saw him go right to the closet, open the closet door, and find her bong. Fortin then called for the Defendant and told Rose to wait with Whiteman in the living room. Fortin then told the Defendant that he thought there was nothing in the apartment that he shouldn’t have known

about and the Defendant responded “sorry.” Fortin then searched the rest of the room and found the large amount of marijuana, which Rose testified at the hearing was hers.

The Defendant contends that the apartment was not his residence and that he never told Fortin or Whiteman that it was his. Rose stated that she told Fortin and Whiteman that it was her apartment and that the marijuana was hers during their visit. She stated that the Defendant was at the apartment four (4) to five (5) days of the week and that he stayed overnight about half the month. Rose also indicated that the Defendant kept night clothes at the apartment and that she did his laundry. The Defendant stated that he did not receive mail at the apartment but at his other residence, which is where his mother resides. The Defendant also stated that he had no property or clothes at Rose’s apartment.

The Defendant added additional evidence that the closet door was closed and that Fortin opened it when he found the bong. Kyle Swank stated that he had never been informed that the closet door was off the closet and that his half-brother was the landlord. Rose stated that the closet door always remains closed because when the door is opened the closet light comes on automatically. Rose further testified that “we” have a speaker in the closet that does not allow the closet to be opened the whole way. Both Rose and the Defendant testified that the other reason the door is kept closed is because the cat urinates inside.

### *Motion to Suppress*

The Commonwealth’s witnesses and the Defendant’s witnesses have significantly different accounts of what occurred on February 14, 2012. In order for the Court to make a ruling on the Motion at issue there must first be a determination of credibility. Based on the review of all of the witness testimony, the Court accepts the testimony of Fortin, Whiteman, and McGee. In general, the account of events by Fortin, Whiteman, and McGee were consistent and

made the most sense in light of the circumstances presented. Wezenavich stated that she told Fortin and Whiteman only that the Defendant was visiting his girlfriend. Accordingly, without any information provided, Fortin and Whiteman would have found the Defendant's girlfriend's apartment. No other evidence was presented to explain how Fortin or Whiteman would have located the apartment another way. Defendant, Rose, and Kyle Swank also stated that Fortin and Whiteman never asked if it was the Defendant's apartment at anytime prior to the marijuana being found. The address, however, that the Defendant was currently at was not his listed address, which is a probation violation. Common sense would dictate that Fortin and Whiteman would determine if there was a probation violation and also whose apartment they were currently at before entering.

One of the other factors the Court used to determine credibility is the behavior of the Defendant and his brother during the hearing itself. First, when Kyle Swank testified he was asked whether he knew how often the Defendant stayed the night at the apartment alleged to be his girlfriend's. Prior to his response the Defendant slightly shook his head in order to communicate an answer to his brother on the witness stand. In addition, both the Defendant and his girlfriend's testimony inferentially established that they lived together by references to "my" cat lived in the apartment and his girlfriend stated that "we" have a speaker in the closet. Moreover, the Defendant admitted to having possessions in the apartment, as he told McGee that the marijuana (both in the kitchen and found in the bag) and the bong belonged to him. Finally, the Court found McGee's testimony that he asked the Defendant if the apartment was a "tweaker pad" and his response that he in fact lived at the apartment to be very credible.

After finding in favor of the Commonwealth's witnesses on the issue of credibility, the Court must now determine whether Fortin and Whiteman both legally entered the apartment of the Defendant and observed the bong in the closet.

“The plain view exception to the warrant requirement allows the police to seize objects that are viewed from a lawful vantage point where the incriminating nature of the object is immediately apparent.” Commonwealth v. McGree, 924 A.2d 621, 625 (Pa. 2007). There are three prongs in order to determine whether an object was lawfully observed in plain view: 1) the police must be at a lawful vantage-point; 2) the incriminating character of the object must be immediately apparent; and 3) the police must have a lawful right to access to the object. Id.

According to Fortin and Whiteman, the Defendant gave permission for them to enter his apartment.<sup>2</sup> Consent to enter a residence is an exception to the warrant requirement. Commonwealth v. Strader, 931 A.2d 630 (Pa. 2007). Fortin then asked the Defendant if they could speak in private, in which the Defendant escorted Fortin to a rear bedroom. While in the bedroom, Fortin saw a bong in the closet. Fortin was lawfully in the apartment, as the Defendant gave him permission to enter. Further, after seeing the bong, Fortin realized that the Defendant was not allowed to be in possession of it and asked him about it immediately. Fortin identified the bong as an object used to smoke marijuana and did so without conducting a search.

As Fortin was legally in the Defendant’s residence and in a lawful position to view the bong, the Court must now determine if the search of the apartment was proper. 61 P.S. § 331.27a permits State Parole agents to search property of State offenders “if there is *reasonable suspicion* to believe that the offender possesses contraband or other evidence of violations of the conditions of supervision.” (emphasis added); see also Commonwealth v. Williams, 692 A.2d 1031, 1036 (Pa. 1997) (finding that a parolee who has signed a consent for warrantless search is still entitled to a reasonable search with the parole officer having reasonable suspicion that the

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<sup>2</sup> While the Defendant may not have been on the lease of the apartment he would have still had authority to permit Fortin and Whiteman into the apartment. “The United States Supreme Court has held that a third party has actual authority to consent to a search if he/she ‘possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected.’” Commonwealth v. Basking 970 A.2d 1181 (Pa. Super. 2009) (citing United States v. Matlock, 415 U.S. 164, 171 (1974); see also Commonwealth v. Hughes, 836 A.3d 893, 904 (Pa. 2003) (discussing when a person with apparent authority consents to the entry of police).

parolee committed a parole violation). To determine reasonable suspicion the Court is to take into account numerous factors: (1) the observation of the agent; (2) information provided by others; (3) the activities of the offender; (4) information provided by the offender; (5) the experience of agents with the offender; (6) the experience of agents in similar circumstances; (7) the prior criminal and supervisory history of the offender; and (8) the need to verify compliance with the conditions of supervision. 61 P.S. § 331.27a. The totality of the circumstances must show that the parole officer had reasonable suspicion to believe that the parolee committed a parole violation and that the search was reasonably related to the duty of the parole officer. Commonwealth v. Hunter, 963 A.2d 545, 551-552 (Pa. Super. 2008).

In Colon, a parolee was suspected of living with his girlfriend in an unapproved address. Commonwealth v. Colon, 31 A.3d 309, 315 (Pa. Super. 2011). In addition, the parolee was seen picking up an individual, driving for a few blocks, and then dropping off an individual in the same location they were picked up. Id. Finally, parole agents received reports that the parolee was engaged in drug trafficking. Id. The Superior Court of Pennsylvania ruled that the parole agents had reasonable suspicion to conclude that the parolee was violating a condition of his parole and were able to search his person and his vehicle. Id. at 315-16.

Here, APO received an anonymous tip that the Defendant had been drinking and was selling drugs out of his apartment. When Fortin and Whiteman attempted to make contact with the Defendant, they were informed that he had moved into his girlfriend's apartment. The Defendant did not have permission to change his listed address and if he changed his address he would not have had permission in violation of his supervision. See Colon, 31 A.3d at 315 (reasonable suspicion to search when an individual under supervision moves without getting address approved). Further, Fortin and Whiteman went to the apartment alleged to be his new address and found him. The Defendant was asked if this was his residence and he indicated that

it was and that he attempted to change the address with APO by leaving a message. At this point, Fortin and Whiteman had reasonable suspicion to believe that the Defendant had violated his parole. However, Fortin and Whiteman did not commence a search at this point and were given permission to enter the apartment. Once Fortin saw the bong in plain view and the Defendant stated that he had marijuana, Fortin had reasonable suspicion and probable cause to search the apartment. Any evidence and contraband found as a result of the search is lawfully obtained.

**ORDER**

AND NOW, this \_\_\_\_\_ day of December, 2012, based upon the foregoing Opinion, the Court finds that the Adult Probation Office of Lycoming County lawfully conducted a search of the Defendant's residence. Therefore, the Defendant's Motion to Suppress is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: DA (MW)  
Michael Morrone, Esq.  
Eileen Dgien, Dep. CA  
Gary Weber