

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA

vs.

**CRAIG McCULLOUGH,
Defendant**

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: No. CR-407-2011

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:

: Motion to Suppress

OPINION AND ORDER

Before the Court is Defendant's Motion to Suppress Evidence that was filed on December 15, 2011.

By Information filed on April 20, 2011, Defendant is charged with one count of possession with intent to deliver crack cocaine, one count of possession of crack cocaine, one count of possession of heroin, one count of possession of drug paraphernalia, one count of persons not to possess or use firearms and one count of conspiracy to possess with intent to deliver crack cocaine. The alleged coconspirator is an adult individual named Eric Brown.

On January 31, 2011, law enforcement officers obtained a felony arrest warrant for an individual named Bilal Sabur. On February 3, 2011, Mr. Sabur was at Eric Brown's residence located at 1643 Memorial Avenue (Rear 2nd Floor) in Williamsport and was taken into custody on the arrest warrant. During the arrest of Mr. Sabur, the officer came in contact with three other individuals who were present in the residence: the Defendant, Eric Brown and a female named Amber Woods. In the course of conducting the arrest of Mr. Sabur, the officers allegedly observed in plain view several items to include drug, drug paraphernalia and firearms. A search warrant was later obtained and executed.

Officers eventually located and seized numerous items pursuant to the search warrant including approximately one-half ounce of crack cocaine individually prepackaged in

21 separate Ziploc baggies, nine individually prepackaged bags of heroin, one revolver, one shotgun and one long rifle.

Defendant's Motion to Suppress asks the Court to suppress all of the aforesaid evidence obtained and intended to be utilized against the Defendant on three separate grounds. First, Defendant claims that the entry into the apartment was illegal and without the requisite probable cause. Second, Defendant claims that the search warrant was fatally overbroad. Lastly, Defendant claims that the search warrant contained false information and/or material omissions.

The hearing was held on January 4, 2012. Alex Fils-Aime first testified on behalf of the Commonwealth. He is employed as a U.S. Marshall and presently manages the fugitive task force. On February 3, 2011, the task force established, through independent verification, that Mr. Sabur was inside the rear, second floor apartment at 1643 Memorial Avenue.

At approximately 5:00 a.m. in the morning, task force members began surveillance on the residence. Shortly thereafter, an adult woman left the premises by vehicle.

The woman was detained shortly thereafter. She confirmed that Mr. Sabur was in the residence. She indicated that she went to the residence to see if the female needed a ride to work, but the female decided not to go to work that day. She confirmed that there were weapons in the residence including a rifle and possibly a shotgun. She also indicated that there was a weapon either "stuck down" or "sticking up" in the couch.

As a result of having an arrest warrant for Mr. Sabur on attempted homicide, confirmation from the woman who had just left the residence that Mr. Sabur was located in the

residence by, information that they were weapons in the residence and knowledge of Mr. Sabur's criminal history, the task force members entered the residence.

Entry was made at approximately 7:00 a.m. Approximately six officers were "stacked" at the door. Upon entry, an individual believed to be the Defendant was immediately detained by two of the task force members. The remaining members "cleared" the rest of the apartment searching for Mr. Sabur. They encountered Mr. Brown and a female who was then immediately detained. Shortly thereafter, they encountered Mr. Sabur on a couch in the living room. He was immediately taken into custody.

Mr. Fils-Aime described the entry and clearing process as "systematic." Upon entering the residence, they first went into the kitchen and then immediately went right. They searched any and all places where a person could hide. Each room was cleared until Mr. Sabur taken in custody. The detention and clearing process took approximately sixty seconds. As the individuals were detained, they were kept in the kitchen under watch.

While clearing the residence, Mr. Fils-Aime looked in a closet and saw a portion of a gun. Other than that weapon, he personally saw no other weapons. Members of the task force who assisted in the apprehension of Mr. Sabur advised Mr. Fils-Aime there was other contraband in plain view but he did not personally see such.

Kevin Stiles next testified on behalf of the Commonwealth. He is presently employed by the Williamsport Bureau of Police as a Detective. On February 3, 2011, he was contacted by the U.S. Marshall's Service, which advised Detective Stiles that they had located Mr. Sabur. Agent Stiles had previously applied for and obtained the arrest warrant for Mr.

Sabur and had requested assistance from the task force to locate Mr. Sabur and to execute the warrant.

While the Marshalls were making entry into the residence, Agent Stiles and other members of the Williamsport Bureau of Police secured the perimeter of the residence.

Once all of the individuals inside of the residence were secured, because Agent Stiles had obtained the arrest warrant, he entered the residence to “help escort” Mr. Sabur outside and to take him into custody.

By the time Agent Stiles entered the residence, all of the occupants were detained. He observed Mr. Sabur sitting on the couch.

While entering the premises in order to take Mr. Sabur into custody, Agent Stiles saw several items of contraband in plain view, including a suspected bundle of heroin located on the couch where Mr. Sabur was apprehended, suspected cocaine near a playing card on a coffee table, and a rolled up dollar bill near white powder located on the coffee table. He was also informed by the Marshalls that there were other items in plain view including a plate with white powdery substance, suspected cocaine under a bed, a shotgun in a closet and a packaged suspected substance near a calculator.

After Mr. Sabur was removed from the residence, Agent Stiles returned and took photographs of the items of contraband that he and the Marshalls observed in plain view. Those photographs were attached to a search warrant application and affidavit of probable cause that were prepared by Agent Stiles shortly thereafter. The application for search warrant and authorization, affidavit of probable cause, and attachments were introduced and marked as Commonwealth Exhibit 1.

Through Agent Stiles, the Commonwealth also introduced into evidence a very rough drawing of the layout of the apartment. This layout was marked as Commonwealth Exhibit 2.

Craig McCullough, the Defendant, testified on his own behalf. He stated that his address was 2020 Hayes Lane and that 1643 Memorial Ave, Apartment 2 was Eric Brown's residence. He indicated that approximately 7:00 a.m. on the morning of February 3, 2011 he was at Eric Brown's residence and heard a knock on the door. He asked who it was and then opened the door. He immediately saw guns pointed at him, was ordered to get down and the individuals "came in."

He complied and was detained in the kitchen area. He saw Mr. Sabur to his left on the couch in the living room. The Marshalls immediately seized Mr. Sabur and then went and seized Mr. Brown and an adult female by the name of Amber Woods.

Once all of the individuals were in custody, the Marshalls searched through everything and looked "everywhere." According to the Defendant, Mr. Sabur was already handcuffed when the search of the premises began.

Defendant first contends that the entry into the residence at the outset was illegal. Defendant argues that it was a warrantless entry.

Although a defendant charged with a possessory offense has automatic standing to challenge a search, in order to prevail, the defendant, as a preliminary matter, must show that he had a privacy interest in the area searched. Commonwealth v. Maldonado, 14 A.3d 907, 910-11 (Pa. Super. 2011), citing Commonwealth v. Burton, 973 A.2d 428, 435 (Pa. Super. 2009)(en banc).

There is no evidence in the record to establish that Defendant was an owner or resident of the premises entered by the Marshalls. Neither Marshall Fils-Aime nor Detective Stiles gave any testimony related to who owned the apartment or resided therein. The Defendant testified that his address was 2020 Hayes Lane and the apartment located at 1643 Memorial Avenue was Eric Brown's residence. Since the Defendant has not shown that he had a privacy interest in the premises, he is not entitled to suppression in this case.

Even if the Defendant had established that he has a privacy interest in the premises, the Court finds suppression is not warranted under the facts and circumstances of this case.

Law enforcement officers armed with an arrest warrant and "reason to believe" that the subject of that warrant is within a suspect's own home can enter the home and arrest the suspect without a search warrant. Commonwealth v. Stanley, 498 Pa. 326, 446 A.2d 583 (1982); Commonwealth v. Muniz, 5 A.3d 345, 350-51 (Pa. Super. 2010). Where, however, the arrest warrant names a person who is not an owner or resident of the premises, the officers need either a search warrant or a recognized exception to the warrant requirement, such as consent or exigent circumstances, to justify the search of the defendant/owner's residence. Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642 (1981); Muniz, supra at 350; Commonwealth v. Martin, 620 A.2d 1194 (Pa. Super. 1993).

There is no dispute that at the time entry was made into the residence at 1643 Memorial Avenue (Rear 2nd Floor) on February 3, 2011, the Williamsport Bureau of Police had previously obtained an arrest warrant for an individual named Bilal Sabur.

Exigent circumstances were also present in this case. An arrest warrant had previously

been secured for Mr. Sabur on charges of attempted homicide, a grave offense. Mr. Sabur had an extensive criminal history, which included personal injury offenses and firearms offenses. An eyewitness, who had just left the residence, indicated seeing both Mr. Sabur and firearms in the residence. Clearly, it was reasonable for law enforcement to believe that Mr. Sabur may be armed. Additionally, the officers had probable cause to believe that Mr. Sabur was on the premises. Not only did they have sufficient independent evidence but they also corroboration from an individual who had just been in the residence and saw Mr. Sabur only moments before the arrest was effectuated. Finally, it was a strong likelihood that if Mr. Sabur was not immediately detained, he might escape. In fact, Mr. Sabur had been eluding law enforcement to the extent that the Williamsport Bureau of Police needed to enlist the services of the Federal Fugitive Task Force in order to seek, find and apprehend Mr. Sabur. See United States v. Jones, 155 Fed. Appx. 62 (3rd Cir. 2005).

Next, Defendant argues that in searching for Mr. Sabur, the police and other law enforcement personnel such as the Marshalls engaged in an illegal search. The Court cannot agree. When police officers are justifiably at a scene and see contraband in plain view, it does not constitute a search and no warrant is required. Commonwealth v. Weik, 360 Pa. Super. 560, 521 A.2d 44, 45 (1987).

Defendant argues based upon his testimony, that once Mr. Sabur was taken into custody, law enforcement had no right to enter into other areas of the apartment and accordingly any items seen in plain view must be suppressed. This argument fails, however, for several reasons.

First, the Court finds the testimony of Mr. Fils-Aimee to be credible. He and his Marshalls were lawfully on the premises executing a valid arrest warrant. While still searching for Mr. Sabur, they saw items of contraband in plain view. Those items included suspected illegal narcotics, suspected paraphernalia and suspected firearms.

Secondly, and regardless of who may have been apprehended first or last, Agent Stiles was lawfully on the premises when he entered in order to take custody of Mr. Sabur. He saw items in plain view which included two different items of suspected narcotics and one item of suspected paraphernalia.

Lastly, even if Defendant's testimony is credited and the police first apprehended the Defendant, next apprehended Mr. Sabur and then apprehended the remaining occupants, it does not mean that the entry into the other areas of the residence after securing Mr. Sabur was illegal. Clearly, law enforcement had reasonable suspicion to believe that others were present on the premises and that they may be in harm's way. The police had information that a female was on the premises and that weapons were on the premises. Thus, while "clearing" the premises and until all of the occupants were located and placed in custody, any items seen in plain view are not excludable. Commonwealth v. Crouse, 729 A.2d 588 (Pa. Super. 1999).

Finally, a search warrant was obtained for the premises. The execution of that search warrant would have inevitably resulted in the search of the entire premises and the seizure of the items that may have been illegally seen in plain view. The search warrant would have remained valid even if based only on the observations and items that were seen in plain view by Agent Stiles.

Defendant further claims that the warrant authorizing the search of the property was fatally overbroad, that attachment “A” to the search warrant was insufficiently particularized to satisfy the Constitutional requirements and that the affidavit used to support the issuance of the search warrant contained false and/or material omissions. The Court, however, cannot agree.

The affidavit of probable cause requested a search for the entire apartment at 1643 Memorial Avenue (Rear, 2nd Floor) in Williamsport.

The affidavit of probable cause references weapons, suspected controlled substances (three different types of illegal drugs), suspected contraband and items consistent with drug sales. The items to be searched for and seized as set forth in attachment “A” are clearly not overbroad. Commonwealth v. Grossman, 521 Pa. 290, 555 A.2d 896 (1989); Commonwealth v. Santner, 308 Pa. Super. 67, 454 A.2d 24 (1982).

Moreover, the items to be searched for and seized were set forth with the requisite particularity so as to satisfy and pass constitutional muster. Commonwealth v. Barba, 314 Pa. Super. 210, 460 A.2d 1103 (1983).

Finally, the affidavit utilized in support of the search warrant did not contain false and/or material omissions. Contrary to what was set forth in the Motion to Suppress, Agent Stiles was present on the premises and did observe suspected narcotics and contraband in plain view.

Moreover, the Court cannot conclude that there were any material misstatements of fact set forth in the affidavit or any material omissions. Even accepting Defendant’s earlier argument that the items viewed by the Marshalls were viewed after taking

Mr. Sabur into custody, the items viewed by Agent Stiles alone would have supported the issuance of the search warrant.

Accordingly, the Court will deny Defendant's Motion to Suppress.

ORDER

AND NOW, this ____ day of January 2012, following a hearing and argument, the Court **DENIES** Defendant's Motion to Suppress.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: DA
Todd Leta, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work File