

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

**COMMONWEALTH**

**v.**

**SHAWN GRAHAM,  
Defendant**

:  
:  
:  
:  
:  
:

**CR: 412-2012  
CRIMINAL DIVISION**

**OPINION AND ORDER**

The Defendant filed an Omnibus Motion on April 25, 2012. A hearing on the motion was held on November 6, 2012.

***Background***

On January 4, 2012, Officer Edward Lucas (Lucas) of the Williamsport Bureau of Police was a member of a take down team involved in a controlled buy. An individual known as “Black” was to deliver drugs to a confidential informant. It was suspected that “Black” may have been Shawn McDonald (McDonald), but it was never verified. After the controlled buy with the confidential informant occurred, “Black” drove away in a silver sedan. Lucas was going south towards the location in an unmarked pick-up truck when he saw a silver Chevy sedan stopped at an intersection. The vehicle was traveling north and was signaling to turn west at the intersection. Lucas began to follow the vehicle and while doing so was informed through the radio that the silver vehicle involved in the controlled purchase was a Chevy. Marked police vehicles began pursuit of the vehicle, however, Lucas was unable to pursue in his unmarked pick-up truck.

Subsequently, a report was radioed to officers that a bystander witnessed a silver Chevy sedan crash on High Street and that the driver of the vehicle fled to the address of 724 Locust Street. In response to the radio report, Agent Steven Sorage (Sorage) of the Williamsport Bureau

of Police arrived at 724 Locust Street within minutes of the report. Sorage suspected that the residence could have been a duplex and knocked on one of the doors that the bystander described as the location that the fleeing individual entered. Shawn Graham (Defendant) answered the door and informed Sorage, who was standing outside the residence, that he was playing chess and that only one (1) other individual was in the residence. Sorage saw the chess board and next to it was a marijuana grinder and a package of cigars, which Sorage recognized as typically being used to smoke marijuana. In addition, while Sorage was talking to the Defendant, two (2) individuals appeared in the residence. Sorage was able to identify the two individuals from past contacts with the police. But because the Defendant stated that only one (1) individual was in the residence and now there were really two (2), Sorage believed that the person being sought could have been hiding in the residence. All three (3) individuals, including the Defendant, were taken out of the residence and placed outside on the porch so that they could be identified.

While the occupants of the residence were on the porch, Lucas arrived on the scene and assisted in a protective sweep of the apartment searching for “Black” or any hiding individuals. No one else was found in the apartment, however, Lucas could smell the odor of marijuana near a couch during the sweep. The confidential informant was brought to the residence to identify “Black” but was unable to positively identify the Defendant.<sup>1</sup> As the Defendant was suspected to be “Black,” the Defendant was placed in handcuffs.

Lucas testified that on the day of the incident, the temperature was in the mid twenties and that it was windy. Sorage and Lucas both testified that the Defendant and the two other individuals requested that they were brought back into the apartment due to the cold. At the time, the Defendant was wearing only long underwear/long johns. Lucas went into the apartment and did a sweep of the couch where they were going to seat the three individuals

---

<sup>1</sup> The confidential informant did rule out the other two (2) occupants of the residence.

inside the apartment. Lucas looked between the cushions of the couch and found a pistol. A search warrant was later executed on the Defendant's lower apartment, which resulted in the following items being found: small bags with marijuana flakes; a marijuana grinder; cigars; and heroin.

Subsequently, the Defendant was taken to the Williamsport Bureau of Police station at City Hall. Approximately (20) twenty minutes later, individuals were located in an upper apartment of 724 Locust Street. One of the individuals hiding in the apartment was identified as McDonald and also identified by the confidential informant as "Black."

The Defendant was charged with one count of Persons Not to Possess Firearms,<sup>2</sup> two counts of Possession of a Controlled Substance,<sup>3</sup> and one count of Possession of Drug Paraphernalia.<sup>4</sup> On April 25, 2012, the Defendant filed a Motion to Suppress Physical Evidence, alleging that both entries into the apartment were illegal and that the police did not have probable cause to arrest him.

*Whether police had exigent circumstances to search the Defendant's residence*

The Defendant contends that the first entry into the residence and the subsequent search for individuals should be suppressed because there was no search warrant or exigent circumstances to justify the police entry. The Commonwealth, however, argues that exigent circumstances existed to allow the police to conduct a warrantless search. Generally, a search warrant is required before police may conduct any search. Commonwealth v. White, 669 A.2d 896, 900 (Pa. 1995). An exception to a search warrant is exigent circumstances, which exist "where the need for prompt police action is imperative, either because evidence sought to be

---

<sup>2</sup> 18 P.S. § 6105(c)(2).

<sup>3</sup> 35 P.S. § 780-113(A)(16).

<sup>4</sup> 35 P.S. § 780-113(A)(32).

preserved is likely to be destroyed or secreted from investigation, or because the officer must protect himself from danger to his person by checking for concealed weapons.” Commonwealth v. Rispo, 487 A.2d 937, 939 (Pa. Super. 1985). The courts have used ten (10) factors to determine whether exigent circumstances have existed: 1) the gravity of the offense; 2) a reasonable belief that the suspect is armed; 3) a clear showing of probable cause; 4) strong reason to believe that the suspect is on the premises; 5) likelihood that the suspect will escape if not quickly apprehended; 6) whether the entry is peaceable; 7) the time of the entry; 8) whether the officer was in hot pursuit of a fleeing felon; 9) whether there is a likelihood that evidence may be destroyed; and 10) whether there is a danger to police or others. The Commonwealth has the burden to present clear and convincing evidence that the circumstances surrounding the search were exigent and that the exigency was not attributed to the decision of the police to forgo seeking a warrant. Commonwealth v. Weik, 521 A.2d 44, 47 (Pa. Super. 1987).

Here, this Court will address these factors *ad seriatim*.<sup>5</sup> First, the Court must take into account the gravity of the offense. In regards to this case, McDonald, who was unidentified at the time of the pursuit, had engaged in multiple controlled buys that resulted in felony Possession With Intent to Deliver charges. In addition, McDonald fled from the police, which resulted in a felony three charge of Fleeing or Attempting to Elude Officers. The offenses that McDonald were alleged to have engaged in are of a serious nature. See Commonwealth v. McAliley, 919 A.2d 272, 276 (Pa. Super. 2007) (finding that Possession With Intent to Deliver cocaine is a serious felony offense).

The second factor the Court must address is whether there was a reasonable belief that McDonald was armed. During the hearing, both Sorage and Lucas stated that there was no

---

<sup>5</sup> The Court will consider the actions of McDonald, even though he is not the defendant in this case, as his actions lead to the exigency that would have existed.

information relayed to them from the radio or from other officers that McDonald was either armed or dangerous. Past cases, however, have determined that it is reasonable for narcotics officers to reasonably expect an individual to be armed when they are observed selling drugs. See id.; Commonwealth v. Lopez, 579 A.2d 854, 856 (Pa. 1990).

Third, the Court must determine whether there was a clear showing of probable cause. “The police have probable cause where the facts and circumstances within the officer’s knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed.” Commonwealth v. Rogers, 849 A.2d 1185, 1192 (Pa. 2004). Probable cause is determined by considering all the relevant facts under the totality of the circumstances. Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985). In the present case, McDonald was observed by police engaging in the sale of drugs, which resulted in him fleeing from police. In addition, McDonald had been observed selling drugs to a confidential informant multiple times in the past. The police had probable cause to believe that McDonald committed an offense.

The fourth factor is whether the police reasonably believed that the individual was on the premises. Here, the police were engaged in a hot pursuit of McDonald. McDonald’s vehicle was then involved in an accident and he fled into a nearby residence. The address of this residence was reported to police by observers who witnessed the crash and the driver flee. The entrance to the upstairs that McDonald used to enter the residence was next to another door, which happened to be the entrance to the first floor. When police arrived on the scene, minutes after the vehicle crash was reported, it was uncertain whether the residence was split into apartments. As the downstairs and upstairs doors were next to each other and the first door the police knocked on happened to be the downstairs, the police reasonably believed that McDonald

was in the apartment, especially after the Defendant lied about the amount of people in his apartment.

Fifth, the Court must address the likelihood that the suspect would escape. McDonald had already eluded police during a vehicle pursuit. It was apparent that McDonald was going to try to escape the police and it was important that the police placed him in custody, as his identity had not yet been established. Further, evidence was not given to establish when the residence was surrounded to prevent McDonald from escaping but Sorage stated that officers were arriving continuously after he arrived on the scene.

The sixth factor is whether the police entry was peaceable. The testimony of Sorage stated that he knocked on the door and that the Defendant answered. After observing drug paraphernalia and the Defendant misrepresent the number of individuals in the residence, Sorage ordered the occupants out of the apartment and a search was completed for any additional occupants. The Commonwealth has established that the entry was peaceable. In addition, the entry into the residence occurred in the early afternoon and therefore the seventh factor has been fulfilled. Commonwealth v. Roland, 637 A.2d 269, 271 (Pa. 1994) (finding that entry at nighttime is more suspect).

The eighth factor is whether the police were in hot pursuit of a fleeing felon. Here, the police were in a vehicle pursuit of McDonald, who was a fleeing felon.<sup>6</sup> McDonald was able to elude police for a few minutes until his vehicle crashed and he continued on foot. Commonwealth v. McPeak, 708 A.2d 1263, 1266 (Pa. Super. 1998) (determining that pursuit of a suspect may constitute a chase when based on witness observations as to the location of the suspect). In regards to the ninth factor, which is the likelihood that evidence would be destroyed, it has been established by the courts that drugs are easily destroyed. See Commonwealth v.

---

<sup>6</sup> McDonald was charged with multiple felony counts of Possession With Intent to Deliver.

Walker, 836 A.2d 978, 981 (Pa. Super. 2003). In addition, McDonald knew he was being pursued by the police and therefore there was a strong likelihood that he could have destroyed evidence from the controlled buy.

The tenth factor the Court must determine is whether there was danger to the police officers or other persons. McDonald appeared to be desperate to flee the police, as he drove at high speeds and crashed his vehicle. No specific evidence, however, was given on how McDonald posed a danger to police and others while he fled his vehicle.

After a review of the factors, at least eight of the ten factors, weigh in favor of finding that the warrantless search was based on exigent circumstances. As all the factors are not needed to establish exigent circumstances, this Court finds that the initial warrantless search was lawful as exigent circumstances existed.

#### ***Whether police had probable cause to arrest the Defendant***

The Defendant argues that the police did not have the right to place the Defendant under arrest while he was on the porch. “The police have probable cause where the facts and circumstances within the officer’s knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed.” Commonwealth v. Rogers, 849 A.2d 1185, 1192 (Pa. 2004). “A police officer may arrest without a warrant where there is probable cause to believe that a felony has been committed and that the arrestee is the felon.” Commonwealth v. Chase, 575 A.2d 574 (Pa. Super. 1990). Probable cause is determined by considering all the relevant facts under the totality of the circumstances. Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985).

Here, after Sorage knocked on the Defendant’s door and he answered, he saw from the outside a marijuana grinder and a pack of cigars commonly used to smoke marijuana. “The plain

view doctrine permits the warrantless seizure of an object in plain view when: (1) an officer views the object from a lawful vantage point; (2) it is immediately apparent to him that the object is incriminating; and (3) the officer has a lawful right of access to the object.” Commonwealth v. Gonzalez, 979 A.2d 879 (Pa. Super. 2009). Sorage was lawfully outside the residence when he saw the objects and recognized their incriminating character. See id. (finding plain view exception when police saw a sandwich bag with a “twisted” end on a bed while they were outside of doorway). After Lucas entered the residence due to exigent circumstances, he was further able to smell marijuana near the couch in the living room. Therefore, this Court finds that police had probable cause to believe that the Defendant committed a felony.

In addition, the police had probable cause to arrest the Defendant based off the reasonable belief that he was the individual known as “Black,” who had just supplied drugs in a controlled buy. The police received witness reports that “Black” had fled to 724 Locust Street. When Sorage talked to the Defendant, who matched the limited description given of “Black,” he lied and stated that there was only one (1) other individual in the apartment. Police initially did not know the residence was split into two apartments and believed that “Black” must have entered that apartment. When the confidential informant came to identify “Black,” they were unable to rule out that the Defendant was the assailant being sought. Therefore, this Court finds that police also had probable cause at the time to arrest the Defendant under the reasonable belief that he was “Black.”

***Whether police legally re-entered the Defendant’s residence and searched the couch***

Defendant contends that the police re-entering the residence and conducting a search was illegal because the consent to search was coerced. To enter an individual’s residence there either has to be a warrant or an exception to a warrant. An exception to the requirement of a warrant is



voluntary consent. “The Fourth Amendment right to be free of unreasonable searches and seizures is not violated when the holder of the right provides the officer with voluntary consent to enter the premises.” Gonzalez, 979 A.2d at 886 (citations omitted). Voluntariness of the consent to search and seize, however, is the burden of the Commonwealth to prove. Id. at 887. “To establish a voluntary consensual search [or seizure], the Commonwealth must prove that a consent is the product of an essentially free and unconstrained choice – not the result of duress or coercion, express or implied, or a will overborne – under the totality of the circumstances.” Id. (citing Commonwealth v. Bell, 871 A.2d 267, 273 (Pa. Super. 2005)). The Pennsylvania court have established a non-exclusive list of factors to assess the legality of a consensual search: 1) the presence or absence of police excesses; 2) physical contact or police direction of the subject’s movements; 3) the demeanor of the police officer; 4) the location of the encounter; 5) the manner of expression used by the officer in addressing the subject; 6) the content of the interrogatories or statements; 7) whether the subject was told that he or she was free to leave; 8) the maturity, sophistication and mental or emotional state of the defendant (including age, intelligence and capacity to exercise free will); and 9) whether the citizen has been informed that he is not required to consent to the search. Bell, 871 A.2d at 273; Commonwealth v. Kemp, 961 A.2d 1247, 1261 (Pa. Super. 2008).

In Gonzalez, officers began talking to the defendant in regards to a neighbor but during the discussion the officers noticed drug paraphernalia lying on a bed. Gonzalez, 979 A.2d at 882. The officers asked the defendant “Do you mind if we come in? We want to talk with you about your neighbor” and the defendant responded, “sure.” After entering the residence the officers asked the defendant if he had drugs and large amounts of money in the apartment, which prompted the defendant to produce contraband. Id. Even though the officers did not conduct a

search, the Superior Court still assessed whether the entry into the apartment was garnered by voluntary consent: “this record establishes that police were lawfully in Appellant’s room, in that Appellant admitted the officers *voluntarily*. The Fourth Amendment right to be free of unreasonable searches and seizures is not violated when the holder of the right provides the officer with *voluntary* consent to enter the premises.” *Id.* at 886 (citations omitted) (emphasis added).

The current case raises numerous questions on whether the consent could be considered voluntary. First, it is not clear whether the Defendant even consented to a search of his residence. The facts established at the hearing are that the Defendant and the other individuals on the porch were cold and requested that they be placed inside the residence. The record never established that the Defendant or anyone else gave their unequivocal, specific consent to search the residence. See Commonwealth v. Powell, 994 A.2d 1096, 1102-03 (Pa. Super. 2010) (finding that a defendant’s unclear response and hand gestures in response to an officer’s repeated request to search was not a valid consent). Even if the officers were given consent to merely enter the residence, Gonzalez indicates that the consent must still be given voluntarily.

The totality of the circumstances, however, establishes that the Defendant did not make any consent to enter or search the residence voluntarily. The Defendant was ordered out of the residence. The Defendant, wearing only long underwear, was forced to stand outside and wait for the confidential information to make an identification of the Defendant. Subsequently, the Defendant was placed in handcuffs and still kept outside, while the weather was described to be in the twenties and windy. The Defendant and the other individuals then asked to be placed back inside the residence because it was cold. The record did not show that the police informed the individuals that a search was required or that they even asked them if they could search the

residence. The Commonwealth also did not introduce evidence of the maturity, sophistication and mental or emotional state of the Defendant or even the kind of questions being asked to the Defendant.

Furthermore, not only did the Commonwealth have the burden to prove that the consent was voluntary, the consent was presumed involuntary because the Defendant was in custody. Statements made during custodial interrogation are presumed to be involuntary unless the Defendant was advised of his Miranda rights. Id.; Commonwealth v. Newton, 943 A.2d 278, 284 (Pa. Super 2007) (“The law of this Commonwealth makes amply clear that once a defendant is in custody, the voluntariness of his consent to search will not be assumed, but must be proven by the Commonwealth.”). The Commonwealth did not indicate at the hearing when the Defendant was Mirandized. As the Commonwealth argued that police had probable cause to arrest the Defendant prior to the consent and this Court agreed above, it does not appear to be an issue of whether the Defendant was in custody or not. Accordingly, the Court finds that the Commonwealth did not prove its burden that the consent to search was voluntary and unconstrained.

This Court acknowledges that Pennsylvania recognizes the inevitable discovery doctrine. Commonwealth v. Jones, 928 A.2d 1054 (Pa. Super. 2007); Nix v. Williams, 467 U.S. 431 (1984). The doctrine states that “[i]f the prosecution can establish by a preponderance of the evidence that the illegality obtained evidence ultimately or inevitably would have been discovered by lawful means, then the evidence is admissible.” Gonzalez, 979 A.2d at 890. The Commonwealth, however, did not raise this argument nor provide the Court with the evidence needed to assess these merits.

**ORDER**

AND NOW, this \_\_\_\_\_ day of January, 2013, after a hearing and based upon the foregoing Opinion, Defendant's Motion to Suppress is hereby GRANTED in part and DENIED in part. This Court finds that police had exigent circumstances to search the Defendant's residence and probable cause to place the Defendant under arrest. Police, however, did not have a voluntary consent to re-enter the residence and conduct a search. Accordingly, it is ORDERED and DIRECTED that all of the items seized by police after re-entering the residence, which includes anything recovered from the search of the couch, are hereby SUPPRESSED.

By the Court,

Nancy L. Butts, President Judge

xc: DA  
Edward J. Rymza, Esq.  
Eileen Dgien, Dep. CA  
Gary Weber