

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA

vs.

**FRANK NIXON,
Defendant**

:

: No. CR-916-2012

:

:

: Motion to Suppress

OPINION AND ORDER

This matter came before Court on March 19, 2013 for a hearing on Defendant's motion to suppress that was filed on August 22, 2012. In his motion, Defendant alleges that his arrest was illegal, the protective sweep was illegal, and the search pursuant to the search warrant was illegal.

In lieu of presenting live testimony, the parties stipulated that in deciding the motion to suppress, the Court would consider the criminal complaint, the affidavit of probable cause, Officer Chillson's and Sergeant Farr's police reports, the application for search warrant and supporting affidavit, and the transcript of the preliminary hearing held on May 29, 2012. The parties then filed briefs in support of their respective positions. Defendant's brief was filed on April 15, 2013 and the Commonwealth's brief was filed on April 26, 2013. The matter is now ripe for decision.

Defendant is charged with one count of Persons not to Possess Firearms, a felony of the second degree. The charge arises out of an incident that allegedly occurred on May 12, 2012.

On May 12, 2012 at approximately 10:10 p.m., Officer Chillson of the Williamsport Bureau Police and Sergeant Farr of the Pennsylvania College of Technology responded to 1245 Freed Place for a domestic complaint. Upon arriving at the residence, they spoke with Renea Anderson, the alleged victim. She told the police that she was choked by the

Defendant while inside the residence. Ms. Anderson did not have any pain or marks from being choked and indicated that she did not wish to pursue any charges against Defendant. Defendant stated he was voluntarily moving out of the residence and was packing his belongings while police were on the scene. Both parties were identified and denied wanting to pursue any matters.

The officers exited the residence and waited outside until the parties were separated. While waiting outside, Officer Chillson observed the Defendant walk down the stairs to the first floor of the residence and walk away from the door toward the kitchen. Shortly afterwards, Ms. Anderson walked out of the residence onto the front porch with the police. As Ms. Anderson was standing on the front porch with the officers, Defendant walked back past the front door and upstairs.

As Defendant approached the top of the stairs, Sergeant Farr observed a black colored gun with what appeared to be a wooden grip tucked into the small of Defendant's back. The gun was placed muzzle down into the waistband of Defendant's pants and outside of his white t-shirt which was tucked behind the gun and into the waistline of Defendant's pants. Officer Chillson heard Sergeant Farr say "gun, gun," but he did not see the gun at the back of Defendant's waistband.

The officers then entered the residence with their firearms drawn. Officer Chillson looked up the stairs and was unable to see Defendant. He ordered Defendant to come to the top of the stairs with his hands up where he could see them. Defendant complied and was then ordered to come down the stairs and exit the residence.

Once Defendant was outside the residence, he was patted down for weapons, but none were found. He was detained but denied possessing or having knowledge of a firearm.

Based on his training and experience, the fact that Sergeant Farr saw a firearm on Defendant's person and then Defendant was found not to be in possession of a firearm, Officer Chillson was concerned that Defendant had secreted the firearm inside the residence because he or the firearm may be involved in criminal activity.

There was a young child asleep in the upstairs of the residence where Defendant had disappeared, which Officer Chillson believed created a safety concern. As a result, he conducted a "visual protective sweep" of the upstairs area where the Defendant had disappeared, while Defendant remained outside not yet handcuffed, but "not necessarily free to go" in the presence of Sergeant Farr.

While conducting the sweep, Officer Chillson observed a black colored revolver with wooden grips lying on the floor underneath the front of the dresser in the bedroom where the child was sleeping. Officer Chillson immediately had the child removed and secured the residence.

After the firearm was located, Defendant was handcuffed, placed in Officer Chillson's cruiser, and transported to the Williamsport Bureau of Police headquarters in City Hall.

At some point after Defendant was handcuffed and placed in the cruiser, the police ran a check of Defendant's criminal history and discovered that Defendant had two

robbery convictions from New Jersey, which precluded Defendant from lawfully possessing a firearm.

There is some discrepancy regarding exactly when the records check was conducted. According to Sergeant Farr's police report, Defendant was detained and placed in the rear of Officer Chillson's police vehicle.¹ Sergeant Farr stayed with Defendant and Officer Chillson remained in the apartment to ensure security of the weapon while awaiting a criminal history, which later verified that Defendant was not to be in possession of a firearm. Once confirmation was made, Officer Bell of the Williamsport Bureau of Police came to secure the area while awaiting a search warrant, and Officer Chillson transported Defendant to the Williamsport Bureau of Police headquarters.

According to Officer Chillson's preliminary hearing testimony, police reports and affidavits, the records check was conducted after Defendant had been transported to headquarters and after or as he was finishing the search warrant. Preliminary Hearing Transcript, p. 20; Officer Chillson's police report, p. 2; complaint affidavit of probable cause, p. 2.

Officer Chillson obtained a search warrant for the residence which was executed at approximately 2:30 the next morning. Soon thereafter the police seized a loaded blue finish, wooden colored grip Colt Officer Model Target .22 Caliber Six Shot Revolver. The revolver was located on the second floor in the first bedroom from the stairs on the north side of the residence. The revolver was underneath the front of the dresser in the bedroom. The

¹ Sergeant Farr testified at Defendant's preliminary hearing that Officer Chillson handcuffed Defendant before he was placed in the back of the cruiser. Preliminary Hearing Transcript, p. 13

revolver was the same revolver that Sergeant Farr previously observed in the Defendant's possession.

Defendant first argues that the protective sweep of his residence was illegal. A protective sweep is defined as “a quick and limited search incident to an arrest and conducted to protect the safety of police officers or others; it is narrowly confined to a cursory visual inspection of those places in which a person may be hiding.” Commonwealth v. Crouse, 729 A.2d 588, 592 (Pa. Super. 1999), citing Maryland v. Buie, 494 U.S. 325, 327, 110 S.Ct. 1093, 1094 (1990). Protective sweeps are permissible under both the Fourth Amendment of the United State Constitution and Article I, Section 8 of the Pennsylvania Constitution if the officer reasonably believes, based on specific and articulable facts and rational inferences from those facts, that the area to be swept harbors an individual posing a danger to those conducting the arrest. Buie, 494 U.S. at 327, 110 S. Ct. at 1095; Crouse, 729 A.2d at 592, 597. The rationale for this holding is that the risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on the street or roadside investigatory encounter and the in-home arrest puts the officer at the disadvantage of being on his adversary's “turf.” Buie, 494 U.S. at 333, 110 S. Ct. at 1098. Therefore, the interest of the officers in taking reasonable steps to assure their safety from other persons who could unexpectedly launch an attack outweighs the limited intrusion on individual privacy interest that a protective sweep may entail. *Id.* at 324, 110 S. Ct. at 1098; Crouse, 729 A.2d at 592.

In this matter, the Commonwealth clearly failed to produce any facts or inferences giving rise to a reasonable suspicion that the residence harbored individuals posing a danger to the police. Ms. Anderson was outside on the porch with the police. Once Officer

Farr saw Defendant possessed a weapon inside his waistband, Defendant was removed from the residence. Indeed, the only individual on the premises was the young child who was asleep. The decision to conduct a protective sweep was not made in order to protect the police or to find an individual posing a danger to police; rather it was because the police suspected only generally that a gun would be a danger to a sleeping child if that gun was located in the same room and the police were concerned that Defendant “secreted the firearm inside the residence because he or the firearm may be involved in criminal activity.” See Search Warrant Affidavit of Probable Cause. This is not a situation in which the police conducted a sweep of the residence in order to determine if other individuals might be present who might either pose a danger to police or possible unknown victims.

Moreover, the scope of the protective sweep is indeed questionable. It is clear that a protective sweep cannot be used as a pretext for an evidentiary search. It cannot be lengthy or unduly disruptive. It must be swift and target only those areas where a person could reasonably be expected to hide. Crouse, supra.

In this case, the record clearly shows that the protective sweep was nothing more than a pretext for an evidentiary search. Indeed, once the gun was located, Officer Chillson returned and obtained a search warrant.

Defendant also argues that his arrest was illegal. It is clear from the evidence that Defendant was arrested once he was placed in the cruiser and eventually transported to City Hall. Surprisingly, there is no record evidence by the police officers as to why Defendant was under arrest. Indeed, the record does not supply any basis for an arrest of Defendant, let

alone probable cause. The record only indicates that Defendant was arrested. There is no evidence that was produced by the Commonwealth setting forth the basis for the arrest.

Generally, the police cannot make an arrest for a misdemeanor offense that was not committed within their presence unless specifically authorized by statute to do so. See Pa.R.Cr.P. 502(2)(c). Section 2711 of the Crimes Code provides for probable cause arrests for domestic violence cases, but the facts and circumstances of this case do not meet the requirements of the statute. Section 2711 states:

(a) General rule. -- A police officer shall have the same right of arrest without a warrant as in a felony whenever he has probable cause to believe the defendant has violated ... section 2701 (related to simple assault)...against a family or household member although the offense did not take place in the presence of the police officer. A police officer may not arrest a person pursuant to this section without first observing recent physical injury to the victim or other corroborative evidence...

(b) Seizure of weapons.—The arresting police officer shall seize all weapons used by the defendant in the commission of the alleged offense.

18 Pa.C.S. §2711(a) and (b). Ms. Anderson did not suffer any visible injuries. She also did not have any pain and did not want to press charges. Since there were no visible injuries or other corroborating evidence, the police could not arrest Defendant for the alleged domestic violence incident. They also could not seize the gun that Sergeant Farr observed in Defendant's waistband, because Ms. Anderson claimed that Defendant choked her, and there was no evidence that Defendant used the firearm in the domestic incident.

The police also lacked probable cause to arrest Defendant for a firearm offense. One does not need a license to possess a concealed weapon in one's place of abode. 18 Pa.C.S. §6106(a)(1). The police also did not have any information about Defendant's prior

criminal history until after he was arrested. Therefore, they did not have probable cause to believe Defendant was a person not to possess a firearm pursuant to 18 Pa.C.S. §6105.

Under all of the circumstances, Defendant's privacy rights were violated. Defendant's arrest and the protective sweep of Defendant's residence clearly violated Defendant's constitutional rights.

Regardless, the Commonwealth claims that the gun would have been inevitably discovered. The Court agrees.

No information was discovered as a result of Defendant being taken into custody. When the police initially responded to the incident, both parties were identified and interviewed about the incident. Sergeant Farr saw Defendant in possession of a firearm. Defendant, however, disappeared from the officers' view in the time it took them to draw their weapons, enter the residence and order Defendant to show his hands. After Defendant was ordered downstairs, he was removed from the residence and patted down. Once the officers realized that Defendant no longer possessed the firearm, they knew the firearm was somewhere upstairs.

According to Sergeant Farr's report, Officer Chillson secured the residence and Sergeant Farr detained Defendant until his criminal history verified that Defendant was not to be in possession of a firearm. Even if Defendant was arrested prior to the criminal history being completed, the police had sufficient information to run the records check whether Defendant was in custody or not. They knew Defendant's identity; they knew the firearm was somewhere upstairs; and based on Defendant's actions and denials, they had reason to believe that he was involved in criminal activity by possessing it.

When the fact that Officer Chillson located the firearm in the upstairs bedroom as a result of his visual protective sweep is excised from the affidavit, the police still had sufficient information to establish probable cause and obtain the warrant. Given the totality of the circumstances, which include Sergeant Farr's observation of Defendant in possession of a firearm, the fact Defendant was no longer in possession of that firearm shortly after he went upstairs, and Defendant's prior criminal history that precluded him from possessing a firearm, a reasonable person would believe that Defendant committed the crime of persons not to possess a firearm and that there was a fair probability the firearm Defendant had possessed was now in the upstairs of the residence. Therefore, probable cause existed to issue the warrant and the firearm would have inevitably been discovered and seized.

ORDER

AND NOW, this ____ day of May 2013, following a hearing and argument on Defendant's Omnibus Pretrial Motion, said Omnibus Pretrial Motion is **DENIED**.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: PD (NS)
DA (TC)
Gary Weber, Esquire (Lycoming Reporter)
Work File