

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1712-2012
:
vs. :
:
BENJAMIN VILLANUEVA, : Omnibus Pretrial Motion
Defendant :
:

OPINION AND ORDER

Before the Court is Defendant's omnibus pretrial motion, which includes a motion to suppress, a motion for funds and appointment of expert, a motion for funds and appointment of investigator, and a motion to dismiss the Information.

The hearing and argument on Defendant's motion to suppress was held before the Court on May 1, 2013. The parties offered no testimony but introduced as Commonwealth Exhibit 1 a copy of the application for search warrant and authorization, and affidavit of probable cause.

Defendant's motion to suppress, which shall be addressed first by the Court, asserts that the seizure of hair and blood samples from Defendant constituted an illegal search and seizure.

On March 10, 2010, the South Williamsport Police submitted an application for search warrant and supporting affidavit of probable cause seeking hair samples and blood or oral swabs from Defendant for a DNA comparison.

According to the affidavit of probable cause, on October 11, 2009 at approximately 5:23 in the morning, two robbery suspects entered a business in South Williamsport and stole money from the cash register. Both suspects were males; one was

wearing a ski mask while the other was wearing a “scary Halloween mask.”

The suspects left the store and headed west. Police found two cigarette butts in front of a bank just west of the business. The butts were orange/tan in color and had two golden bands near the burnt end of the cigarette butt.

Both suspects were seen in video surveillance from the store. The one suspect was wearing a green coat, a dark colored shirt with white on the front of it, a dark colored ski mask, dark colored gloves and faded blue jeans. The eye holes of the ski mask appeared to be rather large, and the color in the holes was light in color. This suspect was carrying a bright blue tote with white lettering or symbols on the side of it. The second suspect was wearing a grey hoodie, a flesh-toned scary Halloween mask, dark colored gloves and faded blue jeans.

The description of the first suspect was confirmed through photographs taken from the bank’s ATM video. The suspect as indicated on the store’s video surveillance was wearing a dark ski mask with a light color in the eye hole and a green coat and was holding onto a bag.

Two days later on October 13, 2009, the South Williamsport Police were dispatched to a report of suspicious persons carrying bags in the 700 block of Matthews Boulevard. There were two suspects seen behind residences near a bank on West Southern Avenue and a third suspect in a gold vehicle. It was reported that one of the suspects was hiding behind a dumpster along a different street.

The police stopped the gold vehicle and identified the driver, Stephen Moore. Police also made contact with Defendant “who fit the description of one of the reported

suspects.” When stopped, Defendant asked if “Stephen” got “locked up.” It was noted as well that prior to the vehicle being stopped, Defendant had been seen walking by the vehicle.

During this incident police officers walked along the boulevard where it was reported one of the suspects was hiding. Near a dumpster behind which one of the suspects was hiding, the police found a rubber Halloween mask and a pair of dark colored gloves. The Halloween mask matched the Halloween mask worn by one of the robbery suspects in the surveillance video from the store that was robbed. A short distance west of the mask, officers located another Halloween mask with reddish synthetic hair. This was found underneath a camper trailer tire. Wrapped inside the mask was a loaded .22 caliber handgun. It was apparent that the masks and other items had recently been placed there.

A search warrant was served on the vehicle that was impounded as a result of the incident. There was a black, pullover ski mask consistent with the mask worn by one of the suspects in the store’s robbery found inside the vehicle. Inside this ski mask was a long red synthetic fiber, which was consistent with the red synthetic hair on the Halloween mask recovered along the boulevard. Also recovered from the vehicle was a bright blue tote bag with white writing on the side, which also was consistent with the blue tote bag that was carried by the suspect who was wearing the black ski mask during the store robbery. Furthermore, a pack of Marlboro Menthol 100’s cigarettes were found in the vehicle. The color and markings on the filters in the pack of cigarettes matched those on the filter of the cigarette butts recovered from in front of the bank near the store on the morning the store was robbed. Further, police recovered a green coat from the vehicle that was consistent with

the coat worn by the suspect in the black ski mask during the store robbery. Finally, the police also discovered two pair of faded blue jeans also consistent with those worn by both suspects during the store robbery.

Rule 203 of the Pennsylvania Rules of Criminal Procedure provides in pertinent part:

(B) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.

* * *

(D) At any hearing on a motion for the return or suppression of evidence, or for suppression of the fruits of evidence, obtained pursuant to a search warrant, no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (B).

Pa.R.Crim.P. 203 (B), (D).

In analyzing whether a warrant is supported by probable cause, the court is confined to the four corners of the affidavit. Commonwealth v. Coleman, 830 A.2d 554, 560 (Pa. Super. 2003), app. denied, 864 A.2d 1203 (Pa. 2004).

The test for determining whether a search warrant is supported by probable cause is the totality of the circumstances.

Pursuant to the totality of the circumstances test ...the task of an issuing authority is simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.... It is the duty of a court reviewing an issuing authority's probable cause determination to ensure

that the magistrate had a substantial basis for concluding that probable cause existed. In so doing, the reviewing court must accord deference to the issuing authority's probable cause determination, and must view the information offered to establish probable cause in a common sense, non-technical manner.

* * * *

[Further,] a reviewing court [is] is not to conduct a *de novo* review of the issuing authority's probable cause determination but [is] simply to determine whether or not there is substantial evidence in the record supporting the decision to issue the warrant.

Commonwealth v. Jones, 605 Pa. 188, 988 A.2d 649, 655 (Pa. 2010), quoting Commonwealth v. Torres, 564 Pa. 886, 764 A.2d 532, 537-38, 540 (2001)(citations omitted); see also Commonwealth v. Martinez, 2013 PA Super. 102 (May 2, 2013).

The Court does not hesitate in concluding that the affidavit establishes probable cause to believe that evidence of a crime would be found by collecting DNA from Defendant. More specifically, pursuant to the totality of the circumstances test and making a practical, common-sense decision, all of the circumstances set forth in the affidavit support a finding that there was a fair probability contraband or evidence of a crime would be found on Defendant.

A robbery occurred on October 11, 2009 in South Williamsport. One of the suspects was wearing a ski mask, and the other was wearing "a scary Halloween mask." In an area where the suspects fled, the police found cigarette butts that were distinctive.

Subsequent investigation confirmed that one of the suspects was wearing a green coat, a dark colored ski mask, dark gloves and faded blue jeans. The suspect was also carrying a blue tote bag with white lettering or symbols on the side of it. The other suspect

was wearing a “scary Halloween mask, dark colored gloves and faded blue jeans.” A few days later police responded to suspicious activity near a bank located in South Williamsport. One of the suspects was apparently hiding behind a dumpster. Another suspect was the driver of a gold vehicle.

Defendant, who fit the description of one of the suspects, was stopped and questioned by the police. He asked if Stephen, the driver of the vehicle, got locked up. Furthermore, he had been seen walking by the vehicle. Moreover, during the incidents, police officers found a rubber Halloween mask and a pair of dark colored gloves near a dumpster where one of the suspects was reportedly hiding. The mask matched the mask worn by one of the earlier robbery suspects. As well, officers located another Halloween mask nearby. Located in this Halloween mask was a reddish synthetic hair, as well as a handgun. It was apparent to the officers that the masks had recently been placed there.

A subsequent search of the vehicle revealed numerous items consistent with items utilized by the individuals who robbed the store. These items included a ski mask, red synthetic hairs, a bright blue tote bag with white writing on the side, cigarettes with similar color and markings, a green coat, a black ski mask and two pairs of faded blue jeans.

The totality of the circumstances demonstrates that a robbery occurred at which the perpetrators wore particular clothing and donned ski masks and Halloween-type masks. Within a few days, police officers discovered a vehicle in which similar clothing, a similar mask and other similar items were found. Moreover, police found other items related to the robbery in the area where Defendant was located. Finally, and determinatively,

Defendant was connected to both the initial robbery and the vehicle in which the inculpatory items were found. His description was similar, he referred to the driver of the automobile by first name, he inquired whether the driver was “locked up” and he was seen near the vehicle. Certainly, upon reviewing the affidavit, there was a fair probability that evidence of a crime would be found through obtaining hair samples and blood or oral swabs from Defendant for DNA comparison.

The Court will next address Defendant’s motion for funds and appointment of an expert, as well as Defendant’s motion for funds and appointment of an investigator. Defendant claims that he needs an expert to review the DNA evidence that was obtained from Defendant, as well as to review the DNA testing and conclusions that were reached by the Commonwealth’s DNA expert. Furthermore, Defendant claims that he needs an investigator to question witnesses and obtain exculpatory evidence. The Commonwealth objects and claims that Defendant has not set forth a particular basis upon which appointment of either an expert or investigator is warranted. Defendant counters that his requests for both an expert and an investigator were initially ex parte and that should the Court deny such, Defendant would request leave to file an additional supplemental motion setting forth the basis with more particularity.

“[T]here is no constitutional mandate, either federal or state, that experts be appointed at public expense to assist in the preparation of a defense whenever requested by one accused of crime.” Commonwealth v. Gelormo, 327 Pa. Super. 219, 475 A.2d 765, 770 (1984). The appointment of an expert witness or an investigator to assist in the preparation

of a defense is a decision within the trial court's sound discretion and will not be reversed absent an abuse thereof. Commonwealth v. Wholaver, 605 Pa. 325, 989 A.2d 883, 894 (2010); Commonwealth v. Woods, 394 Pa. Super. 223, 575 A.2d 601, 604 (1990); Gelormo, 475 A.2d at 769.

There is no question that Defendant's indigence should not preclude him from having a fair trial. On the other hand, it is clear that Defendant should be required to set forth with specificity a substantial basis for appointing both an expert and investigator. More specifically, Defendant should set forth a particularized need for either an investigator or an expert, as well as how his due process rights or right to a fair trial would be compromised if he were not given appropriate funds to hire an expert and/or an investigator.

With respect to an investigator, Defendant has not set forth a particularized need. In fact, Defendant only claims that an investigator is needed to speak with witnesses and "follow-up leads." There has been no showing however, that defense counsel cannot perform the same work. Indeed, experienced defense counsel has the ability and resources to not only contact and speak with witnesses but to follow-up leads, to develop a defense theory and to prepare witnesses in support of its defense theory. Defendant has not demonstrated any particularized need in support of an investigator.

The situation is somewhat different with respect to Defendant's request for funds to hire an expert. Based on the information that was presented at the hearing and argument, it is clear to the Court that a substantial piece of evidence against Defendant at trial will be the DNA results. The Court takes judicial notice that the science of DNA is not

only complicated but beyond the understanding of the average juror. Experts are necessary not only to evaluate DNA evidence but to explain their conclusions to the jury in a manner that the jurors understand.

Defendant has set forth a particularized need with respect to the DNA evidence. Specifically, Defendant is requesting an expert to review the findings of the Commonwealth's expert and then do additional testing if necessary. Moreover, the expert may be required to testify if that expert's conclusions are different than the Commonwealth's expert.

It would be patently unfair to the Defendant if he were not provided an opportunity to retain an expert who at the very least can review the Commonwealth's DNA expert's report and determine how to proceed further.

The final issue for the Court's consideration is Defendant's motion to dismiss.

Defendant claims that he was arrested on these charges on July 6, 2012.

Defendant further alleges that approximately three years elapsed from the date of the alleged offense and the date on which the Defendant was first informed of the charges against him. Defendant claims that as a result of the delay between the date of the alleged offense and his arrest, he is unable to account for his actions and unable to secure witnesses. As a result, he claims that his rights to due process under the United States and Pennsylvania Constitutions have been violated.

[I]n order to prevail on a due process claim based on pre-arrest delay, the defendant must first show that the delay caused him actual prejudice, that is, substantially impaired his or her ability to defend against the charges. The court must then examine all of the circumstances to

determine the validity of the Commonwealth's reason's for the delay. Only in situations where the evidence shows that the delay was the product of intentional, bad faith, or reckless conduct by the prosecution, however, will [the court] find a violation of due process. Negligence in the conduct of a criminal investigation, without more, will not be sufficient to prevail on a due process claim based on pre-arrest delay.

Commonwealth v. Scher, 569 Pa. 284, 803 A.2d 1204, 1221-1222 (2002).

Defendant has not established actual prejudice; he has only made a bald allegation of prejudice. Furthermore, there is nothing in the record to even suggest that the delay was intentional or for an improper reason. Therefore, the Court will deny Defendant's motion to dismiss.

ORDER

AND NOW, this ___ day of May 2013, following a hearing and argument, and for the reasons set forth in the foregoing Opinion, the Court **DENIES** Defendant's motion to suppress, motion for funds and appointment of investigator and motion to dismiss.

The Court **GRANTS** Defendant's motion for appointment of an expert. Defendant is authorized to retain the services of a DNA expert to review the report of the Commonwealth's DNA expert as well as all supporting documentation for the purpose of determining whether the proper procedures and protocols were followed and whether the report is valid. The Court approves up to \$1,500 for this initial review to be paid by Lycoming County. If the Defendant's expert is of the opinion that independent testing needs to be done, a supplemental motion shall be filed with respect to such and shall include estimates for the cost of the independent testing and the cost of appearing and testifying at

trial, if necessary. Costs for the expert shall be incurred by Lycoming County and, absent further Court approval, the total costs shall not exceed \$5,000.00.

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney (MW)
Trisha Hoover, Esquire
Gary Weber, Lycoming Reporter
Krista Rogers, Lycoming County Controller
Work File