

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1662-2012; 1990-2013
 :
 KENNETH MARTIN, :
 Defendant :

OPINION AND ORDER

This matter came before the court on Defendant’s omnibus pretrial motion.

On June 19, 2012 at approximately 11:13 a.m. three black males entered Noor Ford’s hotel room, Room 214, at the Econo Lodge in Williamsport, Pennsylvania. Although the door was open because the air conditioner was not working, the individuals entered without Ford’s permission or consent. Ford knew two of the individuals as Snoop and Dark. The third individual was Tee-Pain, who Trooper Havens recognized in the surveillance video as Terrance Forshyte.

Ford had been selling heroin for Snoop and owed him money. Snoop pointed a black semi-automatic pistol at Ford. Snoop said he was going to “pop” Ford and demanded the money. Ford told Snoop he didn’t have the money. Snoop pistol whipped Ford, knocking him to the ground. Then he, Tee-Pain and Dark punched and kicked Ford in the head and upper body. At one point, Ford was knocked unconscious. One of the individuals rifled through Ford’s pockets but they were empty. The three individuals then began rifling through the room. They took money, heroin, Ford’s I-phone, his X-box, a backpack, and a gray duffle bag containing a video game and numerous music CDs. Video surveillance from the Econo Lodge showed the individuals leaving the second floor of the Econo Lodge via the

stairway, carrying the backpack and duffle bag.

After the individuals left, Ford called a friend to take him to the hospital. Ford was badly beaten. His face was bloodied and swollen. His right eye was swollen shut. His lip was cut, as if one of his teeth went into or through it. Ford had a severe headache and was in a lot of pain. Hospital personnel treated his injuries and called the police.

Trooper Tyson Haven responded to the hospital and investigated the matter. During the course of his investigation, he interviewed Ford three times, portions of which were recorded. Ford also signed a written statement. Ford described Snoop as a skinny, 6'2" or 6'3" tall black male in his thirties who was wearing a grey sweatshirt with the words "Live Strong" in yellow. According to Trooper Havens, during a portion of one of the interviews that was not recorded, Ford also described Snoop as having the number 13 tattooed between his eyes.

As part of the investigation, Trooper Havens obtained the video surveillance tape from the Econo Lodge, which depicted the individuals walking down the stairway from the second floor of the Econo Lodge carrying Ford's backpack and duffle bag.

One of the individuals used Ford's I-phone to take photographs of Ford during and after the incident. The images were subsequently posted on Instagram. There was a photo of Defendant wearing a gray sweatshirt and throwing a punch that struck Ford in the head. The comment posted with the photo said, "this [sic] what happens when you fuck with rock money." N.T., 9/18/12, at52. There was another photograph depicting Defendant counting a few stacks of cash posted by somebody that goes by the name of Snoop_Rock.

Another post by Snoop_Rock depicted Defendant laying on something with a smart phone and a revolver. Another posting from Snoop_Rock contained an image of Defendant stacking cash on what appears to be a stove. An image of Ford post-assault had the comment, “Noor Ford I do this shit bitch fuck nigga up about that money” Another comment posted by Snoop_Rock using Ford’s phone said, “oh, oh shit this the nigga right here. I put the right hook down on him. His face fucked up. I didn’t know it was you am I right bad bro. PS get that fuckin money right my man.”

Based on his investigation and his previous knowledge of Defendant, Trooper Havens concluded that Defendant was Snoop.

Defendant was arrested and charged with burglary, two counts of robbery, two counts of conspiracy to commit robbery, criminal trespass, terroristic threats, theft by unlawful taking, receiving stolen property, aggravated assault, simple assault, and recklessly endangering another person.

Unfortunately, Ford failed to appear for Defendant’s preliminary hearing. The Honorable Nancy L. Butts held a hearing on September 13, 2012 and concluded that Ford’s statements would be admissible at Defendant’s preliminary hearing under the exception to the hearsay rule for forfeiture by wrongdoing. All counts were held for court except the burglary charge.

The Commonwealth refiled that charge and a second preliminary hearing was held. By the time of the second preliminary hearing, the police had located Ford and he was held on a material witness warrant. Ford was transported to the preliminary hearing, but he

allegedly could not recall the assault or any of the statements he made to Trooper Havens. His statements to Trooper Havens were admitted and the charge was held for court.

Defendant filed an omnibus pretrial motion, which consisted of a motion to suppress physical evidence; a motion to disclose promises of leniency and criminal history information; a motion for disclosure of other crimes, wrongs, or acts pursuant to Pa.R.E. 404(b); and a petition for writ of habeas corpus.

At the hearing on the omnibus motion, the Commonwealth orally moved to dismiss Defendant's motion to suppress on the ground that Defendant did not have standing or a reasonable expectation of privacy in the phone records to be entitled to the remedy of suppression. During the discussion of Defendant's request for habeas corpus relief, defense counsel objected to the court considering any hearsay. The Commonwealth responded that Judge Butts admitted certain testimony at Defendant's preliminary hearing based on a finding of forfeiture by wrongdoing which rendered that evidence non-hearsay and that this court was bound by Judge Butts' finding. Defense counsel asserted that a finding of forfeiture by wrongdoing does not continue indefinitely, especially when the alleged victim did not testify before Judge Butts because he could not be located but he has since been found. Defense counsel also contended that Judge Butts' finding does not allow a wholesale violation of Defendant's confrontation rights.

The parties agreed that the court would decide whether it was bound by Judge Butts' finding. If not, the court would make its own determination regarding forfeiture by wrongdoing and then decide the request for habeas relief based on that determination and the

review of the transcripts. The parties also agreed that the suppression issues would be bifurcated in that the court would rule on the Commonwealth's motion to dismiss before taking any testimony on the suppression motion.

The Commonwealth first argues that this court is bound to follow Judge Butts' ruling of forfeiture by wrongdoing due to the coordinate jurisdiction rule. The coordinate jurisdiction rule provides that judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions. Commonwealth v. Starr, 541 Pa. 564, 664 A.2d 1326, 1331 (1995); Commonwealth v. Hernandez, 39 A.3d 406, 412 (Pa. Super. 2012). Departure from this principle, however, is allowed "in exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or the evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed." Starr, 664 A.2d at 1332; Hernandez, *supra*.

Here, there was a change in the facts or evidence giving rise to the dispute in the matter. When Judge Butts made her forfeiture by wrongdoing ruling, Ford was not available for the preliminary hearing because he could not be located. The Commonwealth presented audio and written statements from Ford and testimony from Trooper Havens that Ford left town and refused to disclose his whereabouts because he was concerned for his safety and the safety of his family. Ford has since been located and detained on a material witness warrant. The court finds that this is a sufficient change in the facts to justify a reexamination of the forfeiture by wrongdoing ruling.

Despite this change in the facts, however, the court reaches the same conclusion. Although Ford was physically present to testify, he allegedly could not remember any of the conversations or statements he made to Trooper Havens. He also did not want to reveal where he was living or say if he had problems being in a Philadelphia jail “for personal reasons.” When confronted with his previous audio and written statements that he was in fear for his life, Ford claimed his fear was because the Commonwealth was forcing him to testify and he did not trust the cops. He tried to explain his previous statements “you guys offer me death” and he was “in fear for his life” as something could happen to him if he testified, but that “could be from whatever.”

While it was clear that Ford was angry with the Commonwealth and the police because he was the one incarcerated despite being the victim, it was also clear that he not being entirely truthful. It was apparent to the court that Ford was feigning a lack of memory to avoid admitting anything in Defendant’s presence. In fact, in several of the previous written and recorded statements Ford specifically asked Trooper Havens if the statements would be disclosed to Snoop. Notably, Ford never denied making the statements that Trooper Havens was attributing to him.

Despite Ford’s claims of lack of memory, he admitted that his signature was on the letter admitted as Commonwealth’s Exhibit 4. This letter states in relevant part: “You expect me to testify on your behalf then get ship to a Philly jail where Im told more then once someone will get to me? This is where doing the right thing can depend on how you view things. If I was to do what you ask me then I risk putting myself & possibly my family in

danger.... Do you guys think it should come a time when I should look out for my well being? Or should I be more concern about the D.A.? Who probably wont even come to my funeral whether it be months or years from now. I mean I dont think you guys understand I know who & what exactly Im dealing with. No matter how much yall try to downplay it I know whats going on. This has nothing about street code or anything that stuff left me over a year ago. The fact of the matter is I will have to live life lookin over my shoulder regardless of the outcome and I already have come agreement with that.”

This letter also was consistent with and similar to recorded statements Ford made to Trooper Havens and Williamsport Bureau of Police Agent Stephen Sorage, as well as another letter that was sent to Judge Butts, which the Commonwealth admitted as exhibits through a motion to re-open the record.

In addition to these written and recorded statements by Ford, Trooper Havens testified at a September 13, 2012 hearing before Judge Butts that Ford told him he had received numerous phone calls from Snoop threatening him not to cooperate with the police. Trooper Havens obtained Defendant’s phone records as well as the records for Ford’s stolen I-phone. The records showed numerous phone calls to and from the phone number Ford was using after the incident.

As a whole, the evidence presented by the Commonwealth establishes forfeiture by wrongdoing to a preponderance of the evidence. In light of this ruling, Ford’s statements are not considered hearsay and are admissible pursuant to Pa.R.E. 804(b)(6).

Defendant contends the evidence presented was insufficient to establish a

prima facie case of the crimes charged.

“A petition for writ of *habeas corpus* is the proper vehicle for challenging a pretrial finding that the Commonwealth presented sufficient evidence to establish a prima facie case.” Commonwealth v. Carbo, 822 A.2d 60, 67 (Pa. Super. 2003) (citing Commonwealth v. Kohlie, 811 A.2d 1010, 1013 (Pa. Super. 2002)). “While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe that the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal.” Commonwealth v. Wojdak, 466 A.2d 991, 997 (Pa. 1983).

The Commonwealth must present sufficient evidence that a crime has been committed and that the accused is the one who probably committed it. Commonwealth v. Mullen, 333 A.2d 755, 757 (Pa. 1975). The evidence must demonstrate the existence of each of the material elements of the crimes charged. Wojdak, *Id.* at 996-97. Further, when deciding whether a prima facie case has been established, the court must view the evidence in the light most favorable to the Commonwealth and consider all reasonable inferences based on that evidence which could support a guilty verdict. Commonwealth v. McCullough, 86 A.3d 901, 905 (Pa. Super. 2014), quoting Commonwealth v. Landis, 48 A.3d 432, 444 (Pa. Super. 2012); see also Commonwealth v. Santos, 583 Pa. 96, 876 A.2d 360, 363 (2005).

“Although ‘hearsay evidence *alone* may not be the basis for establishing a prima facie case in a preliminary hearing,’ hearsay evidence may be admitted in a

preliminary hearing.” Commonwealth v. Jackson, 849 A.2d 1254, 1257 (Pa. Super. 2004), quoting Commonwealth v. Taylor, 587 A.2d 326, 328 (Pa. Super. 1991).

A person commits burglary “if, with the intent to commit a crime therein, the person enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense any person is present.” 18 Pa.C.S.A. §3502.

The evidence presented was sufficient to show that Defendant and two others entered Ford’s hotel room without Ford’s consent or permission with the intent to commit theft, assault and related charges therein. A hotel room is a separately secured or occupied portion of a building or occupied structure. Video surveillance showed Defendant and two other individuals leaving the second floor of the Econo Lodge carrying Ford’s back pack and duffle bag. This evidence, as well as the Instagram photographs and postings support Ford’s statements that Defendant and two other individuals entered his hotel room without his permission, assaulted him and took his property.

A person commits criminal trespass if, knowing he is not licensed or privileged to do so, he enters any building or occupied structure or any separately secured or occupied portion thereof. 18 Pa.C.S. §3503. Ford gave a statement that he was selling drugs for Snoop and owed him money. He was not taking Snoop’s phone calls. Snoop entered Ford’s hotel room without Ford’s permission or consent. Once inside the room, Snoop assaulted Ford. Snoop was captured on video surveillance leaving the second floor of the Econo Lodge. Trooper Havens identified Defendant as Snoop from the video, his previous

knowledge of Defendant and Ford's description of Snoop. From these facts and circumstances, one could infer that when Defendant entered Ford's hotel room he knew that he was not licensed or privileged to do so.

A person commits robbery, if in the course of committing a theft, he inflicts serious bodily, threatens another with or intentionally puts him in fear of immediate serious bodily injury, inflicts bodily injury on another or threatens another with or puts him in fear of immediate bodily injury. 18 Pa.C.S.A. §3701(a)(1)(i),(ii) and (iv). "An act shall be deemed 'in the course of committing a theft' if it occurs in an attempt to commit a theft or in flight after the attempt or commission." 18 Pa.C.S.A. §3701(a)(2).

The evidence presented was sufficient to show that Defendant threatened to kill Ford, then he and two other individuals, who were acting in concert with Defendant, punched and kicked Ford, badly beating him. During the assault one of the individuals rifled through Ford's pockets, but did not find anything. The individuals then took a backpack, a duffle bag, money, drugs, an X-box, an I-phone, CDs and a video game and left Ford's hotel room. The individuals were caught on video surveillance walking down the stairs from the second floor carrying the backpack and duffle bag. A photograph of Defendant punching Ford in the face, causing him to fall backward toward the headboard was posted on Instagram with Ford's stolen I-phone. Although there were some discrepancies in Ford's statements regarding the drugs and amount of money that was taken from his room, such creates a factual issue for trial. It does not negate the Commonwealth's prima facie case that Defendant committed robbery.

Although Defendant was not the individual who was carrying the backpack and duffle bag on the surveillance video, the evidence taken as a whole still was sufficient to establish a prima facie case that Defendant participated in the theft of items from Ford's hotel room. Defendant demanded payment for drugs that he had provided to Ford. When Ford failed to pay, Defendant and his cohorts badly beat Ford and took various items from Ford's hotel room. Defendant is depicted on the surveillance video leaving the second floor of the Econo Lodge with individuals who were carrying Ford's backpack and duffle bag. He also was depicted in an Instagram photograph punching Ford in the face. Ford also told Trooper Havens that Snoop has the number 13 tattooed between his eyes. Trooper Havens was familiar with Defendant from previous encounters with him at Second Street. Trooper Havens testified that Defendant has the number 13 tattooed between his eyes and he identified Defendant in the courtroom at the preliminary hearing held before Judge Butts. Officer Kenneth Mains also obtained recordings of Defendant's phone calls from prison where Defendant was referred to as Snoop, portions of which were played during the hearing before Judge Butts on September 13, 2012.

A person commits the crime of terroristic threats if he communicates, directly or indirectly, a threat to commit any crime of violence with intent to terrorize another. 18 Pa.C.S.A. §2706. Ford's statements and the Instagram postings show that Defendant threatened to kill or seriously injure Ford because Ford owed him money. The photographs of Ford's injuries show that the threats were not empty statements made at the spur of the moment in the heat of anger.

A person commits aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life or attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon. 18 Pa.C.S. §2702 (b). Serious bodily injury is defined as bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. 18 Pa.C.S. §2301.

A person commits simple assault if he attempts to cause or intentionally, knowingly, or recklessly causes bodily injury to another; negligently causes bodily injury to another with a deadly weapon; or attempts by physical menace to put another in fear of imminent serious bodily injury. 18 Pa.C.S. §2701. Bodily injury is the impairment of physical condition or substantial pain. 18 Pa.C.S. §2301.

Defendant and his cohorts brutally beat Ford. They repeatedly punched and kicked him in the head and face. Ford's eye swelled completely shut and one of his teeth cut through his lip. Ford was taken to the hospital for treatment. He was in a considerable amount of pain. Ford definitely sustained bodily injury. From Ford's testimony, the medical records, and the photographs, however, one also could conclude that Defendant and his cohorts caused or attempted to cause serious bodily injury.

A person commits the crime of recklessly endangering another person if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. 18 Pa.C.S. §2705. Repeatedly punching and kicking someone

in the head and face places or may place him in danger of serious bodily injury.

A person is guilty of theft by unlawful taking if he unlawfully takes, or exercises control over movable property of another with the intent to deprive him thereof. 18 Pa.C.S. §3921. Similarly, a person receives stolen property if he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner. 18 Pa.C.S. §3925.

The Commonwealth presented prima facie evidence that Defendant committed the crimes of theft and receiving stolen property or was responsible for those crimes as an accomplice or co-conspirator. Ford owed Defendant money. Defendant struck Ford with the butt of his pistol, and then Defendant and the other two individuals punched and kicked Ford in the head and face. Someone rifled through his pockets, and then the three individuals began taking valuables from Ford's hotel room. Ford stated that they took money, bags of heroin, his I-phone, his X-box, a backpack, a videogame, numerous CDs, and his duffle bag. Footage from the video surveillance cameras showed Defendant and the other individuals leaving the second floor of the Econo Lodge carrying the back pack and duffle bag. Although Defendant may not have been the individual carrying these items, the evidence amply supports the conclusion that he was acting in concert with the other individuals.

A person commits a conspiracy to commit a crime if, with the intent of promoting or facilitating its commission, he (1) agrees with such other person or persons

that they or one of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid such other person or persons in the planning or commission of such crime or an attempt or solicitation to commit such crime. 18 Pa.C.S. §903.

A conspiracy rarely is proven by direct evidence of a defendant's intent or the conspirators' agreement; rather, conspiracy is almost always proven through circumstantial evidence. Commonwealth v. Figueroa, 859 A.2d 793, 798 (Pa. Super. 2004). Some of the factors which are relevant, but not sufficient by themselves, to prove a conspiracy are: "(1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) participation in the object of the conspiracy." Id. (quoting Commonwealth v. Lambert, 795 A.2d 1010, 1016 (Pa. Super. 2002). "Once there is evidence of a conspiracy, all conspirators are equally criminally responsible for the acts of their co-conspirators committed in furtherance of the conspiracy regardless of their individual knowledge of such actions and regardless of which member of the conspiracy undertook the action." Id. (citing Lambert, 795 A.2d at 1017).

The conspiracy charges present a closer issue than the other charges, but only because the Commonwealth did not charge Defendant with conspiring with all the other individuals depicted on the Econo Lodge surveillance video, but only an individual named Michael Wills. Although Ford stated he was assaulted by three individuals, four individuals can be seen on the stairway surveillance video going to and leaving the second floor together. Trooper Havens was previously familiar with Wills. He recognized him as the individual on

the surveillance video wearing a dark colored t-shirt. N.T., 9/18/12, at 59-60, 85. Wills did not match Ford's description of the individuals who assaulted him. In fact, Trooper Havens testified at the preliminary hearing that Ford did not even realize that Wills was there. Id. at 84. Trooper Havens, however, interviewed Wills, who identified himself on the stairway surveillance video as the person in the dark t-shirt. He was the last individual to walk up the stairs. He was the individual that is seen coming down the stairs and looking around after the individual who flees or appears to flee. Id. at 60. Wills is also the individual that accepted a package from the black male in sweats and then walked back through the lobby by himself. Id.

Rob Diehl testified at Defendant's preliminary hearing that he was at Ford's hotel room for about fifteen minutes around 11:00 a.m., he went to the soda machine and then he left. He admitted he told Trooper Havens that he saw someone outside Ford's hotel room, but he claimed that he lied to Trooper Havens.

Trooper Havens testified that he interviewed Rob Diehl, who told him he was at Ford's room at the Econo Lodge and he left the room briefly to go to the soda machine. When Diehl was walking back to the hotel room, he observed a black male in a dark t-shirt standing outside the doorway of the hotel room and he heard banging inside the room. The individual in the dark t-shirt told Diehl he better stay right there or he was going to have trouble "with my brother" at which point the individual lifted up his shirt to reveal a black, semi-automatic pistol concealed in the right waistband of his pants. Diehl told Trooper Havens he turned and fled because he feared for his safety. Diehl said he ran down the steps

and around to the east side of the Econo Lodge where he hid around the storage units. After Trooper Havens turned off the recording device and escorted Diehl out of the building, Diehl told him that the guy's name is Mike. Id. at 112.

Trooper Havens testified that the video confirmed portions of what Diehl said. Shortly after the four individuals walked up the staircase, the stairway surveillance video shows Diehl hastily come down the stairs and look over his shoulder. About five seconds later, Wills comes down the stairs and looks to the right and left. When he does that, he's bent at the waist and there is an outline of an object that appears to be the shape of the handle of a handgun on his right hip. Id. at 113-114.

Another surveillance video showed Wills arrive at the Econo Lodge. Wills identified himself on that surveillance video as the driver of the green Oldsmobile van, who exited the driver's seat of the van and walked to the eastern side of the Econo Lodge and through the lobby with Terrence Forshyte (or "Tee-Pain"). Id. at 59.

From the evidence presented at the preliminary hearings, one could reasonably conclude that Wills and Forshyte met Defendant and Dark at the Econo Lodge. All four walked up the stairs to the second floor of the Econo Lodge together. Defendant was wearing a gray sweatshirt, Dark and Forshyte were wearing white t-shirts, and Wills was wearing a dark colored t-shirt. Defendant, Dark and Forshyte entered Ford's hotel room, beat Ford up, and took his property. While they were doing that, Wills was acting as the look out and making sure no one, including Diehl, entered the room. Then all four walked down the stairs, carrying Ford's backpack and duffle bag.

Although there is no direct evidence that the four individuals entered an agreement to meet at the Econo Lodge and rob Ford, such an agreement can be found by the circumstantial evidence and the reasonable inferences that can be drawn from that evidence.

As the Commonwealth has presented a prima facie case for each of the crimes charged, the court will deny Defendant's request for habeas corpus relief.

The next issue concerns the Commonwealth's oral motion to dismiss Defendant's motion to suppress because he lacked standing or a privacy interest in the phone records that the police obtained. There are four phone numbers that are relevant to this motion: 570-328-9067, which Trooper Havens previously testified was the phone number for Ford's stolen I-phone (see N.T., 9/13/12, at 22; N.T., 9/18/12 at 46); 570-494-8858, Ford's phone number after the incident (see N.T., 9/13/12, at 22); 570-809-0738, which Trooper Havens previously testified was one of Defendant's phone numbers (see N.T., 9/13/12, at 22-23, 26); and 267-495-9677, a phone number associated with an Instagram account, but it is not clear to the court who the subscriber was for that number.

The Commonwealth argues that Defendant's motion to suppress should be dismissed without an evidentiary hearing for several reasons. First, the Commonwealth asserts that Defendant does not have a privacy interest in Ford's phone records. Second, relying on Maryland v. Smith, 442 U.S. 735 (1979) and ACLU v. Clapper, 13 Civ. 3994 (S.D.N.Y. 2013)(memorandum), the Commonwealth argues that no one has a reasonable privacy interest in the phone company's business records. Finally, the Commonwealth contends that because Judge Butts found that probable cause existed before she issued the

order authorizing the seizure of the phone records, this court is precluded from changing that determination by virtue of the coordinate jurisdiction rule.

Defendant, through this attorney, conceded that he did not have a privacy interest that society would accept as reasonable in the records related to phone number 570-494-8858. Relying on Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983), however, Defendant claimed that he had automatic standing with respect to the I-phone and its number, because robbery and theft are possessory offenses and he was charged with possessing the I-phone. He also argued that while the federal courts may not recognize a person's privacy interest in his or her phone records, case law clearly establishes that such an interest is recognized under the Pennsylvania Constitution. Defendant also contended that the coordinate jurisdiction rule was not applicable to these circumstances.

The Commonwealth's reliance on Smith v. Maryland and ACLU v. Clapper is misplaced. In Commonwealth v. Beauford, 475 A.2d 783, 788-790 (Pa. Super. 1984) and Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989), the Pennsylvania appellate courts rejected Smith and held that the Pennsylvania Constitution provides broader protections in one's phone records than the federal constitution. Clapper is also a nonbinding, memorandum decision in a civil case from a federal district court in New York, which is currently on appeal before the Second Circuit Court of Appeals. It is hornbook law that as a trial court, this court is bound to follow precedential decisions of the Pennsylvania Supreme Court and the Pennsylvania Superior Court. Therefore, the court is precluded from accepting the Commonwealth's argument or relying on either Smith or Clapper. Moreover, the United

State Supreme Court recently held that police generally must obtain a warrant before conducting a search of a cell phone for data such as call logs. Riley v. California, 134 S.Ct. 2473 (2014). Therefore, the federal law, at least in some circumstances, is now recognizing a privacy interest in phone data.

The Commonwealth's reliance on the coordinate jurisdiction rule also is misplaced. In Commonwealth v. McCulligan, 905 A.2d 983, 988 (Pa. Super. 2006), appeal denied, 918 A.2d 743 (Pa. 2007), the Superior Court found that the suppression court erred in relying on the coordinate jurisdiction rule to determine it could not address the issue of probable cause for search warrants authorized by another trial court judge. In so holding, the Court stated,

If we were to accept the Commonwealth's argument and the trial court's finding, it would be impossible or any defendant to challenge search warrants issued by a different judge, for reasons completely out of his control. Should a defendant be so unfortunate as to have one trial judge issue a search warrant, but have a different judge hear his suppression motion, the Commonwealth's version of the coordinate jurisdiction rule would preclude the defendant from ever raising a suppression motion. Such interpretation of the coordinate jurisdiction rule would render suppression motions futile in a substantial number of criminal cases.

Id. The Superior Court also noted that the procedural posture of the authorization differs from that of a suppression motion. Id. Accordingly, the Commonwealth's argument that the coordinate jurisdiction rule precludes this court from determining whether the police had probable cause to seize the phone records is rejected.

While Defendant is correct that he has automatic standing to file a suppression motion since he is charged with possessory offenses, he still must establish that he has a reasonable expectation of privacy to be entitled to suppression of the evidence. See

Commonwealth v. Hawkins, 718 A.2d 265, 267 (Pa. 1998).

In Commonwealth v. Beauford, 475 A.2d 788, 791 (Pa. Super. 1984), the Superior Court held that an individual has a reasonable expectation of privacy in his own phone records. An individual, however, does not have a reasonable expectation of privacy in records for a cellular telephone owned by another, even if the phone is generally used by the individual. Commonwealth v. Benson, 10 A.3d 1268, 1274-1274 (Pa. Super. 2010), appeal denied 24 A.3d 863 (Pa. 2011).

Absent evidence that Defendant is the owner of the I-phone, it will be difficult, if not impossible, for Defendant to show that he has a reasonable expectation of privacy in the records related to that phone. Nevertheless, because Defendant's expectation of privacy, or lack thereof, is part of the merits analysis of a suppression motion, see Commonwealth v. Millner, 888 A.2d 680, 691 (Pa. 2005), the court will hear evidence from the parties regarding ownership of the I-phone before rendering a final decision.

In light of the foregoing discussion, the court will conduct a hearing with respect to all of the phones and phone records except 570-494-8858 and the records associated with that number.

With respect to Defendant's motion to disclose existence of and substance of immunity, leniency or preferential treatment and complete criminal history from the National Crime Information Center (NCIC) and/or the Pennsylvania Justice Network (JNET), based on the statements of counsel at the argument in this matter, the court believes that this request is now moot; however, the Commonwealth has a continuing duty to provide such

information.

With respect to Defendant's motion for disclosure of other crimes, wrongs or act pursuant to Pa. R. Evid. 404(b), if the Commonwealth intends to utilize this type of evidence and it has not already provided notice in accordance with Rule 404(b)(3), it shall provide Defendant with reasonable notice of the general nature of any such evidence before the next pre-trial date in this case.

ORDER

AND NOW, this ___ day of September 2014, upon consideration of Defendant's omnibus pre-trial motion, it is ORDERED and DIRECTED as follows:

1. The court DENIES Defendant's petition for writ of habeas corpus.
2. The court DENIES the Commonwealth's oral motion to dismiss Defendant's suppression motion. The court will conduct a hearing with respect to all of the phones and phone records except 570-494-8858 and the records associated with that number. **The suppression hearing is scheduled for October 3, 2013 at 2:30 p.m. in courtroom #4 of the Lycoming County Courthouse.**
3. Defendant's motion for disclosure of promises of leniency and criminal history information is moot; however, the Commonwealth has a continuing duty under Pa.R.Cr.P. 573(D) to provide any new or additional information that would be responsive to this request.
4. Defendant's motion for disclosure of other crimes evidence under

Pa.R.E. 404(b) is GRANTED. If the Commonwealth intends to introduce at trial any evidence that would fall within the parameters of Rule 404(b), it shall provide Defendant with reasonable notice of the general nature of any such evidence before the next pre-trial date in this case.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Edward J. Rymysza, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file