

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

COMMONWEALTH OF PA	:	
	:	
vs.	:	NO.: CR-625-2014
	:	CRIMINAL DIVISION
SAMUEL McHENRY	:	
Defendant	:	Petition for Habeas Corpus

OPINION AND ORDER

By Information filed on May 2, 2014, the Defendant is charged with Failure to Comply with the Registration Requirement in violation of 18 Pa. C.S.A. § 4915.1 (a) (1). It is alleged that the Defendant was an individual subject to registration requirements and that he knowingly failed to register as a transient with the Pennsylvania State Police as required under 42 Pa. C.S.A. §§ 9799.15, 9799.16(b)(6), and 9799.25.

The Defendant subsequently filed a Petition for Habeas Corpus alleging that there is insufficient evidence to establish that he knowingly failed to register. Specifically, the Defendant asserts that he resided where he registered and that there is no evidence that he either resided or was temporarily lodged elsewhere, or that he was a transient, thus requiring him to register.

A hearing on the Defendant's Petition was held on August 4, 2014. Admitted into evidence at the hearing was a transcript of the preliminary hearing held on April 14, 2014 before MDJ Gary Whiteman.

At the preliminary hearing, the Commonwealth first called Michael Walls as a witness. Mr. Walls resides at 528 Ruben Kehrer Road. He has lived there approximately eleven years. For the past ten years his roommate has been Teresa Kennedy.

According to Mr. Walls, the Defendant and Ms. Kennedy are dating each other. For “about a year or more” (Transcript, p. 4), the Defendant has been sleeping over at the residence about four nights on average every week.

According to Mr. Walls, the Defendant stays overnight on weekends and during the week “a night or two.” (Transcript, p. 4).

When the Defendant visits with Ms. Kennedy during the day “they usually go out and do things.” (Transcript, p. 5). If the Defendant is staying over, they usually come home between 7:00 or 8:00. When staying over, the Defendant brings with him his clothes and personal items but takes them when he leaves. (Transcript, pp. 4, 6).

The Defendant does not keep any personal items in the trailer. He has no furniture in the trailer. He does not receive mail at the trailer and is not on the lease. As well, he pays no rent nor does he contribute to any utilities.

Mr. Walls also testified at the habeas corpus hearing on August 4, 2014. Somewhat contrary to what he testified to at the preliminary hearing, he noted that the Defendant began sleeping over in December of 2013 after Teresa asked permission of Mr. Walls.

He further clarified that in January of 2014, the Defendant stayed over approximately ten nights and since then approximately ten to twelve nights per month until the Defendant was arrested by the State Police. He further clarified that the longest consecutive period that the Defendant would stay over would be two nights.

He confirmed that the Defendant would sometimes show up at the trailer during the weekdays in the afternoon. He and Ms. Kennedy would hang around

and both leave and return later. He clarified that the Defendant never stayed at the residence if Ms. Kennedy was not present. He added that the Defendant would sometimes buy food with Ms. Kennedy. They would prepare the food and eat it “right away.” The Defendant might store sodas in the refrigerator but never food.

He noted that the Defendant did not reside at the trailer. Mr. Walls was aware of his “background” and considered the Defendant “a guest” of Ms. Kennedy “his tenant.”

Angela Bieber, a Trooper with the Pennsylvania State Police testified as well at both the preliminary hearing and the habeas corpus hearing.

At the preliminary hearing, she testified that the Defendant registered his address as 648 Route 15 Highway, South Williamsport, Pennsylvania. (Transcript, p. 8).

She began investigating whether the Defendant was “living” at the Ruben Kehrer address in early April of 2014 and as a result visited the trailer. On April 4, 2014, she went to the trailer and “Mr. McHenry was there.” (Transcript, p. 10). As well, she observed that two of the Defendant’s vehicles were parked across the street from the trailer. According to her, “it appeared [that the Defendant] had stayed the night, he came out in like pajama pants. It was obvious that he had just gotten out of bed.” (Transcript, p. 10). According to Trooper Bieber, the Defendant indicated that “he only stays there occasionally. (Transcript, p. 10).

At the habeas corpus hearing, Trooper Bieber testified that the Defendant explained to her when she confronted him at Mr. Walls’ trailer in April that he still “lived with his dad.” She then took the Defendant in custody. At that time Ms.

Kennedy told the Defendant that “I told you to take care of this and you didn’t listen to me.”

Trooper Matthew Sweet also with the Pennsylvania State Police testified at the habeas corpus hearing. He assisted “Trooper Bieber when she went to the Walls’ trailer in April.”

He confirmed that the Defendant “made statements about staying a couple times.” As well, he indicated that the Defendant stated that he did not like living with his father “because it’s boring and we don’t get along.”

The Commonwealth advances several arguments in support of its position that the Defendant failed to comply with his Megan’s Law registration requirement. The Commonwealth contends that the Defendant failed to register the 528 Ruben Kehrer Road residence as temporary lodging as required by 42 Pa C.S.A. § 9799.15(g)(7). The Commonwealth further argues that the Defendant violated 42 Pa C.S.A. §9799.15(g)(2) by failing to register the Ruben Kehrer Road address as an additional or new residence. Finally, the Commonwealth argues, in the alternative, that the Defendant became a transient and as a result violated 42 Pa C.S.A. §9799.15(h)(1) by failing to update his registration to reflect his transient status.

The Defendant argues on the contrary that the evidence is insufficient to prove prima facie that he did not reside at his registered address in South Williamsport, that he resided at the Ruben Kehrer Road address, that he was temporarily lodged at the Ruben Kehrer Road residence or that he was a transient.

The proper means to attack the sufficiency of the Commonwealth’s evidence pretrial is through the filing of a petition for writ of *habeas corpus*. Commonwealth v.

Marti, 779 A.2d 1177, 1179 n.1 (Pa. Super. 2001). At a *habeas corpus* hearing, the issue is whether the Commonwealth has presented sufficient evidence to prove a prima facie case against the defendant. See Commonwealth v. Williams, 911 A.2d 548, 550 (Pa. Super. 2006).

“A prima facie case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime.” Commonwealth v. Packard, 767 A.2d 1068, 1070 (Pa. Super. 2001). The purpose of a habeas corpus proceeding is not merely to review the prior preliminary hearing but rather to determine the legality of the existing restraint on the defendant’s liberty. Commonwealth v. Lawson, 650 A.2d 876, 879 (Pa. Super. 1994), citing Commonwealth v. Morman, 541 A.2d 356 (Pa. Super. 1988).

The Defendant has a prior conviction for Unlawful Contact with a Minor, which is a Tier II sexual offense. 42 Pa.C.S.A. §9799.14(c)(5). As a result of this conviction, the Defendant is required to register his residence with the Pennsylvania State Police for a period of twenty-five years. 42 Pa C.S.A. §9799.15(a)(2).

With respect to the Commonwealth’s first argument regarding Defendant allegedly residing at the Ruben Kehrer Road address, an individual who is subject to registration commits an offense if he fails to appear in person at an approved registration site within three business days to provide current information regarding a new residence, a change in residence, a termination of residence or failure to maintain a residence.

According to the statute, a “residence” is “a location where an individual resides or is domiciled or intends to be domiciled for 30 consecutive days or more during a calendar year. The term includes a residence which is mobile, including a houseboat, a mobile home, trailer or recreational vehicle.” 42 Pa. C.S.A. § 9799.12.

Under any definition of residence or domicile, the Commonwealth has failed to prove a prima facie case that the Defendant added a new residence, changed his residence, terminated his residence or failed to maintain a residence.

The Commonwealth has failed to establish a prima facie case that the Defendant stayed or intended to stay at the Ruben Kehrer Road address for 30 consecutive days or more in a calendar year. The Defendant was not on the lease, paid no rent, did not contribute to the costs of maintaining the residence or any utilities, failed to maintain or store any personal property in the residence, did not get mail at the residence, and did not intend to reside or live at the residence. Any clothes or personal hygiene items that he brought were taken with him when he left and any food that he purchased was consumed immediately except for perhaps soda, which was kept temporarily in the refrigerator. He did not maintain or upkeep the premises, he bore no responsibility with respect to the premises, and he had no authority or license to permit others to visit the premises. Plainly put, it was as Mr. Walls testified; the Defendant was a “guest” of Ms. Kennedy. Therefore, the Commonwealth has failed to show that Defendant added a new residence or changed his residence by staying overnight seven to twelve nights per month at the Ruben Kehrer Road address.

The Commonwealth also failed to present a prima facie case that the Defendant terminated his residence or failed to maintain his registered address. The definition of residence includes not only the location where an individual resides but also where he is domiciled or intends to be domiciled for 30 consecutive days or more during a calendar year. A domicile is “[t]hat place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.” Black’s Law Dictionary 435 (5th Edition 1979); In re Residence Hearing Before the Bd. Of Sch. Dirs., 560 Pa. 366, 744 A.2d 1272, 1275 (2000). No evidence was produced to show that the Defendant was no longer domiciled at his registered address. Although the Commonwealth presented evidence to show that the Defendant was spending seven to twelve nights per month at his girlfriend’s residence, there is nothing in the record to show that the Defendant was not spending the remainder of the month at his registered address or that he no longer received mail or kept his belongings at his registered address.

The police did not check with the postal authorities to determine where the Defendant was receiving mail. They did not conduct surveillance on the Ruben Kehrer Road residence to see if the Defendant was living there full time. They did not present any evidence that the Defendant kept any of his belongings at the Ruben Kehrer Road address. Therefore, contrary to the Commonwealth’s argument, the evidence failed to establish a prima facie case that the Defendant terminated or failed to maintain his registered address as his residence.

Accordingly, the Court will GRANT Defendant's Petition for Habeas Corpus to the extent it relates to the Defendant not registering as required by 42 Pa. C.S.A. § 9799.15 (g) (2).

The Commonwealth also failed to show that the Defendant is a transient. A transient is an individual "who does not have a residence but nevertheless resides in this Commonwealth in a temporary habitat, or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park." 42 Pa.C.S.A. §9799.12. While the Defendant is certainly temporarily staying at his girlfriend's residence, such does not render him a "transient" because he has a residence -his registered address, which continues to be his domicile.

The next issue concerns the sufficiency of evidence with respect to the Commonwealth's temporary lodging theory. Pursuant to 42 Pa. C.S.A. § 9799.15, one subject to registration requirements must appear in person at an approved registration site within three days to provide current information relating to a commencement of temporary lodging or a termination of temporary lodging. 42 Pa. C.S.A. § 9799.15 (g) (7).

Temporary lodging is defined as the specific location where an offender is staying when away from the sexual offender's residence for seven or more days. 42 Pa. C.S.A. § 9799.12.

The Defendant contends the statute implicitly requires that the seven or more days must be consecutive. The Court cannot agree. The word consecutive is conspicuously absent from the definition of temporary lodging, unlike the definition of a residence, wherein the term days is expressly conditioned by the word consecutive.

“Where a section of a statute contains a given provision, the omission of such a provision from a similar [section] is significant to show a different intention existed.” Commonwealth v. Heath, 528 Pa. 316, 597 A.2d 1135, 1136 (1991)(citation omitted); see also Commonwealth v. Hoke, 599 Pa. 587, 962 A.2d 664, 669 (2009). Similarly, “[w]here a legislature includes specific language in one section of a statute and excludes it from another, that language should not be implied where excluded.” Commonwealth v. Berryman, 437 Pa. Super. 258, 649 A.2d 961, 965 (1994).

Therefore, the Court cannot imply the term consecutive in the definition of temporary lodging. Unfortunately, there is no guidance in the statute with respect to the time frame in which those seven or more days happen.¹ Nevertheless, the evidence clearly shows that the Defendant stayed at his girlfriend’s residence a total of more than seven days. He slept overnight there most weekends and several week nights per month. He brought a change of clothes and hygiene items. He stayed in her bedroom with her. He brought occasional food items and stored them in the refrigerator. Accordingly, the Commonwealth presented sufficient evidence to prove a prima facie case that the Defendant commenced temporary lodging without complying with his registration requirements.

Defendant argues that it would be impossible to comply with the temporary lodging definition as advanced by the Commonwealth and as found by this Court in that the individual must provide the specific length of time and the dates

¹ Certainly it would have been more helpful if the legislature had utilized the word consecutive as it did in its definition of the term residence or if it had expressly provided a time frame as it did when it defined the term “employed” as “a vocation or employment that is full time or part time for period of time exceeding four days during a seven-day period or for an aggregate period of time exceeding 14 days during any calendar year...”

during which the individual will be temporarily lodged. 42 Pa. C.S.A. § 9799.15 (g)
(7). Again, the Court cannot agree.

In this particular case, the Defendant could easily register with the State Police information relating to his temporary lodging with his girlfriend. Like a visitation or partial custody schedule in family court case, the Defendant could notify the State Police that he would be at the Ruben Kehrer Road residence every weekend from a time on Friday to a time on Sunday and the weeknight or weeknights that he would be staying overnight.

ORDER

AND NOW, this ____ day of September, 2014, following a hearing, the Court grants in part and denies in part the Defendant's Petition for Habeas Corpus. The Court GRANTS the Defendant's Habeas Corpus to the extent the Commonwealth claims that the Defendant failed to register a change of residence, commencement of a residence, and/or transient status. The Court DENIES Defendant's Petition for Habeas Corpus to the extent that the Commonwealth claims the Defendant failed to register temporary lodging.

By The Court,

Marc F. Lovecchio, Judge

cc: DA (AC)

PD (KG)
Gary Weber, Esquire (Lycoming Reporter)
Work File