

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CR-1408-2009
	:	
v.	:	
	:	CRIMINAL DIVISION
JERMAINE WEEKS,	:	
Defendant	:	PCRA

OPINION AND ORDER

On March 5, 2014, the Defendant filed a timely *pro se* Post-Conviction Relief Act Petition (PCRA Petition). The Court appointed Julian Allatt, Esquire, as PCRA Counsel. On May 19, 2014, PCRA Counsel filed an Amended PCRA Petition. The Court held a conference on the Amended Petition on May 19, 2014.

I. Background

On August 16, 2009, at approximately 2:19 A.M., multiple units from the Williamsport Bureau of Police responded to reports of gun shots fired. One of the reporting persons, Shakeema Shuler, told police that she had been arguing with Jermaine Weeks (Defendant) in her residence. Shuler said that the Defendant had displayed a handgun and then left. Shuler said that a few seconds after the Defendant left, she heard shots and saw flashes outside her window. A few moments later, Shuler heard more shots and saw more flashes.

Another witness told police that he heard four shots. He said that a few moments after the shots were fired, he saw a man get into a car and leave the area. The witness's description of the man matched that of the Defendant. The witness stated that he saw no other pedestrian or vehicular traffic in the area.

Upon examining the area, police found eight shell casings. Police also checked the Defendant's criminal history, which indicated he had a conviction that made him a person not to possess a firearm.

Police applied for a warrant to search the Defendant's apartment for a handgun and gun accessories. Magisterial District Judge James G. Carn (MDJ Carn) granted the application at 5:50 A.M. on August 16, 2009. Shortly thereafter, police executed the warrant and found a rifle in the Defendant's apartment.

The Defendant was charged with two counts of Possession of a Firearm by a Prohibited Person.¹ Following the preliminary hearing, one count was dismissed, and the other count was held for trial.

On November 17, 2009, trial counsel filed a motion to suppress the rifle found in the Defendant's apartment. During the hearing on the motion, trial counsel argued that police entered the Defendant's residence before the warrant was obtained. Trial counsel also argued that police had entered the residence during nighttime even though the warrant was to be served only between the hours of 6 A.M. and 10 P.M. Following the hearing, the Honorable Marc Lovecchio found that MDJ Carn inadvertently checked the wrong box on the search warrant and intended to indicate that the warrant could be served any time day or night. In addition, Judge Lovecchio found that the search warrant was issued at 5:50 A.M. and execution of the warrant began at 5:59 A.M. Judge Lovecchio determined that the Defendant was not entitled to the suppression of the rifle because a technical or procedural violation does not justify exclusion of the evidence. *See* Order, February 2, 2010.

¹ 18 Pa.C.S. § 6105(a)(1).

On October 19, 2010, a jury found the Defendant guilty of Possession of a Firearm by a Prohibited Person. On March 8, 2011, this Court sentenced the Defendant to a prison term of five to ten years. The Defendant appealed the judgment of sentence. The Superior Court denied the appeal on May 25, 2012. On January 14, 2013, the Defendant filed a PCRA petition, in which he requested reinstatement of his right to petition for allowance of appeal to the Supreme Court of Pennsylvania. On April 16, 2013, this Court reinstated the Defendant's right to petition for allowance of Appeal to the Supreme Court. On October 29, 2013, the Supreme Court of Pennsylvania denied the Defendant's petition for allowance of appeal.

In his Amended PCRA Petition, PCRA Counsel argues that the Defendant's trial counsel was ineffective because she did not argue that the affidavit of probable cause in support of the search warrant failed to establish a substantial nexus between the crime of Persons Prohibited from Possessing a Firearm and the Defendant's apartment. PCRA Counsel argues that affidavit supporting the search did not establish a substantial nexus between the crime and the Defendant's apartment, and, therefore, the evidence obtained from the Defendant's apartment should have been suppressed.

II. Discussion

A defendant is entitled to relief pursuant to the Post-Conviction Relief Act for ineffective assistance of counsel when the defendant can show "(1) that the claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." Commonwealth v. Kimball, 724 A.2d 326, 333 (Pa. 1999). "Where the ineffectiveness claim is based on the failure of counsel to move for

suppression of evidence, ‘the defendant must establish that there was no reasonable basis for not pursuing the suppression claim and that if the evidence had been suppressed, there is a reasonable probability the verdict would have been more favorable.’” Commonwealth v. Arch, 654 A.2d 1141, 1143 (Pa. Super. 1995) (quoting Commonwealth v. Melson, 556 A.2d 836, 839 (Pa. Super. 1989)). Pursuant to the test for ineffectiveness, this Court must first determine if there is merit to the claim that the evidence obtained from the Defendant’s apartment should have been suppressed.

A search warrant must be supported by probable cause. U.S. Const. amend. IV; Pa. Const. art. I, § 8. “[T]he United States Supreme Court established the ‘totality of the circumstances’ test for determining whether a request for a search warrant under the Fourth Amendment is supported by probable cause. . . . [The Supreme Court of Pennsylvania] adopted the totality of the circumstances test for purposes of making and reviewing probable cause determinations under Article I, Section 8.” Commonwealth v. Jones, 988 A.2d 649, 655 (Pa. 2010).

“The task of an . . . authority [deciding whether to issue a warrant] is simply to make a practical, commonsense decision whether, given all of the circumstances set forth in the affidavit [of probable cause] 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.” Commonwealth v. Gray, 503 A.2d 921, 925 (Pa. 1985) (quoting Illinois v. Gates, 462 U.S. 213, 238-39 (1983)).

“The affidavit supporting the search warrant must set forth a substantial nexus between the crime and the place to be searched.” Commonwealth v. Funds in Merrill Lynch Account,

777 A.2d 519, 523 (Pa. Super. 2001) (citing Commonwealth v. Fisher, 681 A.2d 130, 136 (Pa. 1996)).

“[T]he duty of [a court reviewing a probable cause determination] is simply to ensure that the magistrate had a ‘substantial basis . . . for concluding that probable cause existed.’” Gray, 503 A.2d at 925 (quoting Gates, 462 U.S. at 238-39).

“As our United States Supreme Court stated: ‘A grudging or negative attitude by reviewing courts towards warrants . . . is inconsistent with the Fourth Amendment’s strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner.’” Jones, 988 A.2d at 655-56 (quoting Gates, 462 U.S. at 236).

Here, MDJ Carn had a substantial basis for concluding that there was a fair probability that the gun used in the crime would be found in the Defendant’s apartment. A gun is the type of evidence likely to be kept in a suspect’s residence. *See* United States v. Jones, 994 F.2d 1051, 1056 (3rd Cir. 1993) (citing United States v. Anderson, 851 F.2d 727, 729 (4th Cir.1988) (listing cases that state that it is reasonable to assume that people keep guns in their homes)).

In addition, the affidavit of probable cause provided that the crime was committed around 2 A.M. Police had submitted their request for a warrant by 6 A.M. that same morning. Four hours is not a large window of time for a suspect to hide a gun in a place other than his or her home. *See* Commonwealth v. Klimkowicz, 479 A.2d 1086, 1089 (Pa. Super. 1984) (noting the difficulty of disposing of guns). The difficulty of hiding the gun in a place other than home is compounded in the early morning hours when a suspect would have access to few other buildings in which to hide a gun, and many of the individuals that a person knows would be asleep. Because a gun is likely kept in a home and because the Defendant could not have easily

hidden a gun in a place other than his apartment, MDJ Carn had a substantial basis for concluding that there was probable cause that the gun would be found in the Defendant's apartment. Therefore, the evidence obtained from the Defendant's apartment should not have been suppressed, and there is no merit to the Defendant's claim.

PCRA Counsel cites Commonwealth v. Kline² and Commonwealth v. Way³ to support his argument that there was not a substantial nexus between the crime and the Defendant's apartment. In Kline, the affidavit of probable cause provided that two girls asked the defendant for drugs. 335 A.2d at 362. The affidavit also provided that the defendant went to his apartment and then returned with drugs. Id. A request for a warrant to search the defendant's apartment was granted. Id. at 363.

The Superior Court of Pennsylvania held that the affidavit did not establish a substantial nexus between the crime and the defendant's apartment. Id. at 364. The Court determined that a substantial nexus was not established because the affidavit did not set forth how the girls concluded that the drugs were in the defendant's apartment. Id. The Court wrote, "Probable cause to believe that a man has committed a crime on the street does not necessarily give rise to probable cause to search his home." Id.

In Way, the affidavit of probable cause provided the following information. An undercover state trooper asked a person to purchase drugs for him. 492 A.2d at 1153. Other undercover troopers followed the person, who drove to a roadway. Id. The troopers saw a van pull up to the person's vehicle. Id. A registration check indicated that the van belonged to the defendant. Id. After 45 minutes, the van departed. Id. A trooper followed the van to a

² 335 A.2d 361 (Pa. Super. 1975).

³ 492 A.2d 1151 (Pa. Super. 1985).

residence a short distance away from the roadway. Id. It was determined that the defendant lived at the residence a short distance away from the roadway. Id.

Later, the trooper who asked for drugs met with the person. Id. The person then gave drugs to the trooper. Id. Troopers arrested the person, who said that she would call the defendant at a certain number to set up drug transactions. Id. The person provided the phone number. Id. A request for a warrant to search the defendant's residence was granted. Id. The Superior Court of Pennsylvania held that the affidavit of probable cause did not establish a substantial nexus between the crime and the defendant's residence. Id. at 1154. The Court relied on the decision in Kline. *See id.*

The facts of Kline and Way are distinguishable from the facts of this case. In Kline and Way, there was not necessarily further evidence of the crimes that could be obtained from anywhere, let alone the defendants' residences. Searches of the defendants' residences would serve largely to pile on charges for more crimes of which police did not have probable cause to suspect the defendants. Here, unlike in Kline and Way, there was necessarily further evidence of the crime that police suspected the Defendant committed. This further evidence was the gun.

Additionally, in Kline, the Superior Court used the *Aguilar-Spinelli* tests⁴ to determine that the affidavit did not establish probable cause to search the defendant's apartment. *See Kline*, 335 A.2d at 363. However, in Gates, the Supreme Court of the United States abandoned the *Aguilar-Spinelli* tests and established a new test for determining whether a request for a search warrant under the Fourth Amendment is supported by probable cause. *See Gates*, 462 U.S. at

⁴ Under the *Aguilar-Spinelli* tests, "whenever a finding of probable cause to issue a search warrant [was] based on information from an informant, the affiant [had to] give the issuing authority a statement of facts sufficient to enable the issuing authority to make two independent judgments: (1) that the informant had knowledge of sufficient facts to conclude that the suspect was engaged in criminal activity; and (2) that the affiant is justified in his belief that the informant is reliable." Kline, 335 A.2d at 363.

238. In abandoning the *Aguilar-Spinelli* tests, the Court wrote, “[the] totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific ‘tests’ be satisfied by every informant’s tip.” *Id.* at 230-31. Moreover, in *Gray*, the Supreme Court of Pennsylvania rejected the *Aguilar-Spinelli* tests and adopted the *Gates* “totality of circumstances” test for determining whether a request for a search warrant under Article I, Section 8 of the Pennsylvania Constitution is supported by probable cause. *See Gray*, 503 A.2d at 925-26.

III. Conclusion

The rifle should not have been suppressed because MDJ Carn had a substantial basis for concluding that there was probable cause that the gun used in the crime would be found in the Defendant’s apartment. As there is no merit to the Defendant’s claim that the rifle should have been suppressed, this Court finds that the Defendant’s trial counsel was not ineffective.

Based upon the foregoing, this Court finds no basis upon which to grant the Defendant’s PCRA petition. Additionally, this Court finds that no purpose would be served by conducting further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court’s intention to deny the Defendant’s PCRA petition. The Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing the petition.

ORDER

AND NOW, this _____ day of July, 2014, the Defendant is notified that this Court intends to dismiss the Defendant's PCRA petition. The Court will dismiss the Defendant's petition unless the Defendant files an objection to that dismissal within twenty (20) days of date of this Order.

By the Court,

Nancy L. Butts, President Judge