

COMMONWEALTH : No's. CR-2128-2013; CR-1325-2010
: CR-262-2013
vs. :
:
:
:
ANTHONY SNYDER, :
Defendant :

OPINION AND ORDER

Under Information 2128-2013, Defendant was charged with statutory sexual assault and corruption of a minor. Following a jury trial, Defendant was acquitted of statutory sexual assault but convicted of corruption of minors, a misdemeanor of the first degree. On February 3, 2015, the court sentenced Defendant on the corruption charge to a split sentence consisting of a minimum of 11 ½ months to a maximum of 23 months incarceration plus 2 consecutive years of probation. Because Defendant served his minimum, he was made eligible to be released on parole upon the submission of an approved parole plan. As set forth in the sentencing order, Defendant was directed to attend any program to which he was referred by the Adult Probation office.

Under Information 262-2013, Defendant pled guilty on April 29, 2013 to Count 1, simple assault, a misdemeanor of the second degree. Defendant was sentenced to serve two years on the Lycoming County Intermediate Punishment (IP) program with the first three months to be served at the pre-release facility on work release. The sentence was to run consecutive to any and all sentences that Defendant was serving. Special conditions of supervision included that he attend and complete any and all other programs and conditions to which he was directed by the Adult Probation office.

Under 262-2013, Defendant was brought before the court on IP violations on

both October 17, 2013 and November 27, 2013. Following the hearings, the court found probable cause to believe that Defendant violated the conditions of his intermediate punishment by allegedly committing and then being arrested and charged with new criminal offenses.

In an order dated February 3, 2015, under Information 262-2013, a final violation hearing was held and no further action was taken upon agreement of the parties.

On June 19, 2015, following a hearing, the court found probable cause to believe that Defendant violated conditions of his supervision under both 262-2013 and 2128-2013 by allegedly failing to reside at his approved address. On August 6, 2015, under both 262-2013 and 2128-2013, Defendant was yet again brought before the court on an alleged violation of parole, probation and IP. The Adult Probation office asserted that Defendant admitted to selling controlled substances to a third party, and they allegedly found proof relating to such on Defendant's phone. Defendant denied all of the allegations, and a final hearing was scheduled for September 8, 2015.

At the September 8, 2015 hearing, Adult Probation Officer Loretta Clark testified. She has been supervising Defendant since February of 2015.

On July 25, 2015, as part of a saturation unit, Officer Clark, as well as Adult Probation Officer Schriener and Mahaffey, made a field contact with Defendant at his residence. Defendant was present at the home. Defendant was asked to have a seat on the couch while the officers spoke with him. Officer Clark asked Defendant if she could see his cell phone. He handed it to her. She then asked if she could look through the cell phone and he answered "yes." As she was searching through Defendant's phone, she came across numerous text messages that appeared to reference illegal drug activity including, but not

limited to, the sale of Vicodin, Tramadol and Adderall. The text messages were descriptive, lengthy and over a period of days.

Officers asked Defendant about the alleged drug transactions. Defendant changed his story numerous times and was not able to give a consistent statement. Eventually, Defendant was placed in handcuffs and detained. Upon being detained, Defendant admitted that he was selling the various narcotics to a third party.

Defendant first argues that the Adult Probation office unlawfully seized and searched his phone. The court agrees.

In *Commonwealth v. Wilson*, 620 Pa. 251, 67 A.3d 736 (2013), the Pennsylvania Supreme Court held that courts were not empowered to direct that a probation officer may conduct warrantless, suspicionless searches of a probationer and his property as a condition of probation. Instead, searches of probationers must be conducted in accordance with 42 Pa.C.S. §9912(d), which requires reasonable suspicion and, in the case of property searches, a supervisor's prior approval unless there are exigent circumstances.

The Commonwealth argues that the search was consensual.

“To establish a voluntary consensual search, the Commonwealth must prove ‘that a consent is the product of an essentially free and unconstrained choice--not the result of duress or coercion, expressed or implied, or a will overborn--under the totality of the circumstances.’” *Commonwealth v. Acosta*, 815 A.2d 1078, 1083 (Pa. Super. 2003)(citations omitted).

When addressing the voluntariness of a consent, the court considers numerous factors including “the length and location of the detention; whether there were any police abuses, physical contact, or use of physical restraints; any aggressive behavior or any use of

language or tone by the officer that were not commensurate with the circumstances; whether the questioning was repetitive and prolonged; whether the person was advised that he or she was free to leave; and whether the person was advised of his or her right to refuse to consent.” *Commonwealth v. Caban*, 60 A.3d 120, 131 (Pa. Super. 2012).

In this case, the court finds that Defendant merely acquiesced to the probation officers’ authority. A saturation unit of probation officers arrived at Defendant’s residence. Defendant was not free to leave, and he was not told that he could refuse to consent.

Even if Defendant voluntarily consented to the search of his phone, the Commonwealth has not met its burden of proof, because Defendant’s admission was procured after questioning while Defendant was in custody without being provided *Miranda* warnings.

Neither party contends that Defendant was not in custody at the time he was questioned and at the time he gave the incriminating statement. Defendant was placed in handcuffs and was to be transported to the Lycoming County Prison on the alleged violations as evidenced on the phone.

In the recent decision of *Commonwealth v. Cooley*, 118 A.3d 370 (Pa. 2015), the court addressed the issue as to whether a parole agent must issue *Miranda* warnings to a parolee when the parolee is in custody and questioned about new crimes.

In addressing an individual’s right to refuse to testify against himself, the Court noted that the right applies not only when the individual is a defendant but also permits him the privilege “not to answer official questions put to him in any other proceedings, civil or criminal, formal or informal, or the answers might incriminate him in future proceedings.” *Cooley*, supra (citing *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984)). While the

Commonwealth argues that the questioning of Defendant related to the conditions of his supervision which the Court does not dispute, this does not end the inquiry. As in *Cooley*, Defendant was accused of crimes for which he was not on parole; there was no interview or dialog related to the conditions of his supervision or supervision violations. The interrogation was unquestionably aimed at crimes for which he was not on parole and at crimes for which he could then be charged.

The fact that Defendant was not charged is not dispositive. The court concludes that Defendant's admission must be suppressed because no *Miranda* warnings were given.

Furthermore, the text messages were not otherwise authenticated and were hearsay. *Commonwealth v. Koch*, 39 A.3d 996 (Pa. Super. 2011), *aff'd by divided court*, 106 A.3d 705 (Pa. 2014)

A probation violation hearing differs from a trial. The issue is whether the facts presented to the court are probative and reliable. The question is whether the defendant has violated the conditions of his supervision and if so whether his conduct indicates a likelihood of future offenses and detaining him is necessary to protect the public. "A probation violation is established whenever it is shown that the conduct of the probationer indicates that the probation has proven to have been an ineffective vehicle to accomplish rehabilitation and not sufficient to deter against future anti-social conduct." *Commonwealth v. Infante*, 585 Pa. 408, 421, 888 A.2d 783, 791 (2005); see also *Commonwealth v. Mullins*, 591 Pa. 341, 918 A.2d 82, 85 (2007); *Commonwealth v. Holder*, 569 Pa. 474, 805 A.2d 499, 504 (2002). The Commonwealth need only make this showing by a preponderance of the evidence. *Commonwealth v. A.R.*, 990 A.2d 1, 4 (Pa. Super. 2010).

While the court certainly suspects that Defendant was engaging in illegal drug transactions with the third party and in fact believes so, it is not the court's personal opinion that matters. The issue is whether the Commonwealth has proven by a preponderance of the evidence that Defendant committed another crime. The court is not willing to conclude such. Unfortunately, there are far too many variables and not one shred of corroborating evidence.

ORDER

AND NOW, this ___ day of October 2015, Defendant's Probation, Intermediate Punishment and Parole violation is **DISMISSED**. Defendant is immediately released on continuing supervision. Upon his release, he must immediately report to the Lycoming County Adult Probation office for continued processing.

By The Court,

Marc F. Lovecchio, Judge

cc: APO
PD (KG)
DA
Work file
Gary Weber, Esquire (Lycoming Reporter)