

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:
	:
vs.	: No. CR-1340-2014
	:
LONDELL MURRAY-BEY,	:
Defendant	:
* * * * *	* * * * *
COMMONWEALTH	:
	:
vs.	: No. CR-1341-2014
	:
RONDELL HOLMES,	: Opinion & Order Re: Omnibus Pretrial Motions
Defendant	:

OPINION AND ORDER

Defendant Murray-Bey is charged by Information filed on August 29, 2014 with one count of possession with intent to deliver heroin, one count of receiving stolen property, one count of possession of a controlled substance, one count of possession of drug paraphernalia and one count of possession of a small amount of marijuana for personal use.

Defendant Holmes is charged by Information filed on August 29, 2014 with five counts of possession with intent to deliver controlled substances, one count of possession of a firearm with an altered manufacturer's number, one count of possession of a controlled substance and one count of possession of drug paraphernalia.

Both defendants filed omnibus pretrial motions. Defendant Murray-Bey filed his motion on October 1, 2014, and Defendant Holmes filed his motion on September 8, 2014.

A hearing was held on October 31, 2014 on both motions. By Order dated

October 31, 2014, the court decided all of the defendants' motions except for the motions to suppress evidence and the petitions for writ of habeas corpus filed on behalf of both defendants.

The charges against the defendants arise out of a search of a residence located at 727 ½ West Fourth Street in Williamsport on July 28, 2014. Defendants assert that the search of the residence by the Williamsport Police as well as a detective for the Lycoming County District Attorney's office was illegal in that there was no consent, no search warrant and no probable cause with exigent circumstances when they entered the residence. Defendants also claim the search warrant that the police obtained after the residence was entered and searched contained the wrong address which, as well, rendered the search unconstitutional.

The Commonwealth counters that the search was constitutional in that it was authorized via consent. Alternatively, the Commonwealth argues that the search was based on probable cause and exigent circumstances. Finally, the Commonwealth contends that even if the initial search was unconstitutional and the portions related thereto are excised from the affidavit of probable cause for the search warrant, the items would have been inevitably discovered.

In connection with the outstanding motions, the court was asked to consider not only the testimony produced at the hearing, but also the testimony produced at the preliminary hearing which was held on August 12, 2014.

Tracy Gross is employed by the Pennsylvania Board of Probation and Parole.

On July 28, 2014, he was working as a member of the Federal Marshal's Fugitive Task Force. The Task Force received information that a wanted individual, Basil Hall, may be hiding at 729 West Fourth Street in Williamsport.

Members of the Task Force arrived at the residence between 7:30 and 8:00 a.m. 729 West Fourth Street was the same structure as 727 or 727 ½ West Fourth Street. It was a large Victorian home with multiple apartment units. There were three floors as well as an attic.

Agent Gross and others were permitted into the structure by a first floor tenant. After inquiring of the tenants if they knew Mr. Hall, Defendant Holmes came out of a second floor apartment on the left and walked partially down the stairs to speak with Agent Gross.

After a short conversation, Defendant Holmes agreed to allow the Task Force members to search his apartment in an attempt to locate Mr. Hall. Once Agent Gross entered the apartment, he immediately noticed the odor of burnt marijuana. While clearing the house looking for Mr. Hall, Agent Gross observed heroin packaging material in an open closet, as well as silver handgun at the top of the stairs leading to the attic. It appeared that the gun was recently placed there because it was very clean in comparison to what he described as a "very dirty attic."

In the attic, Agent Gross also found Defendant Murray-Bey hiding behind a large wooden box that was approximately 20 feet from the revolver.

Other agents removed Defendant Murray-Bey from the house and checked his

criminal record. They determined through their investigation that Defendant Murray-Bey was precluded from possessing any firearms because he was under parole supervision out of Philadelphia and apparently had a felony criminal record.

While not locating Mr. Hall, because of Agent Gross' observations with respect to the controlled substances and the firearm, Agent Gross contacted the Williamsport Bureau of Police to "assist." When members of the Williamsport Bureau of Police arrived, Agent Gross explained to them what he observed. He also showed to them the paraphernalia and the gun. In fact, when the officers arrived, they entered the front door of the apartment building, went up the stairs to the apartment of Mr. Holmes, went into the apartment and up the stairs to the attic where they met with Agent Gross.

The defendants had previously been taken out of the apartment. Agent Gross remained with the handgun until he was informed by police that they had secured the residence to obtain a search warrant.

Jeremy Brown is employed by the Williamsport Police and was working on the date in question as a member of the Lycoming County Narcotics Enforcement Unit. He was called to the residence to assist in the search warrant application process. He arrived at the residence and met with Captain Orwig outside on the front porch. He could not recall if he was escorted or directed to the upstairs apartment to meet with Agent Gross. As soon as he walked into the apartment, he smelled the odor of burnt marijuana. After Officer Brown met with Agent Gross, Agent Gross directed him to the paraphernalia and gun. Additionally, Officer Brown observed a marijuana roach in the ashtray in the living room and a plate with

a powdery substance and maybe a razor.

He determined to secure the residence and make an application for a search warrant. He and other officers checked the rest of the apartment in order to secure it pending the search warrant application.

Officer Brown left the residence and prepared an affidavit of probable cause along with a search warrant application. With respect to the specific description of the premises to be searched, he listed the following: “729 West Fourth Street, 2nd Floor Apartment, Williamsport, 17701 Lycoming County, PA. Apartment includes the 3rd floor and attic as part of the 2nd floor residence. Structure is a Victorian style brick house with a wraparound porch.”

The search warrant application and supporting affidavit were introduced as Commonwealth Exhibit 1 at the hearing. Officer Brown conceded that the address on the search warrant was incorrect. It listed 729 when it should have listed 727. He indicated that he “got the address off of the apartment building.” There was a sign to the right of the front door leading into the apartment building that listed the address as 729. He subsequently determined, however, that there was another sign on the left of the doorway that was marked 727 but that when he first gathered the information, the people who were standing on the porch inadvertently obstructed his view.

Matthew Keller was employed by the Lycoming County District Attorney’s Office on July 28, 2014 as a detective. He was on duty that date and received a request for assistance from state parole agents who were looking for a fugitive that could be in the house

located at 729 West Fourth Street. Detective Keller assisted in the execution of the search warrant which uncovered numerous illegal controlled substances, numerous items of paraphernalia, indicia of distribution of said controlled substances and indicia of occupancy by the defendants. Recovered, among other things, were prescription drugs, heroin, crack cocaine, marijuana, packaging material, packaging bags, and “wads of cash.” Law enforcement officers also located a loaded “Glock 21” firearm and a reportedly stolen Ruger Blackhawk .357 revolver.

When Detective Keller arrived at the residence, Officer Brown was already in the house. Officer Brown had entered the residence “to confirm what parole saw.” He looked around the house and then a search warrant was obtained. Detective Keller indicated that he, as well, entered the residence prior to the receipt of the search warrant.

Officer Brown was called to the stand as a Commonwealth witness at the preliminary hearing. He testified that he reviewed the evidence that was recovered in the respective cases and, in his opinion as an expert in the field of possession and distribution of illegal narcotics, he concluded that the defendants possessed the narcotics with the intent to deliver them.

The Court will first address the defendants’ motions/petitions for habeas corpus. The proper means to attack the sufficiency of the Commonwealth’s evidence pretrial is through the filing of a writ of *habeas corpus*. Commonwealth v. Marti, 779 A.2d 1177, 1178 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 (Pa. Super. 2006).

The defendants contend that the Commonwealth's evidence in support of the charges against them is solely hearsay evidence and accordingly the charges should be dismissed. In the context of a petition for writ of habeas corpus or a sufficiency of evidence challenge, the Commonwealth may rely on hearsay testimony. Hearsay, however, cannot constitute the only basis upon which a case is held for court. Commonwealth v. Carmody, 799 A.2d 143, 146 n.2 (Pa. Super. 2002).

In reviewing the transcript of the preliminary hearing as well as the testimony from the omnibus pretrial hearing, the Court does not agree with the defendants. There is sufficient evidence to hold both defendants on all charges and, accordingly, the defendants' petitions for habeas corpus will be dismissed.

The Court will now address the motions to suppress. The Court will first address the defendants' motion to suppress based on the alleged inaccurate address in the warrant. The Court notes that there does not appear to be any argument over the correct address of the premises that were searched. The Commonwealth apparently concedes that the address set forth in the warrant was incorrect. The residence searched was apparently 727 or 727 ½ West Fourth Street, not 729. As the defendants argued, the Rules of Criminal Procedure include a particularity requirement. Rule 205 of the Pennsylvania Rules of Criminal Procedure requires that each search warrant, among other things, specifically identify the property to be seized and name or describe with particularity the place to be searched.

Contrary, however, to what the defendants assert, the search warrant under the circumstances of this case is not rendered invalid by containing an incorrect address for the apartment. The police knew the exact location of the residence to be searched. There was no doubt that they would be searching the 2nd floor apartment on the left. Federal Marshals as well as representatives of the Williamsport Police and the Lycoming County District Attorney's Office had observed controlled substances, at least one weapon, and alleged illegal activity in the apartment. The apartment described in the affidavit was the same apartment in which the alleged criminal activity did or was occurring and any mistake in the address did not mislead the Magisterial District Judge (MDJ) in the assessment of probable cause or hamper the MDJ's ability to determine the scope of the search.

This exact issue has been raised in other cases including Commonwealth v. Washington, 858 A.2d 1255 (Pa. Super. 2004), appeal denied, 872 A.2d 1126 (Pa. 2005) and Commonwealth v. Belenky, 777 A.2d 483 (Pa. Super. 2001).

As the Court in Belenky, noted: "The validity of a search must be determined by what was done, not by what in hindsight another might have done. Whether the officer could have caught the numbering error isn't the question; the proper issue is whether that affected probable cause or the ability to identify the premises to be searched." 777 A.2d at 487. As the Court further noted, "the particularity requirement seeks to preclude general or exploratory searches... [and] is meant to further the twin aims of protecting privacy and ensuring warrants are based on probable cause." Id.

This Court fails to see how the search offends any of the purposes in connection with the particularity requirement. Accordingly, the defendants' motion to suppress on that ground will be denied.

The Court will next address the defendants' motion to suppress based on the failure of the Williamsport Bureau of Police to obtain a search warrant prior to entering the premises and in essence searching it. There is no dispute as to the basic underlying facts. Marshals entered the premises with the consent of Defendant Holmes to search for a fugitive. During that search, the marshals smelled the odor of burnt marijuana, observed what they believed to be heroin and heroin related materials, observed a gun near one of the defendants and discovered that Defendant Murray-Bey was precluded from possessing weapons. Accordingly, the marshals contacted the Williamsport Bureau of Police and the Lycoming County District Attorney's office.

Those law enforcement officers went to the residence, entered the apartment, spoke with the marshals, observed what the marshals observed and made additional observations of alleged illegal activity while further searching and/or securing the residence in order that a search warrant could be obtained.

As the Pennsylvania Supreme Court recently noted in Commonwealth v. Gary, 91 A.3d 102, 107 (Pa. 2014): "As a general rule, for a search to be reasonable under the Fourth Amendment [of the United States Constitution] or Article I, Section 8 [of the Pennsylvania Constitution], police must obtain a warrant, supported by probable cause and issued by an independent judicial officer prior to conducting the search." The failure to

obtain a warrant is only excused in very limited circumstances such as consent or exigent circumstances. Id.

Following the argument in this matter, the Court was unclear as to what the Commonwealth was arguing in connection with any exception to the search warrant requirement. The Commonwealth conceded during the oral argument that it was a search but “not a search for new information.” The Commonwealth noted that Officer Brown was “requested to go in by parole agents” and that the “legal basis [for the search] is a request from [another] law enforcement agency.” The Commonwealth argued further that once the request was made and the police entered the residence they were required to do a “protective sweep” to secure the residence in order that a search warrant could be obtained.

The Commonwealth’s contention that the entry by the Williamsport Bureau of Police and Lycoming County Detective were justified because it was a request from another law enforcement agency, clearly fails to pass constitutional muster. There is no exception to the warrant requirement as argued by the Commonwealth.

Additionally, there were no exigent circumstances. The defendants had been taken into custody, and there was no testimony whatsoever that would support any claim that the alleged items were going to be destroyed or not available following the obtaining of a search warrant.

As well, the Commonwealth cannot bootstrap the consent. The consent in this particular case was given to state parole agents for the particular purpose of looking for a fugitive. The consent was not given to the Williamsport Bureau of Police to search all 12

rooms looking for evidence of criminal activity. As noted in Commonwealth v. Reid, 571 Pa. 1, 811 A.2d 530 (2002): “When an official search is properly authorized, the scope of the search is limited by the terms of its authorization. The standard for measuring the scope of a person’s consent is based on an objective evaluation of what a reasonable person would have understood by the exchange of the officer and the person who gave the consent.” 811 A.2d at 548 – 549.

Regarding the Commonwealth’s protective sweep argument, the Court again disagrees. A protective sweep is defined as “a quick and limited search incident to an arrest and conducted to protect the safety of police officers or others; it is narrowly confined to a cursory visual inspection of those places in which a person may be hiding.” Commonwealth v. Crouse, 729 A.2d 588, 592 (Pa. Super. 1999). Protective sweeps are permissible under the constitution if the officer reasonably believes, based on specific and articulable facts and rationale inferences from those facts, that the area to be swept harbors an individual posing a danger to those conducting the arrest. Maryland v. Buie, 494 U.S. 325, 327, 110 S. Ct. 1093, 195; Crouse, 729 A.2d at 597. The rationale for this holding is that the risk of danger and the context of an arrest in a home is as great as, if not greater than, it is on the street or at a roadside encounter and, the in-home arrest puts the officer at the disadvantage of being on his adversary’s turf. Buie, 494 U.S. at 333.

In this case, however, the Commonwealth clearly failed to produce any facts or inferences giving rise to a reasonable suspicion that the residence harbored individuals posing a danger to the police. Both of the defendants had been taken into custody and

removed from the residence. Furthermore, the members of the fugitive task force had already cleared the entire residence looking for the alleged fugitive.

During the argument in this matter, it was apparent to the Court that the Commonwealth essentially conceded that any argument regarding the search by the Williamsport Bureau of Police was legally justified, would be difficult if not impossible to be successful. Instead, the Commonwealth argued the concept of inevitable discovery. The Commonwealth's main argument was that even if the search by Officer Brown and other members of the police department and District Attorney's office was improper and even if the results of such were excised from the search warrant, there still would have been sufficient information in the search warrant to establish probable cause to search. That search warrant then would have resulted in the police seizing all of the items against the defendants.

In order to receive the benefit of the inevitable discovery rule, the Commonwealth must prove by a preponderance of the evidence that the information invariably or inevitably would have been discovered by lawful means. Commonwealth v. Rood, 686 A.2d 442, 448 (Pa. Commw. 1996), quoting Nix v. Williams, 467 U.S. 431, 444 (1984). To do that in this case, one must determine, after the illegally obtained information is excised from the search warrant, whether the evidence would have been discovered nonetheless. The ultimate question is whether the search pursuant to a warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. Commonwealth v. Hernandez, 590 A.2d 325, 329 (1991).

In looking at the application for the search warrant as a result of the illegal

search of the premises by law enforcement, the Court would be required to excise the following: “I also observed a strong odor of marijuana inside the 2nd floor bedroom. Inside an ashtray in the living room were two small marijuana blunts and observed in plain view on a dresser in the 3rd floor north bedroom was a blue waxen bag containing heroin and also in the room were several packaging bags/containers.”

The information thus left in support of the search warrant would consist of state parole agents arriving at the apartment, obtaining consent to search for a fugitive and then conducting said consent search. The agents would have smelled the odor of burnt marijuana and would have observed a handgun in plain view at the top of the attic near an individual who was hiding. The handgun was reported to have been stolen.

Curiously, Officer Brown did not include the information from Agent Gross that he also observed heroin packaging material in an opened closet. Nonetheless, the issue for the Court is whether the information set forth is sufficient to establish probable cause to search the apartment.

“Probable cause exists where the facts and circumstances within the officers’ knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed.” Commonwealth v. Gibson, 536 Pa. 123, 130, 638 A.2d 203, 206 (1994). Probable cause exists when criminality is one reasonable inference. Commonwealth v. Quiles, 422 Pa. Super. 153, 619 A.2d 291, 298 (1993) (en banc).

With respect to the odor of burnt marijuana, the courts have held that it is sufficient to establish probable cause necessary to believe a crime is being committed.

Commonwealth v. Dean, 940 A.2d 514, 523 n.3 (Pa. Super. 2008), citing Commonwealth v. Pullano, 295 Pa. Super. 68, 440 A.2d 1226 (Pa. Super. 1982).

In Pullano, Reading police officers were present at 927 North Ninth Street in Reading for the purpose of a valid search warrant for an apartment consisting of a second and third floor to the building. While there, one of the officers smelled a strong odor of marijuana which he determined to be emanating from the first floor apartment. He also heard voices which led him to believe that a party was in progress in the apartment.

In concluding that the subsequent search was legal, the Court noted that the officers at the scene had smelled a strong odor of burning marijuana. These circumstances suggested that criminal activity was under way within their presence. They were not required to ignore the activity. To ignore the aroma of an illegal drug which they were trained to identify would have been a dereliction of duty. Pullano, 440 A.2d at 1227.

In Commonwealth v. Stainbrook, 324 Pa. Super. 410, 471 A.2d 1223 (Pa. Super. 1984), township police officers drove into a bowling alley parking lot while on patrol. Upon observing a truck parked in the lot, one of the officers approached the vehicle and while approaching, detected the odor of burning marijuana and observed an individual bend over abruptly as if to hide something under the seat.

In addressing the legality of the subsequent search, the Superior Court held that the officer was justified in conducting his search. In addition to observing the further behavior of the defendant who appeared to be stuffing something under his seat, the officer detected the odor of burning marijuana. The Court noted as well that it was part of the

officer's training to be able to identify marijuana by its smell. 471 A.2d at 1225.

In this particular case, the Court concludes that there was probable cause based upon the four corners of the search warrant to obtain a search warrant. The Court concludes that probable cause was sufficient absent the observations of Officer Brown and excising those statements. Upon entering the apartment, Agent Gross and the marshals smelled an odor of burnt marijuana. While looking for a fugitive, they observed a handgun in plain view and another individual hiding in the attic near the handgun. The handgun was reported to be stolen.

While the Court is somewhat concerned that nothing was set forth in the warrant regarding the training or experience of Agent Gross, the totality of the circumstances clearly established probable cause. In addition to the odor of marijuana which in and of itself can establish probable cause, Agent Gross and the marshals observed a stolen handgun in plain view and an individual hiding in the attic near the stolen gun thus evidencing consciousness of guilt. These facts and circumstances would warrant a reasonably prudent person to believe that criminal activity was afoot and that evidence of criminal activity could be obtained through a further search.

ORDER

AND NOW, this ___ day of January 2015, following a hearing and argument, the Court DENIES the defendants' omnibus pretrial motions and, in particular, the defendants' motions to suppress and petitions for habeas corpus. The defendants' remaining motions were decided previously.

By The Court,

Marc F. Lovecchio, Judge

cc: DA (EL)
DA (AC)
PD (WM), attorney for Defendant Murray-Bey
Don Martino, Esquire, attorney for Defendant Holmes
Gary Weber, Lycoming Reporter
Work File