

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

KHALIF AKINS,
Defendant

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CR-1071-2016

OMNIBUS PRETRIAL MOTION

OPINION AND ORDER

Defense Counsel filed an Omnibus Pretrial Motion on July 6, 2016, and an Amendment to the Petition on August 17, 2016. Argument and testimony were heard on August 26, 2016.

Factual Background

Khalif Akins (Defendant) is charged in a criminal information filed June 24, 2016, with Count 1, Possession with Intent to Deliver¹, an ungraded felony; Count 2 Possession of a Controlled Substance², an ungraded misdemeanor; and Count 3, Possession of Drug Paraphernalia.³ The charges arise from an incident on June 2, 2016, where the Defendant was visited by his parole officer at his home. At the time of the home visit, marijuana, a schedule I controlled substance, was recovered from Defendant's home and criminal charges followed.

Testimony of David Frederick, Parole Agent

David Frederick (Frederick) testified on behalf of the Commonwealth. Frederick is a Probation Officer for the Pennsylvania Department of Probation and Parole (PBPP). Frederick is a 19 year employee of PBPP and has been supervising Defendant since September of 2015. Defendant was paroled from state prison for a (7) to fourteen (14) year sentence out of Monroe County.

¹ 35 Pa.C.S. §780-113(a)(30).

² 35 Pa.C.S. § 780-113(a)(16).

³ 35 Pa.C.S. § 780-113(a)(32).

Frederick testified that in April of 2016, Defendant changed his residence from his approved residence of his parents' home in Williamsport, PA, to live with his girlfriend at 831 Elmira St, Williamsport, PA. He testified that he confirmed with the landlord that a State Parolee would be residing in his rental property and that the landlord agreed. Frederick testified that he gave verbal permission to Defendant to change address. He testified that such permission is required in order for parolees to change address. Frederick testified that though he did discuss with Defendant's parents the rules and regulations of having a State parolee reside in the home, he did not have a conversation with Rashea Moore (Moore), Defendant's girlfriend who would be sharing the residence with Defendant. Frederick testified that Commonwealth's Exhibit #3, the Lease Agreement, dated April 1, 2016, was not executed until July of 2016, after Defendant's offense date in the matter (June 2, 2016). Frederick also testified that Commonwealth's Exhibit #4, a letter dated May 2, 2016, addressed to Defendant at 831 Elmira St. Williamsport, PA 17701 granting permission to change residence was not mailed to Defendant.

Frederick testified that he had visited Defendant at his new address on April 19, 2016, in early May, and again on June 2, 2016. Frederick testified that on the June 2, 2016, home visit he detected a strong odor of marijuana in the home. He testified that Defendant told him that his urine would be positive for marijuana. Frederick observed a marijuana bud on the windowsill in Defendant's bedroom that Defendant then tried to cover up. Frederick also testified that he searched a black backpack in the kitchen because during searches of prior parolees he has found "weed in a backpack". On this occasion, Frederick found packaged marijuana in the black backpack.

Testimony of Rashea Moore, Girlfriend of Defendant

Moore testified on behalf of the Defense. She was aware that her boyfriend was on State Parole. She testified that the lease agreement was not executed until July 2016. She testified that she, not Defendant, signed Defendant's name to the lease. She testified that though Defendant never received written permission to change residence, verbal permission was given.

Discussion

I. MOTION TO DISMISS

In the Omnibus Pretrial Motion, filed July 14, 2016, Defense Counsel requested that the Possession with Intent to Deliver charge be dismissed as the Commonwealth does not have prima facie evidence of Possession with Intent to Deliver. The Commonwealth filed a response to Defendant's original motion requesting that the Motion to Dismiss be dismissed with prejudice since Defendant's counsel had waived Defendant's right to a preliminary hearing and therefore, no objection to the Commonwealth's prima facie evidence can be made. Pa.R.Crim.P. 541. Defense Counsel did not argue any alternative reason for the Court to consider the Motion to Dismiss. Rather Counsel amended its Omnibus Pretrial Motion by written motion on August 17, 2016, and argued for the suppression of all evidence found at 831 Elmira St. on June 2, 2016.

II. MOTION TO SUPPRESS

In any suppression motion, the question at the outset is whether the Defendant has a reasonable expectation of privacy in the area that was searched. In this case, Defense Counsel's argument rests on the fact that Frederick did not follow PBPP policy and procedure by providing written notice therefore 831 Elmira St. was not an approved residence. He never provided written notice as he was required to do by the terms of Conditions Governing Parole/Reparole, PBPP-11 (Rev. 03/88), which Defendant signed on 9/8/2015. Condition #2 lists Defendants

approved residence and states “your approved residence may not be changed without the written permission of the parole supervision staff.” He never interviewed Moore as a home provider as he was required to do. He never had Moore sign a home provider agreement as he was required to do.

The Court finds based on the testimony presented that 831 Elmira St. was not a third party residence subject to the higher a quantum of suspicion on part of the parole agent to justify an entry into the residence. Since it was Defendant’s primary residence, as testified to by both Frederick and Moore, the Court finds the argument that it was a third party residence is without merit. The Court will not elevate form over substance. Even though the Parole agent did not follow PBPP procedure in providing written permission for the Elmira St. address he was given verbal permission to reside there.

The Court finds the below cited document controlling in Defendant’s case and that he did not have a reasonable expectation of privacy in the areas that were searched.

The Conditions Governing Parole/Parole, which Defendant signed, state

“I expressly consent to the search of my person, property and residence, without a warrant by the agents of the Pennsylvania Board of Probation and Parole. Any items, in the possession of which constitutes a violation of parole/reparole shall be subject to seizure and may be used as evidence in the parole revocation process.”

Conditions Governing Parole/Reparole, 9/8/2015, Commonwealth’s Exhibit 2.

The Court finds that although 61 Pa.C.S. Section 6153, Supervisory Relationship to Offenders, appears to give more protections to Parolees than afforded by the PBPP form cited above signed by Defendant as his conditions of supervision, the Defendant has waived any greater protection by virtue of his acceptance of conditions of PBPP supervision.

An example of additional protections provided by Section 6153 include (d) (2) which requires that any search of parolee's property must be approved by agent's supervisor absent exigent circumstances. Frederick did not obtain supervisor approval before searching Defendant's home and backpack. However, the Court finds that an exigent circumstance did exist: possible destruction of the evidence. Additionally, a violation of Section 6153 is not an "independent ground for suppression of evidence in any probation or parole or proceeding or criminal proceeding." 61 Pa.C.S. § 6153(c) Effect of violation.

To the extent that 6153(d) requires reasonable suspicion for search of offenders, the Court finds that Frederick did have reasonable suspicion to do a walkthrough of Defendant's home given the odor of marijuana and Defendant's admission that he would test positive for marijuana. In determining reasonable suspicion the Court finds 6 of the 8 specific factors listed in the statute to justify its decision and finds the following:

- i. the observation of agents: Frederick observed the smell of marijuana.
- iv. information provided by the offender: Frederick stated that the Defendant told him he would test positive for marijuana if his urine were tested.
- v. the experience of agents with the offender: nature of Defendant's prior record.
- vi. the experience of agents in similar circumstances: Frederick testified that he has found marijuana in other backpacks possessed by parolees.
- vii. the prior criminal history of the offender: see Commonwealth's Exhibit 1. Defendant has a prior record score of "5". Three of his prior nine convictions involve the possession of controlled substances. Two are Simple Possession and paraphernalia charge. Criminal history is indicative of the type of criminal activity one might be

engaged in presently, so Frederick was reasonable in suspecting that Defendant had resumed the activities that resulted in Defendant being a State Parolee.

- viii. the need to verify compliance with the conditions of supervision: The conditions of supervisions specifically mandate compliance with all municipal, county, state, and Federal criminal laws (Condition #4) and demand that Parolees “abstain from the unlawful or possession or sale of narcotics and dangerous drugs and abstain from the use of controlled substances within the meaning of the Controlled Substance, Drug, Device and Cosmetic Act (35 Pa.C.S. § 780-101 *et seq.*) without a valid prescription. The smell of marijuana indicated a violation of compliance with the conditions of supervision.

Defense Counsel cites Commonwealth v. Edwards, 874 A.2d 1192 (Pa. Super 2005) in support of the proposition that the entrance to the home was illegal and therefore the search of the premises was illegal. In Edwards, the residence searched by parole officers was not Edwards’ legal address. The facts of record made it clear that Edwards was living there, in fact, the parole agents arrived based on a tip that Edwards was at an illegal address. There was no indication in Edwards that parole agents knew that Defendant was living at the unapproved address prior to the time they received the tip that he was living there, much less that they had already conducted two home visits at the unapproved address. Since it is undisputed that Frederick had made two prior home visits to the address and conducted PBT tests of Defendant, clearly indicating that this address was the address where all future home visits for Defendant would occur.

The Commonwealth provided the Court Commonwealth v. Smith, 85 A.3d 530 (Pa. Super 2014) at argument. In Smith there was an executed home visit agreement between

Defendant's girlfriend and the PBPP. Id. at 532. The Home Provider Agreement signed by the girlfriend distinguished between a "search" that requires reasonable suspicion to be valid and a "home visit" which may occur unannounced at any time. Id. at 535. The Parole Agents also had permission from their supervisor to check the residence with the authorization of a supervisor. Id. Presumably, if Moore had been provided with a Home Provider Agreement she would have had actual notice of the types of visits she could expect at her home. However since she knew she was living with someone on State Parole and presented no evidence to the contrary and would have been aware of the prior visits of Frederick and the urine screens taken, the Court believes she would be aware of the increased scrutiny given to Defendant.

ORDER

AND NOW, this _____ day of October 2016, based upon the foregoing Opinion, the Omnibus Pretrial Motion as amended is hereby DENIED.

BY THE COURT,

Nancy L. Butts, President Judge

cc: Andrea Pulizzi, Defense Counsel
Nicole Ippolito, ADA
Gary Weber, Lycoming Law Reporter
Work file