

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-153-2015
 :
 DURWARD ALLEN, :
 :
 Defendant : Omnibus Pretrial Motion

OPINION AND ORDER

This matter came before the court on Defendant’s omnibus pretrial motion, which consists of a motion to suppress evidence and a petition for writ of habeas corpus.

The relevant facts follow.

At approximately 2:11 p.m. on December 3, 2012, County Communications relayed a dispatch over both the Williamsport Bureau of Police (WBP) and Old Lycoming Township Police Department (OLTPD) frequencies that there was a robbery at the M&T Bank on West Fourth Street, near Arch Street in the city of Williamsport. Although the bank was approximately 2000 feet inside WBP jurisdiction, it was closer to the headquarters of the OLTPD.

The robber, who was last seen running westbound toward Funston Avenue, was described in the dispatch as a black male between 5’8” and 6’ tall, wearing a ski mask and a dark sweatshirt.

Officers from both police departments responded to set up a perimeter around the scene of the robbery.

Detective/Sergeant Chris Kriner of the OLTPD was on duty, but he was dressed in plain clothes and was driving an unmarked, brown Ford Crown Victoria. Sgt.

Kriner responded to the dispatch and positioned his vehicle at or near the intersection of West Fourth Street and Funston Avenue in Williamsport.

Sgt. Kriner saw a white Chrysler 300 traveling eastbound on Fourth Street. The occupants of the vehicle were three black males in their twenties that were wearing dark clothing. As the vehicle passed in front of Sgt. Kriner, the backseat passenger “ducked down.”

Sgt. Kriner pulled onto Fourth Street and began following the vehicle. He noticed that the registration plate on the vehicle was from Tennessee. He ran the registration and it came back as a Hertz rental car. Sgt. Kriner believed the occupants of the vehicle could have been involved in the bank robbery. He radioed a location where he intended to stop the vehicle and asked about the location of officers who could provide back up. As Sgt. Kriner followed the vehicle down Fourth Street, it got on the highway via the Route 15 South on ramp.

At 2:40 p.m. a Williamsport police officer relayed more information regarding the description of the bank robber. The perpetrator was a 5’7” to 5’10” black male in his twenties that had a thin build and was wearing jeans, a dark hoodie, a ski mask, white gloves and was carrying a gray bag.

At 2:43 p.m. Sgt. Kriner activated his lights and siren and pulled over the white Chrysler at the Maynard Street exit. When he approached the vehicle and made contact with the occupants, he noticed an odor of marijuana. At the time of the stop there was another dispatch that the bank robber was wearing a Hollister sweatshirt. All the occupants

of the vehicle were wearing black jackets.

The driver of the vehicle was Timothy Eiland, the front seat passenger was Defendant Durward Allen, and the rear passenger was David Collins. Collins was removed from the vehicle first because there was a warrant for his arrest. He was not wearing a Hollister sweatshirt, but he did possess a small amount of marijuana.

Sgt. Kriner then asked Eiland to exit the vehicle. Sgt. Kriner asked Eiland to unzip his coat so he could see if he was wearing a Hollister sweatshirt. When Eiland complied, Sgt. Kriner noticed a bulge in Eiland's pocket. Eiland said the bulge was money and he pulled out a wad of currency rubber banded together. Eiland told Sgt. Kriner it was \$3,000 or \$4,000, but it turned out to be about \$7,000. Sgt. Kriner confiscated the money and had Eiland sit along the guard rail.

Sgt. Kriner then went to the passenger side of the vehicle and asked Defendant to exit. Sgt. Kriner noticed that the marijuana smell seemed stronger on the passenger side of the vehicle. Sgt. Kriner asked Defendant to unzip his coat just as he did with Eiland. Defendant gave Cpl. Sponhouse consent to pat him down. During the pat down, Cpl. Sponhouse discovered a wad of money in Defendant's left coat pocket. Cpl. Sponhouse pulled out the money and handed it over to Sgt. Kriner. Defendant asked the officers not to confuse his money with Eiland's money.

Due to the odor of marijuana, Sgt. Kriner requested a canine sniff of the vehicle. Officer Devin Thompson of the South Williamsport Police Department responded with his canine. Officer Thompson deployed the canine at the request of Sgt. Kriner. The

canine alerted at the base of the driver's door and door handle, and the front passenger door and handle.

As a result of the canine sniff, the police impounded the vehicle and obtained a search warrant. During the search of the vehicle, the police discovered two firearms, a large quantity of heroin, a large quantity of cocaine, and several items of drug paraphernalia, such as rubber bands, unused Ziploc baggies, unused glassine packets, scales and a mixer.

Defendant asserts a series of motions and varied arguments in support of said motions.

Defendant's first motion is a motion to suppress. Defendant asserts that the stop of the car was illegal and in violation of the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution "for the reason that the police neither had probable cause nor reasonable suspicion." Defendant next argues that the frisk of him and search of the car were also unconstitutional for the lack of probable cause and reasonable suspicion. Finally, Defendant argues that "the warrant was the fruit of the wrongful stop, frisk and search of all evidence pursuant to the warrant [that] was obtained in violation of the Defendant's rights under the U.S. and Pennsylvania Constitutions."

The parties do not dispute that the majority of the legal matters involved in this case are similar to those in the cases of Defendant's Co-Defendants, see Commonwealth v. David Collins, CP-41-CR-144-2013 (Lycoming County) and Commonwealth v. Timothy Eiland, CP-41-CR-341-2013 (Lycoming County).

In an Opinion and Order dated December 2, 2013, this Court, finding that it was a logical fallacy to conclude that the backseat passenger ducked down to avoid detection, concluded that Sgt. Kriner did not have reasonable suspicion to stop the vehicle and as a result granted the suppression motion filed in Collins.

In a memorandum decision filed on December 16, 2014, the Superior Court concluded that this Court erred as a matter of law when it granted the motion to reconsider and suppressed the evidence derived from the traffic stop in the co-defendants' cases. Collins, 2248 MDA 2013 (Pa. Super. 2014); Eiland, 88 MDA 2014 (Pa. Super 2014). This Court's orders of December 2, 2013 and January 9, 2014 were reversed, and the case was remanded for further proceedings, consistent with the Superior Court's memorandum decision.

Accordingly, and as noted at the July 10, 2015 argument in this matter, the court is bound by the decision of the Superior Court and will deny Defendant's motion to suppress based on the alleged illegal stop of the vehicle.

Alternatively, Defendant argues that his frisk and the subsequent search of the car were also unconstitutional due to a lack of probable cause or reasonable suspicion.

Sgt. Kriner testified that he originally stopped the vehicle because he suspected that one of the occupants was involved in the bank robbery. Of the three black males in the car, any one of them would have fit the description of the alleged robber. Moreover, Sgt. Kriner was concerned with the suspicious behavior of the backseat passenger who ducked down, the fact that they were coming from the area where the bank robber was

last seen and the vehicle had an out-of-state plate.

In his contention that his frisk was without probable cause or reasonable suspicion, Defendant ignores the fact that he consented to being frisked. The testimony of Sgt. Kriner and the dash-cam video clearly support this conclusion.

Defendant was asked to exit the vehicle. Once the front passenger door was opened, the marijuana smell was more pronounced and stronger. Defendant was asked to consent to a pat down, which he did. Based on his consent, neither probable cause nor reasonable suspicion was required.

Defendant next contends that the search of the car was unconstitutional. Defendant's contention belies the fact that the search of the car was conducted pursuant to a duly authorized search warrant. Commonwealth's Exhibit 3. Defendant has not argued any deficiency in connection with the search warrant and accordingly, Defendant's argument as to the search is without merit.

Defendant's last argument is a fruit of the poisonous tree argument. This catchall argument is without any basis in that the stop of the vehicle was not illegal, the search of Defendant was with his consent, and the search of the automobile was based on a duly authorized search warrant.

Accordingly, Defendant's motion to suppress shall be denied.

Defendant's next motion is for a writ of habeas corpus.

Defendant contends that he was a passenger in the vehicle and he neither possessed nor had in his control any controlled substances or weapons. Defendant argues that

once removed from the car “the only thing found [on] him was currency.” Defendant argues that “no weapons were found, no drugs were found, and none of the weapons or drugs were in the vicinity of the Defendant in the passenger seat area.” Defendant further argues that “the drugs were found under the driver’s seat and in the trunk area and the weapons were found in the backseat area and the trunk area.”

Defendant is charged with possession with intent to deliver heroin, possession with intent to deliver cocaine, conspiracy to commit delivery of heroin and cocaine, person not to possess firearms, receiving stolen property, firearms not to be carried without a license, possession of a controlled substance (heroin), possession of a controlled substance (cocaine) and possession of drug paraphernalia.

On December 3, 2012, after Sgt. Kriner initiated the traffic stop, he detected a strong odor of marijuana and the occupants were ultimately searched.

Collins was taken into custody on an outstanding assault warrant from Philadelphia. A search incident to arrest revealed that he was in possession of a small plastic bag containing marijuana. At the prison, Collins discarded a plastic grocery bag containing 93 Ziploc bags of heroin.

Eiland was found to be in possession of \$7,285.00. Defendant was found to have an estimated \$2,500.00 in his pocket.

A search of the vehicle recovered two .40 caliber semiautomatic handguns, one of which had been reported stolen, approximately 1,200 small Ziploc bags containing heroin wrapped in blue glassine packets, three bags containing a total of approximately 109

grams of loose heroin, 187 small Ziploc bags containing cocaine, and a bag of crack cocaine. There was also paraphernalia recovered including rubber bands, unused blue glassine packets, unused small Ziploc bags, a scale and a mixer.

As indicated previously, Defendant was the front seat passenger. Located inside the vehicle, under the driver's seat, was a plastic grocery bag containing several hundred blue glassine packets of heroin. Also located inside the vehicle in the rear middle console area was a loaded Glock .40 caliber semiautomatic handgun. The police found a loaded Taurus .40 caliber semiautomatic handgun, a partial box of .40 caliber ammunition, 303 blue glassine packets containing heroin, three loose plastic bags containing approximately 109 grams of heroin, and 30 grams of packaged (crack) cocaine base in the trunk of the vehicle. The Taurus firearm was also reported stolen.

If a defendant wishes to challenge the sufficiency of the evidence that was adduced during a preliminary hearing, the defendant may file a pretrial petition for a writ of habeas corpus. *Commonwealth v. Claffey*, 80 A.3d 780, 788 (Pa. Super. 2013)(citing *Commonwealth v. Landis*, 448 A.3d 432, 444 (Pa. Super. 2012)). The Commonwealth's duty at the habeas corpus stage is to present a prima facie case. *Id.* "A prima facie case consists of evidence showing the existence of each material element of the charged offenses and probable cause to believe that the defendant committed the crimes such that if the evidence was presented at trial, the court would be warranted in submitting the case to the factfinder." *Id.*

In other words, a "prima facie case consists of evidence, read in a 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). A prima facie case merely requires evidence of each element of the offense charged, not evidence beyond a reasonable doubt. *Commonwealth v. Santos*, 583 Pa. 96, 101, 876 A.2d 360, 363 (2005).

With respect to the ten counts against Defendant, he contends that the Commonwealth cannot prove, for prima facie purposes, the required element of possession. Specifically, Defendant contends that the Commonwealth has failed to prove, for prima facie purposes, that Defendant possessed any controlled substance or weapons because none were found on his person or in his control. (Omnibus Pretrial Motion, paragraph 17).

The Commonwealth concedes that if it cannot prove that Defendant constructively possessed the firearms, controlled substances and paraphernalia that it would not be able to sustain its prima facie burden with respect to the counts against Defendant.

Possession can be established by showing either actual or constructive possession. Actual possession is established by showing that the defendant had the item on his person while constructive possession can be proven through showing that the defendant exercised conscious dominion over the item(s). *Commonwealth v. Macolino*, 503 Pa. 201, 469 A.2d 132, 134 (1983).

In a case such as this where the items were not found on Defendant’s person, the Commonwealth must establish constructive possession of the items. *Commonwealth v. Haskins*, 677 A.2d 328, 330 (Pa. Super. 1996), appeal denied, 692 A.2d 563 (Pa. 1997).

Constructive possession is defined as “the ability to exercise a conscious dominion over the illegal substance: the power to control the contraband and the intent to exercise that control.” *Macolino*, supra. (citations omitted).

In *Commonwealth v. Mudrick*, 510 Pa. 305, 507 A.2d 1212 (1986), the Pennsylvania Supreme Court described the concept of constructive possession as follows: “Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not.” *Id.* at 1213. “An intent to maintain a conscious dominion may be inferred from the totality of the circumstances...[and], circumstantial evidence may be used to establish a defendant’s possession of drugs or contraband.” *Commonwealth v. Valette*, 613 A.2d 548, 550 (Pa. Super. 1992) (quoting *Macolino*, 469 A.2d at 134). In addition, multiple people may be found to constructively possess an item in situations where the item is found in an area of joint control and equal access. *Haskins*, 677 A.2d at 330. However, close proximity to the item is not enough to establish constructive possession. *Commonwealth v. Keblitis*, 500 Pa. 321, 456 A.2d 149, 151 (Pa. 1983); *Commonwealth v. Spencer*, 621 A.2d 153, 155 (Pa. Super. 1993); *Valette*, supra at 551; *Commonwealth v. Juliano*, 490 A.2d 891, 894 (Pa. Super. 1985).

Considering all of the circumstances, the Court concludes for prima facie purposes that Defendant probably constructively possessed all of the weapons, controlled substances and paraphernalia that were found in the vehicle.

The vehicle was a rental vehicle, rented by Defendant Eiland but occupied by all three. All three allegedly traveled from the Philadelphia area to the Williamsport area in this vehicle that was rented in Philadelphia. Both Eiland and Defendant had thousands of dollars in cash in their direct possession and both lied as to the source of said monies. All three occupants including Defendant had a criminal history for drug offenses. All three occupants were deceptive in their dealing with the police officers at least with respect to requested information, the presence of firearms and the possession of controlled substances. Defendant Collins allegedly threw a plastic grocery type bag containing 93 double bagged blue glassine packets of heroin on the prison floor after he was arrested. All of the items discovered in the vehicle were in close proximity to Defendant and Defendant had clear access to said items. From the totality of the circumstances, there is a reasonable inference that all three of the occupants had control over the items in the vehicle and the intent to exercise said control. There also is a reasonable inference that all three were acting in concert. Therefore, the Court rejects Defendant's arguments and finds that the Commonwealth has established a prima facie case that Defendant jointly possessed and controlled the items discovered inside of the vehicle.

ORDER

AND NOW, this ___ day of January 2016, following a hearing and argument,
Defendant's omnibus pretrial motion is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Michael Rudinski, Esquire
Gary Weber, Esquire, Lycoming Reporter
Work file