

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1924-2016
:
vs. :
:
:
: **Opinion and Order re**
JEROME KENNEDY, JR., : **Defendant's motion to dismiss**
Defendant :

OPINION AND ORDER

Defendant is charged with delivery of a controlled substance, possession with intent to deliver controlled substances and a handful of related counts. Defendant was scheduled for his formal arraignment on November 21, 2016. Through his then counsel, who was an assistant public defender, Defendant waived arraignment. Defendant was scheduled for a guilty plea on January 6, 2017. However, on January 5, 2017, upon motion of Defendant, the case was removed from the guilty plea list and placed on the call of the list for April 18, 2017 for possible jury selection that trial term.

On February 27, 2017, present counsel, Matthew Zeigler, Esquire, entered his appearance on behalf of Defendant. Before the court is Defendant's motion to dismiss or, in the alternative, to suppress filed on March 15, 2017. A conference was held on April 17, 2017. In his motion, Defendant claims that: (1) Count 5, persons not to possess firearms should be dismissed; and (2) Defendant's incriminating statement that, in effect, the gun belonged to him should be suppressed as being obtained in violation of Defendant's Miranda rights.

Defendant contends that he is entitled to a hearing on both claims. The Commonwealth contends that Defendant is not entitled to a hearing on either claim. First, the Commonwealth claims that the motion is untimely. Second, with respect to Defendant's

claim regarding the dismissal of the firearm charge, the Commonwealth contends that Defendant is precluded from attacking the sufficiency of the evidence because he waived his preliminary hearing.

Clearly, Defendant's motion was filed late. It was required to be filed within 30 days after his arraignment on November 21, 2016. Pa. R. Crim. P. 579 (A). There are, however, exceptions. The court may hear Defendant's motion to dismiss if his defense attorney was not previously aware of the grounds for the motion. *Id.* The court may hear Defendant's suppression motion if the interests of justice otherwise require it to be heard. Pa. R. Crim. P. 581; see also, *Commonwealth v. Johonoson*, 844 A.2d 556, 561 (Pa. Super. 2004).

The court will excuse the tardy filing of Defendant's motion. It was filed within three weeks after present defense counsel entered his appearance and received at least partial discovery in response to his formal request for pretrial discovery. Obviously, present counsel was not aware of the grounds for the motion until after he became involved in the case and received the discovery. The underlying facts are not apparent in the affidavit of probable cause or criminal complaint. Further, the merits of the underlying suppression motion are strong if the facts alleged prove to be true. Finally, the Commonwealth has not asserted any prejudice whatsoever.

With respect to Defendant's motion to dismiss, Defendant argues that it is, in fact, a motion in limine that can be heard at any time. In support of his position, Defendant improperly relies on an unpublished Superior Court decision. An unpublished memorandum decision shall not be relied upon or cited by a court or a party in any proceeding except under

circumstances not applicable to this case. 210 Pa. Code § 65.37.

The court disagrees with Defendant's characterization of his motion to dismiss. It is not a motion in limine. "A motion *in limine* is used before trial to obtain a ruling on the admissibility of evidence." *Commonwealth v. Reese*, 31 A.3d 708, 715 (Pa. Super. 2011) (en banc)(quoting *Commonwealth v. King*, 689 A.2d 918, 921 (Pa. Super. 1997)). To the contrary, Defendant's petition to dismiss is a de facto petition for writ of habeas corpus. At a habeas corpus hearing, the issue is whether the Commonwealth has presented sufficient evidence to prove a prima facie case against the defendant.

Commonwealth v. Williams, 911 A.2d 548, 550 (Pa. Super. 2006).

Defendant argues that his mere presence in the residence in close proximity to the firearm is "legally insufficient to show constructive possession." (Defendant's motion, paragraph 9).

Treating Defendant's motion to dismiss as a petition for writ of habeas corpus, the Commonwealth is correct that Defendant is precluded from raising the sufficiency of the evidence at this stage. A defendant who is represented by counsel and waives his preliminary hearing is precluded from raising the sufficiency of the Commonwealth's prima facie case unless: (1) the parties have agreed at the time of the waiver that the defendant may later challenge the sufficiency; or (2) the defendant waived the preliminary hearing by way of an agreement, made in writing or on the record, and the agreement is not accomplished. Pa. R. Crim. P. 541(A).

On November 1, 2016, Defendant waived his preliminary hearing. Defendant signed a waiver of preliminary hearing form. The form states, in relevant part: "I understand

that when I am represented by counsel and I waive the right to a preliminary hearing, I am thereafter precluded from raising challenges to the sufficiency of the prima facie case.” Defendant was represented by an assistant public defender at the time scheduled for the preliminary hearing and at the time of his waiver. Defendant has not alleged that the parties have agreed that he could file a petition for habeas corpus or that an agreement was reached at the preliminary hearing that was not accomplished. Therefore, Defendant has waived his right to file a petition for writ of habeas corpus.

Defendant also argues that the Commonwealth cannot establish a *corpus delicti* for the firearm charge based upon Defendant’s statements. This argument also relates to the sufficiency of the Commonwealth’s evidence and is precluded at this stage of the proceedings due to Defendant’s waiver of his preliminary hearing. Therefore, unless Defendant is successful on his motion to suppress, which may render the *corpus delicti* issue moot, these are arguments that will need to wait until trial.

ORDER

AND NOW, this ____ day of April 2017 following a conference and argument, the court DENIES Defendant’s motion to dismiss.

A hearing on Defendant’s motion to suppress is scheduled for **June 26, 2017** **at 9:00 a.m. in Courtroom No. 4** of the Lycoming County Courthouse.

By The Court,

Marc F. Lovecchio, Judge

cc: Scott, Werner, Esquire (ADA)
Matthew Zeigler, Esquire
Gary Weber, Lycoming Reporter

The Honorable Marc F. Lovecchio