

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	:	No. CR-1660-2016
	:	
vs.	:	
	:	
	:	
YURIY GUSEV, Defendant	:	Motion to Suppress

**OPINION AND ORDER**

Defendant is charged by Information filed on September 29, 2016 with one count of possession of intent to deliver a controlled substance. Officer Zachary Geary of the Williamsport Bureau of Police alleges that on September 3, 2016 at approximately 7:53 p.m., Defendant possessed approximately 130 waxen baggies containing heroin.

Defendant waived his arraignment scheduled for October 3, 2016 and the case was placed on a subsequent trial list. Defendant filed a motion to suppress on May 3, 2017. Defendant asserts that Officer Geary illegally and unconstitutionally searched Defendant’s cell phone and obtained incriminating evidence against Defendant. The hearing on Defendant’s motion was held on May 26, 2017.

Officer Geary and Defendant both testified at the hearing. The Court finds the following facts to have been credibly established.

Officer Geary was on duty on September 3, 2016. At approximately 7:53 p.m., he was dispatched to the Sheetz convenience store located at 105 Maynard Street in Williamsport. Defendant was found to be unresponsive on the floor of the Sheetz bathroom.

Defendant was being attended to first by an employee and an off-duty nurse. EMS personnel soon arrived and began treating Defendant. EMS personnel administered a

Narcan shot and then transported Defendant by ambulance to the Williamsport Hospital emergency room.

Officer Geary noticed several items of contraband on the bathroom floor near Defendant including empty waxen bags and a needle. He also noticed a plastic bag sitting on top of a toilet paper roll. The bag contained 13 bundles (10 baggies each) of waxen bags containing suspected heroin.

Suspecting Defendant had overdosed on heroin and was mostly likely selling it as well, Officer Geary subsequently went to the hospital to talk with Defendant. He met Defendant and started interviewing Defendant while Defendant was laying on a gurney in a draped enclosed room in the emergency department.

While Officer Geary was asking Defendant preliminary biographical questions, Defendant responded that he did not know his present address. Defendant wanted to use his cell phone to call his roommate to get the address, but Officer Geary refused to allow Defendant to use the phone because it could have “evidentiary value.” However, Officer Geary offered to call the roommate for Defendant. Defendant agreed and asked Officer Geary to get the phone.

Officer Geary obtained the phone and brought it back to Defendant. Following Defendant’s instructions, Officer Geary activated the phone. He was instructed by Defendant to find the contact information for “Zach B” and then contact “Zach B” for the correct address. Upon activating the phone Officer Geary noticed that the messaging app was open and the following text message was present: “Word, do you have any bags?”

Officer Geary located the contact information for “Zach B” and attempted to

call him without success. Officer Geary then used Defendant's phone to send "Zach B" the following text message: "What is the address at the house."<sup>1</sup>

Officer Geary subsequently submitted a search warrant and application for the phone. After the phone was accessed via the warrant, the incriminating statement as well as potentially other statements and contacts were verified.

Defendant argues that Officer Geary searched the cell phone without probable cause, a warrant or consent. Accordingly, Defendant argues that the text message that Officer Geary claims to have seen on the screen initially should be suppressed, as well as all of the other information obtained from the phone in that the search warrant application included the initial unconstitutional search information.

The parties do not dispute that Officer Geary seized the phone. He admitted holding it as potential evidence and not allowing Defendant to access it. In *Commonwealth v. Stem*, 96 A.3d 407 (Pa. Super. 2014), relying on United States Supreme Court cases, the Pennsylvania Superior Court held that accessing a cell phone constituted a search that implicated the owner's constitutional rights. Among other things, police opened the flip phone, observed a wallpaper photo, pressed a button to access the phone's call log, pushed other buttons to determine numbers associated with a certain moniker and reviewed the information.

In this case, Officer Geary searched the phone. He "activated" the phone by pressing a button. After pressing a button, the screen was displayed. The incriminating message was present on the screen at that time.

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<sup>1</sup> According to the phone records submitted as part of Commonwealth's exhibit 1, this message was sent at 2:15a.m. on 4 Sept. 2016 UTC, which would correlate to 10:15 p.m. on 3 Sept. 2016 in the eastern time zone. A

While generally the warrantless search of a cell phone violates the U.S. and Pennsylvania Constitutions, consent to search constitutes an exception. *Commonwealth v. Randolph*, 151 A.3d 170, 176-77 (Pa. Super. 2016).

Defendant contends that he discussed with Officer Geary using the phone to contact Defendant's roommate. He acknowledged that Officer Geary would not let him use the phone by himself. He acknowledged as well that Officer Geary went, retrieved the phone and brought it back to Defendant.

Defendant claims that once Officer Geary retrieved the phone, Officer Geary started pushing buttons and looking through the phone without Defendant's consent. The Court does not find Defendant's testimony on this issue to be credible.

Unless the version of events took place as testified to by Officer Geary, he would have never known Defendant's roommate's name or how to contact him. Further, given this Court's experience with cell phones, Officer Geary's version of events makes sense. Most phones are protected by passwords. Most phones are difficult to navigate unless one has a similar type phone. If one wanted to use another person's cell phone, they would almost certainly, need or inquire, as to how to access and reach the contact information.

Obviously, the Commonwealth bears the burden of proving that Defendant consented to the warrantless search. *Commonwealth v. Acosta*, 815 A.2d 1078, 1083 (Pa. Super. 2003) (en banc). "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, express or implied or a will overborn-- under the totality of

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few minutes later, "Zack B" sent a text message with the address.

the circumstances.” *Id.* (citations and internal quotation marks omitted).

The Court finds that the Commonwealth has met this burden. There is absolutely no credible evidence to suggest that Defendant was coerced, pressured or placed under duress prior to consenting to Officer Geary accessing his phone and obtaining the contact information for Defendant’s roommate. The scenario as explained by Officer Geary is entirely consistent with the consent being the product of an essentially and unconstrained choice. Indeed, Defendant’s claim at this point that the search was without consent is a byproduct of unfortunate timing. Defendant received an incriminating message text shortly before he overdosed. This incriminating message was present on Defendant’s cell phone when Officer Geary accessed the phone in accordance with Defendant’s instructions and when he attempted to obtain Defendant’s address from “Zach B” as directed by Defendant.

**ORDER**

**AND NOW**, this 2<sup>nd</sup> day of June 2017, following a hearing, the court **DENIES** Defendant’s Motion for Suppression.

By The Court,

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Marc F. Lovecchio, Judge

cc: Nicole M. Ippolito, Esquire (ADA)  
Kirsten Gardner, Esquire (APD)  
Gary Weber, Esquire (Lycoming Reporter)  
Bettina Peluso, Legal Intern  
Work file