

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
 :  
 vs. : No. CR-784-2017  
 :  
 CARLOS R. CASTRO, JR., :  
 Defendant : Defendant's (second) Motion to Suppress

**OPINION AND ORDER**

Defendant is charged by Information filed on May 19, 2017 with, among many other charges, two counts of rape of a child as well as several counts of photographing sexual acts.

On July 21, 2017, Defendant filed an omnibus pretrial motion, which included two motions to suppress, specifically requesting that evidence obtained via two search warrants, be suppressed. A hearing and argument were held before the court on August 31, 2017. By Opinion and Order dated September 26, 2017, the court denied Defendant's omnibus pretrial motion "in the nature of a motion to suppress the data recovered from the Samsung Galazy S5 cellphone and the SD card."

On February 20, 2018, Defendant filed another motion to suppress. Defendant again requested that the evidence from Defendant's Samsung cellphone and SD card be suppressed but argues a different basis for seeking suppression. Specifically, Defendant argues that the police searched the cellphone and SD card without permission from the Defendant and accordingly, violated his constitutional rights to be protected against unreasonable searches and seizures.

The Commonwealth filed a written objection to Defendant's second motion to

suppress arguing that the issue of suppression was waived, that defendant's suppression issues were already litigated and that the second motion to suppress was untimely.

An argument was held before the court on March 5, 2018 with respect to only the Commonwealth's objections.

By way of background, the criminal complaint against Defendant was filed on March 29, 2017. Following the filing of the complaint, Defendant obtained representation through the Lycoming County Public Defender's office. Defendant's preliminary hearing was held on May 1, 2017. Defendant's arraignment was scheduled for May 22, 2017 but was waived by his counsel who formerly entered his appearance on the same date.

The parties subsequently filed a stipulated motion to extend the filing date for omnibus pretrial motions to July 21, 2017. Subsequently, the Commonwealth and defense counsel informally agreed to another week. The motion to suppress, as indicated previously, was filed on July 27, 2017, and the court's decision was rendered on September 26, 2017.

Defendant's case was originally placed on the August 22, 2017 call of the list but was continued by Defendant because of the outstanding pretrial motion. It was next scheduled for call of the list on January 9, 2018 but continued by Defendant to March 20, 2018, because Defendant's assigned counsel left the office effective January 1, 2018, the case was reassigned, and the "new attorney will need time to meet with the client and analyze the case."

Rule 581 of the Pennsylvania Rules of Criminal Procedure governs the timeliness of suppression motions. Unless the opportunity did not previously exist, or the

interests of justice otherwise require, a suppression motion must be made in an omnibus pretrial motion as set forth in Rule 578. If a timely motion is not made, the issue of suppression is deemed waived. Pa. R. Crim. P. 581(B). An omnibus pretrial motion must be filed within 30 days after the arraignment unless the opportunity therefore did not exist or the defendant, defense attorney or the attorney for the Commonwealth was not aware of the grounds for the motion or unless the time for filing has been extended by the court for cause shown. Pa. R. Crim. P. 579 (A).

Defendant did not obtain leave of court to file his second motion to suppress. It is late by several months. As the Rule and case law note, however, a judge may excuse a defendant's tardy presentation of a suppression motion when required in the interests of justice. *Commonwealth v. Johonoson*, 844 A.2d 556, 561 (Pa. Super. 2004).

Defendant's present counsel argues that the interests of justice require that the motion be heard at this time. Defense counsel concedes that the information set forth in its second motion was known to Defendant and defense counsel at the time discovery was provided "months ago." Defendant concedes that he raised the issue set forth in the second suppression issue to his then counsel within the timeframe for counsel to include the issue in the first motion to suppress. Furthermore, Defendant concedes that while there is some information that the phone at issue was commonly used by him and his intimate partner, Victoria Clements, he "thought there was an indication in the discovery" that he used it exclusively. Neither he nor his counsel, however, could point to the portion of the discovery that Defendant claims supports his position.

In a nutshell, Defendant claims that his prior counsel through the public defender's office was ineffective in not raising the issue in a timely manner and that when present counsel reviewed the file, said counsel determined that there was a basis for proceeding and accordingly filed the motion.

Whether the interests of justice require an untimely omnibus pretrial motion or motion to suppress evidence to be heard is a matter for the discretion of the trial judge. *Commonwealth v. Long*, 753 A.2d 272, 279 (Pa. Super. 2000). In making this decision, the judge should consider several factors including: (1) the length and the cause of the delay; (2) the merits of the suppression claim; and (3) the court's ability, considering the complexity of the issues and the availability of the witnesses, to hold the hearing promptly. *Commonwealth v. Brown*, 378 A.2d 1262, 1266 (Pa. Super. 1977). A trial court should exercise discretion to hear an untimely motion where the merit of counsel's motion is so apparent that justice requires it to be heard. *Long*, 753 A.2d at 280; *Commonwealth v. Williams*, 323 A.2d 862, 866 (Pa. Super. 1974).

Under the circumstances in this particular case, the court declines to conclude that the interests of justice require that the suppression hearing be heard at this time. The length of the delay is significant. Not only have several months passed, but the case is presently on the pretrial list and scheduled for call of the list today, March 20, 2018. Defendant has continued to be represented by the Public Defender's office throughout.

The case was assigned to an assistant public defender who, at that time, the Chief Public Defender determined had sufficient training, experience and knowledge to

properly handle the case. The initial attorney, who had been provided with the information that formed the basis for the present motion, decided to limit the motion solely to the search warrant issue. It is significant to note that during the argument and hearing on the timeliness of the second motion, Defendant did not call as a witness prior defense counsel to explain why he chose not to pursue the motion.

The interests of justice are necessarily determined on a case by case basis, but remain an elusive concept. No human institution can guarantee justice. Human institutions can only strive to achieve justice through procedures which are as fair as possible. Often times, when one decides what's fair, one must define it in terms of what is not fair.

In this case, it certainly would not be fair to the alleged victim to continue the trial for months pending the litigation of a second suppression motion. In this case, it would not be fair to the prosecution to have to expend additional time and resources relating to a second suppression motion. In this case, it would not be fair to take more judicial time, energy, and resources when those resources should have been consolidated with the time, effort, and resources spent on the first suppression motion.

In this case, it would not be fair to permit a new, arguably more experienced attorney from the Public Defender's office, to review a case and decide to pursue a motion that was not pursued by the attorney to whom the case was originally assigned. In this case, it would not be fair to simply guess why the first attorney chose not to pursue the issue in the first motion to suppress. In this case, it would not be fair to essentially open Pandora's Box for future litigants and potentially allow an evisceration of the timeliness requirements of the

Rules of Criminal Procedure.

Finally, in this case, it would not be fair to permit the motion to be heard at this time when its merits are not at all obvious. In fact, it appears that the merits of the motion are suspect at best. There is absolutely no evidence before the court to conclude that Defendant utilized the phone himself to the exclusion of his paramour. To the contrary, there is evidence that the paramour also used the phone and had Defendant's consent to use the phone. She had the ability to access the phone and its contents and had the apparent authority to do so. As well, all of the factual information upon which the motion is based was known to Defendant and his counsel within the timeframes permitted by the Rules to timely file the motion. Indeed, defense counsel was granted additional time. Lastly, it appears almost certain to the court that the evidence would have been obtained and that Defendant's motion would be denied based upon inevitable discovery. *See Commonwealth v. Lyons*, 622 Pa. 91, 79 A.3d 1053, 1064-1065 (2013) ("We reject Appellant's predicate assumption that Trooper Biever, in the affidavit of probable cause, was required to aver facts demonstrating Rupp's credibility and reliability. This Court has repeatedly rejected the argument that an officer relying on statements from an ordinary citizen, in contrast to a police informant, must establish the citizen's credibility and reliability.").

**ORDER**

**AND NOW**, this \_\_\_\_ day of March 2018, following a hearing and argument, Defendant's (second) Motion to Suppress dated February 20, 2018 is **DISMISSED** as untimely

By The Court,

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Marc F. Lovecchio, Judge

cc: Scott Werner, Esquire (ADA)  
William Miele, Esquire (PD)/Nicole Spring, Esquire (APD)  
Work file  
Gary Weber, Esquire, Lycoming Reporter