IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-1999-2017**
v.	:	
	:	
ADRIAN M. HARRY,	:	**OMNIBUS PRETRIAL**
Defendant	:	**MOTION**

OPINION AND ORDER

Defendant, Adrian M. Harry (Defendant), was arrested by the Williamsport Bureau of Police on one count of Criminal use of a Communication Facility[1] and one count of Possession of Drug Paraphernalia[2]. The charges arise out of a motor vehicle stop of the Defendant within the City of Williamsport on October 24, 2017. Defendant filed a timely Omnibus Pretrial Motion on February 8, 2018. Hearing on the motion was held by this Court on March 2, 2018.

In his Omnibus Motion, Defendant challenges both the sufficiency of the evidence presented at the preliminary hearing and that the evidence the police had in their possession at the time they saw Defendant did not justify his stop or frisk.

Testimony

Officer Clinton Gardner (Gardner) testified that on October 25, 2017, he was on patrol with Officer Joshua Bell (Bell), both not in uniform, and operating an unmarked SUV in the area of the 1200 block of Memorial Avenue. While on patrol on Isabella Street, they observed a black Ford sedan pull out, turn north on the alley, and then park in the 1200 block of Isabella Street facing westbound. He observed the

[1] 18 Pa.C.S.A. §7512 (a)
[2] 35 P.S. 780-113(a) 32

Defendant who was operating the vehicle, pull away from the curb at a high rate of speed traveling westbound on Isabella ultimately coming to a stop on Park Avenue just east of ABC Lanes. At that point the officers initiated a traffic stop, believing that because the Defendant was traveling in a high narcotics area and acting suspiciously they needed to investigate further. They turned their lights on however no weapons were drawn. After they spoke with the Defendant he gave consent to search without Gardner or Bell having to ask.

Once the officers searched the vehicle they found a cigar package with a black zip top bag in the driver side door that they associated with marijuana use. Gardner testified that based upon his 30+ marijuana investigations he believed that the Defendant was engaged in illegal drug activity. Despite finding the packaging that Gardner believed was associated with drug use or activity, the bag was not sent for testing. Additional searching of the vehicle revealed three cell phones inside the vehicle. The Defendant denied ownership of the flip phone that was found inside the driver's side door.

Bell also testified about the events of the day. He and Gardner were on aggressive patrol in an unmarked unit; although he did not have a uniform on, he had a vest marked police. Bell testified they were in the 1200 block of Memorial Avenue in the City of Williamsport, which he knows to be a high narcotics area. He described Memorial Avenue along with Rose Street, Park Avenue and Isabella Streets as an area where many drug transactions take place. Bell also testified that the police have obtained information from the "tip line "about drug activity occurring in the 1100 to 1200 block of Isabella Street and he had purchased narcotics with a confidential

informant in the same area in the past. As part of his routine interdiction patrol, it was usual for him to go to a high narcotics traffic area and that was why they were located in that specific area that day.

At about 1624 hours they observed a black sedan pull out of the 1200 block of Memorial Avenue, and followed the vehicle to the area of the 1200 block of Isabella Street. He testified he observed the vehicle park facing west. He then noticed that the vehicle moved its position traveling north on Rose Street; Bell felt that Defendant was trying to avoid having contact with the police officers. Bell then saw him turn eastbound on Park Avenue, park and exit the vehicle in a very fast manner. Once the Defendant was out of the vehicle Bell approached him. He said that the Defendant spontaneously remarked “there was nothing in his vehicle that the police could search it.” In fact the Defendant offered himself up “to enable us to pat him down.”

While patting down the Defendant, Bell found a big wad of money in his right hand front pants pocket. When asked what the source of the income was, the Defendant said he was “not going to tell you anything“. When the three phones were found in the vehicle, Defendant stated that two of the phones belonged to him, but not the flip phone. Bell testified that the flip phone was specifically suspicious due to not only the make of the phone but the fact it was a cheaper phone than the other phones. He explained that phones such as the flip phone that was found can be purchased from dealers with the contacts pre-loaded in the phone. He testified that for a similar Samsung phone such as the one seized it could cost upwards of $1000.00 to purchase, but generate close to $20,000 per month in income. He also testified that the wad of cash found was mostly in $20’s which is also consistent with

drug dealing. On cross-examination, Bell was asked if he knew that the item in the right front pocket was not a weapon. He acknowledged that he did and he knew that it was currency.

At this point in the hearing, the Commonwealth wanted to enter into evidence the substance of the texts found in the flip phone to establish that the Defendant used the flip phone to engage in illegal drug activity. The Court sustained the Defense objection as the Commonwealth could not establish in their offer who was communicating by text on the phone; the testimony about the text messages on the phone was merely going to be used to establish that it was used for drug dealing.

Habeas Corpus motion

Defendant in his Habeas Corpus motion alleges that the Commonwealth's evidence is insufficient to establish a prima facie case on the charge of Criminal use of a Communication Facility. Defendant alleges because there is no proof to show that the he had used the cell phone seized by the police; there is no evidence to support he was engaged in any illegal drug activity. Furthermore, Defendant alleges the evidence is also insufficient on the charge of Possession of Drug Paraphernalia as there was no evidence to prove that the Defendant possessed the plastic baggie or that it contained residue of a controlled substance.

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove the defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. A *prima facie* case exists when the Commonwealth produces evidence of each of the

material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. ***Commonwealth v. Karetny,*** 880 A.2d 505, 583 Pa. 514, 529 (Pa. 2005). The *prima facie* standard requires that the Commonwealth's evidence must establish that the crime has been committed and to satisfy this requirement the evidence must show that the existence of each of the material elements of the charge is present. ***Commonwealth v. Wodjak***, 446 A.2d 991, 996 (Pa. 1983). While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. ***Id.*** at 997.

The first question for the Court to decide is the issue of possession of both the phone and the ziplock baggie. Possession can be found by proving actual possession, constructive possession or joint constructive possession. See ***Commonwealth v. Gladden***, 445 Pa.Super. 434, 665 A.2d 1201 (1995), appeal denied, 544 Pa. 624, 675 A.2d 1243 (1996); ***Commonwealth v. Magwood***, 371 Pa.Super. 620, 538 A.2d 908 (1988), appeal denied, 519 Pa. 653, 546 A.2d 57 (1988); ***Commonwealth v. Naguski***, 223 Pa.Super. 301, 299 A.2d 39 (1972). ***Commonwealth v. Heidler***, 1999 PA Super 266, 741 A.2d 213, 215 (1999).

Constructive possession "is found where the individual does not have actual possession over the illegal item but has conscious dominion over it." ***Commonwealth v. Carroll,*** 510 Pa. 299, 507 A.2d 819 (1986). In order to prove "conscious dominion," the Commonwealth must present evidence to show that the defendant had both the power to control the [item] and the intent to exercise such

control. See ***Gladden**, supra*, 665 A.2d at 1206; *Magwood*, *supra*, 538 A.2d at 909-10. These elements can be inferred from the totality of the circumstances. ***Commonwealth v. Gilchrist***, 255 Pa.Super. 252, 386 A.2d 603 (1978). ***Heidler***, *supra***,** 741 A.2d 213, 215–16.

The offense of Criminal use of Communication Facility is committed when

> "[a] person **uses** a **communication facility** to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act of April 14, 1972 (P.L. 233, No. 64),[1] known as the Controlled Substance, Drug, Device and Cosmetic Act. "

The Commonwealth alleges here that the Defendant Possessed the Samsung phone and used it to commit the offense of drug delivery.

Officers found three phones in the vehicle but the Defendant acknowledged that only two of them belonged to him. Based upon the neighborhood and the type of phone it was, Commonwealth's witnesses opined that the Defendant possessed the third phone and used it to engage in the sale of controlled substances.

The Commonwealth did not present any evidence tying the third phone to the Defendant. Without any other evidence to link both items to the Defendant, the Commonwealth cannot prove the important element of possession.

Commonwealth argues that the Court erred in precluding the additional evidence that it presented at the preliminary hearing of the text messages contained in the third phone by not allowing the officers to testify about the those messages. That evidence would establish the purpose for which they claim the phone was being used and possibly that it belonged to Defendant thus establishing possession.

> Authentication is a prerequisite to admissibility… *In re F.P., a Minor,* and courts of other jurisdictions concur, that authentication of electronic communications, like documents, requires more than mere confirmation that

> the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required… Text messages are somewhat different in that they are intrinsic to the cell phones in which they are stored. While e-mails and instant messages can be sent and received from any computer or smart phone, text messages are sent from the cellular phone bearing the telephone number identified in the text message and received on a phone associated with the number to which they are transmitted. The identifying information is contained in the text message on the cellular telephone. However, as with e-mail accounts, cellular telephones are not always exclusively used by the person to whom the phone number is assigned.

Commonwealth v. Koch, 39 A.3d 996, 1005 (Pa.Super. 2011). Therefore, in order for the Commonwealth to use the contents of the phone it must be properly authenticated.

The requirement of authentication or identification is codified at Pennsylvania Rule of Evidence 901, 42 Pa.C.S.A.: "(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Pa.R.E. 901(a). Testimony of a witness with personal knowledge that a matter is what it is claimed to be may be sufficient to authenticate or identify the evidence. Pa.R.E. 901(b)(1).

A document may be authenticated by direct proof and/or by circumstantial evidence. ***Commonwealth v. Brooks***, 352 Pa.Super. 394, 508 A.2d 316, 318 (1986) (citations omitted). "'[P]roof of any circumstances which will support a finding that the writing is genuine will suffice to authenticate the writing.' " Id. at 319, quoting McCormick, Evidence § 222 (E. Cleary 2d Ed.1972). "The courts of this

Commonwealth have demonstrated the wide variety of types of circumstantial evidence that will enable a proponent to authenticate a writing." Id. (collecting cases). ***In the Interest of F.P., a Minor***, 878 A.2d 91, 94 (Pa.Super. 2005). The proponent of [social media evidence] must present direct or circumstantial evidence that tends to corroborate the identity of the author of the communication in question, such as testimony from the person who sent or received the communication or contextual clues in the communication tending to reveal the identity of the sender. ***Commonwealth v. Mangel****,* ---A3d---, 2018 WL 1322179 (Pa. Super.2018) at 6.

In the Commonwealth's offer they did not assert that the phone number even belonged to Defendant let alone the fact that he or some other witness originated the texts on the phone. Therefore, applying ***Koch****,* since the Commonwealth was unable to present either direct or circumstantial evidence that Defendant authored any of the texts contained on the phone, the Commonwealth was properly precluded from presenting any testimony about the contents of the text messages on the phone to establish drug dealing or possession.

Defendant also challenges the evidence presented by the Commonwealth on the charge that he possessed the zip lock baggie and it was drug paraphernalia.

"To sustain a conviction for possession of drug paraphernalia, the Commonwealth must establish that items possessed by defendant were used or intended to be used with a controlled substance so as to constitute drug paraphernalia and this burden may be met by Commonwealth through circumstantial evidence." ***Commonwealth v. Little***, 879 A.2d 293, 300 (Pa.Super.2005), appeal denied, 586 Pa. 724, 890 A.2d 1057 (2005).

The baggie was found inside the car near the Defendant. No evidence was presented that the Defendant actually possessed the bag. No evidence was presented that the bag was fingerprinted and identified as the Defendant's. Defendant acknowledged that the other two phones in the car were his but nothing else. Without any other evidence to link the bag to the Defendant, the Commonwealth cannot prove the required element of possession.

Gardner also testified that the bag was not sent for testing to identify the presence of controlled substance. Without any evidence of the bag being in contact with a controlled substance, the element of used or intended to be used with a controlled substance also cannot be proven. Therefore, the Commonwealth failed to present prima facie evidence of the possession of drug paraphernalia.

Since the issues of the stop of the Defendant on the date in question and the seizure of items from him was also challenged, despite finding that insufficient evidence was presented on the charges filed to hold them for court, the Court will address the Motion to Suppress.

Was the stop of the Defendant made without probable cause

The Defendant alleges the stop of his vehicle was in violation of both the U.S. and Pennsylvania Constitutions because there was no reasonable suspicion on the part of the police to stop him. Commonwealth alleges that based upon the manner in which the Defendant was driving through the neighborhood, which was also a high crime area, justified their stop of the Defendant. In support of its position,

the Commonwealth relies on this Court's decision in the ***Commonwealth v. Emary Michelle Najdek***.[3]

In ***Najdek***, decided by this Court on January 11, 2018, Gardner and Bell were also working together with Gardner observing a vehicle dropping off a female; a relatively short interaction, where Najdek exited the car and began walking south while, the vehicle (a Ford Edge) traveled westbound on Park Avenue. The officers followed these individuals as they found the observed behavior consistent with the purchase of narcotics. Bell testified that in criminal interdiction there is a minimal amount of time to observe somebody's actions and what short interactions officers observe, they must then decide whether to pursue further. Bell also testified that Gardner reported to him that the vehicle driver was reluctant to make eye contact with Gardner. Bell testified that though a quick departure without saying goodbye and a driver not looking at a police officer are not criminal in themselves, when they are observed in area where a lot of narcotic transactions are taking place they heighten officers' suspicion. This Court felt that the combination of the behavior exhibited by both individuals contributed to the probable cause for the officers to stop the vehicle.

In the seminal case of ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court indicated that police may stop and frisk a person where they had a reasonable suspicion that criminal activity is afoot. In order to determine whether the police had a reasonable suspicion, the totality of the circumstances—the whole picture—must be considered. ***United States v. Cortez,*** 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). "Based upon that whole

[3] Commonwealth v. Emary Michelle Najdek, Lyc. Cty. CP-41-CR-1327-2017 (Butts, P.J., Jan. 11, 2018).

picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Id. at 417–18, 101 S.Ct. 690. Pennsylvania courts have consistently followed ***Terry*** in stop and frisk cases, including those in which the appellants allege protections pursuant to Article 1, Section 8 of the Pennsylvania Constitution**.** ***In re D.M.***, 566 Pa. 445, 449, 781 A.2d 1161, 1163 (2001).

Here, Defendant, unlike ***Nadjak,*** was driving around an area known for drug trafficking trying to avoid police. He was not observed making contact with anyone or violating any laws of the Commonwealth. Therefore, the stop of the Defendant would not be lawful. However the Court does not believe the Defendant was stopped as in a motor vehicle stop, but rather approached once he exited his vehicle.

The Fourth Amendment provides three categories of interaction between citizens and the police. A "mere encounter" or request for information need not be supported by any level of suspicion, but carries no official compulsion for a citizen to stop or to respond to the officer's request for information. An "investigative detention" must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. An arrest or "custodial detention" must be supported by probable cause. 16A West's Pa. Prac., Criminal Practice § 19:34.

Moreover, Pennsylvania courts have held that an officer may conduct a limited search, i.e., a pat-down of the person stopped, if the officer possesses reasonable suspicion that the person stopped may be armed and dangerous*.* ***Commonwealth v. Carter***, 105 A.3d 765, 768–69 (Pa.Super. 2014) (en banc) (citation omitted). "In

assessing the reasonableness of the officer's decision to frisk, we do not consider his unparticularized suspicion or 'hunch,' but rather ... the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." ***Commonwealth v. Zhahir*****,** 561 Pa. 545, 554, 751 A.2d 1153, 1158 (2000) (quoting ***Terry***, 392 U.S. at 27, 88 S.Ct. at 1883). Further, "the court must be guided by common sense concerns that give preference to the safety of the police officer during an encounter with a suspect where circumstances indicate that the suspect may have, or may be reaching for, a weapon." ***Commonwealth v. Stevenson***, 894 A.2d 759, 772 (Pa.Super. 2006) (citing ***Zhahir***, 561 Pa. at 555, 751 A.2d at 1158). This Court has held that "even in a case where one could say that the conduct of a person is equally consistent with innocent activity, the suppression court would not be foreclosed from concluding that reasonable suspicion nevertheless existed. ... [E]ven a combination of innocent facts, when taken together, may warrant further investigation." ***Carter*****,** 105 A.3d at 772 (finding reasonable suspicion existed to stop and frisk the appellee, who was present in a high crime area, appeared to be concealing a weighted bulge in his pocket from police officers, and walked away multiple times when the officers' patrol car passed by).***Commonwealth v. Thomas,*** --- A.3d ----, 2018 WL 653721, (Pa. Super. 2018).

The Court finds that the behavior exhibited by the Defendant by walking away quickly after moving his vehicle a number of times in an effort to avoid the police while in the known crime area along with their on the job experience, would have justified the police request to pat the Defendant down for officer safety. However

since Defendant “offered himself up” for the police to pat him down, he consented to the encounter with them.

Seizure of Currency

Having concluded that the stop and frisk were proper by virtue of the fact the Defendant consented, the Court’s analysis goes to the seizure of the contraband. As noted earlier, the purpose of the frisk under ***Terry*** is not to discover evidence, but to allow the officer to pursue his investigation without fear of violence. See ***Adams*****,** 407 U.S. at 146, 92 S.Ct. at 1923. In keeping with such purpose, the frisk must be limited to that necessary for the discovery of weapons. ***Terry***, 392 U.S. at 26, 88 S.Ct. at 1882. The United States Supreme Court has held, however, that an officer may also properly seize non-threatening contraband detected through the sense of touch during a protective frisk for weapons. ***Minnesota v. Dickerson***, 508 U.S. 366, 373, 113 S.Ct. 2130, 2136, 124 L.Ed.2d 334 (1993).

Pursuant to the plain view doctrine, when an officer is lawfully in a position to view an item, the incriminating nature of which is immediately apparent, he may legitimately seize that item. See ***Harris v. United States***, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968); ***Commonwealth v. Davenport***, 453 Pa. 235, 243–44, 308 A.2d 85, 89 (1973).

Here Bell testified that he felt the wad of cash and knew it not to be contraband. If the pat down was for safety and the item was clearly not a weapon or easily identifiable contraband its seizure by the police was in error.

The Court has ruled that there was no stop of the vehicle as the Defendant was approached by police after he left the vehicle. Bell testified that not only did the Defendant allow them to pat him down, but he gave them consent to search the vehicle. Once Defendant acknowledged the two cell phones, the Court is hard pressed to find a reason why, without linking the phone to illegal conduct, the police can justify the seizure of the third phone.

ORDER

AND NOW, this _____ day of May, 2018, based upon the foregoing Opinion, the Defendant's Omnibus Pretrial Motion is GRANTED.

On the motion for Habeas Corpus relief, the Court finds that insufficient evidence was presented to believe that Defendant was using a cell phone found in the car for drug dealing and a zip lock baggie found within the car was not possessed by the Defendant or used as drug paraphernalia, the charges of Criminal Use of a Communication Facility and Possession of Drug Paraphernalia are hereby DISMISSED.

The Court also finds that although the Defendant consented to a frisk of his person and a search of the car there was insufficient evidence for police to have confiscated either item; therefore the currency and phone taken in the vehicle stop are hereby SUPPRESSED.

By the Court,

Nancy L. Butts, President Judge

cc: Nicole M. Ippolito, Esquire, ADA
Peter T. Campana, Esquire