IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-1670-2017**
v.	:	
	:	
NAZEER BURKS,	:	**OMNIBUS PRETRIAL**
Defendant	:	**MOTION**

OPINION AND ORDER

Nazeer Burks (Defendant) was arrested on September 10, 2017 on two counts of Criminal Conspiracy to Possess a Controlled Substance with the Intent to Manufacture or Deliver,[1] two counts of Possession of a Controlled Substance with the Intent to Manufacture or Deliver,[2] two counts of Criminal Conspiracy to Possess a Controlled Substance,[3] two counts of Possession of a Controlled Substance,[4] one count of Criminal Conspiracy to Possess Drug Paraphernalia,[5] one count of Possession of Drug Paraphernalia,[6] and one count of Criminal Use of a Communication Facility.[7] The charges arise from police conducting an encounter with Defendant parked in his vehicle outside of 340 Mountain Ave. Williamsport, PA 17701. Defendant filed a timely Omnibus Pretrial Motion on November 29, 2017. A hearing on the motion was held by this Court on June 22, 2018.

In his Omnibus Motion, Defendant challenges that the police had reasonable suspicion to initially seize Defendant and that the search of his residence by state parole was without consent or reasonable suspicion of contraband or a violation of Defendant's supervision had

[1] 18 Pa. C.S. § 903(a)(1).
[2] 35 P.S. §780-113(a)(30).
[3] 18 Pa. C.S. § 903(a)(1).
[4] 35 P.S. §780-113(a)(16).
[5] 18 Pa. C.S. § 903(a)(1).
[6] 35 P.S. §780-113(a)(32).
[7] 18 Pa. C.S. § 7512.

occurred. The search warrant obtained as a result of the search by state parole incorrectly identified the address of the residence that was to be searched. Defendant contends as a result of his unlawful initial seizure, improper search by state parole, and/or incorrect identification of the residence to be searched any evidence obtained as a basis of the search of the residence should be suppressed.

Background and Testimony

Officer Devin Thompson of South Williamsport Borough police, Officers Clinton Gardner and Joshua Bell of the Williamsport Borough police, and Agent Jason Lamay of State Parole testified on behalf of the Commonwealth. Their testimony established the following. On September 8, 2017, Officer Gardner was operating a marked patrol vehicle, in an area known for heavy narcotics activity, when he engaged in a mere encounter with a male sitting inside a maroon Ford Fusion at the intersection of Elmira St and Louisa St, he had seen earlier that day. Upon seeing the officer, the male pulled the vehicle in front of the residence at 340 Mountain Ave. When Officer Gardner approached the vehicle someone within the residence of 340 Mountain Ave. opened the door and closed it quickly, at which time Officer Gardner smelled the strong odor of marijuana. At this time, Officer Gardner called for back-up and asked the man to identify himself, which he initially refused until Officer Gardner told him he was not free to leave and part of a narcotics investigation. The man then identified himself as Nazeer Burks, Defendant. Officer Bell arrived and noticed Defendant's zipper was down. He asked Defendant why his zipper was down to which Defendant could provide no answer. Both officers indicated it is common for drug traffickers to conceal narcotics in their underwear and often keep their jeans unzipped.

While speaking with Defendant, Officer Gardner heard the back door slam and three males climbing the rear fence and fleeing on foot. Officer Gardner chased after them, but was unable to catch them. Officer Gardner then relayed to Officer Bell that he had smelled marijuana he believed to be coming from the residence, at which time Officer Bell contacted Officer Thompson to bring a K9 to search the exterior of the vehicle. The K9 indicated a positive response to the driver side door of the vehicle.

At around this same time, Agent Lamay heard from a scanner that three males running from police near the area of Defendant's approved residence. He had been approved to live at 340 Mountain Ave. with his girlfriend, Cheyanne Taylor, on August 25, 2017. Upon hearing this Agent Lamay decided to visit to see if Defendant was involved. When Agent Lamay arrived at Defendant's approved residence, Defendant was sitting on his porch with several police cars outside of his home. One of the officers informed Agent Lamay when the door to the home had opened there was a believed smell of marijuana and multiple males had fled out of the back of the house. When Agent Lamay spoke to Defendant, Defendant stated he was not aware of what was going on, he was not sure if others were in the house, and the door was unlocked. Upon speaking with Defendant and officers, Agent Lamay determined that a parole search of house was necessary. He informed Defendant of this, to which Defendant stated it was fine. Immediately upon entered Agent Lamay detected a poignant odor of marijuana. With the assistance of Williamsport police, Agent Lamay conducted a safety sweep of the house and no persons were present. Agent Lamay contacted his supervisor for permission to search the house and after receiving permission conducted a search while police were outside. Almost immediately a mason jar of believed marijuana was found.

At this point parole officers discontinued their search and informed officers what was found. Officer Bell then went and obtained a search warrant for the "residence at 304 Mountain Ave." A search of the residence yielded a firearm, forty (40) bags of suspected heroin, five (5) grams of marijuana, heroin and marijuana packaging materials, and a scale. No means of ingesting or using heroin or marijuana were located.

Whether the initial stop and K9 sniff was lawful

Defendant alleges that he was detained by the police in violation of his constitutional rights and his continued detention was done without probable cause or an exception to the probable cause requirement, therefore any evidence seized by the police through the search warrant should be suppressed. There are three categories when dealing with interactions between citizens and the police:

> The first is a "mere encounter" (or request for information) which need not be supported by any level of suspicions, but carries no official compulsion to stop or respond. The second, 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. Finally, an arrest or "custodial detention" must be supported by probable cause.
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> *Commonwealth v. Gutierrez*, 36 A.3d 1104, 1107 (Pa. Super. 2012).

The Pennsylvania Supreme Court has adopted the United States Supreme Court's holding in *Terry v. Ohio*, 392 U.S. 1 (1968), permitting police to effectuate a precautionary seizure when there is reasonable suspicion criminal activity is afoot. *Commonwealth v. Matos*, 672 A.2d 769, 773-74 (Pa. 1996) (citing *Commonwealth v. Hicks*, 253 A.2d 276 (Pa. 1969)). The Court views a totality of the circumstances to determine whether "a reasonable person would believe that he was not free to leave." *Commonwealth v. Collins*, 672 A.2d 826, 829 (Pa. Super. 1996). "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to

the specific reasonable inferences he is entitled to draw from the facts in light of his experience." *Commonwealth v. Cook*, 735 A.2d 673, 676 (Pa. 1999) (quoting *Terry*, 392 U.S. at 27). Case law has established certain facts alone do not create reasonable suspicion, but a totality of the circumstances may create it. *See Commonwealth v. DeWitt*, 608 A.2d 1030 (Pa. 1992) (flight alone does not establish reasonable suspicion); *Commonwealth v. Kearney*, 601 A.2d 346 (Pa. Super. 1992) (mere presence in a high crime area alone does not create reasonable suspicion).

Although Affiant, Officer Gardner, states he "was conducting a mere encounter" with Defendant, when he informed Defendant "he was not free to leave" the encounter became an investigatory detention. Affidavit of Probable Cause, 09/10/17, at 1. Prior to being told he was not free to leave, Officer Gardner observed Defendant parked out front of the residence at 340 Mountain Ave., someone within the residence opened and closed the door quickly which produced a strong smell of marijuana, and Defendant did not want to provide his name until Officer Gardner informed him he was not free to leave. Defendant did not leave the vehicle or attempt to enter the house at any time during Officer Gardner's observations. Officer Gardner believed the smell of marijuana came from the house. *See Id.* at 2 ("I suspected the odor came from the house due to the door opening and closing and the smell dissipating."). At this point Officer Bell called a K9 unit to conduct a sniff of the vehicle, which indicated a positive response on the driver side door. As with an investigatory detention a K9 sniff of a vehicle also requires reasonable suspicion. *See Commonwealth v. Rogers*, 849 A.2d 1185, 1190-91 (Pa. 2004).

There was no evidence available to the officers at the time to indicate the odor was emanating from Defendant, instead officers were quite certain the odor had originated from the

house at 340 Mountain Ave. Defendant had simply parked in front of the residence at 340 Mountain Ave., been in a high crime area, and happened to be talking to Officer Gardner when he smelled marijuana originated from a believed other source. This is not enough to create reasonable suspicion to detain and then search Defendant's person or vehicle. For this reason the Court finds that reasonable suspicion did not exist at the time of the initial detention or at the time officers conducted the K9 sniff.

Did Agent Lamay have independent reasonable suspicion to conduct search of the residence

Defendant contends that police contacted state parole and as such the resulting search of Defendant's residence was under the guise of Agent Lamay acting as a "stalking horse" for police. Memorandum of Law in Support of Omnibus Pretrial Motion, 02/16/18, at 2. Parolees are entitled to Fourth Amendment protections and those protections are violated when a parole officer acts as a "stalking horse" or "switches hats" with police officers. *Commonwealth v. Pickron*, 634 A.2d 1093, 1095 (Pa. 1993). "*Pickron* stands for the proposition that without a prior agreement, or specific guidance from statute or regulation, a parolee's protection from an unreasonable search and seizure is no less than that afforded any other Commonwealth resident." *Commonwealth v. Rosenfelt*, 662 A.2d 1131, 1134 (Pa. 1995).

In *Commonwealth v. Gould*, a parole agent was contacted by a police officer and told that he believed an individual was on parole and was involved in suspected drug activity. 187 A.3d 927, 931(Pa. Super. 2018). Based on this information the parole officer looked into the situation, met with the officer where the parolee was staying, and in the presence of officers conducted a stop and search. *Id.* at 931-33. The court found that the parole officer looking into the situation separately and conducting the stop and search personally, although alerted to the

issue by the officer and conducting the search in the presence of the officer, was separate enough to not be a "stalking horse." *Id.* at 937. If the parole officer is found to not be acting as a "stalking horse" the officer must show either a parole violation has occurred, reasonable suspicion a parole violation is occurring, or parolee consents. *Rosenfelt*, 662 A.2d at 1133.

Defendant signed a parole/reparole agreement stating:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.
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> Commonwealth's Exhibit #2, at 2.

Agent Lamay knows Defendant and knows of his status as a parolee. The address of 340 Mountain Ave. was approved as Defendant's address with his girlfriend Cheyanne Taylor on August 25, 2017. Agent Lamay heard of the events of September 8, 2017, over a scanner and decided to go to Defendant's residence to see if he was involved. Once he arrived he saw Defendant was outside his residence with police officers, and Agent Lamay was informed of the interaction that had taken place including the smell of marijuana coming from the residence and three individuals fleeing the rear of the residence. Agent Lamay then spoke with Defendant who stated that he was unaware of what was going on or if there were others inside. At this point Agent Lamay informed Defendant that he would be going in to check, which Defendant stated that was fine.

Immediately upon entering Agent Lamay stated he could smell suspected marijuana and after securing the residence for other individuals he contacted his supervisor and got permission to search the residence. Officers Bell and Gardner were not a part of the search and Agent Lamay and State Parole conducted the search themselves. Unlike *Gould*, Agent Lamay was not

contacted by police and overheard an incident occurring near a parolee residence and decided to respond. Upon talking to officers and Defendant, Agent Lamay made the individual determination to enter and search. Based upon individuals fleeing the house, the believed smell of marijuana, and his experiences as a parole officer, with Defendant particularly, determined to conduct a search. This Court finds that Agent Lamay was not acting as a "stalking horse" for the police, he was not informed by police of what was occurring prior to arriving, and he made a personal determination to conduct a search based on his own conclusions, much like in *Gould*.

The Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution protects persons against unreasonable searches and seizures. *Commonwealth v. Mason*, 637 A.2d 251, 254 (Pa. 1993). Violations, such as a search of a residence absent a search warrant supported by probable cause or exigent circumstances, are subject to the exclusionary rule. *Id.* at 254-56. Courts under the Pennsylvania Constitution must balance the "twin aims" of deterring police conduct, while safeguarding privacy of private citizens. *Id.* at 256. When the Commonwealth can demonstrate "allegedly tainted evidence was procured from an independent origin—a means other than the tainted sources—the evidence will be admissible." *Commonwealth v. Melilli*, 555 A.2d 1254, 1262 (Pa. 1989) (evidence was procured through execution of valid search warrant, which had nothing to do with warrantless forced entry).

In *Commonwealth v. Henderson*, the Pennsylvania Supreme Court found that there does not need to be "true independence" unless there is a presence of "intentional willful police misconduct." 47 A.3d 797, 804-05 (Pa. 2012). That case involved a second detective being tasked to investigate for probable cause for a search warrant of a blood drawl, due to potential issues with the first search warrant, that was later suppressed. *Id.* at 798-99. The second

detective was part of the same unit as the first, interviewed the first detective for information regarding the case, and used the first file in order to conduct an investigation for his finding of probable cause. *Id.* at 799-801. The court, in reaching their decision, recognized the "difference between egregious police misconduct and lesser infractions, such as carelessness, incompleteness, and/or oversight" as opposed to the conduct seen in *Mason* where police used a battering ram to illegally enter an individual's home. *Id.* at 803.

The taint here is the detention and search that resulted from Officer Gardner's initial stop of Defendant, when he informed Defendant he was not free to leave. This Court agrees that if any evidence was seized from Defendant or Defendant's vehicle as a result of that it would be suppressed. But, Agent Lamay arrived on scene due to what he heard across a scanner, and he was not directly contacted by Officers Gardner or Bell. He then spoke with Defendant and officers to learn that three males fled from Defendant's approved residence and that Officer Gardner had smelled marijuana. It was based on this information that Agent Lamay made the individual determination that a house check was necessary. Parole officers conducted the search without officers present, and once Agent Lamay found contraband he discontinued the search and notified Officer Bell, which was the basis of the Affidavit of Probable Cause for the search warrant executed on 340 Mountain Ave.

This Court is satisfied Agent Lamay's actions were of his own accord and not as a "stalking horse" for Officers Bell and Gardner. Once Agent Lamay arrived, he made the determination to conduct a safety sweep and then check of residence. Then when contraband was found the search was discontinued at which point Officer Bell was informed of the marijuana found and a search warrant was obtained. The marijuana found as a result of Agent Lamay search was sufficient justification for the obtaining of a search warrant and independent

of Officer Gardner's improper detention and search. Therefore the evidence will not be suppressed.

Whether the incorrect house number in the search warrant is a fatal error

Defendant argues the fact that the address was listed as 304 Mountain Ave. as opposed to 340 Mountain Ave. is a fatal flaw and therefore the evidence must be stricken as fruit of the poisonous tree. He relies on *Commonwealth v. Belenky*, 77 A.2d 483 (Pa. Super. 2001) in making this assertion. This is an incorrect reading of *Belenky*, which held the opposite. An incorrect address does not invalidate a search warrant supported by probable cause when the place to be searched can be specified and this is particularly true when the affiant assists in conducting the search, as was the case here. *Belenky*, 77 A.2d at 487; *See also Commonwealth v. Washington*, 858 A.2d 1255 (Pa. Super 2004) (reaffirming the holding in *Belenky*).

Conclusion

The Court finds that although the original stop and K9 sniff conducted by Officer Gardner was devoid of the required reasonable suspicion, the facts supporting probable cause for the search warrant were established through the independent actions of Agent Lamay acting as an independent source from the original detention. His actions were solely of his own accord, not that of a "stalking horse," and supported by reasonable suspicion of an ongoing parole violation. Therefore, there is no violation of Defendant's constitutional rights and the evidence resulting from the search of 340 Mountain Ave. shall not be suppressed.

ORDER

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

By the Court,

Nancy L. Butts, President Judge

cc: Nicole Ippolito, Esquire, ADA
Robert Hoffa, Esquire