

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CP-41-CR-872-2018
v.	:	
	:	
ZACHARY CHISM,	:	OMNIBUS PRETRIAL
Defendant	:	MOTION

OPINION AND ORDER

Zachary Chism (Defendant) was arrested on May 27, 2018 on one count of Possession of a Controlled Substance with the Intent to Manufacture or Deliver,¹ one count of Possession of a Controlled Substance,² and one count of Possession of Drug Paraphernalia.³ The charges arise from police conducting an area canvas for a report of criminal mischief at 35 Back St., Loyalsock Township, Lycoming County. Defendant filed this timely Pretrial Omnibus Motion on September 24, 2018. A hearing on the motion was held by this Court on October 26, 2018.

In his Omnibus Motion, Defendant challenges whether exigent circumstances existed to permit the police to enter Defendant's residence without obtaining a search warrant. Defendant contends as a result of this unlawful entry any evidence obtained as a basis of the search of his residence should be suppressed.

Background and Testimony

Trooper Jonathan Thompson (Thompson) of the Pennsylvania State Police testified on behalf of the Commonwealth. His testimony established the following. On May 27, 2018 at approximately 1:30 p.m., Thompson responded to a criminal mischief report of an individual shooting a glass window with a BB gun. He arrived in the area of Lot 35, 36, and 37 of Back

¹ 35 P.S. §780-113(a)(30).

² 35 P.S. §780-113(a)(16).

³ 35 P.S. §780-113(a)(32).

St. to conduct an area canvas by knocking on residences' doors and asking questions. As soon as Thompson exited the vehicle he smelled the pervasive smell of processed marijuana in the area. The smell led Thompson to initially believe someone was smoking a gravity bong in front of their fan. There were no observable individuals in the area of Lots 35, 36, and 37 at that time. As Thompson spoke with one individual (who later was determined to be the mother of Defendant), he could continually smell the marijuana coming from behind him, Lot 35. Thompson then approached the door of Lot 35, as he did he could smell the overwhelming scent of marijuana. He knocked on the door, without announcing himself as a police officer, and Defendant answered the door visibly intoxicated with the smell of burnt marijuana emanating from his breathe. Additionally, the smell of unburnt, processed, marijuana was emanating from within the residence. Initially Thompson asked Defendant about whether or not he had a BB gun, but quickly turned the conversation to "how much marijuana had he smoked." Thompson then asked if and how many individuals were within the residence. Defendant responded that his two friends and girlfriend were within the residence. At this time Thompson placed Defendant in handcuffs, informed him he was not free to leave, and that he was being detained. Thompson then had Defendant enter his residence, sit in the kitchen, and summoned the others into the kitchen and instructed them to sit on the kitchen floor as they also were not allowed to leave. At this point Thompson radioed for backup as he was the only trooper on the scene. It was after this that Defendant took Thompson to a rear room where a gravity bong and multiple smoking devices were present. Defendant gave permission to search the residence, as a result of the search eleven pounds of marijuana and assorted drug paraphernalia was recovered.

Whether Thompson's Detention of Defendant and Search of Residence was Permissible

Defendant alleges that the search of his residence was impermissible and lacked one of the recognized exigent circumstances to permit a warrantless search of the residence. As a result Defendant claims any evidence seized by the police should be suppressed. Defendant implores the Court to implement *Commonwealth v. Johnson*, 68 A.3d 930 (Pa. Super. 2013), as a road map when analyzing the present case.

Probable cause alone will not support a warrantless search or arrest within a residence absent exigent circumstances. *Commonwealth v. Govens*, 632 A.2d 1316, 1322 (Pa. Super. 1993). A warrantless search lacking both requirements, probable cause and an exigent circumstance, is a direct violation of both the Fourth Amendment of the United States Constitution and Article 1 § 8 of the Pennsylvania Constitution. *Commonwealth v. Gibbs*, 981 A.2d 274, 280 (Pa. Super. 2009). When evaluating exigent circumstances the following factors need to be considered:

(1) the gravity of the offense; (2) whether the suspect is reasonably believed to be armed; (3) whether there is a clear showing of probable cause; (4) whether there is a strong reason to believe that the suspect is within the premises being entered; (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended; (6) whether the entry is peaceable; (7) the timing of the entry; (8) whether there is hot pursuit of a fleeing felon; (9) whether there is a likelihood that evidence will be destroyed if police take the time to obtain a warrant; and (10) whether there is a danger to police or other persons inside or outside of the dwelling to require immediate and swift action.

Commonwealth v. Dean, 940 A.2d 514, 522 (Pa. Super. 2008).

In its opinion in *Johnson*, the Court analyzed multiple cases' application of the above stated factors. *Johnson*, 68 A.3d at 937-44. Two cases of particular note are *Commonwealth v. Demshock*, 854 A.2d 553 (Pa. Super 2003) and *Commonwealth v. Waddell*, 61 A.3d 198 (Pa. Super. 2012).

In *Demshock*, officers responded to an area for reports of vandalism and automobile theft. 654 A.2d at 554. While canvassing the area one of the officers witnessed individuals he believed to be teenagers consuming alcohol through a window. *Id.* Officers then called backup and one of them knocked on the door without identifying himself as a police officer and once it opened stepped into the residence. *Id.* The officers arrested the individuals for underage drinking and possession of marijuana. *Id.* at 555. The Pennsylvania Superior Court recognized that “police were not in hot pursuit of a fleeing felon, there was no indication that anyone was in danger, including the police or the partygoers, there was no reason to believe that the occupants of the apartment were armed, and the entry occurred at night.” *Id.* at 556. The Court determined that the exigency was created by the officers. *Id.* at 559. There was time to secure a search warrant because the party goers were unaware of the police’s presence. As such, police could not rely on a self-created exigency to justify a warrantless search of the residence. *Id.*

In *Waddell*, the following factual situation was presented:

Chief DeSimone stated that *because* he could not get Knight to commit his statement to paper, evidence he would have used to obtain a search warrant, he “felt we had to get up there, [and] possibly do a knock and talk.” Chief DeSimone, Officer Fusco, and Munhall officers Caterino and Trout then went to 314 West 12th Avenue. At some point in time after the traffic stop and before their arrival at the house, Fusco informed DeSimone that there was a possibility that an associate of Appellant had observed the traffic stop, and may have “alerted the occupants of 314 West 12th” Avenue. Officer Fusco approached the home from the rear alley as DeSimone and the Munhall officers approached the front door. DeSimone indicated that as he approached the home, “the odor of raw marijuana was prevalent. And the closer we drew to the house, the stronger the odor got.” DeSimone believed the odor was emanating from an open window near the front door. Chief DeSimone knocked on the door, receiving no response. He knocked again, following which he heard the sound of “slight movement.” Still, no one answered the door. DeSimone then knocked a third time and announced, “police, please open the door[.]” at which time “the movement got more profound.” DeSimone stated: “[a]t that point in time, with the loud movement, having the information that narcotics was [sic] involved, two suspects on the inside, we had no idea what at this point was transpiring on the other side of that door, really.” Simultaneously, Fusco radioed from the back of the house. DeSimone described the transmission as “excited” but “garbled.” DeSimone did not understand what was being said. Fusco radioed DeSimone again,

saying that there was some activity involving a person opening a window and jumping out at the rear of the residence.

61 A.3d at 209.

The Court again determined that the exigency was created by the officers' actions. *Id.* at 218. Specifically, “[o]nce the odor of marijuana was detected emanating from the residence, the threshold necessary to establish probable cause to obtain a search warrant was met.” *Id.* at 215. The Court has reaffirmed that even in light of the holding in *Kentucky v. King*, 563 U.S. 452 (2011), it “decline[s] to jettison long-standing Pennsylvania constitutional law that prohibits actual police-created exigencies to justify a warrantless arrest.” *Commonwealth v. Haynes*, 116 A.3d 640, 655 (Pa. Super. 2015).

The factors apply to the current case in the following manner. The offense of possession of a large amount marijuana is a serious offense and favors the Commonwealth. *Waddell*, 61 A.3d at 215. But, there was no reason to believe Defendant would be armed, and “[o]nce the odor of marijuana was detected emanating from the residence, the threshold necessary to establish probable cause to obtain a search warrant was met,” therefore there is clear showing of probable cause.⁴ *Id.* As in *Waddell*, “the instant case did not present a situation where a warrantless entry was necessary to prevent or stop an immediate threat of violence. Police were also not in hot pursuit of a felon whose felonious conduct had been directly observed by police.” *Id.* The entry was peaceable and during the day, which cuts in favor of the Commonwealth. As in *Demshock*, police presence was unknown to Defendant prior to Thompson knocking on the door, therefore the exigent circumstances of destruction of

⁴ Although Thompson testified that he did not believe there was probable cause sufficient for a search warrant until Defendant answered the door, Thompson’s “subjective belief at that time is not dispositive as to the question of whether probable cause existed.” *Waddell*, 61 A.3 at 215.

evidence and/or Thompson's safety concerns requiring him to handcuff Defendant and secure the residence is only created due to Thompson's actions. 854 A.2d at 559.

Thompson cannot create an exigency and then use it as a justification to effectuate an arrest and search of a residence. Thompson had probable cause to obtain and a search warrant when he knew the overwhelming smell of marijuana was coming from Lot 35. *See Waddell*, 61 A.3d at 215; *Johnson v. United States*, 333 U.S. 10, 13 (1948) ("If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character."). Also the contention that Thompson was at that point still investigating the criminal mischief complaint is overcome by the direct testimony he provided at the hearing.

Conclusion

This Court finds Thompson created the exigent circumstances of officer safety and/or destruction of the evidence by knocking on Defendant's door, when the requisite probable cause for a search warrant of the residence was already established. Therefore, the violation of Defendant's constitutional rights requires the resulting evidence be suppressed.

ORDER

AND NOW, this _____ day of November, 2018, based upon the foregoing Opinion, Defendant's Pretrial Omnibus Motion is hereby **GRANTED**. Accordingly, it is **ORDERED** and **DIRECTED** that all of the evidence seized by Trooper Thompson during the search of Defendant's residence in Loyalsock Township, is hereby **SUPPRESSED**.

By the Court,

Nancy L. Butts, President Judge

cc: Joseph Ruby, Esquire, ADA
Matthew Welickovitch, Esquire