

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CP-41-CR-1200-2018
v.	:	
	:	
JAMES CHOICE,	:	OMNIBUS PRETRIAL
Defendant	:	MOTION

OPINION AND ORDER

James Choice (Defendant) was arrested by the Williamsport Bureau of Police on July 15, 2018, on one count of Person Not to Possess a Firearm,¹ five counts of Manufacturing, Delivering, or Possessing with the Intent to Manufacture or Deliver a Controlled Substance,² three counts of Possession of a Controlled Substance,³ one count of Possession of a Small Amount of Marijuana,⁴ and one count of Possession of Drug Paraphernalia.⁵ The charges arise from police conducting a search warrant on Defendant's residence 681 Wildwood Boulevard, Williamsport, PA. Defendant filed an Omnibus Pretrial Motion on September 26, 2018 requesting suppression of the evidence yielded as a result of the search of the residence, severance of count one from the other counts, disclosure of any *Brady/Giglio* information, disclosure pursuant to Pa. R. Evid. 404(b), and reserving the right to additionally file. A hearing on the motion was conducted by this Court on December 6, 2018.

In his Motion to Suppress Defendant challenges the entry into his residence claiming the search warrant failed to allege the requisite probable cause, contends the search warrant is

¹ 18 Pa. C.S. § 6105(a)(1).

² 35 P.S. § 780-113(a)(30).

³ 35 P.S. § 780-113(a)(16).

⁴ 35 P.S. § 780-113(a)(31)(i).

⁵ 75 Pa. C.S. § 3743(a).

insufficiently particularized,⁶ and that police violated Pa. R. Crim. P. Rule 208 by not serving a copy of the search warrant and affidavit to Defendant until after the search was complete and Defendant was in custody, as a result Defendant claims any evidence unlawfully obtained should be suppressed.

Testimony

Officer Joshua Bell (Bell) of the Williamsport Bureau of Police testified on behalf of the Commonwealth. On July 15, 2018, Bell was operating an unmarked vehicle in area he described as “high in narcotics activity recently.” Search Warrant, 7/15/18 at 2. He based this knowledge on arrests and investigations he conducted in the area within the past three or four months. During his patrol, Bell observed Raymond Richards (Richards) walk north on Wildwood Boulevard before ultimately going onto the porch of 681 Wildwood Boulevard. Richards was known to Bell to be a crack/cocaine user and also what is known as a “hook,” or an individual that sells narcotics to satisfy their own drug use. Richards had taken confidential informants to that same residence to purchase controlled substances on two prior occasions, one in the end of April/early May and another in the end of May/early June. The Williamsport Bureau of Police had also “received information from concerned citizens regarding suspected narcotics activity involving the residence.” *Id.* Richards exited the residence approximately two minutes later, which in Bell’s experience and training is consistent with narcotic’s transactions.

⁶ The Court will not delve into the issue of specificity of the search warrant as the items that were to be seized were “any and all controlled substances, related drug paraphernalia and US currency as proceeds of narcotics sales.” Application for Search Warrant Affidavit of Probable Cause (Search Warrant), 7/15/18 at 2. The Pennsylvania Supreme Court has already held a search warrant seeking the seizure of “any controlled substances, any drug paraphernalia, and any records, documents or photos related to drug trafficking” is permissible and the search may occur anywhere within the residence where narcotics may be secreted, therefore the issue has been clearly decided and does not need to be discussed further. *Commonwealth v. Waltson*, 724 A.2d 289, 293 (Pa. 1998).

Based upon these observations Bell approached Richards on foot. When speaking with Richards, he showed Bell his hands and Bell immediately recognized the presence of crack cocaine on them. Richards was then taken into custody and searched, which yielded .6 grams of crack cocaine on his person. Once back to the station and mirandized Richards stated “he ordered \$40 worth of crack cocaine from ‘CJ’ and subsequently traveled to ‘CJ’s’ residence at 681 Wildwood Blvd. After entering, RICAHARDS provided ‘CJ’ with \$40 and in exchange was provided crack cocaine.” *Id.* Richards also gave a description of CJ to Bell. Based on Richards statement, his prior experiences and observations with Richards regarding the residence, and information received from concerned citizens’ in the vicinity, Bell applied for a search warrant of 681 Wildwood Boulevard. The purpose was for the search and seizure of “any and all controlled substances, related drug paraphernalia and US currency as proceeds of narcotics sales.” *Id.* Upon entry into the residence, the only individual present was Defendant, who matched the description of CJ given to Bell by Richards. Search of Defendant’s residence resulted in recovery of 28.6 grams of methamphetamine, 20 grams of crack cocaine base, materials for cooking/mixing crack cocaine, twenty-four suboxone strips, \$3,645, indicia of Defendant, a small amount of marijuana, paraphernalia for packaging and distribution, and a .40 caliber pistol. There was no paraphernalia for consumption present and all substances field tested positive. After locating the firearm during the search Bell applied for another search warrant specific to the firearm. The first search warrant was left at the residence and he was advised of it, but not given it. The second search warrant was given to him at a later date when the charges were already against him.

Whether the Requisite Probable Cause Was Established to Search the Residence

Defendant claims that police did not independently corroborate Richards's information and reliability and therefore probable cause was not sufficient to search the residence. When evaluating the probable cause of a search warrant this Court's determination is whether there was "substantial evidence in the record supporting the decision to issue a warrant" by giving deference to the issuing magistrate's probable cause determination and "view[ing] the information offered to establish probable cause in a common-sense, non-technical manner." *Commonwealth v. Jones*, 988 A.2d 649, 655 (Pa. 2010). Probable cause can be established by an informant's tip when "police independently corroborate the tip, or where the informant has provided accurate information of criminal activity in the past, or where the informant himself participated in the criminal activity. The corroboration by police of significant details disclosed by the informant in the affidavit of probable cause meets the *Gates* threshold." *Commonwealth v. Sanchez*, 907 A.2d 477, 488 (Pa. 2006). Probable cause is established by a "totality of the circumstances." *Commonwealth v. Gray*, 503 A.2d 921, 925 (Pa. 1985) (adopting *U.S. v. Gates*, 462 U.S. 213 (1983)). It is "not require[d] that the information in a warrant affidavit establish with absolute certainty that the object of the search will be found at the stated location, nor does it demand that the affidavit information preclude all possibility that the sought after article is not secreted in another location." *Commonwealth v. Forster*, 385 A.2d 416, 437-38 (Pa. Super. 1978).

Defendant directs the Court's attention to the holding in *Commonwealth v. Manuel*, 194 A.3d 1076 (Pa. Super. Aug. 23, 2018). In that case the officer met with a confidential informant, who advised him that within the past seventy-two hours he/she had been within a residence and marijuana was being grown and packaged for distribution inside. *Id.* at 1079. The

informant also advised the officer of the name of the individual within in the residence and gave a description of him. *Id.* Based on this information the officer applied for a search warrant. *Id.* The extent of the information provided to establish probable cause for the search warrant was that the informant had previously provided information, which led to one arrest pending conviction, and that the residence and vehicle, parked out front of the residence, were registered to someone with the name the informant gave the officer. *Id.* at 1082-83. The Court found the informant's reliability was not adequately established and therefore the warrant was not supported by probable cause. *Id.* at 1086-87.

The "totality of circumstances" in the present case provides much more to consider for a probable cause evaluation than what was provided in *Manuel*. First, Richards had participated in the criminal activity. *See Sanchez*, 907 A.2d at 488 ("police independently corroborate the tip, or where the informant has provided accurate information of criminal activity in the past, ***or where the informant himself participated in the criminal activity***") (emphasis added); *Commonwealth v. Luv*, 735 A.2d 87, 93 (Pa. 1999) ("The informant's participation in the criminal activity is a sufficient basis to give rise to probable cause."). Additionally, unlike the officers in *Manuel*, Bell has personal knowledge through past personal observations and experience with Richards and 681 Wildwood Boulevard, which allowed him to reach the conclusion that probable cause was established. Although it is not investigation that occurred after Richards confessed information to the police, such is not a requisite to establish separate investigative efforts. Bell testified that on two previous occasions Richards had walked north on Wildwood Boulevard, taken a confidential informant to 681 Wildwood Boulevard, and then exited shortly thereafter and the confidential informant would have narcotics. On this occasion Bell observed Richards walk north on Wildwood Boulevard, briefly enter the residence, and

after being stopped by Bell has crack cocaine on his hands and person. Bell's previous observations in conjunction with Richards statement are sufficient to establish adequate probable cause for application of a search warrant. Alternatively, Defendant claims the information Bell observed between the confidential informant and Richards is stale and therefore cannot establish probable cause. But staleness is defined as: "[T]he issuing officer is presented with evidence of criminal activity at some prior time, this will not support a finding of probable cause as of the date the warrant issues, *unless it is also shown that the criminal activity continued up to or about that time.*" *Commonwealth v. Shaw*, 281 A.2d 897, 899 (Pa. 1971) (emphasis added). When Bell stops Richards leaving 681 Wildwood Boulevard with crack cocaine on his hands and person, and then he later informs Bell he bought it from "CJ" inside, probable cause is refreshed and it is "shown that the criminal activity continued up to or about that time." *Id.* Lastly, the reports from "concerned citizens regarding suspected narcotics activity involving [the] residence," also weighs in favor of establishing probable cause. Search Warrant, 7/15/18 at 2; *see also Commonwealth v. Luton*, 672 A.2d 819, 823 (Pa. Super. 1996) (Probable cause for search of the residence was established based on one controlled buy and community reports of ongoing drug activity, because "neighborhood[s] are well-qualified to observe what is happening in their community, and should be supported in reporting drug activity to the police."). Based on the "totality of the circumstances" discussed above, the requisite probable cause was met.

Whether, Due to Police's Violation of Pa. R. Crim. P. Rule 208 Suppression, is Necessary

Defendant argues that because officers did not comply with Pa. R. Crim. P. Rule 208 the evidence seized must be suppressed under the exclusionary rule. Pa. R. Crim. P. Rule 208 states:

(A) A law enforcement officer, upon taking property pursuant to a search warrant, shall leave with the person from whom or from whose premises the property was taken a copy of the warrant and affidavit(s) in support thereof, and a receipt for the property seized. A copy of the warrant and affidavit(s) must be left whether or not any property is seized.

(B) If no one is present on the premises when the warrant is executed, the officer shall leave the documents specified in paragraph (A) at a conspicuous location in the said premises. A copy of the warrant and affidavit(s) must be left whether or not any property is seized.

Bell testified that the first search warrant pertaining to the search of the residence for drugs and drug paraphernalia was left at the residence, therefore the first search warrant did not violate Pa. R. Crim. P. Rule 208. The search warrant at issue is the second search warrant applied for by Bell after locating the firearm. Bell testified that he did not give this search warrant to Defendant until a few days later. This plainly violates subsection (B) requiring the search warrant to be left in a “conspicuous location,” but the Pennsylvania Supreme Court has held a violation under this chapter does not automatically require exclusion of evidence.

Commonwealth v. Mason, 490 A.2d 421, 424 (Pa. 1985). In *Commonwealth v. Musi*, the court found that where there is no evidence of “widespread and flagrant abuse” of Rule 208 a *per se* exclusion of evidence is inappropriate and “[t]herefore, the imposition of a sanction requiring the exclusion of evidence that results from a search where there has not been compliance with the rule must depend upon the relationship of the violation to the reliability of the evidence seized.” 404 A.2d 378, 384-85 (Pa. 1979). Specifically, probable cause was found “for the entry and search and there is no dispute that the rifle was in fact found on the premises described in the warrant and seized pursuant to that search. Thus, appellant's rights were not prejudiced by the officer's failure to fully comply with the mandates of the rule.” *Id.* at 385.

Although a violation of Rule 208 has occurred, the Rule was established for Defendant to have an inventory of what has been acquired from his residence. Pa. R. Crim. P. Rule 209 cmt. (“It

thus differs from the receipt required by Rule 208, which is for the personal records of those from whose possession or from whose premises property was taken.”). He is on notice of that fact and no prejudice has occurred, which would limit his defense or prejudice him personally, therefore exclusion of the evidence would be inappropriate. *See id.* at 384-85; *see also Commonwealth v. Watson*, 2015 WL 7076814, at *5 (Pa. Super. 2015) (although non-binding opinion, persuasive analysis in holding a technical violation of Rule 208 does not warrant suppression).

Whether the Firearms Charge Should be Severed from the Drug Charges

Defendant filed a Motion to Sever count one, Persons Not to Possess a Firearm, from the remainder of his charges based on prejudice. Joinder is permissible under Pennsylvania Rules of Criminal Procedure Rule 582:

(A) Standards

- (1) Offenses charged in separate indictments or informations may be tried together if:
 - (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
 - (b) the offenses charged are based on the same act or transaction.
- (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

Pa. R. Crim. P. 582(A)(1), (2).

Additionally a defendant may seek severance and “[t]he court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.” Pa. R. Crim. P. 583. When evaluating whether severance shall be granted the court should consider “whether the evidence of each of the offenses would be admissible in a separate trial for the other; whether such

evidence is capable of separation by the jury so as to avoid danger of confusion; and . . . whether the defendant will be unduly prejudiced by the consolidation of offenses.”

Commonwealth v. Collins, 703 A.2d 418, 422 (Pa. 1997). Prejudice can be determined through the following factors:

(1) Whether the number of defendants or the complexity of the evidence as to the several defendants is such that the trier of fact probably will be unable to distinguish the evidence and apply the law intelligently as to the charges against each defendant; (2) Whether evidence not admissible against all the defendants probably will be considered against a defendant notwithstanding admonitory instructions; and (3) Whether there are antagonistic defenses.

Commonwealth v. Tolassi, 392 A.2d 750, 753 (Pa. Super. 1978).

To be found guilty of count one the Commonwealth must provide evidence of a prior criminal conviction or convictions, which makes Defendant ineligible to possess a firearm. 18 Pa. C.S. § 6105(a)(1). Because evidence of prior crimes is inadmissible for the sole purpose of demonstrating criminal propensity, under Pa. R. Evid. Rule 404(B), “it is common practice for defense counsel to request severance of this charge from the charges presented to the jury to avoid any undue prejudice that could arise from the jury hearing evidence pertaining to a defendant's prior conviction.” *Commonwealth v. Cobb*, 28 A.3d 930, 931-32, fn. 3 (Pa. Super. 2011) (citing *Commonwealth v. Melendez-Rodriguez*, 856 A.2d 1278, 1283 (Pa. Super. 2004)). In this situation, the prior offenses that will be permitted to prove a required element of count one, would prejudice Defendant’s proceeding in his accompanying charges, which barring exception would be inadmissible under Pa. R. Evid. Rule 404(B)(1). Therefore the Motion for Severance of count one will be granted.

As for Defendant’s Motion to Disclose Existence of and Substance of Promises of Immunity, Leniency or Preferential Treatment and Complete Criminal History from the National Crime Information Center (“NCIC”) and/or the Pennsylvania Justice Network

("JNET"), Motion for Disclosure of Other Crimes, Wrongs, or Acts Pursuant to Pa. R. Evid. 404(b), and Motion to Reserve Right, the motions are noted but will not be decided at this juncture as it would be premature. This was discussed with the Commonwealth and defense counsel at the hearing on December 6, 2018.

ORDER

AND NOW, this _____ day of December, 2018, based upon the foregoing Opinion, the Court rules as follows:

1. Defendant's Motion to Suppress Physical Evidence is hereby DENIED.
2. Defendant's Motion to Sever count one is hereby GRANTED. It is ordered and directed that the firearms charge shall be tried separately from the remaining charges on the criminal information.
3. Defendant's Motion to Disclose Existence of and Substance of Promises of Immunity, Leniency or Preferential Treatment and Complete Criminal History from the National Crime Information Center ("NCIC") and/or the Pennsylvania Justice Network ("JNET"), Motion for Disclosure of Other Crimes, Wrongs, or Acts Pursuant to Pa. R. Evid. 404(b), and Motion to Reserve Right are noted, but will not be addressed at this time.

By the Court,

Nancy L. Butts, President Judge

cc: Neil Devlin, Esquire, ADA
Edward J. Rymysza, Esquire