

COMMONWEALTH : **No. CP-41-CR-0001086-2018**
:
:
vs. :
: **Opinion and Order re:**
BYRON MARTINEZ : **Defendant's Omnibus Pretrial Motion**

OPINION AND ORDER

On March 30, 2017, Defendant was processed by the Lycoming County Adult Probation Office (APO) for parole supervision to be followed by a term of probation. While waiting to see a probation officer, he was given the written standard conditions to read. He was then processed by Denise Gee who asked Defendant if he had any questions regarding any of the conditions. She then reviewed and explained each condition to him and asked again whether he had any questions or concerns. Defendant subsequently signed the conditions. Among those conditions, Defendant agreed that he would abide by any verbal instructions of his probation officer (Commonwealth's Exhibit 5, Rule 1), that he understood that he may be required at any time to undergo a warrantless search with reasonable suspicion of his person or residence by his probation officer (Commonwealth's Exhibit 5, Rule 2) and that he would comply with any conditions imposed by his probation officer. (Commonwealth's Exhibit 5, Rule 11).

Defendant is charged by Information filed on July 27, 2018 with possession with intent to deliver approximately 170 grams of cocaine and related charges. Before the court is Defendant's Omnibus Pretrial Motion filed on August 29, 2018. The omnibus motion includes a motion to suppress, petition for writ of habeas corpus, motion to compel, motion for 404 (b) disclosure, and a motion to reserve right. The hearing on Defendant's Omnibus Pretrial

Motion was held before the court on October 25, 2018. Prior to the hearing, the parties submitted written briefs.

On May 17, 2018, Luke Ellison was employed and on duty for the Lycoming County Adult Probation Office (APO). He was partnered with APO Officer Sara Johns. At 8:00 p.m., he and Officer Johns were conducting a random field visit at Defendant's approved residence, 641 Fourth Avenue, Williamsport, PA.

Officer Ellison parked his vehicle a block or two away from the residence. He walked up to the front outdoor stairs onto the front porch of the residence. He knocked on the front door but no one answered. He continued knocking and peered through a torn window blind on the front door. He observed an adult white female walking toward the door. Expecting the female to open the door, Officers Ellison and Johns waited for about five to ten seconds but no one answered.

Because no one answered the door, Officer Ellison started knocking louder and more frequently. Officer Johns moved to the back of the residence. Officer Ellison kept peering through the window blind and eventually saw three black males come from the kitchen area, two of whom were then standing at the bottom stairs of the staircase going from the first floor to the second floor, and the third, Defendant, standing on a landing at the bottom of the stairs within a few feet of the other two. Officer Ellison continued "pounding" on the door announcing his presence as a probation officer.

He could not hear what the individuals were saying but they appeared to be arguing. Defendant was waving his arms in an outward wing type motion. Defendant was dressed in a white t-shirt and black athletic pants. One of the other males was holding a lunch pail/purse object. The object appeared to be of a soft material, dark black and approximately 12

inches wide and 14 inches high. Soon all three as well as the female went up the stairs out of view.

Officer Ellison continued knocking but in a more aggressive manner directing the residents to open the door and announcing the presence of probation officers. He also contacted County Communication for both police and additional APO backup.

Approximately three to five minutes passed. Backup arrived. Expecting to soon breach the door, Officer Ellison observed Defendant coming down the stairs and toward the front door. Defendant was wearing only a towel around his waist and appeared to be “a little wet.” Officer Ellison again identified himself. Defendant opened the door. Officer Ellison as well as Officer Stevens and Corporal McGee of the Williamsport Bureau of Police entered the residence. The police officers entered as backup. Officer Ellison questioned Defendant as to why he did not open the door. Defendant replied that he did not know “it was you.” Officer Ellison also asked who else was in the house to which Defendant responded he didn’t know. Defendant was directed to have a seat on the living room couch.

Officer Ellison went to the base of the stairs, announced his presence and directed anyone who was upstairs to come downstairs. He then “cleared” the dining room and kitchen and opened the rear door letting Officer Johns into the residence. The police officers remained with Defendant. Officer Ellison returned to the base of the stairs and again directed the others to come downstairs. Three black males and a white female came down the stairs. He recognized two of the males as being previously with Defendant on the stairs when the agents first arrived.

Officer Ellison and Corporal McGee cleared the remainder of the residence for other individuals. None were found. All five individuals who were in the residence were seated

in the living room. Officer Ellison took Defendant into the dining room to have a “one on one” conversation. Officer Ellison asked Defendant if he and the police could search the house and Defendant agreed.

Officer Ellison advised Defendant that he would get Defendant some clothes to get dressed. Officer Ellison went upstairs to Defendant’s bedroom. Officer Ellison picked up Defendant’s white t-shirt and black athletic pants off of the floor. Defendant was previously wearing these items when Officer Ellison first saw him.

For safety and security purposes, Officer Ellison searched the pants and found in one pocket U.S. currency in a clear sandwich bag with a white powdery substance suspected to be cocaine. In the other pocket, Officer Ellison found a cell phone, set of keys and a bank/credit card with Defendant’s name on it. He placed these items on the bed, took photographs, notified Corporal McGee of what he found and stopped any further search. Officer Ellison went downstairs with Defendant’s clothes, allowed Defendant to get dressed and took Defendant into custody on an APO detainer. Probation Officers Lucas Mahaffey and Christina Lepley transported Defendant to the Lycoming County Prison. Meanwhile, Probation Officers Ellison and Johns secured the residence while police obtained a search warrant.

According to Officer Ellison, the subsequent search of the residence uncovered the following items in the following places: empty sandwich bags behind the radio in the living room, and a black lunchbox containing several bags of suspected cocaine in a grey tote in a third-floor bedroom closet.

Officer Stevens of the Williamsport Bureau of Police was dispatched to the residence at 641 Fourth Avenue to assist APO with a “check on a client.” After he arrived, he

observed Defendant coming down the stairs and opening the front door. He confirmed that Defendant gave APO consent to search and that cash and suspected cocaine were found in the clothes “on the floor in [Defendant’s] bedroom that [APO] observed [Defendant] wearing when he ran from the kitchen up the steps.”

Subsequently, within less than an hour, Officer Stevens obtained and executed a search warrant. Among Officer Stevens’ observations of note were the following: the burner on the kitchen stove was still on; the kitchen sink was running; three plastic bowls were in the sink; cocaine was recovered from Defendant’s pants along with \$983.00 in cash; a red and black Igloo cooler found in a third floor bedroom closet was found containing a digital scale, 18 clear plastic bags - some of which contained a white powdery substance, a clear plastic bag containing 51.3 grams of suspected crack cocaine, a clear plastic bag containing 36.69 grams of crack cocaine, a clear plastic bag containing 5.67 grams of crack cocaine, a clear plastic bag containing 17.1 grams of powder cocaine, a clear plastic bag containing 22.68 grams of cocaine, and a bottle of a cutting agent known as Inositol. Also found were a drawstring bag that contained plastic “trashcans” commonly used to package crack cocaine, a small plastic container with a digital scale, a plastic bag containing four pink pills, and a grey pill subsequently identified as Oxycodone which were found in a coat in the dining room. Also found were a cutting agent in the kitchen and another \$1,726.00 in cash found in a coat in the dining room. Officer Stevens also observed that the bags “that the crack cocaine were in” were still wet indicating that they “just came off the stove.”

He opined as an expert on narcotics that, under the totality of the circumstances, the crack was “just basically cooked” and possessed with the intent to deliver. He conceded, however, that there were three other males in the house and at least one other female.

Defendant first claims in his motion to suppress that the items located in the residence must be suppressed for three reasons. First, APO did not have reasonable suspicion to enter the residence. Second, APO did not have reasonable suspicion to search Defendant's clothing. Lastly, Defendant did not voluntarily consent to any search whatsoever.

The law assumes that an individual under probation or parole supervision is more likely than an ordinary citizen to violate the law; accordingly, reasonable suspicion, not probable cause, is sufficient to authorize a search. *Commonwealth v. Murray*, 174 A.3d 1147 (Pa. 2017), citing *Commonwealth v. Curry*, 900 A.2d 390, 394 (Pa. Super. 2006).

A parole officer's search of a parolee or his property will be deemed reasonable if the totality of the circumstances demonstrate that the parole agent had a reasonable suspicion that the parolee had committed a parole violation, and that the search was reasonably related to the parole agent's duty. *Commonwealth v. Gould*, 187 A.3d 927, 935 (Pa. Super. 2018) (citing *Commonwealth v. Williams*, 547 Pa. 577, 692 A.2d 1031, 1036 (1997)). Reasonable suspicion exists where the officer is able to articulate specific observations which, in conjunction with reasonable inferences derived from those observations, lead him reasonably to conclude, in light of his experience, that the parolee committed a violation of supervision or that criminal activity was afoot and that the person he stopped was involved in that activity. *Id.*

The Commonwealth appears not to contest Defendant's assertion that reasonable suspicion was required in order for Officer Ellison to enter Defendant's residence despite the fact that it was a routine and random field visit. The Commonwealth asserts, however, that at the time of the entry, Officer Ellison possessed the requisite reasonable suspicion. The court agrees.

As a condition of supervision, Defendant agreed to comply with conditions imposed by his probation officer. The evening in question, he was required to open his door and allow the officers in so they could speak with him and conduct a home check.

Clearly, Officer Ellison possessed reasonable suspicion that Defendant was not complying with this condition. Officer Ellison observed Defendant standing at the bottom of the stairs with two other adult individuals. They appeared to be discussing something. Defendant actually gestured and looked at the front door while Officer Ellison was pounding on it, announcing the presence of APO and requesting Defendant to open the door. It appeared to Officer Ellison that Defendant heard Officer Ellison's request. Seemingly ignoring Officer Ellison, Defendant and all of the other individuals went upstairs, failing to comply with Officer Ellison's directives.

At least three to five minutes went by. Officer Ellison continued knocking but more aggressively. He continued to announce APO's presence. He sought police and APO backup. He was readying himself to breach the door.

Defendant then appeared down the stairs without the clothes he was wearing but instead only a towel around his waist and somewhat wet, pretending as if he had just taken a shower. This conduct clearly evidenced consciousness of guilt.

At this point, Officer Ellison entered the premises having reasonable suspicion that Defendant had violated a condition of parole by not answering the door as directed. As well, the court concludes that Officer Ellison had reasonable suspicion to believe that criminal activity was afoot.

Defendant and the two other males came from the kitchen at the same time after APO arrived. Given that the female entered the living room near the door, ignored the officers

and then exited to the area of the kitchen, a reasonable inference can be made that the female went to the kitchen and informed Defendant and others that APO was present and wanted to enter the premises. Shortly thereafter, all three male adults and the female exited the kitchen, with one of the males in possession of a container big enough to store or house controlled substances or even handguns. They appeared to be arguing or discussing something. A reasonable inference can be drawn that Defendant and others were clearly ignoring APO at the door and discussing what to do with the contents of the container. Despite the repeated knocking, everyone went upstairs taking the container with them. A reasonable inference can be made that they were attempting to conceal and/or hide the container from APO. Defendant then returned downstairs after three to five minutes dressed only in a towel around his waist and somewhat “wet.” Given that Defendant had been wearing clothes just minutes earlier, a reasonable inference can be made that Defendant exhibited consciousness of guilt by pretending to have taken a shower and not hearing APO at the door.

Next, Defendant contends that the items found in the house must be suppressed because he did not voluntarily consent to the search. Officer Ellison possessed reasonable suspicion, though, that Defendant violated a condition of supervision and/or was involved in criminal activity; therefore, he legally could have searched Defendant’ clothing as well as the entire house. However, he only searched Defendant’s clothing which he was legally entitled to do.

Alternatively, the court will address Defendant’s consent issue. Defendant argues that he merely acquiesced to the probation officer’s authority and his consent to search was not voluntary. The Commonwealth argues that Defendant’s bald accusation that his consent to search was not voluntary comes with no support.

Once the initial commotion of the entry stopped, Officer Ellison and Defendant went into the kitchen. At Officer Ellison's request, Defendant consented to a search. For a consent to be voluntary, it must be the product of an essentially free and unconstrained choice. *Commonwealth v. Valdivia*, 9 MAP 2017, 2018 WL 5019769, *4 (Pa., Oct. 17, 2018). The Commonwealth established that Defendant's consent was voluntary. It was not pressured, coerced, threatened or intimidated.

Defendant's next motion consists of a petition for writ of habeas corpus. Defendant asserts that the Commonwealth has failed to prove for prima facie purposes that he possessed the "alleged crack in the Igloo cooler." Defendant argues that "absent pure speculation, there was insufficient evidence that he constructively possessed those drugs and the charges against him must be dismissed."

A defendant may challenge the sufficiency of the evidence presented by the Commonwealth pretrial through the filing of a petition for writ of habeas corpus. *Commonwealth v. Predmore*, 2018 PA Super 313, 2018 WL 6186215, *2 (Nov. 27, 2018). The burden of the Commonwealth at this stage is to set forth a prima facie case of Defendant's guilt. *Commonwealth v. Nieves*, 876 A.2d 423, 424 (Pa. Super. 2005). A prima facie case exists when the Commonwealth produces evidence of each of the material evidence of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense. *Id.*

The evidence, if presented at trial and accepted as true, must be such that the trial judge would be warranted in permitting the case to be decided by the jury. *Id.* (citing *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001)); see also *Predmore, id.* The evidence must be read in a light most favorable to the Commonwealth and inferences

reasonably drawn from the evidence which would support a verdict of guilty must be given effect. *Nieves, id.*

When considering a challenge to sufficiency of evidence, any question of doubt is for the trier of fact, unless the evidence is so weak and inconclusive that as a matter of law no probability can be drawn from the combined circumstances. *Commonwealth v. Kirkland*, 831 A.2d 607, 610 (Pa. Super. 2003).

There is no dispute between the parties that in order for Defendant to be convicted of possession with intent to deliver (PWID) with respect to the items found in the cooler, the Commonwealth would need to prove possession. Possession of a controlled substance can be proven by showing actual possession which is something found on a defendant's person or by showing the defendant constructively possessed the drug. *Commonwealth v. Macolino*, 469 A.2d 132, 134 (Pa. 1983).

Because the cooler and its contents were located in a third-floor bedroom and not on Defendant's person, the Commonwealth has the burden of proving that Defendant had constructive possession of the cooler and contents where they were found. Where a defendant is not in actual possession of prohibited items, the Commonwealth must establish that the defendant had constructive possession to support a conviction. *Commonwealth v. Parrish*, 191 A.3d 31, 36 (Pa. Super. 2018).

Constructive possession of a controlled substance is the ability to exercise conscious dominion over the substance: the power to control it, and the intent to exercise that control. *Macolino, id.* All of these elements may be inferred from the totality of the circumstances as well as circumstantial evidence. *Id.* "In other words, the Commonwealth must establish facts from which the trier of fact can reasonably infer that the defendant exercised

dominion and control over the contraband at issue.” *Parrish*, at 37. Furthermore, more than one individual may be found to have joint constructive possession of a controlled substance.

Macolino, id.

For prima facie purposes, the Commonwealth has established constructive possession. The Commonwealth has presented sufficient facts which read in a light most favorable to them, established that Defendant probably constructively possessed the items in the Igloo cooler.

Defendant was in close proximity to the cooler as it was brought out from the kitchen to the stairs and then upstairs. While in close proximity and while APO agents were knocking on the door requesting to enter, Defendant and two others were having a discussion or argument. Defendant along with the others and while still in close proximity to the cooler proceeded up the stairs together essentially ignoring the APO commands. Three to five minutes passed between the time the cooler was brought upstairs until Defendant returned down the stairs. Enough time had passed for the cooler to be hidden. In fact, the cooler was found secreted in a third-floor bedroom closet of a residence which was Defendant’s approved residence for supervision purposes.

Additionally, items were found in the kitchen, a common area from which Defendant was first observed exiting, which were consistent with cooking cocaine. These items included three plastic bowls. Observations made about the kitchen were also consistent with cooking cocaine. The burner on the stove was still on and the kitchen “sink was running.” As well, a cutting agent was found in the kitchen.

The contents of the cooler also had a reasonable connection with the items found in the kitchen. A cutting agent was found in the cooler. Four plastic bags containing

cocaine or crack which were still “wet” were found in the cooler. Officer Stevens opined that these items appeared to have just come off of the stove. A reasonable inference is that Defendant and his cohorts were cooking the cocaine in the kitchen, were interrupted by APO, put everything away as best as possible, and then secreted the cocaine upstairs.

Other items were located in the residence as well as in Defendant’s clothing supporting the inference that Defendant exercised dominion and control over the contents of the cooler. Cash was located in Defendant’s pants, in a coat found in the dining room, and in the cooler. Digital scales were found both in a different coat found in the dining room and the cooler. Plastic storage baggies or containers were found in a coat from the dining room, behind a radio in the living room and in the cooler. Cocaine was found in Defendant’s pants, as well as in large amounts in the cooler.

Finally, Defendant’s conduct demonstrated a consciousness of guilt. Specifically, Defendant not only hid from APO but also gave a false statement when questioned by Officer Ellison. As the standard jury instructions aptly note, generally when a crime has been committed and a person thinks he may be accused of committing it and that person hides and/or gives false statements when questioned by law enforcement, such concealment or false statements are circumstances tending to prove the person is guilty. Pa.SSJI 3.14 (Crim), 3.15 (Crim).

Unlike what Defendant argues, he was not merely present. The circumstantial and direct evidence are beyond pure “supposition”, guess work or speculation. It is not so weak or inconclusive that as a matter of law no probability can be drawn that Defendant constructively possessed the items in the cooler. In light of this finding, the court need not

address the Commonwealth's alternative argument that Defendant is prima facie liable as an accomplice.

As to Defendant's motion for the disclosure of promises or immunity, said motion is granted.

As for Defendant's motion for disclosure of Rule 404 (b) evidence, said motion shall be granted. As for Defendant's motion to reserve right and file additional motions if necessary, said motion shall be granted in part.

ORDER

AND NOW, this ___ day of December 2018 following a hearing, argument and the submission of written briefs, Defendant's motion to suppress is **DENIED** and Defendant's petition for habeas corpus is **DENIED**.

Defendant's motion to compel disclosure is **GRANTED**. Within thirty (30) days of today's date, the Commonwealth shall provide to Defendant, the existence of and substance of promises of immunity, lenience or preferential treatment as well as the complete criminal history for any and all witnesses the Commonwealth intends to call at trial. This shall be a continuing obligation on behalf of the Commonwealth.

Defendant's motion for rule 404 (b) evidence is **GRANTED**. Within thirty (30) days of today's date, the Commonwealth shall provide to Defendant a notice of all 404 (b) evidence that the Commonwealth intends to introduce at trial in this matter.

Finally, with respect to Defendant's motion to reserve right, said motion is **DENIED** to the extent that the motion would address any evidence or information provided to Defendant prior to the filing of his motion. Within thirty (30) days of receipt of any additional

information including any discovery, Defendant may file a supplemental omnibus pretrial motion.

By The Court,

Marc F. Lovecchio, Judge

cc: Edward J. Rymza, Esquire
Neil Devlin, Esquire, ADA
Gary Weber, Lycoming Reporter
Work File