

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH OF PA**

**vs.**

**ANTON McCULLOUGH,  
Defendant**

**:**

**: No. CR-600-2017**

**:**

**:**

**: Motion to Suppress**

**OPINION AND ORDER**

Defendant is charged by Information filed on April 21, 2017 with possession with intent to deliver, possessing instruments of a crime and disorderly conduct.

Pursuant to testimony obtained during a December 28, 2017 hearing on Defendant's Motion to Suppress, Officer Joshua Bell of the Williamsport Bureau of Police was on patrol on March 10, 2017 and at approximately 1:30 p.m. he stopped a Chevy Cobalt automobile for a traffic violation. The stop occurred on West Fourth Street near Cady's News Stand.

Immediately following the stop, Defendant jumped out of the backseat and confronted Officer Bell. As a result of Defendant's conduct, statements and refusal to abide by Officer Bell's instructions, Defendant was placed under arrest for disorderly conduct. Defendant was arrested at approximately 1:40 p.m., ten minutes after the stop.

Upon being arrested, Defendant was secured in handcuffs and placed in the backseat of the patrol unit. Defendant had previously thrown his wallet and two cell phones on the ground. After Defendant was placed in the backseat of the patrol unit, these items were seized at the scene and transported with Defendant to police headquarters at Williamsport City Hall.

At City Hall, the wallet and other items seized not only from Defendant but from the driver, were secured, searched and carefully photographed. Although Officer Bell was not certain, he believes that the items were secured, searched and photographed by other officers while he was questioning the driver.

Following his questioning of the driver, Officer Bell viewed the seized items and suspecting that there may be controlled substances hidden in the case of the phone, peeled the rubber backing off one of Defendant's phones and found two bags of suspected Fentanyl. The baggies field-tested positive for Fentanyl. While he was not at all certain, Officer Bell estimated that the pictures of the seized items were taken within an hour of Defendant's arrest and that shortly thereafter, after completing his questioning of the driver, he would have further searched the phone.

Defendant seeks suppression of the Fentanyl recovered from his cell phone. Defendant argues that the search of the cell phone exceeded the scope of a permissible search incident to an arrest. More specifically, Defendant argues that the search was not substantially contemporaneous with the arrest or confined to the immediate vicinity of the arrest. Indeed, Defendant argues that there were two searches and that the "second search of the phone" was unconstitutionally impermissible.

The evidence, while not entirely specific, proves by a preponderance of the evidence that the defendant was arrested at approximately 1:40 p.m. and that the items within his immediate control which he discarded on the scene near him, were immediately seized and taken to City Hall. The initial search of Defendant's wallet and phone occurred within approximately one hour of Defendant's arrest at City Hall and not in the vicinity of where Defendant was arrested, on West Fourth Street near Cady's News Stand. The evidence further

proves that the phone was further searched and/or searched a second time in a different manner by Officer Bell over an hour after the defendant was arrested. This subsequent search also occurred at City Hall and not in the vicinity of where Defendant was arrested.

Relying on the Supreme Court decision in *Commonwealth v. Wright*, 560 Pa. 34, 742 A.2d 661 (1999), Defendant argues that the warrantless search of his phone was not valid because it was not substantially contemporaneous with his arrest or confined to the immediate vicinity of his arrest.

*Wright*, however, is not only factually distinguishable but does not accurately set forth the law which applies under the circumstances of this case.

In *Wright*, at approximately 11:55 p.m., the Pennsylvania State Police received a radio dispatch for a shooting at the Wright residence. When the troopers arrived, they observed evidence of a shooting. The troopers eventually went into the residence, ordered Wright out of the residence, handcuffed him and took him into custody.

At approximately 1:04 a.m., upon being questioned, Wright admitted that he had used a firearm in the shooting and that the firearm was in his residence. The police maintained the security of the residence until another trooper arrived at approximately 1:40 a.m. At that time, the troopers entered the residence, searched it and discovered the firearm.

In the lower court, Wright moved for suppression of the firearm noting that it was obtained from his residence without a search warrant. A divided panel of the Superior Court affirmed the trial court. While the majority did not address the propriety of the search arguably being incident to a lawful arrest, Judge Kelly in a concurring opinion stated that in his view the warrantless search was permissible as incident to a lawful arrest.

The Supreme Court reversed and remanded the case for a new trial. With respect to the propriety of the search as being incident to a lawful arrest, the Court noted that it could only be valid if the search of the home was substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest. The Court noted that Wright had been in custody for over an hour and that the search was conducted inside the home instead of outside the home where defendant was arrested.

The issue in this case does not concern a search of Defendant's home or even the automobile that he was riding in. Rather, the search in this case concerns items that were on Defendant's person or which Defendant removed from his person and discarded on the ground in his immediate vicinity while he was being detained or arrested by the police.

Once a suspect is lawfully arrested, the officer is permitted to search the arrestee and the immediate area in which the arrestee was initially detained. *Commonwealth v. Taylor*, 565 Pa. 140, 771 A.2d 1261, 1271 (2001)(scope of a search incident to arrest extends not only to the arrestee's person but also to into the area within the arrestee's "immediate control").

One of the two historical rationales permitting the search incident to an arrest exception to the warrant requirement is the need to preserve evidence for later use at trial. *Id.*

Contrary to what Defendant claims, the law with respect to items seized from a defendant incident to an arrest may be searched at a later time. The courts have consistently held that once an accused has been lawfully arrested and is in custody, anything that was subject to search and seizure at the time and place of his arrest may be lawfully searched without a warrant, even after a substantial amount of time has lapsed following the defendant's arrest. *United States v. Edwards*, 415 U.S. 800, 803-804 (1974); *Commonwealth v.*

*Stallworth*, 566 Pa. 349, 781 A.2d 110, 116-117 (2001); *Commonwealth v. Ventura*, 975 A.2d 1128, 1139 (Pa. Super. 2009); *Commonwealth v. Guzman*, 612 A.2d 524, 526-527 (Pa. Super. 1992).

Thus, in this case, the police lawfully seized the cellphone and were lawfully permitted to search it not only at first when it was photographed but again when Officer Bell removed the rubber backing.

**ORDER**

**AND NOW**, this \_\_\_\_ day of January 2018, following a hearing and argument, for the reasons set forth above, Defendant's Motion to Suppress the items recovered from Defendant's cellphone is **DENIED**.

BY THE COURT,

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Marc F. Lovecchio, Judge

cc: Scott Werner, Esquire ADA  
Julian Allatt, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work File