

**COMMONWEALTH** : **No. CP-41-CR-0001976-2017**  
:   
:   
**vs.** :   
: **Opinion and Order re:**  
**TYRONE SIMS** : **Defendant's Omnibus Pretrial Motion**

**OPINION AND ORDER**

Defendant was charged by Information filed on December 15, 2017 with possession with intent to deliver and related counts. Defendant was arraigned on December 18, 2017 at which time he pled not guilty and his case was placed on the March 6, 2018 pretrial list. Call of the List was scheduled for March 20, 2018. On February 9, 2018, Kirsten Gardner of the Lycoming County Public Defender's office entered her appearance on behalf of Defendant. Subsequently, the parties filed various motions which were heard and decided by the court. Defendant filed a motion for return of property on March 15, 2018. The Commonwealth filed a Motion to Consolidate on March 27, 2018.

On May 9, 2018, Aaron Biichle, Esquire was appointed as conflicts counsel to represent Defendant.

By Order of Court dated May 17, 2018, the court granted the Commonwealth's motion to consolidate. The Informations under 1928-2017, 1976-2017 and 2038-2017 were consolidated for trial purposes.

The case was not reached during the March trial term and was next set for Call of the List on May 22, 2018. At Defendant's request, it was continued to the July 31, 2018 Call of the List. On June 25, 2018, Defendant filed a Petition for a Nebbia Hearing in connection with Defendant's bail. A hearing was held on August 9, 2018 and the Nebbia hold was lifted.

The case had not been reached at this point and was placed on the Call of the List for September 25, 2018. Defendant sought and obtained a continuance to the January 15, 2019 Call of the List.

Before the court is Defendant's Omnibus Motion Nunc Pro Tunc filed on Defendant's behalf by Attorney Biichle on July 30, 2018. The court heard argument on the timeliness issue on September 18, 2018.

Defendant's omnibus motion includes a motion to suppress physical evidence, a motion to disclose promises and agreements of immunity, a motion for disclosure of Rule 404 (b) evidence and a motion to reserve right. The motion filed on July 30, 2018 is facially untimely.

Rule 579 of the Pennsylvania Rules of Criminal Procedure governs the timeliness of an omnibus pretrial motion. Specifically, it must be filed "within thirty (30) days after arraignment unless opportunity therefore did not exist or the defendant, or defense attorney, or the attorney for the Commonwealth was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown." Pa. R.Crim.P. 579(A).

Rule 581 of the Pennsylvania Rules of Criminal Procedure governs the timeliness of suppression motions. Unless the opportunity did not previously exist, or the interest of justice otherwise require, a suppression motion must be made in an omnibus pretrial motion. If a timely motion is not made, the issue of suppression is deemed waived. Pa. R. Crim. P. 581(B).

Defendant was arraigned on December 18, 2017. At the time of Defendant's arraignment, he was proceeding pro se. See Order of December 18, 2017 by President Judge Nancy L. Butts.

Clearly, Defendant's omnibus pretrial motion was not filed within thirty (30) days of December 18, 2017. In fact, it was filed 195 days late.

Attorney Biichle was appointed as conflicts counsel on May 9, 2018. He did not file the motion, however, until July 30, 2018, 83 days after he was appointed.

At the argument in this matter, Defendant asserted that his omnibus motion should be heard in the interests of justice. A judge may excuse a defendant's tardy presentation of a suppression motion when required in the interests of justice. *Commonwealth v. Johonson*, 844 A.2d 556, 561 (Pa. Super. 2004); *Commonwealth v. Micklos*, 672 A.2d 796, 802 (Pa. Super. 1996).

In asserting that the motion should be heard in the interests of justice, Defendant makes several arguments. First, Defendant argues that in lieu of litigating an omnibus pretrial motion, he attempted to negotiate a global plea agreement. The parties were not able to do so. He next argues that the discovery was not provided to him until shortly before the motion was filed. The Commonwealth conceded that no discovery was sent because defendant never requested such. The Commonwealth's claim, however, is belied by the record. On January 23, 2018, Defendant filed a request for pretrial discovery. Lastly, Defendant argues that the motion to suppress has arguable merit.

The court agrees that the interests of justice support the motion being heard at this time. First, the motion can be heard and decided well before the Call of the List which is scheduled for January 2019. Secondly, counsel's actions were reasonable in attempting to

negotiate a global resolution. The actions are consistent with criminal litigation in Lycoming County. Furthermore, this court is aware of circumstances where the Commonwealth has refused to tender an offer or in fact withdrawn an offer if pretrial motions were filed.

Further, it appears that the Commonwealth failed to timely respond to Defendant's request for discovery filed in January. Discovery was not produced until Attorney Biichle actively pursued such.

Finally, Defendant's Motion does have arguable merit. According to the Affidavit of Probable Cause, the arresting officer was following the defendant who was driving a vehicle. The vehicle that the defendant was driving stopped at an intersection. The arresting officer claimed that by not signaling at least 100 feet from the turn at the intersection, the defendant committed a traffic violation. According to Pennsylvania law, if a vehicle is traveling at less than 35 mph, it needs to use its turn signal at least 100 feet before making a turn. 75 Pa. C.S. §3334(b). An argument can be made, however, that the arresting officer lacked probable cause to stop the vehicle, because Defendant's vehicle was stopped at an intersection and not moving. An argument can be made that the applicable provision of the statute is section 3334(a), which only requires that a turn signal be on prior to entering the traffic stream. See for example, *Commonwealth v. Slattery*, 139 A.3d 221 (Pa. Super. 2006) (changing lanes did not constitute turning within meaning of statute).

### **ORDER**

**AND NOW**, this \_\_\_ day of October 2018, the Court **GRANTS** Defendant's nunc pro tunc request. The hearing and argument on Defendant's motion shall be held on

**December 6, 2018 at 9:00 a.m. in Courtroom No. 4** of the Lycoming County Courthouse.

One hour has been allocated for this hearing.

By The Court,

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Marc F. Lovecchio, Judge

cc: Aaron S. Biichle, Esquire  
Kenneth Osokow, Esquire, District Attorney  
Gary Weber, Lycoming Reporter  
Work File