

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :  
 :  
 vs. : No. CR-1191-2018  
 :  
 GARREN BIGELOW, :  
 :  
 Defendant : Motion to Suppress

**OPINION AND ORDER**

Defendant is charged with numerous counts of delivery of a controlled substance and possession with intent to a deliver controlled substance as well as related charges. The charges involve alleged controlled buys between May 21, 2018 and July 23, 2018, involving a confidential informant, Dustin Seese and Defendant. A portion of the evidence that the Commonwealth intends to use against Defendant includes suspected cocaine, paraphernalia and money, all seized from Defendant’s apartment on July 23, 2018. The Commonwealth also intends on using against Defendant a “confession” and other statements he allegedly made to law enforcement while being questioned at his residence on July 23, 2018.

Defendant filed a motion to suppress on October 22, 2018. While hearings were scheduled previously, they were not held until March 20, 2019, May 16, 2019, and July 12, 2019. On March 20, 2019, testimony was given by Detective Cassandra McCormack, Detective Michael Caschera and Detective Tyson Havens. On May 16, 2019 another hearing was held. On this date testimony was given by Trooper Edward Dammer, Detective Michael Simpler, Dustin Seese and Defendant. The final hearing was held on July 12, 2019. Testimony was given again by Trooper Havens. The record was closed. Written briefs were

submitted by the parties prior to the July 12, 2019 hearing. Following said hearing, the court heard supplemental oral argument. The issues raised in Defendant's motion are now ripe for a decision.

Defendant's first issue relates to the entry into his apartment on July 23, 2018. Defendant claims that the entry into his apartment on said date by law enforcement was illegal because it was without a search warrant and without probable cause and exigent circumstances. The Commonwealth concedes that this is a "threshold issue" (Commonwealth's Memo, p. 9) and that if the entry into the apartment is "improper" the fruits of the search, including the items seized and statements, must be suppressed. (Commonwealth's Memo, p. 10).

Once a defendant files a motion to suppress evidence, it is the Commonwealth's burden to prove, by a preponderance of the evidence, that the challenged evidence was not obtained in violation of the defendant's rights. *Commonwealth v. Kane*, 2019 PA Super 153, 2019 WL 2042034, \*2 (May 9, 2019), citing *Commonwealth v. Wallace*, 42 A.3d 1040, 1047-48 (Pa. 2012) (citing Pa. R. Crim. P. 581 (H)).

Both the Fourth Amendment of the United States Constitution and Article I, § 8 of the Pennsylvania Constitution "guarantee individuals freedom from unreasonable searches and seizures." *Kane*, *id* at \*3, citing *Commonwealth v. Bostick*, 958 A.2d 543, 550 (Pa. Super. 2008). Searches or seizures inside a home without a warrant are presumptively unreasonable. *Commonwealth v. Romero*, 183 A.3d 364, 396 (Pa. 2018). A warrantless entry by police, in order to be reasonable, requires a showing of both probable cause and exigent

circumstances. *Commonwealth v. Johnson*, 68 A.3d 930, 935 (Pa. Super. 2013). Absent exigent circumstances, private residences may not be constitutionally entered without a warrant, even where probable cause exists. *Id.*

The exigent circumstances exception to the warrant requirement applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. *Commonwealth v. Trahey*, 183 A.3d 444, 449-450 (Pa. Super. 2018), *appeal granted* 196 A.3d 603 (Pa. 2018), citing *Missouri v. McNeely*, 569 U.S. 141, 148-149 (2013). It allows officers in certain circumstances to conduct a warrantless search to “prevent the imminent destruction of evidence.” *Trahey, id.* at 450, citing *McNeely*, 569 U.S. at 149. It is typically applied in the context of warrantless entries into homes, with the exigencies supported by probable cause plus some circumstance beyond the mere need to investigate the crime. *Commonwealth v. Mackey*, 177 A.3d 221, 236 (Pa. Super. 2017).

This exception requires a totality of the circumstances analysis and is fact specific. *Trahey, Id.*

In *Commonwealth v. Johnson*, 68 A.3d 930 (Pa. Super. 2013), the police arrived at the defendant’s trailer in response to ongoing drug dealing. While making their way to the trailer they encountered a woman who they believed had previously been involved in drug activity at the trailer. Fearing that she would alert the occupants of the trailer, the police opted to knock on the trailer door in furtherance of their investigation.

Upon reaching the steps to the door of the trailer, the officers immediately

detected a strong odor of burnt marijuana coming from within the trailer. They proceeded with their investigation by knocking on the door of the trailer. When the defendant opened the front door, they could see that the trailer was smoke-filled and the smell of burnt marijuana coming from the trailer became even stronger. They asked the defendant if they could enter his residence. The defendant refused. They informed the defendant that they would obtain a search warrant where upon the defendant suggested that they do so. The defendant then immediately attempted to retreat indoors when the police officers took hold of him to prevent him from reentering the premises.

The police then entered the premises and conducted a sweep. They testified that they were not going to allow him back inside the residence to destroy evidence.

In assessing the presence of exigent circumstances, courts must take into account the presence of various factors including the gravity of the offense, whether the suspect is reasonably believed to be armed, whether there is a clear showing of probable cause, whether there is a strong reason to believe that the suspect is within the premises being entered, whether there is a likelihood that the suspect will escape and swiftly be apprehended, whether the entry is peaceable, the timing of the entry, whether there is hot pursuit of a fleeing felon, whether there is a likelihood that evidence will be destroyed if police take the time to obtain a warrant and whether there is a danger to the police or other persons inside or outside of the dwelling to require immediate and swift action. *Johnson*, 68 A.3d at 937, citing *Commonwealth v. Dean*, 940 A.2d 514, 522 (Pa. Super. 2008).

In *Johnson*, the court concluded that the actions of the police officers were

supported by both probable cause and exigent circumstances. It was not unreasonable for the officers to knock on the door, rather than wait outside for a search warrant, given that they were already standing in full view on the porch steps, together with their concern that the woman would alert the occupants of the trailer to their presence and that the occupants would have the opportunity to dispose of the burning marijuana.

Moreover, once the police officers knocked on the door, they did not immediately arrest the defendant or intrude into the trailer but asked to enter and complied when he refused. Only when he sought to retreat did the officers restrain him, informing him that they needed to secure the trailer, pending a search warrant, out of fear that he might destroy the burning marijuana. The restraint of the defendant occurred in response to the immediacy of the events rapidly unfolding before them. Given the officers' belief that marijuana was actively burning in the residence, they had legitimate concerns that evidence would be destroyed if he was allowed to reenter, an exigency which justified their attempt to secure him.

In *Commonwealth v. Waddell*, 61 A.3d 198 (Pa. Super. 2012), the court addressed the constitutionality of a warrantless entry into a home. The police received information that large quantities of marijuana were being distributed from a residence in Homestead, PA. Based on information that a vehicle was transporting marijuana from the residence, police officers stopped the vehicle, arrested the occupants and seized the marijuana. They then proceeded to the residence and learned in route that the occupants of the residence may have been alerted to the police investigation after the earlier traffic stop.

Upon arrival at the residence, the officers detected a strong odor of raw marijuana emanating from an open window. They knocked on the front door and heard loud movements inside. An officer who had proceeded to the back of the residence then radioed the officers at the front door that a person was jumping out of a window. Fearing that the occupants were destroying evidence, the police kicked in the door and entered the residence.

In concluding that an exigency did not exist, the Superior Court concluded that while the distribution of large quantities of marijuana is a serious offense, the 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. Furthermore, the defendant did not flee from police into the residence in response to spotting the police. Instead, the defendant appeared to be unaware that the police were investigating until they arrived at his home to conduct a knock and talk. The officers lacked any specific evidence that anyone inside the home was armed. Rather, the suspicion that firearms or other weapons might be found within the home was premised upon their generalized experience with those that traffic in narcotics and not any particular evidence derived from the investigation in the case. The evidence clearly surpassed the threshold necessary to establish probable cause after the officers detected the smell of marijuana emanating from the house. While probable cause existed at the time of the entry, the Commonwealth failed to demonstrate exigent circumstances. While there was a risk that evidence would be destroyed, there was no evidence that such destruction of evidence was occurring, as hurried movement did not provide a strong inference that

evidence was being destroyed, and there was nothing to indicate that there was anyone else in the house after the defendant's exit through the window.

Additionally, the court concluded that any exigency that occurred was created by the police since the loud noises behind the door and the defendant's exit from the window occurred after police knocked on the door. The police cannot rely upon exigent circumstances to justify a warrantless entry when the exigency derives from their own actions. Moreover, the court reasoned that the police expected large quantities of marijuana were present inside the residence, and that large quantities of marijuana could not be easily disposed of in the same manner as most other controlled substances. For example, one could not flush multiple pounds of marijuana down a toilet quickly and there was no serious risk that a substantial quantity of marijuana could be destroyed within the residence, while secured from the outside by police pending the arrival of the search warrant, without those surrounding the residence becoming aware of such activities. *Id.* at 215-217; see also *Commonwealth v. Bowmaster*, 101 A.3d 789 (Pa. Super. 2014)(A balancing of the relevant factors demonstrated a lack of exigency to support a nighttime, warrantless entry into residence as, even assuming the gravity of the offense of possession of a potentially stolen gun was high, the officers had no reason to believe the occupants of the home were aware of the officers' presence that such destruction of the evidence, escape or violence was imminent); *Commonwealth v. Berkheimer*, 57 A.3d 171 (Pa. Super. 2012) (police officers' warrantless search and seizure was supported by no exigency and constitutionally impermissible where police, acting on a tip that a suspect was in the residence, opened the

door of the residence at night while the occupants were asleep, to execute a probation detainer, and detected the odor of marijuana, where upon the house and its occupants were secured while a search warrant was obtained); see also *Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996); *Commonwealth v. Mason*, 637 A.2d 251 (Pa. 1993).

For the purposes of this analysis, the court will conclude that the police had probable cause to believe that Defendant's apartment was being used for distributing cocaine and most likely contained evidence of such. There were four total buys from Dustin Seese. Defendant and Mr. Seese were friends through Facebook. During one of the buys, Seese entered a blue Hyundai vehicle. The driver of the vehicle matched Defendant's description. The vehicle was registered to Defendant's mother. Seese and Defendant drove away, returned and then Seese allegedly delivered the controlled substances to the confidential informant. During the last controlled buy, police conducted surveillance on Defendant's apartment. Defendant's name was on a mailbox and police determined that the apartment was rented to Defendant's girlfriend. Once the buy was arranged, Mr. Seese was seen going into the apartment for approximately five minutes, returning to the confidential informant and providing the controlled substances. At some point prior to this transaction, both Defendant and Seese were seen entering the apartment together.

The court cannot, however, conclude that the Commonwealth has proven by a preponderance of the evidence that there were exigent circumstances. While the court would have no hesitancy in concluding that there were exigent circumstances if the Commonwealth proved that Defendant fled upon being confronted by the police, the testimony is inconsistent



and for the court to conclude that Defendant fled, it would take the court to believe one Commonwealth witness over another.

In fact, all three eyewitnesses to the incident testified differently.

Detective Tyson Havens testified that on the date in question, Detective Caschera posed as a pizza delivery man. The plan was to have Caschera knock on the door in order to have Defendant open it. Law enforcement officers were then going to speak with Defendant to determine if he wished to cooperate.

On the day in question, Caschera knocked on the door as planned and said “pizza.” Once Defendant opened the door, Detective Havens indicated that he and Trooper Dammer went to the threshold of the door. Trooper Havens indicated that he showed Defendant his badge and said “we need to talk.”

According to Detective Havens, Defendant struck an aggressive stance, took a breath and “bolted” toward the back of the apartment. Detective Havens clearly stated that Defendant immediately turned around and “shot toward the other end of the apartment.”

According to Detective Havens, Defendant’s “body language” was such that he “was attempting to destroy evidence.” Defendant only went approximately four steps before Detective Havens took him to the ground and handcuffed him. According to Detective Havens, entry was made into the apartment in a matter of seconds.

Trooper Dammer testified somewhat differently. According to Trooper Dammer, once Defendant opened the door, Detective Havens indicated that “we would like to talk to you.”

According to Trooper Dammer, Defendant turned as if to run and may have taken a few steps. According to Trooper Dammer, Defendant tensed up and “just turned and ran.” He got about 15 feet when he was apprehended by Detective Havens.

According to Trooper Dammer, both Detective Havens and Detective Caschera immediately went into the residence upon Defendant turning and taking a few steps.

Detective Caschera testified almost entirely different than Detective Havens and Trooper Dammer. He posed as pizza delivery man and knocked on the front door and said “pizza.” Defendant answered the door at which time Detective Caschera asked if anyone ordered pizza. Defendant said he didn’t but would check. He turned to speak with Mr. Seese.

Detective Caschera stepped out of the way and both Detective Havens and Trooper Dammer came to the threshold of the door with their badges out.

Defendant was tense, his jaw was clenched and he started to backpedal into the apartment. He was walking backwards looking very distraught and concerned. He was bladed toward them and looked like he might head into the back of the apartment.

Detective Havens entered and took Defendant down. Defendant was “taken down approximately five to ten feet from the door.”

In explaining why Detective Havens ran into the apartment, Detective Caschera said Defendant was distraught and it “appeared” that he would run to the back of the apartment.

Incidentally, the testimony of Mr. Seese and Mr. Bigelow confirmed the

testimony of Detective Caschera. Mr. Seese indicated that as soon as Defendant turned to ask him about the pizza, Detective Havens rushed into the door immediately and took Defendant down. Defendant reiterated the same indicating that they “bum-rushed in.”

The court cannot conclude that the Commonwealth has proven by a preponderance of evidence that an exigency existed. There is insufficient evidence for the court to determine that Defendant ran, backpedaled, bladed, bolted or shot towards the back of the apartment. Moreover, there is insufficient evidence for the court to conclude that whatever Defendant did, he did so with the intent of destroying evidence.

### **ORDER**

**AND NOW**, this \_\_\_ day of August 2019, following hearings, the submission of written briefs and memos and oral argument, the court **GRANTS** Defendant’s motion to suppress. The evidence seized from the home including any and all statements made by Defendant may not be used against Defendant in connection with the charges against him.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)  
Paul Petcavage, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work File