

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:
	:
vs.	: No. CR-1813-2018
	:
MARK BILLUPS, JR.,	:
Defendant	: Omnibus Pretrial Motion

OPINION AND ORDER

Defendant is charged by Information filed on December 14, 2018 with possession with intent to deliver, resisting arrest and related charges. Before the court for disposition is Defendant's omnibus pretrial motion filed on January 15, 2019. Hearings were held on March 20, 2019; May 3, 2019; and July 10, 2019. Transcripts of the hearings were prepared and the parties submitted their respective Briefs on May 3, 2019 and November 12, 2019 (Defendant's Briefs) and on October 29, 2019 (Commonwealth's Brief).

In November of 2018, Officer Clinton Gardner of the Williamsport Bureau of Police along with his then partner, Officer Trafford, initiated an investigation into alleged "narcotics trafficking" at 1650 Andrews Place in Williamsport, PA. Prior to November 5, 2018, Officer Gardner received information from nearby residents that there was heavy foot and vehicle traffic in the rear alley of 1650 Andrews Place.

On November 5, 2018, Officer Gardner spoke with two residents of an adjoining home, 1652 Andrews Place. The next-door residents indicated that there "were vehicles parking and running to the rear of 1650 Andrews Place throughout the day." They indicated there were two to three black males with shaved heads who were operating in the area and that the individuals would either arrive on foot or in vehicles that would park in the

alleyway behind the residence.

Among other things, they indicated that a black BMW vehicle frequented the residence but more recently it was a white Audi vehicle. According to the residents, the cars would keep coming and going and “they saw transactions either in the house or at the car.” The different people “being involved” were “two to three black males with shaved heads in their mid-20’s to 30’s.”

On November 9, 2018, Officer Gardner observed a “white tinted Audi” parked behind 1650 Andrews Place. He parked in the alleyway and then walked 15 to 20 feet onto the property and while using his flashlight, looked inside the Audi vehicle. He observed in the center console what he believed to be a large amount of cash and illicit pills. The cash was folded in half and “kind of just squished together.” According to Officer Gardner, it looked like a “significant amount of cash.” He noticed as well, pills that appeared to have “a blue color to them” which were in a clear plastic bag. According to Officer Gardner, there was a “decent amount of pills” but he could not see how many.

Based upon his substantial training and experience, he suspected that the pills were illicit Oxycodone pills. He confirmed with his partner at the time, Officer Bell, that the pills were believed to be illicit “controlled substances.”

At around this same time, a vehicle pulled in to the alley behind the patrol unit. The driver eventually identified as Terrance Forsythe walked up to Officer Bell and asked him what was “going on.” Mr. Forsythe identified the white Audi as belonging to a gentleman he knew as “Cheech.”

While Officer Bell was having the conversation with Mr. Forsythe, the defendant “came out of the back” door of the residence at 1650 Andrews Place. Mr. Forsythe identified the defendant as “Cheech.” The defendant then returned into the house a few seconds later.

Officer Gardner went to the back doorway and knocked on the door. An elderly woman came to the door. The defendant soon fled out of the front door. A chase ensued lasting approximately 5 to 15 minutes, after which the defendant was apprehended. The defendant was apprehended in the 1600 block of Memorial Avenue.

Concerned that possible evidence could be destroyed or that there were “possible weapons”, the officers entered the residence and performed a protective sweep. Nothing of any evidentiary value or significance was found in the home. While illicit controlled substances and paraphernalia were located, they were “not connected with Mr. Billups.”

While not recalling whether the white Audi was searched during the house search or prior to the Audi being towed, it was searched no later than prior to it being towed. It was described as “a cursory search.” The pills and money were seized and the defendant’s wallet was found in the driver’s door pocket. The wallet contained the defendant’s identification.

The search of the vehicle netted 117 Percocet 30’s, which were located in a clear plastic baggie on top of the center console area. It also resulted in the seizure of approximately \$2,000.00 in U.S. currency that was folded up in the cup holder next to the

pills within just “a few inches away” and another approximate \$1,700.00 that was found in the glove box.

Officer Bell testified that upon driving down the alleyway to the rear of 1650 Andrews Place, they recognized the white Audi as being one of the cars that had been reported to be involved in drug trafficking. He confirmed the observations of Officer Gardner.

Trooper Maggs of the Pennsylvania State Police has been employed for eleven years. Over the past three years, he was assigned duties in the auto theft unit.

In this particular case he was tasked with attempting to identify the owner of the Audi. He determined through his investigation that it was last registered to a Zhao Bowen, which registration expired in September of 2012.

He also determined that the vehicle was later sold at an auction on January 2, 2018. The vehicle was sold to “T&K Auto Sales” with a Philadelphia address. He could not determine if “T&K” was a viable business; there was no paperwork associated with such. He could also not determine who owned the vehicle or leased it as of November 9, 2018.

He never visited the address of “T&K” and could not determine if vehicles were actually being sold or leased out of those premises.

Shakira Allen resided at 1652 Andrews Place in Williamsport on November 9, 2018. She knew the defendant. He was her boyfriend’s friend.

The defendant did not reside at her home nor did he have any belongings or other personal articles at the home. He was simply an occasional visitor. He could not go

and come when he pleased; he had no key and did not pay any bills.

When the defendant visited, he normally parked in the back of the house. He had parked in the back of the house on at least two prior occasions. He would drive the 2010 white Audi vehicle.

On November 9, 2018 at approximately 7:00 p.m., Ms. Allen got in her car to go to work. While leaving, she noticed that the defendant was seated on the driver's side in his vehicle, which was parked in the lot behind her home. She knew that it was the defendant, as she saw him through the windows. She did not stay and talk; she simply left.

The parking lot behind her home where the defendant's vehicle was parked on November 9, 2018 was not open to the public for parking. The only cars that were permitted to park there were either hers or individuals who she invited. She noted that the parking lot is part of her yard and property.

The defendant testified that he purchased the Audi in January of 2018 from a "virtual bidding website." He indicated that he purchased it through his cousin. Specifically, he used his cousin's account to purchase the vehicle. According to screenshots of text messages, he purchased the vehicle on January 5, 2018 for \$5,300.00. At around that same time, he also purchased car insurance for the Audi. The insurance was purchased under his girlfriend's name, Paulina Ray.

Defendant argues that the items seized from his vehicle must be suppressed because they were obtained in violation of his state and federal constitutional rights against unreasonable searches and seizures. While the Commonwealth concedes that the defendant

has standing to challenge the search, it argues that the defendant did not have an expectation of privacy in the vehicle which would entitle him to the protections of Article I, Section 8 or the Fourth Amendment.

The test to determine whether there is an expectation of privacy recognized under the constitutions is twofold. “An expectation of privacy will be found to exist when the individual exhibits an actual or subjective expectation of privacy, and that expectation is one that society is prepared to recognize as reasonable.” *Commonwealth v. Viall*, 890 A.2d 419, 422 (Pa. Super. 2005).

As Defendant properly noted in his brief, the United States Supreme Court has held “that as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.” *Byrd v. U.S.*, 138 S. Ct. 1518, 1524 (2018). Contrary to what the Commonwealth claims, the court finds that with respect to the vehicle, the defendant both had a subjective expectation of privacy and has demonstrated that his expectation was one that society is prepared to recognize as reasonable and legitimate. He was in possession of the vehicle for a period of time. Not only did he utilize the vehicle on the date in question but he had utilized it previously. The defendant’s credible testimony supports the fact that he purchased the vehicle, albeit through his cousin’s account. Furthermore, he obtained insurance for the vehicle, albeit through his girlfriend. Mr. Forsythe confirmed that the vehicle was being operated by the defendant and he considered the defendant the owner of the vehicle. When the defendant was apprehended by the police, he was in possession of the

keys to the vehicle. Furthermore, the search of the vehicle revealed that the defendant's wallet was located in it.

The Commonwealth next argues that even if the defendant had a reasonable expectation of privacy in the vehicle, he did not have a reasonable expectation of privacy with respect to the gravel portion of the backyard that was utilized for parking. Clearly, the defendant did not reside at 1650 Andrews Place; he was at most a guest. While the court does not necessarily agree with the Commonwealth's argument that the defendant would need to show a reasonable expectation of privacy in the parking lot, the court concludes that in this case, he did in fact have a reasonable expectation of privacy in the parking lot for the purposes of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

As defense counsel argues, the defendant was invited to be at the house in question. He had been at the house previously and was regularly invited to be at the house. He was welcome at the house even when Mr. Forsythe wasn't home. He had permission to be at the house and in this particular case was expressly permitted to be there on that date when he was seen by Ms. Allen.

Even if a person is not an owner or lessee of property, the person can still have a reasonable expectation of privacy. *Commonwealth v. Bostik*, 958 A.2d 543, 552 (Pa. Super. 2008). Any guest, in appropriate circumstances, may have a legitimate expectation of privacy when he is there with the permission of his host who is willing to share his house and his privacy with his guest. *U.S. v. Fields*, 113 F.3d 313, 321 (2nd Cir. 1997).

The Commonwealth justifies the search of the defendant's vehicle via the plain view exception to the warrant requirement.

As both parties note, the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution prohibit unreasonable searches and seizures. *Commonwealth v. Loughnane*, 173 A.3d 733, 741 (Pa. 2017). A warrantless search and seizure is presumptively unreasonable under the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution. *Commonwealth v. McCree*, 924 A.2d 621, 627 (2007).

The plain view doctrine, however, is an exception to the warrant requirement. It allows the warrantless seizure of an item in the following situation:

- “(1) The police must be at a lawful vantage point;
- (2) the incriminating character of the object must be immediately apparent; and
- (3) the police must have a lawful right of access to the object.”

Id. at 625.

The defendant argues that the officers were not at a lawful vantage point when they observed the items in the cup holder of the vehicle. He argues that the vehicle was parked in the gravel lot and not in the roadway and therefore on private property. The defendant argues that both officers had to walk essentially 15 to 20 feet onto the private property, shine a flashlight through the windows and then observe the items in the cup holder. The defendant concludes that because the police “were trespassers” they did not have a lawful vantage point to view the items and that the plain view doctrine cannot apply.

The Commonwealth argues that the police were in a lawful vantage point in the gravel parking area” which was used by numerous individuals, guests and residents alike, as a parking area.” The Commonwealth argues that this conclusion was established through the testimony of Ms. Allen and the location of the parking area.

The court cannot agree with the Commonwealth. As the defendant notes in his brief, the police did not have a lawful right to access the driveway without a search warrant or consent. As it appears that the police trespassed on private property to view the inside of the vehicle, the search and seizure do not satisfy the plain view exception. See *Soldal v. Cook County, Ill.*, 506 U.S. 56, 66, 113 S.Ct. 538, 546, 121 L.Ed.2d 450 (1992)(in the absence of consent or a warrant, plain view seizures can be justified only if they meet the probable cause standard and if they are unaccompanied by unlawful trespass).

The Commonwealth offers no further argument in support of its opposition to the defendant’s motion. Accordingly, the defendant’s motion to suppress will be granted.

Because the court has granted the defendant’s motion to suppress, the court need not address at this time the defendant’s motion for writ of habeas corpus, motion in limine, motion to compel discovery or motion for leave to file an amended pretrial motion and/or additional motions.

ORDER

AND NOW, this 16th day of December 2019 following a handful of hearings and the submission of briefs, the court GRANTS the defendant’s motion to suppress. All of the items seized from the white Audi on November 9, 2018 are suppressed and may not be

utilized by the Commonwealth in its case against the defendant. The court is of the opinion that it need not address the defendant's other motions at this time. This is without prejudice to the defendant to reinstate the motions no later than thirty (30) days prior to trial if the Commonwealth wishes to proceed to trial in light of this court's ruling.

By The Court,

Marc F. Lovecchio, Judge

cc: Aaron Gallogly, Esquire (ADA)
David Lampman, Esquire
Lampman Law
2 Public Square
Wilkes-Barre, PA 18701
Gary Weber, Esquire (Lycoming Reporter)
Work File