

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

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
	:	<b>CP-41-CR-1550-2018</b>
<b>v.</b>	:	
	:	
<b>JORDAN WHALEY,</b>	:	<b>OMNIBUS PRETRIAL</b>
<b>Defendant</b>	:	<b>MOTION</b>

**OPINION AND ORDER**

Jordan Whaley (Defendant) was arrested on September 8, 2018, on one count of Possession of a Controlled Substance with the Intent to Manufacture or Deliver.<sup>1</sup> The charge arises from police conducting a search warrant on 637 Fourth Avenue, Williamsport, PA 17701. Defendant filed this timely Pretrial Omnibus Motion on November 21, 2018. A hearing on the motion was held by this Court on December 20, 2018. At that hearing the Commonwealth orally motioned to amend the information to add the charges of Possession of a Controlled Substance<sup>2</sup> and Possession of Drug Paraphernalia,<sup>3</sup> which was not objected to by Defendant and thereby granted in an Order filed on December 21, 2018. Both Defendant and the Commonwealth were provided an opportunity to brief the issues following the hearing. Defendant was given until January 4, 2019 to submit a brief and/or case law, which he did, and the Commonwealth was given until January 11, 2019, to submit a brief and/or case law, which the Commonwealth elected not to do.

In his Omnibus Motion, Defendant Petitions for Writ of Habeas Corpus challenging whether there was sufficient evidence to establish the intent to sell and/or deliver the controlled substance as to satisfy the charge of Possession with the Intent to Deliver. He also raises a

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<sup>1</sup> 35 P.S. § 780-113(a)(30).

<sup>2</sup> 35 P.S. § 780-113(a)(16).

<sup>3</sup> 35 P.S. § 780-113(a)(32).

Motion to Suppress Evidence based on whether the initial entry into the residence was unlawful, and therefore could not be the basis for a valid search warrant and whether the currency and firearms need to be suppressed, because they were not specifically identified by the search warrant. Lastly, Defendant raises a Motion for Return of Property claiming that Defendant is entitled to lawful possession of the firearms and currency because the items were unlawfully seized.

### **Background and Testimony**

Officers Andrew Stevens (Stevens), Christopher Salisbury (Salisbury), and Joshua Bell (Bell) of the Williamsport Bureau of Police testified on behalf of the Commonwealth. Their testimony established the following. On September 8, 2018 at approximately 7:30 p.m., Stevens and Salisbury responded to a call about a yellow sedan being parked in front of and blocking a garage that was clearly marked “no parking.” A neighbor reported a female exited the vehicle and entered 637 Fourth Avenue. Stevens and Salisbury then went to the front door of the residence and knocked in an effort to have someone move the vehicle. Defendant and another individual opened the door. Both officers testified that they could immediately smell the odor of marijuana emanating from the residence. The officers first asked who owned the vehicle and the individuals stated that she was in the house. Stevens then asked about the smell of marijuana and asked if any was in the house. Stevens told the individuals he was not worried about “a little bit of marijuana” and Defendant stated there was a small bag upstairs. Defendant when asked also indicated another individual named “Nick” was upstairs. Officers then asked if they could retrieve Nick, which was consented to. Stevens took the two individuals out onto the porch before going upstairs to get Nick. The officers testified the odor was emanating throughout the entire house. Nick was located on the third floor in a bedroom with a young

child. Stevens also observed a bag of suspected marijuana and a half smoked marijuana blunt on the dresser.

Stevens brought Nick down to the porch with the other individuals and asked whether they could conduct a search of the residence, which Defendant agreed, but Nick refused. After this refusal, officers had the individuals stay on the porch as a protective sweep of the residence was conducted prior to obtaining a search warrant. Stevens testified that in conducting the protective sweep, the officers walked through the rooms announcing their presence, they did not open any containers or drawers, it was common practice in a situation like this, and it was strictly a search for the presence of other individuals. Upon clearing the house, Stevens noticed in plain view a bag of suspected marijuana on a television stand and a firearm in one bedroom and two handgun boxes and another bag of suspected marijuana in the other second floor bedroom. After the protective sweep, Salisbury waited outside with the individuals as Stevens went to procure a search warrant. While waiting, Defendant asked Salisbury if the officer would go get his sweatpants and directed as to which room. When Stevens returned with the search warrant officers started conducting a search of the residence, but prior to, Defendant advised officers that there was a firearm underneath his pillow. During the search of the room, which Defendant previously directed Salisbury to retrieve his sweatpants, officers located a large vacuum sealed bag containing five individual plastic baggies of marijuana weighing approximately 39.62 grams, two other clear plastic baggies containing approximately 6.76 grams and 2.25 grams of suspected marijuana, \$739 mostly in denominations of \$20s, two fully loaded Glock handguns one on the bed and the other under the pillow, and an extended magazine for one of the firearms. The firearms were not seized until a separate search warrant was executed identifying them with specificity.

Bell testified as an expert, which Defendant stipulated to, as to whether Defendant possessed the marijuana with the intent to deliver or for personal use. Bell testified that the presence of currency predominately in \$20 denominations, multiple firearms, marijuana in different locations within the room, and a large bag with individually packaged smaller bags of marijuana led Bell to the conclusion that the marijuana was Possessed with the Intent to Deliver. In Bell's opinion the packaging was a key component. The fact that smaller individual packages were vacuum sealed in a larger bag was consistent with Possession with the Intent to Deliver marijuana. Another pertinent detail that helped him reach his conclusion was the presence of multiple firearms, which are often used to protect drugs and money. Finally, Bell testified that, although there was not a large amount of marijuana, the totality of the circumstances were consistent with someone possessing with the marijuana with the intent to deliver.

**Whether a *Prima Facie* case has been Established for Possession with the Intent to Deliver**

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove Defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused likely committed the offense. *Id.* Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001). *Prima facie* in the criminal realm is the measure of evidence, which if accepted as true, would warrant the conclusion that the crime charged was committed. While the weight and

credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. *Commonwealth v. Ripley*, 833 A.2d 155, 159-60 (Pa. Super. 2003). Moreover, “inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.” *Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003).

For a *prima facie* case of Possession with the Intent to Deliver to be established against Defendant the Commonwealth must show he “possess[ed] with intent to manufacture or deliver, a controlled substance by a person not registered.” 35 P.S. § 780-113(a)(30). Bell testified as to his expert opinion regarding the evidence collected. He opined that it was consistent with possession of marijuana with the intent to distribute/deliver. This opinion was based on the presence of weapons, a large amount of currency, and as Bell pointed out as most important, the presence of marijuana in three different locations with one large vacuum sealed bag containing smaller individual bags of marijuana inside of it. As weight and credibility of testimony is not at issue at this stage and all reasonable inferences are to be drawn in favor of the Commonwealth, the testimony of Bell is sufficient to establish that the evidence shows the marijuana was possessed with the intent to deliver.

#### **Whether the Initial Entry of the Residence Tainted the Constitutionality of the Warrant**

Defendant claims that the initial entry was unlawful and illegal and therefore the subsequent search warrant based on those observations should be suppressed. Probable cause alone will not support a warrantless search or arrest within a residence absent exigent circumstances. *Commonwealth v. Govens*, 632 A.2d 1316, 1322 (Pa. Super. 1993). A

warrantless search lacking both requirements, probable cause and an exigent circumstance, is a direct violation of both the Fourth Amendment of the United States Constitution and Article 1 § 8 of the Pennsylvania Constitution. *Commonwealth v. Gibbs*, 981 A.2d 274, 280 (Pa. Super. 2009). When evaluating exigent circumstances the following factors need to be considered:

(1) the gravity of the offense; (2) whether the suspect is reasonably believed to be armed; (3) whether there is a clear showing of probable cause; (4) whether there is a strong reason to believe that the suspect is within the premises being entered; (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended; (6) whether the entry is peaceable; (7) the timing of the entry; (8) whether there is hot pursuit of a fleeing felon; (9) whether there is a likelihood that evidence will be destroyed if police take the time to obtain a warrant; and (10) whether there is a danger to police or other persons inside or outside of the dwelling to require immediate and swift action.

*Commonwealth v. Dean*, 940 A.2d 514, 522 (Pa. Super. 2008).

It has been established that a protective sweep is permissible when “securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents.” *Commonwealth v. Gillespie*, 821 A.2d 1221, 1227 n.2 (Pa. 2003) (quoting *Segura v. United States*, 468 U.S. 796, 810 (1984)). In *Commonwealth v. Johnson*, officers arrived at a trailer park to investigate recent drug activity. 68 A.3d 930, 944 (Pa. Super. 2013). Upon arriving the officers encountered a woman who matched the description of one of the alleged suspects. *Id.* This prompted them to knock on the trailer door of where the suspected activity was occurring out of fear she would notify its residents. *Id.* When climbing the stairs the officers detected the odor of burning marijuana. *Id.* The defendant answered the door, refused to allow officers inside, and upon attempting to retreat back inside was restrained by the officers. *Id.* at 945. The Pennsylvania Superior Court found that based on the “officers’ belief that marijuana was actively burning in the residence, the officers had a legitimate

concern that evidence would be destroyed if [the defendant] was allowed to re-enter, an exigency which justified their attempt to secure [the defendant].” *Id.* The court also determined that after the defendant was outside and restrained the officers’ protective sweep of the trailer was permissible for the same reason. *Id.* at 946. In reaching that determination the court determined after the exigency of potential destruction of the marijuana arose and the defendant was detained, it was permissible to “simply [look into] the various rooms to make sure nobody else was present.” *Id.*

Defendant cites to *Commonwealth v. Caudell*, determined by this Court, as evidence that the protective sweep was not permissible. 40 Pa. D&C 5<sup>th</sup> 546 (Lycoming County 2014). The two cases are factually very distinct. In *Caudell*, police did not have probable cause prior to entering the residence and did not observe or smell the marijuana until officers had already impermissibly entered. *Id.* Here the testimony by both officers was that they immediately could smell the odor of marijuana as soon as the door was opened, but not prior to its opening. Therefore the exigency is not one that is created by the police. *See id.*; *Commonwealth v. Waddell*, 61 A.3d 198, 218 (Pa. Super. 2012) (once the odor of marijuana was detected the requisite probable cause was met, therefore police could not knock on the door of the unassuming residence, thereby creating an exigency and a reason to search). Additionally, the officers had a permissible purpose for knocking on the door in an attempt to have someone move the vehicle that was blocking the neighbor’s garage. *See Commonwealth v. Gibson*, 638 A.2d 203, 207 (Pa. 1994) (“the police have the power to knock on the doors of the citizens of this Commonwealth for investigatory purposes without probable cause”).

The factual situation in the present case more directly aligns with *Johnson* and when viewing a totality of the circumstances there was sufficient reason to conduct a protective

sweep and secure the residence prior to obtaining a search warrant. Stevens and Salisbury responded to a complaint of a vehicle blocking a garage. Upon ascertaining the driver entered 637 Fourth Avenue, they lawfully knocked on the door of the residence. As the door opened both officers testified they could immediately smell marijuana. Stevens then asked about the marijuana and if anyone else was in the residence, which Defendant answered affirmatively to both questions. The odor of burnt marijuana was detected throughout the house as the officers went upstairs to get Nick, which was done with consent. In the room Nick was located was a plastic bag of suspected marijuana and a half smoked blunt on the dresser. At this point and even prior to, the officers had already established probable cause. Upon refusal of a search, the conducting of a protective sweep was lawful to secure the scene until a search warrant could be obtained. *See Gillespie*, 821 A.2d at 1226 (once consent is refused, but probable cause is present officers may secure the residence while obtaining a search warrant). Based on the size of the residence, being three floors, having already made contact with three individuals and a small child, and the driver of the vehicle being reportedly in the house, it was reasonable to conduct the search to avoid the dissipation of evidence, specifically the burning of the marijuana, by other potential individuals. *Johnson*, 68 A.3d at 945.

### **Whether the Seizure of the Firearms and Currency was Permissible**

Defendant argues the seizure of the firearms and currency was impermissible because the items were not specifically identified in the search warrant. As for the firearms, the second search warrant specifically identified both and the testimony provided corroborated that the firearms were not seized until that second search warrant's issuance.

“[A] warrant must describe the place to be searched *and the items to be seized with specificity*, and the warrant must be supported by probable cause.” *Commonwealth v. Waltson*,



724 A.2d 289, 292 (Pa. 1998) (emphasis added). This means items may not be seized “without describing them as nearly as may be” within a search warrant. Pa. Const. Art. 1, § 8. “The clear meaning of the language is that a warrant must describe the items as specifically as is reasonably possible” and the requirement in Pennsylvania is more stringent than under the Fourth Amendment of the United States Constitution. *Commonwealth v. Love*, 186 A.3d 1030, 1033 (Pa. Cmwlth 2018). The purpose of the requirement is “to proscribe general or exploratory searches . . . warrants should, however, be read in a common sense fashion and should not be invalidated by hypertechnical interpretations. This may mean, for instance, that when an exact description of a particular item is not possible, a generic description may suffice.” Pa. R. Crim. P. Rule 205 cmt.

The portion of the search warrant at issue reads: “Identify items to be searched for and seized (Be as specific as possible): Any Controlled Substance(s)[;] Any Drug Paraphernalia[;] [Crossed out and initialed;] Indicia of Residency.” Commonwealth’s Exhibit #1. It is clear that the search warrant does not include US currency. This Court is aware that the seizure of currency is common among search warrants issued for controlled substances, but it still must be specifically stated. Common examples, which are often used in search warrants for charges of this nature, are: “US currency,” “Proceeds of narcotics sales,” or “Associated monies.” The issuance of this search warrant does not list currency as an item to be seized and further there is no mention of any currency in the attached Affidavit of Probable Cause. Therefore Defendant could not be on notice of currency being seized. As this is at odds with Pennsylvania’s more stringent specificity requirement the \$739 in US currency shall be suppressed. Although this Court suppresses the currency seized, it will not yet rule on the Motion for Return of Property

until a final disposition of this case is reached, at which time a hearing shall be conducted as necessary.

### **Conclusion**

This Court finds the Commonwealth has provided sufficient evidence to establish a *prima facie* case of Possession with the Intent to Deliver, therefore Defendant's Petition for the Writ of Habeas Corpus is denied. Additionally, this Court finds that the protective sweep of 637 Fourth Avenue was proper and therefore the subsequent search warrant was proper and the fruits of the search shall not be suppressed, but the \$739 shall be suppressed as it was not properly included in the search warrant.

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of February, 2019, based upon the foregoing Opinion, Defendant's Pretrial Omnibus Motion is hereby **DENIED** in part and **GRANTED** in part. The Petition for Writ of Habeas Corpus is hereby **DENIED**. The Motion to Suppress Evidence is hereby **DENIED** in part and **GRANTED** in part. Accordingly, it is **ORDERED** and **DIRECTED** that the \$739 seized by Officer Stevens during the search of Defendant's residence, is hereby **SUPPRESSED**, as to the remaining evidence seized the Motion is **DENIED**. Lastly the Motion for Return of Property is stayed pending final disposition of the above docketed case.

By the Court,

Nancy L. Butts, President Judge

cc: Joseph Ruby, Esquire, ADA  
Peter Campana, Esquire