

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : No. CR-538-2020
:
vs. :
:
STEPHANIE FOSTER, :
Defendant : Omnibus Pretrial Motion

OPINION AND ORDER

Defendant is charged by Information filed on June 4, 2020 with possession with intent to deliver and related charges. Defendant waived her arraignment scheduled for June 8, 2020. On July 26, 2020, Defendant filed a “Pretrial Omnibus Motion.” The hearing on such was held on September 15, 2020. Defendant seeks the suppression of “all physical evidence and statements” obtained from the defendant following her allegedly illegal detention by law enforcement on April 23, 2020.

At the hearing, the Commonwealth called two witnesses: Agent Jason Lemay of the Pennsylvania Parole Board and Carl Finnerty, who on April 23, 2020 was a Corporal with the South Williamsport Police Department (hereinafter Corporal Finnerty).¹ Defendant testified in support of her motion.

On April 23, 2020, Agent DeFrancesco of the Pennsylvania Parole Board requested Agent Lemay to assist with the search of the approved residence of parolee Robert Belton, 300 Curtin Street in Williamsport. Defendant rented the residence and permitted Mr. Belton to reside there.

Mr. Belton was on active parole; he was not an absconder. The Parole Office received a call from “someone” claiming that Belton threatened him with a firearm because

¹By the time of the hearing, Corporal Finnerty had left the South Williamsport Police Department and was

of an alleged unpaid debt. Agent Lemay did not receive the tip and he had no first hand knowledge regarding its contents. He did not know where the tip originated and no investigation was conducted to corroborate the tip. Agent Lemay did not know if the individual provided a name. As far as Agent Lemay knew, it could have been an anonymous tip. Agent Lemay admitted that he had minimal information regarding the report of a firearm.

Agent Lemay and Trooper Denucci, both members of the Fugitive Apprehension Search Team, met with other law enforcement and parole agents at the Pennsylvania Parole Board's Williamsport office. Board Supervisor Frederick approved the search. The purpose of the search was to determine if Belton was in violation of the conditions of his supervision by possessing a firearm.

While specifics were lacking, during "the morning" of April 23, 2020, Defendant signed a "PB 30H" agreement letter authorizing the search of the residence upon reasonable suspicion that the parolee was in violation of the conditions of supervision.

Between 9:00 and 9:30 a.m., Agent Lemay positioned himself in his vehicle approximately 25 to 30 feet from the residence to conduct surveillance. After about 15 minutes, Defendant drove up in a vehicle, parked, exited and then entered the residence.

In the interim, however, Agent Lemay spoke with Agent DeFrancesco, who informed Agent Lemay that he heard from Defendant and that Defendant informed him that Belton had previously been dropped off in Linden.

Soon after the conversation, approximately five minutes, Agent Lemay

working as a Lycoming County Deputy Sheriff.

noticed that someone inside the residence moved the blinds to look out. Belton then exited the residence out of the front door and started walking down the front stairs. Agent Lemay and other officers were armed and wearing vests identifying them as parole agents. Agent Lemay exited his vehicle, unholstered his firearm and approached Belton. Agent Lemay and other law enforcement immediately detained Belton, patted him down and took him into custody.

When Belton was walking down the stairs, Defendant exited the front door behind him and started walking down the stairs as well. She was a step or two behind Belton. Defendant was carrying a dark drawstring type backpack. The backpack was approximately two feet long and 10 inches wide and made of suspected nylon. Agent Lemay told Defendant to remain where she was and told her that he would be with her “in a minute” after Belton was in custody.

After Belton was in custody and sitting on the ground near the side of the residence out of the view of Defendant, Agent Lemay reholstered his firearm and approached Defendant. He directed Defendant to come further down the stairs. Agent Lemay asked Defendant to place the backpack on the ground. She indicated that the backpack wasn't hers by saying “it's not mine.” As requested, she put it on the ground. When asked whose it was, she repeated that she didn't know. When asked again, Defendant responded that the bag didn't belong to her and that she didn't know who it belonged to. While speaking with Defendant, Agent Lemay was calm and polite.

Agent Lemay testified that Defendant did not seem to be any threat and he initially did not think she had a firearm. However, Agent Lemay was concerned that

property was leaving the residence and that the backpack might contain a weapon or controlled substances. It appeared to be “weighted.” Further, when Defendant placed the bag down on the cement landing near the stairs, Agent Lemay heard a “clank.” Accordingly, he looked into the bag and observed suspected drug paraphernalia (empty Ziploc bags). He then stopped and asked another agent to keep an eye on the bag. He then assisted in clearing the residence, although he did not have any knowledge of anybody else inside.

Once the residence was cleared, Agent Lemay searched the bag further and saw a metal container with illegal controlled substances inside. Agent Lemay immediately contacted the South Williamsport Police to assist further. The South Williamsport Police soon arrived and “took control.”

In response to the call from the Agent Lemay, Corporal Finnerty arrived on the scene. He observed Defendant seated at the bottom of the stairs. He subsequently took her into custody.

According to Defendant, on the morning of the 23rd, she left the residence behind Mr. Belton. She was wearing a nylon “UPMC” bag on her back. As she exited the residence and began walking down the stairs, a parole agent told her to stop where she was. Approximately three to four minutes later while she was standing on the steps, she was directed to put the bag down. She removed the bag and Agent Lemay placed it in an area approximately 10 feet from where she was then sitting on the steps. Agent Lemay first looked into the bag. Then someone handcuffed her. Agent Lemay then “searched the house” with other law enforcement agents. After searching the house, Agent Lemay “fully” looked in the bag. One agent or officer told Defendant they were searching the bag because she was

protecting Belton; another said it was “for safety.” Defendant confirmed that she told Agent Lemay two or three times, that the bag was not hers and a couple times that she didn’t know whose it was.

Regarding Defendant’s motion to suppress, Defendant argues that Agent Lemay seized her and conducted an investigatory detention without the requisite reasonable suspicion. Defendant also argues that the search of the bag was unlawful because it was conducted without a warrant and requisite probable cause.

The Commonwealth bears the burden of proof to establish that the evidence was not obtained in violation of the defendant’s rights. Pa. R. Crim. P. 581 (H). The court finds that the Commonwealth failed to satisfy its burden of proof.

The Commonwealth conceded that Defendant was seized as soon as Agent Lemay told her to stop and wait on the stairs, which occurred as soon as she exited the residence. At that time, Agent Lemay had his firearm drawn and he was in the process of detaining Belton and taking him into custody. Law enforcement did not possess any information that Defendant was engaged in criminal activity or that she was armed and dangerous. The only reason law enforcement stopped her was because they intended to search the residence to determine if Belton was in possession of a firearm.

The only basis to search the residence was the tip that Belton possessed a firearm. Therefore, this case hinges on the tip. There is nothing in the record, however, to establish when or where Belton allegedly possessed the firearm or when Agent DeFrancesco received the tip. For all the court knows, the information could be stale.

Inexplicably, the Commonwealth failed to call Agent DeFrancesco as a

witness, and instead, it chose to rely on the testimony of Agent Lemay.² However, Agent Lemay did not receive the tip and he did not have any knowledge regarding any details. He did not know where the tip originated, and no investigation was conducted to corroborate the tip. Agent Lemay did not even know if the individual provided a name. As far as Agent Lemay knew, it could have been an anonymous tip. Agent Lemay admitted that he had minimal information regarding the report of a firearm.

Where the underlying source of the information is an anonymous telephone call, the tip should be treated with particular suspicion. *Commonwealth v. Jackson*, 698 A.2d 571, 573 (Pa. 1997). Based on the lack of record evidence regarding the tip, the court concludes that law enforcement did not have reasonable suspicion to detain Defendant or to search the backpack she was carrying.

ORDER

AND NOW, this ___ day of December 2020 following a hearing and argument, the court grants Defendant's Omnibus Pretrial Motion.

By The Court,

Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)
Matthew Welickovitch, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file

²Equally inexplicably, defense counsel did not object to Agent Lemay's testimony regarding the tip or the statements Defendant allegedly made to Agent DeFrancesco.