

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-0001030-2017
vs. :
: CRIMINAL DIVISION
: CHRISTOPHER MULLEN,
: Appellant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This Opinion is written in support of the court’s orders denying the motion to suppress and the motion in limine filed by Appellant Christopher Mullen.

By way of background, the police charged Mullen with persons not to possess firearms, resisting arrest, possession of a controlled substance, and possession of drug paraphernalia. The charges arose out of an incident on June 7, 2017, where parole agents, United States Marshals, and police officers went to 408 Anthony Street based on an anonymous tip that Mullen, who was wanted on a warrant for absconding from parole supervision, was presently living at that location with his girlfriend or ex-girlfriend and he was in possession of firearms and controlled substances.

At a briefing prior to going to the residence, the officers and agents were provided a photograph of Mullen. The officers and agents went to the residence and knocked on the door. Mullen moved the blinds of a window near the door and Supervisor Michael Barvitskie, who was a mere two feet from the window, saw Mullen’s face from his forehead to his chin. Supervisor Barvitskie said “State parole. Come to the door.” Mullen let the blind

go, and a few seconds later a white male came to the door. The white male initially denied that Mullen was in the residence but after he stepped outside and was shown a picture of Mullen, the white male nodded his head and said Mullen was inside the residence.¹

When the law enforcement officers entered the residence to arrest Mullen, they observed firearms and controlled substances in plain view inside the residence. The police then obtained a search warrant for the residence and seized various firearms, cocaine, and drug paraphernalia.

On August 10, 2017, Mullen filed a motion to suppress, in which he alleged that the authorities lacked a reasonable belief that he was located inside the residence; therefore, the entry into the residence was unlawful and any evidence observed and seized as a result of that entry must be suppressed.

The court held a hearing on October 12, 2017 on Mullen's motion. In an Opinion and Order entered on October 13, 2017, the court denied the motion.

This case was scheduled for jury selection on January 17, 2019 and a trial on February 15, 2019.

On January 22, 2019, Mullen filed a motion in limine in which he sought suppression of the evidence based on the Supreme Court's decision in *Commonwealth v. Romero*, 183 A.3d 364 (Pa. 2018). The court summarily denied Mullen's motion in limine as untimely/waived.

On February 19, 2019, Mullen waived his right to a jury trial and elected to proceed to a nonjury, case-stated trial. The court found Mullen guilty of possession of a controlled substance, possession of drug paraphernalia, and two counts of persons not to

¹ The photograph was admitted as Commonwealth Exhibit 1.

possess firearms. The court acquitted Mullen of resisting arrest.

On April 2, 2019, the court sentenced Mullen to an aggregate term of six to thirteen years' incarceration in a state correctional institution.

On April 17, 2019, Mullen filed a post sentence motion nunc pro tunc, in which he asked the court to award him a new trial and suppress the evidence based on *Romero*.

On June 4, 2019, the court denied the nunc pro tunc motion, as the failure to file the post sentence motion in a timely manner was not the result of fraud, a breakdown in the court's operations or non-negligent circumstances. See *Criss v. Wise*, 566 Pa. 437, 781 A.2d 1156 (2001).

Through a Post Conviction Relief Act (PCRA) petition, the court reinstated Mullen's appeal rights nunc pro tunc.

The sole issue asserted on appeal is that the trial court erred in failing to suppress evidence obtained pursuant to a warrantless search in a third-party residence.

When Mullen filed his motion to suppress, his only claim was that the agents and marshals did not have sufficient reason to believe that he was inside the residence prior to their entry. The court could not agree. The parole agents and marshals did not enter the residence based solely on the anonymous tip. The evidence presented at the suppression hearing clearly showed that: parole agents received information that Mullen was staying at the residence and that he was in possession of firearms and controlled substances; law enforcement officers knocked on the door of the residence; Mullen moved the blind of the window near the door; Supervisor Barvitskie saw Mullen peering out of the window; Supervisor Barvitskie announced "state parole" and directed Mullen to come to the door;

Mullen failed to come to the door as directed; a white male answered the door; and, after being shown a photograph of Mullen, the white male confirmed that Mullen was inside the residence. Therefore, not only did the agents and marshals have a tip that Mullen was staying at the residence, they obtained corroboration that Mullen was present by Supervisor Barvitskie's observations and confirmation from the white male who answered the door. Therefore, the court properly denied Mullen's motion to suppress which was based solely on insufficient cause to believe that Mullen was present in the residence.

Mullen's current appeal is based on the lack of a search warrant authorizing the entry into the residence. The court found that Mullen was not entitled to relief on this claim for several reasons.

First, this issue was not asserted in a timely filed motion to suppress. A motion to suppress shall be contained in the omnibus pretrial motion. Pa. R. Crim. P. 581(B). The omnibus pretrial motion must be filed within 30 days after arraignment, unless the opportunity therefor did not exist, or the defendant or defense attorney 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). The issue of suppression of evidence shall be deemed waived if it is not made in a timely motion to suppress. Pa. R. Crim. P. 581(B).

To attempt to avoid the issue of untimeliness, Mullen raised this issue in a motion in limine. A motion in limine was not the proper motion. Instead, Mullen should have filed either a motion to suppress nunc pro tunc or a motion to reconsider his prior motion to suppress based on *Romero*.

The court understood that *Romero* had not been decided at the time Mullen's motion to suppress was filed. However, *Romero* was decided on April 26, 2018, and

Mullen's motion was not filed until January 22, 2019, which was also after Mullen's jury selection. Mullen did not offer good cause for filing his motion nearly nine months after the *Romero* decision was issued and days after his jury selection occurred.

For the foregoing reasons, the court found that Mullen's request for suppression based on the lack of a search warrant was untimely and/or waived.

Even if the issue had been properly raised in a timely motion to suppress or motion to reconsider, the court does not believe that *Romero* applies to the facts and circumstances of this case because *Romero* is factually distinguishable and there were exceptions to the warrant requirement in this case.

Romero is factually distinguishable in that *Romero* dealt with the rights of third parties who were not the subject of the arrest warrant and law enforcement lacked probable cause to believe that the subject of the warrant was currently inside the premises. Additionally, *Romero* appears to only be a binding, majority opinion with respect to third parties. The concurring opinion by Justice Mundy and the concurring and dissenting opinion by Justice Dougherty which was joined by Chief Justice Saylor and Justice Baer clearly indicate that four out of the seven Justices do not view as dictum the relevant language in *Payton v. New York*² with respect to the subject of an arrest warrant.

Here, unlike *Romero*, Mullen was the subject of the warrant, and law

² 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

enforcement had probable cause to believe that Mullen was inside the residence based on the tip, Supervisor's Barvitskie's observations, and the confirmation by the individual who answered the door.

Romero also does not negate the recognized exceptions to the warrant requirement such as exigent circumstances and consent. *See*, 183 A.3d 405-406 (absent a warrant reflecting a magisterial determination of probable cause to search that home, whether by a separate search warrant or contained within the arrest warrant itself, an entry into a residence is excused only by a recognized exception to the search warrant requirement).

In this case, there were exigent circumstances. The tip indicated that Mullen was staying with his girlfriend or ex-girlfriend at 408 Anthony Street and that he possessed firearms and controlled substances. Supervisor Barvitskie's observation of Mullen inside the residence and the confirmation of Mullen's presence by the white male who answered the door corroborated the information provided in the anonymous tip. In light of the contents of the tip and the corroboration of Mullen's presence inside the house, the law enforcement officials had reason to believe that Mullen was armed and that there were other individuals inside the residence.

Mullen obviously heard the knocking and was aware that law enforcement officers were present and telling him to come to the door because he moved the blind to peer out of the window and Supervisor Barvitskie was only about two feet away from the window when he observed Mullen and said "State parole. Come to the door." Nevertheless, Mullen failed or refused to come to the door.

408 Anthony Street is also a half-double house with 406 Anthony Street. These residences are connected such that there is a way to pass through from one to the other

in the space where the roof trusses are located. N.T., 10/12/2017, at 5, 11-12.

In light of the totality of the circumstances, waiting to obtain a search warrant prior to entering the residence would risk Mullen harming any of the occupants³ of either side of the half-double, taking them as a hostage, or using them as a shield.⁴

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
Jeana Longo, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)

³ The affidavit of probable cause attached to the criminal complaint indicates that there was another occupant inside the residence but it was not Mullen's girlfriend or ex-girlfriend.

⁴ The affidavit of probable cause also states that J.M. allowed State Parole and U.S. Marshals inside the residence. Mullen's motion in limine identifies J.M. as the white male who answered the door. Motion in Limine, ¶ 10. Therefore, there is also the possibility that the entry was made with consent of an individual with actual or apparent authority. The court did not hold a hearing to determine such after Mullen filed his motion in limine because the record from the suppression hearing indicated that there were exigent circumstances to warrant immediate entry into the residence.