IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-0002139-2017**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
KASAN SANDERS,	:	
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 judgment of sentence dated December 11, 2019 and amended on January 23, 2020. Through Post Conviction Relief Act (PCRA) proceedings, Appellant's direct appeal rights were reinstated nunc pro tunc on September 16, 2021.

By way of background, on December 12, 2017, a criminal complaint was filed against Appellant. Appellant was charged with four counts of person not to possess firearms, two counts of possession with intent to deliver a controlled substance, and two counts of possession of a controlled substance arising from a search of a residence located at 513 High Street. At Appellant's request, the court severed the firearms charges for trial purposes.

On October 11, 2018, Appellant requested a continuance of the trial to investigate further the confidential informant and he made an oral motion for a *Franks* hearing to invalidate the search warrant, both of which the court denied.

On October 12, 2018, Appellant waived his right to a jury trial on the firearms offenses and immediately proceeded to a bench trial. Appellant was convicted of the four

firearms offenses.

On August 14, 2019, Appellant filed a Rule 600 motion to dismiss the remaining charges, which the court denied by Opinion and Order entered on September 5, 2019. On September 6, 2019, the Commonwealth agreed to dismiss at the time of sentencing the remaining drug offenses in this case in exchange for Appellant's guilty plea to four counts of delivery of a controlled substance in CP-41-CR-0001972-2017.

On December 11, 2019, the court sentenced Appellant to two consecutive terms of five to ten years' incarceration and two concurrent terms of five to ten years' incarceration on his four counts of person not to possess firearms.[1] Upon motion of the Commonwealth, the court dismissed the remaining charges.

On December 23, 2019, Appellant filed a post sentence motion in which he asserted that the evidence was insufficient to support his firearms convictions, the court erred in denying his *Franks* motion to suppress, and the court should have imposed a lesser sentence.

On January 23, 2020, the court reconsidered Appellant's sentence and imposed concurrent sentences of five to ten years' incarceration on all of Appellant's firearms convictions.[2] In all other respects, the court denied Appellant's post sentence motion. Appellant did not file a direct appeal.

On November 19, 2020, Appellant filed a PCRA petition in both cases. The court appointed counsel to represent Appellant and gave counsel the opportunity to file an amended PCRA petition. After obtaining the transcripts of various proceedings, PCRA

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[1]In accordance with Appellant's plea agreement, the court imposed a consecutive sentence of two to four years' incarceration in CR-1972-2017, resulting in an original aggregate sentence of 12 to 24 years' incarceration.

counsel filed, on April 7, 2021, an amended PCRA petition alleging various claims of ineffective assistance of trial counsel. The court held hearings on Appellant's amended PCRA petition on July 6, 2021 and July 22, 2021. During the hearings, an additional issue was raised and accepted for determination, namely whether counsel was ineffective for failing to appeal the court's denial of his post sentence motion. By Opinion and Order entered on September 16, 2021, the court reinstated Appellant's direct appeal rights nunc pro tunc, but otherwise rejected Appellant's ineffective assistance of counsel claims.

On September 24, 2021, Appellant filed his notice of appeal. On September 29, 2021, Appellant filed a concise statement of matters complained of on appeal in which he asserted two issues: (1) the trial court erred in denying Appellant's Rule 600 motion; and (2) the trial court erred in denying Appellant's *Franks* suppression motion.

DISCUSSION

Appellant first contends that the court erred in denying his Rule 600 motion to dismiss. The court cannot agree.

Rule 600 states, in relevant part: "Trial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed." PA. R. CR. P. 600 (A)(2)(a). The criminal complaint against Appellant was filed on December 12, 2017. Accordingly, the mechanical run date was December 12, 2018. The court held a nonjury trial on Appellant's firearms charges on October 12, 2018. Therefore, Rule 600 was not violated.[3]

The Commonwealth dismissed the remaining charges in this case at the time

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[2] As a result, Appellant's amended aggregate sentence was 7 to 14 years' incarceration.

[3] If, for any reason, the appellate courts need to examine the excludable time in this case, the court would rely on

of sentencing.[4]

Appellant also contends that the trial court erred in denying his *Franks* suppression motion. Again, the court cannot agree.

First, Appellant's motion was untimely. Unless the opportunity did not previously exist or the interests of justice otherwise require, a suppression motion shall be made in an omnibus pretrial motion. PA. R. CR. P. 581(B). An omnibus pretrial motion shall be filed and served 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. CR. P. 579(A).

Appellant's arraignment was January 8, 2018. Therefore, Appellant should have filed his motion on or before February 7, 2018. Appellant never filed a written motion for a *Franks* hearing prior to trial. Instead, he made an oral motion on October 11, 2018, literally on the eve of trial. At that time, Appellant's counsel claimed he had only recently discovered that the CI's crimen falsi conviction involved the theft of a portion of the buy money in a 2013 case. This information about the CI was not included in the affidavit of probable cause for the search warrant for 513 High Street. However, Appellant's counsel acknowledged that he had the information regarding the CI's criminal history for months, and he simply did not investigate it until the Commonwealth revealed a day or two earlier

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the Opinion and Order entered on September 5, 2019.

[4] The Rule 600 motion related to the dismissed drug offenses in this case and the charges against Appellant in his other case, CP-41-CR-0001972-2017. Appellant waived any Rule 600 issue by pleading guilty in case 1972-2017. Specifically, in Questions 15 a and b of the written guilty plea colloquy, Appellant indicated that he understood by pleading guilty he was waiving, or giving up, any pre-trial motions already filed and his right to appeal any adverse decisions on motions already heard by the court.

that law enforcement had paid the CI for some of the transactions in CR-1972-2017. Transcript, 10/11/2018, at 5, 7, 9-10.

Second, the *Franks* motion would not have been successful. A defendant may challenge the validity of a warrant based on false statements and omissions in the affidavit. *Franks v. Delaware,* 438 U.S. 154 (1978). The suppression court must conduct a *Franks* hearing "where the defendant makes a preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement in an affidavit." *Id*. at 155-156; *Commonwealth v. James,* 69 A.3d 180, 188 (Pa. 2013). The burden is on the defendant to provide allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. *Franks,* 438 U.S. at 171. If the defendant meets this burden, then the affidavit's false material is disregarded; however, the search warrant will only be voided, and the fruits thereof excluded, if the remaining content is not sufficient to establish probable cause. *James,* 69 A.3d at 188.

With respect to omissions, a defendant has the right to challenge omissions in the affidavit of probable cause. *James,* 69 A.3d at 189. Challenges of this nature must be resolved with evidence beyond the affidavit's four corners. *Id.* The task of the court is to determine whether the omitted facts need to be included in determining probable cause. *Id.*

Where omissions are the basis for a challenge to an affidavit of probable cause, the following test is applied: "(1) whether the officer withheld a highly relevant fact within his knowledge, or any reasonable person would have known that this was the kind of thing the judge would wish to know; and (2) whether the affidavit would have provided probable cause if it would have contained a disclosure of the omitted information."

Commonwealth v. Taylor, 850 A.2d 684, 689 (Pa. Super. 2004).

Even if the payments to the CI and the CI's theft conviction were included in the search warrant affidavit of probable cause for 513 High Street, there still would have been probable cause to search. The CI made four controlled buys inside 513 High Street. The buys occurred on October 18, 2017; October 23, 2017; October 25, 2017; and November 7, 2017. Prior to each buy, the CI was strip-searched and then law enforcement officers observed the CI enter the premises. Shortly thereafter, the CI exited the premises and provided controlled substances to the officers. Officers executed the warrant and searched the premises on November 9, 2017, two days after the last controlled buy. Given the number of times that the CI entered the premises and returned with controlled substances and the fact that the search occurred only two days after the fourth controlled buy, there was fair probability that officers would find controlled substances within 513 High Street on November 9, 2017.

Finally, Appellant was not entitled to the remedy of suppression because he did not have a reasonable expectation of privacy in 513 High Street. In connection with a motion to suppress, in order for an individual to invoke the protections of the constitutions, the defendant bears the burden of demonstrating that he personally had an expectation of privacy in the area searched, and that this expectation is reasonable, i.e., one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. *Minnesota v. Carter,* 525 U.S. 83, 88 (1998); see also *Commonwealth v. Enimpah*, 106 A.3d 695, 698-699 (Pa. 2014)(a defendant must show that he had a privacy interest in the place invaded that

society is prepared to recognize as reasonable; if the defendant has no privacy interest, neither the Fourth Amendment nor Article I, §8 is implicated). 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).

Appellant failed to meet this burden. First, the record is devoid of any evidence whatsoever as to Appellant's actual or subjective expectation of privacy in the residence.

Second, the court cannot conclude on the record, that Appellant's expectation of privacy, if any, is one that society is prepared to recognize as reasonable.

As the court noted in its prior Orders, Appellant did not have a reasonable expectation of privacy in the residence that entitled him to suppression. Appellant was not residing at the property; he resided next door. He went to the property to conduct drug transactions and to hang out and watch the property if need be. There was no testimony whatsoever that Appellant owned or leased the property; in fact, the testimony was to the contrary. Instead, the "trap house" was a structure that Appellant and others were utilizing to conduct drug transactions and to use controlled substances. Appellant did not have a reasonable expectation of privacy in these premises; therefore, he was not entitled to the remedy of suppression. See *Commonwealth v. Peterson*, 636 A.2d 615 (Pa. 1993)(appellant did not have a reasonable expectation of privacy in abandoned storefront being utilized as a gate house); *Commonwealth v. Cameron*, 561 A.2d 783 (Pa. Super. 1989), *appeal denied*, 575 A.2d 108 (Pa. 1989)(despite presence of a tv, couch and a platter of food, appellant did

not have a legitimate expectation of privacy in abandoned house that was not his residence).

Accordingly, the trial court did not err in denying Appellant's *Franks* motion.

DATE: _____________ By The Court,

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Marc F. Lovecchio, Judge

cc: District Attorney
Trisha Hoover Jasper, Esquire
Judge Marc F. Lovecchio
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)