IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR-1296-2020
V.	:	
MARCELLUS TURNER	:	Omnibus Pre-Trial Motion
* * * * * * * * * * * * *		
COMMONWEALTH OF PENNSYLVANIA	:	NO. CR-1339-2020
V.	:	
SEAN JOHNSON-BROWN, JR.	:	Omnibus Pre-Trial Motion

OPINION AND ORDER

Defendant Turner is charged by Information filed on October 16, 2020 with conspiracy to deliver a controlled substance, firearms not to be carried without a license, conspiracy to possess a controlled substance and related traffic summaries.

Defendant Sean Johnson-Brown, Jr. is charged by Information filed on October 16, 2020 with possession with intent to deliver a controlled substance, firearms not to be carried without a license, possession of a controlled substance and persons not to possess.

Turner filed an Omnibus Pretrial Motion on November 20, 2020 and a Supplemental Omnibus Pretrial Motion on November 24, 2020. A hearing was held on February 1, 2021 with oral argument being held on February 22, 2021.

Turner seeks a dismissal of the conspiracy charges contained in Counts 1 and 3 as well as the firearms without a license charge contained in Count 2. Turner

argues that the evidence is insufficient to prove a *prima facie* case of constructive possession of the controlled substance, paraphernalia and firearm found in the backpack of another, namely Brown.

Turner argues that the items were not in plain view, as the items were located in a backpack owned by Brown. Although Turner was driving the vehicle, he did not own it, no illegal items were found in Turner's bag, almost all of the illegal items were found in Brown's bag or the center console, and Turner did not attempt to flee or make any furtive movements.

Turner also seeks to suppress all evidence obtained from any cell phones that the officers searched without a warrant or consent. Turner claims that officers powered on cell phones, pressed buttons and read the screens of both a flip phone and at least two other iPhones.

Turner further seeks to suppress the items seized from his bag. Turner contends that it was located in the rear hatch compartment of the vehicle and that he never consented to the search of his bag. Alternatively, Turner argues that the owner of the vehicle, Mr. Brown, did not have authority to consent to the search of Turner's bag.

Turner also filed several other motions including, motions for leave to file an amended omnibus pretrial motion after reviewing additional discovery as such discovery was provided after the date of the hearing in this matter; a motion in limine to preclude the Commonwealth from introducing evidence including, but not limited to,

evidence found on the MVR tape; a motion to preclude reference to cell phones as being "burner phones"; and a motion in limine to preclude the Commonwealth from introducing evidence that the firearm did not have a serial number, evidence that Turner had a prior criminal record and evidence as to any of Turner's prior convictions.

Finally, Turner filed a motion to compel discovery of photographs taken by Officer Esposito, and a motion for severance for trial purposes of Count 2, firearms without a license, Count 7, persons not to possess and Count 4, driving under suspension DUI related.

Brown filed an omnibus Pretrial motion on December 22, 2020. A hearing was held on February 25, 2021.

Brown contends that the search of his vehicle and the bag were illegal because his continued detention was not based on reasonable suspicion.

Brown also argues that his consent was not knowing, intelligent or voluntary, either because he did not give consent at all or because he was not made aware of the extent and scope of the search.

Brown also filed a motion for severance of his case from Turner's case, a motion for separate trials in connection with his firearm offenses, and a motion to suppress the fruits of the illegal cell phone search.

This Opinion will address Turner's petition for habeas corpus and/or dismissal of the conspiracy charges contained in Counts 1 and 3 as well as the firearm

charges contained in Counts 2 and 5. It will also address Turner's motion to suppress the items seized from Turner's bag.

This Opinion and Order also will address Brown's motion to suppress based on an alleged lack of reasonable suspicion for his continued detention and the consent issue.

As noted above, the court held a hearing on Turner's motions on February 1, 2021, and it held a hearing on Brown's motion on February 25, 2021. Further, during Turner's hearing, the Commonwealth introduced in evidence the transcript of Turner's preliminary hearing held on September 28, 2020, as well as the preliminary hearing transcript involving Brown on September 28, 2020. The Commonwealth also admitted into evidence photographs of the monies allegedly seized from both defendants and what was characterized as an 'owe sheet' that was allegedly located in the center console of the vehicle. The court also reviewed the MVR of the incident. In both hearings, a separate copy was admitted into evidence.

In reviewing all of the evidence as set forth above, the court finds the Commonwealth established the following facts for *prima facie* purposes.

On September 21, 2020, Officer Gareck Esposito and Corporal William MacInnis, both of the South Williamsport Police Department, were on duty working together. They were sitting stationary at a bank parking lot on South Market Street in South Williamsport facing South Market Street. They observed a Jeep Cherokee with

heavy window tint traveling south on Market Street drive in front of their position. They pulled out to further investigate. The Jeep stopped at a traffic light on South Market Street in the left lane. The officers pulled in the right lane and stopped at the traffic light next to the Jeep. They confirmed that the window tint was likely illegal. When the light turned green, the Jeep quickly cut in front of the officers' vehicle and started making a right turn into a gas station. The officers initiated a traffic stop to investigate the window tint, as well as the careless driving.

Both officers exited their unit. Corporal MacInnis approached on the driver's side of the vehicle and directed the driver to roll down all of the windows. Corporal MacInnis subsequently identified the driver as Turner. Officer Esposito made contact with the passenger, who he subsequently identified as Brown.

Upon making contact with Brown, Officer Esposito smelled the odor of raw marijuana, saw marijuana flakes in plain view on the front passenger floorboard, and saw a marijuana "nugget" between the back passenger seat and the door.

Corporal MacInnis engaged Turner in conversation and he asked Turner for his license and the vehicle's registration. He discovered from Turner that the vehicle belonged to Brown. Corporal MacInnis was concerned and wanted to investigate the window tint and the driver's careless driving of cutting off the officers. Upon speaking with Turner, he noticed an odor of both marijuana and alcohol coming from Turner.

Among other things, Corporal MacInnis asked Turner where they were headed and how much he had to drink. Turner replied that he had a couple shots. He also indicated that he did not have a driver's license, as it was under suspension. The initial interaction between Corporal MacInnis and Turner lasted approximately 60 to 65 seconds.

At this time, Corporal MacInnis told Turner that he needed to give him a minute. Corporal MacInnis returned to his police vehicle while Officer Esposito remained at Brown's vehicle. Corporal MacInnis suspected that Turner was driving under the influence (DUI), as well as driving under suspension. He requested warrant information from County Communications, ran the plate and confirmed that Turner's license was suspended and that Turner had five prior drug convictions.

After approximately five minutes in his vehicle checking information, Corporal MacInnis exited his vehicle and met with Officer Esposito in front of their unit but behind the vehicle occupied by the defendants. The officers discussed what they saw, what they smelled, and what Corporal MacInnis discovered.

Corporal MacInnis returned to the vehicle and started talking with Turner. Again, they discussed how much Turner allegedly had to drink. Corporal MacInnis started asking numerous questions of both occupants, including asking if they had anything the officers should know about, such as "pipe bombs, anthrax, methamphetamine, heroin, cocaine, or weapons of mass destruction." Both individuals replied in the negative, although they made some other comments as well.

Corporal MacInnis then asked if they had any objection to him searching the vehicle. There was some initial muttering. Turner said no but then he looked at Brown, deferring to him as the owner of the vehicle. Corporal MacInnis then asked a second time "do you guys object to me searching the vehicle?"

Brown testified during the hearing that when asked by Corporal MacInnis, neither he nor Turner gave their consent nor said anything at all. His testimony, however, is belied by the MVR tape, on which one can hear the individuals in the car speaking to the officers. Further, Corporal MacInnis credibly testified that when he asked if they had any objection, they either said "no" or "go ahead." Corporal MacInnis then immediately said to them, "okay, we're good?" Corporal MacInnis' testimony is corroborated by the MVR.

Corporal MacInnis asked Turner to step out of the vehicle and then asked if he could search him. Turner said yes. Turner asked, "isn't it the same thing—a search and a frisk?" Corporal MacInnis replied no and actually showed Turner the difference but reminded him that it didn't matter because he "already consented."

Brown was subsequently searched. The officers then directed Turner and Brown to sit in front of the patrol unit.

Corporal MacInnis then opened up the back hatch and saw two black bags located near each other.

The two black bags resembled book bags and they were directly beside each other or "side by side" in the cargo area of the vehicle. Being a Jeep Cherokee, there was no trunk. The bags were located in the cargo area behind the last row of seats.

Corporal MacInnis identified one of the bags and asked who's "is this?" Turner said the bag was his. Corporal MacInnis then asked who owned the other bag and Brown indicated it was his.

Officer MacInnis searched Turner's bag and found some money. He asked Turner how much money was there and how he obtained it. The bag contained $2,500 in cash. Turner claimed the money was from working construction, but Officer Esposito testified that the Department of Labor and Industry did not have any record for Turner.

Brown claimed ownership of the other bag, which contained a loaded firearm, $2,800 in cash and 11 bundles of heroin. According to the officers, the money in both bags was "packaged very consistent with each other." It was clean, neat, and stacked in the same numerical order, although only the money in Brown's bag was "rubber banded" together.

Once the officers found the weapon and drugs, both defendants were immediately handcuffed and detained further.

A further search of the vehicle resulted in officers finding a "drug sales sheet" consistent with the selling of heroin. "The numbers were consistent with some of the numbers that are found on heroin sales sheets", including amounts paid, number of

bags and a person's name. They also found a small amount of packaged marijuana. The officers found these items in the center console of the vehicle.

The officers also found five different cell phones. One was on Brown, one was on Brown's seat, and a third cell phone attributed to Brown was found in the center console. The officers found two other phones on Turner. Turner claimed that of the two phones he possessed, one was for work.

Neither officer specifically asked Turner or Brown for consent to search the bags, but both consented to the search of the vehicle in which the officers found the bags. Furthermore, and as indicated above, both Brown and Turner were outside of the vehicle watching as the officers opened the hatch and seized the bags. As Corporal MacInnis took out each bag, each individual identified the bag as his. Corporal MacInnis then searched each bag without Turner or Brown making any objection.

The court will first address Turner's petition for habeas corpus with respect to all counts of the Information but for the summary charges. Defendant Turner argues that he did not have exclusive control over the vehicle, the Commonwealth had no proof of how long he was in the vehicle or if he ever had exclusive control over the vehicle, he did not attempt to flee or make furtive movements and the officers did not find any contraband in plain view. Turner further argues that his mere presence at the scene where contraband was found, while a factor, is insufficient to establish that a *prima facie* case has been met.

The proper means to attack the sufficiency of the Commonwealth's evidence pretrial is through the filing of a petition for writ of habeas corpus. *Commonwealth v. Lambert,* 244 A.3d 38, 42 (Pa. Super. 2020); *Commonwealth v. Dantzler,* 135 A.3d 1109, 1112 (Pa. Super. 2016)(en banc).

At a habeas corpus hearing, the issue is whether the Commonwealth has presented sufficient evidence to prove a *prima facie* case against the defendant. *Commonwealth v. Williams,* 911 A.2d 548, 550 (Pa. Super. 2006), abrogated on other grounds by *Dantzler,* 135 A.3d at 1112 n.5; see also *Commonwealth v. Hilliard,* 172 A.3d 5, 10 (Pa. Super. 2017) (a trial court may grant a defendant's petition for writ of habeas corpus after a preliminary hearing where the Commonwealth has failed to present a prima facie case against the defendant).

A workable definition of prima facie is not without controversy. See *Commonwealth v. Ricker,* 652 Pa. 367, 381, 170 A.3d 494, 503 (2017) (per curiam) (Saylor, C.J., concurring). On the one hand, a prima facie case consists of evidence, read in a light most favorable to the Commonwealth, that sufficiently establishes both the commission of the crime and that the accused is probably the perpetrator of that crime. Pa. R. Crim. P. 542 (D); *Commonwealth v. Ouch,* 199 A.3d 918, 923 (Pa. Super. 2018). On the other hand, "a prima facie case in support of an accused's guilt consists of evidence that, if accepted as true, would warrant submission of a case to a jury." *Commonwealth v. Marti,* 779 A.2d 1177, 1180 (Pa. Super. 2001).

When reviewing a petition for writ of habeas corpus, the court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. *Commonwealth v. Santos,* 876 A.2 360, 363 (Pa. 2005). A *prima facie* case merely requires evidence of each of the elements of the offense charged, not evidence beyond a reasonable doubt. *Marti, supra.* Moreover, the Commonwealth can sustain this burden by means of wholly circumstantial evidence. *Commonwealth v. Hill*, 210 A.3d 1104, 1112 (Pa. Super. 2019).

Further, at the *prima facie* level, inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given affect and the evidence must be read in a light most favorable to the Commonwealth's case. *Ouch, supra* at 923.

Pursuant to the Crimes Code, a person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission, he:

> (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) agrees to aids such other person or persons in the planning or commission of such crime or of an intent or solicitation to commit such crime.

18 Pa. C.S. § 903(a).

"A conspiracy is almost always proved through circumstantial evidence. The conduct of the parties and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy…" *Commonwealth v. Lambert,* 795 A.2d 1010, 1016 (Pa. Super. 2002)(citations and internal quotation marks omitted).

To sustain a conviction of criminal conspiracy,

> The Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or person; (2) with a shared criminal intent; and (3) an overt act done in furtherance of the conspiracy. Additionally, an agreement can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode. These factors may coalesce to establish conspiratorial agreement beyond a reasonable doubt where one factor alone might fail.

Commonwealth v. Bricker, 882 A.2d 1008, 1017 (Pa. Super. 2005), quoting *Commonwealth v. Jones*, 844 A.2d 108, 121-22 (Pa. Super. 2005)(internal citations and quotation marks omitted).

For the defendant to be convicted of possession with intent and to deliver and/or possession of a controlled substance, the Commonwealth would need to prove that the defendant possessed with intent to manufacture or deliver, or simply possessed, a controlled substance. 18 P.S. § 780-113 (a) (30) (16). Because Turner was not in actual possession of any controlled substances, paraphernalia or the firearm, the Commonwealth would need to prove what is known as constructive possession.

As Defendant notes in his motion, constructive possession is a legal fiction. It is an inference arising from a set of facts that possession of the contraband was more likely than not. Courts have defined constructive possession as conscious dominion. Conscious dominion is explained as the power to control contraband and the intent to exercise that control. *Commonwealth v. Macolino,* 469 A.2d 132, 134 (Pa. 1983). Constructive possession may be established by the totality of the circumstances. *Commonwealth v. Hopkins*, 67 A.3d 817, 819 (Pa. Super. 2013).

Contrary to what Defendant argues, the court is of the opinion that *prima facie* has been proven with respect to both of the conspiracy counts and the firearm counts.

Turner was driving a vehicle with Brown as the passenger. Brown was the registered owner and clearly permitted Turner to drive the vehicle. The two black bags that were found in the cargo area of the Jeep were in close proximity and similar in size and shape. The bag claimed by Brown contained the loaded firearm, $2,800.00 in cash, and 11 bundles of heroin. The bag claimed by Turner had $2,500.00 in cash. The factfinder is not required to accept either defendants claim of ownership.

The cash was similar in how it was stacked in numerical order and was clean and neat. However, it was not exact. The cash by Brown was rubber banded. The cash by Turner may have contained different denominations and may have been stacked differently by the face of the bills or the back of the bills.

Turner claimed the cash was from working construction, but the Department of Labor and Industry did not have any record of Turner's employment.

The factfinder also would not be required to accept any claim by Turner that he was working "under the table" as suggested by defense counsel's questioning of Officer Esposito.

More importantly, a drug sales sheet consistent with heroin sales was located in the center console of the vehicle within arm's reach of Turner. Moreover, Turner had two cell phones. The factfinder is not required to accept his explanation as to why he had two cell phones. Brown had three cell phones, one of which was in the center console.

For *prima facie* purposes, the court concludes that the Commonwealth has established the elements of a conspiracy as well as the elements of possession. The court acknowledges that it is a close call, especially with respect to the possession of the firearms but, at this stage, the Commonwealth has met its burden.

The court will next address Turner's Motion to Suppress evidence of the claimed illegal bag search. As Turner explains, an exception to the warrant requirement is a consensual search. *Commonwealth v. Valdivia,* 195 A.3d 855, 861 (Pa. 2018).

Turner argues that the owner of the vehicle did not have authority to consent to the search of Turner's bag and the scope of any consent exceeded the authority to search the vehicle. In other words, Turner argues that searching the vehicle is not the same as searching the bag.

To some extent, Brown relinquished possession of the vehicle to Turner by allowing him to drive the vehicle. At the very least, Turner had joint access to the

vehicle. Contrary to what Turner claims, he clearly consented to the search of the vehicle. *U.S. v. Morales*, 861 F.2d 396, 399-400 (3d Cir. 988)(driver of vehicle has authority to consent to a full search of the vehicle, including its trunk).

Additionally, Brown clearly consented to the search of the vehicle. As the owner of the vehicle, Brown clearly had the authority to consent to the search of the vehicle.

As for Turner's scope argument, the standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective reasonableness" or what would the typical reasonable person had understood by the exchange between the officer and suspect. *Florida v. Jimeno,* 500 U.S. 248, 251 (1991).

When a law enforcement officer asks for permission to search the car and the consent given in response is general and unqualified, then the officer may proceed to conduct a general search of that vehicle including the portions in the trunk or hatchback portion of the vehicle. *Morales*, *supra.*

Under all of the circumstances, the court finds that consent was given by Turner to search the vehicle and his general consent included consent to search his bag in the back of the Jeep. Additionally, Brown consented to the search of the vehicle and, as owner of the vehicle, he clearly had the authority to consent to the search. Furthermore, it was objectively reasonable for the police to conclude that the general consent to search the Jeep included consent to search the bags in the back hatch area. The authorization to search in this case extended beyond the surfaces of the car's interior. It clearly extended to the bags. *Jimeno*, 500 U.S. at 251 ("it was objectively

reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs.").

Alternatively, even if consent was not expressed, it was certainly implied. As indicated, consent to search is objective but it may also be implied. *Commonwealth v. Fredrick,* 230 A.3d 1263, 1267 (Pa. Super. 2020); see also *Morales*, *supra* (by remaining silent during search, passenger/lessee impliedly consented to it, and the failure of the driver and passenger to object during extensive search of the vehicle indicated that the search was within the scope of the consent given by the driver).

The court will next address the issues set forth by Defendant Brown. He first argues that it was illegal to continue to detain him following the initial stop. The court cannot agree.

Following the stop, evidence was obtained to raise a suspicion that not only was the driver potentially impaired through controlled substances or alcohol but also that the occupants of the vehicle may be engaged in illegal drug activity.

Brown is correct that once the reason for the initial stop has been satisfied, the police may not further detain an individual without reasonable suspicion. The reasonable suspicion standard allows a police officer to stop an individual based upon specific and articulable facts and rational inferences from those facts that warrant a belief that the individual is involved in criminal activity. *Commonwealth v. Hicks,* 208 A.3d 916, 932 (Pa. 2019), *cert. denied*, 140 S. Ct. 645 (2019).

When evaluating whether reasonable suspicion exists in a particular case, the court must view the circumstances through the eyes of a trained officer, not an

ordinary citizen. *Commonwealth v. Milburn,* 191 A.3d 891, 898 (Pa. Super. 2018). Although the police officers' own observations, knowledge and experience does weigh heavily in determining whether reasonable suspicion exists, our courts remain mindful that the officer's judgment is necessarily colored by his or her primary involvement in the often-competitive enterprise of ferreting out crime. *Commonwealth v. Beasley,* 761 A.2d 621, 626 (Pa. Super. 2000). The test to be applied remains an objective one and will not be satisfied by an officer's hunch or unparticularized suspicion. *Id.*

In this case, however, there was far more than a hunch or suspicion. Both officers articulated specific observations that supported a reasonable suspicion that both defendants were engaged in criminal activity. While Brown is correct that both parties were cooperative and answered the questions posed by law enforcement, many other factors raised reasonable suspicion.

The defendants had a difficult time explaining where they were going or why they were in Williamsport. There was an odor of marijuana coming from the vehicle. There were marijuana flakes found in the front passenger area the vehicle. There was a marijuana nugget in the back passenger area of the vehicle. Brown was in the front passenger seat and was the owner of the vehicle. The officers had reasonable suspicion that Brown was in possession of marijuana.

Turner was the driver of the vehicle. Turner smelled of alcoholic beverages and marijuana and admitted to having two shots. Turner was driving under a suspended license. There were marijuana flakes and a marijuana nugget in plain view in the vehicle. Finally, Turner had five prior controlled substance convictions. The

officers had reasonable suspicion that Turner was driving under the influence of alcohol and marijuana and that Turner possessed marijuana.

In both instances, it was reasonable for the officers to investigate further to confirm or dispel their reasonable suspicions. Part of that investigation was seeking consent to search the defendants and consent to search the vehicle to determine whether additional controlled substances were present.

As for Brown's argument that his consent was not knowing, intelligent or voluntary because he was not made aware of the extent or scope of the search, the issue is much more direct. Brown testified that neither he nor Turner gave any consent whatsoever. Both officers on the other hand testified that consent was given and the officers' version clearly or at the least more clearly is supported by the audio-video MVR.

ORDER

AND NOW, this _____ day of April 2021, following hearings and arguments, Defendant Turner's Motion for Writ of Habeas Corpus set forth in his Omnibus Pretrial Motion filed November 12, 2020 is **DENIED**, and his Motion to Suppress Evidence set forth in his November 24, 2020 Supplemental Omnibus Pretrial Motion is **DENIED**.

With respect to Defendant Brown, his Motion to Suppress Evidence as set

forth in his December 22, 2020 Omnibus Pretrial Motion is **DENIED**.

BY THE COURT:

_____

Marc F. Lovecchio, Judge

cc: Ryan Gardner, Esquire, ADA
Robert A. Hoffa, Esquire (Sean Johnson Brown, Jr.)
Leonard Gryskewicz, Jr., Esquire (Marcellus Turner)
Lampman Law
2 Public Square
Wilkes-Barre, PA 18701
Gary Weber, Esquire
Judge Marc F. Lovecchio