IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 99-10,308

VS :

MICKEY CHARLES TODD :

OPINION AND ORDER

Before the Court is the Defendant's Motion to Suppress and Petition for Writ of Habeas Corpus. After a review of the transcript of the preliminary hearing, the Court finds the following facts relevant to the Defendant's motions. On February 13, 1999, at 3:00 a.m., Delores Miller of 121 Eldred Street awoke to the sound of her dog barking. She looked out of the front and back of her home, but saw nothing. She returned to bed, but again at 3:30 a.m., she awoke to her dog barking. The second time when she looked out the front window of her home, she saw a man walking on the sidewalk by her driveway and across the street (N.T. 2/19/99, p. 4). When she looked out the back of her home, she noticed that her storm door was ajar. When she went to close the door, she noticed that one of the windows had been taken out of the casing (Ibid.) She testified that she did not know whether it had fallen out, so she went closer to investigate. When she looked out the window she saw footprints in the snow (Ibid.) She called the police and gave a description of the man she had seen walking from her home. She told the officers that she saw a man in dark clothing, possibly sweat pants, and a knit cap (Id., p 5). She testified that she did not believe that anything had been taken, but some items had been knocked to the floor from the area around the window.

Sergeant Arnold Duck, Jr., of the Williamsport Bureau of Police testified that he responded to the call at Ms. Miller's residence that evening. He testified that he positioned himself at the intersection of Eldred and Mary Streets. While at that location

he came into contact with the Defendant, who fit the description given by Ms. Miller (Id., p. 12). He approached the Defendant and requested his identification. The Defendant told him that he was coming from the home of a friend, and that he was unsure of where he was, as he had recently moved to the area (Id., p 14). According to the Defendant's identification, he was found approximately four blocks from his home. The Defendant was detained and turned over to Officer Williams.

Officer Brett Williams of the Williamsport Bureau of Police testified that he responded to the home of Ms. Miller that evening. He testified that after taking her statement he went to the back porch to investigate the footprints in the snow. He testified that the footprints were distinguishable as far as the tread on the footwear (Id., p 18). After photographing the footprints in the snow, the Defendant's sneaker was removed to compare the treads. Officer Williams testified that the Defendant's shoe fit into the print perfectly (Id., p. 19). The Defendant was arrested and charged with attempted burglary, criminal trespass, and loitering and prowling at night time.

HABEAS

A preliminary hearing was held February 19, 1999, after which District Justice Page bound over all charges. The Defendant now argues that the Commonwealth did not present a prima facie case on the charges. To successfully establish a prima facie case, the Commonwealth must present sufficient evidence that a crime was committed and the probability the Defendant could be connected with the crime. Commonwealth v. Wodjak, 502 Pa 359, 466 A.2d 991 (1983). 18 Pa.C.S.A. § 3502(A) provides that a person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the

premises are at the time open to the public or the actor is licensed or privileged to enter. Under 18 Pa.C.S.A. § 901 an attempt occurs when a person, with an intent to commit a specific crime, does any act which constitutes a substantial step toward the commission of that crime.

Instantly, the Court finds that the Commonwealth presented sufficient evidence to establish a prima facie case that the Defendant entered the home of Ms. Miller. The window of Ms. Miller's home had been completely removed providing a means of entry. Although nothing had been taken, items had been knocked from the area around the window onto the floor. Ms. Miller testified that she felt that her dog's ferocious bark had scared the person away. Constructive, although incomplete, entry, as by a portion of the body only, satisfies the entry requirement of the crime. Commonwealth v. Myers, 223 Pa.Super. 75, 297 A.2d 151 (1972).

The Court further finds that the Commonwealth presented sufficient evidence to establish a prima facie case that the Defendant entered the victim's house with the intent to commit theft after entry. *See* Commonwealth v. Morgan, 265 Pa.Super. 225, 236, 401 A.2d 1182 at 1187 (1979) (court concluded that the evidence was sufficient to support a reasonable inference that the defendant intended to commit theft. The incident involved a residence, which one ordinarily expects to contain items of value that can be removed by a single individual without the use of special tools.) *See also* Commonwealth v. Miller, 279 Pa.Super. 254, 420 A.2d 1129, (1980).

Having found that the elements of the attempted burglary were established, the Court must then determine whether the Commonwealth provided sufficient evidence to establish the Defendant could be connected with the crime. In the instant case, the

Defendant was found walking a short distance from the scene in the early morning hours. When confronted by the officers, the Defendant stated that he had been at the home of a friend, but could not tell the officers where his friend lived. Upon investigation of the scene, officers found footprints in the freshly fallen snow. The footprints perfectly matched the tread on the Defendant's shoes. The Court finds this evidence to sufficiently establish that the Defendant could be connected with the crime. As the Court finds that the Commonwealth established that the crime of attempted burglary was committed and established the probability that the Defendant could be connected with the crime, the Defendant's Motion to dismiss the charge of attempted burglary is denied.

The Defendant next argues that the Commonwealth failed to establish a prima facie case for the crime of criminal trespass. 18 Pa.C.S.A. § 3503 provides that a person commits the crime of criminal trespass if he, knowing that he is not licensed or privileged to do so, enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof; or breaks into any building or occupied structure or separately secured or occupied portion thereof. The Commonwealth must therefore provide sufficient evidence that the Defendant broke into a structure knowing that he was not authorized to do so. As the Court has already found that the Commonwealth established these elements with regard to the charge of burglary, the Defendant's motion to dismiss this charge is denied.

The Defendant next alleges that the Commonwealth failed to establish a prima facie case of Loitering and Prowling at night time. 18 Pa.C.S.A. § 5506 provides that a

person is guilty of loitering and prowling at night time, if he at night time maliciously loiters or maliciously prowls around a dwelling house or any other place used wholly or in part for living or dwelling purposes, belonging to or occupied by another. The Court finds the Commonwealth established a prima facie case that the Defendant was loitering and prowling around the residence of Ms. Miller. The Court therefore denies the Defendant's Motion to dismiss this charge.

MOTION TO SUPRESS

The Defendant next argues that the Court should suppress all statements made by the Defendant, as well as all evidence obtained with respect to the Defendant's sneakers. With regard to the suppression, the Commonwealth presented the testimony of Officer Houseknecht and Sergeant Duck, and Officer Williams, all of the Williamsport Bureau of Police.

Sergeant Duck testified that at 4:00 a.m. on February 13, 1999, he received a call with regard to an incident in the 100 block of Eldred Street. The suspect was identified as an individual with a dark jacket and possibly blue jeans. There were reports that the individual was running in an east – northeast direction from Adams Street. Sergeant Duck positioned himself approximately 1-1 ½ blocks from the area where the individual was seen. Moments later, he saw the Defendant, wearing clothes that matched the description given of the assailant. Sergeant Duck stopped the Defendant and asked for identification. Sergeant Duck testified that the Defendant told him that he was coming from his friend's house, but he didn't know the name of his friend. Sergeant Duck called Officer Williams to the scene. He detained the Defendant

for approximately ten minutes while waiting for Officer Williams to arrive. Officer Williams looked at the sole of the Defendant's sneakers, and took him into custody.

Officer Williams testified that he initially responded to the scene of the incident to talk to the person who had made the report. He investigated the scene, including the footprints surrounding the window on the deck of the home. He testified that the footprints had the tread of sneakers. He was then notified by Sergeant Duck that he had stopped a person fitting the description of the assailant. He responded to the area where the Defendant had been detained. He testified that it took him approximately 5 to 10 minutes to get to the Defendant's location. When he arrived at the Defendant's location, he asked the Defendant if he could see the bottom of his shoe. The Defendant lifted his shoe to reveal the tread of his shoe. The Defendant was then taken into custody, he was handcuffed, he was placed in a cruiser, and taken to the scene. The Defendant's shoe was then removed and taken to compare with the shoe print with the prints in the snow. Officer Williams testified that the prints were an identical match.

Officer Houseknecht testified that he sat in the cruiser with the Defendant after he was taken into custody. The Defendant was in the back of the cruiser in handcuffs. The Defendant was not advised of his Miranda warnings. He testified that he made casual conversation with the Defendant. At one point he asked the Defendant, "were you bored tonight?" In response, the Defendant stated to him that he didn't want to say anything without a lawyer. Officer Houseknecht testified that he said nothing further to the Defendant. Approximately one minute later, the Defendant stated that he could pay for the damage, and that he didn't mean to break anything. He testified that while sitting

in the cruiser, the Defendant could have overheard radio traffic of the other officers concerning the investigation.

The Defendant first argues that Sergeant Duck lacked reasonable suspicion necessary to warrant an investigative detention of the Defendant. The Court does not agree. The Court finds the stop and detention of the Defendant in the instant case is similar to the situation presented in Commonwealth v. Ellis, 541 Pa. 285, 662 A.2d 1043 (1995). In Ellis, the police received a call with regard to a possible burglary. A description of the possible suspects was dispatched, and an officer began patrolling in the vicinity of the incident. When the officer closed to within a half mile of the burglary scene, he spotted a vehicle which fit the radioed description of the vehicle seen leaving the area of the burglary. The officer pulled the vehicle over and ordered the occupants out of the car.

The court found there was "no doubt that the initial stop by Officer Neibel constituted an investigative detention and was supported by a reasonable suspicion that Appellant was engaged in criminal activity." Ellis, 541 Pa. at 294. The court found the following articulable facts created a reasonable suspicion that the Defendant was engaged in criminal activity: (1) Appellant's vehicle was the only vehicle on the roadway near the burglary scene at that hour; (2) the car was in the area a vehicle would have been if it left the area of the burglary when the call was broadcasted; and (3) the car matched the description of the one seen at the crime.

Based on Ellis, the Court finds that the stop of the Defendant was based on reasonable suspicion that the Defendant was engaged in criminal activity. The victim reported that the suspect left the vicinity of her house on foot. The call came in at

4:00a.m., a time when there are very few, if any, pedestrians on the street. The Defendant was walking in the area that the suspect was reported to be headed, and where he would have been had he left the area of the burglary when it was reported. Additionally, the Defendant fit the description given of the one seen leaving the scene of the burglary. The Court therefore finds the Defendant's argument without merit.

The Defendant next alleges that the investigative detention did not justify a search of the tread of his sneakers. The Court disagrees. In determining whether an investigative detention is too long in duration to be justified as an investigative stop, the courts have considered it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly. Commonwealth v. Mayo, 344 Pa.Super. 336, 341-342, 496 A.2d 824, 826 (1985), *quoting* United States v. Sharpe, 470 U.S. 675, 686, 105 S.Ct. 1568, 1575-76, 84 L.Ed.2d 605, 615-16 (1985) (citations omitted).

Instantly, the Court finds that the detainment of the Defendant for 5 to 10 minutes until Officer Williams was able to arrive was reasonable under the facts of this case. Additionally, the Court finds that the request to view the bottom of the Defendant's shoes was a diligent means of investigation likely to confirm or dispel their suspicions quickly. Officer Williams testified that he had an opportunity to view the footprints left in the freshly fallen snow by the assailant, and he believed that the print had come from a sneaker. The Defendant was wearing a sneaker. The Court therefore finds the Defendant's argument without merit.

The Defendant next argues that his being placed in the rear of a police vehicle, handcuffed, and transported back to the scene constituted an arrest without probable

cause. The Court disagrees. An investigative detention may properly ripen into an arrest based on probable cause when additional information confirming the earlier suspicions is uncovered. Commonwealth v. White, 358 Pa.Super. 120, 516 A.2d. 1211 (1986) *citing* Commonwealth v. Palm, 315 Pa.Super. 377, 462 A.2d 243 (1983). Instantly, the Court finds that investigative detention in this case ripened into an arrest based on probable cause. As a result of the brief investigation, the Officers learned that the Defendant was returning home from the house of a friend at 4:00 a.m.. The Defendant did not know the name of the friend that he had been visiting. The Defendant was in the vicinity of a reported burglary and was wearing clothing that fit the description given of the assailant. Additionally, the Defendant was wearing sneakers, the tread of which appeared to match the footprints imbedded in the freshly fallen snow at the scene of the burglary and around the window that had been removed. The Court finds that the facts and circumstances of this particular situation would warrant a man of reasonable caution to believe that a crime had been committed. *See* Commonwealth v. Young, 222 Pa.Super 355, 294 A.2d 785 (1972) *citing* Brinegar v. United States, 338 US 160, 69 S.Ct. 1302, 93 L.Ed 1879 (1949).

The Defendant next argues that the physical removal of his sneaker was improper. The Court disagrees. It is well settled that where a defendant is in custody following a lawful arrest, the police may constitutionally seize clothing without obtaining a search warrant. *See* Commonwealth v. Hall, 382 Pa.Super. 6, 554 A.2d 919 (1989), US cert. den.in 112 L.E2 1095, Alloc. den.in 575 A2d 109. Such procedures "may result in freeing an innocent man accused of crime, or may be part of a chain of facts and circumstances which help identify a person accused of a crime or connect a suspect or

an accused with the crime of which he has been suspected or has been accused." Commonwealth v. Aljoe, 420 Pa. 198, 202 , 216 A.2d 50, 52 (1966). The search and seizure may be made on the spot of the arrest, or may be conducted later when the accused arrives at the place of detention. *See* United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974). The Court therefore finds the Defendant's argument without merit.

The Defendant last argues that the statements he made to law enforcement were made while in custody without the benefit of Miranda Warnings, and should be suppressed. The Court disagrees. Under Miranda v. Arizona, 384 US 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), anyone subject to custodial police interrogation must be advised of four specific rights, including their right to remain silent, that anything said may be used against them, and their right to consult with an attorney. The court further defined that custodial interrogation entails questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Instantly, the Court finds that although the Defendant was in custody at the time that he made the statement, he was not subject to interrogation. The officer made one comment to the Defendant, after which, the Defendant stated that he did not want to say anything without a lawyer. Without any further conversation, the Defendant volunteered that he had not meant to cause any damage, and that he could pay to have the damage repaired. The Court finds that the Defendant's statement does not fall within the protection of Miranda.

ORDER

AND NOW, this _____day of February, 2000, based on the foregoing Opinion, it is ORDERED AND DIRECTED that the Defendant's Petition for Writ of Habeas Corpus and Suppression Motion are DENIED.

By The Court,

Nancy L. Butts, Judge

cc: CA
Eric Linhardt, Esquire
Lori Rexroth, Esquire
Honorable Nancy L. Butts
Judges
Law Clerk
Gary Weber, Esquire