

COMMONWEALTH OF PA : No. CP-41-CR-0001062-2018
:
vs. :
:
: Opinion and Order re:
KHALEEF SMITH : Defendant's Omnibus Pretrial Motion

OPINION AND ORDER

Defendant was charged by Information filed on July 20, 2018 with one count of criminal use of a communication facility, one count of possession with intent to deliver a controlled substance and one count of possession of a controlled substance.

On December 4, 2018, Defendant filed an omnibus motion which consisted of a motion to suppress physical evidence, a petition for writ of habeas corpus, a motion to compel disclosure of promises, a motion for Rule 404 (b) evidence, a motion to compel discovery and a motion to reserve right. The hearing on Defendant's motion was held on February 11, 2019. At the hearing different documents were admitted in evidence including documents relating to Defendant's supervision under the Pennsylvania Board of Probation and Parole as well as a transcript of the preliminary hearing held on July 3, 2018. Testimony was also taken from Agent Jason Lemay of the Pennsylvania Board of Probation and Parole.

On May 22, 2018, Agent Lemay was assisting the Marshall's Fugitive Task Force with serving a warrant on two identified individuals. He was in the 600-700 Block of Edwin Street in Williamsport as part of a perimeter detail. He received a phone call from Trooper Dinucci of the Pennsylvania State Police, who was also working with the task force, advising Agent Lemay that a black individual with a backpack on his back, was on a bike and "looked like" he conducted a hand-to-hand sale of drugs with an individual in a car. The guy on the bike was leaving the area and heading toward Agent Lemay. They did not get a good

look at the individual and wanted to know if “the guy on the bike” was or was not one of the persons who they were looking for. As the bike approached, Agent Lemay realized that the guy on the bike was the defendant, and not one of the two individuals who the task force were looking for. Agent Lemay had been supervising Defendant for at least a year and a half. He knew that Defendant was not one of the wanted individuals.

When Agent Lemay recognized Defendant, Agent Lemay got out of his vehicle and directed Defendant to stop. He said something like, “stop, I want to talk with you.” Defendant immediately stopped, dropped his bike and the backpack, and walked four to five feet to where Lemay and two other law enforcement officers were standing.

Defendant had previously signed conditions of supervision allowing his person and his property to be searched by parole agents. It was clear that if Defendant did not sign those conditions, he would have not have been released from incarceration.

Once Defendant approached Agent Lemay, Lemay smelled the odor of raw marijuana. As well, Defendant was agitated and nervous and not acting like he normally acted. According to Agent Lemay, Defendant was acting as if he was hiding something. As a result, Agent Lemay told Defendant to put his arms against the vehicle and patted him down for safety reasons. Other than cash, Agent Lemay found nothing further on Defendant.

After the agent found only cash on Defendant, they continued to have a conversation. Agent Lemay asked Defendant what was in the backpack. Defendant said just a little bit of weed. Agent Lemay searched the backpack and found 14 grams of marijuana in a Ziploc bag and a small digital scale. He immediately called the Williamsport Bureau of Police.

Officer Brittany Alexander of the Williamsport Police, responded to the 600 Block of West Edwin Street to meet with Agent Lemay. By the time she arrived, Defendant

was in the backseat of Agent Lemay's vehicle. Agent Lemay turned Defendant's backpack over to Officer Alexander. Inside the backpack she found a Hefty bag containing approximately a half an ounce of marijuana, a digital scale, approximately \$216.00 in U.S. currency as well as an LG smart phone.

Officer Joshua Bell of the Williamsport Bureau of Police opined that the marijuana found in Defendant's backpack was possessed by Defendant with the intent to deliver. Among the factors leading to this conclusion were the following: the presence of a digital scale, the simultaneous presence of both U.S. currency and marijuana, the lack of methods of ingestion for marijuana, the separation of currency in Defendant's wallet and in his pocket, and the text messaging that was on Defendant's cell phone as well as the timeframe of those text messages in relation to when Defendant was taken into custody.

In connection with Defendant's motion to suppress, he makes three claims. First, Defendant claims that Agent Lemay did not have reasonable suspicion to stop him once he realized that Defendant was not one of the two identified individuals the task force was looking for. Secondly, Defendant argues that Agent Lemay failed to have reasonable suspicion to believe that Defendant was armed and dangerous and therefore had insufficient cause to frisk him. Lastly, Defendant argues that the initial stop escalated into an arrest and that there was insufficient probable cause to search the bag. Alternatively, Defendant argues that if the stop did not escalate to an arrest, there was insufficient reasonable suspicion to search the bag.

With regard to Defendant's first issue, the Commonwealth conceded that Defendant was "seized" when Agent Lemay instructed him to stop. The Commonwealth conceded as well that Agent Lemay needed reasonable suspicion to stop Defendant. The

Commonwealth argues, however, that Agent Lemay had sufficient reasonable suspicion to stop the defendant. The court agrees.

Defendant was paroled on or about November 18, 2016 from the State Correctional Institution at Mahanoy. Prior to being paroled, he signed conditions that included a provision that he expressly consented to the search of his person, property and residence, without a warrant by Agents of the Pennsylvania Board of Probation and Parole. (Commonwealth's Exhibit 1). Nonetheless, a search of an offender by a Board Agent is governed by statute. Specifically, a personal search of an offender may be conducted by an agent "if there is reasonable suspicion to believe that the offender possessed contraband or other evidence of violations of the conditions of supervision." 61 Pa. C.S.A. § 6153(d)(1)(i).

Defendant's first issue, however, precedes the search of Defendant or his property. As indicated above, Defendant contends that his initial seizure was illegal because Agent Lemay failed to have sufficient reasonable suspicion to stop him.

The determination of whether reasonable suspicion exists must be considered in light of the totality of the circumstances. *Commonwealth v. Shabazz*, 18 A.3d 1217, 1221 (Pa. Super. 2011).

A parole officer's warrantless search of a parolee will be deemed reasonable if the totality of the evidence demonstrates that the parole officer had a reasonable suspicion that the parolee had committed a parole violation, and that the search was reasonably related to the parole officer's duties. *Commonwealth v. Gould*, 187 A.3d 927, 935 (Pa. Super. 2019)(citing *Commonwealth v. Williams*, 692 A.2d 1031, 1036 (Pa. 1997)). Reasonable suspicion exists "where the officer is able to articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, in light

of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity.” *Gould, id.* (citing *Commonwealth v. Chambers*, 55 A.3d 1208, 1215 (Pa. Super. 2012)(citation and brackets omitted)).

Under all of the circumstances, the court is of the opinion that Agent Lemay had sufficient reasonable suspicion to stop Defendant. Although Agent Lemay knew that Defendant was not one of the fugitives who the task force were looking for, he knew Defendant as being under his supervision and that Defendant matched the description of an individual who had been suspected by police of engaging in a drug transaction close by and in a short period of time.

Defendant next argues that Agent Lemay did not have reasonable suspicion to search him. Defendant, however, misstates the law with respect to the search of an individual under supervision.

As to non-parolees, in order to justify a protective frisk, a law enforcement officer would need to identify specific and articulable facts that indicate criminality is afoot while also demonstrating a legitimate fear for officer safety. *Commonwealth v. Mathis*, 173 A.3d 699 (Pa. 2017). In other words, a protective search is not constitutional unless the officer can articulate facts that establish an individualized, objective basis for perceiving a threat of armed violence. *Commonwealth v. Grahame*, 7 A.3d 810, 816 (Pa. 2010).

While the court wholly rejects the Commonwealth’s argument that because Defendant was suspected of engaging in a drug transaction, it would follow that he carried weapons,¹ the search of a parolee is governed by a less stringent standard.

¹ See *Graham*, 7 A.3d at 816 (courts cannot abandon the totality of the circumstances test and rely exclusively upon the preconceived notion that certain types of criminals regularly carry weapons).

In exchange for early release from prison, a parolee gives away certain constitutional protections enjoyed by the populous in general. *Commonwealth v. Murray*, 174 A.3d 1147, 1155 (Pa. 2017)(citing *Commonwealth v. Edwards*, 874 A.2d 1192, 1197 (Pa. Super. 2005)). Because the very assumption of the institution of parole is that the parolee is more likely than the ordinary citizen to violate the law, reasonable suspicion is sufficient to authorize a search. *Commonwealth v. Colon*, 31 A.3d 309, 315 (Pa. Super. 2011)(citing *Commonwealth v. Hunter*, 963 A.2d 545, 551 (Pa. Super. 2008)); 61 Pa. C.S.A. § 6153(d)(1)(i) (a personal search of an offender may be conducted by an agent if there is reasonable suspicion to believe that the offender possesses contraband or other evidence of violations of the conditions of supervision).

While the court wholly agrees with Defendant that Agent Lemay did not have reasonable suspicion to believe that Defendant was armed and dangerous, Agent Lemay did have reasonable suspicion to believe that Defendant possessed contraband or other evidence of violations of the conditions of supervision. Again, Agent Lemay knew that Defendant was under his supervision, knew that Defendant matched the description of an individual who had been suspected by police of recently engaging in a drug transaction, and knew that the alleged transaction occurred very recently and within a very short distance away. Additionally, Agent Lemay noticed an odor of raw marijuana and Defendant was acting nervous and agitated and as if he was “hiding something.”

Defendant’s final argument is that Agent Lemay lacked probable cause or reasonable suspicion to search Defendant’s backpack. Defendant’s claim that the seizure of Defendant rose to the level of arrest thus requiring probable cause is unsupported by any law

whatsoever. Defendant has failed to provide the court with any legal authority in support of his position.

The law is absolutely clear that because Defendant was on supervision, Agent Lemay had the authority to search the backpack if he had reasonable suspicion to believe that the backpack, which was under the control of or in possession of Defendant, contained contraband or other evidence of violation of Defendant's conditions of supervision. 61 Pa. C.S.A. § 6153. More specifically, the search of a parolee is reasonable where the totality of the circumstances demonstrate that "(1) the parole officer had reasonable suspicion to believe that the parolee committed a parole violation; and (2) the search was reasonably related to the duty of the parole officer." *Commonwealth v. Hunter*, 963 A.2d 545, 552 (Pa. Super. 2008).

Parole agents with the requisite reasonable suspicion need not obtain a warrant to search the parolee's property. *Commonwealth v. Murray*, 174 A.3d 1147, 1156 (Pa. Super. 2017). To determine whether reasonable suspicion exists under such circumstances, the courts must consider the following factors: (1) the observations of agents; (2) information provided by others; (3) the activities of the offender; (4) information provided by the offender; (5) the experience of the agents with the offender; (6) the experience of agents in similar circumstances; (7) the prior criminal and supervisory history of the offender; and (8) the need to verify compliance with the conditions of supervision. *Id.*; 61 Pa. C.S. § 6153(d)(6).

Clearly, Agent Lemay had reasonable suspicion to search the backpack. Defendant dropped the backpack before going to meet with Agent Lemay. Defendant smelled of the odor of raw marijuana. Defendant was nervous and agitated and acting unlike he had during Agent Lemay's prior interactions with him. Agent Lemay was advised that Defendant fit the description of an individual riding on a bike who was seen close by in a short period of

time likely engaging in drug transaction. Finally, and perhaps determinatively, Defendant told Agent Lemay that there was “weed” or marijuana in the backpack.

Next, the court will summarily deny Defendant’s argument that Agent Lemay “may have been acting” as a stalking horse for the police. There are no facts whatsoever to support such a contention and Defendant has failed to raise any said facts.

Defendant next argues that the Commonwealth failed to present prima facie evidence that Defendant possessed the marijuana with the intent to deliver it. Defendant argues that the factors relied upon by the Commonwealth were “insignificant and innocuous, and equally consistent with mere usage.”

A petition for habeas corpus is the proper vehicle for a defendant to attack the sufficiency of the Commonwealth’s evidence pretrial. *Commonwealth v. Wyatt*, 203 A.3d 1115, 1117 (Pa. Super. 2019). As Defendant notes, in order for the Commonwealth to prove him guilty of possession with intent to deliver, the Commonwealth would need to prove that Defendant possessed the marijuana with the intent to deliver it.

Although Defendant did not possess a large quantity of marijuana, in conjunction therewith he possessed digital scales, \$216.00 in cash, and a cell phone that contained text messages indicative of an intent to deliver controlled substances. He did not possess any items for smoking, ingesting or otherwise using the marijuana. Furthermore, Trooper Dinucci informed Agent Lemay that he had observed the individual on the bike (Defendant) engage in what “looked like” a hand-to-hand sale of drugs with an individual in a car. From the totality of these facts and circumstances, a jury could reasonably conclude that Defendant possessed the marijuana with the intent to deliver it. While certainly the jury may

conclude otherwise, the issue is a factual question for the jury nonetheless. The evidence is sufficient for prima facie purposes to establish intent to deliver.

Equally so, the evidence is sufficient to support the criminal use of a communications facility.

Defendant next asserts that the Commonwealth must disclose the existence of any immunity, leniency or preferential treatment as well as the criminal history of all witnesses it intends to call at trial. The court agrees. As this type of information typically qualifies as *Brady* material, the court will grant this request and require the Commonwealth to provide this information within 30 days of this Order or at least two days prior to jury selection, whichever occurs first.

Next, Defendant argues that the Commonwealth must disclose all Rule 404 (b) evidence. The court agrees. Rule 404(b) generally requires the Commonwealth to provide reasonable notice in advance of trial “of the general nature of any such evidence the prosecutor intends to introduce at trial.” Pa. R. Evid. 404(b)(3). The Commonwealth must provide this information at least three weeks prior to jury selection in this case.

Next, the defendant argues that the Commonwealth must be compelled to provide certain discovery, specifically evidence regarding the search of Defendant’s cell phone and the text messages that were recovered, as well as information from any PWID expert witness consulted in the instant matter. The court will grant this motion with respect to any evidence regarding the search of Defendant’s cell phone and the text messages that were uncovered. The court denies the motion regarding PWID expert witnesses provided the Commonwealth intends to utilize Officer Bell as its PWID expert witness and his opinion is consistent with the testimony he has already provided in this case. If the Commonwealth

intends to use a different PWID expert witness or to rely on different or additional facts, the Commonwealth must provide an expert report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify, and a summary of the expert's opinions and the grounds for each opinion.

Finally, Defendant seeks to preserve the right to make additional pretrial motions. The court grants the motion in part. The defendant may file additional pretrial motions only if he pleads facts in the motion to show that the opportunity to file the motion did not previously exist, the defendant or his attorney were not aware of the grounds for the motion, or the interests of justice require the court to hear the motion.

ORDER

AND NOW, this ___ day of May 2019, following a hearing and argument, Defendant's motion to suppress physical evidence is **DENIED**, and Defendant's Petition for Writ of Habeas Corpus is **DENIED**.

Defendant's motion to compel disclosure the existence of any immunity, leniency or preferential treatment and any witness' criminal history is **GRANTED**. The Commonwealth must provide this information to defense counsel within 30 days.

Defendant's motion for disclosure of other crimes, wrongs or acts pursuant to Pa. R. E. 404(b) is **GRANTED**. The Commonwealth shall provide notice to defense counsel of the general nature of any such evidence the prosecutor intends to introduce at trial at least three weeks prior to jury selection.

Defendant's motion to compel discovery is **GRANTED** in part. Within 30 days, the Commonwealth must provide to defense counsel any evidence regarding his cell phone search and any text messages that were uncovered. The court denies the motion

regarding PWID expert witnesses, provided the Commonwealth intends to utilize Officer Bell as its PWID expert witness and his opinion is consistent with the testimony he has already provided in this case. If the Commonwealth intends to use a different PWID expert witness or to rely on different or additional facts, the Commonwealth must provide an expert report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify, and a summary of the expert's opinions and the grounds for each opinion.

Defendant's motion to reserve right is **GRANTED** in part. The defendant may file additional pretrial motions only if he pleads facts in the motion to show that the opportunity to file the motion did not previously exist, the defendant or his attorney were not aware of the grounds for the motion, or the interests of justice require the court to hear the motion.

By The Court,

Marc F. Lovecchio, Judge

cc: Edward J. Rymza, Esquire
District Attorney
Gary Weber, Lycoming Reporter
Work File