

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CP-41-CR-1374-2020**
 v. :
 :
 NICHOLAS U. ETUMNU, : **OMNIBUS MOTION**
 Defendant :

OPINION AND ORDER

Nicholas Etumnu (Defendant) was charged with Possession with Intent to Deliver a Controlled Substance¹. The charge arises from a search of Defendant's home wherein narcotics and drug packaging material were discovered. Defendant filed an initial Omnibus Pretrial Motion on December 28, 2020 and a Supplemental Motion on January 26, 2021. This Court held a hearing on the motions on March 9, 2021. In his Omnibus motions, Defendant first argues that the Commonwealth has not provided sufficient evidence to satisfy the *prima facie* burden at the preliminary hearing and the charge should be dismissed. Second, Defendant submits a motion for additional discovery². Third, Defendant requests leave of court to file additional pretrial motions in the event that he receives additional discovery³. Lastly, Defendant submits a motion to suppress the evidence seized pursuant to the search warrant.

Preliminary Hearing Testimony

Detective Tyson Havens (Havens) of the Lycoming County Narcotics Enforcement Unit (NEU) testified on behalf of the Commonwealth. On October 5, 2020, Havens was part of the execution of a search warrant on 630 Campbell Street in Lycoming County. N.T. 10/15/2020, at 1, 4. Havens testified that the residence used to be a daycare facility and has since become a boarding house with individual rooms and common living areas. *Id.* at 1. Havens had requested

¹ 35 Pa.C.S. § 780-113(a)(30).

² The request for additional discovery was addressed at the time of the hearing and has been satisfied.

³ This request was also addressed at the time of the hearing. Should Defendant receive any additional discovery, he shall be permitted to file additional motions as a result thereof if necessary.

a sealed search warrant to search Defendant's room in the house which was granted on October 5, 2020. Id. at 3. Havens entered the residence from the rear with some members of the US Marshals. Id. at 1. Once they entered the house, they were calling out "police" to alert occupants of their presence. Id. They continued through an area resembling a daycare into the kitchen and then climbed the stairs to the second floor. Id. Upon entering the second floor, Defendant opened the door to a bedroom and was taken into custody there at the top of the stairs. Id. Havens testified that no one else was in the room with Defendant. Id. at 2. After he was taken into custody, Defendant was found to be in possession of pre-recorded funds that Havens had previously utilized in a controlled buy of crack cocaine. Id. Havens testified that the bedroom had an air mattress, a regular mattress, and a box spring. Id. at 5. The regular mattress and box spring were thrown into a corner and appeared disheveled. Id. Havens searched the bedroom and personally observed "small pink Ziploc bags commonly used to package powder cocaine and crack cocaine in \$50 amounts and \$20 amounts." Id. at 2. Havens also saw larger Ziploc bags that he testified are often "used to package powder cocaine, methamphetamine and marijuana." Id. Havens further testified that his search of the room yielded seventeen (17) bags containing a white powdery substance that, based on his experience, appeared to be fentanyl. Id. A distribution bag was found in the box spring in the bedroom containing fifty-eight (58) pink Ziploc bags that contained approximately a half of a gram of crack cocaine in each bag as well as two (2) plastic bag corners containing suspected narcotics. Id. Digital scales were also found in the bedroom on a small coffee table. Id. at 2, 6. Based on his experience and training, Havens testified that he believed the drugs found were "possessed with the intent to deliver and not for personal use" due to the volume of narcotics that were discovered primarily in the box spring. Id. at 3. The room in which the narcotics were

found is purported to be occupied by Defendant. Id. Havens also testified that it is common for drug dealers to hide the majority of the controlled substances they have in order to prevent their narcotics from being discovered by police. Id. at 7.

Discussion

Habeas corpus Motion

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove a defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. Commonwealth v. McBride, 595 A.2d 589, 591 (Pa. 1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused likely committed the offense. Id. Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa. Super. 2001). To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and may also submit additional proof. Commonwealth v. Dantzler, 135 A.3d 1109, 1112 (Pa. Super. 2016). “The Commonwealth may sustain its burden of proving every element of the crime...by means of wholly circumstantial evidence.” Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001); *see also* Commonwealth v. Jones, 874 A.2d 108, 120 (Pa. Super. 2016). The weight and credibility of the evidence may not be determined and are not at issue in a pretrial habeas proceeding. Commonwealth v. Wojdak, 466 A.2d 991, 997 (Pa. 1983); *see also* Commonwealth v. Kohlie, 811 A.2d 1010, 1014 (Pa. Super. 2002). Moreover, “inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most

favorable to the Commonwealth's case.” Commonwealth v. Huggins, 836 A.2d 862, 866 (Pa. 2003).

Defendant challenges the sufficiency of the Commonwealth’s evidence on the only charge brought against him. Defendant asserts that the Commonwealth failed to establish their *prima facie* burden on Count 1: Possession with Intent to Deliver a Controlled Substance. Pursuant to 35 Pa.C.S. § 780-113(a)(30), the “manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act...” is considered a crime. Defendant argues that the Commonwealth failed to establish their *prima facie* burden because they did not present evidence to establish that Defendant possessed a controlled substance or that he possessed a controlled substance with the intent to deliver it. Defendant contends that the mere presence in a location where drugs are seized is not sufficient to establish a *prima facie* case of the charge. The Commonwealth relies on the transcript of the preliminary hearing and believes that they have presented enough evidence to satisfy their burden.

The Court agrees with the Commonwealth on this issue. Law enforcement had reason to believe based upon gathered intelligence from various sources that Defendant was living on the second floor. On the day the search warrant was executed, Defendant was found on the second floor in a room believed to be his bedroom. All of the narcotics and paraphernalia used for selling drugs were also in that room. Defendant had pre-recorded bills on his person from a prior controlled purchase of crack cocaine that Havens orchestrated between Defendant and a CI. Viewing the evidence in the light most favorable to the Commonwealth as required, this Court agrees that the Commonwealth has satisfied their *prima facie* burden. Therefore, the

Defendant's argument fails on this issue and the charge against Defendant shall not be dismissed.

Motion to Suppress

Defendant also challenges the issuance of the search warrant of the residence claiming the results of search of the residence needs to suppressed because the search warrant did not allege sufficient facts to establish probable cause. When evaluating the probable cause of a search warrant this Court's determination is whether there was "substantial evidence in the record supporting the decision to issue a warrant" by giving deference to the issuing magistrate's probable cause determination and "view[ing] the information offered to establish probable cause in a common-sense, non-technical manner." Commonwealth v. Jones, 988 A.2d 649, 655 (Pa. 2010). Probable cause is established by a "totality of the circumstances." Commonwealth v. Gray, 503 A.2d 921, 925 (Pa. 1985) (adopting U.S. v. Gates, 462 U.S. 213 (1983)). The Court "must limit [its] inquiry to the information within the four corners of the affidavit submitted in support of probable cause when determining whether the warrant was issued upon probable cause." Commonwealth v. Arthur, 62 A.3d 424, 432 (Pa. Super. 2013). It is "not require[d] that the information in a warrant affidavit establish with absolute certainty that the object of the search will be found at the stated location, nor does it demand that the affidavit information preclude all possibility that the sought after article is not secreted in another location." Commonwealth v. Forster, 385 A.2d 416, 437-38 (Pa. Super. 1978). A magistrate must simply find that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Commonwealth v. Manuel, 194 A.3 1076, 1081 (Pa. Super. 2018).

The search warrant, entered as Exhibit A in Defendant's Supplemental Omnibus Motion, was obtained by Havens on October 5, 2020. It was the result of a controlled purchase of suspected crack cocaine from Defendant in addition to information from multiple confidential informants given to members of the NEU, including Havens, that Defendant was selling crack cocaine, heroin, and methamphetamine out of his home. Havens also knew Defendant and at least one other to reside within the residence and that Defendant reportedly lived on the second floor. Exhibit A, at 4. The pertinent portion of the search warrant outlining the events leading up to the application of the search warrant states:

During the month of September, NEU members, including myself, learned from three separate CI's that [Defendant] was again selling crack cocaine, heroin and methamphetamine. During the week of 9/28/20, NEU members, including myself, learned from multiple sources that [Defendant] was living in a boarding room at 630 Campbell Street on the 2nd floor. On 10/4/20 during the evening hours, I was contacted by a CI who has been utilized by NEU in the past. This CI has provided information that yielded a search warrant, the recovery of a stolen firearm and an arrest. The CI called me and advised that B/M "Bear," who I know to be [Defendant], just called him/her and asked for a ride to Philadelphia to obtain 7-8 ounces of crack cocaine, methamphetamine and heroin [Defendant] told the CI that he wanted to be back to his 630 Campbell St residence by morning with the product. The CI advised that within the last two days, he/she has been inside [Defendant's] apartment on the second floor of 630 Campbell St to purchase crack cocaine. He/she advised that he/she had been there three times prior to purchase crack cocaine from [Defendant]...On 10/5/20, the CI called [Defendant] at my direction. [Defendant] advised that he was home from Philadelphia and available to sell crack cocaine. Approximately one hour later, I met with the CI, strip-searched him/her and provided him/her with an amount of prerecorded money. The CI then called [Defendant] in my presence and permitted me to monitor the telephone call on speaker. A male voice answered the telephone and told the CI to go to Park Pizza on memorial Ave to pick him up. Ultimately, the CI obtained a vehicle (that was searched by me) and picked up [Defendant] at a residence near Park Pizza. [Defendant] directed the CI to 630 Campbell St. Once there, I observed the CI park and enter the rear of the residence with [Defendant]. Several minutes later, the CI exited the rear of 630 Campbell St... The CI then provided me with several bags of suspected crack cocaine. He/she was debriefed and related the following: That [Defendant] took him/her into the rear of the residence through the 'middle door.' Once inside, [Defendant]

entered the apartment of Tony BACON to the immediate right. The CI also entered BACON's apartment...Once inside BACON's apartment, [Defendant] produced a large grapefruit sized rock of crack cocaine and proceeded to cut the CI's portion off. The CI observed [Defendant] in possession of heroin and methamphetamine as well. [Defendant] obtained packaging material from BACON and packaged the crack for the CI. He then sold the CI the crack cocaine in exchange for the prerecorded money.

Id. at 4-5.

Defendant asserts the search warrant does not contain enough information to demonstrate a fair probability that drugs would be found within the residence. Specifically, Defendant argues that the affidavit of probable cause fails to show that there is reason to suspect that controlled substances would be secreted in the second floor. Defendant believes that the affidavit contains no information concerning the reliability of the confidential informant (CI). Defendant further asserts that the information included in the application for the search warrant is stale and defective. Therefore, the search pursuant to the warrant was in violation of Defendant's constitutional rights.

The facts presented in the affidavit of the search warrant demonstrate sufficient evidence to establish probable cause to search 630 Campbell Street. Havens indicates that the CI who reported Defendant was selling narcotics had been used in the past successfully and lists the ways in which this particular CI has assisted law enforcement. Furthermore, the CI mentions Defendant's apartment on the second floor specifically during a call to Havens in which the CI stated that they had bought crack cocaine. Since the home has been converted to a boarding house, it is plausible that Defendant's living quarters that are not common areas would be isolated to one (1) room. Additionally, multiple CI's contacted Havens during the week prior to the search of Defendant's home, with one CI providing information to Havens on October 4th, the day prior to the issuance of the search warrant. It is unlikely that the

information given to Havens by the CI's within such a close timeframe to the issuance and execution of the search warrant would be stale and Defense Counsel does not provide reasons as to why it may be outdated or defective. The affidavit also includes information about a controlled purchase of crack cocaine between a CI and Defendant. Havens was able to observe the CI and Defendant enter Defendant's home wherein the CI could see drugs on Defendant's person and watched Defendant package crack cocaine in exchange for prerecorded funds. These facts demonstrate a fair probability that evidence of drug dealing may be found in Defendant's room. Therefore Defendant's argument fails and the four corners of the affidavit of the search warrant establish sufficient probable cause.

Conclusion

The Court finds that the Commonwealth did present enough evidence at the preliminary hearing to establish a *prima facie* case for the count against Defendant. Therefore, Defendant's Petition for Writ of Habeas Corpus is denied. The Court also finds that the affidavit of probable cause for the search warrant of 630 Campbell Street provided sufficient evidence to establish probable cause for law enforcement to search. As a result, Defendant's Motion to Suppress the evidence seized pursuant to the search warrant is denied.

ORDER

AND NOW, this 15th day of July, 2021, based upon the foregoing Opinion, it is **ORDERED AND DIRECTED** that Defendant's Petition for Writ of Habeas Corpus is hereby **DENIED**. The Defendant's Motion to Suppress Evidence is **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (JR)
Robert Hoffa, Esq.
Law Clerk (JMH)