

supplemental Motion, Defendant reiterates his argument about the search incident to arrest but also believes that the affidavit of probable cause in the search warrant for Defendant's home does not support the warrant. Defendant maintains that the search violated his rights under the Fourth Amendment of the United States Constitution and Section 8 of the Pennsylvania Constitution. As such, Defendant believes all evidence found because of this search should be suppressed.

Background and Testimony

Trooper James Nestico (Nestico) of the Pennsylvania State Police (PSP) testified on behalf of the Commonwealth. On August 19, 2020, PSP formed several arrest teams to serve a countywide warrant round up at several locations. Nestico's team included between six (6) to eight (8) officers to arrest Defendant. Police arrived at Defendant's house where they found an adult male outside the residence. This man was identified as Defendant's girlfriend's father. He indicated that Defendant was in the house and sleeping. He led police into the home, went to where Defendant was sleeping, and brought him into the living room where police were waiting. Defendant was taken into custody at that time. Defendant did not have a shirt on and was wearing only shorts or underwear so the arrest team permitted him to get additional clothing before being transported. Police followed him into his room to watch him pick out clothes and immediately smelled marijuana upon entering the room. Nestico also noticed a dresser with the top drawer wide open. When walking past the dresser, a gun was plainly visible within the open drawer. Nestico testified that he did not manipulate or touch anything in the room in order to see or find the firearm. Defendant told the officers that there was marijuana in the closet. Following this sequence of events, the officers on scene called a command post to get a search warrant for the home. Nestico was not involved in the execution

of the search warrant but spoke to the individual who drafted the affidavit of probable cause for the search warrant. Nestico stated that he did fill out a search incident to arrest form for this case that reflected the smell of marijuana upon entering the bedroom and the gun in plain view. This form was entered into evidence as Defendant's Exhibit No. 1. The affidavit of probable cause to the search warrant was entered into evidence as Defendant's Exhibit No. 2.

Analysis

Search Incident to Arrest

First, the Court will address Defendant's argument regarding the warrant exception. The Fourth Amendment to the United States Constitution and Article 1 Section 8 of the Pennsylvania Constitution protect citizens against unreasonable searches and seizures. U.S. Const. amend. IV; P.A. Const. art. 1, § 8. Warrantless searches are unreasonable per se, "subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). "A search incident to a lawful arrest is one of the well-recognized exceptions to the warrant requirement." Commonwealth v. Rickbaugh, 706 A.2d 826, 836 (Pa. Super. 1998). The scope of such a search "extends not only to the arrestee's person, but also into the area within the arrestee's immediate control." Commonwealth v. Taylor, 771 A.2d 1261, 1271 (Pa. 2001). The United States Supreme Court has defined immediate control as "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763 (1969). "Whether an item has been properly seized pursuant to a search incident to an arrest depends upon the facts of each case. The central question is whether the area searched is one 'within which (the arrested person) might gain possession of a weapon or destructible evidence.'" Commonwealth

v. Bess, 382 A.2d 1212, 1214 (Pa. 1978) (citing Chimel v. California, 395 U.S. 752, 763 (1969)).

Defendant argues that the true issue in this case is whether the search of Defendant's home constituted a search incident to arrest. Defendant believes that, since he was already in custody, handcuffed, and outside of the bedroom, the search of Defendant's room was not a proper search incident to arrest. The Commonwealth states that the evidence speaks for itself and believes that the search was proper. For the following reasons, this Court agrees with the Commonwealth on this issue. It appears from the testimony that the plan was to arrest Defendant and leave immediately. Defendant was not wearing a shirt at the time he was arrested and Nestico testified that he was not going to transport Defendant without proper attire. It is reasonable for police to follow an arrestee into the room containing their clothes in order to ensure that the arrestee does not attempt to flee, damage evidence, or create a danger to himself or the officers on scene. Accordingly, the officers walked with Defendant back to his bedroom to keep watch over him until he was ready to be transported. The officers were able to smell marijuana as soon as they entered Defendant's bedroom and saw the firearm in the open dresser drawer. Since Defendant was back in his room to get clothing and the disputed evidence were also in this room, Defendant could have gained possession of either the marijuana or the gun in his search for clothes. "A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." Chimel v. California, 395 U.S. 752, 763 (1969). It is also arguable that at least the firearm comes into evidence as being in plain view at the time of the arrest. "The Fourth Amendment does not prohibit the warrantless seizure of evidence in plain view even though the discovery of the evidence was not inadvertent. Although inadvertence is a characteristic of

most legitimate plain-view seizures, it is not a necessary condition.” Horton v. California, 496 U.S. 128 (1990). Though police may not have discovered these items if Defendant had been wearing a shirt at the time of the arrest, these are not the facts presented to the Court in this case. Therefore, the search conducted in the case *sub judice* was a proper search incident to arrest and the evidence shall not be suppressed.

Probable Cause

Lastly, the Court addresses Defendant’s issue with the probable cause to support the search warrant. 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 analysis. Illinois v. Gates, 462 U.S. 213, 238 (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).

Prior to the discovery of the search warrant on December 9, 2020, defense counsel was lead to believe that the search of Defendant’s home was incident to his arrest. However, upon

discovery of the search warrant, Defendant contends that the affidavit of probable cause fails to demonstrate a fair probability of criminal evidence on the premises and fails to show that there was probable cause to believe drugs or weapons were hidden in the residence. Once again, the Commonwealth believes that the evidence speaks for itself on this issue and that the warrant was properly supported by probable cause.

This Court disagrees with Defendant's argument on this issue. To begin, the Affidavit of Probable Cause, submitted as Defendant Exhibit No. 2, articulates that PSP Troopers responded to Defendant's home to serve an arrest warrant for Delivery of a Controlled Substance. Defendant Exhibit No. 2, at 1. Defendant did not have a shirt on at the time he was taken into custody. Id. When officers went into Defendant's bedroom, they detected a strong odor of marijuana and saw two (2) handguns in plain view. Id. The affidavit also stated that "drug traffickers commonly have in their possession, that is on their person, in their vehicle/s, at their residence/s and/or businesses, firearms...to be used to protect and secure drug trafficker's drugs, cash, jewelry and other related property." Id. Based on the information, the affidavit indicated it was believed Defendant was using his home to store marijuana and illegally possessed firearms. Id. Even though Nestico testified to one (1) handgun discovered in Defendant's room, there is still substantial evidence to support the decision to issue a search warrant. If drugs and a weapon were already found incident to his arrest, it is common sense that a warrant supposing Defendant was hiding the things already found would be discovered and perhaps more would be found upon the execution of the search warrant. Thus, Defendant's claim on this issue is unsuccessful and the evidence shall not be suppressed.

Conclusion

The Court finds that the search of Defendant's room was a proper search incident to arrest. Therefore, the evidence obtained shall not be suppressed. The Court also finds that the information in the affidavit of probable cause was enough to justify the issuance of the search warrant for Defendant's home. As a result, the evidence obtained shall not be suppressed.

ORDER

AND NOW, this 29th day of June, 2021, based upon the foregoing Opinion, Defendant's Motions to Suppress Evidence are **DISMISSED**.

By the Court,

Nancy L. Butts, President Judge

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