IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-700-2019**
v.	:	
	:	
CHRISTOPHER WHITE,	:	**OMNIBUS MOTION**
Defendant	:	

OPINION AND ORDER

Christopher White (Defendant) was charged with four counts of Possession with Intent to Deliver[1], four counts of Delivery of a Controlled Substance[2], and four counts of Criminal Use of a Communication Facility[3]. The charges arise from four controlled purchases of suspected drugs between a confidential informant and Defendant. Defendant filed this Omnibus Pretrial Motion on November 19, 2020. This Court held a hearing on the motion on January 7, 2021. In his Omnibus motion, Defendant first argues that the Commonwealth has not provided sufficient evidence to satisfy the *prima facie* burden at the preliminary hearing and the charges should be dismissed. Secondly, Defendant submits a request for discovery[4]. Lastly, Defendant also argues that the anticipatory warrant was not supported by probable cause or a credible informant and therefore the evidence found as a result thereof should be suppressed.

Background and Testimony

At the preliminary hearing, Corporal Mitchell McMunn (McMunn) of the Pennsylvania State Police testified on behalf of the Commonwealth. On January 15, 2019, McMunn and a confidential informant (CI) set up a controlled purchase of suspected narcotics from Defendant. N.T. 5/9/2019, at 3. Before meeting with the CI, McMunn instructed them to contact Defendant to set up a drug deal. Id. at 4. McMunn and the CI met and the CI confirmed that they had

[1] 35 Pa.C.S. § 780-113(a)(30).
[2] 35 Pa.C.S. § 780-113(a)(30).
[3] 18 Pa.C.S. § 7512(a).
[4] The request for additional discovery was addressed at the time of the hearing and has been satisfied.

contacted Defendant using their cellular phone. Id. McMunn viewed the call log on the CI's phone and saw that the CI had made a call to Defendant's cell phone number earlier that afternoon. Id. The CI relayed to McMunn that Defendant had indicated he was ready to meet up when they were ready. Id. McMunn strip searched the CI for any contraband or currency prior to embarking to where the deal was to take place and McMunn provided them with one hundred (100) dollars of pre-recorded currency. Id. McMunn and the CI drove over to the Crossroads parking lot where the CI exited McMunn's vehicle and walked around the front of K-Bar. Id. Members of a surveillance team observed the CI walk through a brown door located at 523 E. Third Street in Williamsport, and then exit that same door only a few moments later. Id. The CI returned to the vehicle and handed McMunn a clear plastic bag that contained a substance suspected to be crack cocaine. Id. During debriefing, the CI related that after entering the building, they went up the stairs and made a right at the top of the staircase. Id. at 5. At the end of the hall was apartment number seven (7) belonging to Defendant. Id. The CI knocked on the door, Defendant answered, and the money was exchanged for the crack cocaine in the doorway. Id.

On January 18, 2019, a second controlled buy occurred that was similar to the first. Id. McMunn instructed the CI to make contact with Defendant to set up another buy. Id. Once McMunn and the CI met up around 10:45a.m., McMunn checked the CI's phone logs and text messages to verify that Defendant was contacted. Id. About an hour later, Defendant was ready to meet. Id. The CI was strip searched and nothing was found on their person. Id. at 6. McMunn provided the CI with one hundred (100) dollars of pre-recorded money again and the two of them left to meet Defendant. Id. McMunn parked his vehicle behind the Crossroads building where the CI left the car, walked around the rear of the K-Bar building, and met Defendant at

the back of another car. Id. Defendant and the CI entered the same brown door as before and a few minutes later the CI returned to McMunn's vehicle. Id. at 7.The CI told McMunn that he met Defendant in the K-Bar parking lot and they went into the apartment building together. Id. A surveillance team was able to confirm the Defendant and CI's movements in the parking lot and watched them go into the building. Id. at 7. They walked up the stairs to Defendant's apartment where Defendant opened the door, set down his grocery bags, and "reached into his coat pocket and removed the baggy of suspected crack cocaine." Id. at 7-8. The CI commented that the amount looked "a little light" to which Defendant responded he "would get him back next time." Id. They exchanged the drugs for money in the doorway and then the CI left to return to McMunn. Id. at 8.

On April 1, 2019, a similar transaction occurred between the same CI and Defendant. Once again, McMunn and the CI prepared for the controlled buy in the same manner as the other two interactions. Id. at 8. McMunn parked in the same place as before and the CI exited the vehicle and walked into Defendant's apartment building through the same door. Id. at 8-9. Upon his return to McMunn's car, the CI handed over the suspected crack cocaine and informed him that they entered Defendant's apartment and observed Defendant retrieve suspected crack cocaine from "a closet or a cupboard at the foot of his bed." Id. at 9. Defendant handed the narcotics to the CI whereupon the CI commented that the delivery "looked a little light" and Defendant responded that he "would get him back next time." Id.

Lastly, based on the previous three controlled purchases, McMunn obtained an anticipatory search warrant for Defendant's apartment on April 22, 2019. Id. at 10. That same day, McMunn directed the CI to contact Defendant for an exchange of narcotics once again. Id. Following the strip search of the CI and providing the pre-recorded funds, McMunn and the CI

left to meet with Defendant. Id. McMunn parked his vehicle in the same Crossroads parking lot and the CI exited the car and entered the apartment building through the same door. Id. A surveillance team was able to observe the CI entering the building. Id. Shortly thereafter, the CI returned to McMunn's vehicle and handed over a bag of suspected crack cocaine. Id. They told McMunn that after entering Defendant's apartment, they watched Defendant remove drugs from the same closet or dresser in front of his bed and exchanged it for the money the CI had from McMunn. Id. at 10-11. Following this debriefing, McMunn had the search warrant executed by an arrest team. Id. at 11. As a result of the search, some drug paraphernalia was discovered as well as Defendant's cell phone and the pre-recorded cash that McMunn had given the CI for this transaction. Id. at 11, 13. On all occasions, neither McMunn nor the surveillance team were able to watch the CI after he entered Defendant's apartment. Id. at 14.

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 all charges brought against him. First, Defendant argues that the Commonwealth failed to establish the *prima facie* burden on Counts 1 through 8. Four of those Counts are Possession with Intent to Deliver and the remaining four are Delivery of 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. Lastly, Defendant challenges Counts 9 to 12, Criminal Use of a Communication Facility. This crime occurs when a "person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title…." 18 Pa.C.S. § 7512(a). For all of the charges listed above, Defendant argues that the Commonwealth's *prima facie* burden was not met because the confidential informant did not testify as to the events of the drug deals. Defendant takes issue with the fact that the Commonwealth did not have the CI testify because they were the only person to have a

firsthand account of the drug exchanges. Instead, the Commonwealth presented testimony from McMunn who was not able to see the transactions take place and, as a result, anything the CI communicated to McMunn to which he testified to at the preliminary hearing about the controlled buys is considered hearsay. Defendant relies on Commonwealth v. McClelland to assert that the Commonwealth is prohibited from relying solely on hearsay at the preliminary hearing. Commonwealth v. McClelland, 233 A.3d 717 (Pa. 2020). The Commonwealth asserts that they presented more than enough evidence at this stage to bind the charges over, namely that McMunn was able to provide testimony of his experience of the controlled buys and other substantiated evidence of the four instances in question. Furthermore, the Commonwealth argues that the CI is not required to testify at every hearing and that the Commonwealth is not required to put forth their entire case at the preliminary hearing. Viewing the evidence in the light most favorable to the Commonwealth as required, this Court agrees with the Commonwealth on this issue for the following reasons. Though Commonwealth v. McClelland held that it is insufficient to rely solely on hearsay at the preliminary hearing, it does not identify how much additional evidence is required. The Commonwealth's evidence demonstrated McMunn's personal observance of the text and call communications between the CI and Defendant, as well as watching the CI and Defendant enter his apartment building to conduct the transactions. Additionally, in defense counsel's omnibus motion, counsel agrees that the Commonwealth presented "some extraneous evidence" in addition to McMunn's testimony. Therefore, the Court believes that the Commonwealth has provided sufficient additional evidence to establish their *prima facie* burden.

Motion to Suppress

Anticipatory warrants "subject their execution to some condition precedent other than the mere passage of time—a so-called 'triggering condition.'" United States v. Grubbs, 547 U.S. 90 (2006). The Fourth Amendment "does not require that the triggering condition for an anticipatory warrant be set forth in the warrant itself…." Id. at 99. To make a determination on whether the requisite probable cause exists to support a warrant, the totality of the circumstances is considered. Illinois v. Gates, 462 U.S. 213 (1983). Pennsylvania has also adopted the totality of the circumstances test. Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985). Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238. "[I]n making the practical determination of *what* amounts to probable cause, the magistrate may consider likely future events, subject to the sorts of specificity and reliability strictures attending all probable cause evaluations. Id. at 664. To support an anticipatory warrant, an affidavit of probable cause must satisfy two "prerequisites of probability" to satisfy the Fourth Amendment. Grubbs, 547 U.S. at 96. Those prerequisites are:

> "(1) establish a fair probability that the triggering condition for the warrant's execution, as set forth in the affidavit, will occur at the place described therein, and (2) the affidavit must establish a fair probability that contraband will be found in the specified place after the triggering event for the execution of the warrant transpires."

Commonwealth v. Wallace, 42 A.3d 1040, 1046 (Pa. 2012); *see* United States v. Grubbs, 547 U.S. 90 (2006).

The Defendant first alleges that the anticipatory warrant did not include sufficient evidence that the triggering event would occur. Specifically, Defendant argues that nothing in the affidavit suggested that Defendant would be willing to meet the CI on that day or that he had crack cocaine to sell. Additionally, Defendant avers that the affidavit did not include any

information for the controlled buy on April 1, 2019, regarding whether the CI handed over purported crack cocaine to McMunn or whether the substance tested positive. Defendant also argues that the warrant lacked specificity of what items were to be seized from the apartment. Defendant believes that the warrant used "boilerplate" language for items usually searched for in cases involving drugs instead of being specific to this case and because of this, the warrant is overbroad. Therefore, Defendant asks for the evidence seized as a result of the warrant be suppressed for lack of probable cause and a credible informant.

Upon reviewing the warrant's affidavit of probable cause and analyzing the totality of the circumstances as required, this Court disagrees with Defendant on this issue. The affidavit included three (3) prior drug transactions that articulated Defendant's willingness to meet with the CI for the purpose of selling crack cocaine. In light of no assertions or evidence demonstrating any hesitation from Defendant, it is fair to assume that following three prior exchanges, Defendant would be willing to meet with the CI on April 22nd and that he would have drugs to sell on that day. Anticipatory warrants do not require an absolute certainty that the triggering condition will be met. In this case, the requisite fair probability that the triggering condition will occur was established when the affidavit included the details of multiple controlled buys with Defendant, two of which the test results of the substance came back positive for cocaine. Even though no specific lab results had been returned to police for the substance given to the CI on April 1, 2019, it is safe to assume that McMunn's training and the visual similarities between this substance and the other two as well as its similar packaging are enough in this case. Furthermore, the affidavit includes specific, clear language about what must occur in order to trigger the execution of the search warrant. Therefore, the Defendant's argument fails on this issue.

Lastly, Defendant alleges the affidavit of probable cause contained false statements in regards to the visual surveillance that occurred on each drug transaction as well as the reliability and credibility of the CI. Defendant believes these inaccuracies violated the requirements as articulated in Franks v. Delaware, 438 U.S. 154 (1978). Defendant asserts that without these falsities, probable cause required for the anticipatory warrant would not have existed.

> Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 156. However, there is "a presumption of validity with respect to the affidavit supporting the search warrant." Id. at 171. If "material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." Id. In this case, the Defendant takes issue with the statements in the affidavit that the CI was kept under visual surveillance during the controlled buy when in actuality the CI was out of sight of McMunn and the surveillance team once he entered the apartment building. It was in this building in Defendant's home that the exchanges actually occurred. Additionally, the Defendant challenges the veracity of the CI in this case based on the crimen falsi included in their criminal history. Due to the CI's prior offenses, Defendant does not believe that the CI can be trusted to have made truthful statements to McMunn following the controlled buys nor can they be trusted not to take some of the

alleged narcotics prior to returning to McMunn's vehicle. Once again, Defendant asks for the evidence seized because of the warrant be suppressed.

This Court agrees with Defendant that the claim that the CI was under surveillance during the controlled buys is false. However, the rest of the information in the affidavit is still sufficient to establish probable cause. McMunn was able to personally observe the phone used to contact Defendant to set up the transactions. McMunn also conducted a strip search of the CI prior to embarking to Defendant's apartment as well as another strip search following each purchase of the crack cocaine. The CI used in these instances had been reliable in their cooperation with police investigations since March of 2018. The substances on at least two of the transactions tested positive for cocaine. Therefore, the Defendant's argument fails on this issue as well.

Conclusion

The Court finds that the Commonwealth presented enough evidence at the preliminary hearing to establish a *prima facie* case for all counts against Defendant. Therefore, Defendant's Petition for Writ of Habeas Corpus is denied. The Court also finds that the warrant was supported by probable case and a credible informant. The evidence seized because of the warrant issued in this case shall not be suppressed.

ORDER

AND NOW, this 3rd day of May, 2021, based upon the foregoing Opinion, it is **ORDERED AND DIRECTED** that Defendant's Petition for Writ of Habeas Corpus in his Omnibus Pretrial Motion is hereby **DENIED**. Defendant's Motion to Suppress is **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA
Helen A. Stolinas, Esq.
Law Clerk (JMH)