

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v.

BRETT RODRIGUEZ,
Defendant

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: No. CR 217-2018
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Michael S. Greek, Esq.

Counsel for Commonwealth
Assistant District Attorney

Matthew Mottola, Esq.

Counsel for Defendant

MEMORANDUM OPINION AND ORDER

Matika, J. - December 30, 2019

I. INTRODUCTION.

This Memorandum Opinion addresses the January 16, 2019 "Supplemental Suppression Motion" filed by Defendant Brett Rodriguez ("Defendant" or "Mr. Rodriguez").¹

In accordance with the Order that follows this Memorandum Opinion, the Supplemental Suppression Motion shall be **DENIED**.

¹ As acknowledged by Matthew Mottola, Esq., counsel for Defendant, during the May 14, 2019 hearing in this matter, disposition of the Supplemental Suppression Motion shall also dispose of the substantively identical issues raised in the December 21, 2018 "Motion of Suppression" filed *pro se* by Defendant.

II. FACTUAL AND PROCEDURAL BACKGROUND.

A. The Underlying Non-Summary Charges.

Defendant has been charged with:

- Aggravated Assault [Count 1] [Felony 2]
(18 Pa.C.S.A. §2702(a)(3));
- Aggravated Assault [Count 2] [Felony 2]
(18 Pa.C.S.A. §2702(a)(3));
- Simple Assault [Count 3] [Misdemeanor 2]
(18 Pa.C.S.A. §2701(a)(1));
- Simple Assault [Count 4] [Misdemeanor 3]
(18 Pa.C.S.A. §2701(a)(1)); and

B. Factual Background.

1. Overview of the Arrest Warrants, Law Enforcement Personnel, and 102 East White Bear Drive.

On February 13, 2018, Carbon County Deputy Sheriff Joseph Hager ("Deputy Hager") went to the dwelling located at 102 East White Bear Drive, Summit Hill, Pennsylvania (the "Premises") in an attempt to arrest James Fredericks ("Mr. Fredericks") and Chad Himelberger ("Mr. Himelberger") on, respectively, a bench warrant and an arrest warrant. This Court had issued a bench warrant for Mr. Fredericks for missing a court hearing; the Berks County Court of Common Pleas had issued an arrest warrant for Mr. Himelberger with respect to a new criminal charge. No search warrants were issued with respect to this case.

Paul Zuzo ("Mr. Zuzo") owned the Premises and permitted Mr. Fredericks, Mr. Himelberger, Defendant, and several other individuals to reside there. As of February 13, 2018, Defendant kept both clothing and personal items inside the home.

To effectuate the planned arrests, Deputy Hager enlisted the aid of Agent Schwartz and Agent Bodden of the Pennsylvania Attorney General's Office to address the possibility that a meth lab existed at the Premises. In attempting to execute the subject warrants, Deputy Hager also enlisted the assistance of Deputy Sheriff Kristy Cummins ("Deputy Cummins"), Officer Matthew Schwartz ("Officer Schwartz") of the Jim Thorpe Police Department, and members of the Summit Hill Police Department.

2. Execution of the Arrest Warrants and Law Enforcement Entry of the Premises.

During the May 14, 2019 hearing, Deputy Hager testified with respect to law enforcement's entry into the Premises and the nature of law enforcement interaction with Mr. Fredericks at the time of said entry.

On direct examination, Deputy Hager stated that "[w]e knocked on the door and after several minutes Mr. Fredericks came to the door and myself and Deputy Cummins entered the house." Deputy Hager then indicated that once inside the house, he informed Mr. Fredericks that he had a warrant for Mr. Fredericks' arrest, that

Mr. Fredericks was very cooperative and said "OK, I'll go with you" and that he needed to get some clothing on, that Deputy Hager and Deputy Cummins escorted Mr. Fredericks to the basement, that Deputy Hager asked Mr. Fredericks if he knew Mr. Himelberger, that Mr. Fredericks said that he didn't but that he wasn't sure who was in the house, that Deputy Hager asked Mr. Fredericks "if we could look around?" and that Mr. Fredericks responded, "Sure."

On cross-examination, Deputy Hager clarified that he knocked on the door of the premises, Mr. Fredericks opened the door, Deputy Hager announced to Mr. Fredericks that he had a warrant for him, and Deputy Hager entered the Premises. Deputy Hager testified that after law enforcement had entered the Premises he asked if law enforcement "could look around for Mr. Himelberger?"

Under inquiry from the Court, Deputy Hager indicated that, while at the front door of the Premises, Deputy Hager told Mr. Fredericks that they had a warrant for Mr. Fredericks' arrest, Mr. Fredericks "...basically said he had to get his shoes on," Deputy Hager said "[w]e have to come with you," and Mr. Fredericks responded with "I understand." Deputy Hager testified that, while following Mr. Fredericks as he gathered his shoes, Deputy Hager stated that law enforcement had a warrant for someone else in the home and if Mr. Fredericks minded if they looked around. Mr. Fredericks replied "go ahead" to this inquiry.

Several minutes after Deputy Hager entered the premises, Agent Schwartz, Agent Bodden, and Officer Schwartz entered the Premises. Upon hearing sounds upstairs and going upstairs to investigate the source thereof, they encountered Defendant. Defendant seemed upset that the officers were at the Premises and questioned them as to the reason for their presence. For officer safety, Agent Schwartz approached Defendant to place him in handcuffs. Agent Schwartz grabbed Defendant's wrist and Defendant pulled away and turned to face Agent Schwartz. As this occurred, Officer Schwartz came up behind Defendant and took him to the ground, a struggle ensued that resulted in relatively minor injuries to both Agent Schwartz and Officer Schwartz. Officer Schwartz eventually successfully handcuffed Defendant.

C. Procedural Background: The Charges Filed and the Instant Motion.

Based upon the foregoing, the Commonwealth charged Defendant with the above-delineated charges.

Defendant, through the Supplemental Suppression Motion, characterizes issues raised for this Court's consideration thusly:

- "Whether Deputy Hager and the other officers performed an unreasonable search under the Pennsylvania and Federal Constitution when they entered a home without a warrant or an exception to the warrant requirement?"

See Defendant's Brief in Support of Suppression Motion ("Defendant's Brief") at 3. Broadly speaking, Defendant contends that "[t]he sole issue in this Suppression Motion is whether the officers were justified in entering that home at 102 White Bear Drive in Summit Hill." See Defendant's Brief at 3.

III. DISCUSSION.

A. The United States Constitution and Pennsylvania Constitution Proscriptions Against Unreasonable Searches and Seizures.

In this matter, the Commonwealth did not possess a search warrant(s) at the time that the law enforcement officers involved entered the Premises.

"Both the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution 'guarantee individuals freedom from unreasonable searches and seizures.'" See *Commonwealth v. Bostick*, 958 A.2d 543, 550 (Pa.Super. 2008) citing *Commonwealth v. El*, 933 A.2d 657, 660 (Pa.Super. 2007).² A search occurs when police - i.e., the

² The Fourth Amendment to the United States Constitution states "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See U.S. Const., Amend. IV.

Article I, Section 8 of the Pennsylvania Constitution provides that "[t]he people shall be secure in their persons, houses, papers and

government as opposed to a private individual or entity - "...intrude[s] upon a constitutionally protected area without the individual's explicit or implicit permission." See *Commonwealth v. Fulton*, 179 A.3d 475, 487-488 (Pa. 2018). Entry into a home or living area constitutes a search that requires a warrant. See *Commonwealth v. Demshock*, 854 A.2d 553, 555 (Pa.Super. 2004). See also *Commonwealth v. Gibson*, 638 A.2d 203, 208 (Pa. 1994) ("[A]n examination of an individual's house, buildings or person, for the purpose of discovering contraband or some evidence of guilt to be used in the prosecution of a criminal action."). "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." See *Payton v. New York*, 445 U.S. 573, 586 (1980).

"[T]he Fourth Amendment does not shield only those who have title to the searched premises." See *Commonwealth v. Ferretti*, 577 A.2d 1375, 1377 (Pa.Super. 1990). As matter of general Fourth

possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." See Pennsylvania Const., Art. I, §8.

As is the practice of the Pennsylvania Supreme Court, this Court shall assume for purposes of analysis that, in the absence of any contention to the contrary, the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution offer the same protection under the circumstances presented. See *Commonwealth v. Jon Eric Shaffer*, No. 16 WAP 2019 at 7, nn. 9, 10 (Pa. June 18, 2019).

Amendment jurisprudence, a defendant "must show that he had a privacy interest in the area searched." See *Commonwealth v. Jones*, 874 A.2d 108, 117 (Pa.Super. 2005). "An expectation of privacy will be found to exist when the individual exhibits an actual or subjective expectation of privacy and that expectation is one that society is prepared to recognize as reasonable." See *Commonwealth v. Bostick*, 958 A.2d 543, 552 (Pa.Super. 2008). In order to establish a reasonable expectation of privacy, "a defendant must establish a possessory interest, a legitimate presence, or some 'factor from which a reasonable and justifiable expectation of privacy could be deduced' to prove that this subjective expectation of privacy is legitimate." See *Commonwealth v. Gordon*, 683 A.2d 253, 257 (Pa. 1996).

Non-owner(s) of a particular premises may maintain a privacy interest therein if such individual(s) constitutes more than a casual visitor. See *Commonwealth v. Bostick*, 958 A.2d at 552. A defendant's "status as an overnight guest provides in an individual with an expectation of privacy in the home that society is prepared to recognize as reasonable." See *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990). A defendant maintains a reasonable expectation of privacy in a home that - while not as a permanent residence - the defendant stayed overnight for several days with permission of the

homeowner. See *Commonwealth v. Ardestani*, 736 A.2d 552, 556 (Pa.1999).

B. The Requirement that Law Enforcement Possess a Search Warrant when Entering a Dwelling to Execute an Arrest Warrant.

The Pennsylvania Supreme Court, in *Commonwealth v. Romero* 183 A.3d 364 (Pa. 2018), has held that "[t]he Fourth Amendment requires that, even when seeking to execute an arrest warrant, a law enforcement entry into a home must be authorized by a warrant reflecting a magisterial determination of probable cause to search that home, whether by a separate search warrant or contained within the arrest warrant itself."

In so holding, the Pennsylvania Supreme Court declined to follow as dicta a United States Supreme Court regimen with respect to the necessity of a search warrant to effectuate an arrest when officers possess an arrest warrant but not a search warrant. In dicta in *Payton v. New York*, the United Supreme Court pronounced that an arrest warrant carried with it the limited authority to enter a suspect's dwelling to effectuate an arrest. See *Payton v. New York*, 445 U.S. 573, 603 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). The United States Supreme Court also has held that authorities **must** have a search warrant when effectuating the arrest warrant in a dwelling **other than the suspect's dwelling**. See *Steagald v. United States*, 451 U.S. 204, 101 S.Ct., 68 L.Ed.2d 38 (1981)

(warrant for an individual's arrest does not authorize entry into the home of a third party not named in the arrest warrant).

C. Exceptions to the Search Warrant Requirement.

"As a general rule, a search or seizure without a warrant is deemed unreasonable for constitutional purposes." See *Commonwealth v. Holzer*, 389 A.2d 101, 106 (Pa. 1978) citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971). This general rule does not apply when a search or seizure has been "conducted pursuant to a specifically established and well-delineated exception to the warrant requirement." See *Commonwealth v. Key*, 789 A.2d 282, 287 (Pa.Super. 2001).

Absent a warrant, a law enforcement officer can only enter a home with consent or under exigent circumstances. See *Payton v. New York*, 445 U.S. at 576, 590. See also *Commonwealth v. Strickler*, 757 A.2d 884, 888 (Pa. 2000) (law enforcement officer does not need warrant to perform search where individual with apparent authority consents to the search). In order for consent to be constitutional, the Commonwealth must establish (1) that an individual giving consent did so during a legal police interaction and (2) that any consent had been voluntarily given. See *Commonwealth v. Caban*, 60 A.3d 120, 127 (Pa.Super. 2012).

"[T]he Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained

choice - not the result of duress or coercion, express or implied, or a will overborne - under the totality of the circumstances." See *Commonwealth v. Kemp*, 961 A.2d 1247, 1261 (Pa.Super. 2008). Consent must be "unequivocal, specific, and voluntary." See *Commonwealth v. Gibson*, 638 A.2d 203, 207 (Pa. 1994).

No contention exists that exigent circumstances exist in this case.³

D. The Commonwealth has Demonstrated both that No "Search" Occurred upon Entry of the Premises and that Consent Existed for a Warrantless Search in this Matter.

In the instant case, the Commonwealth has demonstrated both that no "search" occurred upon entry of the Premises and that consent existed for a warrantless search in this matter.

To reiterate the factual narrative pertaining to law enforcement's entry into the Premises, on direct examination,

³ See generally, *Commonwealth v. Johnson*, 969 A.2d 565, 569 (Pa.Super. 2009) ("It is well-settled that exigent circumstances excusing the warrant requirement arise where the need for prompt police action is imperative."); *Commonwealth v. Roland*, 637 A.2d 269, 271 (Pa. 1994) (Commonwealth "bears a heavy burden" to establish exigency); *Commonwealth v. English*, 839 A.2d 1136, 1142 (Pa.Super. 2003); *Commonwealth v. Lee*, 972 A.2d 1, 3 (Pa.Super. 2009) quoting *Commonwealth v. Roland*, 637 A.2d 269, 270 - 271 (Pa. 1994) (To determine the existence of exigency, court may consider "(1) the gravity of the offense, (2) whether the suspect is reasonably believed to be armed, (3) whether there is above and beyond a clear showing of probable cause, (4) whether there is a strong reason to believe that the suspect is within the premises being entered, (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended, (6) whether the entry was peaceable, and (7) the time of the entry, i.e. whether it was made at night.").

Deputy Hager stated that "[w]e knocked on the door and after several minutes Mr. Fredericks came to the door and myself and Deputy Cummings entered the house." Deputy Hager then indicated that once inside the house, he informed Mr. Fredericks that he had a warrant for Mr. Fredericks' arrest, that Mr. Fredericks was very cooperative and said "OK, I'll go with you" and that he needed to get some clothing on, that Deputy Hager and Deputy Cummins escorted Mr. Fredericks to the basement, that Deputy Hager asked Mr. Fredericks if he knew Mr. Himelberger, that Mr. Fredericks said that he didn't but that he wasn't sure who was in the house, that Deputy Hager asked Mr. Fredericks "if we could look around?" and that Mr. Fredericks responded, "Sure."

On cross-examination, Deputy Hager clarified that he knocked on the door of the premises, Mr. Fredericks opened the door, Deputy Hager announced to Mr. Fredericks that he had a warrant for him, and Deputy Hager entered the Premises. Deputy Hager testified that after law enforcement had entered the Premises he asked if law enforcement "could look around for Mr. Himelberger?"

Under inquiry from the Court, Deputy Hager indicated that, while at the front door of the Premises, Deputy Hager told Mr. Fredericks that they had a warrant for Mr. Fredericks' arrest, Mr. Fredericks "...basically said he had to get his shoes on," Deputy Hager said "[w]e have to come with you," and Mr. Fredericks

responded with "I understand." Deputy Hager testified that, while following Mr. Fredericks as he gathered his shoes, Deputy Hager stated that law enforcement had a warrant for someone else in the home and if Mr. Fredericks minded if they looked around. Mr. Fredericks replied "go ahead" to this inquiry.

As an initial constitutional matter, the Court first finds that no "search" occurred during law enforcement interactions with Mr. Fredericks that resulted in entry to the Premises. As the Pennsylvania Supreme Court has held, a search occurs when police - i.e., the government as opposed to a private individual or entity - "...intrude[s] upon a constitutionally protected area without the individual's explicit or implicit permission." See *Commonwealth v. Fulton*, 179 A.3d 475, 487-488 (Pa. 2018). The factual narrative in this matter indicates that, at a minimum, Mr. Fredericks, considering the totality of the circumstances, provided law enforcement personnel with "implicit permission" to enter the Premises by virtue of his permitting them to enter the Premises without objection in order to execute an arrest warrant for Mr. Fredericks' arrest.⁴

⁴ The Court recognizes that this Pennsylvania Supreme Court pronouncement effectively collapses the distinction between (1) "consent" as a factor to be considered in the definition of "search" and (2) "consent" as providing an the exception to search warrant requirements. As a matter of common sense, and notwithstanding the constitutional definitions of the term "search" of which the Court stands fully cognizant, one would be hard-pressed meaningfully characterize the

Additionally, even if the Court did not so find that the constitutional definition of "search" has not been met, the Court finds that Mr. Fredericks provided law enforcement with consent by allowing law enforcement to enter the premises to execute an arrest warrant for his arrest and by responding to conversation initiated by law enforcement. See *Commonwealth v. Daniels*, 421 A.2d 721, 722 (Pa.Super. 1980) (verbal and non-verbal cues may constitute consent to enter a premises and consent found where law enforcement permitted to enter premises, defendant unlocked door, and defendant - unlike the instant case - did not respond to law enforcement). Moreover, Mr. Fredericks, and as is consistent with his initial consent, expanded the scope of the consent which he afforded to law enforcement to merely enter the Premises to execute the arrest warrant for Mr. Fredericks' arrest while Mr. Fredericks gathered his shoes to include conducting a Premises-wide search for Mr. Himmelberger.⁵

initial interaction between law enforcement and Mr. Fredericks - wherein Mr. Fredericks opened a door and stood directly and gloriously unconcealed in the presence of law enforcement - as constituting a "search."

⁵ Had Mr. Fredericks - when confronted with law enforcement officers seeking to execute a warrant for Mr. Fredericks' arrest and standing before him at the door - sought to evade or resist arrest, the Court would find that Mr. Fredericks' would thereby have created exigent circumstances sufficient to create an exception to a search warrant requirement.

IV. CONCLUSION.

For the foregoing reasons, the Supplemental Suppression Motion shall be **DENIED**.

BY THE COURT:



Joseph J. Matika, J.

2019 DEC 30 P 19 15

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ORDER OF COURT

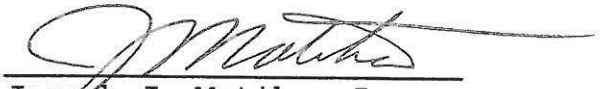
AND NOW, this 30th day of December, 2019, upon consideration
of

- the December 21, 2018 "Motion of Suppression" filed by
Defendant Brett Rodriguez,

- the January 16, 2019 "Supplemental Suppression Motion"
filed by Defendant Brett Rodriguez, and

upon consideration of the May 14, 2019 hearing thereon, and upon
comprehensive review of this matter, it is hereby **ORDERED** and
DECREED that the Supplemental Suppression Motion shall be **DENIED**.

BY THE COURT:


Joseph J. Matika, J.