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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
	:	
vs.	:	**No. CR 676-2015**
	:	
	:	
MARK ANDREW AZAR	:	
	:	
Defendant	:	

Michael S. Greek, Esquire — Counsel for Commonwealth
Assistant District Attorney
Matthew J. Mottola, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Matika, J. – June , 2016

Before this Court is an Omnibus Pretrial Motion filed by Defendant, Mark Andrew Azar (hereinafter "Defendant"). In that motion, Defendant raises a litany of arguments, including: suppression of any evidence taken from an unreasonable search and seizure of Defendant's person; a habeas corpus motion for failure to establish a *prima facie* case; Defendant's actions, if they do constitute a violation of the law, were merely a *de minimus* violation, and finally, the statute being applied to Defendant, 35 P.S. § 780-113 §§ A2, Misbranding of a Controlled Substance, is void for vagueness. For the reasons stated within this Opinion, upon consideration of Defendant's "OMNIBUS PRE-TRIAL MOTION," and after a hearing held thereon, and after reviewing the Defendant's

Brief in Support[1], Defendant's motion is **GRANTED in part and DENIED AS MOOT in part.**

FACTUAL AND PROCEDURAL BACKGROUND

On April 4, 2015, Patrolman David Mason of the Kidder Township Police Department received a dispatch regarding a domestic dispute in the Beechcrest Development. Upon his arrival at approximately 10:49 a.m., Patrolman Mason found Defendant and his wife, Kristen Pieri (hereinafter "Pieri"), arguing outside of their residence regarding "cellphones, drugs, pictures of women."[2] The two continued yelling back and forth at each other, making it difficult for Patrolman Mason to determine what had transpired. Patrolman Mason, in an attempt to diffuse the situation, "detained"[3] Defendant by placing him in handcuffs and escorting him towards his patrol vehicle. Before placing Defendant in the patrol vehicle, Patrolman Mason performed a pat-down for "safety"[4] reasons.

During the course of this patdown, Patrolman Mason felt an object in Defendant's left front pocket of his jeans. The patrolman then removed that object from Defendant's jeans and

[1] Defendant was ordered to file their Brief in Support of their Omnibus Motion within thirty (30) days of the Omnibus hearing of September 25, 2015, and the Commonwealth was given ten (10) days after which to file their Brief in Response. Defendant filed his Brief in Support on October 19, 2015. The Commonwealth never filed a brief in this matter.
[2] N.T. Prel. Hearing, P. 6.
[3] *Id.* at 7.
[4] *Id.*

observed it to be a "red pill bottle."[5] The bottle had a prescription label bearing Defendant's name for 300 milligrams of Quetiapine. Patrolman Mason then opened the bottle and discovered five (5) pills, three of which were white and green in color, one was white, and the fifth was peach colored. Although he was unable to identify them at the scene, Patrolman Mason later determined, using a pill identification book, that the three green and white pills were Fluoxetine, and the peach pill and the white pill were two different Quetiapine pills. At this point, Patrolman Mason seized the bottle and the pills, and transported Defendant back to the Kidder Township Police Station.

Thereafter, Defendant was charged with Adulterating or Misbranding a Controlled Substance, 35 Pa.C.S.A. § 780-113 §§ A2. After a Preliminary Hearing where a *prima facie* case was found on this charge, Defendant filed this Omnibus Pretrial Motion.

DISCUSSION

Defendant, in his Omnibus Pretrial Motion, raises four (4) separate issues. First, Defendant requests the Court suppress all evidence in this case uncovered during the search and seizure of the pill bottle for violating his right to be free from unreasonable searches and seizures. Second, Defendant filed a writ of habeas corpus claiming the Commonwealth does not have

[5] *Id.*

sufficient evidence to establish a *prima facie* case. Third, Defendant contends that in the event that he did in fact violate 35 Pa.C.S.A. § 780-113 §§ A2, his violation was *de minimus* and thus, the Court should dismiss the charge. Finally, Defendant argues that 35 Pa.C.S.A. § 780-113 §§ A2 is unconstitutionally vague as it applied to Defendant's conduct.[6] This opinion will first address this motion in the order of the events that occurred on the date of April 4, 2015.

In a motion to suppress evidence, the burden is placed upon the Commonwealth to establish that the allegedly suppressible evidence was not obtained in violation of a defendant's rights. *Commonwealth v. Ryan*, 407 A.2d 1345, 1348 (Pa. Super. Ct. 1979).

"The Fourth Amendment of the United States Constitution and Article I, Section VIII of the Pennsylvania Constitution guarantee individuals freedom from unreasonable searches and seizures." *Commonwealth v. El*, 933 A.2d 657, 660 (Pa. Super. Ct. 2007). "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions.'" *Coolidge v. New Hampshire*, 403 U.S.

[6] Defendant originally raised a fifth claim, which was that 35 Pa.C.S.A. § 780-113 §§ A2 was also unconstitutionally overbroad. However, at the time of filing his Brief in Support of his Omnibus Motion, Defendant represented that he was withdrawing this claim, because it lacked merit.

2022, 2032 (1971), *quoting Katz v. United States*, 389 U.S. 347, 357 (1967). In the Suppression portion of his Omnibus Motion, Defendant raises four (4) separate acts by Patrolman Mason that he claims violated his right to be free from unreasonable searches and seizures: 1) the performance of the pat down search; 2) removing the pill bottle from Defendant's pocket; 3) opening the pill bottle; and 4) seizing the pills inside the bottle.

1. The Performance of the Pat-Down Search

There is no dispute that the pat-down of Defendant was done without a search warrant. Therefore, as stated above, for the search to be lawful, it would have to fall into one of the "specifically established and well delineated exceptions" mentioned above in *Coolidge* and *Katz.* Such pat downs are permissible "without a warrant and on the basis of reasonable suspicion less than probable cause, must always be strictly limited to that which is necessary for the discovery of weapons" that may present a danger to the officer. *Commonwealth v. Ingram*, 814 A.2d 264, 269 (Pa. Super. 2002). When reviewing the legitimacy of a pat down search, "we examine the totality of the circumstances . . . giving due consideration to the reasonable influences that the officer can draw from the facts in light of his experience, *while disregarding any particularized suspicion or hunch.*" *Commonwealth v. Wilson*, 927 A.2d 279, 284 (Pa. Super. Ct. 2007) (emphasis in original).

The two exceptions that apply in this matter are a search incident to a lawful arrest, or a search permitted under *Terry v. Ohio*, 392 U.S. 1 (1968). Looking first at the search incident to a lawful arrest, this does not appear to be the situation present in this matter. There was no testimony, at either the Preliminary Hearing or the Omnibus Hearing, that Defendant was under arrest at the time the pat down search was conducted. In fact, Patrolman Mason testified at the Omnibus Hearing that Defendant was not under arrest, but merely "detained" so that the patrolman could "get control of the situation." The Pennsylvania Supreme Court has defined an arrest as:

> [a]ny act that indicated an intention to take the person into custody and subjects him to the actual control and will of the person making the arrest. . . . The test is an objective one, viewed in the light of the reasonable impression conveyed to the person subjected to the seizure rather than the strictly subjective view of the officers or the persons being seized.

Commonwealth v. Rodriquez, 614 A.2d 1378, 1384 (Pa. 1992), *quoting Commonwealth v. Duncan*, 525 A.2d 1177, 1179 (Pa. 1987).

The language of the *Duncan and Rodriquez* decisions means this Court must look beyond the testimony of Patrolman Mason. The fact that Defendant was handcuffed, in and of itself, is insufficient to show that Defendant was under arrest. Conversely, the Pennsylvania Supreme Court has refused to hold that each time an individual has been handcuffed that the individual has been arrested. *Commonwealth v. Carter*, 643 A.2d 61, 67 n. 2 (Pa. 1994).

Further, the rest of the facts in this matter lend support to the idea that Defendant was not under arrest. The search was undertaken as soon as the detention occurred, the detention was intended to separate the parties to assess the situation, Defendant was placed in the back of the police vehicle, but not immediately transported anywhere, and there was no force used by the Patrolman other than placing the handcuffs on Defendant.[7] All of these indicate that Defendant was not under arrest, but rather "detained" as part of an investigative detention. Accordingly, there can be no justification of the warrantless search based on a lawful arrest and search incident to that arrest.

Next, the Court turns to the exception created in *Terry v Ohio*, where the U.S. Supreme Court "granted authority to police officers to pat-down or frisk a suspect for weapons based only upon the reasonable suspicion that criminal activity is afoot, and that the suspect may be armed and dangerous." *Commonwealth v. Griffin*, 116 A.3d 1139, 1142 (Pa. Super. Ct. 2015), *citing Terry v. Ohio*, 392 U.S. 1 (1968). The Pennsylvania Supreme Court has explained that:

> the sole justification for a *Terry* search is the protection of the officers or others nearby, such a protective search must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. Thus, the purpose of this limited search is not to discover

[7] N.T. Prel. Hearing, P. 6-7.

> evidence, but to allow the officer to pursue his investigation without fear of violence.

Commonwealth v. Stevenson, 744 A.2d 1261, 1264-1265 (Pa. 2000).

Under *Terry*, such a search is only permissible if two requirements are met:

> It is well-established that a police officer may conduct a brief investigatory stop of an individual if the officer observes unusual conduct which leads him to reasonably conclude that criminal activity may be afoot. Moreover, if the officer has a reasonable suspicion, based on specific and articulable facts, that the detained individual may be armed and dangerous, the officer may then conduct a frisk of the individual's outer garments for weapons.

Commonwealth v. Clemens, 66 A.3d 373, 381 (Pa. Super. Ct. 2013). In the instant matter, Defendant is not contesting that the first of the two factors exists; namely, the fact that Patrolman Mason was called to Defendant's residence to handle a domestic dispute provided Patrolman Mason with reasonable suspicion that Defendant may be involved in some type of criminal activity.

The issue in this matter turns on whether or not Patrolman Mason had reasonable suspicion, based on specific and articulable facts, to permit a pat-down search of Defendant:

> Although a weapons frisk must be strictly circumscribed by the exigencies that justify it, '[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [officer] in the circumstances would be warranted in the belief that his safety or that of others was in danger.'

Commonwealth v. Mathis, 125 A.3d 780, 791 (Pa. Super. Ct. 2015); citing *Terry*, 392 U.S. at 27, *also citing Commonwealth v. Mesa*,

683 A.2d 643 (Pa. Super. Ct. 1996). Further, the Pennsylvania Supreme Court has also rejected the idea of absolute assurance before conducting a *Terry* search, saying "[w]e cannot demand of our police that they determine with one hundred percent certainty that criminal activity is afoot or that a person is armed before they take protective steps." *Commonwealth v. Cortez*, 491 A.2d 111, 113 (Pa. 1985).

Courts in this Commonwealth have held repeatedly that "[r]easonable suspicion is determined by the totality of the circumstances." *See Commonwealth v. Scarborough*, 89 A.3d 679, 683 (Pa. Super. Ct. 2014). The Supreme Court ruled that "reasonable suspicion does not require that the activity in question must be unquestionably criminal before an officer may investigate further. Rather, the test is what it purports to be — it requires a *suspicion* of criminal conduct based upon the facts of the matter." *Commonwealth v. Rogers*, 849 A.2d 1185, 1190 (Pa. 1190) (emphasis in original).

In the instant matter, Patrolman Mason, at the Preliminary Hearing and at the Omnibus Hearing, testified surrounding the circumstances of Defendant's detention. Additionally, Patrolman Mason authored an Affidavit of Probable Cause including these facts as well. In the Affidavit, Patrolman Mason also stated that Defendant was "slow to respond" to questions and "had slurred speech". He also affirmed that Defendant's wife informed him that

Defendant had used heroin and fallen down the steps the night before and struck his face, and that Defendant had facial marks above his right eye. At the Omnibus Hearing, when asked, the patrolman stated that at the time, he had a suspicion of drug use by the Defendant.

Patrolman Mason testified that he was "not able to investigate"[8] what was going on when he arrived because Defendant and his wife were yelling at each other, and that Defendant was the more aggressive of the two. Further, the Defendant informed Patrolman Mason he was on probation in Lehigh County. Patrolman Mason also testified that the pat down was conducted for "officer safety", and that because he could not get the parties to stop fighting, he had "no idea" whether or not Defendant was armed before conducting the pat-down search.

In reviewing the information present, this Court finds the standard from *Mathis* and *Cortez* convincing in this matter. Patrolman Mason cannot have been expected to be one hundred percent certain that Defendant was armed before conducting the pat down search of Defendant's clothes. The Patrolman testified to specific facts about the incident that gave him reason to perform the search, such as Defendant's potential drug use and the contentious nature of the scene when the Patrolman arrived. Thus, this Court

[8] N.T. Prel. Hearing, P. 7.

finds that Patrolman Mason's pat down search of Defendant's clothing for weapons before placing Defendant in the patrol vehicle was reasonable and constitutional under the circumstances.

2. The Removal of the Pill Bottle from Defendant's Pocket

After determining that the Patrolman's *Terry* search of Defendant was reasonable, this Court must next focus on whether or not the item uncovered in the search, a prescription pill bottle, was justifiably removed from Defendant's pocket during the course of the search. A protective search under *Terry* must be "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry v. Ohio*, 392 U.S. 1, 26 (1968). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. *Sibron v. New York*, 392 U.S. 40, 65-66 (1968).

In furtherance of the doctrine created under *Terry*, the U.S. Supreme Court created the "plain feel doctrine", which states that when:

> a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993). The Pennsylvania Supreme Court has further clarified the plain feel doctrine, ruling "[a]s *Dickerson* makes clear, the plain feel doctrine is only applicable where the officer conducting the frisk feels an object whose mass or contour makes its criminal character immediately apparent." *Commonwealth v. Stevenson*, 744 A.2d 1261, 1265 (Pa. 2000). "Immediately apparent" has been determined to mean "that the officer readily perceives, without further exploration or searching, that what he is feeling is contraband." *Id.* Thus, after feeling the object, if the officer lacks probable cause that the object is contraband without further investigation, he has not met the "immediately apparent" requirement and the plain-feel doctrine does not justify seizing the object. *See Commonwealth v. Graham*, 721 A.2d 1075, 1082 (Pa. 1998).

Courts in Pennsylvania have stated in numerous cases that when an officer is unsure whether an item is contraband or not, the plain feel doctrine does not apply. In *Interest of S.D.*, the Superior Court held than an officer testifying that he "felt a bulge" in the defendant's pocket, but offering no testimony as to his perception of what he felt did not justify the intrusion into the defendant's pockets. *633 A.2d 172, 176* (Pa. Super. Ct. 1996). Similarly, in another case, where a detective gave general testimony that an object "felt like a controlled substance", but "never provided specific testimony as to why the 'shape and form'

of the bulge warranted an intrusive search", that evidence had to be suppressed. *Commonwealth v. Mesa*, 683 A.2d 643, 648 (Pa. Super. Ct. 1996). The Pennsylvania Supreme Court has also held that when an officer testifies than an item on a person "may" be some type of contraband, but was unable to testify that the pat down established identifiable contraband, the search was unconstitutional. *Commonwealth v. E.M.*, 735 A.2d 654, 664 (Pa. 1999).

In addition to the requirements that the officer be able to testify that an object found during a pat-down search is "immediately apparent" as contraband, the object itself must also be contraband. The Superior Court has previously suppressed evidence where it was not obvious that it was contraband seized during the search:

> The record supports a factual finding that the officer felt a mass that he recognized as a baggie; it does not support a factual finding that the officer felt what he immediately recognized as contraband. Sight unseen, the contents of the baggies that the officer felt in appellant's pants pockets could as easily have contained the remains of appellant's lunch as contraband.

Commonwealth v. Stackfield, 651 A.2d 558, 562 (Pa. Super. Ct. 1994).

The Pennsylvania Supreme Court has also ruled that a pill bottle is not, by its nature, contraband. *See Commonwealth v. Stevenson*, 744 A.2d 1261, 1267 (Pa. 2000). Further, in the same case, the court held that the plain-feel doctrine is not satisfied

when the officer removed the pill bottle and inspected its contents before determining there was contraband inside of it. *Id.* The Superior Court has ruled similarly, holding:

> [w]e agree with [Appellant's] contentions that equate a pill bottle to a baggie when felt during a lawful *Terry* frisk. The incriminating nature of the former object is not more evident and logically apparent to an officer than that of the latter. In either case, the officer is not feeling a contour or a mass of contraband, rather, he or she is merely sensing the shape of a container. Furthermore, if any type of container were to allow an officer to in fact feel the contour of illegal drugs it would be that of a flexible plastic bag, not that of a hard bottle.

Commonwealth v. Guillespie, 745 A.2d 654, 659 (Pa. Super. Ct. 2000).

Turning to the instant matter, Patrolman Mason never stated that it was "immediately apparent" that the object he felt during the search of Defendant was contraband. Rather, Patrolman Mason testified at the Omnibus Hearing that he "had no idea" what he felt when he conducted the search on Defendant, and that he did not know it was a plastic pill bottle until he removed it from Defendant's pocket. He offered no testimony about any "bulge" or "protrusion" in Defendant's clothes prior to the pat down that would lead him to believe that what he felt during the search was a weapon or contraband. Further, the search itself turned out to only be a plastic pill bottle, with corresponding label to indicate a valid prescription in Defendant's name, which, in and of itself, is not contraband. Therefore, in accordance with Pennsylvania

case law, the plain feel doctrine does not justify Patrolman Mason's removal of the pill bottle from Defendant's pocket or any subsequent inspection of said pill bottle. Consequently, the results of the search along with any evidence obtained thereafter shall be suppressed and inadmissible at trial as Fruits of the Poisonous Tree.

The other issue this Court must dispose of is Defendant's motion for habeas corpus. Defendant asks the court in his Motion to dismiss the charges asserted against him based on, *inter alia*, the anticipation that his suppression motion would be granted. Defendant argues that as a result of the improper search and removal of the pill bottle and the suppression of any evidence illegally obtained, the Commonwealth lacks sufficient evidence to establish a *prima facie* case for the charges asserted against him.

It is well settled that a petition for a writ of habeas corpus is the correct means for testing a pretrial finding that the Commonwealth has sufficient evidence to establish a *prima facie* case. *Commonwealth v. Morman*, 541 A.2d 356, 357 (Pa. Super. Ct. 1988). A *prima facie* case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes the commission of a crime and that the accused is probably the perpetrator of the crime. In criminal matters, a *prima facie* case is that amount of evidence which, if accepted as true, would justify the conclusion that the defendant did commit the charged

offense. *See Commonwealth v. Scott*, 578 A.2d 933 (Pa. Super. Ct. 1990).

In this case, Defendant is charged with one crime: Misbranding of a Controlled Substance. Pursuant to this statute:

> a) The following acts and the causing thereof within the Commonwealth are hereby probihited:
> (2) The adulteration or misbranding of any controlled substance, other drug, device, or cosmetic.

35 Pa.C.S.A. § 780-113(a)(2).

Given the standard the Court must apply in regard to a writ of habeas corpus motion, that being accepting only the evidence that the Commonwealth could present at trial as true, this Court finds there is insufficient evidence presented by the Commonwealth to establish a *prima facie* case for this charge. This Court, in suppressing the evidence obtained as a result of this pat-down search, leaves the Commonwealth with no admissible evidence that can be used at trial. Therefore, the Commonwealth lacks sufficient evidence to establish a *prima facie* case that Defendant was Misbranding a Controlled Substance, and thus, Defendant's writ of habeas corpus is granted.

Accordingly the Court enters the following order:

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	:	
MARK ANDREW AZAR,	:	
Defendant	:	

Michael S. Greek, Esquire — Counsel for Commonwealth
Asst. District Attorney

Matthew J. Mottola, Esquire — Counsel for Defendant

ORDER OF COURT

AND NOW, this _____ day of June, 2016, upon consideration of Defendant's Omnibus Pretrial Motion and accompanying brief in support thereof, and after a hearing held on this matter, it is hereby **ORDERED and DECREED** that Defendant's Motion to Suppress is **GRANTED.**

As a result, and in accordance with this Court's Opinion, it is **FURTHER ORDERED and DECREED** that Defendant's Motion for Writ of Habeas Corpus is **GRANTED.** Accordingly, the charge against Defendant is **DISMISSED.** Any and all other aspects of Defendant's Omnibus Pretrial Motion are **DENIED AS MOOT.**

BY THE COURT:

_____
Joseph J. Matika, J.