IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 106 CR 2009
	:	110 CR 2009
JEFFREY HOSIER,	:	
Defendant	:	
Gary F. Dobias, Esquire, District Attorney		Counsel for the Commonwealth
Paul J. Levy, Esquire		Counsel for the Defendant

Criminal Law – Authority to Secure Premises Pending Search Warrant - Warrantless Search – Exigent Circumstances – Threat of Physical Harm – Plain View – Protective Sweep – Suppression -- "Good Faith" Exception to Exclusionary Rule

1. In general, warrantless searches and seizures are unreasonable per se, unless conducted pursuant to a specifically established and well-delineated exception to the warrant requirement. Exigent circumstances is one such exception.
2. In the absence of an exception to the warrant requirement, if probable cause exists for the issuance of a search warrant, the temporary securing of the premises to be searched pending the receipt of a search warrant to prevent the destruction or removal of evidence is not itself an unreasonable seizure of either the dwelling or its contents.
3. Exigent circumstances justify a warrantless entry and search when police reasonably believe that a person within a structure is in need of immediate aid.
4. The burden of establishing exigent circumstances is upon the Commonwealth; the standard is clear and convincing evidence.
5. When entry is supported by exigent circumstances, any evidence in plain view during the course of legitimate emergency activities may be seized by the police.
6. Police are permitted to conduct a protective sweep of premises where they are lawfully present when reasonable suspicion exists to believe that the area to be swept

harbors an individual posing a danger to the police.

7. Absent exigent circumstances or some other established and well-delineated exception to the warrant requirement, all evidence seized under a search warrant which issues upon information obtained from an illegal entry must be suppressed as the fruits of an illegal entry and search.

8. The privacy guarantees embodied in Article I, Section 8 of the Pennsylvania Constitution, allow for no "good faith" exception to the exclusionary rule.

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MEMORANDUM OPINION

Nanovic, P.J. – June 15, 2010

PROCEDURAL AND FACTUAL BACKGROUND

On October 3, 2008, between 8:00 and 9:00 P.M., John Doucette, the Chief of Police for Weissport Borough, received a call from the Borough's Mayor reporting a disturbance at the Defendant's home located at 316 Bridge Street. Within minutes, Chief Doucette was at the Defendant's home and heard the voice of one person screaming in a detached garage building located approximately twenty-five to thirty feet from the rear of the

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home. Chief Doucette was familiar with the Defendant, having previously responded to this property on approximately five to six occasions during the prior two years, and was also aware that the state police had similarly responded on approximately five to six occasions during this same period.[1] Chief Doucette recognized the voice of the person screaming as that of the Defendant.

The Chief immediately went to the garage, knocked on the door, and identified himself as a police officer. Initially the Defendant refused to open the door, stating only that his son, Dietrik, was not there. When advised that if he did not open the door he would be arrested, the Defendant opened the door.

Chief Doucette advised the Defendant he was investigating a disturbance at the property and wanted to know where Dietrik was. In response, the Defendant told the Chief that Dietrik was in the house packing his clothes and was leaving. This was, in fact, an accurate statement. Approximately five minutes before the police arrived, the Defendant and Dietrik had been arguing outside in the backyard

[1] It is significant that almost all of these disputes to which the police responded were between the Defendant and his son, Dietrik. (Suppression Hearing, pp. 17-18, 41). Other than the disputes between the Defendant and Dietrik, on one occasion the Weissport police responded to a loud argument between the Defendant and his neighbors (Preliminary Hearing, p. 26), and on a couple of occasions the Pennsylvania State Police responded to arguments between Dietrik and his brother. (Suppression Hearing, pp. 41-42).

between the Defendant's home and garage. The Defendant requested that his son move out.

When Chief Doucette questioned who was in the garage, the Defendant identified only his girlfriend, Donna Delabar, who stepped forward within the Chief's view. At this point, wanting to see if anyone else was present, Chief Doucette entered the garage without seeking permission or receiving any. Once inside, the garage, the Chief heard noise coming from the second floor loft and requested whoever was there to come down. At this point, a third person, a man who resembled the Defendant's brother, Berle, came running down the stairs and immediately ran past the Chief and out of the garage without identifying himself.[2]

Because the Defendant had only moments prior to this unidentified person running out of the garage denied that anyone else was also present, for officer safety, Chief Doucette decided to examine for himself if anyone else was present in the loft. *See* Commonwealth v. Crouse, 729 A.2d 588, 598 (Pa.Super. 1999) (holding that police may conduct a protective sweep of the premises where they are lawfully present when reasonable suspicion exists to believe "that the area to be swept harbors an individual posing a danger to the police"), *appeal denied*,

[2] At the time of this incident, other than the Defendant and his son, Dietrik, the other residents of the household were the Defendant's girlfriend, Donna Delabar, his mother, Linda Sperlbaum, and his brother, Berle. (Suppression Hearing, pp. 5, 57).

747 A.2d 364 (Pa. 1999).[3] When the Chief went towards the steps to go upstairs, the Defendant stepped in front of him and blocked his way. The Defendant told the Chief he had no right to be there, and wanted him to leave. A shoving match between the two then ensued with the Chief trying to climb the stairs and the Defendant denying him access. As this was occurring, Chief Doucette told the Defendant he was under arrest. (Suppression Hearing, pp. 50-51).

At about this same time, the Defendant ran from the garage, and the Chief, together with Officer Medoff who had accompanied the Chief to the Defendant's residence, gave chase. As the Defendant was running away, he directed Ms. Delabar to lock the garage door.

After approximately ten to fifteen minutes of attempting to catch the Defendant, the Defendant returned to his home where he was apprehended and arrested. Chief Doucette then returned to the garage and tried to enter. The door was locked. At first, Chief Doucette attempted to kick the door open, and when this failed, he ordered Ms. Delabar to unlock it. She did so, whereupon Chief Doucette entered the garage, went to the second floor, and checked whether anyone else was present. No one was there; however, during his view, Chief Doucette observed

[3] While Chief Doucette was able to observe that no one else was present on the first floor, a portion of the loft area was hidden and could not be viewed from the first floor. (Preliminary Hearing, pp. 13-14, 49).

three to five clotheslines hanging with several bushels of a green leafy substance which he suspected was marijuana.

Both the garage and the Defendant's home were secured until Chief Doucette could obtain a search warrant. *See* Segura v. United States, 468 U.S. 796, 810 (1984) ("[S]ecuring a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents."). This warrant was obtained and a later search of the garage and home led to the seizure of marijuana in both locations, as well as various suspected items of drug paraphernalia and a black jack, a prohibited offensive weapon. A copy of the search warrant and an inventory of the items seized were provided to the Defendant by Chief Doucette at the Carbon County prison where the Defendant had been taken following his arraignment before Magistrate Homanko who, at that time, had also issued the search warrant.

In his Omnibus Pretrial Motion filed on August 27, 2009, the Defendant seeks to have the charge of resisting arrest docketed to No. 110 CR 2009 dismissed for insufficient evidence and the evidence obtained from the search warrant pertaining to the drug related offenses docketed to No. 106 CR 2009 suppressed as the product of an illegal search and seizure. The Commonwealth has conceded in its brief responsive to the issues

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raised that a *prima facie* case has not been established with respect to the resisting arrest charge and this case will be dismissed. *See* Commonwealth v. Eberhardt, 450 A.2d 651, 653 (Pa.Super. 1982) (holding that attempt to escape officers' control and fleeing, without "aggressive assertion of physical force by [the Defendant] against the officers," does not constitute resisting arrest); *see also* Commonwealth v. Wertelet, 696 A.2d 206, 210 (Pa.Super. 1997) (holding that a lawful arrest is an essential element of the crime of resisting arrest).

As to the drug related offenses docketed to No. 106 CR 2009, the Defendant contends that the Commonwealth failed to establish exigent circumstances sufficient to justify Chief Doucette's entry into the garage and observation of the suspected marijuana. The Defendant argues it was the information Chief Doucette obtained from this illegal entry and search that provided the probable cause for the subsequent search warrant obtained, thereby requiring suppression of all evidence seized under the warrant as the fruits of an illegal search.

DISCUSSION

As a general rule, "[w]arrantless searches and seizures are . . . unreasonable *per se*, unless conducted pursuant to a specifically established and well-delineated

exception to the warrant requirement." Commonwealth v. Bostick, 958 A.2d 543, 556 (Pa.Super. 2008) (brackets and ellipsis supplied), *appeal denied*, 987 A.2d 158 (Pa. 2009). One such exception is that which exists for exigent circumstances. Among these is the threat of physical harm or danger to police or other persons inside or outside a structure.

> Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. [. . .] The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.

Mincey v. Arizona, 437 U.S. 385, 392 (1978) (footnotes omitted). Furthermore:

> The burden is on the Commonwealth to present clear and convincing evidence that the circumstances surrounding the opportunity to search were truly exigent . . . and that the exigency was in no way attributable to the decision by the police to forego seeking a warrant. Moreover, [a]ll decisions made pursuant to the exigent circumstances exception must be made cautiously, for it is an exception which by its nature can very easily swallow the rule unless applied in only restricted circumstances.

Commonwealth v. Bostick, 958 A.2d at 556-57 (quotations omitted). Additionally, "the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. [. . . .] But a warrantless search must be strictly circumscribed by the exigencies which justify its initiation."

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Mincey, 437 U.S. at 393 (quotations and citations omitted); *see also* Commonwealth v. Davis, 743 A.2d 946, 952 (Pa.Super. 1999) ("[E]vidence may be seized by the police when it is in 'plain view' *only* if the police observe the evidence from a vantage point [at] which they are legally entitled to be.") (emphasis in original).

Here, the Commonwealth contends that the Defendant's home was surrounded by a history of violence, that Chief Doucette was aware of this history at the time he arrived to investigate the disturbance at the Defendant's property, and that Chief Doucette had the right to enter the second floor of the Defendant's garage to make sure no one was present, injured, and in need of treatment. To support this position, the Commonwealth relies on Chief Doucette's familiarity with previous disturbances at the Defendant's home to which he, as well as the Pennsylvania State Police, responded; the Defendant's obvious attempts to keep Chief Doucette away from the upstairs of the garage; and Chief Doucette's repeated testimony that the reason he wanted to view the garage loft was to assure that no one was there, injured, and in need of help. We do not believe the evidence supports the warrantless entry by Chief Doucette.

For perceived danger to a potentially injured person to constitute exigent circumstances sufficient to justify a

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warrantless search, the danger must be evidenced by articulable facts and inferences giving rise to a reasonable belief that a person has been injured, is in need of immediate aid, and is located within the building, or secured area, to which entry is sought. A mere assertion of danger is insufficient. The evidence must assure that the police have acted reasonably, not arbitrarily, and that the reasons given are not a pretext for an evidentiary search, an end run around the Constitution. The burden is upon the Commonwealth to establish that exigent circumstances exist and this burden is a heavy one. *See* Commonwealth v. Roland, 637 A.2d 269, 270-71 (Pa. 1994).

The Commonwealth's reliance on a history of violence at the Defendant's home appears, on more careful review of the evidence, to be both exaggerated and unreliable. While we find that multiple disturbances occurred at the Defendant's home during the previous two years, investigated by both the local and state police, no specific evidence was presented that anyone was ever hurt or in need of medical attention. The Commonwealth presented no evidence of any specific incidents of past violence, who was involved, what type of injuries, if any, were sustained, or that medical treatment was ever necessary. To the extent Chief Doucette claimed personal knowledge of physical violence at the Defendant's home, it was between the Defendant and Dietrik. (Preliminary Hearing, p. 10; Suppression Hearing,

p. 64). In response, the Defendant denied that he was ever physically violent with his son, and Dietrik, while admitting that he and his father often argued, never testified that these arguments were physical. (Suppression Hearing, pp. 40-41, 49).

In none of the incidents were charges ever filed against the Defendant. (Suppression Hearing, pp. 17, 49). In none, at least with respect to those reported to the Weissport Police, were weapons ever involved. (Preliminary Hearing, p. 56). Further, when told early on by the Defendant at the time Chief Doucette first arrived to investigate the disturbance at the Defendant's property that Dietrik was in the home, the Chief made no effort to check on Dietrik's condition.

Chief Doucette's testimony that he believed someone might have been injured, might be in need of treatment, and might be on the second floor of the garage, appears to be little more than speculation without any objective, tangible evidence to support it. No evidence was presented that the Chief or anyone else observed any signs of a physical struggle at the Defendant's property or of any injuries to anyone including the Defendant. Chief Doucette further admitted that after the Defendant was chased down and in custody, and the Chief was again standing in the Defendant's backyard before he entered the garage and went upstairs, there were no cries for help or other

noises coming from the garage. (Preliminary Hearing, pp. 53-54).

This case is unlike either Commonwealth v. Miller, 724 A.2d 895 (Pa. 1999), *cert. denied*, 528 U.S. 903 (1999), or Commonwealth v. Silo, 502 A.2d 173 (Pa. 1985) where in both, a person was missing and believed to be injured and in need of treatment. In Miller the victim was the wife of the defendant who had recently been released from prison for aggravated assault of her and who, while in prison and on the day of his release, expressed a desire to kill her. The victim was last seen with the defendant at a local tavern where they used illegal drugs and where the defendant was visibly angry with her. The victim and the defendant did not appear the following morning to pick up their children, as planned, and after the victim was missing for two days, a missing person's report was filed with the Pennsylvania State Police. Given the history of drug abuse of both the defendant and the victim, the defendant's history of spousal abuse towards the victim, and the prolonged absence of both the defendant and victim, particularly when they failed to pick up their children, as well as the right of the children to gain entry to their own home, the Court upheld the police troopers' forced entry into the defendant's home "in response to the urging of [the defendant's] family and based upon a reasonable belief that the [defendant and the victim]

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were inside the residence and in need of assistance." 724 A.2d at 900.

In Silo, the Court likewise held that sufficient evidence existed to justify the warrantless entry by police into the victim's home where the police had reason to believe that the victim was in the home and in need of help. There,

> [t]he victim had last been observed by her neighbors at her home where she was heard arguing with [the defendant, her son]. In the ensuing twenty-four hours she was not seen by anyone, could not be reached by telephone, and did not report for work. She was not observed leaving her home for work, and she did not visit her son in the hospital [where he had been taken the day following the argument for treatment of chest pains].

Id. at 176. Here, the Commonwealth has failed to identify any person who was missing who could reasonably be expected to be on the second floor of the garage in need of help.

CONCLUSION

Under the facts of this case, to sanction the search of the garage loft by Chief Doucette would "unjustifiably [expand] the scope of exigent circumstances." Commonwealth v. Perry, 798 A.2d 697, 724 n.5 (Pa. 2002) (Nigro, J., dissenting). As Chief Doucette did not legally enter the second floor of the garage and as the issuance of the search warrant is unsustainable absent Chief Doucette's observations while on the second floor, we conclude that all of the evidence seized under

the warrant must be suppressed as the fruits of an illegal entry and search.[4]

BY THE COURT:

_____

P.J.

[4] In reaching our decision, we do not question that Chief Doucette acted in good faith in wanting to investigate the garage loft. The Defendant's persistence in keeping Chief Doucette from climbing the steps and viewing the loft area, the quick departure of an unidentified person from the loft when the police were present, and the Defendant's direction to his girlfriend to lock the garage as he ran away, all evidence that the Defendant was concealing something. In finding that exigent circumstances did not exist after the Defendant was in custody and the garage could be secured pending a warrant, we note that no good faith exception exists to the exclusionary rule. *See*, *e.g.*, Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991) (concluding that a "good faith" exception to the exclusionary rule in Pennsylvania would frustrate the privacy guarantees embodied in Article I, Section 8 of the Pennsylvania Constitution).