

Possession of Instruments of Crime (M1)¹. In support of the charges, the affidavit of probable cause states that Weatherly Police responded to a call of shots fired on February 13, 2011 at 2:55 a.m. in the area of 327 Yeakle Street. The police found that three (3) houses, a garage, a vehicle and a utility pole were hit with rounds fired from a .9mm firearm and a .22 caliber firearm. The three homes struck were 319 Yeakle Street, 327 Yeakle Street and 335 Yeakle Street. The vehicle that was hit was parked in front of 319 Yeakle Street and was owned by the owner of that residence. The Barnic family owns 319 Yeakle Street, and they were found to be sleeping at home. The owners of 335 Yeakle Street, the Powells, were also asleep at the time of the shooting. No one was home at 327 Yeakle Street at the time of the shooting.

According to the affidavit, the police discovered that the shots were fired from the north of the three residences, where they found .9mm and .22 caliber shell casings. They determined that the vehicle was struck by four (4) bullets and that 319 Yeakle Street was struck by five (5) bullets, with two (2) hitting the front banister, one (1) hitting the side of the house near a bedroom, one (1) hitting the front porch awning, and one (1) becoming lodged in the wall inches away from where the owners' infant child was sleeping. They also determined that

¹ 18 Pa. C.S.A. §§ 2702(a)(1), 2702(a)(4), 903(a)(1), 2705, 2707.1(a), and 907(a), respectively.

327 Yeakle Street was struck by one (1) bullet, to the left of the front door, and the home's garage was struck by two (2) bullets, and that 335 Yeakle Street was struck by one (1) bullet that became lodged between the two (2) downstairs windows. The affidavit also contains averments in support of the Commonwealth's position that the Defendant, James M. Delbo, Joshua Zink and Andrew Ortiz were together on the night of the shooting and agreed to shoot up the residence of Matt Sipler located on Yeakle Street in Weatherly.

Prior to filing the criminal complaint in this matter, on March 2, 2011, Officer Bogart applied for and received a search warrant to search the residence located at 133 South Hancock Street, McAdoo, Pennsylvania where the Defendant, Jennifer Harris and James M. Delbo resided. (See Commonwealth's Exhibit 3). The warrant describes the items to be searched for and seized and the place to be searched, and is sworn and subscribed before a magisterial district judge. It is alleged in the affidavit of probable cause attached to the warrant application that the Defendant was suspected of not getting along with James Delbo and Matthew Sipler of 327 Yeakle Street in Weatherly, where criminal activity was suspected. The Defendant was a frequent guest at the residence nonetheless, and had displayed a firearm at them on at least one occasion. Delbo was charged with

attempting to force his way into that residence with a .22 caliber rifle after having been evicted therefrom.

The affidavit also indicates that the police were dispatched to 327 Yeakle Street on February 13, 2011 for a report of shots fired at that residence, and found that four (4) of nineteen (19) shots fired struck that residence. Shell casings were retrieved and determined to be from .9mm and .22 caliber bullets. In establishing the trajectory of the bullets, it was determined that the shots were fired from an elevated position, as if the shooters were sitting/propped up against the window of an automobile. It is alleged that the Defendant and Delbo have a habit of driving around in vehicles and shooting hand guns from the windows. Additionally, according to the affidavit, on February 17, 2011, the police interviewed Sipler, who stated that he suspected that Delbo and the Defendant committed the shooting. It also notes that, within twelve (12) hours of the shooting, the Defendant posted "I make it rain, bitch" on his Facebook social networking page. Interviews with neighbors revealed that none of them had any enemies or a reason to believe that someone would shoot at their residences.

The affidavit further alleges that, on February 22, 2011, the Defendant's vehicle was stopped by the Pennsylvania State Police in Lebanon County for a motor vehicle violation. As a result, the Defendant was found to be in possession of a .9mm

pistol and two (2) .22 caliber handguns. Several spent shell casings were also discovered scattered throughout the interior of the vehicle. None of the items were seized because the state trooper believed that the Defendant had a permit to carry issued by the Luzerne County Sheriff's Department, and he did not suspect any criminal activity at that time. Upon further investigation, it was discovered that the Luzerne County Sheriff's Department had revoked the Defendant's permit. Based on the foregoing information, the Commonwealth believed that weapons and ammunition would be found in the Defendant's McAdoo residence.

Officer Bogart executed the search warrant on March 2, 2011 with the assistance of other police officers. The officers recovered multiple firearms, ammunition and other items from the residence, which are detailed in the "Receipt/Inventory of Seized Property." (See Commonwealth's Exhibit 4). The Defendant waived arraignment on May 9, 2011. On June 13, 2011, the Commonwealth charged the Defendant by Information with the offenses outlined in the Criminal Complaint, and added an additional three (3) counts of Criminal Conspiracy-Discharge Firearm, 18 Pa. C.S.A. § 903 (F3).

On August 8, 2011, the Defendant filed a "Notice of Alibi Defense." On September 2, 2011, Defendant filed an "Omnibus Pretrial Motion for Relief," containing a Motion to Suppress as

the sole count for relief. On September 12, 2011, the Defendant filed a "Motion to Modify Bail." On September 15, 2011, the Defendant filed an "Addendum to Omnibus Pretrial Motion for Relief," containing a Motion to Suppress the oral or written statements allegedly made by him on July 6, 2011.

On November 18, 2011, the Defendant filed an "Amended Omnibus Pretrial Motion." The Motion includes a request to modify bail, in the form of removing the ankle bracelet and home confinement conditions placed upon him. The Motion also requests that the matter be remanded for a preliminary hearing, because the Defendant avers that he did not voluntarily, knowingly or intelligently waive the pending charges to court. The Motion also includes a "Motion to Suppress Pursuant to Pa. R. Crim. P. 203(b)." In support of this Motion, the Defendant avers that the search warrant issued and executed on March 2, 2011 did not outline probable cause to support the search. He also avers that the affidavit supporting the warrant contained no indication as to what information or evidence gave rise to probable cause to believe that the items sought by the police were located in 133 South Hancock Street. Rather, according to the Motion, the affidavit contains a collection of unrelated events and misleading information, and does not discuss surveillance of the property. Therefore, the Defendant seeks to exclude all evidence seized as a result of the allegedly unlawful search.

The Omnibus Pre-Trial Motion also contains a "Motion to Suppress Pursuant to Pa. R. Crim. P. 208 and 209," since the Defendant avers that he did not receive a copy of the search warrant on March 2, 2011, did not receive a receipt for the property allegedly seized on March 2, 2011, and did not receive a return with inventory for the property allegedly seized on March 2, 2011. Therefore, the Defendant seeks to exclude all the evidence seized from 133 South Hancock Street in McAdoo, Pennsylvania. The Omnibus Motion also contains a Motion to Suppress any oral or written statement made on July 6, 2011 in accordance with the previous "Addendum to Omnibus Pre-Trial Motion." The Motion further seeks to exclude any evidence of alleged prior bad acts, wrongs or crimes from presentation at trial.

Finally, the Omnibus Motion contains a Motion to Compel Discovery. The Defendant requests that the Commonwealth clarify an item on page 6 of the incident report, produce any additional video surveillance obtained from several locations, produce the results of all scientific testing and lab reports, specify the other types of ammunition purchased by Delbo on February 12, 2011 at Wal Mart, provide a new photocopy of Delbo's March 6, 2011 handwritten statement to rectify missing portions/pages that were not provided, provide Delbo's March 7, 2011 statement given at the Carbon County Prison, clarify the number of

statements given by Delbo, provide any statement made by or notes referencing the phone conversation and/or interview police conducted with Zink's mother, and produce all information pertaining to a murder Ortiz allegedly committed in New Jersey.

The Defendant also requests that the Commonwealth produce further discovery in the form of any and all items requested in his "Request for Pre Trial Discovery and Inspection" that have not yet been produced, as well as the names and addresses of all Commonwealth witnesses, the criminal records of all Commonwealth witnesses, and any other information constitutionally required to be turned over to the defense.

On January 6, 2012, a hearing was held on the Defendant's "Amended Omnibus Pre-Trial Motion," at the conclusion of which the parties requested an opportunity to submit briefs on the matter. On January 6, 2012, this Court issued an Order directing the Defendant to submit an additional brief to the Court on or before January 13, 2012, and directing the Commonwealth to file a response brief on or before January 27, 2012. Having already filed a brief in support of the Motion on January 6, 2012, the Defendant did not file any further briefs. On January 20, 2012, the Commonwealth filed its "Brief in Opposition to Defendant's Omnibus Pre-Trial Motion."

DISCUSSION

Pursuant to Pennsylvania Rule of Criminal Procedure 578, all pretrial requests for relief must be included in a single omnibus motion, unless the interests of justice require otherwise. Such requests for relief typically include a motion for the suppression of evidence. See Comment to Pa. R. Crim. P. 578. ²

A. Motion to Suppress Search of Home: No Probable Cause

It is established that "(i)n determining whether probable cause exists to issue a search warrant, Pennsylvania applies the 'totality of the circumstances' test as set out in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) and adopted in Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985)." Commonwealth v. Sharp, 683 A.2d 1219, 1223 (Pa. Super. 1996). Pursuant to the Superior Court's decision in Sharp, "[a]n affidavit for a search warrant is to be tested by this court with common sense and a realistic manner, and not subjected to overly technical interpretations; the magistrate's determination of probable cause is to be accorded great deference on review." Sharp, 663 A.2d at 1223. Only that probability of criminal

² Per the agreement of counsel, the Defendant's "Motion to Suppress any Oral or Written Statements Allegedly Made by Defendant on or about July 6, 2011," and "Motion to Compel Discovery" are moot. Therefore, we need not address them in this Memorandum Opinion. Additionally, we need not address the Defendant's "Motion to Preclude Evidence of Alleged Prior Bad Acts, Wrongs or Crimes Pursuant to Pa. R.E. 404(b)," since the disposition of the same will be deferred to the time of trial.

activity, and not a prima facie showing, is required to meet the standard of probable cause. Commonwealth v. Days, 718 A.2d 797, 800 (Pa. Super. 1998).

The totality of the circumstances test states that "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gray, 503 A.2d at 925.

Because "affidavits supporting search warrants normally are prepared by nonlawyers in the midst and haste of a criminal investigation," courts should interpret them "in a 'common sense and realistic' fashion rather than in a hypertechnical manner." Commonwealth v. Ensminger, 473 A.2d 116, 120 (Pa. Super. 1984) (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965)).

An affidavit of probable cause may be based on hearsay information and need not reflect the direct personal observations of the affiant. Commonwealth v. Greco, 350 A.2d 826 (Pa. 1976). However, it still must contain "sufficient information to justify the conclusion that a crime has been committed and that evidence or fruits of the crime may be found

at the place to be searched." Commonwealth v. Heyward, 375 A.2d 191, 192 (Pa. Super. 1977).

Due deference should be given to the magistrate making the probable cause determination, recognizing that he is entitled to make reasonable inferences about where evidence is likely to be found, and that the possibility that other inferences could be drawn does not mean the inference actually drawn by the magistrate is an unreasonable one. Commonwealth v. Moss, 543 A.2d 514, 518 (Pa. 1988). While "in a particular case it may not be easy" to determine whether probable cause exists, "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." Ventresca, 380 U.S. at 109 (holding that an affidavit based on information received from investigators' hearsay reports was sufficient for a finding of probable cause); Commonwealth v. Muscheck, 334 A.2d 248 (Pa. 1975).

In Commonwealth v. Banahasky, 378 A.2d 1257 (Pa. Super. 1977), the Superior Court determined that the arrest of a person found in possession of four packets of marijuana did not provide probable cause to believe that more marijuana would be found in that person's residence. The Court noted that there was "no reason to believe that he possessed any additional drugs, and therefore no probable cause to believe that he had left any additional drugs at the house where he happened to be staying,"

concluding that "[p]robable cause to believe that a man has committed a crime on the street does not necessarily give rise to probable cause to search his home." Id. at 1261.

Here, the affidavit articulated the following: Matthew Sipler lived at 327 Yeakle Street in Weatherly; James Delbo had lived at that address, and Defendant had frequently been a guest there but had feuded with the other residents; Delbo had been charged with attempting to force his way into the residence after Sipler evicted him following a dispute over drugs and money; on that occasion he was found on the porch at 327 Yeakle Street with a .22 caliber rifle; Delbo was known to the police to have made threats to Sipler about getting even with him; and it was believed to be the practice of Delbo and Defendant to drive around firing guns out of their vehicles.

The police were dispatched to 327 Yeakle Street on February 13, 2011 for a report of shots fired at that residence, and found that four (4) of the nineteen (19) shots fired had struck the house. Police retrieved shell casings and determined that they were from .9mm and .22 caliber bullets. In establishing the trajectory of the bullets, police determined that the shots were fired from an elevated position, as if the shooter were sitting propped up against the window of an automobile.

On February 17, 2011, the police interviewed Sipler, who stated that he suspected that Delbo and Harris committed the

shooting. Within twelve (12) hours of the shooting, Defendant posted "I make it rain, bitch" on his Facebook page. On February 22, 2011, Defendant's vehicle was stopped by the Pennsylvania State Police in Lebanon County for a motor vehicle violation. He was in possession of a .9mm pistol and two .22 caliber handguns, and spent shell casings were scattered in the interior of the vehicle. None of the items were seized because the state trooper believed that Defendant had a permit to carry issued by the Luzerne County Sheriff's Department, and he did not suspect any criminal activity at that time. Upon further investigation, it was discovered that the Luzerne County Sheriff's Department had revoked Defendant's permit.

The affidavit indicated that three (3) motor vehicles registered to Defendant and Delbo were located at Defendant's McAdoo residence. Among the items to be searched for were any and all firearms, bullets, shells, shell casings and slugs, and documents pertaining to firearms. The affidavit was sworn before the magisterial district judge on March 2, 2011, and the search of the Defendant's residence was executed that same evening. The police seized multiple items that day from the residence, including guns and ammunition.

Defendant argues that nothing in the affidavit indicates what gave the affiant probable cause to believe weapons and ammunition would be found at the residence, and that various

statements made in the affidavit are insufficiently supported by facts. Considering the totality of the circumstances, however, we find that the facts contained in the affidavit supported a finding of probable cause. The magisterial district judge could conclude, and did conclude, that because of the history of conflicts involving Sipler and Delbo and/or Defendant at the 327 Yeakle Street residence, the presence of a .22 caliber firearm in one such dispute, and the discovery in Defendant's vehicle of firearms and shell casings of the same types used in the shooting at 327 Yeakle Street, there was a fair probability that evidence of criminal activity related to the shooting would be found at the named address.

In accordance with the standards set forth in Sharp and Heyward, the affidavit need only have contained sufficient information to justify the magisterial district judge's conclusion that probable cause existed. The affidavit identified police investigations as the source of many of the supporting statements and provided specific dates to identify many of the events it described, including those relating to prior disputes at 327 Yeakle Street and the traffic stop on February 22, 2011. The magisterial district judge was entitled to credit the veracity and reliability of those investigations as sufficient to form the basis for a probable cause determination.

"In dealing with probable cause, we deal with probabilities; these are the factual and practical considerations of everyday life in which reasonable men act." Commonwealth v. Jefferson, 412 A.2d 882, 885 (Pa. Super. 1979). It is the well-settled law of this Commonwealth that the affidavit upon which a search warrant is sought must be read with common sense, and that technical requirements of elaborate specificity are inappropriate. Furthermore, the resolution of marginal cases should be largely determined in favor of the warrant's validity.

In accordance with the foregoing, we find that there was probable cause to support the search warrant and Defendant's Suppression Motion is denied in this regard.

B. Motion to Suppress Search of Home: No Inventory, Receipt or Copy of Warrant Provided to the Defendant

In this Motion to Suppress, the Defendant avers that he did not receive a copy of the search warrant on March 2, 2011, did not receive a receipt for the property allegedly seized on March 2, 2011, and did not receive a return with inventory for the property allegedly seized on March 2, 2011. Pennsylvania Rules of Criminal Procedure 208 and 209 require that the officer executing the search warrant leave a copy of the warrant, the supporting affidavit and a receipt for any property taken with the person whose premises was searched. At the hearing held on

January 6, 2012, Officer Bogart of the Weatherly Police Department testified that he executed the search warrant on the Defendant's residence on March 2, 2011. He also prepared the warrant for the residence, listing the Defendant, Jennifer Harris and James Delbo as occupants. He testified that he provided the Defendant with a copy of the warrant on the date of the search. He also prepared a receipt of the property seized from the residence, and presented it to Defendant for his signature. The Defendant then signed the document. (See Commonwealth's Exhibit 4).

Officer Minnick of the McAdoo Police Department testified that he photocopied the receipt for Officer Bogart and provided the copies to him. We find the testimony of the aforementioned officers credible and conclude that the Defendant was presented with a copy of the inventory and receipt of the property seized from his residence, along with a copy of the search warrant. Accordingly, the Defendant's Motion must be denied in this regard.

C. Motion to Modify Bail

In his "Motion to Modify Bail," the Defendant argues that the eighty-five thousand dollar (\$85,000) straight cash bail, which was posted by Defendant's father and secured by his residence, is sufficient to guarantee his attendance at further court proceedings and trial, and that he has longstanding

personal and family ties to the area. He also argues that he has complied with all of the conditions of bail to date. The Defendant requests that the requirement that he wear an ankle bracelet be removed because he is not a flight risk, the daily cost of the ankle bracelet is a financial burden, the bracelet hampers his ability to prepare a defense, and the bracelet amounts to a form of pre-trial punishment. The Commonwealth argues that, because of the nature of the charges against the Defendant, it is reasonable to require the Defendant to wear an ankle bracelet as a condition of his release.

Pursuant to Pennsylvania Rule of Criminal Procedure 523(a), the Court must consider the nature of the offenses charged and any aggravating or mitigating factors that may bear on the likelihood of conviction and possible penalty, in addition to any other factor relevant to whether the defendant will appear as required and comply with the conditions of bail. Given that the Defendant is facing multiple felony charges, the risk for flight is high, and it is therefore reasonable to require the Defendant to wear an ankle bracelet as a condition of his release. Thus, we will deny the Defendant's Motion in this regard.

D. Motion to Remand for a Preliminary Hearing

In the "Motion to Remand for a Preliminary Hearing," the Defendant argues that he did not knowingly, voluntarily or

intelligently waive his right to a preliminary hearing on the pending charges, and that his prior counsel did not advise him of his rights regarding a preliminary hearing. Attorney Brian Gazo, who was previously appointed as conflict counsel to represent the Defendant, testified that he explained to the Defendant the purpose of a preliminary hearing, and that it was the Defendant's right to have such a hearing. Since the Defendant was concerned with being released from prison, Attorney Gazo also discussed with the Defendant the possibility of having his bail reduced if he would waive the preliminary hearing. After discussing the matter with the Defendant, his family and the Commonwealth, Attorney Gazo was able to reach an agreement with the Commonwealth that the Defendant's bail would be reduced to an amount that would equal the value of the Defendant's father's home as collateral in exchange for a waiver of the preliminary hearing. The bail was then lowered to eighty-five thousand dollars (\$85,000) straight. Attorney Gazo testified that the Defendant knew what he was doing when he signed the waiver form for the preliminary hearing, and that he was not coerced into doing so. He reviewed the waiver form with the Defendant and read it to him. The Defendant also conceded on cross examination that Attorney Gazo explained that the Commonwealth had to present evidence against him at the preliminary hearing.

Based on the foregoing, the Defendant clearly had the benefit of counsel when he executed the waiver form and waived his right to a preliminary hearing. As a result, since the case of Commonwealth v. Smith, 6 Pa. D. & C. 3d 365 (C.P. Warren 1978), cited by the Defendant, involved a defendant who waived his preliminary hearing without the benefit of counsel, that case is distinguishable from the instant matter. Accordingly, there is insufficient evidence to suggest that the Defendant did not knowingly or voluntarily waive his right to a preliminary hearing. Thus, the Defendant's Motion must be denied in this regard.

CONCLUSION

In accordance with the foregoing, the Defendant's "Amended Omnibus Pretrial Motion" is denied.

BY THE COURT:

Steven R. Serfass, J.

6. The Defendant's "Motion to Preclude Evidence of Alleged Prior Bad Acts, Wrongs or Crimes Pursuant to Pa. R.E. 404(b)" is **DEFERRED** until the time of trial;
7. The Defendant's "Motion to Compel Discovery" is **DISMISSED** as moot; and
8. The Defendant shall be permitted to file additional Motions in Limine, following receipt of the Commonwealth's complete discovery submissions, no later than seven (7) days prior to the commencement of trial in this matter.

BY THE COURT:

Steven R. Serfass, J.