

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

COMMONWEALTH OF PENNSYLVANIA     :  
  :  
              vs.                                 :  
  :  
CHRISTOPHER RAY HARRIS,                 :  
              Defendant                         :

No: 354 CR 11

William E. McDonald, Esquire  
Assistant District Attorney     Counsel for the Commonwealth  
David V. Lampman, II, Esquire     Counsel for the Defendant

**MEMORANDUM OPINION**

Serfass, J. - February , 2012

Here before the Court is the Defendant's "Amended Omnibus Pretrial Motion" in the nature of several motions to suppress; a motion to modify bail; a motion to remand for a preliminary hearing; a motion to exclude evidence of alleged prior bad acts, wrongs or crimes; and a motion to compel discovery. For the reasons that follow, we will grant in part and deny in part the Defendant's Motion.

**FACTUAL AND PROCEDURAL BACKGROUND**

On March 7, 2011, the Commonwealth through Officer Mike Bogart filed a Criminal Complaint against the Defendant, charging him with seven (7) counts of Aggravated Assault (F1), seven (7) counts of Aggravated Assault (F2), seven (7) counts of Criminal Conspiracy-Aggravated Assault (F1), seven (7) counts of Criminal Conspiracy-Reckless Endangerment (M2), seven (7) counts of Reckless Endangerment (M2), three (3) counts of Discharge of

a Firearm into an Occupied Structure (F3), and one count of Possession of Instruments of Crime (M1)<sup>1</sup>. 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 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, 327 Yeakle and 335 Yeakle. The vehicle that was hit was parked in front of 319 Yeakle and was owned by the owner of that residence. The Barnic family owns 319 Yeakle, and they were found to be sleeping at home. The owners of 335 Yeakle, the Powells, were also asleep at the time of the shooting. No one was home at 327 Yeakle at the time of the shooting.

The Affidavit also states that 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 bullets; and that 319 Yeakle was struck by five bullets, with two hitting the front banister, one hitting the side of the house near a bedroom, one hitting the front porch awning, and one becoming lodged in the wall inches away from where the owners' child was sleeping. They also determined that 327 Yeakle was struck by one

---

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

bullet, to the left of the front door, and the home's garage was struck by two bullets; and that 335 Yeakle was struck by one bullet that became lodged between the two 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 Defendant's residence located at 133 S. Hancock St., McAdoo, Pennsylvania. (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 magistrate. The Affidavit of Probable Cause attached to the warrant application alleges 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 has displayed a firearm at them on at least one occasion. Delbo was charged with attempting to force his way into that residence after being evicted from therein, with a .22 caliber rifle and ammunition.

It also indicates that the police were dispatched to 327 Yeakle on February 13, 2011 for a report of shots fired at that residence, and found that 4 of 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 shooter 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 window. Additionally, it states that, 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 12 hours of the shooting, the Defendant posted "I make it rain, bitch" on his Facebook page. Interviews with neighbors revealed that none 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 PA State Police in Lebanon County for a motor vehicle violation. As a result, he was found in possession of a .9mm pistol and two .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 trooper believed that the

Defendant has a permit to carry out of Luzerne County, and he did not suspect any criminal activity at that time. Upon further investigation, it was discovered that Luzerne County had revoked the Defendant's permit. Based on the aforementioned, 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 his Omnibus Pretrial Motion, 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 what information or evidence gave rise to probable cause to believe that the items sought by the police were located in 133 S. Hancock St. Rather, 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 illegally seized as a result of the unlawful search.

The 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 illegally seized from 133 Hancock St in McAdoo, Pennsylvania. The 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 Motion. The Motion further seeks to exclude any evidence of alleged prior bad acts, wrongs or crimes from presentation at trial.

Finally, the 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 ammo 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 turned over, 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 Motion, at 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 the same in response 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 the Motion.

### **DISCUSSION<sup>2</sup>**

Pursuant to Pa. R. Crim. P. 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

---

<sup>2</sup> 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.



typically include a motion for the suppression of evidence. See Comment to Pa. R. Crim. P. 578.

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

"In determining whether the warrant is supported by probable cause, the magistrate may not consider any evidence outside the four corners of the affidavit." Commonwealth v. Sharp, 683 A.2d 1219, 1223 (Pa. Super. 1996). "Probable cause either exists or it does not, and its existence must be evident solely from the affidavit itself." Id. "In 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*, 509 Pa. 476, 503 A.2d 921 (1985)." Id.

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." Commonwealth v. Gray, 503 A.2d 921, 925 (Pa. 1985). "We are guided by these standards:

An 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. The law is clear that before a search warrant may issue, facts supported by oath or affirmation must be presented to the issuing officer which will justify a finding of probable cause. For the warrant to be constitutionally valid, the issuing officer must conclude that probable cause exists at the time the warrant is issued. Such a conclusion may not be made arbitrarily and must be based on facts which are closely related in time to the date the warrant is issued."

Sharp, 663 A.2d at 1223. "An affidavit of probable cause must include facts from which a magistrate can determine the time frame within which the supporting information was acquired." Id. "A search warrant is defective if the issuing authority is not supplied with a time frame upon which to ascertain when the affiant obtained the information from the informant and when the informant himself witnessed the criminal acts detailed in the affidavit of probable cause." Id. "[A]ffidavits supporting search warrants normally are prepared by nonlawyers in the midst and haste of a criminal investigation." Commonwealth v. Ensminger, 473 A.2d 116, 120 (Pa. Super. 1984). "Therefore, they should be interpreted in a 'common sense and realistic' fashion rather than in a hypertechnical manner." Id.

An affidavit of probable cause may be based on hearsay information and need not reflect the direct personal observations of the affiant. Aguilar v. Texas, 378 U.S. 108

(1964); 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).

Here, after reviewing the Affidavit of Probable Cause attached to the search warrant application, there appears to be insufficient evidence to suggest that evidence or contraband sought by the Commonwealth would be found in the Defendant's residence. The Affidavit indicates that the incident under investigation occurred on February 13, 2011. On February 17, 2011, the police interviewed Sipler, who indicated that he merely suspected that the Defendant and Delbo had committed the February 13 shooting. The Affidavit does not indicate that anyone positively identified the Defendant as being present at the scene. On February 22, 2011, the Defendant was found to be in possession of a .9mm pistol, two .22 caliber handguns and spent shell casings in his vehicle, which were not seized at that time. The Affidavit was sworn before the magistrate 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.

In Commonwealth v. Banahasky, 378 A.2d 1257 (Pa. Super. 1977), the Court determined that the arrest of a person found in

possession of four packets of marijuana did not constitute probable cause to believe that more marijuana would be found in that person's residence. The Court stated 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. In Commonwealth v. Jones, 304 A.2d 684 (Pa. 1973), the Court determined that an affidavit merely alleging that there is reason to believe that a resident of the place to be searched was involved in an attempted robbery involving a gun was not sufficient to meet constitutional standards.

However, the Court in Commonwealth v. Hutchinson, 434 A.2d 740, 743 (Pa. Super. 1981), concluded that it was reasonable for the magistrate to conclude that the items seized would be found in the defendant's home based upon a positive identification of the defendant as the perpetrator, and the span of four and one-half (4½) hours between the application for the warrant and the commission of the crimes. The instant matter is distinguishable from Hutchinson in that there is no positive identification of the Defendant as the perpetrator, only mere suspicions, and close to one month passed between the commission of the crime and the application for the warrant. See also United States v. Charest, 602 F.2d 1015 (1<sup>st</sup> Cir. 1979) (holding that it was unreasonable to infer that the murder weapon would be found in the suspect's home eighteen days after the crime).

While "the law does not require that the information in a warrant affidavit establish with absolute certainty that the object of the search will be found at the stated location, nor does it demand that the affidavit information preclude all possibility that the sought after article is not secreted in another location," the affidavit must provide a nexus between the place to be searched and the evidence to be seized. Commonwealth v. Foreman, 390 A.2d 840, 842 (Pa. Super. 1978); Hutchinson, supra. Here, the averments contained in the Affidavit as a whole do not suggest that there is a connection to Defendant's residence. The record also contains no indication that any oral testimony was presented to the magistrate in support of the warrant. Thus, consistent with Banahasky and Jones, we cannot conclude that the mere possession of firearms and spent ammunition by the Defendant in his vehicle provides probable cause to believe that the Defendant is in possession of guns and/or ammunition in his residence.

As a result, we conclude that the crucial nexus between the alleged crime and the evidence sought has not been established, because of the lapse of time between the alleged crime and the warrant, the lack of a positive identification of the Defendant as a perpetrator, and the lack of any other facts to suggest that the Defendant is keeping weapons in his home. Therefore, while the Affidavit may lead to the conclusion that a crime has

been committed, it does not give rise to probable cause that evidence of that crime would be found in the Defendant's residence. Accordingly, the Defendant's motion to suppress must be granted, and the evidence seized from the Defendant's residence must be excluded from evidence in this matter.

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

In his Motion, 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. Pa. R. Crim. P. 208 and Pa. R. Crim. P. 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, the Defendant argues that the \$85,000 in collateral provided by Defendant's father's home is sufficient to secure 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 Pa. R. Crim. P. 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 ankle bracelet requirement 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, 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 discussed with the Defendant what a preliminary hearing was, and that it was his right to have one. Since the Defendant was concerned with being released from prison, Attorney Gazo also discussed with the Defendant the possibility of getting 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 \$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 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**

Based upon the foregoing, we conclude that the Commonwealth has not demonstrated the existence of probable cause to show that the evidence sought would be found in the Defendant's residence. As a result, the Defendant's "Amended Omnibus Pretrial Motion" must be granted in part and denied in part.

**BY THE COURT:**

---

**Steven R. Serfass, J.**

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

COMMONWEALTH OF PENNSYLVANIA     :  
  :  
              vs.                                 :  
  :  
CHRISTOPHER RAY HARRIS,                 :  
              Defendant                         :

No: 354 CR 11

William E. McDonald, Esquire  
Assistant District Attorney     Counsel for the Commonwealth  
David V. Lampman, II, Esquire     Counsel for the Defendant

**ORDER OF COURT**

**AND NOW**, to wit, this day of February, 2012, upon consideration of the Defendant's "Amended Omnibus Pretrial Motion," the briefs of counsel, and after a hearing thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby **ORDERED and DECREED** that the "Defendant's Amended Omnibus Pretrial Motion" in the nature of the "Motion to Suppress Pursuant to Pa. R. Crim. P. 203(b)" is **GRANTED**, and that any and all items obtained during the execution of the search warrant of the Defendant's residence on March 2, 2011 are hereby suppressed and shall not be received in evidence, the Commonwealth being precluded from offering same and no testimony or comment shall be received respecting the same.

It is **FURTHER ORDERED and DECREED** as follows:

1. The Defendant's "Motion to Modify Bail" is **DENIED**;
2. The Defendant's "Motion to Remand for Preliminary Hearing" is **DENIED**;

3. The Defendant's "Motion to Suppress Pursuant to Pa. R. Crim. P. 208 & 209" is **DENIED**;
4. The Defendant's "Motion to Suppress Any Oral or Written Statements Allegedly Made by Defendant on or about July 6, 2011" is **DISMISSED** as moot;
5. 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;
6. The Defendant's "Motion to Compel Discovery" is **DISMISSED** as moot; and
7. 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.**