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DEBRA L. RIMM
PROthonotary
CENTRE COUNTY PA

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL ACTION - LAW

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : No.: CP-14-CR-1569-2008
 :
 HOBSON MCKOWN :

**REPLY TO COMMOWNEALTH'S MOTION TO QUASH DEFENDANT'S
MOTION TO SUPPRESS**

AND NOW, comes the Defendant, Hobson McKown, by and through his counsel, Jason S. Dunkle, Esquire, and Masorti & Sullivan, P.C., and brings this Reply to Commonwealth's Motion to Quash Defendant's Motion to Suppress, whereof the following is a statement:

1. On October 25, 2010, the Commonwealth filed a Motion to Quash Defendant's Motion to Suppress.
2. The Commonwealth's arguments urging the Court to quash the Defendant's motion can be summarized under the following three (3) theories or arguments: 1) the Defendant is a vexatious litigator; 2) the motion was not filed within thirty (30) days of the arraignment date and the case is old; and 3) the relief sought by Defendant is not related to the Defendant's Motion to Declare Statutes Unconstitutional.

I. VEXATIOUS LITIGATION

The Commonwealth claims that the Defendant has a "record of filing vexatious motions" (Paragraph 4 of Commonwealth's Motion to Quash) and that the motion to suppress was filed "merely for the purposes of vexation and delay." (Paragraph 14 of

Commonwealth's Motion to Quash). First, the phrase vexatious litigator is a civil concept that has no place in the criminal context. Even if the court's considers the Commonwealth's claim, it is clear that the Defendant is not a vexatious litigator. In considering the Commonwealth's claim, one must first consider the definition of "vexatious." "An opponent also can be deemed to have brought suit 'vexatiously' if he filed the suit without sufficient grounds in either law or in fact and if the suit served the sole purpose of causing annoyance." Thunberg v. Strause, 682 A.2d 295, 299 (Pa. 1996). In support of its argument, the Commonwealth provides a list of motions that were filed on behalf of the Defendant in both the instant action as well as the Defendant's companion case. Basically, the Commonwealth argues that because the Defendant has exercised his right to seek pretrial relief by the filing of motions, his current motion should simply be disregarded without consideration on the merits.

It is admitted that many motions have been filed on behalf of the Defendant. However, it can hardly be claimed that the Defendant was vexatious or pursued claims that did not have sufficient grounds as the relief sought in many of the motions was either granted or should have been granted. For example, the Commonwealth references motions that were filed in the Defendant's companion case, a case in which the Defendant was charged with possession possessed a small amount of marijuana and paraphernalia after a search of his home was conducted by law enforcement. The Defendant filed a motion to modify bail with the Court of Common Pleas to reduce the bail amount from \$250,000.00 straight on the ungraded misdemeanor case only after the Magisterial District Judge had refused to reduce the bail despite the Commonwealth concurrence in the reduction request. At the hearing on the motion to reduce bail, the Commonwealth again agreed to the

reduction, and the Defendant's motion was granted by the Honorable Judge Thomas King Kistler. The Defendant then filed a motion to suppress evidence challenging the search of his residence. At the hearing on said motion, the Defendant also brought an oral motion to dismiss the possession of marijuana charge as the forensic lab analysis report confirmed that the substance seized by the police was not marijuana. The motion to dismiss the possession of a small amount of marijuana charge was granted by the Judge Kistler without objection from the Commonwealth. Judge Kistler later denied the motion to suppress, which led the Defendant to file a motion to modify the order to certify the issue for interlocutory appeal in an effort to afford the expense and time of trial. Judge Kistler denied the motion to amend the order to add the interlocutory language, so the Defendant proceeded to a trial to preserve his appellate rights and thereafter perfected an appeal to the Superior Court by the timely filing of a Notice of Appeal. By Memorandum Opinion and Order, the Superior Court held that the trial court had erred in denying the suppression motion. More specifically, the Superior Court found that the Defendant did not consent to the warrantless entry into his residence after law enforcement gained entry after handcuffing the Defendant, conducting a warrantless non-consensual search of his person for the residence key, and thereafter entered the residence despite the Defendant's clear resistance to the warrantless entry. The Defendant won or should have won all of the motions that were filed on his behalf in the companion case, so said motions could hardly be deemed vexatious or without merit.

With regard to motions filed in the instant matter, the Defendant filed a habeas petition, and, upon having the habeas petition denied, the Defendant filed a motion to amend the trial court's denial of the habeas petition to allow for an interlocutory appeal. As assistant District Attorney McGraw was not the prosecutor at that time, he may have been

unaware that the trial court expressly supported the filing of the interlocutory appeal after denying the motion. The Defendant filed the motion to amend the order simply to make sure that the Order contained the precise language as required by statute to facilitate the appeal, and said motion to amend was granted by the Honorable Judge Bradley P. Lunsford as he believed that the statutory interpretation issue should be considered by the appellate court prior to engaging in the expense of a trial. In order to effectuate the appeal, the Defendant filed the requisite Petition for Allowance of Appeal with the Superior Court, but said petition was denied by the appellate court. Had the habeas petition been without merit, the trial court would not have certified the issue for interlocutory consideration.

With regard to motions to modify bail and return of property, the Defendant sought a modification of his bail to allow him to possess a firearm and thereby exercise his Second Amendment right to defend himself. As no allegation was raised that the Defendant threatened any person with a firearm or exhibited a firearm in a threatening manner, the Defendant did not believe that a “no possession of firearm” bail provision was supported by the facts of the case. Said motion was denied by the trial court. A motion for return of the Defendant’s non-firearm property was filed as the police had no legal authority to seize the items and the bail condition only prevented the Defendant from possessing firearms and not other weapons. The Defendant sought the return of items such as knives, ammunition, cross bows, and toy guns. The motion for return of property was denied after the trial court stated that he was not concerned about the toy guns causing any damage to anyone else but was concerned that law enforcement may see him with a toy gun and thereafter hurt the Defendant. The Defendant’s property was not returned out of a concern for the Defendant’s

safety from law enforcement. It is acknowledged that the bail and property motions were denied, but it can hardly be claimed that they were without merit or vexatious.

While the Defendant has admittedly filed a plethora of motions, said motions cannot be labeled as being without merit or vexatious in nature as the relief sought was granted in many. Perhaps Attorney McGraw was unaware of the number of the motions that were won by the Defendant as he only took over prosecution of the case relatively recently, and his lack of knowledge of the meritorious issues raised by the Defendant led him to incorrectly conclude that the Defendant was a vexatious litigator. The court should not consider the Commonwealth's baseless and readily-disproved claim that the Defendant is a vexatious litigator to summarily dismiss the motion to suppress without considering the matter on its merits.

II. DELAY ISSUE

The Commonwealth also asserts that the Defendant is filing the motion to suppress to cause delay. This case is admittedly old, having been filed over two (2) years ago, but seeking justice in a relatively complicated case takes time. Also, the court should be made aware of why this case has taken two (2) years to get to this point. First, an Omnibus Pretrial Motion that included a motion to remand to the preliminary hearing and a petition for a writ of habeas corpus was filed in November of 2008 after the Arraignment in September of 2008. The Commonwealth and the Defendant agreed that Judge Kistler should consider the motion to remand issue first, and, in the event said motion was denied, the court would proceed to consider the habeas petition. In January of 2009, a hearing was held on the motion to remand, timely briefs were submitted by both parties, and the motion was denied on or about April 29, 2009. On or about September 11, 2009, an scheduling order was

issued setting a hearing on the habeas petition, a hearing was held on or about September 29th, supplemental briefs were submitted thereafter, and the trial court denied the petition on or about October 21st. The Defendant then filed the paperwork necessary to perfect an interlocutory appeal, including a Petition for Allowance of Appeal, but the Superior Court denied the request to consider the habeas petition interlocutory on or about March 11th of 2010. The case was then remanded to the trial court, and this Court became involved after the Defendant filed a motion to recuse Judge Kistler in June of 2010. While this case is old, the Defendant has timely filed motions and briefs as requested by the court and has not engaged in delay tactics.

The fact that this case is old and the motion to suppress was filed beyond the thirty (30) days limit as generally provided for by the Rules of Criminal Procedure does not automatically require the Court to dismiss the motion to suppress. Pennsylvania Rule of Criminal Procedure 579 provides that the omnibus pretrial motion shall be filed within thirty (30) days of the arraignment “unless opportunity therefore did not exist, or the defendant or defense attorney, or the attorney for the Commonwealth, was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown.” Here, the relief sought in the motion to suppress became viable only after a claim that the statute was unconstitutional as applied was brought on behalf of the Defendant. The suppression motion was not based upon a claim that for which the grounds previously existed. The suppression motion is not the routine challenge to a warrantless search or seizure as is brought in the majority of cases, would have been known after receiving and reviewing the discovery materials, and thereby would be expected to be filed in accordance with Rule 579. Here, the suppression argument is directly linked to the officer’s false

assertion of authority to check for firearms in a court facility, an act that infringed the Defendant's constitutional right to bear arms as protected by both the Federal and Pennsylvania constitutions. The grounds for the motion to suppress did not exist prior to the filing of the motion challenging the constitutionality of the firearm statutes and the Defendant presented sufficient cause for the Court to consider the motion. Therefore, the Defendant falls under the exceptions to the generally 30 day filing rule for pretrial motions, and the motion to suppress should be considered on its merits.

III. SUPPORT IN LAW

The Commonwealth claims that the Court should not consider the Defendant's motion as it is not based on any state or federal decisional law. As discussed above, this is not a case based upon standard constitutional arguments, such as suppression based upon warrantless searches or seizures, for which case law is readily available. Instead, the Defendant's argument is directly related to the officer's misrepresentation that he was acting pursuant to the authority of section 913 in discovering the firearm as a check station. The Defendant argues that the court's lack of a check station clearly violates the mandates of section 913, said violation constitutes an unconstitutional infringement of the Defendant's Second Amendment right to bear arms. It was this violation, the lack of a check station or notice of the check station's location, that allowed the officer to misrepresent his authority as being the check station, thereby led to the discovery of the firearm, and thereby led to the charges being filed against the Defendant. The motion to suppress is part-and-parcel and directly linked to the constitutional argument.

Consider an analogous fact pattern. Courts have held that municipalities may limit a citizen's First Amendment right by requiring them to obtain a permit or license to speak in

particular areas at particular times. Assume that a municipality has such an ordinance, said ordinance provided that a particular panel would decide whether or not to issue the permit, but the municipality never created the panel referenced in the ordinance. Presume that a person attempts to comply with the ordinance and goes to the building where the panel was supposed to be located, talks to a law enforcement officer there that purports to be the issuing panel, the officer requests identification from the person, and the person provides the officer with false identification. In the classic sense, the person has no reason to seek suppression as he voluntarily surrendered the license during a mere encounter. However, it would shock one's conscience to think that a government would draft a law setting forth a procedure for the issuance of a speaking permit, fail to implement said law, and thereafter allow a misrepresentation from an officer to lead to the discovery of evidence and thereby result in prosecution of the person that attempted to comply with the law.

While the facts of the instant case are different from those in the above referenced hypothetical as this case invokes the Second Amendment as opposed to the First Amendment, the link between suppression and violation of the constitutional right are the same. The suppression argument here is directly based upon the Defendant's argument that the application of section 913 here violated his right to bear arms protected under the Second Amendment and the Pennsylvania Constitution.

In conclusion, the Commonwealth attempts to use a smoke screen to convince the Court to disregard the merits of the motion to suppress and dismiss it outright. The Commonwealth inaccurately claims that the Defendant is a vexatious litigator, but the record reflects that the Defendant filed many meritorious motions that were granted by the court,

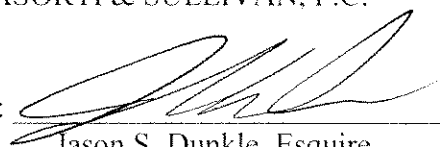
and while some motions were denied, the trial court acknowledged the meritorious nature of the claim by facilitating the interlocutory appeal. The Commonwealth argues that because the case is old, it evidences a tactic on the part of the Defendant to delay. However, the record reflects that the trial court and appellate courts have taken considerable time in reviewing and considering the Defendant's meritorious motions. The Commonwealth is again seeking to punish the Defendant for filing motions that took the courts time to adequately consider. The Commonwealth argues that the motion is untimely and the arguments presented in the motion are not supported by case law. The lack of precise case law on this issue evidences that it is not the typical motion to suppress that would be expected to be filed within thirty (30) days of the arraignment. Instead, the argument is a hybrid "fruit of the poisonous tree" argument that is directly linked to the court's decision on the unconstitutional as applied issue. The Commonwealth's Motion to Dismiss resembles the act of a politician in "slinging mud", using words such as vexatious litigator and delay tactician, to inflame one's passions in an attempt to divert attention from the true issue or merits of the motion. Instead of addressing the issue head-on, a claim is made that the Defendant is a pain in the side of the judicial system and thereby should not be given due consideration. The record clearly refutes the Commonwealth's claims attacking the Defendant as a vexatious litigator and delay tactician, and the suppression issue was raised in a timely manner in the context of the constitutional challenge. Send a message to the Commonwealth this Tuesday, November 2nd, a message that the Court is not swayed by the Commonwealth's mud slinging and mischaracterization of the Defendant's litigation record and thereby deny the meritless Motion to Dismiss filed by the Commonwealth.

WHEREFORE, the Defendant respectfully requests this Honorable Court deny the Commonwealth's Motion to Quash the Defendant's Motion to Suppress.

Respectfully submitted,

MASORTI & SULLIVAN, P.C.

By:

A handwritten signature in black ink, appearing to read 'J. Dunkle', is written over a horizontal line.

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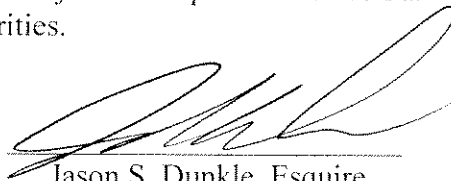
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VERIFICATION

I, Jason S. Dunkle, Esquire, do hereby verify that I am the Attorney for the Defendant, that I am fully authorized to make this verification on his behalf and that the Defendant is unavailable to this make this verification and that the facts set forth in the foregoing document are true and correct to the best of my knowledge, information and belief, and that the source of my information is from discussions with my client and the documents provided.

I understand that the statements therein are made subject to the penalties of 18 Pa. C.S. A. §4904 relating to unsworn falsification to authorities.

By:



Jason S. Dunkle, Esquire
Attorney for Defendant

Dated: 10/29/10

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CERTIFICATE OF SERVICE

I hereby certify that on October 29th, 2010, a true and correct copy of
the Reply to the Commonwealth's Motion to Quash Defendant's Motion was served via hand
delivery to the following:

Sean McGraw, Assistant District Attorney
4th Floor, Centre County Courthouse
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Bellevue, PA 16823

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Respectfully submitted,

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