IN THE SUPERIOR COURT OF PENNSYLVANIA

MIDDLE DISTRICT

NO.: 1739 MDA 2009

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

HOBSON L. MCKOWN,
Appellant

BRIEF FOR APPELLANT

Appeal from the judgment of conviction on August 20, 2009, and sentence imposed on September 17, 2009, by the Honorable Judge Thomas King Kistler, Court of Common Pleas of Centre County, docketed at CP-14-CR-1610-2008.

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STATEMENT OF JURISDICTION

This is an appeal of the conviction and sentence of the Defendant of Possession of Drug Paraphernalia, in violation of 35 P.S. §780-113(a)(32), upon the conclusion of a non-jury trial.

This Court has jurisdiction over appeals from such orders of the Courts of Common Pleas pursuant to 42 Pa.C.S. §742, Jurisdiction of Superior Court – Appeals from Courts of Common Pleas.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

This is an appeal by the Defendant, Hobson L. McKown, of the final order of the Court of Common Pleas of Centre County imposing sentence on September 17, 2009, upon a conviction of Possession of Drug Paraphernalia, 35 P.S. §780-13(a)(32), following a non-jury trial held on August 20, 2009. The Defendant brings a challenge to the sufficiency of the evidence presented at the non-jury trial, and the Defendant seek review of the suppression court's denial of the Defendant's Omnibus Pretrial Motion seeking suppression of evidence.

"When reviewing the propriety of a suppression order, an appellate court is required to determine whether the record supports the suppression court's factual findings and whether the inferences and legal conclusions drawn by the suppression court from those findings are appropriate." Commonwealth v. Foglia, 979 A.2d 357, 360 (Pa. Super. 2009). "Where the record supports the factual findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error." Id. "However, where the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's conclusions of law are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts." Id. Where the testimony presented at the suppression hearing is uncontradicted and no relevant facts are in dispute, the issue presented is purely a question of law and the standard of review is *de novo*. Commonwealth v. Gonzalez, 979 A.2d 879, 883 (Pa. Super. 2009).

When undertaking a review of the sufficiency of the evidence, the standard is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. Commonwealth v. O'Brien, 939 A.2d 912, 913 (Pa. Super. 2007). The court may not weigh the evidence and substitute its judgment for the fact-finder, and the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Id. at 913-914. "The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence", and, "in applying the above test, the entire record must be evaluated and all evidence actually received must be considered." Id.

ORDERS IN QUESTION

A true and correct copy of the true and correct copy of the VERDICT is attached hereto as Appendix C, and the ORDER OF COURT imposing sentence on the Defendant is attached hereto as Appendix D.

STATEMENT OF QUESTIONS INVOLVED

I. QUESTIONS PRESENTED:

1. **Did the suppression court err in finding that the magisterial district judge had jurisdiction to modify the defendant's bail after said judge had already bound the case over to the Court of Common Pleas and that said modification requiring the surrender of firearms was made in accordance with the Pennsylvania Rules of Criminal Procedure and not in violation of the Defendant's constitutional rights?**
   Suggested Answer: Yes.

2. **Did the suppression court err in finding that the defendant freely and voluntarily consented to the warrantless entry and search of his residence for firearms by deputy sheriffs and other law enforcement officers?**
   Suggested Answer: Yes.

3. **Did the suppression court err in finding that the defendant's consent to comply with a bail condition requiring the immediate surrender of firearms in his possession permitted deputy sheriffs to enter and search his residence without a warrant to seize the firearms?**
   Suggested Answer: Yes.

4. **Did the suppression court err in finding that law enforcement officers were not required to obtain a warrant prior to entering and searching the Defendant's residence based upon an "exigent circumstances" exception to the warrant requirements as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution?**
   Suggested Answer: Yes.

5. **Did the suppression court err in finding that the search warrant for the Defendant's residence set forth probable cause to justify issuance even though the veracity and basis of knowledge of persons supplying hearsay information was not provided to the issuing authority?**
   Suggested Answer: Yes.

6. **Did the trial court err in finding that the Commonwealth had presented sufficient evidence to prove a beyond a reasonable doubt that the Defendant "possessed" "drug paraphernalia" as those terms are defined by statute and case law?**
   Suggested Answer: Yes.

STATEMENT OF CASE

On September 10, 2008, the Defendant appeared at Central Court at the Court of Common Pleas of Centre County for a preliminary hearing on a case involving the possession of a firearm in a court facility. Upon the conclusion of the Commonwealth's case, Magisterial District Judge Leslie A. Dutchcot bound over all charges to the Court of Common Pleas. (N.T. 9/10/08, p. 56-58; R225-R227). The Commonwealth then orally requested that Judge Dutchcot modify the Defendant's bail conditions to add a provision that the Defendant was not permitted to possess firearms. (N.T. 9/10/08, p. 58-59; R227-R228). Despite defense counsel's argument in opposition to the bail modification, Judge Dutchcot granted the motion and issued a bail condition that the Defendant was not permitted to possess any firearms. (N.T. 9/10/08, p. 61-62; R230-R231). The Defendant was ordered to surrender his weapons to the Centre County Sheriff's Department. (N.T. 9/10/08, p. 61; R230). A bail release condition form was generated and signed by Judge Dutchcot that stated that the Defendant was prohibited from possessing firearms and that all firearms must be immediately surrendered to the Centre County Sheriff's Department. (R15). The Centre County Sheriff, Denny Nau, advised Judge Dutchcot that she must issue an Order "directing it." (N.T. 9/10/08, p. 63; R 232). Judge Dutchcot then issued an Order directing the Sheriff's Department to take custody of all firearms in the Defendant's possession. (R16).

The Defendant proceeded to the Sherriff's Department to discuss the surrender of his weapons. The Defendant offered to personally surrender the firearms, and he offered to have a third party surrender the firearms. (N.T. 1/8/09, p. 9-10, 19; R37-R38, R47). The Defendant was instructed by deputy sheriffs and/or the Sherriff that the Defendant must accompanying members of the Sherriff's Department to his residence and thereafter must allow the deputy sheriffs to enter his residence to seize firearms because the sheriffs were going to enforce an Order immediately. (N.T. 1/8/09, p. 10; R38). The Defendant was advised that his failure to consent to the warrantless entry and seizure would be considered a violation of the Defendant's bail. (N.T. 1/8/09, p. 10; 17; R38, R45). The bail condition form signed by Judge Dutchcot expressly prohibited the Defendant from possessing firearms and required him to immediately surrender his firearms to the Sheriff's Department, but the Order did not expressly, or even implicitly, require the Defendant to permit members of law enforcement to conduct a warrantless entry and search of his residence. (R16).

The Defendant was searched and placed in the rear of a sheriff's cruiser to be transported to his residence. (N.T. 1/8/09, p. 17-18; R45-R46). As the Defendant walked with deputy sheriffs towards his residence, his mother approached. (N.T. 1/8/09, p. 11; R 39). Again, the Defendant renewed his request to be permitted to personally enter or to have a third party enter his residence, locate the firearms and surrender same to the sheriff's department. (N.T. 1/8/09, p. 11, 19-21; R39, R47-R49). The deputy sheriffs again advised the Defendant that his proposal was not acceptable, and the Defendant was told that he would be required to enter the residence with the deputies and show the deputies the locations of his firearms. (N.T. 1/8/09, p 12; R40). As the deputies and the Defendant neared the residence, the Defendant stopped walking. (N.T. 1/8/09, p. 12;

R40). At that point, the deputy sheriffs handcuffed the Defendant, searched his pockets to locate a key to the residence, and, upon discovering a key, utilized same to open the front door to the Defendant's residence. (N.T. 1/8/09, p. 22-24; R50-R52). The deputy sheriffs knew that the Defendant was not consenting to the warrantless entry into his residence, but the sheriffs felt that they were legally permitted to enter based upon an *ex parte* Order that was issued by Judge Dutchcot. (N.T. 1/8/09, p. 5-6; 22). After opening the front door, the deputies immediately saw a sign that expressly stated that the Defendant did not consent to this search. (N.T. 1/8/09, p.13; R41).

The deputy sheriffs then entered the Defendant's residence with the intent to search, locate, and seize firearms. (N.T. 1/8/09, p. 24; R52). After entering the residence, a deputy trained in explosive devices observed materials in various rooms of the Defendant's residence that caused him concern that the Defendant had been engaged in bomb making. (N.T. 1/8/09, p. 15; R43). The deputies exited the residence and contacted the local police and a bomb expert from the Penn State Police Department. Members of the Ferguson Township Police Department and the Officer White, the bomb expert from the Penn State Police, met with the deputy sheriffs to discuss the situation, and law enforcement devised a plan to have the bomb expert search the Defendant's entire residence for explosive devices, and, if contraband or evidence of illegal activity was found, law enforcement would apply for a warrant at that time. (N.T. 1/8/09, p. 37, 52; R65, R80).

The police then set their plan into action, and White conducted a warrantless search of the Defendant's residence. In the kitchen area of the residence, White located green vegetable material and what appeared to be a glass smoking pipe. (N.T. 1/8/09, p. 55; R197). The expert exited the residence, advised Ferguson Township police of his findings, and a search warrant was then sought from the local magisterial district judge. The application for issuance of the search warrant failed to set forth any of the bomb expert's experience, training, knowledge or ability to suspect that the green vegetable material and pipe were marijuana and drug paraphernalia. Judge Dutchcot issued the search warrant for the Defendant's residence. Ferguson Township police executed the warrant, seized the vegetable material and pipe, and sent the suspected contraband to the State Police laboratory for forensic testing. The vegetable material was not marijuana, but the paraphernalia did test positive for the presence of marijuana.

The Defendant had been in custody since being handcuffed by the Sheriff, and he was transported to Judge Dutchcot for the filing of Possession of a Small Amount of Marijuana and Possession of Paraphernalia charges. Judge Dutchcot arraigned the Defendant and set bail at $250,000.00 straight monetary bail. At the preliminary hearing, the Defendant orally requested a modification of bail. The Commonwealth agreed to the bail reduction, but Judge Dutchcot denied the bail modification. The Defendant waived his preliminary hearing.

The Defendant filed a timely Omnibus Pretrial Motion to suppress physical evidence obtained during the search of his residence. At the hearing, the Commonwealth agreed to dismiss the Possession of a Small Amount of Marijuana charge as the substance

that the bomb expert had identified as marijuana was in fact not marijuana. The Commonwealth argued that the sheriffs were authorized to conduct a warrantless search and seizure based upon the Order issued by Judge Dutchcot. (N.T. 1/8/09, p. 5-6; R33-R34); Despite the Defendant's hearsay objection, the suppression court allowed the Commonwealth to present hearsay testimony about the Order from members of law enforcement that had not even viewed the Order and were not sure what express authority they were actually granted under the Order. (N.T. 1/8/09, p. 5-6, 20; R33-R34, R 48). Both the Commonwealth and the Defendant presented timely briefs. Via opinion and order, the Honorable Judge Thomas King Kistler denied the relief sought in the Defendant's Omnibus Motion. (R133-R142).

The Defendant's case proceeded to a non-jury trial. Upon the conclusion of the Commonwealth's testimony, the Defendant argued that the Commonwealth had failed to present sufficient evidence to prove beyond a reasonable doubt that the Defendant possessed drug paraphernalia as those terms are defined in both statutory and/or case law. Judge Kistler found the Defendant guilty of Possession of Paraphernalia. (Appendix C). The Defendant was later sentenced by Judge Kistler to serve a probationary sentence. (Appendix D). The instead appeal was started after the Defendant filed a Timely Notice of Appeal.

SUMMARY OF ARGUMENT

Members of law enforcement conducted a warrantless entry and search of the Defendant's residence based upon an Order issued by a magisterial district judge. The deputy sheriffs admit that it was clear that the Defendant did not consent to the entry. In order to gain entry, the Defendant was taken into custody, handcuffed, and his person was searched. The deputy sheriffs admit that they entered pursuant to an Order issued by the magisterial district judge and not because the Defendant consented. The Commonwealth adopted the justification set forth by the deputy sheriffs and argued that a search warrant was not required to enter and search the Defendant's residence based upon the issuance of the Order. The suppression court rejected the argument from the Commonwealth that the Order justified the entry and search, but the Court held that the Defendant had consented to the warrantless entry and search. The Defendant argues here that the magisterial district judge did not have jurisdiction over the Defendant's case to modify his bail after she had already bound the charges over to the Court of Common Pleas. With regard to the consent issue, the Defendant argues that his actions clearly indicate that he did not consent to the warrantless entry, a fact acknowledged by law enforcement but rejected by the suppression court; and, to the extent that the Defendant did consent, his consent was to agree to the bail condition that he not possess weapons, but he did not consent to allowing law enforcement to arrest him and conduct a warrantless search and seizure of his residence.

The Defendant also argues that the "plan" of law enforcement to conduct a warrantless search of the Defendant's and then apply for a search warrant after the fact violated the Defendant's rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. The suppression court erred finding that the search of the Defendant's residence for evidence was permitted under the exigent circumstances exception to the warrant requirement.

The Defendant argues that the search warrant for the Defendant's residence must be quashed and all evidence obtained therefrom must be suppressed. The application for issuance of the search warrant states that White observed suspected marijuana, but the probable cause fails to provide any information to the issuing authority regarding the expert's knowledge, training, or experience that would provide the issuing authority to gauge the informant's ability to identify marijuana. The fallacy of this omission is glaring because the expert was incorrect in his assessment as the substance was not marijuana. It is clear that the police knew of the importance of including such information as the affiant set forth his training and experience in conducting drug investigations, and the failure to include similar information relating to the bomb expert indicates said experts lack of training or experience. After reviewing the four corners of the warrant, the warrant lacks probable cause to justify its issuance. Therefore, all evidence obtained pursuant to the execution of the search warrant must be suppressed.

Finally, the Defendant raised issues related to the trial. The Defendant argues that the Commonwealth failed to present evidence that proved beyond a reasonable doubt that

the Defendant *possessed* the contraband, and the Defendant argues that the Commonwealth failed to prove beyond a reasonable doubt that the Defendant possessed *paraphernalia* as that term is defined by statute.

ARGUMENT

1. Did the suppression court err in finding that the magisterial district judge had jurisdiction to modify the defendant's bail after said judge had already bound the case over to the Court of Common Pleas and that said modification requiring the surrender of firearms was made in accordance with the Pennsylvania Rules of Criminal Procedure and not in violation of the Defendant's constitutional rights?

Suggested Answer: Yes.

"[J]urisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs." Commonwealth v. Mockaitis, 834 A.2d 488, 495 (Pa. 2003), quoting Riedel v. Human Relations Comm'n of Reading, 739 A.2d 121, 124 (Pa. 1999). "[J]urisdiction of justices of the peace and other inferior magistrates is purely of statutory origin" Wolfe v. Socash, 205 A.2d 645, 646 (Pa. Super. 1964). Since a question of subject-matter jurisdiction goes to the very power of the court to act, it may be raised at any time during the proceedings." Commonwealth v. Khorey, 500 A.2d 462, 465 (Pa. Super. 1985).

"At the conclusion of the preliminary hearing, the decision of the issuing authority shall be publicly pronounced." Pa.R.Crim.P. 543(A). "If the Commonwealth establishes a *prima facie* case of the defendant's guilt, the issuing authority shall hold the defendant for court." Pa.R.Crim.P. 543(B). "When the defendant has appeared and has been held for court, the issuing authority shall:(1) set bail as permitted by law if the defendant did not receive a preliminary arraignment; or (2) continue the existing bail order, unless the issuing authority modifies the order as permitted by Rule 529(A). Pa.R.Crim.P. 543(C). The issuing authority may modify a bail order at anytime ***before*** the preliminary hearing. Pa.R.Crim.P. 529(A) (emphasis added).

In its 1925(a) Opinion, the trial court claims that the Defendant failed to raise the jurisdiction issue and said issue was therefore waived. (Appendix B, p. 6). The opinion states that the "Court relies on Motions and Briefs in order to know what issues need to be addressed" and "those issues contained and addressed in a motion or an accompanying brief will be addressed by this Court." (Appendix B, p. 6). The Defendant did raise the jurisdiction issue upon the conclusion of the suppression hearing, more specifically, it was argued that the magisterial district judge did not have jurisdiction to modify the Defendant's bail after the Defendant's case had been bound over to the Court of Common Pleas. (N.T. 1/8/09 p. 62; R90). In response to the Defendant's oral reference to the jurisdiction issue, the Commonwealth briefed the issue in opposition to the Defendant's claim. (R124-R125). As the Court was put on notice that jurisdiction was an issue and it was addressed by parties, the issue was not waived and should have been addressed by the court.

The Defendant appeared for a preliminary hearing on September 10, 2008, before Magisterial District Judge Leslie A. Dutchcot. The Defendant had been charged with firearms violations after being preliminarily arraigned. After hearing the evidence presented by the Commonwealth and listening to legal arguments from both sides, Judge Dutchcot orally discussed her reasoning in binding over all charges to the Court of Common Pleas. (N.T. 9/10/08, p. 56-58; R225-R227). The judge expressly stated that "we bind over all charges." (N.T. 9/10/08, p. 58; R227). Immediately thereafter, the Commonwealth orally requested that the Defendant's bail be modified. (N.T. 9/10/08, p. 58; R227). After listening to arguments from the prosecution and the defense, the judge granted the Commonwealth's bail modification request. (N.T. 9/10/08, p. 61; R230).

In accordance with the Rules of Criminal Procedure, the judge publicly pronounced her decision to bind over all charges and hold the Defendant for court upon the conclusion of the preliminary hearing. As the Defendant appeared and was held for court, the judge could have continued the existing bail, unless the issuing authority modifies the order as permitted by Rule 529(A), which allows for modification of bail before the preliminary hearing. Here, the judge modified bail *after*, not before the hearing. Therefore, the modification was not in accordance with Rule 529(A). As the issuing authority failed to modify the bail order as permitted by Rule 529(A) and the Defendant had been subject to a preliminary arraignment, the judge could only continue the existing bail order. Pa.R.Crim.P. 543(C). Under the facts here, after the Defendant was held for court by Judge Dutchcot, jurisdiction over the Defendant was transferred to the Court of Common Pleas. Therefore, Judge Dutchcot lacked jurisdiction over the Defendant to modify his bail conditions. If the Defendant's bail conditions had not been modified, members of the Centre County Sheriff's Department would not have conducted a warrantless entry and search of the Defendant's residence. Without the warrantless entry and search, the Commonwealth would not have discovered evidence of contraband in the Defendant's residence.

Assuming that the magisterial district court retained jurisdiction to modify the Defendant's bail, the modification was not warranted under the circumstances presented here. "The fundamental purpose of bail is to secure the presence of the accused at trial." Commonwealth v. Truesdale, 296 A.2d 829, 834 (Pa.1972). The "right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty" and "[b]ail set a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." Stack v. Boyle, 342 U.S. 1, 4 (1951). "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." Id. The Pennsylvania Supreme Court expressly stated that the "burden of proof is upon the Commonwealth" in arguing for a more restrictive bail. Truesdale, 296 A.2d at 338. The purpose of bail is not to "provide for a system of preventive detention" to be used to "incarcerate a person to prevent future offenses." Id. In determining what bail conditions to impose, the "bail authority shall consider all available information as that information is relevant to the defendant's appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with the conditions of the bail bond." Pa.R.Crim.P 523(A). The bail

authority is instructed to consider ten (10) factors in setting the release criteria of bail. Pa.R.Crim.P. 523(A). The bail authority may also impose nonmonetary condition of release of bail if the conditions are designed to ensure the defendant's appearance and compliance with the conditions of the bail bond.

Here, the Commonwealth argued that the Defendant's bail should be modified to include a condition that the Defendant "be ordered to turn over all weapons to the Centre County Sheriff until the case is resolved." (N.T. 9/10/08, p. 58; R227). In support of the bail modification, the Commonwealth argued that the Defendant "doesn't have a valid permit to carry any weapons anywhere." (N.T. 9/10/08, p. 59; R228). This argument was simply a misstatement of the law. The Defendant was only required to have a valid license or permit to carry a weapon concealed or in his vehicle. 18 Pa.C.S.A. §6106. As long as the Defendant was not carrying his weapon concealed or in a vehicle, no license or permit was needed, so the Defendant was lawfully permitted to possess a weapon. The Commonwealth then advised the court that "Detective Martin called our office expressing concerns" about the Defendant's behavior. (N.T. 9/.10/08, p. 60; R229). No description of the Defendant's behavior that caused the "expressed concerns" was provided to the court. The bail authority was prevented from undertaking an independent analysis of the Defendant's behaviors to make a determination whether the behaviors should be addressed through nonmonetary conditions. Finally, the Commonwealth argues that the bail condition is needed "for the safety of the public." (N.T. 9/10/08, p. 60; R229). At no point was any evidence presented that any person was in danger when the Defendant carried his firearm, and no evidence was presented that the Defendant posed a danger to anyone. When the Defendant was arraigned on the firearm charges, a bail authority imposed monetary conditions, and the Commonwealth presented no evidence that the monetary conditions had not successfully ensured the defendant's appearance and compliance.

Not only did the Commonwealth fail to carry the burden of proof justifying the modification of bail, said modification impinged on the Defendant's constitutional rights. "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." P.A. Const. art. I, §1. "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." P.A. Const. art. I, §21. By preventing the Defendant from possessing firearms pursuant to a public safety rationale, the bail authority "questioned" the right of the Defendant to "bear arms in defence" of himself.

As the modification of bail was not conducted in compliance with the Rules of Criminal Procedure, statutory law, and violated the Defendant's constitutional rights, all evidence obtained as a result of the violations of the Defendant's rights should be suppressed. More specifically, had the bail authority not modified the bail, the Sheriff's Department would not have entered the Defendant's residence and ultimately seized the alleged drug paraphernalia. Therefore, evidence pertaining to the alleged drug paraphernalia should be suppressed, thereby requiring the Defendant's conviction to be reversed.

2. Did the suppression court err in finding that the defendant freely and voluntarily consented to the warrantless entry and search of his residence for firearms by deputy sheriffs and other law enforcement officers?

Suggested Answer: Yes.

The Fourth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment of the United States Constitution, and Article 1, Section 8 of the Pennsylvania Constitution states that people shall be free from unreasonable searches and seizures. The Fourth Amendment has drawn a firm line at the entrance to a house, applying equally to seizures of persons or seizures of property. Payton v. New York, 445 U.S. 573, 589-590 (1980). The purpose is not to protect the person of the suspect but to protect the homes from physical entry. Minnesota v. Olson, 495 U.S. 91, 95 (1990). See New York v. Harris, 495 U.S. 14 (1990)(holding that the chief evil sought to be eliminated by the Fourth Amendment is physical entry). Searches by the state shall be permitted only upon obtaining a warrant issued by a neutral and detached magistrate, and, as a general proposition, warrantless searches are unreasonable for constitutional purposes. Commonwealth v. Perry, 798 A.2d 697, 699-700 (Pa. 2002). Police officers may not conduct a warrantless search or seizure unless one of several recognized exceptions applies, such as consent. A warrantless search of a residence is *per se* unreasonable unless justified by a specific exception to the warrant requirement. Commonwealth v. Dommel, 885 A.2d 998, 1003 (Pa. Super. 2005); Commonwealth v. Richter, 791 A.2d 1181, 1184 (Pa. Super. 2002); Commonwealth v. Strickler, 757 A.2d 884, 888 (Pa. 2000).

"Voluntary consent to search is an exception to the general rule that a warrantless search of a residence is *per se* unreasonable." Commonwealth v. Gillespie, 821 A.2d 1221, 1225 (Pa. 2003). "The central Fourth Amendment inquiries in consent cases entail assessment of the constitutional validity of the citizen/police encounter giving rise to the consent; and, ultimately, the voluntariness of consent." Strickler, 757 A.2d at 888. "Where the underlying encounter is found to be lawful, voluntariness becomes the exclusive focus." Id. at 888-889.

"Where, however, a consensual search has been preceded by an unlawful seizure, the exclusionary rule requires suppression of the evidence obtained absent a demonstration by the government both of a sufficient break in the causal chain between the illegality and the seizure of evidence, thus assuring that the search is not an exploitation of the prior illegality, and of voluntariness." Id. at 889. "In order for consent to be valid, it must be unequivocal, specific, and voluntary", and "[c]onsent must also be given free from coercion, duress, or deception. Commonwealth v. Edwards, 735 A.2d 723, 725 (Pa. Super. 1999). "In connection with such inquiry, the Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained choice-not the result of duress or coercion, express or implied, or a will overborne-under the totality of the circumstances." Strickler, 757 A.2d at 901. In reviewing the voluntariness of consent, the totality of the circumstances must be

evaluated, and the court should consider the following factors: 1) the defendant's custodial status; 2) the use of duress or coercive tactics by law enforcement personnel; 3) the defendant's knowledge of his right to refuse to consent; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel. Gillespie, 821 A.2d at 1225. "[W]hile knowledge of the right to refuse to consent to the search is a factor to be taken into account, the Commonwealth is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." Strickler, 757 A.2d at 901. "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543, 548 (1968). "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." Id. at 548-549.

When a Motion to Suppress is filed by a defendant, the Commonwealth has the burden of establishing by a preponderance of the evidence that the challenged evidence was not obtained in violation of defendant's rights and is thereby admissible. Pa.R.Crim.P. 581(h); Commonwealth v. Beaman, 846 A.2d 764, 767 (Pa. Super. 2004). The "burdens of production and persuasion are on the Commonwealth to prove the challenged evidence was not obtained in violation of the defendant's rights." Commonwealth v. West, 834 A.2d 625, 629 (Pa. Super. 2003).

The Defendant filed an Omnibus Pretrial Motion and sought suppression of the evidence obtained via the warrantless entry and search of his residence by members of the Centre County Sheriff's Department and other members of law enforcement. (RR17-R20). The Commonwealth argued that the actions of the Sheriff's Department in arresting the Defendant and entering his residence without a warrant did not constitute a search. (R125-R127). The Commonwealth argued that the action of the Sheriff's Department was excused as the "sheriff's office was there to execute a lawful court order" and the sheriff's department followed their normal protocol that they use in the seizure of weapons in Protection from Abuse Act Cases. (R125). In opposition to the Commonwealth's claim, the Defendant argued that the suppression court had erred in allowing the Commonwealth to present hearsay testimony regarding the order as the testimony violated the "best evidence rule". (R109-R111).

The suppression court avoided the hearsay and best evidence rule evidentiary issues by rejecting the Commonwealth's argument that the entry by deputy sheriffs into the Defendant's residence was justified by the court order. (R137). The suppression court ruled that the entry into the Defendant's residence was a search, thereby triggering a Fourth Amendment analysis. (R137-R139). The suppression court ultimately held that "[b]ased on the totality of the circumstances, the Court determines that the Commonwealth has proven by clear and convincing evidence that consent was freely given." (R137-R138). The Court then held that the warrantless entry was legal based upon the consent exception to the warrant requirement. (R139).

It must be emphasized that the Commonwealth never raised the issue of consent as an exception to the warrant requirement (See Commonwealth's Suggested Findings of Fact and Conclusions of Law, R119-R132), and the Commonwealth never presented evidence pertaining to the consent factors to be considered by the court as referenced in Strickler and Gillespie. As the Commonwealth failed to articulate this argument, the Defendant did not address same in any pretrial motion documents as both statute and case law places the burden of proof on the Commonwealth to present evidence that the challenged evidence was not obtained in violation of the Defendant's rights. See Pa.R.Crim.P. 581(h); Beaman, 846 A.2d at 767. While the trial court stated that it "relies on Motions and Briefs in order to know what issues needed to be addressed," neither party raised the consent issue as it is clearly inapplicable in this case, but the court raised the consent exception on its own accord in its Omnibus Pretrial Opinion. (Appendix B, p. 6). In raising the consent issue *sua sponte* and finding that said exception to the warrant requirement was applicable here, the court improperly placed the burden on the Defendant to present evidence that the challenged evidence was obtained in violation of the Defendant's constitutional rights. As the Commonwealth failed to allege consent, the suppression court should not have *sua sponte* raised the issue and thereby relieved the Commonwealth of carrying its burden of proof. The suppression court should have deemed the consent exception to the warrant requirement to justify the warrantless entry into the Defendant's residence to have been waived as it was not raised by the Commonwealth.

In reviewing the consent issue, the suppression court should have applied the Strickler analysis and considered the custodial status of the Defendant in reviewing consent. When the warrantless entry occurred, the Defendant was handcuffed eventhough there was no probable cause to believe that the Defendant had violated the law or posed a danger to law enforcement. Under the Strickler case, the unconstitutional arrest of the Defendant should be deemed to have vitiated any consent to enter the Defendant's residence. If the Commonwealth attempted to argue that the Defendant was subject to an investigative detention as opposed to an arrest, such detentions "are designed to address immediate suspicions of current illegal conduct." Commonwealth v. Melendez, 676 A.2d 226, 229 (Pa. 1996). Law enforcement had no reason to believe that the currently engaged in illegal conduct when they detained the Defendant by placing him in handcuffs. Albright testified that the decision was made to handcuff the Defendant because of the Defendant's behaviors and his reluctance to "let us go in" the Defendant's residence. (N.T. 1/8/09, p. 22; R50). The Defendant's behaviors in trying to avoid having law enforcement in his residence and his reluctance to consent to the warrantless entry evidence an intent to exercise one's constitutional rights. There was no immediate suspicion of illegal conduct to justify the detention of the Defendant. The unconstitutional detention of the Defendant vitiated any consent issued by the Defendant.

Assuming the court found that the police-citizen encounter was legal and thereby consent was not *per se* the product of coercion or duress, then the court is instructed to consider the totality of the circumstances, including the factors set forth in Gillespie. The facts of the instant case readily evidence that any initial consent was based upon coercion and police excesses, and the testimony clearly evidenced that it was clear to law

enforcement that the Defendant did not consent to the entry. At the suppression hearing, Albright admitted that the Defendant voluntarily appeared at the sheriff's department to discuss the surrender of his firearms to said department and had proposed to either personally deliver the firearms to the sheriff's department or to have a third party do same. (N.T. 1/8/09, p. 9-10, 19; R37-R38, R47). The Defendant was told that his proposal was not acceptable. (N.T. 1/8/09, p. 10; R38). More specifically, Albright testified that Lieutenant Weaver "pretty much told him [McKown] that it wasn't an option for him to bring the firearms to us tomorrow; that we were going to enforce the Order immediately." (N.T. 1/8/09, p.9-10; R37-R38). Albright stated that "we told him he was going to go in with us, and he was going to us where the weapons were, and we were going to retrieve them." (N.T. 1/8/09, p. 12; R40). Albright testified that the Defendant had been advised that Defendant's failure to comply to comply with the order would lead to the revocation of his bail. (N.T. 1/8/09, p. 10; R38). Albright admitted that he felt that he was authorized to enter the Defendant's residence and search for firearms without obtaining a warrant or the consent of the Defendant. (N.T. 8/20/09, p. 22-23, R164-R165). Albright's testimony made it clear that the Defendant was told that he was not permitted to surrender firearms to the Sheriff's Department but was instead forced to comply with an Order and permit a warrantless entry into his residence or have his bail revoked and be returned to pretrial incarceration.

In response to the threat to revoke his bail, the Defendant preliminary submitted to the authority of the Sheriff's Department and agreed to ride with them to his home. The Defendant was subjected to a search of his person and rode in the rear of a sheriff's cruiser to his residence. A total of four (4) deputy sheriffs traveled to the Defendant's residence. (N.T. 1/8/09, p. 26; R54). Upon reaching his residence, the Defendant renewed his request to be permitted to enter the residence or allow his mother to enter the residence and surrender the firearms to the sheriffs. (N.T. 1/8/09, p. 11, 19-21; R39, R47-R49). The Defendant then stopped walking towards the residence to discuss his options with the deputies, and he was immediately handcuffed and searched. (N.T. 1/8/09, p. 22-24; R50-R52). Upon discovering a key to the Defendant's residence on the Defendant's person, Albright opened the door to the Defendant's residence and peered inside. (N.T. 1/8/09, p. 24; R52). Albright admitted that the deputies did not ask the Defendant for consent to enter. (N.T. 1/8/09, p. 24; R52). After opening the front door, the deputies immediately saw a sign that expressly stated that the Defendant did not consent to this search. (N.T. 1/8/09, p.13; R41). Of critical importance, Albright expressly admitted that "it was very clear" that the Defendant did not want Albright or other law enforcement officers entering his residence. (N.T. 1/8/09, p. 22; R50).

After reviewing the totality of the circumstances, it is clear that any perceivable element of consent was not voluntary but was instead the product of duress and coercion. The Defendant was told that members of the Sheriff's Department intended to execute an Order to take possession of his firearms and conduct a warrantless entry and search of the Defendant's residence. The Defendant was also told that if he did not comply or consent to the warrantless search and seizure, it would be deemed a violation of his bail and he would be detained in the pretrial phase of his case. After being transported to the scene, Albright admits that it was clear that the Defendant did not consent to the warrantless

entry. The fact that the Defendant was handcuffed, his person subjected to a warrantless search, and his residence entered after a key was found on his person clearly evidences that the Defendant did not consent to the entry. The Commonwealth claims that "[a]t no time did the defendant indicate that he would not cooperate", and it was only "when the defendant's action gave them cause for concern that resulted in their deviation from the standard operating procedure". (R126-R127). Assuming the Commonwealth was correct in claiming that the Defendant did not indicate that he would not cooperate, the law is clear that the burden of proving voluntariness of consent requires more than showing more than acquiescence to a claim of lawful authority." Bumper, 391 U.S. at 548-549. Also, the Commonwealth's claim that the Defendant's action, meaning his clear indication to law enforcement that he did not consent to the warrantless entry, caused the deputies to deviate from the standard operating procedure and conduct a warrantless entry.

The burden was on the Commonwealth to establish that the challenged evidence was not obtained in violation of the Defendant's rights, and the suppression court rejected the Commonwealth's argument that the warrantless entry did not constitute a search as it was conducted pursuant to a court order. Despite the Commonwealth's failure to argue the consent exception to the warrant requirement, the suppression court raised the exception on its own and thereby committed an error of law by relieving the burden of proof from the Commonwealth. Assuming the suppression court did not err in raising the consent issue *sua sponte*, the court's holding that the Defendant consented to the warrantless entry and search for firearms is not supported by the facts, therefore the court's legal conclusion are incorrect. Under Strickler, the illegality of the arrest or detention of the Defendant vitiates any consent that may have been given. Assuming the detention does not vitiate consent, after reviewing the totality of the circumstances, it is clear that no valid consent to enter the Defendant's residence. Any consent was clearly a product of duress and coercion as the Defendant was threatened with bail revocation and incarceration if he did not comply with the Sheriff's Departments plan of entering his residence and searching for firearms. Albright candidly admitted that the Defendant was told what he would do. Finally, it is critical to reiterate that Albright testified that it was very clear to him that the Defendant did not consent to the warrantless entry. The suppression court clearly overlooked Albright's admission of apparent non-consent in holding that the Defendant's voluntarily consented to the entry. As the suppression court erred in finding that the consent exception to the warrant requirement applicable here, the warrantless entry was *per se* unreasonable and violative of the Defendant's constitutional rights as set forth in the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution. All evidence obtained in violation of the Defendant's constitutional rights must be suppressed.

3. Did the suppression court err in finding that the defendant's consent to comply with a bail condition requiring the immediate surrender of firearms in his possession permitted deputy sheriffs to enter and search his residence without a warrant to seize the firearms?

Suggested Answer: Yes.

"A person's right to delimit the scope of consent to a search is well established." Commonwealth v. Guerrero, 646 A.2d 585, 587 (Pa. Super. 1994). "When an official search is properly authorized-whether by consent or by the issuance of a valid search warrant-the scope of the search is limited by the terms of its authorization." Commonwealth v. Parker, 619 A.2d 735, 740 (Pa. Super. 1993). The "scope of a search is generally limited to the areas where the object of the search may be found, but the party consenting to a search may restrict authorization to defined areas." Commonwealth v. Yedinak, 676 A.2d 1217, 1220 (Pa. Super. 1996). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Id.

Upon the conclusion of the preliminary hearing on September 10, 2008, Magisterial District Judge Dutchcot found that the Commonwealth had presented a *prima facie* case and thereby held the Defendant for court. (N.T. 9/10/08, p. 56-58; R225-R227). Immediately thereafter, Judge Dutchcot granted the Commonwealth's oral motion to modify bail, stating that she was "willing to grant the requested bail modification that all weapons be surrendered to the custody of the Centre County Sheriff's Department." (N.T. 9/10/08, p. 61; R230). The Defendant was then provided with a form identified as Bail Release Conditions that was signed by Judge Dutchcot, and the form stated that the Defendant was prohibited from possessing firearms and required to immediately surrender his firearms to the Centre County Sheriff's Department. (R15). The Defendant was later advised by members of the Sheriff's Department that Judge Dutchcot had issued an Order directing the Sheriff's Department to take custody of the Defendant's firearms. (See R16).

Judge Dutchcot's oral modification of bail and the Bail Release Conditions Form signed by Judge Dutchcot clearly evidence that the Defendant was prohibited from possessing and firearms and that he was required to surrender all firearms to the Sheriff's Department. In order to comply with this bail condition, the Defendant would have been permitted to have a third party take possession of his firearms and immediately surrender same to the Sheriff's Department. The Defendant requested on numerous occasions that he be permitted to have a third party surrender the firearms to the Sheriff's Department. (N.T. 1/8/09, p. 9-11, 19-21; R37-R39, R47-R49). At no point did Judge Dutchcot provide the Defendant with notice that the Sheriff's Department would be authorized to enter his residence and search for firearms. The Order issued by Judge Dutchcot also did not expressly authorize the Sheriff's Department to enter the Defendant's residence to search and seize weapons. When the Bail Release Conditions are read in conjunction with the Order, it is clear that the Order simply authorized the Sheriff's to take custody of weapons that were surrendered by the Defendant. It is clear that the Sheriff's Department improperly exceeded the authority issued by Judge Dutchcot's in the Order.

The suppression court held that the Defendant had consented to allowing the Sheriff's Department to enter his residence and conduct a warrantless search for

weapons, thereby adopting the adopting the extremely expansive interpretation of Judge Dutchcot's Order proposed by the Sheriff's Department. (R138). Article I, Section 8 of the Pennsylvania Constitution provides that "people shall be secure in their persons, houses, papers and possessions from unreasonable search and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable case, supported by oath or affirmation subscribed to by the affiant." An affidavit of probable cause seeking issuance of a search warrant "set forth specifically the facts and circumstances which form the basis for the affiant's conclusion that there is probable cause to believe that the items or property sought are located at the particular place described." Pa.R.Crim.P. 206. It seems axiomatic that an issuing authority would require reference to a specific area to be search prior to issuing a warrant, but the same issuing authority would create an order that would allow law enforcement to search anywhere. While the entry into the Defendant's residence was the only property at issue in the suppression action, the absurdity of law enforcement's interpretation of the order is apparent when considering that the Sheriff's Department searched the Defendant's vehicle, which was parked near the courthouse in Bellefonte, for firearms after the Defendant was charged with Possession of Drug Paraphernalia on this case and held in custody after being unable to post the $250,000.00 straight bail. (N.T. 8/20/09, p. 26-29; R168-R170). Would a judge, knowing the constitutional requirements relating to issuance of warrants, intend to issue an order that allows for general searches of any area in which law enforcement believes that they can locate a firearm that could be possessed by the Defendant?

To the extent that this Honorable Court finds that the Defendant voluntarily consented, it is clear that the Defendant's subjective intent was to comply with his bail condition and surrender firearms to the Sheriff's Department. At no point did he consent to the warrantless entry and search of his residence. To the contrary, the testimony of Albright evidences that it was clear to him that the Defendant did not consent to the warrantless entry into his residence. (N.T. 1/8/09, p. 22; R50).

The suppression court's legal conclusion that the Defendant consented to the warrantless entry and search of his residence is erroneous. The warrantless entry and search exceeded any reasonable scope of consent issued by the Defendant, therefore, the search violated the Defendant's constitutional rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. All evidence obtained as a result of the unconstitutional search must be suppressed.

4. Did the suppression court err in finding that law enforcement officers were not required to obtain a warrant prior to entering and searching the Defendant's residence based upon an "exigent circumstances" exception to the warrant requirements as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution?

Suggested Answer: Yes.

A warrantless search of a residence is *per se* unreasonable unless justified by a specific exception to the warrant requirement. Dommel, 885 A.2d at 1003; Richter, 791 A.2d 1184. Searches by the state shall be permitted only upon obtaining a warrant issued by a neutral and detached magistrate, and, as a general proposition, warrantless searches are unreasonable for constitutional purposes. Perry, 798 A.2d at 699-700. Exceptions to the warrant requirement include:1) exigent circumstances; 2) consent; 3) plain view. See Dommel *supra* (holding that exigent circumstances justified warrantless arrest of suspect in suspect's residence); See Commonwealth v. Bell, 871 A.2d 267 (Pa. Super. 2005)(holding that consent is a recognized exception to the warrant requirement); See Commonwealth v. Harris, 888 A.2d 862 (Pa. Super. 2005)(holding that plain view is exception to the warrant requirement). Home entries predicated upon "exigent circumstances" place a heavy burden on police to show a legitimate need for immediate entry, and such decisions must be made only in restricted circumstances or the exception will swallow the rule. Richter, 791 A.2d at 1184; Commonwealth v. Govens, 632 A.2d 1316, 1324 (Pa. Super. 1993). "Absent probable cause and exigent circumstances, the entry of a home without a warrant is prohibited under the Fourth Amendment." Commonwealth v. Rowe, 984 A.2d 524, 526 (Pa. Super. 2009).

"In determining whether exigent circumstances exist, a number of factors are to be considered: (1) the gravity of the offense, (2) whether the suspect is reasonably believed to be armed, (3) whether there is above and beyond a clear showing of probable cause, (4) whether there is strong reason to believe that the suspect is within the premises being entered, (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended, (6) whether the entry was peaceable, and (7) the time of the entry, i.e., whether it was made at night." Id. "These factors are to be balanced against one another in determining whether the warrantless intrusion was justified." Id. "Other factors may also be taken into account, such as whether there is hot pursuit of a fleeing felon, a likelihood that evidence will be destroyed if police take the time to obtain a warrant, or danger to police or other persons inside or outside the dwelling." Id. "Nevertheless, police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." Id.

In order to justify the warrantless entry and search of the Defendant's residence by White, the Commonwealth argued that the protective sweep doctrine was applicable. (R128). Pennsylvania has recognized the authority of police to effectuate a warrantless search of a residence to ensure the safety of police under the "protective sweep" doctrine, but this doctrine is a search for persons and "cannot be used as a pretext for an evidentiary search. Commonwealth v. Witman, 750 A.2d 327, 336 (Pa. Super. 2000). The Fourth Amendment permits a protective sweep if the searching officer possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others. Maryland v. Buie, 494 U.S. 325, 327-328 (1990). It is clear that the protective sweep doctrine is not applicable to this case. Law enforcement officers had no reason to believe that the Defendant's residence harbored an individual that posed a danger to the officers or

others. The Commonwealth conceded in its brief that the protective sweep doctrine is applied in a search incident to arrest scenario, and the police did not have probable cause to arrest the Defendant in his residence.

While the Commonwealth argued that the protective sweep doctrine justified White's warrantless entry and search of the Defendant's residence, the suppression court never addressed or reviewed this argument in its suppression opinion. (R139-R141). Instead, the suppression court *sua sponte* decided to conduct an "exigent circumstances" review and ultimately hold that White's warrantless entry was justified under the exigent circumstances exception to the warrant requirement. The suppression court's decision to initiate a legal analysis and exception to the warrant requirement removed the burden of proof that is placed on the Commonwealth to prove that evidence was not obtained in violation of the Defendant's constitutional rights. As the Commonwealth failed to raise the exigent circumstances exception to the warrant requirement, the suppression court should not have raised this issue on it own initiative but should have instead deemed said argument to have been waived.

Even if this Honorable Court finds that the suppression court did not exceed its authority when raising the exigent circumstances exception *sua sponte*, it is clear that said exception is not applicable under the facts set forth here. The suppression court accurately stated that the fact that the Defendant "was handcuffed and placed in the back of a police car" "clearly weight heavily against the Commonwealth." (R140). The suppression court then states that the peaceable nature of the entry and the time of entry "weighs heavily in favor of the Commonwealth." (R140). The peaceable nature of the entry is somewhat disputable as Albright testified that it was clear that the Defendant did not want members of law enforcement in his home, and to ensure that the entry was peaceable, the deputies took the Defendant into custody before entering the residence. (N.T. 1/8/09, p. 22; R50). The suppression court also states that the intrusion by law enforcement was "minimal" based upon the court's holding that the Defendant had consented to members of the Sheriff's Department entering his home. (R140). As discussed *supra*, court's finding that the Defendant consented to the entry of his residence is not supported by the evidence and is instead expressly refuted by Albright's testimony. (See N.T. 1/8/09, p. 22; R50).

Finally, the suppression court determined that "the police officers acted without a warrant due to a reasonably perceived threat to officer and public safety." (R140). "A delay to secure a warrant could only have worked to increase the risk to officers at the residence and any members of the public who might come within proximity of the mobile home unit." (R141). No testimony was presented that any members of the public were or could come within proximity of the Defendant's residence. Also, the actions of the police evidence that they did not feel at great risk. First, it is important to note that the deputy sheriffs and officers from the Ferguson Township Police Department remained in close proximity to the Defendant's residence from 3:00 p.m. until approximately 5:00 p.m. when White arrived. Also, prior to entering the residence, White made the decision that the danger posed by entering the Defendant's residence did not require him to wear the full bomb suit but instead simply wore a "flat jacket and Kevlar helmet." (N.T.

1/8/09, p. 38; R 66).

Absent from the suppression court's analysis is any explanation from law enforcement or the Commonwealth why no warrant was sought after Albright noticed bomb making materials at approximately 3:05 to 3:10 p.m. but before White arrived at approximately 5:00 p.m. (N.T. 1/8/09, p. 29-31; R57-R59). When White arrived, the Ferguson Township police were already present. (N.T. 1/8/09, p. 37; R65). As the Defendant's residence was located within Ferguson Township, said police department had jurisdiction to seek issuance of a search warrant. At no point did the Commonwealth seek to explain why a search warrant for the Defendant's residence was not sought during the two (2) hours that the deputy sheriffs and Ferguson Township Police waited for White to arrive. After White arrived, time was spent devising a "plan" to have White conduct a general warrantless search of the residence and the obtain warrants after the discovery of any contraband. (N.T. 1/8/09, p. 37, 52; R65, R80). The availability of the issuing authority was clearly not at issue as Martin had no difficulty requesting or obtaining a search warrant for the Defendant's residence at approximately 9:00 p.m., six (6) hours after Albright noticed what he felt was bomb making equipment.

While the Rowe case involved the presence of no factors evidencing exigent circumstances, the facts here clearly do not satisfy the police's heavy burden of demonstrating an urgent need to justify the warrantless entry. As the suppression court acknowledged, the fact that the Defendant had been handcuffed and placed in the back of a police cruiser weighs heavily against a finding of exigent circumstances. There was no reason to believe that any persons were located within the residence. While the suppression court emphasized the gravity of the offense factor by noting that "explosives" are "volatile and need not be within the reach of a Defendant to be dangerous", the reference to explosives is not supported by the record (R140-R141). Albright testified that he observed items that "could be components of or for the production of an IED or an Improvised Explosive Device." (N.T. 1/8/09, p. 15; R43). The items observed by Albright, circuit boards, computer hard drives, and mousetraps are items that are found in many homes. (N.T. 1/8/09, p. 14; R42). The suppression court should have been considering a crime of possessing instruments that could be used to make a bomb as opposed to making the leap that an explosive device was present in the residence. The Commonwealth also provided no excuse for law enforcement's failure to obtain a search warrant during the two (2) hours that were spent waiting for White to appear.

The suppression court erred in *sua sponte* addressing the exigent circumstances exception to the warrant requirement where the Commonwealth claimed that the protective sweep doctrine excused the warrantless entry and search of the Defendant's residence. To the extent that the suppression court properly raised the exigent circumstances exception and thereby relieved the Commonwealth of its burden of proof, the factual record does not support the legal conclusion exigent circumstances were present here. The Commonwealth bears a heavy burden in claiming exigent circumstances. Here, the Defendant was in custody, and the police had adequate time to seek issuance of a warrant prior to the entry. The suppression court erred in finding that

exigent circumstances were present here to justify the warrantless entry and search of the Defendant's residence. The warrantless entry into the Defendant's residence by White violated the Defendant's constitutional rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

5. Did the suppression court err in finding that the search warrant for the Defendant's residence set forth probable cause to justify issuance even though the veracity and basis of knowledge of persons supplying hearsay information was not provided to the issuing authority?

Suggested Answer: Yes.

Article I, Section 8 of the Pennsylvania Constitution provides that "people shall be secure in their persons, houses, papers and possessions from unreasonable search and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable case, supported by oath or affirmation subscribed to by the affiant." Before an issuing authority may issue a constitutionally valid search warrant, he or she must be furnished with information sufficient to persuade a reasonable person that probable cause exists to conduct a search. Commonwealth v. Rivera, 816 A.2d 282, 291 (Pa. Super. 2003). The standard for determining whether probable cause existed for the issuance of a search warrant is the "totality of the circumstances" test. Commonwealth v. Hernandez, 892 A.2d 11, 20 (Pa Super. 2006). The task of the issuing magistrate is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, 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. Camperson, 650 A.2d 65, 70 (Pa. Super. 1994).
"The information offered to demonstrate probable cause must be viewed in a common sense, nontechnical, ungrudging and positive manner." Rivera, 816 A.2d at 291.

Pennsylvania Rules of Criminal Procedure provides that each application for a search warrant shall be supported by written affidavit, and the affidavit must "specify or describe the crime which has been or is being committed" and "set forth specifically the facts and circumstances which form the basis for the affiant's conclusion that there is probable cause to believe that the items or property sought are located at the particular place described." Pa.R.Crim.P. 206(5)(6). At any hearing on a motion for suppression of evidence seized pursuant to the execution of a warrant, no evidence shall be admissible to establish probable cause other than the Affidavit of Probable Cause submitted with the Application for the Search Warrant. Pa.R.Crim.P. 203(d); Commonwealth v. Ryerson, 817 A.2d 510, 513 (Pa. Super. 2003). Evidence discovered as a result of a search that violates the fundamental constitutional guarantees of Article I, Section 8, will be suppressed. Commonwealth v. Gordon, 683 A.2d 253, 256 (Pa. 1996).

In arguing that the search warrant for the Defendant's residence was supported by probable cause, the Commonwealth argued that the issuing authority must only be provided with the training and experience of the affiant and similar information need not

be provided regarding the person providing information to the affiant. The Commonwealth's argument is clearly not supported by case law that clearly indicates that the issuing authority is to consider the **veracity and basis of knowledge of persons supplying hearsay information** in determining if there is a fair probability that contraband or evidence of a crime will be found in a particular place. Camperson, 650 at 70.(emphasis added). Clearly, Martin, the affiant here, was required to advise the issuing authority with the basis of knowledge of White and his ability to recognize marijuana. The Commonwealth's assertion that Martin's credentials as an experienced drug investigator and his acceptance of White's statements automatically provides the issuing authority with probable cause is expressly rejected in Commonwealth v. Thompson, 985 A.2d 928 (Pa. 2009). In Thompson, the court engaged in a probable cause analysis and considered the weight that should be placed on a police officer's experience and knowledge of drug investigations. The Thompson court held that a police officer's experience is a relevant factor in determining probable cause, but the officer "shall not simply reference training and experience abstract from an explanation of their specific application to the circumstances at hand. Id. at 935. The "officer must demonstrate a nexus between his experience and the search, arrest, or seizure of evidence." Id. Here, Martin failed to provide the issuing authority with a nexus between his experience and his ability to determine that White had observed marijuana. The issuing authority should have been provided with the basis of knowledge of White that would allow the issuing authority to make a common sense decision that White had the experience and training necessary to identify marijuana; or, if the affiants seeks to rely on his experience, then he must include statements from White describing the substance that would have allowed Martin to conclude that the substance was marijuana. The Affidavit of Probable Cause fails to fully identify Officer White, fails to set forth Officer White's duration of employment, and, most importantly, is devoid of any information pertaining to the officer's training, basis of knowledge, or foundation upon which White could have "recognized" a substance as being marijuana. (R26). Without such information, the issuing authority was unable to consider the "basis of knowledge of persons supplying hearsay information" as required by law. Camperson, 650 A.2d at 70.

In denying the Defendant's request to quash the search warrant, the suppression court held that the "basis of knowledge" is a factor to consider in applying the totality of the circumstances test, but "it is not a defining factor as in the case with information provided by the citizen informant." Here, the issuing authority was not provided with any background information evidencing White's ability to identify marijuana. After considering the facts of this case and the rationale of the suppression court, it is clear that the suppression court eliminated the basis of knowledge as a consideration factor. If the rationale of the suppression court were taken to its logical conclusion, probable cause would be found as long as the affiant included his experience and stated that a fellow identified something illegal. This rationale creates a slippery slope problem. In this case, could a warrant have been issued if Martin stated that Deputy Albright had observed bomb making materials and never referenced Albright's training or experience? Consider an application for a search warrant in which the affiant references his experience but fails to include the experience of a second officer that had observed suspicious activity that the second officer felt was a drug transaction. Would a court

reviewing probable cause be able to simply accept the experience of the affiant as justifying issuance of the warrant and ignore the fact that the conclusion that a drug transaction occurred was made by the second officer. It can readily be argued that Thompson and its requirement for a nexus between the experience and the illegal conduct be clearly established to the court rejects the suppression court's rationale here. In this case, the lack of such information pertaining to White's training, experience, and basis of knowledge is extremely troublesome in that the substance that was "recognized" as being marijuana by Officer White was found to not be marijuana by the Pennsylvania State Police Forensic testing. (See N.T. 1/8/2009, p. 54; R82).

In Commonwealth v. Trenge, 451 A.2d 701 (Pa. Super. 1982), the Superior Court had to determine whether an officer had probable cause to arrest a person suspected of possessing marijuana and/or paraphernalia after smelling marijuana in the area and observing the stem of a marijuana pipe protruding from the defendant's pocket. At the suppression hearing, the Commonwealth questioned the arresting officer as to his basis of knowledge for concluding that the pipe stem that he observed was that of a marijuana pipe as opposed to a legal pipe, and the officer expressly testified that, over his 14 years of experience, he had observed over 150 marijuana pipes and "been to numerous schools on the subject also." Id. at 709. In response to a followup question, the officer stated that the schools which he attended included several at Lehigh Community College and several in police training courses. Id. In concluding that the officer had sufficient probable cause to arrest the defendant, the Superior Court stated that the observations and opinions of the arresting officer were "obviously those of a highly trained and experienced police officer." Id. at 710.

The failure of the affiant to provide the issuing authority with any basis of knowledge for White's identification of a substance as being marijuana prohibits a finding of probable cause here. Both the Commonwealth and suppression court are satisfied that including the affiant's experience is sufficient by itself to confirm White's identification, but said premise is clearly rejected by the Pennsylvania Supreme Court in Thompson. The warrant here was not supported by probable cause, therefore, the search was conducted in violation of Defendant's constitutional rights as set forth in Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution. All evidence obtained in violation of the Defendant's constitutional rights must be suppressed.

6. Did the trial court err in finding that the Commonwealth had presented sufficient evidence to prove a beyond a reasonable doubt that the Defendant "possessed" "drug paraphernalia" as those terms are defined by statute and case law?

Suggested Answer: Yes.

Subsection 32 of section 780-113 of The Controlled Substance, Drug, Device and Cosmetic Act prohibits the "use of, or possession with intent to use, drug paraphernalia" for the purpose of committing various acts pertaining to introducing into the human body

a controlled substance in violation of this act. The term "drug paraphernalia" is defined as "all equipment, products and materials of any kind which are used, intended for use or designed for use" in committing various acts pertaining to the introduction of a controlled substance into the body in violation of The Controlled Substance, Drug, Device and Cosmetic Act. 35 P.S. §780-102(b). "Drug paraphernalia" includes, but is not limited to "[o]bjects used, intended for use or designed for use in ingesting, inhaling or otherwise introducing marihuana, cocaine, hashish or hashish oil into the human body, such as….[m]etal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls. 35 P.S. §780-102(b).

Section 780-102 of Title 35 provides guidance as to factors to be considered when determining whether an item is drug paraphernalia. Commonwealth v. Torres, 617 A.2d 812, 815 (Pa. Super. 1992). "The thrust of these considerations is that the Commonwealth must establish that the items possessed were used or intended to be used with a controlled substance." Id. "Chief among the factors to be considered by the court is expert testimony concerning the object's use." Commonwealth v. Lacey, 496 A.2d 1256, 1261 (Pa. Super. 1985). In order to sustain a conviction for possession of drug paraphernalia, the Commonwealth must present evidence that the items possessed by the defendant were used or intended to be used with a controlled substance so as to constitute drug paraphernalia and this burden may be met by Commonwealth through circumstantial evidence. Commonwealth v. Coleman, 984 A.2d 988, 1001 (Pa. Super. 2009).

As the controlled substance was not found on the defendant's person, he was not in "actual possession," and the Commonwealth therefore must present evidence that the defendant constructively possessed said substance. Commonwealth v. Petteway, 847 A.2d 713, 716 (Pa. Super. 2004), citing Commonwealth v. Vallette, 613 A.2d 548, 550 (Pa. 1992). "Constructive possession is a legal fiction, which is invoked when actual possession at the time of arrest cannot be shown, but there is a strong inference of possession for the facts surrounding the case." Commonwealth v. Battle, 883 A.2d 641, 644 (Pa. Super. 2005). Constructive possession requires "conscious dominion," which is comprised of the following two elements: 1) power to control the contraband; and 2) the intent to exert such control. Id. at 645. Constructive possession may be established by the totality of the circumstances. Commonwealth v. Bricker, 882 A.2d 1008, 1014 (Pa. Super. 2005). "Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not." Commonwealth v. Parker, 847 A.2d 745, 750 (Pa. Super. 2004).

At the non-jury trial, the Commonwealth presented testimony from White regarding the glass pipe that was located in the Defendant's residence. The Commonwealth elicited testimony from White regarding his training related to marijuana and related devices. (N.T. 8/20/09, p. 42; R184). The Commonwealth then asked White about his opinion regarding the pipe, and White responded by saying that "I thought based on my training and experience it was a piece of drug paraphernalia. (N.T. 8/20/09 p. 42; R184). Defense counsel objected to the conclusion that the item was drug

paraphernalia as White did not explain the rationale or basis for his conclusion, similar to the analysis and rationale that was presented in Trenge discussed *supra.* (N.T. 8/20/09, p. 42; R184). It is important to note that the trial judge expressly stated that White was not testifying as an expert. (N.T. 8/20/09, p. 49; R191). As the trial judge did not treat White as an expert, his opinion that the pipe was paraphernalia should not have been accepted by the court, and the Commonwealth was therefore lacking a chief factor in the paraphernalia determination.

The glass pipe was found in a cabinet next to the stove in the kitchen. (N.T. 8/20/09, p. 55; R197). Martin testified that his conclusion that the glass pipe was paraphernalia was based upon his visual observations and the fact that it was located near suspected marijuana. (N.T. 8/20/09, p. 61; R203). It was later discovered that the suspected marijuana was not in fact marijuana. (See N.T. 1/8/2009, p. 54; R82). At no point did the Commonwealth ask Martin if he believed that the glass pipe was "drug paraphernalia" as defined by statute.

It is clear that the only factor that circumstantially evidences that the pipe was paraphernalia was that the pipe tested positive for the presence of marijuana. In order to find the Defendant guilty of Possession of Drug Paraphernalia, the Commonwealth was required to present evidence that the Defendant used or possessed with intent to use. The record is devoid of any evidence that the Defendant used the pipe to smoke marijuana. The presence of marijuana residue evidences that the pipe had been used by someone at some point in time to smoke marijuana, but there is no evidence that the pipe was used by the Defendant. There was also no evidence that the Defendant possessed the pipe with the intent to use it to ingest marijuana. To the contrary, the pipe was located near a green leafy substance that was not marijuana. The Commonwealth also failed to elicit testimony from White or Martin that their experience allowed them to be considered an expert by the court and they could therefore opine that the pipe was used to inhale marijuana. After considering all the evidence presented, the Commonwealth failed to prove beyond a reasonable doubt that the pipe was paraphernalia that was either used by the Defendant or intended to be used by the Defendant to inhale or ingest marijuana.

The Commonwealth also failed to present sufficient evidence showing that the Defendant constructively possessed the pipe. "Where more than one person has equal access to where drugs are stored, *presence alone* in conjunction with such access will not prove conscious dominion over the contraband." Commonwealth v. Ocasio, 619 A.2d 352, 354 (Pa. Super. 1993), quoting Commonwealth v. Davis, 480 A.2d 1035, 1045 (Pa. Super. 1984). In Ocasio, the Superior Court reviewed a constructive possession issue in which 567 vials of crack cocaine were found in a trash can in the kitchen during the execution of a search warrant. Id. at 353. The defendant in Ocasio was a resident in the home where the crack cocaine was found. Id. In finding that the defendant in Ocasio did not constructively possess the crack in the kitchen, the Superior Court stated that "[s]ince the drugs were accessible to any residence of the house, the Commonwealth must introduce evidence demonstrating either appellant's participation in the drug related activity or evidence connecting appellant to the specific room or areas where the drugs were kept." Id. at 354-355. The facts here are similar to those Ocasio in that the

Commonwealth failed to present any evidence that the Defendant was the sole resident of the house. Id. at 355. The Commonwealth failed to present evidence that proved beyond a reasonable doubt that the Defendant constructively possessed the pipe that was found in a kitchen cabinet.

After reviewing the entire record of the non-jury trial, it is clear that the Commonwealth failed to present sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. As the pipe was not found on the Defendant's person, the Commonwealth had to rely on a theory of constructive possession. In accordance with the holding in Ocasio, the Commonwealth needed to present more than showing that the Defendant had access to the drugs, but presence alone does not evidence conscious dominion. The Commonwealth also failed to present sufficient evidence to prove beyond a reasonable doubt that the pipe was considered paraphernalia that was either used by or possessed with the intent to use to inhale or ingest marijuana. The Defendant's conviction of Possession of Drug Paraphernalia, 35 P.S. §780-113(a)(32) must be reversed.

CONCLUSION AND RELIEF SOUGHT

The suppression court erred in holding that the magisterial district judge had jurisdiction to modify the Defendant's bail after the Defendant's charges had been held for court. The trial court erred in holding that the bail authorities modifications of the Defendant's bail was in conformance with the requirements set forth in the Pennsylvania Rules of Criminal Procedure, case law, and constitutional protections. The suppression court erred in finding that the Defendant consented to allowing deputy sheriffs to conduct a warrantless entry and search of his home for firearms, and the suppression court erred in finding that White's warrantless entry and search of the Defendant's residence was justified under the exigent circumstances exception. The suppression court erred in finding that the search warrant for the Defendant's residence contained sufficient probable cause to justify its issuance. The above referenced actions of the suppression court violated the Defendant's constitutional rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. All evidence obtained as a result of the unconstitutional searches must be suppressed. The Defendant respectfully requests that this Honorable Court grant the relief sought and issue an Order reversing the Defendant's convictions and remand the matter with an Order granting the suppression of evidence.

The trial court erred in finding that the Commonwealth had presented evidence to prove beyond a reasonable doubt all elements of the charge of Possession of Drug Paraphernalia. More specifically, the Commonwealth failed to present evidence that the Defendant constructively possessed the pipe, and the Commonwealth failed to present evidence that the Defendant used or intended to use the pipe to ingest or inhale marijuana. The Defendant's conviction must be reversed and the matter dismissed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Jason S. Dunkle, Esquire, hereby certify that I served two true and correct copies of the Brief for Appellant and Reproduced record upon the following individuals via First Class, United States Postal Service, Thursday, February 11, 2010:

Stacy Parks Miller, Esquire
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