

IN THE SUPERIOR COURT OF PENNSYLVANIA

MIDDLE DISTRICT

NO.: 1739 MDA 2009

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

HOBSON L. MCKOWN,
Appellant

REPLY 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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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 Commonwealth argues that the sheriffs were authorized by the court order to make a warrantless entry in the Defendant's residence, search said residence for firearms, and take possession of said firearms. The Commonwealth also argues that the Defendant consented to the warrantless entry and search of his residence. The Commonwealth failed to enter the Order into evidence at the suppression hearing. The Defendant objected to the admission of testimony related to the contents of the Order, but said objection was overruled by the suppression court. As the Order was never admitted into evidence, the Commonwealth cannot be permitted to argue that the contents of the Order supported the warrantless entry and search of the Defendant's residence. No competent or reliable evidence was presented to the suppression court that accurately informed the court of the contents of the Order. Even if the Order is considered, it only gave the sheriff the authority to take custody of firearms in the Defendant's possession. The Order did not provide sheriffs the authority to conduct a warrantless entry in the Defendant's residence, conduct a warrantless search, and seize whatever items they deemed appropriate. To the extent that the Commonwealth argues that the Defendant consented, said argument is expressly refuted by the testimony of Deputy Sheriff Albright. Albright admitted that it was clear to him prior to entering the Defendant's residence that the Defendant did not consent to the entry.

The warrantless entry and search of the Defendant's residence 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.

ARGUMENT

1. The entry into the Defendant's residence by deputy sheriffs violated the Defendant's constitutional rights as the seizure of firearms constituted a search of the Defendant's residence and was not a lawful exercise of the sheriff's historic and statutory duty to execute court orders.

The Commonwealth argues that sheriffs possess inherent powers to enter buildings by force if necessary to carry out court orders. Here, the Commonwealth argues that an Order issued by a Magisterial District Judge directing the sheriff's department "to take custody of all firearms in defendant's possession" justified the warrantless entry into the Defendant's property prohibiting the Defendant from possessing (A true and correct copy of the Order is attached to the Reproduced Record at R16). The Commonwealth's argument is that the Order issued by Judge Dutchcot allowed the sheriffs to enter the Defendant's residence and conduct a warrantless search for firearms.

It is critical to note that the Commonwealth never admitted a copy of the Order into evidence at the suppression hearing held before the Judge Thomas King Kistler on January 8, 2009. At the hearing, the Commonwealth attempted to question Deputy Sheriff Albright regarding the Order issued by Judge Dutchcot. (R33). Defense counsel raised a hearsay objection to Albright testifying regarding the contents of the Order under what is commonly referred to as the "best evidence rule." (R34). Without requiring the Commonwealth to respond to the best evidence rule argument, Judge Kistler denies the objection and permitted Albright to testify as to the contents of the Order. (R35).

"To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, by other rules prescribed by the Supreme Court, or by statute." Pa.R.E. 1002. "'Writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation." Pa.R.E. 1001(1). "The 'best evidence' rule, now established in Pa.R.E. 1002, limits the method of proving the terms of a writing to the presentation of the original writing, where the terms of the instrument are material to the issue at hand." Commonwealth v. Townsend, 747 A.2d 376, 379 (Pa. Super. 2000). "The rule is not implicated just because evidence is relevant; the rule applies where the writing itself is necessary to that which must be proved," and the "rule is controlling only if the terms of a writing must be proved to make a case or provide a defense." Id. at 380. The rationale for the best evidence rule is that it prevents the mistransmitting of critical facts as the original writing should be presented to prove its terms. Id. at 381.

Instead of admitting the Order into evidence, the Commonwealth witnesses testified as to their general recollection of the contents of the Order. Albright was unable to present any clear testimony regarding the express language of the Order, more specifically, Albright testified to the following: 1) I'm not sure how it reads (R. 48); 2) I

think it said (R. 48); 3) Does the Order say that you're to take custody of the weapons? I would have to look at the Order (R. 48); 4) Like I said, I would have to look at the Order (R 48); 5) Do you recall the exact language? Was it to retrieve firearms? I would have to look at the Order (R 55); 6) I don't remember exactly what it said (57). Albright later admitted that he had never physically observed the order or read the order prior to attempting to execute same. (R 160).

The rationale for application of the best evidence rule here is clear as said rule would prevent the mistransmitting of critical facts as to the contents of the Order. Townsend, 747 A.2d at 381. When Albright was asked questions as to the precise language or content of the Order, he was unable to speak with any specificity as to the critical facts. By overruling the defendant's objection under the "best evidence rule," the Commonwealth was permitted to present testimony regarding the scope of authority to search and seize permitted by an Order where the declarant had never read the Order and could not testify as to the precise contents or language used in the Order.

As the Commonwealth failed to admit the Order into evidence at the suppression hearing, the suppression court was never provided with the "best evidence" of the contents of the Order. With the crux of the Commonwealth's argument being that the sheriffs were authorized to enter pursuant to the Order, the suppression court would have needed to review the Order to consider whether the Order *per se* violated the Defendant's constitutional rights and whether the sheriffs acted in accordance with the authority set forth by the Order. The Commonwealth's argument that the Order acts as an exception to the warrant requirement should be dismissed as the Order was never admitted into evidence at the suppression hearing.

The Commonwealth argues that execution of the Order allowing the sheriffs to take custody of the firearms was simply the exercise of an administrative function. The suppression court rejected this argument and expressly found that "'conditions of bail' are not the equivalent of a Court order authorizing law enforcement to take custody of a Defendant's firearms." (R 137). More specifically, the court stated that the "Defendant had the choice of either **surrendering** his firearms or having his bail revoked and being sent to prison." (emphasis added)(R 137). It was clear to the trial court that the purpose of the Order was to allow the sheriff to accept custody of the weapons if the Defendant voluntarily surrendered them, or, in the event that the Defendant refused to surrender said weapons, that he be returned to the magistrate for a bail revocation proceeding. Deputy Sheriff Albright testified that "it was very clear" that the Defendant did not want Albright or other law enforcement officers entering his residence. (R50). As it was clear to Albright that the Defendant was not complying with his bail condition to surrender his firearms, according to the trial court's rationale, the sheriffs should have stopped their actions of attempting to enter the residence and instead taken the Defendant before the magistrate.

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). 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). 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). “[S]heriffs have only such independent investigative authority to seek out evidence of wrongdoing that is committed outside their presence as is expressly authorized by statute.” Commonwealth v. Dobbins, 934 A.2d 1170, 1171 (Pa. 2007),

In Dobbins, the Pennsylvania Supreme Court reviewed the authority of sheriff to conduct an investigation of a violation of the Controlled Substances Act, obtain a search warrant related thereto, and ultimately to file a Police Criminal Complaint. 934 A.2d at 1175-1175. The Dobbins Court expressly rejected the Commonwealth’s argument that while “sheriffs are not investigative or law enforcement officers for purposes of the Wiretapping Act, they are law enforcement officers for essentially any other purpose.” Id. at 1179. The Dobbins Court referenced prior Pennsylvania Supreme Court precedent in stating that the court had a “duty to strictly construe any statute that grants authority to invade individuals’ constitutional right to privacy.” Id. at 1180. In reviewing the privacy interest, the Court noted that the “sheriff’s deputies conducted an un-warranted investigation of private property” and “sought, secured, and executed a search warrant.” Id. at 1181. The Dobbins Court ultimately held that the sheriffs did not have the authority to conduct an investigation that was not expressly authorized by statute and suppressed all evidence derived therefrom. Id.

In the instant case, Deputy Sheriff Albright testified generally that there was an Order that directed the Sheriff’s Department to take possession of firearms and/or weapons. As discussed *supra*, the precise language of the Order is unknown as the Commonwealth failed to admit a copy thereof into evidence. However, no testimony was presented that the Order provided the Sheriff’s Department expressly with any authority or authorization to enter onto private property, conduct a warrantless search for weapons, and contact other law enforcement agencies to assist in the warrantless search. The Sheriff is able to do this without any showing of probable cause to believe that weapons were present in the Defendant’s home. It is the court’s duty to strictly construe the Order as it was interpreted to grant authority to invade Defendant’s constitutional right to privacy. Id. at 1180. The sheriffs had no independent investigative authority to enter onto Defendant’s property and thereafter enter Defendant’s residence without a warrant in order to conduct a warrantless search for weapons.

There is a critical difference between a sheriff having authority to seize weapons pursuant to a Protection from Abuse Order and a bail order to do the same. The PFA statute specifically provides the sheriffs with the authority to seize all firearms, other weapons, and ammunition for a violation of a PFA order. 23 Pa.C.S.A. §6113(a)(b). As required by the Dobbins Court, said statute provides the sheriff with express statutory authority. The Rules of Criminal Procedure relating to bail, i.e., Rule 520-536, do not contain an express statutory authority permitting the sheriff to seize all firearms, other weapons, and ammunition, therefore the current situation is factually and legally distinguishable from the PFA context. The ‘standard operating procedure’ testified by Deputy Albright, is no substitute for the requirement of a search warrant to search and seize items from the Defendant’s home.

While the exact language of the Order was not presented by the Commonwealth, the Commonwealth witnesses generally testified that they were to take possession of Defendant’s firearms and/or weapons. The sheriff is not conferred with such authority under any statute or under any caselaw interpreting the sheriff’s common law authority. Therefore, the sheriff was not the appropriate agency to execute an order seizing Defendant’s weapons under the facts of this case. In order for a search warrant to comply with constitutional parameters, it must describe the place to be searched and set forth the time in which the warrant can be executed. The Order, as testified to by the Deputy Albright, would have placed no parameters on the sheriff with regard to place or time in which to search but would instead have permitted the sheriff to enter any/all residences or other forms of private property and conduct warrantless searches. Such an Order would clearly be violative of Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United State Constitution. To the extent that this Court interprets the Order to not violate Defendant’s constitutional rights, the Court must strictly construe the Order and the authority associated therewith as it infringes on Defendant’s privacy rights.

The Commonwealth seeks to substitute a bail order and condition for the requirements of a search warrant.

CONCLUSION AND RELIEF SOUGHT

The suppression court erred in allowing the Commonwealth to present testimony regarding the contents of the Order without requiring the Commonwealth to admit the best evidence of the contents of the Order, meaning the Order itself. Not only did the Commonwealth fail to admit the Order into evidence, the Commonwealth also had a deputy sheriff that had never read the Order testify as to its contents. As the precise contents of the Order was never provided to the suppression court, the Commonwealth could not argue that the sheriffs acted in accordance with the authority set forth in a Order to which the judge was ignorant as to the scope of authority issued. By failing to provide the judge with the contents of the Order, the judge could not define the scope of authority issued, and therefore could not render an informed decision on whether the sheriffs acted in accordance with the authority set forth in the Order. Execution of the Order was also not administrative or ministerial as it was warrantless search of the Defendant's residence and car for weapons. An Order issued by a magistrate judge as a bail condition cannot give a sheriff more authority to search a citizen's property than would be permitted under either the Federal or state constitutions. Both Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution require that an issuing authority be provided with probable cause to believe that items sought are expected to be found in a particular location. Here, the Commonwealth argues that an Order allowing a sheriff to take custody bypasses constitutional protections and allows an arm of law enforcement to conduct warrantless searches and seizures wherever the Defendant's property may be found. Such general searches were the reason our Founding Fathers included the aforementioned constitutional protections.

The warrantless search of the Defendant's residence 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.

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 Reply Brief for Appellant and Reproduced record upon the following individuals via First Class, United States Postal Service, Wednesday, May 12, 2010:

Sean McGraw, Esquire
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