NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
HOBSON L. MCKOWN,	:	
Appellant	:	No. 1739 MDA 2009

Appeal from the Judgment of Sentence entered August 20, 2009
in the Court of Common Pleas of Centre County Criminal Division
at No(s): CP-14-CR-0001610-2008

BEFORE: ALLEN, MUNDY, and COLVILLE,* JJ.

MEMORANDUM: FILED: October 7, 2010

Appellant, Hobson L. McKown, appeals from the August 20, 2009 judgment of sentence imposed after being found guilty of possession of drug paraphernalia.[1] After careful review, we reverse and remand for proceedings consistent with this memorandum.

The relevant facts as set forth by the trial court are as follows.

> On the day of [Appellant]'s arrest, [Appellant] had originally been taken to the Centre County Courthouse for a preliminary hearing on a separate matter. Upon the conclusion of the preliminary hearing, the Commonwealth requested that the court modify [Appellant]'s bail and prohibit [Appellant] from possessing any firearms.[2] Magisterial District

[1] 35 P.S. § 780-113(32).

[2] From the certified record we discern that Appellant was in front of District Justice Jonathan Grine on September 2, 2008, for a hearing unrelated to the charges presently before us.

* Retired Senior Judge assigned to the Superior Court.

> Judge Leslie A. Dutchcot modified [Appellant]'s bail to include a special condition that he was not able to possess any firearms.
>
> [Appellant] proceeded to the Sheriffs Department to make arrangements to comply with the surrender of his firearms. Upon learning that sheriff's deputies would accompany him into his home in order to secure the firearms, [Appellant] attempted to negotiate an alternate time or way in which the weapons could be surrendered. The sheriff's deputies refused to wait until a later time in which to enforce the order and explained to [Appellant] that, as the surrender of his firearms was a condition of his bail, failure to comply with this condition would likely result in his bail being revoked.
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> [Appellant] then agreed to comply with his bail conditions and accompany the sheriff's deputies to his residence to retrieve the firearms. [Appellant]'s residence is a mobile home trailer divided into two living units. Upon arriving at [Appellant]'s residence, the sheriff's deputies were met by a middle aged female who the police later discovered was [Appellant]'s mother. The sheriff's deputies asked the female to stay outside the residence while they collected the guns.
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> As [Appellant] and the sheriff's deputies were walking towards the residence, [Appellant] began to once again ask the sheriff's deputies if they could make an alternate arrangement to collect the firearms and slowed his pace as the group approached the residence. At approximately thirty

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On said date, Appellant arrived at court carrying a concealed weapon which resulted in his arrest and three firearms charges which are currently listed as "active" on the Court of Common Pleas docket at CP-14-CR-0001569-2008. As a result of the firearms charges, a preliminary hearing was held on September 10, 2008, at which time District Justice Leslie A. Dutchcot modified Appellant's bail to prohibit Appellant from possessing firearms. Certified Record (C.R.) at 38; ***see also*** N.T., 9/10/08. As a direct result of Appellant's bail modification, Centre County sheriffs proceeded with Appellant to his home to confiscate his firearms. The search of Appellant's home resulted in the drug paraphernalia charge currently before us, as listed on the Court of Common Pleas docket at No. CP-14-CR-0001610-2008.

feet from the residence, [Appellant] stopped walking and stood still, looking extremely nervous. At this moment, the sheriff's deputies became concerned that there was something in the trailer which was dangerous. The sheriff's deputies asked [Appellant] if there was anything in the residence that could harm or hurt them. [Appellant] responded that there was not but the sheriff's deputies remained unconvinced.

As a result of [Appellant]'s nervous behavior, the sheriff's deputies handcuffed [Appellant] and retrieved the house key from his left front pocket. Deputy Albright walked up the steps and opened the door a few inches in order to peer inside. Upon looking into the residence, Deputy Albright observed a sign which read, "I do not consent to this search." Stacked near the sign were six ammunition cans. Upon viewing the ammunition cans, Deputy Albright opened the door further and observed a computer desk with a set of wire cutters, voltage meter, circuit boards, phone cords and hard drives. There was also another ammunition can next to the door and three mouse traps stacked on top of each other on the kitchen counter.

Deputy Albright had seven years experience as a K-9 handler of an explosive detection dog and 200+ hours of explosives and IED (Improvised Explosive Device) training. He recognized the aforementioned objects as components used in the construction of explosives or IEDs. Deputy Albright backed out of the residence and contacted the local bomb tech, Officer White. Shortly before Officer White arrived, [Appellant] was placed in the back of a police cruiser while handcuffed and transported to a holding cell. Upon arriving at the residence, Officer White agreed that if he were to encounter any IEDs or booby traps he would render them safe and contact the appropriate federal employees and obtain a search warrant for IED components and explosives. Officer White then entered the residence without a warrant. During the search, Officer White observed items which are used to manufacture

> components of IEDs. In addition to searching the open areas for bombs, Officer White opened kitchen cabinets in order to allow the officers to retrieve the firearms in safety. Officer White opened these areas because the size of an IED could be as small as a thumb. In a kitchen cabinet were several shipping envelopes and a cloth bag. Officer White looked inside the bag and recognized a pipe which he believed was used to smoke marijuana. In one of the envelopes, Officer White felt what he believed to be another pipe used to smoke marijuana. Officer White also observed a green, substance which he believed was marijuana. The substance was later determined not to be a controlled substance.
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> Officer White immediately notified the other officers of what he found and then completed his search of the area for explosives. No items were found which presented a danger to law enforcement. Based on Officer White's observations, Detective Martin obtained a search warrant for the pipe and substance which was believed to be marijuana. The pipe was later determined to contain marijuana residue.

Trial Court Opinion, 11/6/09[3], at 3-5 (footnote omitted).

Thereafter, Appellant was charged with possession of a small amount of marijuana and possession or use of drug paraphernalia. A pre-trial hearing was held on January 8, 2009. Certified Record (C.R.) at 18. At the hearing, upon agreement of the Commonwealth, the trial court dismissed the possession of a small amount of marijuana charge. N.T., 1/8/09, at 67. The trial court bound over the possession or use of drug paraphernalia charge for trial, and denied Appellant's pre-trial motions by an opinion and

[3] We note that the trial court incorporated as part of its November 6, 2009 Rule 1925(a) opinion, its 4/28/09 suppression order and opinion, addressing the issues considered and resolved at the January 8, 2009 suppression hearing.

order dated April 28, 2009. ***Id.***

Following a non-jury trial on August 20, 2009, Appellant was found guilty of possession of drug paraphernalia. C.R. at 37. On September 17, 2009, Appellant was sentenced to six months' probation. C.R. at 27. Appellant filed a notice of appeal on October 2, 2009.[4]

On appeal, Appellant raises the following issues for our review.

> 1. Did the suppression court err in finding that the magisterial district judge had jurisdiction to modify the [Appellant]'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 [Appellant]'s constitutional rights?
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> 2. Did the suppression court err in finding that defendant freely and voluntarily consented to the warrantless entry and search of his residence for firearms by deputy sheriffs and other law enforcement officers?
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> 3. Did the suppression court err in finding that the [Appellant]'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?
>
> 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 [Appellant]'s residence based upon an "exigent circumstances" exception to the warrant requirements as set forth in the Fourth

[4] While it does not appear from the certified record to have been ordered by the trial court, Appellant and the Commonwealth have both complied with Pa.R.A.P. 1925.

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

Appellant's Brief at 4.

Before reaching the merit of Appellant's suppression arguments, we must resolve the challenge to District Justice Dutchcot's jurisdiction to modify Appellant's bail. Preliminarily we note that District Justice Dutchcot modified Appellant's bail on September 10, 2008 at the preliminary hearing conducted on the firearms charges pending in the Court of Common Pleas at Docket No. CP-14-CR-0001569-2008. Because the instant appeal involves **only** Appellant's conviction for possession of drug paraphernalia, docketed at No. CP-14-CR-0001610-2008, Appellant's challenge to District Justice Dutchcot's jurisdiction to modify bail is not presently before us. The proper avenue to challenge the District Judge's jurisdiction to modify bail on the firearms charges would lie in an appeal from the judgment of sentence imposed at Docket No. CP-14-CR-0001569-2008.

However, even if the jurisdiction issue was properly before us, we conclude District Justice Dutchcot acted within her jurisdiction in modifying Appellant's bail. On January 8, 2009, a hearing was held on Appellant's omnibus pre-trial motions for the charges pursuant to both docket numbers, CP-14-CR-0001569-2008 and CP-14-CR-0001610-2008. N.T., 1/8/09. At the hearing, Appellant challenged District Justice Dutchcot's order and averred, "I'm going to argue that Judge Dutchcot didn't actually even have jurisdiction to issue this order. The bail modification occurred after the preliminary hearing was over. She bound the charges over. So to me at that point her jurisdiction of the case is done." ***Id.*** at 62.

District Justice Dutchcot's jurisdiction is guided in pertinent part by the Pa.R.Crim.P. 529, **Modification of Bail Order Prior to Verdict**.

> (A) The issuing authority who is the magisterial district judge who was elected or assigned to preside over the jurisdiction where the crime occurred, upon request of the defendant or the attorney for the Commonwealth, or by the issuing authority *sua sponte*, and after notice to the defendant and the attorney for the Commonwealth and an opportunity to be heard, may modify a bail order at anytime before the preliminary hearing.
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> **(B) A bail order may be modified by an issuing authority at the preliminary hearing.**
>
> (C) The existing bail order may be modified by a judge of the court of common pleas:
>
> (1) at any time prior to verdict upon motion of counsel for either party with notice to opposing counsel and after a hearing on the motion; or

> (2) at trial or at a pretrial hearing in open court on the record when all parties are present.
>
> (D) Once bail has been set or modified by a judge of the court of common pleas, it shall not be modified except
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> (1) by a judge of a court of superior jurisdiction, or
>
> (2) by the same judge or by another judge of the court of common pleas either at trial or after notice to the parties and a hearing.
>
> (E) When bail is modified pursuant to this rule, the modification shall be explained to the defendant and stated in writing or on the record by the issuing authority or the judge.

Pa.R.Crim.P. Rule 529 (emphasis added).

At the September 10, 2008 preliminary hearing, District Justice Dutchcot stated on the record that it was her intention to bind over for trial all charges and to grant the Commonwealth's request to modify Appellant's bail. Essentially, Appellant is now arguing that because District Justice Dutchcot stated her intention to bind over the charges on the record first, before resolving the Commonwealth's request for bail modification, she had relinquished jurisdiction to the Court of Common Pleas.

Appellant's argument is an attempt to distort the plain meaning of the above rule. While it is clear from subsection (D) that once the Court of Common Pleas has jurisdiction the District Justice would no longer have jurisdiction to modify bail, nowhere does Rule 529 state that the District Justice relinquishes jurisdiction at the instant he or she pronounces his or

her intention to bind the charges over for trial. Rather, a plain reading of the rule demonstrates that only after the business of the preliminary hearing is resolved, any or all related orders are entered, and the hearing is concluded, does the district justice relinquish jurisdiction to the Court of Common Pleas.

Pa.R.Crim.P. 529(B) states bail may be modified at the preliminary hearing, which is precisely what happened herein. In support of her decision to modify bail District Justice Dutchcot stated the following.

> [W]e had numerous cases where there's never been a problem with asking to have firearms removed from a location when the interest of public safety is afoot.
>
> And in the interest of public safety I'm certainly willing to grant the requested bail modification that all weapons be surrendered to the custody of the Centre County Sheriff's Department.
>
> Just because nothing has happened to this point I am not willing to take a chance on any future incidents. And in consideration of the fact that [Appellant] was told by court staff and then again would have seen written notice on the day that this incident occurred I'm not so certain that we can rely on his honor not to violate this statute any further or to allow him to possess any firearms during the course of these proceedings.

N.T., 9/10/08, 61-62.

In summation, we conclude that the jurisdiction issue is not properly before us, as it should be appealed in conjunction with Docket No. CP-14-

CR-0001569-2008, and, moreover, that District Justice Dutchcot acted within her discretion when she modified Appellant's bail.

We now turn to Appellant's suppression issues. In his second and third issues, Appellant avers that the suppression court erred in finding that he freely and voluntarily consented to the warrantless search of his house, and that his consent to comply with the bail condition permitted a warrantless entry into his residence. Appellant's Brief at 13, 17.

"Our standard of review when addressing a challenge to a trial court's denial of suppression is whether the factual findings are supported by the record and whether the legal conclusions drawn from these facts are correct." ***Commonwealth v. Tiffany***, 926 A.2d 503, 506 (Pa. Super. 2007) (citations omitted), *appeal denied*, 948 A.2d 804 (Pa. 2008).

> When it is a defendant who has appealed, we must consider only the evidence of the prosecution and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. With respect to factual findings, we are mindful that it is the sole province of the suppression court to weigh the credibility of the witnesses. Further, the suppression court judge is entitled to believe all, part or none of the evidence presented.

Commonwealth v. Swartz, 787 A.2d 1021, 1023 (Pa. Super. 2001) (citations omitted).

> The Fourth Amendment to the United States Constitution and Article 1, § 8 of the Pennsylvania Constitution require that searches be conducted pursuant to a warrant issued by a neutral and detached magistrate. A warrantless search or

> seizure is *per se* unreasonable unless it falls within a specifically enumerated exception.

Commonwealth v. Rowe, 984 A.2d 524, 526 (Pa. Super. 2009).

"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), *cert. denied*, 540 U.S. 972 (2003). "To establish a valid consensual search, the Commonwealth must first prove that the consent was given during a legal police interaction. Where the underlying encounter is found to be lawful, voluntariness becomes the exclusive focus." ***Commonwealth v. Acosta***, 815 A.2d 1078, 1083 (Pa. Super. 2003), *appeal denied*, 839 A.2d 350 (Pa. 2003). "In order for consent to be valid, it must be unequivocal, specific, and voluntary. Consent must also be given free from coercion, duress, or deception. The voluntariness of consent is a question of fact that is determined by looking at the totality of the circumstances." ***Commonwealth v. Edwards***, 735 A.2d 723, 725 (Pa. Super. 1999).

First, we must address whether the sheriffs were lawfully present at Appellant's home pursuant to the mandates of Appellant's bail release conditions. The bail release conditions stated the following.

> Defendant is prohibited from possession of any firearms while on bail. All firearms in Defendant's possession are to be immediately surrendered to the Centre County Sheriff's Department.

C.R. at 38. Based on the foregoing, the sheriffs accompanied Appellant to his residence to surrender his firearms. At the suppression hearing, on direct examination, Assistant District Attorney Larrabee questioned Deputy Albright on the standard procedures for obtaining firearms upon a district magistrate imposing such bail conditions.

> [Q.] []. Is there a standard operating procedure for when you have to go and collect weapons?
>
> [A.] Yes.
>
> [Q.] What is that standard procedure?
>
> [A.] Obviously, we get service of the order, and when we enter the residence to collect the weapons, we actually do the collection for safety reasons.
>
> [Q.] Why is that?
>
> [A.] For safety reasons.
>
> [Q.] Okay.
>
> [A.] We'll ask the defendant where the weapons are located. We'll retrieve them. Make sure they're safe, they're not loaded. Take an inventory and - -
>
> [Q.] Is the owner of the weapons generally with you when you do this?
>
> [A.] Generally, yeah.

N.T., 4/28/09, at 6-7. The suppression court conceded that if Appellant had rejected the conditions of the modified bail order, law enforcement would have had no right to enter Appellant's residence absent his express consent. Suppression Court Opinion, 4/28/09, at 5.

Having established the officers were legally present at Appellant's home, our focus now turns to whether Appellant consented to the sheriffs entering his residence. Appellant's consent to meeting the conditions of his bail does not imply that the officers had the authority to conduct a warrantless search of Appellant's house absent consent or exigent circumstances. ***See Rowe***, ***supra***.

Appellant's counsel cross-examined Deputy Albright at the suppression hearing as to whether he and the other sheriffs obtained Appellant's consent before entering Appellant's residence.

> [Q.] []. I had asked you previously did [Appellant] expressly tell you that you can't enter but I'm going some say by his body language, it was clear to you that he didn't want you going into that residence?
>
> [A.] It was very clear.
>
> [Q.] Okay. And he was handcuffed prior to you guys ever opening the door; is that true?
>
> [A.] That's true.
>
> [Q.] And he was handcuffed before you went into -- or a deputy went into his pocket and retrieve[d] the house key; is that true?
>
> [A.] Right.
>
> [Q.] Okay. To the best of your knowledge, at any point did [Appellant] consent to somebody going into his pocket to retrieve that house key?
>
> [A.] I believe one of the deputies asked him where the key was.
>
> [Q.] Okay.

> [A.] He said: It's in my left front pocket.
>
> [Q.] To the best of your knowledge, he didn't say: It's in my front pocket. Go ahead and get it. Go ahead and go in the house?
>
> [A.] No.
>
> [Q.] I'm sorry. That was a double question. At no point to your recollection did he say: It's in my pocket. Feel free to pull it out. You have my consent to go in my pocket and pull out the key; didn't say that?
>
> [A.] No.
>
> [Q.] Okay. But somebody did go in his pocket. Do you remember that deputy?
>
> [A.] I believe it was Deputy Berry.
>
> [Q.] Okay. And did Deputy Berry proceed to the residence and open the door or did he hand the key off to another deputy?
>
> [A.] He handed the key to me.
>
> [Q.] He handed it to you. Okay. So you put it - - inserted the key into the lock, opened the door and cracked it?
>
> [A.] Yes.
>
> [Q.] Okay. At no point did [Appellant] consent to that?
>
> [A.] He wasn't asked.

N.T., 1/8/09, at 22-24.

Bearing in mind our standard, in light of the facts before us, we disagree with the suppression court that Appellant freely and voluntarily

consented to a warrantless entry of his house. Accordingly, we conclude that the trial court erred in denying Appellant's suppression motion and therefore reverse said order and remand for proceedings consistent with this memorandum.

Order reversed. Case remanded. Jurisdiction relinquished.

Judge Colville concurs in the result.

Judgment Entered.

Deputy Prothonotary

Date: October 7, 2010