

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

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : No.: CP-14-CR-1610-2008
 :
 HOBSON MCKOWN :

DEFENDANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

AND NOW, comes the Defendant, Hobson McKown, by and through his counsel, Jason S. Dunkle, Esquire, and Masorti & Sullivan, P.C. and brings this Brief in Support of Defendant's Omnibus Pretrial Motion, whereof the following is a statement:

I. PROPOSED FINDINGS OF FACT

1. Defendant appeared at Central Court in the Centre County Courthouse on September 10, 2008, for a preliminary hearing on another criminal case.
2. Upon the conclusion of the preliminary hearing, the Commonwealth orally requested that the court modify Defendant's bail and prohibit Defendant from possessing any firearms.
3. Defendant objected to the bail modification.
4. Magisterial District Judge Leslie A. Dutchcot modified Defendant's bail to include a special condition that he was not able to possess any firearms. (N.T. 1/8/2009, p. 4, lines 13-16).
5. Defendant proceeded to the Sheriff's Department to make arrangements to comply with the surrender of his weapons. (N.T. 1/8/2009, p. 9, lines 1-3).
6. Defendant attempted to negotiate with members of the Sheriff's Department and have either Defendant or a third party surrender Defendant's weapons. (N.T. 1/8/2009, p. 9, lines 15 thru p. 10, line 7).
7. After approximately five to ten minutes of Defendant attempting to negotiate the surrender of his weapons, Sheriff Denny Nau advised Defendant that his non-compliance with him would cause the Sheriff to contact the court and seek a bail revocation. (N.T. 1/8/2009, p. 10, lines 8-16; p. 17, lines 1-16).

8. Deputy Sheriff Eric Albright (Deputy Sheriff Albright) was aware that the remedy for Defendant's non-compliance was bail revocation. (N.T. 1/8/2009, p. 17, lines 17-20).
9. Members of the Sheriff's Department transported the Defendant to his residence. (N.T. 1/8/2009, p. 11, line 1).
10. Defendant and the deputy sheriffs arrived at his residence at approximately 3:00 p.m. (N.T. 1/8/2009, p. 30, lines 1-3).
11. At his residence, Defendant renewed his attempts to negotiate with the Sheriff's Department to have either himself or his mother retrieve the weapons from his residence. (N.T. 1/8/2009, p. 11, lines 14-20; p. 19 lines 8-14; p. 21, lines 13-17).
12. Based upon Defendant's actions, it was very clear to Deputy Sheriff Albright that Defendant did not want law enforcement to enter his residence. (N.T. 1/8/2009, p. 22, lines 19-24).
13. The members of the Sheriff's Department "told him he was going to go in with us, and he was going to tell us where the weapons were, and we were going to retrieve them." (N.T. 1/8/2009, p. 12, lines 3-7).
14. Deputy Sheriff Albright asked Defendant if there was anything in the residence that would harm him or the other deputy sheriffs. (N.T. 1/8/2009, p. 13, lines 4-7).
15. Defendant stopped walking towards his residence. (N.T. 1/8/2009, p. 12, line 8).
16. Defendant was then handcuffed. (N.T. 1/8/2009, p. 23, lines 3-6).
17. Members of the Sheriff's Department conducted a warrantless search of Defendant's person and retrieved a house key from his left front pants pocket. (N.T. 1/8/2009, p. 13, lines 11-13).
18. Deputy Sheriff Albright used the house key and opened the front door to Defendant's residence. (N.T. 1/8/2009, p. 13, lines 13-16).
19. The deputy sheriffs conducted the warrantless entry into Defendant's residence at approximately 3:05 to 3:10 p.m. (N.T. 1/8/2009, p. 30, lines 12-15).
20. A sign was hung from the rightside of Defendant's doorway that expressly stated that Defendant did not consent to this search. (N.T. 1/8/2009, p. 13, lines 19-23).
21. Deputy Sheriff Albright entered the residence and surveyed the scene for approximately five minutes. (N.T. 1/8/2009, p. 30, lines 21-23).

22. Deputy Sheriff Albright then observed electronic components and mouse traps and believed that said materials could be used to make bombs. (N.T. 1/8/2009, p. 14, lines 13-25; p. 15, lines 3-5).
23. Deputy Sheriff Albright and the other deputy sheriffs immediately exited Defendant's residence. (N.T. 1/8/2009, p. 16, lines 5-6).
24. Deputy Sheriff Albright made contact with Penn State University's Bomb Technician Officer Matt White. (Officer White)(N.T. 1/8/2009, p. 5-11).
25. Officer White arrived at Defendant's residence at approximately 5:00 p.m. (N.T. 1/8/2009, p. 30 line 24 thru p. 31, line 1).
26. Shortly before or after Officer White arrived, Defendant was transported to the Ferguson Township Police Department and placed in a holding cell. (N.T. 1/8/2009, p. 55, lines 21-24).
27. Officer White met with the deputy sheriffs and the Ferguson Township police and developed a "plan." (N.T. 1/8/2009, p. 37 lines 20-25).
28. The plan called for Officer White to enter Defendant's residence, conduct a search for explosive devices, and, if either explosive devices or other evidence of criminality was discovered, a warrant would be sought thereafter. (N.T. 1/8/2009, p. 37, lines 20 thru p. 38, line 3).
29. Officer White entered Defendant's residence and conducted a warrantless search. (N.T. 1/8/2009, p. 42, lines 1-11).
30. During Officer White's search, he discovered a cloth bag. (N.T. 1/8/2009, p. 46, lines 23-25).
31. Officer White manipulated the bag, opened same, and found a pipe. (N.T. 1/8/2009, p. 47, 1-11).
32. Officer White exited the residence and spoke with Detective Joshua Martin of the Ferguson Township Police Department (Detective Martin) regarding discovery of the pipe. (N.T. 1/8/2009, p. 39, line 25 thru p. 40, line 4).
33. Detective Martin then filed an Application for Search Warrant and Authorization before Magisterial District Judge Dutchcot. (A true and correct copy of the Application was attached to Defendant's Omnibus Pretrial Motion as "Defendant's Exhibit A").
34. Magisterial District Judge Dutchcot issued the requested warrant to search Defendant's residence.

35. After a protective search of the residence by Officer White, members of the Sheriff's Department conducted a search for weapons. (N.T. 1/8/2009, p. 25, line 23 thru p. 26, line 2).
36. Detective Martin and other members of law enforcement executed the search warrant on Defendant's residence and seized suspected marijuana and paraphernalia. (A true and correct copy of the Receipt/Inventory was attached to Defendant's Omnibus Pretrial Motion as "Defendant's Exhibit B").
37. Detective Martin filed a Police Criminal Complaint charging Defendant with Possession of a Small Amount of Marijuana, 35 P.S. §780-113(a)(31), and Possession of Drug Paraphernalia, 35 P.S. §780-113(a)(32).
38. On January 8, 2009, the charge of Possession of a Small Amount of Marijuana was dismissed as the substance sent to the Pennsylvania State Police Forensic Lab did not test positive for marijuana. (N.T. 1/8/2009, p. 65, lines 10-22).

II. PROPOSED CONCLUSIONS OF LAW

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).

A. "BEST EVIDENCE RULE" – Pa.R.E. 1002

"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.

The crux of the Commonwealth's argument is that the Sheriff's Department and other law enforcement officers were justified in entering and searching Defendant's residence based

upon an alleged Order issued by Magisterial District Judge Dutchcot upon the conclusion of Defendant's preliminary hearing on September 10, 2008. Centre County Deputy Sheriff Eric Albright testified that on September 10, 2008, "we were given a court order from a district magistrate to gather some weapons or to seize some weapons." (N.T. 1/8/2009, p. 5, line 16 thru p. 6, line 1). Officer White admitted that he did not have a warrant to enter Defendant's residence and conduct a search. (N.T. 1/8/2009, p. 42, lines 1-11). He testified that he entered under the direction of the Sheriff's Department pursuant to the Order. (N.T. 1/8/2009, p. 42, lines 16-25). Detective Martin testified that law enforcement developed a plan to allow the sheriffs to serve the court order. (N.T. 1/8/2009, p. 52, lines 1-4). The plan called for Officer White to enter, conduct a thorough search, and, in the event that any evidence of criminal activity was discovered, the police would seek issuance of a search warrant to seize the evidence. (N.T. 1/8/2009, p. 37, line 19 thru p. 38, line 3; p. 47, lines 16-24; p. 52, lines 13-21; p. 58, lines 5-9). At no point did law enforcement obtain a search warrant prior to entering Defendant's residence and conducting a thorough search. (N.T. 1/8/2009, p. 58, 10-14). It is clear that the warrantless entry and subsequent search of Defendant's residence by the Sheriff's Department and Officer White was based upon a perceived authority from a court Order.

As the precise contents of the Order are critical to the Commonwealth's case, defense counsel objected to testimony from Deputy Albright regarding the contents of the Order based upon the "best evidence rule" as set forth in Pennsylvania Rule of Evidence 1002. (N.T. 1/8/2009, p. 6, lines 2-10). The suppression court denied the objection and permitted the Commonwealth to elicit testimony as to the contents of the Order without requiring the Commonwealth to admit the Order into evidence. (N.T. 1/8/2009, p. 6, line 11). 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 Deputy Sheriff 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. More specifically, he provided the following testimony with regard to the Order: 1) I'm not sure how it reads (N.T. 1/8/2009, p. 20, line 3); 2) I think it said (N.T. 1/8/2009, p. 20, line 5); 3) Do you recall the exact language? Was it to retrieve firearms? I would have to look at the Order. (N.T. 1/8/2009, p. 27, lines 6-8); 4) I don't remember exactly what it said (N.T. 1/8/2009, p. 29, lines 18-19). Deputy Sheriff Albright expressly testified that he did not recall the precise language contained on the Order.

As set forth *supra*, it is important to consider that the Commonwealth bears the burden of production and persuasion to prove that the challenged evidence was not obtained in violation of Defendant's rights. West, 834 A.2d at 629. As the Commonwealth is justifying the warrantless entry and search conducted of Defendant's residence by the Sheriff's Department and Officer White upon the existence of an Order, the precise language of the Order is critical in reviewing the authority of law enforcements actions. Pennsylvania Rule of Evidence 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." Townsend, 747 A.2d at 379. The contents of the Order are not simply relevant to the case but are instead necessary to that which must be proved, meaning did the Order grant the Sheriff and other law enforcement with the authority to enter a residence and conduct a warrantless search. As the Order was not admitted

into the evidence, the suppression court must not consider the testimony regarding the authority that the Order may have granted. Since the Commonwealth has failed to carry the burden of production that the evidence was seized lawfully pursuant to a court Order, the evidence must be suppressed. Id.

If this were a 'search warrant' case, and the contents of the search warrant were at issue, such as whether there was probable cause to search, or whether the police were sufficiently specific in describing the place to be search or the items to be seized, then the Commonwealth would be required to enter into evidence the contested search warrant. The Defendant cannot imagine a situation in which a reviewing court would not have a copy of the search warrant before it to review. The same is true here. The failure of the Commonwealth to introduce the bail order before this Court is fatal to its case. This Honorable Court cannot provide meaningful review without a copy of the bail order.

B. REMEDY FOR BAIL VIOLATION IS REVOCATION

"A person who violates a condition of the bail bond is subject to a revocation of release and/or a change in the conditions of the bail bond by the bail authority." Pa.R.Crim.P. 536(a)(1). Deputy Sheriff Albright testified that the Sheriff's Department and Defendant were aware that Defendant's bail had been modified and that Defendant was required to surrender his firearms, and a failure to comply with the bail condition could result in a bail revocation. More specifically, Sheriff Denny Nau told Defendant in the presence of Deputy Albright that if Defendant "didn't comply with the Order that his bail would be revoked." (N.T. 1/8/2009, p. 10, 8-12). Albright was aware that Sheriff Nau had advised Defendant that he had the option of not complying and said non-compliance would possibly result in the revocation of Defendant's bail. (N.T. 1/8/2009, p. 17, lines 12-20). Deputy Albright testified that Defendant was apprehensive about having law enforcement enter his residence. (N.T. 1/8/2009, p. 21, lines 21-23). Albright further testified that "[i]t was very clear" that Defendant did not want the sheriffs to enter his residence. (N.T. 1/8/2009, p. 22, lines 19-24). At that point, members of the sheriff's department handcuffed Defendant, searched his person for keys, and then made a warrantless entry into his residence. (N.T. 1/8/2009, p. 22, line 25 thru p. 23, line 6).

If the suppression court were to hold that the hearsay testimony regarding the Order was sufficient to permit the sheriffs to take possession of Defendant's firearms, the authority of said Order was still conditioned upon Defendant's intention to not violate his bail condition. The Commonwealth witness clearly testified that members of the Sheriffs Department were aware that Defendant could refuse to comply with the seizure of his firearms and that the remedy would be a bail revocation proceeding. At no point did the Commonwealth testify that they had the authority to force Defendant to comply with surrender of his firearms. Upon Defendant's very clear expression of his unwillingness to permit entry into his residence, the sheriffs remedy was to contact the court regarding bail revocation. The sheriffs warrantless entry clearly violated Defendant's rights as set forth in Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution.

Furthermore, Pa.R.Crim.Pro. 527 gives Magisterial District Judges the authority to impose special conditions of bail. The condition of the bail for the Defendant to not possess firearms is not related to ensuring his appearance to court. Indeed, the Defendant still has a constitutional right to possess firearms. There must be limits to a Magisterial District Justice imposing conditions of bail that are not related to ensuring his appearance to court. To extend the Commonwealth's position to its natural conclusion, once a person is arrested, and bail is set, any Magisterial District Judge could impose as a condition that the police be allowed to enter the Defendant's residence to look for weapons. The effect of what the Commonwealth is proposing is to replace search warrants with bail conditions.

C. SHERIFFS HAD NO LEGAL AUTHORITY TO ENTER DEFENDANT'S RESIDENCE AND SEARCH

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.

D. WARRANTLESS ENTRY AND SEARCH OF DEFENDANT'S RESIDENCE BY OFFICER WHITE

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).

If this Honorable Court were to find that the sheriff had the authority to take possession of Defendant's firearms via conducting a warrantless entry and search of Defendant's residence, the warrantless entry and search of Defendant's residence by Officer White was *per se* unreasonable. The Order directed the sheriff to take possession and did not give Officer White any authority to enter Defendant's residence and search without a warrant. Defendant could not consent to Officer White's entry and search as he had been arrested and transported to the Ferguson Township Police Department either shortly before or after White's arrival. The plain view exception is not applicable as Officer White did not find any evidence of criminal activity from a lawful vantage point as he had already entered and searched the residence without a warrant prior to finding the suspected marijuana.

The Commonwealth also cannot rely on the exigent circumstances exception as nothing prevented them from obtaining a warrant to search for explosive devices. Defendant was arrested at approximately 3:15 p.m., and Albright discovered what he thought were implements of explosive devices shortly thereafter. Albright then contacted Penn State Police regarding his observations, but Officer White did not arrive until approximately 5:00 p.m. The sheriffs and/or Ferguson Township had approximately two hours in which to seek issuance of a search warrant prior to White making his warrantless entry and search. The Commonwealth cannot carry their heavy burden to show that there was a legitimate need for White's immediate entry and search. Clearly, allowing law enforcement to execute a plan which calls for a warrantless search to be conducted, the fruits of the warrantless search to serve as the basis for issuance of a search warrant, and then apply for a warrant after the item has already been seized would allow the exigent circumstances exception to swallow the rule. Richter, 791 A.2d at 1184; ovens, 632 A.2d 1324. The Commonwealth failed to present any testimony or justification for not seeking a search warrant prior to Officer White entering Defendant's residence and conducting a search.

Again, it must be emphasized that the Commonwealth bears the burden of production and persuasion, and the Commonwealth has failed to produce any evidence that justifies the warrantless entry and search of Defendant's residence. As none of the recognized exceptions to the warrant are applicable, the search was *per se* unreasonable. All evidence obtained via the warrantless entry and search of Defendant's residence must be suppressed and the entry and search violated 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.

E. MOTION TO QUASH WARRANT – LACK OF PROBABLE CAUSE

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 cause, 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) (emphasis added). “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).

When reviewing the constitutionality of the issuance of the search warrant in this case, the suppression court’s review is limited to the Affidavit of Probable Cause attached as page two (2) of the Application for Search Warrant, which was attached to Defendant’s Omnibus Pretrial Motion as “Defendant’s Exhibit A.” Pa.R.Crim.P. 203(d); Ryerson, 817 A.2d at 513. Detective Martin, the Affiant on the Application for Search Warrant, referenced the alleged violation

justifying issuance of the search warrant as “Possession of Controlled Substance.” In the Affidavit of Probable Cause, Martin wrote that “PSU bomb technician, Officer White... was securing the residence he observed what he recognized as a baggie of marijuana and a woven bag containing a glass blown smoking device within the residence.” It is never alleged that the glass blown smoking device was considered paraphernalia. 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. 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. Detective Martin acknowledged the importance of providing the issuing authority with experience and basis of knowledge when he wrote that “[b]ased on my experience and participation in training, execution of search warrants where I have seen marijuana.” The clear error was that Detective Martin only included his experience in the Affidavit, and the only officer to “recognize” the substance as being marijuana was Officer White. Martin also never indicated in the Affidavit of Probable Cause that the glass blown smoking device was commonly associated with ingestion of controlled substances, so the issuing authority was never provided with probable cause to determine that the pipe was associated with criminal activity.

In Commonwealth v. Trengge, 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.

As expressly discussed and emphasized in Trengge, the training and experience of an officer is a critical factor that the court must consider in undertaking a probable cause review. Here, the Affidavit fails to include any reference to Officer White’s training, employment history, participation in narcotics investigations, or any basis of knowledge upon which he could have “recognized” a substance as being marijuana. The courts routinely review search warrants on drug cases in which the affiants provide very detailed information with regard to narcotics training, experience, and basis of knowledge. By having such information, the issuing authority can undergo a common sense review and believe that a trained narcotics officer can identify a controlled substance. Detective Martin even referenced his own training and experience in drug cases, but he failed to include any information pertaining to the training and experience of Officer White. In this case, the lack of such information pertaining to Officer 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, lines 4-7, Detective Martin testified that the green vegetable matter seized did not test positive for the presence of marijuana).

By failing to include any reference to Officer White’s training, experience, or participation in drug investigations, the issuing authority was not provided with a basis of knowledge upon which Officer White could have “recognized” as a substance to be marijuana. Lacking such basis of knowledge, the issuing authority erred in finding that probable cause existed to justify the search of Defendant’s residence. As the warrant was not supported by probable cause, 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. Evidence discovered as a result of a search that violates the fundamental constitutional guarantees of Article I, Section 8, must be suppressed. Gordon, 683 A.2d at 256.

F. NO EXIGENT CIRCUMSTANCES

The Commonwealth’s conclusion of law simply states that Officer safety is a recognized exigent circumstances excepting it from the warrant requirement. However, no where in the Commonwealth’s brief discusses what are exigent circumstances, or even whether exigent circumstances existed. In this case, the Defendant was already handcuffed. See Commonwealth v. Colon, 777 A.2d 1097 (Pa.Super. 2001)(the moment Defendant was placed in handcuffs, any exigencies that may have existed prior to that point in time dissipated).

WHEREFORE, Defendant respectfully requests that this Honorable Court grant the relief sought and suppress all evidence seized during the warrantless search of Defendant’s residence.

Respectfully submitted,

MASORTI & SULLIVAN, P.C.

By: 

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

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : No.: CP-14-CR-1610-2008
 :
 HOBSON MCKOWN :

CERTIFICATE OF SERVICE

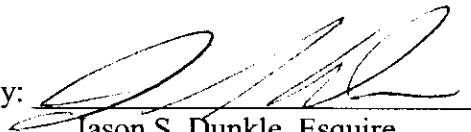
I hereby certify that on February 23, 2009, a true and correct copy of the Brief in Support of Defendant's Omnibus Pre-Trial Motion was served via hand delivery to the following:

Carolyn Larrabee, Assistant District Attorney
4th Floor, Centre County Courthouse
Allegheny and High Streets
Bellefonte, PA 16823

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