

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION NO. 00-242
 :
 MAURICE JONES :

MEMORANDUM

Padova, J. December , 2000

On May 9, 2000, Defendant Maurice Jones (“Jones”) was originally charged with four counts relating to events occurring on December 14, 1999: possessing with intent to distribute marijuana and crack cocaine under 21 U.S.C. § 841(a); carrying a firearm during a drug trafficking crime under 18 U.S.C. § 924(c); and being a felon in possession of a firearm under 18 U.S.C. § 922(g). Defendant subsequently moved to suppress the evidence seized on December 14, 1999. The Court denied Defendant’s request on June 28, 2000.

On August 29, 2000, the Government filed a Superseding Indictment. The Superseding Indictment replicates the charges in the original Indictment in Counts I, II, III, and VIII, while adding several offenses related to events occurring on April 25, 2000. Count IV charges Jones with possession with intent to distribute crack cocaine. Count V charges Jones with possession with intent to distribute cocaine. Count VI alleges that Jones possessed with intent to distribute marijuana. Count VII alleges that Defendant possessed a firearm in furtherance of a drug trafficking crime. Count IX charges Jones with being a felon in possession of a firearm. Presently before the Court is Defendant’s Motion to Suppress all of the evidence obtained by police on April 25, 2000, relating

to Counts IV, V, VI, VII, and IX. The matter has been extensively briefed and an evidentiary hearing was held on November 27, 2000. For the reasons that follow, the Court denies Defendant's Motion.

I. BACKGROUND¹

On April 25, 2000, at approximately 11:30 a.m., six Philadelphia Police Officers² went to a house at 6071 Upland Street ("Property") in search of a fugitive, Tyreek Whitaker ("Whitaker"). (Transcript of November 27, 2000 Hearing ("Tr.") at 4, 5,10.) Officer Muller, an officer with the Southwest Detective's Fugitive Task Force, had two bench warrants for Whitaker's arrest. (Tr. at 8; Gov. Ex. S-2; Gov. Ex. S-4.) Earlier that day, Officer Muller had obtained information that Whitaker was staying at the Property. (Tr. at 4, 5, 9.) Based on the information, Officer Muller, accompanied by Officers Ghee, Dunbar, and Young, went to the Property. (Id. at 10.) On the way to the Property, Officer Muller encountered Officers Emory and Burns in their patrol car and requested they accompany him to the Property to serve the warrants. (Id.) Officer Emory agreed and radioed over the band assigned to the 12th Police District that he would be at the 6000 block of Upland street. (Id. at 55-56.)

The officers arrived at the Property and knocked on the door. (Id. at 11.) Defendant Jones answered the door wearing boxer shorts and brown Timberland boots. (Id.) Officer Muller told Jones that they were Philadelphia police officers and had a warrant for Tyreek Whitaker. (Id.) Jones

¹The following facts are gleaned from the testimony of Officers Robert Muller ("Muller") and William Emory ("Emory") at the evidentiary hearing, and the transcript of the grand jury testimony of Renata Overby ("Overby") submitted by Defendant. The Government has stated that it does not object to the Court's consideration of Overby's testimony for the purposes of determining Defendant's Motion to Suppress. (Gov. Reply at 3 n.2.)

²Officer Muller testified at the evidentiary hearing that Officers Emory, Burns, Ghee, Dunbar, and Young accompanied him to the Property. (Tr. at 10.)

replied that he had not seen Whitaker and turned and walked into the house. (Id.) The officers followed. (Id.) In response to Officer Muller's questions, Defendant told the police his name, that he rented a room at the Property, that he was on state parole, and did not have identification with him. (Id.) Jones offered to retrieve his identification from his mother's house. (Id. at 12.) Officer Muller told him that as a state parolee, he is supposed to have his identification with him and was not supposed to stay anywhere but his mother's house. (Id.) As they conversed, Officer Muller heard sounds from the second floor of the Property directly above where they were standing, asking who else was in the house. (Id. at 11-12.) Jones told him that his girlfriend was in his room in the front room of the second floor. (Id.)

Officer Emory and Muller went upstairs to investigate, announcing themselves as the police. (Id.) The second floor has back, middle, and front bedrooms and a bathroom. (Id. at 13.) All of the room doors were closed. (Id.) The officers began checking the Property room by room, calling out to Jones' girlfriend, Renata Overby, to open the door of the room she was occupying. (Id.) The officers first checked the back bedroom. (Id. at 14, 57.) The back bedroom was unoccupied, but the officers saw a fresh plate of food and a pair of jeans on the bed. (Id.) The officers next moved on to the middle room, finding only a mattress on the floor and disheveled ceiling tiles. (Id. at 14.)

Officer Muller then knocked on the front bedroom door and called out Overby's name. (Id. at 57.) After a minute, Overby opened the door in a state of partial undress. (Id. at 58.) As the officers entered the room, they saw a police scanner tuned to the 12th District radio frequency sitting on a dresser. (Id. at 14.) At this point, Officer Muller believed that Whitaker had heard the officers reporting to the Property and fled. (Id.) Officer Muller went back downstairs, yelling to Officer Emory to bring Overby downstairs and get some clothes for Defendant so that they could be taken

to the police station. (Id. at 15.)

Officer Emory told Overby to get dressed and that Defendant needed some clothing. (Id. at 58; Transcript of Overby's June 27, 2000, Grand Jury Testimony ("Overby Tr.") at 9-10.) Overby handed Officer Emory a gray denim jacket. (Tr. at 58; Overby Tr. at 11.) While patting down the jacket for weapons, Officer Emory felt what he believed to be marijuana in the jacket pocket. (Tr. at 58-59.) He reached into the pocket and removed six packets of marijuana. (Id. at 58.) Officer Emory then left the room briefly to allow Overby to get dressed. (Id. at 72.) Upon reentering the room, Officer Emory picked up a pair of pants laying across a dresser and asked Overby for a shirt for Defendant. (Tr. at 59, 72-73.) Overby directed him to a dresser. (Tr. at 59.) Officer Emory opened the dresser drawer and saw a .38 caliber revolver, \$ 504.00 cash, and twenty-six Ziploc bags of cocaine. (Tr. at 59.)

Officer Emory then called Officer Muller into the room and showed him the marijuana and the contents of the drawer. (Tr. at 16, 60.) Officer Emory also told Officer Muller that he never finished checking the bedroom closet. (Tr. at 17, 22, 47, 60.) One of the closet doors was missing and the other was closed. (Tr. at 60; Gov. Ex. S-8c.) Officer Muller opened the closet door and saw bags piled halfway up from the floor and items on the top shelf. (Tr. at 17, 46.) Officer Muller pushed on the bags and moved the items on the top shelf around, purportedly to ensure that they did not conceal Whitaker. (Id. at 22, 47, 53.) A bag fell from the top shelf revealing glass jars of marijuana. (Id. at 17, 22, 51, 60.) Officer Muller picked up the bag and told Emory that they would need a search warrant. (Id. at 17.) Both officers went downstairs with Overby, carrying all of the contraband for confiscation. (Id. at 17, 73-74.)

Overby's testimony differs slightly from that of the police officers. Overby claims that three

officers entered the room. (Overby Tr. at 9.) One officer initially searched the closet while another searched under the bed.³ (Id.) Overby also states that Officer Emory opened the dresser drawer of his own accord. (Id. at 10.) Overby does not testify that Officer Muller ever left or returned to the front bedroom. Rather, Overby states that Officer Emory was carrying a police scanner and a bag containing jars when taking her downstairs. (Id. at 11-13.) Overby did not know from what location Officer Emory obtained the bag. (Id. at 12.)

After bringing Overby downstairs, Officers Muller and Emory left the Property to get a search warrant. (Tr. at 17, 62.) Another officer from the Narcotics Strike Force, Officer Walker, prepared the warrant application (“Application”). (Id. at 18; Gov. Ex. S-5.) The Application lists the chain of events outlined by Officers Muller and Emory and describes the marijuana recovered from the jacket and the closet, and the contents of the dresser drawer. (Gov. Ex. S-5.) Officers Muller and Emory then returned to the Property at approximately 8:00 that evening to execute the warrant. (Tr. at 18, 62-63.) During the search pursuant to the warrant, the police discovered additional narcotics, drug paraphernalia, firearm clips, money, letters, and pictures. (Tr. at 63.)

II. DISCUSSION

Defendant seeks suppression of all of the evidence seized from the Property on April 25, 2000 including: proof of Jones’ residency; a picture of Jones and others; a 9 mm magazine loaded with five rounds of ammunition; \$ 1,384.00 cash; a .38 caliber revolver loaded with five rounds of ammunition; 1,495.7 grams of marijuana; 33 grams of crack; 3 grams of powder cocaine; drug

³Officer Emory confirms that he searched under the bed and glanced in the open closet door upon first entering the bedroom, but states that the closet was not thoroughly searched until Officer Muller reentered the room after Officer Emory found the marijuana in the jacket and cocaine in the dresser. (See Tr. at 58, 60.)

paraphernalia; and a black fur jacket. Defendant primarily challenges the legitimacy of his arrest and detention. Because the police lacked probable cause to arrest him, Defendant argues that the subsequent searches of his clothing and his room conducted prior to obtaining a search warrant violated his Fourth Amendment rights. According to Defendant, since these subsequent searches produced the evidence used to justify the search warrant, any evidence obtained after the issuance of the warrant should also be suppressed. Even if the arrest was legitimate, Defendant alternatively argues that the subsequent searches exceeded the permissible scope of a search incident to arrest.

Based on the evidence presented during the hearing and the parties' submissions, the Court concludes that the officers had probable cause to arrest Defendant. Since probable cause to arrest existed, Officer Emory's search of Defendant's clothing and the dresser drawer was constitutionally permissible. The Court further concludes that Officer Muller's search of the closet violated the Defendant's Fourth Amendment rights. In this case, however, the Court will not suppress the marijuana jars found in the closet pursuant to the doctrine of inevitable discovery. The police would have uncovered the marijuana when conducting the subsequent warrant search. Accordingly, the Court will not suppress any of the items seized on April 25, 2000.

A. Arrest

The Fourth Amendment prohibits police from arresting citizens without probable cause. Paff v. Kaltenbach, 204 F.3d 425, 435 (3d Cir. 2000). Probable cause exists when, at the time of the arrest, the facts and circumstances within the arresting officer's knowledge are "sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." Sharrar v. Felsing, 128 F.3d 810, 817 (3d Cir. 1997). Probable cause need only exist as to any offense that could be charged under the circumstances. Graham v. Conner, 490 U.S. 386, 435 n.6 (1989). In

determining whether probable cause exists, the court should assess whether the objective facts available to the arresting officers at the time of the arrest were sufficient to justify a reasonable belief that an offense had been committed. Sharrar, 128 F.3d at 817. Courts apply a common sense approach based on the totality of the circumstances. Paff, 204 F.3d at 436. Based on the record evidence, the Court determines that Officers Muller and Emory had probable cause to believe that Defendant had committed two crimes by hindering the apprehension of a fugitive in violation of 18 Pa. Const. Stat. Ann. § 5105, and violating the parole conditions outlined in 37 Pa. Code § 63.4.

One general condition of parole is that the parolee “live at the residence approved by the Board [of Probation and Parole] at release and not change residence without the written permission of the parole supervision staff.” 37 Pa. Code § 63.4 (2000). Municipal police officers may arrest parolees for whom probable cause exists to believe that they have committed summary or technical offenses. 42 Pa. Cons. Stat. Ann. §§ 8952, 8953 (West 2000); Commonwealth v. Elliott, 599 A.2d 1335, 1337 (Pa. Commw. Ct. 1991). Based on Defendant’s statements that he was on parole and rented a room at the Property while keeping his identification at his mother’s house, the officers had probable cause to believe that Defendant was in technical violation of his parole.

Pennsylvania law criminalizes the hindrance of apprehension of a fugitive:

A person commits an offense if, with intent to hinder the apprehension, prosecution, conviction or punishment of another for crime or violation of the terms of probation, parole, intermediate punishment or Accelerated Rehabilitative Disposition, he:

...

(4) warns the other of impending discovery or apprehension, except that this paragraph does not apply to a warning given in connection with an effort to bring another into compliance with law; or

(5) provides false information to a law enforcement officer.

18 Pa. Const. Stat. Ann. § 5105 (West 2000).

Officer Muller had two bench warrants for Whitaker's arrest, and information that Whitaker lived at the Property. Defendant told the police that Whitaker was not present. In the back bedroom that was not occupied by Defendant, the officers found a partially eaten plate of fresh food. The officers could have reasonably inferred that the occupant of that bedroom, whom they believed based on reliable information to be Whitaker, made a quick departure. In Defendant's bedroom, the police found a police scanner that was on and tuned to the 12th District radio band, the same radio band over which Officer Emory had called himself out of service to the 6000 block of Upland street. The facts as available to the officers at the time are sufficient to warrant a prudent person to believe that Defendant had violated the law by warning Whitaker of his impending apprehension by the police. The police officers, therefore, had sufficient probable cause to justify arresting Defendant.

B. Searches

The Court next will examine the propriety of the subsequent searches of Defendant's jacket, dresser, and closet. The Fourth Amendment requires the government to obtain a warrant prior to searching areas in which an individual possesses a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 360 (1967); United States v. Herrold, 962 F.2d 1131, 1136-37 (3d Cir. 1992). For evidence obtained during a warrantless search to be admissible at trial, the government must establish that the search and seizure was permissible under an exception to the Fourth Amendment's warrant requirement. Minnesota v. Dickerson, 508 U.S. 366, 372 (1993); Herrold, 962 F.2d at 1137. Otherwise, the exclusionary rule bars the admission of the illegally obtained evidence. United States v. Calandra, 414 U.S. 338, 347 (1974); Herrold, 962 F.2d at 1137.

Courts have held that officers effecting an arrest with probable cause may collect clothing for the suspect where he is partially or fully unclothed. See United States v. DiStefano, 555 F.2d

1094, 1101 (2d Cir. 1977); United States v. Leftwich, 461 F.2d 586, 592 (3d Cir. 1972). Since the officers had probable cause to arrest and detain Defendant, their subsequent collection of clothing for Defendant was proper. In addition to collecting clothing for the suspect, the officer may search the clothing for weapons prior to giving it to the suspect. Leftwich, 461 F.2d at 592. While Officer Emory searched the jacket for weapons, he discovered several marijuana packets in a jacket pocket. Officer Emory was constitutionally permitted to retrieve the marijuana packets from the jacket pocket during his weapon search under the ‘plain feel’ doctrine.

The ‘plain view’ doctrine that permits warrantless seizures of incriminating evidence that is in plain view of the officer if: (1) the officer arrived lawfully at the vantage point from which the object was seen; (2) the object was in plain view; (3) the incriminating character of the object was immediately apparent; and (4) the officer had a lawful right of access to the object seized. Horton v. California, 496 U.S. 128, 142 (1990); United States v. Menon, 24 F.3d 550, 559 (3d Cir. 1994). The United States Supreme Court extended the plain view doctrine to situations where the officer discovers contraband through the sense of touch during an otherwise lawful search. Dickerson, 508 U.S. at 375 (identifying the ‘plain feel’ doctrine). The facts in this case clearly satisfy the requirements of the ‘plain feel’ doctrine. As previously stated, the law permitted Officer Emory to obtain clothing for Defendant upon his arrest and search that clothing for weapons. See DiStefano, 555 F.2d at 1101; Leftwich, 461 F.2d at 592. He, therefore, arrived lawfully at the vantage point from which the marijuana was felt and had a lawful right of access to the marijuana. Accepting as true Officer Emory’s testimony that he felt the packets in the jacket pocket and knew from experience that they contained marijuana, the marijuana could be plainly felt from the outside of the jacket and its incriminating character was immediately apparent. (See Tr. at 59.) For these reasons,

the Court concludes that Officer Emory acted within constitutional bounds when he collected and searched the jacket and retrieved the marijuana packets.

Regardless of whether Officer Emory opened the dresser of his own accord or on Overby's direction, the search of the dresser drawer also was permissible under the plain view exception to the warrant requirement of the Fourth Amendment. When he opened the dresser drawer, Officer Emory was still collecting clothing for Defendant. Officer Emory testified that he did not see any shirts lying in plain view in Defendant's bedroom, and the record contains no evidence to the contrary. (See Tr. at 81-82.) Given these circumstances, it was reasonable and logical for him to attempt to locate a shirt in a dresser drawer. Once Officer Emory opened the dresser drawer in a legitimate attempt to locate clothing for Defendant, the presence of the contraband was apparent. These facts satisfy the requirements of the plain view exception in that Officer Emory arrived lawfully at the vantage point from which he saw the contents of the dresser drawer in plain view. See Menon, 24 F.3d at 559. Furthermore, he had a lawful right of access to the seized objects. Id. Finally, the incriminating character of the items in the drawer, namely cocaine, a gun, and money, was immediately apparent. Id. Officer Emory, therefore, was entitled to seize the contraband in the drawer pursuant to the plain view exception.

The final search was that of the bedroom closet.⁴ The Court concludes that Officer Muller's search of the closet that resulted in the discovery of approximately 110 jars of marijuana violated Defendant's rights under the Fourth Amendment. There is no question that it was constitutional for Officer Muller to search the areas of the closet in which Whitaker could be hidden pursuant to the bench warrants issued against Whitaker. See United States v. Ross, 456 U.S. 798, 820-21 (1982).

⁴The Court credits the sequence of events to which Officers Emory and Muller testified.

Given the closet's dimensions, however, it is highly unlikely that Whitaker could discreetly hide on the top shelf of the closet. (See Gov. Ex. S-3, S-8c.) Since the top shelf rests at Officer Muller's eye level and extends only 18 inches deep and Whitaker is five feet seven inches tall, Officer Muller could have merely looked at the top shelf to see if Whitaker was there without moving any items on the shelf. (See Tr. at 46-47.) Similarly, any search for false ceiling tiles would not require shifting items on the top shelf of the closet. (See id. at 47.) Officer Emory admits that Whitaker could not have hidden inside the bag from which the marijuana jars fell. (Id. at 76.) Given these facts, the Court infers that Officer Muller was searching not for the body of Whitaker but for additional contraband. Since the Government can identify no applicable exception to the Fourth Amendment warrant requirement, such a search could only be conducted after obtaining a valid search warrant.

Ordinarily, the Court would suppress the evidence obtained from Officer Muller's search of the closet as well as any derivative evidence therefrom as 'fruit of the poisonous tree.' See Wong Son v. United States, 371 U.S. 471, 484-85 (1963); United States v. Herrold, 962 F.2d 1131, 1137 (3d Cir.1992). The Government, however, argues that the evidence would inevitably have been discovered when the police subsequently searched pursuant to a search warrant. The Government refers to the 'inevitable discovery rule' which permits courts to admit evidence where the prosecution establishes that the evidence ultimately would have been discovered by lawful means, although the search that actually led to the discovery of the evidence was unlawful. Nix v. Williams, 467 U.S. 431, 444 (1984); Herrold, 962 F.2d at 1139-40. The Court agrees.

The primary question is whether a neutral magistrate would have issued the search warrant

absent knowledge of the marijuana found in the closet.⁵ The presence of factual averments in an affidavit supporting an application for a search warrant that are ‘tainted’ by police misconduct need not vitiate a warrant that is otherwise supported by probable cause as reflected in the affidavit. Herrold, 962 F.2d at 1138. The proper procedure in such a situation is to examine the affidavit for probable cause after excising the tainted averments. Id.; United States v. Daly, 937 F. Supp. 401, 409 (E.D. Pa.), aff’d, 35 F.3d 767 (3d Cir. 1997).

In conducting a review of a warrant, the court must determine that the magistrate judge would have had a substantial basis for concluding that probable cause existed. United States v. Whitner, 219 F.3d 289, 296 (3d Cir. 2000) (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)). The test to determine whether probable cause exists to support the issuance of a search warrant is the totality-of-the-circumstances approach. Gates, 462 U.S. at 238. The United States Supreme Court has defined probable cause as "a fair probability that contraband or evidence of a crime will be found in a particular place." Id. Probable cause "is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules." Id. at 232. Probable cause can be inferred by considering the type of crime, the nature of the items sought, the suspect's opportunity for concealment and normal inferences about where a criminal might hide stolen property. Whitner, 219 F.3d at 296.

Absent the marijuana discovered in the closet, the Application listed ample information to

⁵The Application included information about the marijuana found in the closet:
P/O Muller #3403 went to the closet of the front bedroom and moved articles while search for (Tyreek Whitaker). A blue plastic bag with the writing GAP in white lettering fell from the shelf spilling several clear jars with black tops containing a green weed substance alleged marijuana.

(Gov. Ex. S-5) (errors as in original).

constitute a substantial basis for a conclusion that a fair probability existed for contraband to be found at the Property. The Application states that Officer Emory found six packets containing marijuana in Defendant's jacket located in Defendant's room, as well as a .38 caliber revolver loaded with five rounds, a Ziploc bag containing twenty-six packets of cocaine and \$ 504 cash in Defendant's dresser drawer. (Gov. Ex. S-5.) This constitutes direct evidence linking the place to be searched to the crime of possession of narcotics. See Whitner, 219 F.3d at 297 (describing as 'ideal' an affidavit that contains direct evidence linking the place to be searched to the crime). Evidence of the presence of narcotics and firearms at a location certainly provides a substantial basis for concluding that additional drug-related evidence could likely be found at the same location. See id. Accordingly, the Court determines that a magistrate judge would have had a substantial basis for concluding that probable cause existed based on the remaining information in the Application after excising the details of the marijuana found in the closet.⁶ Furthermore, the Court has no doubt that the police officers would have searched the closet as a logical location for hiding contraband.

For these reasons, the Court denies Defendant's Motion to Suppress Evidence. An appropriate Order follows.

⁶Because the Court concludes that the search warrant was supported by probable cause absent the marijuana found in the closet and that the police would have searched the closet, it need not examine the exception to the exclusionary rule where fruits of a search are admissible when the police execute an invalid search warrant on the good faith belief that the warrant is valid. See United States v. Leon, 468 U.S. 897, 922 (1984).