IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	No. 2554 - 2010
LUIS DANIEL MELENDEZ-DEJESUS	:	

OPINION SUR PA. R.A.P. 1925(a)

BY: ASHWORTH, J., JANUARY 4, 2013

Luis Daniel Melendez-DeJesus has filed a direct appeal to the Superior Court of Pennsylvania from his judgment of sentence entered on November 9, 2012. This opinion is written pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

I. Background

On August 21, 2009, Appellant was arrested and charged with possession with intent to deliver 15 grams of cocaine. *See* 35 P.S. § 780-113(A)(30). Said offense occurred at 625 Rockland Street in the City of Lancaster and within a Drug Free School Zone as set forth in 18 Pa. C.S.A. § 6317(a). A preliminary hearing was held on December 9, 2009, before Magisterial District Justice Kelly S. Ballentine, and the charges were dismissed for lack of *prima facie* evidence. The Commonwealth applied, in writing, for permission to refile the charge pursuant to Pa. R.Crim.P. 544. On March 14, 2010, the charge was refiled with MDJ Ballentine. On June 9, 2010, a preliminary hearing was held on the refiled charge before MDJ Cheryl N. Hartman, and the matter

was held over for court. Appellant was released on bail. On June 29, 2010, Appellant waived his arraignment.

Thereafter, Appellant requested and received trial continuances on September 28, 2010, October 5, 2010, December 15, 2010, February 15, 2011, April 19, 2011, June 21, 2011, August 29, 2011, October 31, 2011, and March 14, 2012. Appellant was represented by private counsel, Scott K. Oberholtzer, Esquire, from June 2010, through May 9, 2011, at which time Jay Whittington entered his appearance.

It was not until March 5, 2012, that defense counsel filed two pre-trial motions, including a motion to suppress evidence and a motion to dismiss criminal information on the grounds that the preliminary hearing on the refiled charge was conducted by a different issuing authority. These matters were scheduled to be heard at time of trial.

On March 14, 2012, a motion to produce informant or dismiss prosecution was also filed on behalf of Appellant. This Court entered an Order the same day directing the Commonwealth to produce and make available at the time of trial the identity and whereabouts of the confidential informant (CI), as well as any present and/or prior criminal record the Commonwealth may have access to which is relevant to the issues in this case. The requested information was produced by the Commonwealth just prior to trial. (Notes of Testimony ("N.T."), Suppression at 34-35.)

A hearing was held on May 10, 2012, to address Appellant's suppression motion, which were denied.[1] Trial commenced immediately thereafter with jury selection, and

[1]Appellant's other outstanding pretrial motion to dismiss criminal information for "procedural irregularities" was withdrawn by counsel following the suppression hearing. (N.T., Suppression at 34.)

concluded with a verdict of guilty on May 11, 2012. (N.T., Jury Trial Vol. II at 258.) I ordered a presentence investigation within 45 days, with sentencing within 60 days. (Id. at 263.) Bail was increased to $75,000.00 upon motion by the Commonwealth. (Id. at 262.) Appellant was incarcerated following the guilty verdict from May 11, 2012, until May 17, 2012, when bail was posted.

On May 29, 2012, Appellant reported for the scheduled PSI interview with Adult Probation. His eyes were red, glassy, and bloodshot, and he appeared to be under the influence at that time. The probation officer questioned Appellant regarding possible drug use and he admitted to using marijuana 15 minutes prior to his arrival. Appellant agreed to sign the Adult Probation and Parole Services Substance Abuse Admission Form at that time. As a result of his criminal activity, Appellant was in violation of his state parole and was picked up by state parole agents and transported to SCI-Camp Hill on May 31, 2012.[2]

The PSI was timely filed on June 11, 2012. In the PSI, Appellant's residence was identified as SCI-Camp Hill. However, the probation officer-investigator who authored the PSI, Deborah Capo, informed my staff that Appellant's whereabouts were unknown and that she would have to get back to the Court with his current address. My secretary waited two weeks and when she had not heard back from Ms. Capo, she called her office. At that time, she was informed that Ms. Capo had left her employment with the County. The secretary then spoke with Kelly Diller of the probation office who was able to locate Appellant at SCI-Camp Hill.

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[2]Appellant had previously been convicted of three felony drug charges in Philadelphia County in 2003 and 2004, and was on state parole at the time of this offense.

After several unsuccessful efforts to consult with Appellant's attorney, Jay Whittington, regarding possible dates for sentencing, the matter was turned over to the assistant district court administrator for judicial information systems to schedule the sentencing via video conference on a date convenient to this Court's schedule. Arrangements were made with SCI-Camp Hill on August 1, 2012, and a notice of sentencing was filed by Court Administration on August 2, 2012, scheduling the sentence for August 24, 2012, at 9:45 a.m. A copy of the sentencing notice was sent to Appellant at SCI-Camp Hill. Defense counsel was served with notice of the sentencing by email on August 2, 2012, from Michelle L. Morales in criminal court scheduling.

On the morning of the scheduled sentencing, August 24, 2012, SCI-Camp Hill notified the assistant district court administrator for judicial information systems that Appellant had been transferred and the video conference could not take place as scheduled. A follow-up call to SCI-Camp Hill by my secretary confirmed that Appellant had been transferred to another institution on August 22, 2012. Defense counsel, who had appeared for the scheduled sentencing, was instructed by me to locate the whereabouts of his client so the sentencing could be rescheduled.

Over the next several days, efforts by my staff to locate Appellant through the Inmate Locator were unsuccessful due to the extensive number of aliases used by Appellant. Emails and telephone calls to defense counsel over the next several weeks were not returned. On October 17, 2012, the Commonwealth was able to locate Appellant in SCI-Smithfield and informed my office via email.[3] The sentencing was

[3]The information received from the Commonwealth was that Appellant had been in Smithfield since June 28, 2012. This is questionable since his presence in Camp Hill was

promptly scheduled for Friday, November 9, 2012. On November 5, 2012, Appellant sent the Court a *pro se* "Motion for Extraordinary Relief, Request for Entry of Judgement of Acquittal Due to Unreasonable Delay in Sentencing Procedure" seeking the dismissal of all charges due to the delay in sentencing. As Appellant was represented at that time, a copy of the *pro se* pleading was forwarded to defense counsel for his consideration. No further action was taken by counsel.

On November 9, 2012, Appellant received a mandatory sentence of five to ten years plus a $30,000.00 fine.[4] (N.T., Sentencing at 10.) Appellant received credit for time served from May 11, 2012, through November 9, 2012, or 183 days. (Id. at 11-13.) Appellant was represented at trial and sentencing by Attorney Whittington.

Appellant filed a timely notice of appeal to the Superior Court of Pennsylvania on December 7, 2012. A statement of matters complained of on appeal was filed on December 31, 2012, in which Appellant raises two issues: (1) whether the Court erred in denying Appellant's motion to suppress cocaine and other physical evidence seized by police on August 21, 2009; and (2) whether the Court erred in overruling Appellant's objection to the Commonwealth's introduction of evidence detailing two "probable cause buys" of cocaine that pre-dated the execution of the search warrant. Appellant is represented on appeal by the Office of Public Defender, specifically, James J. Karl, Chief Public Defender.

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confirmed by the assistant district court administrator for judicial information systems on August 1, 2012, prior to her scheduling the video sentencing for August 24, 2012.

[4]On May 8, 2012, the Commonwealth gave notice in accordance with 18 Pa. C.S.A. § 7508 of its intent to apply the mandatory five-year minimum sentence and $30,000 fine in this case.

II. Discussion

A. Suppression

Appellant initially challenges the search of his residence and the seizure of evidence by police on August 21, 2009. Appellant claims "police violated 'knock-and-announce' requirements by forcibly entering a residence to execute a search warrant without a reasonable time for the occupants to peacefully admit them," thus requiring the suppression of all seized evidence. (*See* Statement of Errors at ¶ 1.)

> Pennsylvania Rule of Criminal Procedure 207 requires that law enforcement officers give, or make a reasonable effort to give, notice of their identity, authority, and purpose to the occupant of the premises, unless exigent circumstances require immediate forcible entry. *See* Pa.R.Crim.P. 207. The rule is designed to promote peaceable entry by affording fair warning, and to safeguard legitimate privacy expectations to the degree possible. The procedural rule subsumes the Fourth Amendment requirement that officers must announce their presence upon the execution of a search warrant and provide residents with some chance to open the door.

Commonwealth v. Sanchez, 589 Pa. 43, 63, 907 A.2d 477, 489 (2006) (citations omitted). This Court ruled that there was no police violation of the "knock-and-announce" rule under the circumstances of this case.

On August 21, 2009, at approximately 1:55 p.m., Detective Peter J. Ondeck, together with members of the Lancaster County Drug Task Force, executed a search warrant at 625 Rockland Street in the City of Lancaster. (N.T., Suppression at 5-6, 8.) Upon knocking on the transparent, screen door of the residence, Detective Ondeck was met by a 13-year-old Hispanic male who stated his parents were not home. (Id. at 9, 10, 16, 21.) Detective Ondeck advised the juvenile that he was a police officer and that

he had a search warrant for the residence. (Id. at 9, 20.) Detective Ondeck, and every member of the team, was wearing Drug Task Force rain gear with the words "Police" on the front and "County Detective" on the back. (Id.)

Upon hearing that he was a police officer there to execute a search warrant, the juvenile began to open the screen door and stepped aside for Detective Ondeck to enter the residence. (N.T., Suppression at 9, 16.) The Detective put his hand on the door knob and began to pull the door open as the juvenile was simultaneously pushing the door open. (Id. at 16-17.) Once the door was opened but before crossing the threshold, Detective Ondeck heard and then observed a pit bull inside the house barking and asked that the dog be restrained. (Id. at 18.) Another juvenile in the residence immediately secured the dog. (Id. at 18-19.)

At that point, Detective Ondeck again announced his identity and his purpose before entering the home. (N.T., Suppression at 10.) He and the other seven officers continued announcing, "police with a search warrant," as they secured the residence. (Id. at 10, 22, 25.) Ultimately, five juveniles and their 34-year-old uncle, who resided on the third floor of the residence, were identified and secured in the dining room area. (Id. at 10-11, 15, 23.) A search of Appellant's bedroom on the second floor revealed 15 grams of cocaine.

Appellant claims the search of 625 Rockland Street was illegal as it failed to comply with the strictures of Pa. R.Crim.P. 207, mandating that the occupants of the house be given a reasonable amount of time to voluntarily relinquish the premises to law enforcement officers. The law does require the police to knock and announce their presence, and give a reasonable amount of time before they make entry into the

residence. *See* **Commonwealth v. Chambers**, 528 Pa. 403, 598 A.2d 539 (1990). Police, however, are allowed to make forcible entries if within a reasonable amount of time no one has answered the door. *See* **Commonwealth v. Piner**, 767 A.2d 1057 (Pa. Super. 2000).

In the instant case, a 13-year-old boy answered the door promptly upon the police knocking. A conversation ensued through the transparent screen door. Detective Ondeck announced his authority and his intention to execute a search warrant. The juvenile began to open the door at which time Detective Ondeck took the door handle. Before making entry, however, Detective Ondeck observed a barking dog and asked the residents to secure the dog for the officers' safety. After complying with the request, Detective Ondeck and the members of his team entered the premises.

Unlike the situation in **Chambers**, *supra*, where the police made no announcement prior to storming the house by pushing the defendant aside as he attempted to answer the door, the screen door at 625 Rockland Street was voluntarily opened by one of its residents after the officers repeatedly stated their identity and purpose. Thus, there was no violation of the "knock-and-announce" rule in this case and no requirement to suppress the evidence seized at the Rockland Street residence.

B. Admissibility of Evidence

Appellant next contends that this Court erred in allowing the Commonwealth to introduce evidence detailing two "probable cause buys" of cocaine that pre-dated the execution of the search warrant on the premises at 625 Rockland Street on August 21, 2009. (*See* N.T., Suppression at 33.)

On March 2, 2012, the Commonwealth gave notice of its intent to introduce evidence of probable cause buys. Specifically, during the week of August 2, 2009, a CI made a controlled purchase of cocaine from Appellant which involved the residence located at 625 Rockland Street. The purchase was made under the direction and control of Detective Ondeck, and the CI was searched prior to and after the buy. Within 48 hours of August 19, 2009 (date of affiant's application for the search warrant), a CI made a second controlled purchase of a quantity of cocaine from Appellant at his Rockland Street residence. Again, this purchase was made under the direction and control of Detective Ondeck, and the CI was searched prior to and after the buy. In each instance, the contents field tested positive for drugs. (N.T., Suppression at 32-33.)

Appellant claims evidence regarding these two "probable cause buys" of cocaine that pre-dated the execution of the search warrant on August 21, 2009, is inadmissible under Pa.R.E. 404(a)(1), which generally bars the introduction of a criminal defendant's prior bad acts to prove character." (*See* Statement of Errors at ¶ 2.) Although evidence of prior bad acts or uncharged crimes is generally inadmissible, exceptions exist to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Pa.R.E. 404(b)(2). *See also* **Commonwealth v. Stafford**, 749 A.2d 489, 495 (Pa. Super. 2000); **Commonwealth v. Echevarria**, 394 Pa. Super. 261, 267, 575 A.2d 620, 623 (1990). Nevertheless, even where evidence is within one of the above exceptions its probative value must still outweigh its prejudicial effect. Pa.R.E. 404(b)(3).

The Commonwealth argued in its notice of intent to introduce evidence of probable cause buys that such evidence was relevant in order to prove Appellant's intent to deliver the cocaine which was seized during the subsequent search of the residence at 625 Rockland Street. (*See* Commonwealth's Notice at ¶ 7.) The Commonwealth further claimed that such evidence was admissible because the Commonwealth needed the evidence of the controlled buys to establish Appellant's intent as without the evidence there remained only circumstantial evidence consistent with intent to deliver. (Id.) Also, it was the Commonwealth's contention at trial that there was sufficient quantum of proof linking Appellant to the controlled buys through the proffered testimony of the CI. (N.T., Suppression at 31.) *See* **Commonwealth v. Matthews**, 415 Pa. Super. 306, 311-12, 609 A.2d 204, 206-07 (1992) (holding that evidence of a controlled buy which occurred at defendant's residence was admissible to establish intent to deliver where there are facts that tip the balance in favor of admission). *See also* **Commonwealth v. Camperson**, 417 Pa. Super. 280, 284-85, 612 A.2d 482, 484-85 (1992) (with crime involving specific intent, it was relevant to show that prior to police finding drugs in defendant's apartment, he had agreed to sell drugs to a third person); **Echevarria**, 394 Pa. Super. at 267-68, 575 A.2d at 623-24 (testimony by detective of controlled buy by CI from defendant directly relevant to charge of PWID and probative of defendant's status as a dealer).

Based upon the facts of this case, I ruled that evidence regarding the two "probable cause buys" of cocaine was admissible under Pa.R.E. 404(b)(2) in order to prove Appellant's intent to deliver the cocaine which was seized during the subsequent

search of the residence at 625 Rockland Street in light of the proffered testimony by the CI in this case. (N.T., Suppression at 33.)

III. Conclusion

For the reasons set forth above, Luis Daniel Melendez-DeJesus' appeal should be dismissed.

Accordingly, I enter the following:

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ORDER

AND NOW, this 4th day of January, 2013, the Court submits this Opinion pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

BY THE COURT:

DAVID L. ASHWORTH
JUDGE

I certify this document to be filed in the Lancaster County Office of the Clerk of the Courts.

Joshua G. Parsons
Clerk of the Courts

ATTEST:

Copies to: Susan E. Moyer, Assistant District Attorney
James J. Karl, Chief Public Defender