

COMMONWEALTH OF PENNSYLVANIA vs. KEVIN  
LANCE NEWMAN, C.P. Fulton County Branch, Criminal  
Action, No. 7 of 1999

*Commonwealth v. Newman*

*protective sweep - reasonable belief that others are present*

1. A protective sweep in conjunction with an in-home arrest is permissible when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual who poses a danger to those on the arrest scene.
2. Information that defendant had committed a (drug-related) assault in West-Virginia with an accomplice "from Pennsylvania" did not give rise to reasonable belief the accomplice was inside the trailer where the alleged assault took place two weeks earlier and in the absence of any information that the accomplice was living near or at defendant's residence.
3. The fact that other people *might* be present at the house is not sufficient to conduct a protective sweep.
4. The police officers' experience that drug dealers are often violent and that people come and go from drug houses is not a sufficient basis to conduct a protective sweep; the Superior Court was unwilling to create a presumption that drug dealers customarily carry weapons and therefore any search of a suspected drug dealer's operating base would necessarily endanger the investigating officers.
6. After defendant stepped out of the trailer and was arrested, and after two others identified by defendant had stepped out, the police had no reason to believe other people were present; all evidence obtained during the protective sweep and subsequent search warrant must be suppressed.

*Dwight C. Harvey, Esquire, District Attorney, Attorney for the Commonwealth*

*David S. Keller, Esquire, Attorney for the Defendant*

*Christopher E. Sheffield, Esquire, Attorney for the Defendant*

OPINION AND ORDER

WALKER, P.J., April 20, 1999:

**Factual and Procedural Background**

On December 11, 1998, Corporal Sechoka of the Pennsylvania State Police received a telephone call from a colleague of the West

Virginia State Police, advising him that an arrest warrant had been issued for Defendant Kevin Newman. (Notes of Testimony of Omnibus hearing, p. 4-5). Corporal Sechoka was informed that defendant allegedly went to West Virginia, where he assaulted Richard Bixby and threatened him with a gun because Mr. Bixby had not paid defendant for drugs. (N.T. p. 12). It was furthermore alleged that defendant was accompanied by an accomplice from Pennsylvania whose first name was Eric. (N.T. p. 12-13).

After having verified that the arrest warrant was active, six officers of the Pennsylvania State Police went to serve the warrant on defendant on December 22, 1998. (N.T. p. 14). When the officers arrived at defendant's trailer, they noticed that there were three parked vehicles. Two of the vehicles had been parked there previously when the police looked at the residence to determine its exact location. (N.T. p. 31). The officers knocked on the door and announced their presence. They heard some movement inside the trailer but the door was not opened immediately. (N.T. p. 14-15). After a few minutes, they knocked again and after a short delay, the defendant opened the door. (N.T. p. 15). Defendant was arrested and asked if there was anyone else inside the trailer. (N.T. p. 15). Defendant told them that there were two other people. (N.T. p. 15). They came out of the trailer and identified themselves as defendant's son (age 13 or 14) and a man by the name of Dale Penrod. (N.T. p. 17). Mr. Penrod informed the police that the third car parked at the premises belonged to him. (N.T. p. 33). At that time, two officers commenced a protective sweep to determine whether there were any other people in the trailer. (N.T. p. 16-17). Corporal Sechoka identified the reasons for the protective sweep as follows:

Q. Why did you send the officers in for the protective sweep?

A. It was alleged that Mr. Newman had committed a violent crime. It was related to the dealing of controlled substances. It was also informed that Mr. Newman allegedly had several weapons, basically a small arsenal. There was a possibility that he had a fully automatic weapon or weapons, machine gun.

Q. This may be a little obvious but I'd ask you why you ordered the protective sweep, and you talked about the type of crime that was committed and your

knowledge about possible weapons. What did that information cause you to believe that led you to order the sweep?

A. I've been with the Pennsylvania State Police for approximately 11 years, the past four of which has been as a supervisor. It's been my experience that violence is often associated with the dealing of drugs. Drug dealers can be unpredictable. People come and go from there whenever they are living in an unpredictable fashion. You never know exactly how many people are in one of these places or what they are actually doing.

N.T. p. 16-17; p. 18-19.

When the officers entered the master bedroom during the protective sweep, they observed, in plain view, triple beam scales and a two-gallon plastic ziplock bag full of marijuana. (N.T. p. 19-20). They left the trailer to inform Corporal Sechoka, who then accompanied them and seized both items. On the basis of the items seized, the police applied for a search warrant for the trailer, which they received. During the execution of the search warrant, the police found more marijuana, drug paraphernalia, weapons and ammunition. Defendant was subsequently charged with possession of a controlled substance, possession with intent to deliver, and possession of drug paraphernalia.

Defendant filed an omnibus pre-trial motion, seeking to suppress any evidence found during the protective sweep and the execution of the search warrant. On March 2, 1999, a hearing was held on the suppression motion.

### Discussion

Defendant in his pre-trial motion argues that the initial search of his home occurred without a search warrant and in the absence of any recognized exceptions to the requirement of a search warrant. The United States Supreme Court has recognized that there are exigent circumstances which justify a warrantless search incident to an arrest. *Commonwealth v. Curry*, 343 Pa. Super. 400, 404, 494 A.2d 1146 (1985). The rationale underlying these exceptions to the warrant requirement is to ensure the safety of police officers and to prevent the destruction and removal of evidence. *Id.* The Fourth Amendment of

the United States Constitution permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed. 2d 276, 288 (1990). Similarly, the Pennsylvania Supreme Court has ruled that police may search the entire building incident to an arrest to search for other people who may threaten the police officers' safety, if the officers have reason to believe that others are present. *Curry*, at 404, citing *Commonwealth v. Norris*, 498 Pa. 308, 446 A.2d 246 (1982). For example, the police have been permitted to conduct such a protective sweep where they were shot at from inside the house or where the person arrested told them there was another person staying in the hotel room with a gun. *Curry*, at 405-407.

Defendant argues that in the underlying case, the police did not have any reason to believe there were others inside the trailer once defendant was arrested and the two other people who defendant said were inside had come out of the trailer. This court agrees. The facts of this case show that, despite a short delay, defendant opened the door himself, stepped out and submitted to arrest without any resistance. When the police asked him if there were others inside the trailer, he answered that there were two other people. Upon the officer's request, defendant called for those people to come out and that they did so immediately. Mr. Penrod then told the police that the third car on the premises was his, thus accounting for that vehicle's presence. There was no evidence to indicate that there were any other people inside, such as the occurrence of any noises or visible movement inside the house. In fact, Corporal Sechoka admitted that "[n]othing while I was standing there led me to believe that there was -- independent of anything else, that there was other people in the trailer but nothing led me to believe there wasn't." (N.T. p. 34).

It is the Commonwealth's position that there was a sufficient basis to conduct a protective sweep. First, the Commonwealth points out that the police had information that defendant had been involved in a violent assault, involving guns and another accomplice from Pennsylvania and that there was a third car which did not belong to defendant. However, the owner of the third car was identified immediately when Mr. Penrod came out of the trailer. Furthermore,

the fact that the assault for which defendant was being arrested took place with an accomplice does not give rise to a reasonable belief that the accomplice may have been present at the trailer. The Commonwealth argues that the Third Circuit Court of Appeals has held that a protective sweep may be justified where a "reasonable possibility that an associate of the arrestees remains at large to do mischief or cause danger to the officers is salient . . ." *Sharrar v. Felsing*, 128 F.3d 810, 824 (3rd Cir. 1997). However, in *Sharrar* the facts did not warrant a protective sweep on that basis: the police had been informed that the arrestee was present at the residence with three accomplices. Once four people had come out of the house and were in custody, the arresting officers had no basis to believe that others remained inside. *Sharrar*, at 825.

Similarly, in the underlying case, the police did not have any basis to believe that an accomplice was present. The alleged assault took place in West-Virginia approximately two weeks before the arrest. Even though the police were told that the accomplice was also from Pennsylvania, they had no information showing that this accomplice was living at or near defendant's residence, nor was there any other reason to believe he was present. The mere fact that a criminal offense was committed with the help of an accomplice, without more, does not give rise to a reasonable belief that the accomplice is present at the residence of the perpetrator. Having "no information" as to whether other people are still inside the house "cannot be an articulable basis for a sweep that requires information to justify it in the first place." *Sharrar*, at 824; 825. The fact that other people *might* be present simply is not sufficient; if it were, a protective sweep would be justified in virtually every case. This is not allowed under the law which requires specific and articulable facts.

The Commonwealth further argues that the police had information (from the victim of the alleged assault) that defendant was using his house to deal drugs and that weapons were present. It is the Commonwealth's position that the police officers' experience that drug dealers are often violent and that people come and go from a "drug house," constituted reasonable grounds to believe others may have been present and, because of the possibility that weapons were present, posed a danger to the officers on the scene.

This argument has been specifically rejected by the Superior Court. See *Commonwealth v. McDonel*, 411 Pa. Super. 187, 601 A.2d 302 (1991). *McDonel* involved a situation where the police went to the defendant's house to execute a search warrant to seize drugs and paraphernalia. The police failed to wait a reasonable period of time after having knocked and announced their presence in violation of Pa.R.Crim.P. 2007 and entered the residence forcibly. *McDonel*, 411 Pa. Super. at 191-192. The Commonwealth argued that there were exigent circumstances which did not require the police to comply with the Rule. The Commonwealth based its assertion of exigent circumstances on the officers' experience that the probability of finding firearms proximate to controlled substances is quite high and thus that there was danger to the officers. *Id.*, at 193. The Superior Court, relying on a previous opinion, held as follows with respect to the Commonwealth's argument:

Under limited circumstances, the knock and announce rule has been disregarded where police had reason to believe announcement prior to entry would imperil their safety. However, in this case, to accept the Commonwealth's argument is to recognize a presumption whereby exigent circumstances sufficient to do away with the knock and announce rule would exist any time a search for drugs is conducted. We would, in effect, be taking judicial notice of the fact that drug dealers customarily carry weapons and therefore any search of a suspected drug dealer's operating base would necessarily endanger the investigating officers. We are unwilling to create this presumption.

*McDonel*, at 194-195, citing *Cw. v. Grubb*, 407 Pa. Super. 78, 595 A.2d 133 (1991).

While *McDonel* involves the knock and announce rule, its rationale applies to the underlying case because the justification for a protective sweep is also based on a threat to the police officers' safety. Like the Superior Court, this court is unwilling to create a presumption that the safety of police officers is in danger any time the arrestee is an alleged drug dealer and drugs are believed to be sold from the house. The law requires that in order to do a protective sweep, police officers must have specific and articulable facts giving rise to a reasonable belief that others are present. This standard is not met by creating a presumption that protective sweeps are permitted in

all drug cases because of a high likelihood in such cases that violence will be involved or that others may be present.

In the underlying case, the police did not have a reasonable basis to believe other people would be present. Therefore, the protective sweep without a warrant was not justified. If the police had wanted to search the trailer, they should have obtained a search warrant, although it is this court's belief that there was not sufficient probable cause to have obtained such a warrant. Because the protective sweep was not justified, all evidence seized during the sweep must be suppressed. Since the subsequent search warrant was obtained on the basis of the evidence recovered during the protective sweep, it was tainted. Therefore, all evidence seized during the execution of the search warrant must also be suppressed. Because of this ruling, this court believes that the other issues raised by defendant have become moot and need not be addressed.

#### ORDER OF COURT

April 20, 1999, after consideration of defendant's omnibus pretrial motion and the evidence presented at the hearing, this court finds that the protective sweep of defendant's residence without a warrant was not justified and therefore that all evidence seized during the protective sweep and the subsequent execution of the search warrant must be suppressed. Defendant's motion to suppress is hereby granted.

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