

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SALEM SUPERIOR COURT
DOCKET No: ESCR2014-01130

COMMONWEALTH)
)
v.)
)
LUZ MADE,)
Defendant)

MOTION TO DISMISS

NOW COMES THE DEFENDANT, by and through counsel, and respectfully moves pursuant to Mass. R. Crim. P. 3(g), Mass. R. Crim. P. 13 and Commonwealth v. McCarthy, 385 Mass. 160 (1982) that this Honorable Court dismiss the instant indictment charging trafficking in heroin over 100 grams.

As grounds therefor, the Defendant states that the Commonwealth presented insufficient evidence to the grand jury as to establish probable cause that the Defendant committed the charged offense.

As a result, the instant indictment issued in violation of the rights which the Fourteenth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights guarantee her.

Respectfully submitted,
Luz Made,
By her Attorney:

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Date: October 29, 2014

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SALEM SUPERIOR COURT
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COMMONWEALTH)
)
v.)
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LUZ MADE,)
Defendant)

MEMORANDUM OF LAW
IN SUPPORT OF
MOTION TO DISMISS

FACTS AND GRAND JURY PRESENTMENT

On September 10, 2014, an Essex County Grand Jury returned a single indictment against the Defendant, charging trafficking in heroin in excess of 100 grams. The Commonwealth presented one witness, John F. Delaney, a Detective with the Andover Police Department.

The Detective testified to an investigation by the Andover Police Department involving suspected narcotics activity at 600 Bullfinch Drive, Andover, Massachusetts. (GJ 8-9).¹ The investigation involved allegations that “there was possibly more than one Hispanic male involved in the apparent dealing of drugs from Apartment Number 408 in Building 600[.]” Id.

The Detective testified that he and others conducted surveillance of the building, observing what they believed

¹ Where necessary, the Defendant cites to the Grand Jury minutes as (GJ [page number]).

to have been covert drug transactions conducted by males they would later identify as Luis Hiciano and Joselin Reina-Mercedes. (GJ 9-10). In addition, the police "had gotten multiple tips" regarding "individuals" conducting purported transactions, though the Grand Jury heard no testimony regarding the source of the "tips" or which individuals the tipsters described. Id.

The Detective further testified to surveillance conducted from within the building, during which he observed Reina-Mercedes exit apartment number 408. The Detective testified that Reina-Mercedes "looked startled to see somebody" outside the apartment. (GJ 11).

Thereafter, the Detective left the building via a common staircase leading from the fourth floor to the entrance. When he reached the bottom, he observed "a female outside the door" who he also speculated "kind of seemed startled[.]" Id. The Grand Jury heard no evidence as to the identity of this startled woman, though from the Detective's testimony it appears he believed this woman to be a customer of Reina-Mercedes, and not a resident of the building. Id.

The Detective further testified to a "controlled buy" conducted by a confidential informant, which allegedly occurred within the building. (GJ 12-15). The Detective

testified that the informant entered the building, conducted a drug transaction with Hiciano, and then left. Id.

At no point did the informant, nor any of the undercover officers allegedly conducting surveillance in the building, observe the Defendant to participate in, or even be present at, this "controlled buy." Id.

In fact, at no point did the Defendant surface as even potentially involved relative to any stage of the surveillance and investigation of the two male drug dealers.

With this information, the Detective applied for and received a search warrant, which he and his team executed on August 13, 2014. On their entry, the police found the Defendant in the living room with Hiciano, sleeping on an air mattress. (GJ 17). Police found Reina-Mercedes asleep in the bedroom. (GJ 19).

Their search of the apartment yielded presumed narcotics in the kitchen drawers, as well as "numerous bags" of a substance "believed to be heroin" in Reina-Mercedes' bedroom. (GJ 19). The police discovered "large wads of cash and a handgun" in a plastic bin in the bedroom as well. Id. In the bedroom closet, the police found handheld scales and torn baggies. (GJ 20-21).

Police discovered six cell phones in the house, total. A call to the number allegedly dialed by the informant caused one of the phones to ring. The Grand Jury heard no testimony as to whom this phone belonged. (GJ 21-22).

Regarding the discovery of the handgun, the Detective testified that the police discovered it in a plastic bin in the bedroom occupied by Reina-Mercedes. However, police found personal documents bearing Hiciano's name, including mail addressed to him at that address, in the bin with the gun. (GJ 22).

Following the search of the apartment, Detective Delaney contacted the building's management "to try to determine whose name was on the lease to Apartment Number 408[.]" (GJ 17). The Detective learned that the Defendant's "name appeared as the leaseholder[.]" Id. Police eventually "did find out that [the Defendant] was the boyfriend of Hiciano." (GJ 18).

ARGUMENT

For an indictment to survive a motion to dismiss, "at the very least the grand jury must hear sufficient evidence to establish the identity of the accused and probable cause to arrest him." Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982). "Probable cause requires more than mere suspicion but something less than evidence sufficient to

warrant a conviction.” Commonwealth v. Hanson, 387 Mass. 169, 174 (1982).

This Honorable Court should dismiss the trafficking indictment in its entirety. The Commonwealth failed to establish probable cause that the Defendant had either actual or constructive possession of the controlled substances located in various common areas throughout the shared apartment. See e.g., Commonwealth v. James, 54 Mass. App. Ct. 726 (2002) (conviction for trafficking requires proof of actual or constructive possession).

For the instant indictments to survive a motion to dismiss, the Commonwealth had to present evidence to the grand jury establishing probable cause that the Defendant possessed the contraband at issue. Here, because the Commonwealth must necessarily proceed against the Defendant on a constructive possession theory, the grand jury, at a minimum, had to hear evidence establishing that the Defendant had “knowledge coupled with the ability and intention to exercise dominion and control” over the contraband. Commonwealth v. Brzezinski, 405 Mass. 401, 409 (1989), citing Commonwealth v. Rosa, 17 Mass. App. Ct. 495, 498 (1984).

In the context of contraband discovered in a common area of a shared apartment, the Grand Jury had to hear

evidence connecting the Defendant to the location where police discovered the secreted contraband. See e.g., Commonwealth v. Hill, 51 Mass. App. Ct. 598 (2001).

In Hill, police developed information that Hill and another individual ran a cocaine delivery service out of a duplex in Springfield. Police stopped Hill's car, finding cocaine in plain view in the console. Police found personal papers and drug proceeds in Hill's apartment. Additionally, police found ammunition, a clip, and a holster in the cellar.

The Court held that the trial court properly dismissed the indictment charging possession of ammunition. Id. at 604. Despite the fact that the evidence established her involvement in a drug delivery service, the ammunition indictment failed because police did not find "any item identifiably belonging to or associated with Hill, such as personal papers or effects," in the particular area of the house where police found the ammunition. Id.

The instant case suffers from the same defect, but to a far greater degree. As with the ammunition in that case, police found nothing belonging to the Defendant with any of the various amounts of controlled substances found in the apartment. Police found nothing belonging to her in the kitchen drawers where they discovered narcotics. Police

found nothing of hers in the bedroom with Reina-Mercedes, where they discovered the remaining narcotics and the handgun.

The Commonwealth's showing in the instant case is far weaker than that deemed insufficient in Hill, where the police made no observations of her involvement in Hiciano's and Reina-Mercedes' apparent drug distribution. The police did not observe the Defendant during their "controlled buy," nor did they observe her during their surveillance inside the building. Indeed, as far as the Grand Jury heard, the police never saw the Defendant at all before entering the apartment to search.

The sum total of the testimony presented to the Grand Jury involving the Defendant is simply that she was present, in bed sleeping with her boyfriend, when the police entered and searched her home. The Detective's testimony is bereft of any reference to her prior to that point. As a result, the Grand Jury had no reason whatsoever to conclude that the Defendant had the requisite "knowledge coupled with the ability and intention to exercise dominion and control" over the suspected contraband, sufficient to establish her possession of the same. See Commonwealth v. Brzezinski, 405 Mass. 401, 409 (1989), citing Commonwealth v. Rosa, 17 Mass. App. Ct. 495, 498 (1984).

As an initial matter, the Defendant's knowledge of the suspected contraband's existence within the apartment cannot be inferred from her mere presence at the time police entered. Police discovered none of the contraband in plain view, and none of it in any degree of proximity to where the Defendant slept. Rather, the police discovered the contraband in various drawers, bins, and closets throughout the apartment. The Commonwealth has thus failed to establish that she knew of the drugs' presence, and fails on the first prong of constructive possession. Contrast Commonwealth v. Albano, 373 Mass. 132, 135 (1977) ("Knowledge may be inferred when the prohibited item is found in open view in an area over which the defendant has control").

Further, the facts of her presence during the police entry and her name appearing on the lease do not establish probable cause that she knew of the contraband's existence, let alone had the requisite ability and intent to exercise dominion and control over it necessary to establish constructive possession. Neither "presence in an area where contraband is found," "living in a place where drugs are in plain view and being sold, [nor] associating with someone who controls the contraband" are sufficient to

establish constructive possession. Commonwealth v. Boria, 440 Mass. 416, 418-419 (2003)

In Boria, Brockton police officers executed a search warrant at an apartment and located two men and the defendant inside. Police officers secured and searched each of the individuals located in the apartment. Officers did not locate any contraband on the defendant's person. The defendant told the officers that she resided in the apartment with her boyfriend – one of the detained males.

Officers located nine bags of cocaine hidden in a video cassette recorder (VCR) in the living room of the apartment. Officers also located various items used for processing cocaine on the kitchen counter.

The Supreme Judicial Court reversed the defendant's convictions. The Court noted that the defendant was linked to the apartment through personal papers located in the apartment. The Court, however, reasoned that the Commonwealth did not present evidence linking the Defendant to the cocaine or related drug paraphernalia in the apartment.

The Court first cautioned that residence in an apartment where contraband does not compel the conclusion that each occupant possesses the contraband. Id. at 418-419. Rather, the Court continued, "contraband located in

proximity to a defendant's personal effects may provide a link between a defendant and the contraband, if other evidence shows that the defendant has a particular relationship to that location within the apartment." Id., at 420, citing Commonwealth v. Pratt, 407 Mass. 647, 652 (1990).

The Court reasoned, "to establish the defendant's 'relationship' to contraband located in a common area sufficient to permit an inference of control over the contraband, there must be a more particular link to the defendant than merely (1) her presence in the living room where cocaine was hidden in a VCR, and (2) her [welfare] application found in the living room closet." Id. at 420-421 (emphasis in original).

The Court held that the Commonwealth only showed the defendant's presence near where contraband was located. "Such evidence is not the supplement to incriminating evidence required to tip the scale in favor of the sufficiency of the evidence." Id. at 421.

In the instant matter, the Commonwealth presented the Grand Jury with even less evidence indicating the Defendant's possession than that deemed insufficient in Boria, such that the Commonwealth has failed to establish

even the degree of probable cause necessary to support the indictment.

As in Boria, the Defendant here possessed no contraband or related items on her person that might connect her to the suspected drugs. Unlike Boria, however, where police discovered documents bearing the defendant's name in the residence, police discovered no such documents of the Defendant's in the instant case. Moreover, police found nothing in proximity to the contraband or elsewhere bearing her name.

Also dissimilar to Boria is the fact that police found no contraband in the room with the Defendant during their search. Here, the Defendant slept on an air mattress in the living room, while police found the alleged contraband in the kitchen and Reina-Mercedes' bedroom. Thus, of the two facts present but insufficient to demonstrate constructive in Boria, neither are present in the instant matter. Police found no documents bearing her name within the apartment and found no contraband in her proximity. Id.

Finally, the Commonwealth's insistence that the Defendant's name appearing on the lease evidences her guilt cannot withstand scrutiny. This argument poorly costumes the arguments rejected by the Court in Boria and related cases, that the Defendant's presence in the apartment is

enough to meet its burden. The Court should reject this argument out of hand. See e.g., Commonwealth v. Romero, 464 Mass. 648 (2013) (ownership of motor vehicle coupled with operation of the same insufficient to establish constructive possession of firearm found in vehicle; “for one’s ownership interest to have significance in this regard there must be additional incriminatory evidence that links that interest to the particular contraband at issue”).

The Commonwealth’s presentation established exactly two facts regarding the Defendant: (1) she dated Hiciano, and (2) slept with him at that apartment on the day in question. While these facts may indicate that the Defendant has bad taste in men, they do not establish probable cause to indict her for trafficking in heroin. See e.g., Commonwealth v. Frazier, 410 Mass. 235, 240 (1991) (“A person may not be arrested on mere suspicion and association with another individual, even if there is probable cause to believe that the latter committed a crime”).

Because the Commonwealth did not present the Grand Jury with sufficient evidence to establish probable cause that the Defendant possessed the substances giving rise to the instant charges, the Court should dismiss the indictment as described above.

CONCLUSION

For the above reasons, the Defendant respectfully requests that this Honorable Court allow his Motion to Dismiss.

Respectfully submitted,
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By and through her Attorney,

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Date: October 29, 2014