

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

DISTRICT COURT DEPT.
HINGHAM DIVISION
1658CR0366

COMMONWEALTH

V.

ERIKA ZERKEL

DECISION ON DEFENDANT'S MOTION TO DISMISS

This matter came before the Court on July 13, 2017 pursuant to the defendant's motion to dismiss so much of the above-captioned complaint as charges knowingly or intentionally cultivating or possessing a class D substance with intent to distribute pursuant to Commonwealth v. DiBennadetto, 436 Mass. 310, 313 (2002), arguing the application for criminal complaint did not provide probable cause for the clerk magistrate to issue that portion of the complaint.

FINDINGS AND RULINGS OF LAW

The complaint originated from an "Application for a Criminal Complaint" made by officer Michael J. Flaherty of the Hull police department and filed March 18, 2016. Appended to the application is the "Preliminary report for arraignment purposes" of Sergeant Craig Lepro. The report formed the basis for two criminal counts against the defendant, including knowingly

or intentionally possessing or cultivating a class D substance in violation of G.L. c. 94C, §32C(a). It is this count challenged by the defendant.¹

Mass. R. Crim. P. 3(g) requires that the facts supporting a finding of probable cause must either be reduced to writing, or recorded or some combination of the two. When, as in this case, a person is arrested without a warrant, the initial assessment of probable cause is made by the arresting police officer. *See* District Attorney for the Norfolk Dist. v. Quincy Div. of the Dist. Ct. Dept., 444 Mass. 176, 182 (2005). In such cases, when the person is promptly released (whether on bail or personal recognizance), a judicial officer must make an independent determination of probable cause before a complaint is issued. *See* Mass. R. Crim.P. 3(g)(2). A motion to dismiss a complaint, in which the defendant challenges whether the charge is supported by probable cause, is a very limited remedy analogous to a postindictment motion to dismiss under Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982) ("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. Huggins, 84 Mass. App. 107 (2013).

Detective Lepro's report describes the execution of a search warrant at a home shared by the defendant and her partner. According to the report, the home contained evidence of a fairly large scale indoor marijuana cultivation operation, all of which, along with unsecured firearms and cash, was in plain view throughout the home. According to the report, the officers seized dozens of vacuumed packed one pound bags of marijuana, each with a retail value of \$2,500.

¹ The defendant was also charged with conspiracy; the Commonwealth moved to dismiss that count.

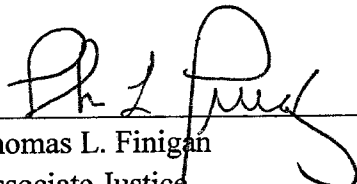
The defendant's partner was the focus of the investigation leading to the issuance of the search warrant. The defendant implausibly denied knowledge of her partner's activities, despite what detective Lepro described as an "overpowering smell" of raw marijuana in the home. Further, the investigation evidently revealed the electrical bill for the property, which was in the defendant's name, exceeded two thousand dollars per month, attributable to high intensity lights, fans, etc., used in connection with the operation.

The thrust of the defendant's argument is that she was not in *actual* possession of the marijuana, and there was insufficient evidence contained in the application to support an inference of *constructive* possession. Presence, even presence coupled with knowledge, is not enough to establish possession of contraband. In the case of constructive possession, possession implies "knowledge coupled with the ability and intention to exercise dominion and control." Commonwealth v. Brzezinski, 405 Mass. 401,409 (1989); Commonwealth v. Johnson, 7 Mass. App. Ct. 191, 194, (1979) (joint possession of items in auto trunk inferable against passenger only with other evidence). Presence alone cannot show the requisite knowledge, power or intention to exercise control over [contraband], but presence, supplemented by other incriminating evidence, "will serve to tip the scale in favor of sufficiency". Commonwealth v. Albano, 373 Mass. 132, 134 (1997, quoting United States v. Birmley, 529 F.2d 103, 108 (6th Cir. 1976).

Here, the fact the defendant lived in the home and was responsible for an astronomical electrical bill is enough to support probable cause that she was actively involved in the enterprise. As in most cases, there is always the prospect of additional evidence being produced at trial, e.g., forensic testing regarding fingerprints or DNA, testimony of one defendant against another, a paper trail of who paid the electrical bill and from what source, etc. (Both the

defendant and her partner were unemployed). That evidence need not be marshalled prior to the issuance of a complaint, with the lesser standard of probable cause, versus beyond a reasonable doubt. See Commonwealth v. Humberto H., 466 Mass. 562, 565 (2013) (“[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction . . . [b]ut probable cause is “more than mere suspicion.” *quoting* Commonwealth v. Hason, 387 Mass. 169, 174 (1982)). For purposes of probable cause, the application is sufficient.

For the foregoing reasons, the defendant’s motion to dismiss is DENIED.



Thomas L. Finigan
Associate Justice

Dated: July 14, 2017