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IN THE COURT OF COMMON PLEAS
OF THE FIFTY-NINTH JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	*	**COUNTY BRANCH-ELK**
	*	
	*	
Vs.	*	**CRIMINAL**
	*	
RICHARD GLENN THIVENER,	*	
Defendant	*	**No. CP-24-CR-0500-2020**

FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW and ORDER OF COURT

Presently pending before the Court are Defendant's Omnibus Pre-Trial Motions To Dismiss filed April 16, 2021, August 17, 2021, and October 1, 2021 by Defendant, Richard Glenn Thivener, by and through his attorney William A. Shaw, Jr., Esq. The Court notes that the Second Omnibus Pre-Trial Motion was an amended version of the First Omnibus Pre-Trial Motion merely correcting clerical errors but is otherwise identical to Defendant's initial Omnibus Pre-Trial Motion. Defendant's Third Omnibus Pre-Trial Motion contained new matters for the Court's consideration.

On August 20, 2021, October 18, 2021, and November 30, 2021 evidentiary hearings were held before the Court on Defendant's aforesaid Omnibus Pre-Trial Motions whereby at time of hearing the Commonwealth was represented by Thomas G.G. Coppolo, Esq., Elk County District Attorney, and Defendant, Richard Glenn Thivener, was present and represented by Attorney Shaw. Upon consideration of the evidence presented at time of evidentiary hearing on Defendant's Omnibus Pre-Trial Motions and the Court's consideration of the respective legal memorandums submitted by counsel for the Commonwealth and Defendant following the final hearing on

November 30, 2021[1], the Court enters the following Findings of Fact, Discussion, Conclusions of Law and Order of Court, to wit:

FINDINGS OF FACT

1. On October 21, 2020 a Criminal Complaint was filed by Patrolman Andrew G. Nero, II, City of St. Marys Police Department, charging Defendant, Richard Glenn Thivener, with allegedly violating a number of provisions of the Pennsylvania Crimes Code, namely Criminal Homicide, 18 Pa. C.S.A. 2501(a), Felony First Degree, Drug Delivery Resulting In Death, 18 Pa. C.S.A. 2506(a), Felony First Degree, and Recklessly Endangering Another Person, 18 Pa. C.S.A. 2705, Misdemeanor Second Degree.
2. On November 5, 2020 the Commonwealth amended the Criminal Complaint filed to add Criminal Attempt, 18 Pa. C.S.A. 901(a) "related to Criminal Homicide" and Acquisition Of A Controlled Substance By Fraud, 18 Pa. C.S.A. 780-113(a)(12), Felony.
3. In consideration of Defendant being charged with Criminal Homicide, 18 Pa. C.S.A. 2501(a), Felony First Degree, Defendant was denied bail on October 21, 2020, consequently, Defendant was and remains incarcerated at the Elk County Prison.
4. On November 6, 2020, a Preliminary Hearing was held before Magisterial District Judge Mark S. Jacob who held all criminal charges against Defendant for court.
5. On November 20, 2020 the Commonwealth filed a Criminal Information and on November 24, 2020 the Commonwealth filed an Amended Criminal Information such that Defendant pursuant to Amended Criminal Information is alleged to have committed the criminal offenses of Criminal Homicide, 18 Pa. C.S.A. 2501(a), Felony First Degree, Drug

[1] The Court notes that an allowance was granted to the parties to submit legal memorandums to the Court provided Attorney Shaw requested an extended allowance of time such that he could have transcripts produced for his review and consideration as it related to his submission of a legal memorandum which the Court found to be acceptable given the issues presented and the nature of the case.

Delivery Resulting In Death, 18 Pa. C.S.A. 2506(a), Felony First Degree, Recklessly Endangering Another Person, 18 Pa. C.S.A. 2705, Misdemeanor Second Degree, Criminal Attempt, 18 Pa. C.S.A. 901(a) to commit Criminal Homicide, 18 Pa. C.S.A. 2501(a), and Acquiring A Controlled Substance By Fraud, 18 Pa. C.S.A. 780-113(a)(12), Felony.

6. At the time of the hearing on August 20, 2021, the Commonwealth by and through Thomas G.G. Coppolo, Esq., Elk County District Attorney, made an oral motion to withdraw Count 5, Acquiring A Controlled Substance By Fraud, 18 Pa. C.S.A. 780-113(a)(12), Felony, in the Criminal Information which Defendant did not oppose, consequently, the Court granted the motion of the Commonwealth and the aforesaid criminal charge was withdrawn. [2]
7. In the early morning hours of July 26, 2020 prior to 5:40 o'clock A.M. Sergeant Peter Largey of the City of St. Mary's Police Department was dispatched to a residence located at 242 North Michael Street, St. Marys, Elk County, Pennsylvania for a reported double suicide involving Defendant, Richard Glenn Thivener, and Defendant's wife, Jessica Thivener, whereby the subject residence was owned and occupied by Defendant and Defendant's wife.
8. Upon initial response to the Thivener residence law enforcement and medics observed Jessica Thivener to be deceased in bed and Defendant was in and out of consciousness, consequently, Defendant was transported by medics to Penn Highlands Elk for treatment.
9. On July 26, 2020 at approximately 5:40 o'clock A.M. Sergeant Largey telephoned Patrolman Andrew Nero, City of St. Marys Police Department, who was not on duty but

[2] The Court finds this moment during the hearing to be of significance to the Commonwealth's "theory of its case" to the extent that the Commonwealth was conceding that it had no independent evidence other than Defendant's own statement of Defendant stealing controlled substances and/or medications from Defendant's place of employment to administer to Defendant's wife, consequently, the Commonwealth by its own motion was bolstering Defendant's *corpus delicti* argument.

was requested to respond to the Thivener residence by Sergeant Largey to assist with the investigation which Patrolman Nero did so arriving at the Thivener residence at approximately 6:20 A.M. on July 26, 2020.

10. Specifically, at the time Patrolman Nero arrived at the Thivener residence on July 26, 2020 Jessica Thivener was deceased in bed, Defendant had been transported for medical treatment by emergency personnel and Sergeant Peter Largey, Chief Thomas Nicklas as well as two Pennsylvania State Troopers were present at the Thivener residence.

11. No search warrant was obtained by any member of the City of St. Marys Police Department for the Thivener residence on July 26, 2020 as it relates to the City of St. Marys Police Department's investigation on July 26, 2020 at the Thivener residence.[3]

12. On July 26, 2020 Patrolman Nero ultimately entered the bedroom of Defendant and decedent seizing a cell phone that was on the floor.

13. Pursuant to Final Anatomic Diagnoses dated October 12, 2020 Kevin D. Whaley, M.D., Pathologist, concluded that the cause of death for Jessica Thivener was "cardiac dysrhythmia of undetermined etiology". See Commonwealth Exhibit #3 and 2C as marked.

14. Kevin D. Whaley, M.D., Pathologist, further stated in the Final Anatomic Diagnoses dated October 12, 2020, "[a]lthough the information postmortem findings must be considered in the context of a complete scene investigation, there are neither gross nor microscopic findings suggestive of physical altercation. Furthermore, sequential toxicological analysis

[3] The Commonwealth concedes this fact. See Commonwealth's Answer To Defendant's Omnibus Pre-Trial Motion filed May 11, 2021 at ¶ 18, to wit: "Admitted that evidence was collected from the scene without a search warrant, but denied that evidence was collected from the scene without probable cause".

of peripheral blood for a wide spectrum of illicit substances revealed only concentrations of lorazepam and naproxen far below published toxic concentration ranges". See *id.*

15. On October 21, 2020 from approximately 4:00 o'clock P.M. to 9:00 o'clock P.M., Defendant was interviewed at the City of St. Marys Police Department by Patrolman Nero, City of St. Marys Police Department, Detective Gregg McManus, Elk County District Attorney Office, and Corporal Matthew Higgins, Pennsylvania State Police, whereby Defendant made certain admission that included Defendant stating that on July 25, 2020 Defendant placed seventeen (17) Ativan pills in Jessica Thivener's soup. Defendant further stated during the interview that he obtained the Ativan pills through his employment at Elk Haven Nursing Home.

DISCUSSION

Defendant's Omnibus Pre-trial Motions essentially pursues relief in fourfold. First, Defendant generally seeks to suppress evidence, and the fruit of said evidence, collected at the Defendant's home without a warrant. Second, Defendant seeks the suppression of evidence pertaining to the cell phone of Defendant for lack of probable cause establishing the grounds for a valid search warrant. Third, Defendant seeks *habeas corpus* relief based on a claim that a *prima facie* case was not and has not been established based upon the evidence presented by the Commonwealth at time of hearing. Fourth, Defendant argues based upon the evidentiary record including the lack thereof presented by the Commonwealth that all criminal charges against Defendant must be dismissed based upon and pursuant to the *corpus delicti* rule.

I. SEARCH OF DEFENDANT'S HOME

Once a motion to suppress evidence has been filed, it is the Commonwealth's burden to prove, by a preponderance of the evidence, that the challenged evidence was not obtained in

violation of the defendant's rights. *Commonwealth v. Coleman*, 204 A.3d 1003 (Pa. Super. Ct.), appeal denied, 217 A.3d 205 (Pa. 2019). When considering the evidence seized at the home of Defendant, the Court is mindful of the recent holding of the Supreme Court of the United States whereby the Court answered whether the "[community] caretaking duties" of police creates a standalone doctrine that justifies warrantless searches and seizures in the home and concluded that "[i]t does not". See *Caniglia v. Strom*, 141 S. Ct. 1596, 1598, 209 L. Ed. 2d 604 (2021). The Court further held that, "[w]hat is reasonable for vehicles is different from what is reasonable for homes" and established an even higher standard for warrantless search and seizure. See *Id* at 1600.

The Supreme Court of the United States also held that, "[i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 573, 100 S. Ct. 1371, 1373, 63 L. Ed. 2d 639 (1980). The United States Supreme Court has described these exigent circumstances as including:

> 1) The "emergency aid" exception (to render emergency assistance to an injured occupant or to protect an occupant from imminent injury);
>
> 2) When police officers are in "hot pursuit" of a fleeing suspect, and;
>
> 3) To prevent the "imminent destruction of evidence".

See *Kentucky v. King*, 563 U.S. 452, 460, 131 S. Ct. 1849, 1856–57, 179 L. Ed. 2d 865 (2011).

While the Court has recognized a "plain view" doctrine with respect to the seizure of property, the Court has held, to wit:

> It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the

> warrantless seizure. First, not only must the item be in plain view; its incriminating character must also be 'immediately apparent.

See *Horton v. California*, 496 U.S. 128, 136, 110 S. Ct. 2301, 2308, 110 L. Ed. 2d 112 (1990). Regarding the "Community Caretaker Exception", the Pennsylvania Supreme Court has held that in order for the exception to apply, "...Police officers must be able to point to specific, objective, and articulable facts that would reasonably suggest to an experienced officer that a citizen is in need of assistance" and that "the police caretaking action must be independent from the detection, investigation, and acquisition of criminal evidence". See *Commonwealth v. Livingstone*, 644 Pa. 27, 70-71, 174 A.3d 609, 634 (2017).

The Pennsylvania Supreme Court adopted the distinction between emergency aid as an exigent circumstance and as a subcategory of the community caretaker exception, to wit:

> [T]he emergency aid doctrine is not a subcategory of the exigent circumstances exception to the warrant requirement. Rather, it is a subcategory of the community caretaking exception, a distinctly different principle of Fourth Amendment jurisprudence. 'When the police act pursuant to the exigent circumstances exception, they are searching for evidence or perpetrators of a crime. Accordingly, in addition to showing the existence of an emergency leaving no time for a warrant, they must also possess probable cause that the premises to be searched contains such evidence or suspects. In contrast, the community caretaker exception is only invoked when the police are not engaged in crime-solving activities.' With respect to Fourth Amendment guaranties, this is the key distinction: 'the defining characteristic of community caretaking functions is that they are totally unrelated to the criminal investigation duties of the police'.

Id. at 60.

Additionally, the Pennsylvania Supreme Court has held, to wit:

> that the police officer must be "able to point to specific, objective, and articulable facts which, standing alone, reasonably would suggest that his assistance is necessary, a coinciding subjective law enforcement concern by the officer will not negate the validity of that search under the public servant exception to the community caretaking doctrine...when the community caretaking exception is involved to validate a search or seizure, courts must meticulously consider the facts and carefully apply the exception

in a manner that mitigates the risk of abuse".

Id at 74.

The Pennsylvania Supreme Court has also held, to wit:

> That there is no "good faith" exception under the Pennsylvania Constitution that would allow for the violation of privacy, and that Pennsylvania affords protections of the right to privacy and against unreasonable search and seizure that are beyond that of the federal constitution, "Citizens in this Commonwealth possess such rights, even where a police officer in 'good faith' carrying out his or her duties inadvertently invades the privacy or circumvents the strictures of probable cause. To adopt a 'good faith' exception to the exclusionary rule, we believe, would virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years."

See *Com. v. Edmunds*, 526 Pa. 374, 399, 586 A.2d 887, 899 (1991).

In 2018, the Pennsylvania Supreme Court held that "certain warrantless actions of police officers do not offend constitutional principles [if] they are motivated by a desire to render aid or assistance, rather than the investigation of criminal activity". See *Com. v. Wilmer*, 648 Pa. 577, 579, 194 A.3d 564, 565 (2018). The Court further held that that the emergency aid exception did not "permit reentry after the emergency had dissipated". *Id* at 580. The Court recognized that, "[u]nder the Fourth Amendment, 'searches and seizures without a warrant are presumptively unreasonable' subject only to specifically established exceptions...". *Id* at 583–84.

The Commonwealth candidly acknowledges that no search warrant was sought or obtained prior to the search of Defendant's residence including the bedroom therein. Patrolman Nero testified that upon his arrival, family members of the decedent, officers of the St. Mary's Police Department, and troopers from the Pennsylvania State Police were present. Patrolman Nero also testified that no medical personnel were present. At the time of Patrolman Nero's arrival at the scene and search of Defendant's residence, per his own testimony, Defendant had already been transported to the hospital and it was known to Patrolman Nero that the decedent, Jessica Thivener, was in fact deceased.

Therefore, in this Court's view it is clear from Patrolman Nero's own testimony that none of the recognized exigent circumstances applied, namely neither Patrolman Nero nor any other law enforcement officer were in hot pursuit of a suspect, there was no risk of destruction of evidence (defendant was taken to the hospital, nobody was upstairs, and the scene could have been secured pending a warrant), and there was no emergency aid to be rendered since the Defendant had already been taken to the hospital, Decedent was deceased, and the medical personnel who responded to the scene had already concluded their duties.

Additionally, this Court finds that the "community caretaker exception" would not apply under the facts of this case. Throughout Patrolman Nero's testimony he stated that he engaged in his course of conduct due to his suspicion of criminal activity regarding the incident and scene he responded to. Therefore, this would negate the "community caretaker exception" as it does not apply to activities in which an officer engages to further criminal investigation. Simply stated this Court finds Patrolman Nero entered Defendant's residence and went upstairs to investigate whether a crime had occurred and not to render aid.

This Court likewise considers whether a "murder scene exception" applies to the facts and circumstances of this case. The Supreme Court of the United States has held, to wit:

> The 'murder scene exception' ... to the warrant requirement is inconsistent with the Fourth and Fourteenth Amendments" and "[a] warrantless search [was not] constitutionally permissible simply because a homicide had occurred there...Nor can the search be justified on the ground that a possible homicide inevitably presents an emergency situation, especially since there was no emergency threatening life or limb, all persons in the apartment having been located before the search began...The seriousness of [an] offense under investigation [does] not itself create exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search, where there is no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant and there is no suggestion that a warrant could not easily and conveniently have been obtained".

See *Mincey v. Arizona*, 437 U.S. 385, 385–86, 98 S. Ct. 2408, 2410, 57 L. Ed. 2d 290 (1978).

Notably, in 1999 the United States Supreme Court reaffirmed its' decision in *Mincey* holding, to wit:

> ...police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises but we rejected any general 'murder scene exception' as 'inconsistent with the Fourth and Fourteenth Amendments...the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there'

See *Flippo v. W. Virginia*, 528 U.S. 11, 14, 120 S. Ct. 7, 8, 145 L. Ed. 2d 16 (1999).

The Supreme Court of Pennsylvania applied the holding of *Mincey* in 2018 when the Court, in the case of a law enforcement officer re-entering a sorority house for administrative purposes, held, to wit:

> Applying the principles in *Mincey* to the facts of record in the case at bar, we assume for purposes of this appeal that the Troopers' initial warrantless entry into the sorority house did not violate the Fourth Amendment's warrant requirement, as they had an objectively reasonable basis to believe that an occupant was in need of emergency assistance. The evidence established that the Troopers observed a visibly intoxicated young man stumbling around on the roof, and they reasonably believed that he was in danger of falling. Upon gaining access to the roof, however, the Troopers learned that the young man had fallen and was being treated by first responders on the ground. At that time, the Troopers' authority for a warrantless entry into the house ceased, and in accordance with *Mincey*'s teaching that the right of entry be 'strictly circumscribed' by the nature of the emergency justifying the intrusion, the Troopers were required to **leave** the premises immediately. While they did so, Trooper Smolleck then reentered the residence. The emergency having passed, the emergency aid exception did not support Trooper Smolleck's reentry. As the Commonwealth does not claim that any other exception to the Fourth Amendment's warrant requirement justified the reentry, we must conclude that all evidence of criminal wrongdoing coming from the reentry had to be suppressed.

See *Com. v. Wilmer*, 648 Pa. 577, 592, 194 A.3d 564, 573 (2018).

The *Wilmer* Court reiterated, "once the emergency that permitted the Troopers' initial entry ceased, their right of entry in the sorority house under the emergency aid exception also ceased. As a result, their actions from that point forward must be evaluated under traditional Fourth

Amendment principles". See *Com. v. Wilmer*, 648 Pa. 577, 596, 194 A.3d 564, 575 (2018). The Court went on to hold that, "[b]ecause no other exception to the warrant requirement applied to permit his reentry, [the Trooper] did not observe the glass marijuana bong and pipe in the sorority house from a lawful vantage point and accordingly, the plain view exception to the Fourth Amendment did not justify his warrantless seizure of those items." *Id.* at 596–97.

In this Court's view based upon the evidence presented that it was not apparent at the onset on the investigation by the City of St. Marys Police Department that a homicide had occurred rather than a suicide. Even if it was apparent that a homicide had occurred, there is no recognized exception for a "homicide or murder scene" to the warrant requirement once it has been ascertained that there were no further victims and that the suspect was not "on the loose". Additionally, at the time of the search the Defendant was not in police custody but rather was receiving medical treatment, Defendant was not under arrest and Defendant had not consented to the search or otherwise forfeited his own individual liberty and/or privacy, including to Defendant's residence.

In this regards, Patrolman Nero testified that when he arrived on the scene, the Decedent, Jessica Thivener, was located and determined to be deceased and the Defendant was accounted for having been taken by medical personnel for treatment to a nearby medical facility. There was no evidence presented that the scene could not have been secured by the multiple law enforcement officers who were present such that a search warrant could have been obtained by law enforcement prior to searching Defendant's residence. Notably at time of hearing, Phillip Hoh, Deputy Coroner, as an agent for the Commonwealth testified, in this Court's view, much to the surprise and revelation of Defendant's attorney, and perhaps the Commonwealth, that evidence, namely prescription bottles containing medication, were removed from the scene by Deputy Coroner Hoh.

Applying the principles set forth by the Pennsylvania Supreme Court in *Wilmer*, once it was determined that emergency aid had been applied, any authority law enforcement had to remain on the premises of Defendant's residence ceased and law enforcement were required to leave the premises absent a search warrant being obtained by law enforcement. Not only had emergency responders began their work but they had completed their work at the scene and departed for the hospital. Accordingly, this Court concludes that since Patrolman Nero had no lawful authority to be in Defendant's residence including the bedroom therein, any items seized by him in "plain view" were not seen from a lawful vantage point and therefore must be suppressed.

II. SEARCH OF ELECTRONICS

The Supreme Court of the United States has held, to wit:

> Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one...Accordingly, the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board.

Riley v. California, 573 U.S. 373, 387, 134 S. Ct. 2473, 2485-2486, 189 L. Ed. 2d 430 (2014).

The Supreme Court of Pennsylvania held, to wit:

> While probable cause to arrest merely requires that there be a sufficient probability that a certain person committed an offense, much more is required to establish probable cause for the issuance of a search warrant. Instead, what is needed is some specific "nexus between the items to be [searched and] seized and the suspected crime committed. *Commonwealth v. Butler*, 448 Pa. 128, 291 A.2d 89, 90 (1972). Stated more plainly, where law enforcement seeks to search a person's cell phone based on the person's mere proximity to illegal contraband, some link sufficient to connect the two must be provided in the affidavit of probable cause. *See Commonwealth v. White*, 475 Mass. 583, 59 N.E.3d 369, 376 (2016) ("even where there is probable cause to suspect the defendant of a crime, police may not ... search his or her cell phone to look for evidence unless they have information establishing the existence of particularized evidence likely to be found there.

Commonwealth v. Johnson, 240 A.3d 575, 587–88 (Pa. 2020)

The Pennsylvania Supreme Court has further held that *no value* could be ascribed to "specialized knowledge" when evaluating an affidavit of probable cause where no other evidence was present regarding the actual use of the cell phone. *Id* at 588.

A. Cell Phone of Decedent, Jessica Thivener

The Decedent's cell phone was seized at the home of the Defendant prior to a search warrant having been obtained by law enforcement. Patrolman Nero testified at time of hearing that he had picked up the cell phone of Decedent at the time he entered the bedroom at which time he noticed a message appear on the screen regarding an attempt to access a chromebook laptop. The cell phone seen lying on the floor was not being used as a weapon, nor did Patrolman Nero give any indication that he believed it to be a weapon. The search was also not taking place incident to an arrest or within any of the recognized exceptions and even if it had, the search of the cell phone and the use of the data obtained would still not be a justifiable search. Although the Court finds that Patrolman Nero should not have even been in the bedroom at all, even if his presence was permissible, no legal authority existed to search the contents of the phone or to use any data present on the phone for investigatory purposes without securing a warrant. For the reasons articulated above, evidence seized from the home prior to obtaining a search warrant must be suppressed, including the decedent's cell phone, along with all evidence obtained as a result of said seizure as the fruit of the poisonous tree.

B. Cell Phone of Defendant, Richard Thivener

The Court notes that the Affidavit of Probable Cause attached to the Search Warrant dated July 30, 2020 and issued by Magisterial District Judge Mark Jacob for Defendant's cell phone relies heavily on the "specialized knowledge" or "general knowledge" of the Affiant regarding the

general use by individuals of cell phones and other electronics to search for information regarding how to commit and/or engage in criminal activity. Nearly every paragraph of the search warrant relevant to the cell phone in question and not merely a restatement of the crime scene in totality was based upon generalized "knowledge and experience" which was held to be impermissible by the Pennsylvania Supreme Court in *Johnson*. While the Affidavit avers that a text message was sent from Defendant's phone to the Decedent's mother and sister regarding a suicide, the Court does not find that the transmission of a text message corresponds with the use of a cell phone to search the internet for information. Furthermore, nothing in the text messages themselves indicates the commission of a crime or the use of a cell phone to further a crime. Additionally, the Affiant made no mention whatsoever regarding the reliability of the alleged text message recipients. Nothing in the Affidavit of Probable Cause for Defendant's cell phone indicates that anyone saw Defendant searching the internet or using his phone to advance a criminal activity nor did any independent evidence of such activity exist. In accordance with the holding of the Pennsylvania Supreme Court in *Johnson*, this Court cannot not allow the constitutional protections against illegal search and seizure to be ignored on the exclusive basis of "specialized knowledge and training" of an affiant to a search warrant particularly when such specialized knowledge absent specific facts of the case or incident is offered as a conclusory statement relative to probable cause.

III. *HABEAS CORPUS* RELIEF

Regarding the authority of this Court to grant a petition for writ of *Habeas Corpus* this Court is mindful of the following, to wit:

> [T]he Supreme Court of Pennsylvania recognized decades ago, the courts of common pleas have "full power, under this common-law authority over inferior magistrates, and also by virtue of being a justice of the peace, to require the Commonwealth to produce evidence proving a *prima facie* case against the incarcerated individual. *Com. ex rel. Levine v. Fair, 394 Pa. 262, 146 A.2d 834, 845 (1958)* (quoting trial court opinion with approval). Indeed, "[t]here is no

> locked door which may not be opened by the key of *habeas corpus* ... there is no enclosure which may not be entered by the person bearing this Writ," the Great Writ of Liberty. *Id.* at 846.

Commonwealth v. Burke, 2021 Pa. Super 167, 261 A.3d 548, 553 (Pa. Super. 2021).

> [N]o matter what may be the situation or how involved the circumstances, any person who claims he is illegally imprisoned or restrained of his liberty may have such claim inquired into by a competent court, and, if his claim is found to be well grounded, he will be discharged and freed of such restraint.

Com. ex rel. Levine v. Fair, 394 Pa. 262, 285, 146 A.2d 834, 846 (1958).

Relative to the petition filed by Defendant, the Court applies the following standard to inquire into Defendant's claim, to wit:

> The focus of the court in a *habeas corpus* hearing is properly upon the legality of the existing restraint on the petitioner's liberty and not solely upon a review of what occurred at a prior preliminary hearing. In the pretrial setting, the focus of the *habeas corpus* hearing is to determine whether sufficient Commonwealth evidence exists to require a defendant to be held in government "custody" until he may be brought to trial.

Com. v. Morman, 373 Pa. Super. 360, 367, 541 A.2d 356, 359–60 (1988). In addition, the Pennsylvania Superior Court has held, to wit:

> A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. *Weigle*, supra at 311 (emphasis added, quotation marks omitted). Further, the evidence must be considered in the light most favorable to the Commonwealth so that inferences that would support a guilty verdict are given effect. *Santos*, supra at 363.

See *Com. v. Hilliard*, 2017 Pa. Super 283, 172 A.3d 5, 10 (2017)

A. *Corpus Delicti*

The Court finds that the issue of whether *habeas corpus* relief should be granted to Defendant is significantly related to the *corpus delicti* issue and argument raised by the Defendant. It has been established that, "[o]nly when the Commonwealth has presented evidence of the *corpus delicti* can it rely upon statements and declarations of the accused to prove that the accused was,

in fact, the criminal agent responsible for the loss". *Com. v. Taylor*, 574 Pa. 390, 831 A.2d 587 (2003). Generally, "[t]he *corpus delicti* consists of two elements: the occurrence of a loss or injury, and some person's criminal conduct as the source of that loss or injury". *Com. v. Zugay*, 2000 PA Super 15, ¶ 32, 745 A.2d 639, 652 (2000). Specifically for homicide cases, the Pennsylvania Supreme Court has held, "[t]he Commonwealth ... in order to establish the *corpus delicti*, must prove (1) that the alleged victim is dead, and (2) that the death occurred as a result of a felonious act". See *Com. v. Gockley*, 411 Pa. 437, 454, 192 A.2d 693, 701–02 (1963). The Pennsylvania Superior Court has held, "[t]he *corpus delicti* in a homicide case consists of proof 'that the person for whose death the prosecution was instituted is in fact dead and that the death occurred under circumstances indicating that it was criminally caused by someone". See *Com. v. Dupre*, 2005 Pa Super 12, ¶ 5, 866 A.2d 1089, 1097–98 (2005). The Pennsylvania Supreme Court also held that since "a criminal conviction may not stand merely on the out of court confession of one accused...a case may not go to the fact finder where independent evidence does not suggest that a crime has occurred". See *Com. v. Ware*, 459 Pa. 334, 366 n.41, 329 A.2d 258, 274 (1974), *Com. v. Byrd*, 490 Pa. 544, 556, 417 A.2d 173, 179 (1980). In summary, it is not merely enough to show evidence of a death (a dead body) but it must also be shown that the death was the result of criminal conduct.

Regarding the burden of proof, the Pennsylvania Superior Court has held, "[t]he Commonwealth need not prove the existence of a crime beyond a reasonable doubt as an element in establishing the *corpus delicti* of a crime, but the evidence must be more consistent with a crime than with [an] accident". *Id* at 866. This is consistent with the holding of the Pennsylvania Supreme Court which held, "[t]he court needs only to be satisfied that the evidence is more consistent with a crime than an accident or suicide to admit the statements". See *Com. v. Reyes*,

545 Pa. 374, 386, 681 A.2d 724, 729 (1996). The Superior Court cited *Reyes* in applying a preponderance of the evidence standard, to wit:

> It is important to note that *Adkins* also offered a qualified expert witness who testified that he could not determine whether the cause of the fire was accidental or intentional based on photos of the scene and the lab reports. However, with regard to the admissibility of evidence, the *corpus delicti* rule only requires that the Commonwealth prove that a crime actually occurred by a preponderance of the evidence, or more simply, that the Commonwealth prove that 'the evidence is more consistent with a crime than an accident ... to admit the statements.

See *Com. v. Adkins*, No. 160 MDA 2016, 2017 WL 678827, at *4 (Pa. Super. Ct. Feb. 21, 2017). The Pennsylvania Superior Court citing Pennsylvania Supreme Court cases held, "[w]hile the burden of establishing the *corpus delicti* is not equivalent to the Commonwealth's ultimate burden of proof, "the evidence of a *corpus delicti* is insufficient if it is merely equally consistent with non-criminal acts as with criminal acts". See *Com. v. Zugay*, 2000 Pa. Super 15, ¶ 35, 745 A.2d 639, 653 (2000).

The Defendant is charged with Criminal Homicide or "unlawfully, intentionally, knowingly, recklessly and/or negligently causing the death or taking part in causing the death of another human being". The autopsy report admitted into evidence and relied upon by the Commonwealth does not indicate that the cause of death of Decedent was the result of criminal activity or even the result of the actions of another person. Except for Defendant's own statement, the Commonwealth has conceded that the Commonwealth is not in possession of any evidence and for that matter has not presented any evidence that Defendant stole Ativan from Defendant's employer to administer to Decedent but even if the Commonwealth had any such evidence the cause of death of Decedent per the autopsy report admitted into evidence by the Commonwealth was not due to a "drug overdose". Absent Defendant's confession, no evidence exists independently to show that the death of the Decedent, Jessica Thivener, was the result of criminal

activity let alone the result of the actions of the Defendant. Accordingly, based upon the evidence presented by the Commonwealth or the lack thereof this Court finds that the Commonwealth has failed to meet its burden of proof and has failed to establish a *prima facie* of all criminal charges set forth in the Amended Criminal Information filed November 24, 2020 including specifically Criminal Homicide.

The Defendant is further charged with Drug Delivery Resulting in Death, Recklessly Endangering Another Person, and Criminal Attempt – Criminal Homicide. Defendant was previously charged with Acquiring Controlled Substance by Fraud, Forgery, and Deception, however, as previously mentioned, the Commonwealth conceded Defendant's *corpus delicti* argument and withdrew the charge. Since the Commonwealth conceded that they could not establish that Defendant was involved in acquiring controlled substances by fraud, forgery, or deception, no other evidence remains that could independently establish that the crimes of drug delivery resulting in death, recklessly endangering another person, or criminal attempt took place. No evidence was presented that Defendant acquired drugs to deliver to the decedent, that he recklessly endangered her by providing her with drugs, nor that he took a substantial step towards committing a homicide.

B. Confession of Richard G. Thivener, Defendant

Defendant avers in the various Omnibus Pre-Trial Motions that Defendant's confession itself should not be admitted at time of trial on the basis that said confession was obtained as the result of coercion and hostility. The burden rests with the Commonwealth to show voluntariness of a confession by a preponderance of credible evidence. *Com. v. Hunt*, 263 Pa.Super. 504, 509, 398 A.2d 690, 692 (1979), citing *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); *Commonwealth v. Moore*, 454 Pa. 337, 311 A.2d 620 (1973). At time of preliminary

hearing, Patrolman Nero testified on cross-examination that "Mr. Thivener confessed to giving his wife Ativan without her knowledge" See Commonwealth Exhibit 2 at 56 (Transcript of Proceedings, Preliminary Hearing). Patrolman Nero further testified that "[w]e decided to pull him in" and telephoned Defendant to come to the police station for another interview. *Id.* at 56. Patrolman Nero testified that the entirety of that interview was recorded. *Id* at 58. Patrolman Nero further testified that he heard Defendant confess to putting Ativan in Decedent's soup after he was interviewed for "a couple hours" and that Defendant was going to be kept at the station "[u]ntil he either confessed or advised us that he wanted an attorney or wanted to leave". *Id.* at 60, 61.Patrolman Nero maintains that Defendant was not handcuffed and was never told that he was not permitted to leave. *Id* at 61.

The Court notes that the Commonwealth, who has the burden to prove that the confession was voluntary by a preponderance of the evidence, failed to present any evidence to overcome Defendant's averments. Significantly and notable, the Commonwealth never introduced into the evidentiary record during the numerous hearings the recording of the confession of Defendant that was alluded to in Patrolman Nero's testimony that could potentially have established that Defendant's confession was voluntary. No rebuttal testimony was offered by the Commonwealth to contradict that evidence elicted by Defendant's attorney on cross-examination as to the issue of Defendant's confession. The Court is then left to evaluate the admissibility of the confession on the basis of the above testimony. While the Defendant was not told that he was not permitted to leave, a reasonable person upon receiving a call from the police to participate in an interview relative to a murder investigation would believe they are obliged to participate. The language used by Patrolman Nero, particularly "[w]e decided to pull him in" indicates that Defendant's interview itself could reasonably be construed as less than voluntary by a reasonable person. Defendant was

interviewed for hours and would have been kept at the station for an indefinite period of time until "he confessed" or advised police that he sought the assistance of counsel. While Defendant could certainly have invoked his right to counsel, as noted above, the burden rests with the Commonwealth to prove that the confession was voluntary and that Defendant was not coerced. The Court finds that the testimony of Patrolman Nero on cross-examination at time of preliminary hearing bolsters the averment of Defendant and no evidence was offered to counter Defendant's averments and therefore the Commonwealth failed to meet their evidentiary burden to prove the voluntariness of Defendant's confession.

In consideration of the aforesaid discussion, the Court enters the following:

CONCLUSIONS OF LAW

1. The search and seizure of evidence at Defendant's residence located at 242 North Michael Street, St. Marrys, Elk County, Pennsylvania on July 26, 2020 by officers of the City of St. Marys Police Department was a warrantless search not falling within or under any of the recognized exceptions to the search warrant requirement and was therefore an unconstitutional search in violation of Defendant's rights under the Fourth Amendment of the United States Constitution and Article One, Section Eight of the Pennsylvania Constitution.
2. Any and all evidence obtained as a result of the unconstitutional search of Defendant's residence must be suppressed, including any fruits thereof as fruit of the poisonous tree.
3. The search warrant for Defendant's cell phone lacked sufficient probable cause therefore any and all evidence seized from Defendant's cell phone must be suppressed, consequently, any evidence subsequently seized that relied upon evidence seized from Defendant's cell phone is fruit of the poisonous tree and must be suppressed.

4. Absent Defendant's confession, no independent evidence exists to indicate that the death of Decedent, Jessica Thivener, was the result of a criminal act as the autopsy report admitted by the Commonwealth the Court finds in itself is insufficient evidence that would require a fact finder to speculate as to the cause of Decedent's death.
5. The Commonwealth has failed to prove by a preponderance of the evidence that Defendant's confession was not obtained in violation of Defendant's constitutional rights and therefore the confession and all evidence resulting from said confession must be suppressed.
6. The Commonwealth has failed to present sufficient evidence establishing a *prima facie* case as to all the criminal charges set forth in the Amended Criminal Information filed on November 24, 2020 by the Commonwealth, as amended by the Commonwealth.
7. Defendant's continued incarceration is unlawful and Defendant therefore at this time must be discharged from custody and freed of all restraints.

IN THE COURT OF COMMON PLEAS
OF THE FIFTY-NINTH JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	*	**COUNTY BRANCH-ELK**
	*	
	*	
Vs.	*	**CRIMINAL**
	*	
RICHARD GLENN THIVENER,	*	
Defendant	*	**No. CP-24-CR-0500-2020**

ORDER OF COURT

AND NOW, this 28th day of June, 2022, upon consideration of Defendant's Omnibus Pre-trial Motions filed on April 16, 2021, August 17, 2021, and October 1, 2021 and the evidence presented on August 20, 2021, October 18, 2021 and November 30, 2021 at time of hearing on said motion, for the reasons set forth in the forgoing Findings of Fact, Discussion and Conclusions of Law entered contemporaneously with this Order of Court, **IT IS HEREBY ORDERED AND DECREED**, that Defendant's Omnibus Pre-trial Motions are **GRANTED** in part and **DENIED** in part as follows:

1. Defendant's Motion for *Habeas Corpus* Relief is **GRANTED** in full without prejudice to the Commonwealth. The Amended Criminal Information filed on November 24, 2020 by the Commonwealth, as amended, is **QUASHED** in its entirety as a result of the Commonwealth failing to present *prima facie* evidence in support of the criminal charges against Defendant set forth in the aforesaid Amended Criminal Information. Accordingly, the Warden of the Elk County Prison or his designee shall immediately release Defendant, Richard Glenn Thivener from incarceration at the Elk County Prison as any further continued incarceration or detention of Defendant would be unlawful.

2. Defendant's Motion To Suppress Evidence relative to items of evidence searched for and seized from Defendant's residence on July 26, 2020 without a search warrant is **GRANTED** such that all evidence seized by members of the City of St. Marys Police Department and/or Pennsylvania State Police from Defendant's residence on July 26, 2020 is hereby **SUPPRESSED.**
3. To the extent necessary, Defendant's Motion For Dismissal Of All Criminal Charges on the basis of the *corpus delicti* rule is **GRANTED** such that all criminal charges set forth in the Amended Criminal filed by the Commonwealth on November 24, 2020, as amended, are **DISMISSED** without prejudice to the Commonwealth;
4. Defendant's Motion To Suppress Evidence pertaining to admissions made under coercive and hostile conditions, particularly the confession made while under interrogation, is **GRANTED** and Defendant's confession is **SUPPRESSED**.
5. Defendant's Motion To Compel Discovery is **GRANTED** to the extent necessary at this time;
6. Defendant's Motion For Expert Witness Fees is **DENIED** without prejudice as being moot at this time;
7. Defendant's motion to clarify expert witness fees is **DENIED** without prejudice as being moot at this time;
8. Defendant's Motion To Amend Pre-Trial Motion is **DENIED** without prejudice as being moot at this time;
9. Defendant's Motion For Supplemental Discovery is **DENIED** without prejudice as being moot at this time;

10. Defendant's Motion For Stipulation is **DENIED** without prejudice as being moot at this time;

11. Defendant's Motion For Contempt, Sanctions and Attorney's Fees has been adjudicate under separate Order of Court entered by this Court;

12. Defendant's Motion For Clarification is **GRANTED** to the extent necessary at this time;

13. Defendant's Motion To Suppress Evidence seized by the City of St. Marys Police Department, Office of the Elk County District Attorney and/or any other law enforcement agency is **GRANTED** such that all evidence seized from Defendant's cell phone is **SUPPRESSED**;

BY THE COURT:

SHAWN T. MCMAHON, P.J.