

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : CR-1824-2016
 :
 BRITTANY BORGESS, :
 Defendant : HABEAS

OPINION AND ORDER

Defense Counsel filed a Petition for Habeas Corpus on December 2, 2017.

Background

At the time set for preliminary hearing, Brittany Borgess (Defendant) waived her right to a preliminary hearing in exchange for a plea offer. Through agreement of the parties it was determined that if no plea agreement could be reached, that Defendant would retain her right to a preliminary hearing. As no plea agreement was reached, the preliminary hearing occurred in this Court on March 23, 2017. Counsel submitted briefs and the following is the decision of the Court.

Factual Background

Defendant is charged with Involuntary Manslaughter¹, Endangering the Welfare of Children², and Recklessly Endangering Another Person³. The charges arise from

¹ **18 Pa.C.S. § 2504 (Involuntary manslaughter.)**

- (a) **General rule.** — A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person.
- (b) **Grading.** — Involuntary manslaughter is a misdemeanor of the first degree. Where the victim is under 12 years of age and is in the care, custody or control of the person who caused the death, involuntary manslaughter is a felony of the second degree.

the death of a four-year old girl on July 22, 2016, in Williamsport, PA⁴. Both parties agree that Defendant forgot the girl in her vehicle and went in to work. As Defendant said in her interview with police “How could I forget her just on the way home?” Police Interview, 8/1/2016, at 33. When the Defendant returned to the vehicle at the close of the work day she found that child unresponsive in the vehicle. The child was pronounced dead at Williamsport Regional Medical Center later that day.

Testimony of Agent Jason P. Bolt

Bolt testified on behalf of the Commonwealth. He is an investigative agent with the Williamsport Bureau of Police. On July 22, 2016, he responded to a call from CompuGen on West Fourth Street in Williamsport, PA. Commonwealth’s Exhibit #1 shows the alley behind that CompuGen and the silver Nissan Rogue where the child was found. Commonwealth’s Exhibit #2 is a photo of the backseat of the Nissan with the doors open. Two car seats are in the backseat. Commonwealth’s Exhibit #3 is a pool thermometer that shows the temperature of the vehicle to be above 120 degrees at 4:39 pm on the day in question. The autopsy report was submitted into evidence

² **18 Pa.C.S. § 4304 (Endangering the Welfare of Children.)**

A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

³ **18 Pa.C.S. § 2705. (Recklessly endangering another person.)**

A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

⁴ Defendant is not the child’s mother but rather appears to be the paramour of the child’s father and mother to the deceased child’s younger brother. Police Interview, 8/1/2016, at 39. Lines 22-23.

and the parties stipulated that if called to testify Pathologist Starling-Roney, M.D. would testify that the cause of death was “hyperthermia due to environmental exposure”. Commonwealth’s Exhibit #2, Autopsy Report, 7/23/2016, at 1. The Defendant was formally interviewed at City Hall, and a transcript of the Interview was produced for the Court.

At the time of the incident, Defendant was engaged to be married to the victim’s father. They were living together and caring for the couple’s three children: a seven year old female who was Defendant’s child, a four year old female, the victim; and a male infant who was the child of both Defendant and victim’s father.

The Defendant drove two children, the four year old female and the infant, on the date in question. The male infant sits in the center of the back seat and the deceased child sits behind Defendant on the rear driver’s side. Police Interview, 8/1/2016, at 9. The male infant was dropped at his daycare center. *Id.* at 10. Defendant and her fiancé were caretaker for the victim “every two days” and on those days she drops her fiance’s child at a different day care center than the one for the male infant. *Id.* at 15. When returning to her vehicle after work that day, she did not recognize the child she had left in the car. She ran screaming into her workplace for help. *Id.* at 27. A co-worker removed the child from the vehicle. *Id.* Defendant admitted that “she had done it before” i.e. not leave the children in the vehicle but found herself in the alley (the alley at her work) with all three children in tow rather than dropped off at their respective school and day-cares. *Id.* at 34.

Discussion

HABEAS CORPUS

In its Habeas petition, Defense Counsel challenges the Involuntary Manslaughter and Recklessly Endangering Another Person charges, saying the Commonwealth's evidence is not a *prima facie* showing of recklessness. Moreover, Defense believes there has not been *prima facie* evidence presented of the *mens rea* required for an Endangering the Welfare of a Child charge i.e. knowing mental state.

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove the defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. 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. Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. Commonwealth v. Karetny, 880 A.2d 505, 583 Pa. 514, 529 (Pa. 2005). *Prima facie* in the criminal realm is the measure of evidence, which if accepted as true, would warrant the conclusion that the crime charged was committed.

The Commonwealth must present evidence of each element of each crime charged in order to show a *prima facie* case at the preliminary hearing. The evidentiary sufficiency, or lack thereof, of the Commonwealth's *prima facie* case for a charged crime is a question of law as to which an appellate court's review is plenary. Karetny at 513. The *prima facie* standard requires that the Commonwealth's evidence

must establish that the crime has been committed and to satisfy this requirement the evidence must show that the existence of each of the material elements of the charge is present. Commonwealth v. Wodjak, 446 A.2d 991, 996 (Pa. 1983). While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. Id. at 997. Moreover, "inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case." Commonwealth v. Huggins, 836 A.2d 862, 866 (Pa. 2003) (quoting Commonwealth v. Owen, 580 A.2d 412, 414 (Pa. Super. 1990).)

In Huggins, a driver defendant fell asleep while operating a bus on Interstate-80. Like the case at bar, Huggins involved a motor vehicle incident resulting in the death of minors. The trial court in Huggins granted a habeas motion dismissing the Involuntary Manslaughter⁵ charges, a decision affirmed by the Superior Court. On appeal, the Supreme Court of Pennsylvania held the Commonwealth had presented a *prima facie* case of recklessness and remanded the case back to the trial court for trial. The High Court did not go on to say that a mere showing of falling asleep at the wheel was enough to show a *prima facie* case of recklessness but rather said that the other evidence the Commonwealth had adduced i.e. the presence of children, the

⁵ The Crimes Code defines involuntary manslaughter as follows: A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person. Huggins at 865-66.

increased rate of speed, the overcrowding on the bus with passengers, and the lack of seatbelts were enough to show recklessness.

Defense Counsel argues because the Defendant in the instant matter forgot the victim, that her conduct could not be reckless. Defense reasons that as recklessness requires a conscious disregard of a substantial and unjustifiable risk, Defendant cannot be proven reckless because being in a state of forgetting is not a conscious state. If one were conscious of forgetting, one has not forgotten. The Court disagrees. In Huggins, the sole issue the Supreme Court consider was

whether the *mens rea* element of the statute was satisfied, i.e., whether the Commonwealth produced prima facie evidence that the deaths caused by appellee were the result of an act undertaken in a reckless or grossly negligent manner.

Huggins at 866.

In its decision, the High Court approved of the reasoning that recklessness and gross negligence are equivalent terms⁶. Id. at 864, 868. It declined to adopt the Commonwealth's argument that the negligence referred to in the involuntary manslaughter statute was equivalent to the negligence defined by the Crimes Code putting weight on the qualifier "gross".

In making its determination, the question for this Court becomes whether the Commonwealth produced *prima facie* evidence that, in leaving the child in the car in the circumstances on which did, that Defendant disregarded a substantial and unjustifiable risk that the direct result of her behavior would be the death of the child.

A motor vehicle can be a dangerous instrumentality. Driving is a correspondingly heavily regulated privilege, both as to licensure and the rules of the

⁶ ...this Court has construed the terms "reckless" and "grossly negligent" as defining the equivalent state of mind for purposes of the involuntary manslaughter provision...

road, the regulation being a necessary concomitant of the dangers to self and other inherent in driving. No driver can get behind the wheel without an acute awareness of the “responsible post of duty”. Huggins at 869. In fact, Defendant was aware of the responsibilities of her duties that morning. She explained in her police interview in detail the routine of the family in getting its respective children to their care locations. Police Interview, 8/1/2016, at 6. She stated that she reaches across the victim in her order to remove her biological child from the vehicle. *Id.* at 11. She stated that she leaves her fiance’s child in the car while she drops her infant son off at his day care location. *Id.* at 12. She stated that she did not teach the victim how to unbuckle her seatbelt or to unlock the doors. *Id.* at 31. She stated that she had often found herself at work with her not having dropped off any of the children to their respective care locations. *Id.* at 34. The Court believes that knowing a situation like this has happened in the past and not taking precautions in order to avoid it could be considered a conscious disregard of a substantial and unjustifiable risk that her actions could lead to the death of her children. The totality of the circumstances presented by the Commonwealth indicates a *prima facie* showing of recklessness on the part of Defendant. The Commonwealth is not obligated to prove recklessness beyond a reasonable doubt at the preliminary hearing. Moreover, the mental state of “forgetting” can be reckless in circumstances such as these where the direct result of allowing oneself to forget is so grave. As such, the Court also finds the *prima facie* of showing recklessness for the charge of Recklessly Endangering Another Person.

Regarding the Endangering the Welfare of Children charge the Court believes that the Commonwealth has provided *prima facie* evidence that:

- 1) the accused is aware of his/her duty to protect the child;
- 2) the accused is aware that the child is in circumstances that could threaten the child's physical or psychological welfare; and
- 3) the accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare.

Commonwealth v. Pahel, 689 A.2d 963, 964 (1997) (three-prong test for establishing the intent (knowingly) element)

The Court finds that the Commonwealth has presented *prima facie* evidence of each prong of the test. Defendant was aware of her duty to care for the child that morning. She was to drive the child to daycare and she knew that was the plan for the day. It is not clear that Defendant was aware that the child was in circumstances that could threaten the child's physical or psychological welfare but a logical inference reasonably drawn from the evidence of record, is that she would have to be aware that leaving a child in a motor vehicle unattended, which she described knowingly doing at least once that day, is a threat to the child's welfare. Of course such knowledge does not have to be proven beyond a reasonable doubt at the preliminary hearing. Lastly, it is clear that the third prong of the test is met with the *prima facie* evidence alone. She failed to act; she failed to remove the child from the car.

ORDER

AND NOW, this 12th day of July, 2017, based upon the foregoing Opinion, the Petition for Writ of Habeas Corpus is hereby DENIED.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Pete Campana, Esq., Defense Counsel
Martin Wade, Esq.
Gary Weber, Esq.