

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-2021-2016
v.	:	
	:	
ARNOLD CAVANAUGH, JR,	:	PRETRIAL MOTION
Defendant	:	

OPINION AND ORDER

Arnold Cavanaugh, Jr. (Defendant), initially filed an Omnibus Pretrial Motion on December 21, 2016. A hearing was scheduled for March 14, 2017, but due to a snowstorm affecting the Northeast Region of the United States, the hearing was rescheduled at the request of Defense Counsel, with no objection by the Commonwealth. Defendant alleges in his motion that the Commonwealth failed to present a *prima facie* case on the charges of Drug Delivery Resulting in Death¹. Defendant also alleges that he was under the influence at the time he was questioned after his arrest and those statements should be suppressed. The Defendant also raised several additional issues covering evidence and procedure directly relating to the time of trial.

On April 19, 2017, the Commonwealth filed a reply brief to the Defendant's Omnibus Pretrial Motion arguing that the Defendant's challenge to the sufficiency of the Commonwealth's evidence at the preliminary hearing should be dismissed because the Omnibus Pretrial Motion failed to state with particularity the grounds for the motion and the facts supporting each ground². At the rescheduled hearing on April 26, 2017, Commonwealth initially requested that the Court dismiss the Defendant's

¹ 18 Pa.C.S. § 2506(a).

² Pa.R.Crim.P.575

Habeas claim as it violated Rule 575. Defense Counsel argued that as the answer was filed more than 10 days after the filing of Defense Counsel's pretrial motion the Court should not consider it. The Court denied the Commonwealth's request.

Defense Counsel began the proceeding by stipulating to the admission of Commonwealth's Exhibit 1 Death Certificate and Commonwealth's Exhibit 2 Toxicology Report; and Commonwealth's Exhibit 3 Preliminary Hearing Transcript. However, in a subsequent letter directed to the Court, Defense Counsel informed the Court that he would like to withdraw the stipulations he entered into with the Commonwealth regarding the authenticity of the Death Certificate and the Toxicology Report. Further hearing on this issue was held on June 27, 2017.

Background

Defendant is charged with Count 1 Drug Delivery Resulting in Death, a felony of the first degree; Count 2 Possession with Intent to Deliver³; an ungraded felony; and Count 3 Possession of a Controlled Substance⁴, an ungraded misdemeanor. The charges arise out of an alleged course of events occurring on July 2, 2016 through July 5, 2016. On July 5, 2016 the alleged victim, Chase McKissick (McKissick), died of a drug overdose.

Testimony of Alexa Cranmer, Preliminary Hearing

Alexa Cranmer (Cranmer) testified for the Commonwealth at the preliminary hearing on November 10, 2016. Cranmer knew McKissick for at least 5 years; he had been her boyfriend for that length of time. Preliminary Hearing Testimony, 11/10/16 at p.6. When she stayed with McKissick, Cranmer said she stayed with him at his

³ 35 P.S. § 780-118(a)(30).

⁴ 35 P.S. 780-113(a)(16).

grandmother's house located at 1529 Catherine Street. She described that on July 2, 2016, "Flamesz" came to McKissick's grandmother's home to sell McKissick drugs. Id. at 7. Flamesz was the street name for Defendant. She knew Flamesz from seeing him multiple times in the past and that he had sold her boyfriend drugs at least 3 times. Id. She stated that at about 5 pm on the night of July 2nd, 2016 she saw the victim and Defendant shaking hands in what she believed was a delivery of drugs between the two outside on the back porch. Id at 14. She also testified that she saw money change hands. She testified that she observed the victim dump two baggies out [of his hand] in his dresser. Id. at 9. She described the baggies as "one was plain and the other one had an Albert Einstein stamp on it". Id. Immediately after the handshake she saw McKissick dump the contents of his hand onto his dresser. She left the room for 20 minutes, and when she came back she observed McKissick nodding out. She was familiar with that reaction from McKissick when he was using heroin. Id. at 10. Cranmer testified that she laid him down in bed and fell asleep with him. Id. at 11. When she woke up, she saw foam coming out of his mouth and he was not breathing. Id. After attempting to wake him, she got his grandmother who started CPR until EMS arrived.

Defendant died two days later at Williamsport Regional Medical Center. Commonwealth's Exhibit 1, Certificate of Death, 10/31/2016.

Testimony of Agent Jason Bolt, Preliminary Hearing

Agent Jason Bolt (Bolt) of the Williamsport Bureau of Police also testified at the preliminary hearing. On July 3, 2016 he had been employed by the City Police for 12 ½ years and was currently assigned to the investigative unit. At about 5:30 am he was called to 1529 Catherine Street, City of Williamsport, where a male had apparently

just died of a heroin overdose. Id. at 27. While on scene he spoke with several individuals, one of whom Alexa Cranmer (Cranmer). She told Bolt that she witnessed McKissick using two bags of heroin and fentanyl. Id. At 28. She told Bolt that the bags had designs on them; one bag had a dollar sign and the other had a picture of Albert Einstein. She also told him that she thought that they had been thrown out in the trash in his bedroom. Bolt was able to recover the two baggies Cranmer described from the trash. Id. at 29. She also provided a description of the person who provided the drugs to McKissick, who Bolt was later able to identify as the Defendant. Id. Bolt sent the bags recovered to the Pennsylvania State Police for testing. Bolt also testified to the results of the NMS Lab Report that stated that the packet that was stamped “balmain money” had heroin residue, cocaine residue and fentanyl residue as well as several other similar-to-fentanyl residue. The second packet, “premeditated”, had heroin residue. Bolt testified that the cause of McKissick’s death was “drug overdose”. Id. at 44.

Testimony of Agent Jason Bolt, Suppression Hearing

Agent Jason Bolt (Bolt) testified on April 24, 2017 that he has been employed by the Williamsport Bureau of Police since 2004. He was a School Resource Officer for nine years, a Mounted Officer for five years, a Special County Detective for the DUI Task Force, and an Agent since June of 2016. He was the primary investigator in the death of McKissick. After interviewing several persons and receiving the results of the toxicology report, Bolt obtained a warrant for Defendant and arrested him on September 28, 2016.

Bolt testified to his experience with intoxicated individuals. As a patrol officer, he has had hundreds of contacts with people under the influence of alcohol including:

DUI stops, drunken college students, intoxicated teenagers, and various disorderly conducts. He would process and interview suspected intoxicated individuals at the DUI Center. Bolt testified that he could determine on sight if an individual is under the influence of an intoxicant and gave examples of signs of intoxication: thick tongue slurred speech; inability to balance, inability to answer clearly; and, red eyes.

On the day of Defendant's police interview, Bolt noted that other than a slight odor of alcoholic beverage, had no outward or classic signs of intoxication. Bolt denied specifically observing any of the signs listed above. Bolt did testify that someone can be intoxicated without slurring speech, having an unsteady gait, red bloodshot eyes, i.e. that someone can be intoxicated without having visual cues. Bolt testified that he did not smell marijuana on Defendant but that he told Bolt that he was a heroin addict.

Bolt asked Defendant if he would speak with him without an attorney, Bolt indicated on the video that Defendant indicated "yes", however, no "yes" is audible. Bolt had no concerns that Defendant was too intoxicated to speak to him. Bolt went over the Miranda⁵ waiver. Defendant signed it. Commonwealth's Exhibit 5, Williamsport Bureau of Police Miranda Waiver Form, 9/28/2016.

Bolt testified that at the time he questioned him, he knew the Defendant personally and that he reads well. Bolt read him the form and Defendant both initialed and signed the form in the appropriate locations. Bolt conducted the interview at approximately 9:30 pm. Bolt showed him the complaint that listed the Drug Delivery Resulting in Death charge.

⁵ Miranda v. Arizona, 384 U.S. 436 (1966).

Bolt estimated the time period between arriving at the station and into the interview room to be about 15 minutes. Bolt denied yelling at Defendant or threatening him. The Commonwealth submitted the video of the interview, portions of which were played for the Court at the April hearing into evidence.

Bolt testified that Defendant had told him during the police interview “he did have contact with [victim] at this Grandmother’s residence and that he was the middleman for getting him what he wanted.” *Id.* at 31. Bolt testified that the cause of McKissick’s death was “drug overdose”. *Id.* at 44. The date and time of death was July 5, 2016, at 3:22 pm. Affidavit of Probable Cause, 8/26/2016, at 1. Bolt also testified to the results of the NMS Lab Report which stated that the packet that was stamped “balmain money” had heroin residue, cocaine residue and fentanyl residue as well as several other similar-to-fentanyl residues. The second packet, “premeditated”, had heroin residue.

Discussion

I. Stipulations

Defense Counsel sought to withdraw his stipulations to the admission of the death certificate and the autopsy report in the Court’s consideration of the habeas motion. Courts will free a party from a stipulation to prevent a manifest injustice. *Fantazzi v. Temple Univ. Hosp., Inc.*, CIVIL ACTION NO. 00-CV-4175, 2002 U.S. Dist. LEXIS 16269, at *6 (E.D. Pa. Aug. 21, 2002).

In determining whether there will be manifest injustice unless a party is relieved from a stipulation, courts have focused on such factors as:

- (1) the effect of the stipulation on the party seeking to withdraw the stipulation;
- (2) the effect on the other parties to the litigation;
- (3) the occurrence of intervening events since the parties agreed to the stipulation; and

(4) whether evidence contrary to the stipulation is substantial.

Id.

Applying the factors above, the Court will deny Defense Counsel's request to withdraw stipulations. The Court accepted the stipulations to establish the authenticity of the documents. Little effect will be had on the moving party for purposes of establishing a *prima facie* case for Drug Delivery Resulting in Death. Moreover, at trial Defense Counsel will be able to cross examine the creator of the documents and argue the validity of the information contained within.

The Court also notes that there have been no intervening events between the time of the stipulation to the time of the request to withdraw them that would render Defense's stipulation to the admission of the documents unwarranted. Defense Counsel has presented no evidence contrary to the stipulation. A court may allow a party to withdraw from a stipulation if the moving party can prove that he relied to his detriment on representations that were untrue, or that the stipulation stemmed from fraud, accident, mistake, inadvertence, surprise, or excusable neglect, or that some other reason justifies relief. United States v. Kulp, 365 F. Supp. 747, 763 (E.D. Pa. 1973). Finding no such fraud or countervailing circumstance here, the Court denies Defense Counsel's request to withdraw his stipulations.

II. Habeas

"A *prima facie* case consists of evidence produced by the Commonwealth which sufficiently establishes that a crime has been committed and that the accused is probably the perpetrator of that crime. In other words, the *prima facie* case in support of [the defendant's] guilt consists of evidence presented by the

Commonwealth that, 'if accepted as true, would warrant the trial judge to allow the case to go to the jury.' Each element of the criminal offense charged must be supported by the Commonwealth's evidence." Commonwealth v. Lopez, 654 A.2d 1150, 1153 (Pa. Super. 1995) (citations omitted). A petition for writ of habeas corpus is the proper means for testing a pretrial finding that the Commonwealth has sufficient evidence to establish a prima facie case. Commonwealth v. Black, 103 A.3d 70, 77 (Pa. Super. 2015).

"In determining the presence or absence of a prima facie case, inferences reasonably drawn from the evidence of record that would support a verdict of guilty are to be given effect." Commonwealth v. Hendricks, 927 A.2d 289, 291 (Pa. Super. 2007). Furthermore, a prima facie case merely requires evidence of each of the elements of the offense charged; not evidence beyond a reasonable doubt. Commonwealth v. Patrick, 933 A.2d 1043, 1047 (Pa. Super. 2007) (en banc). At this stage of the proceedings, the court must view the evidence in the light most favorable to the Commonwealth. Commonwealth v. Santos, 876 A.2d 360, 363 (Pa. 2005). The court, at this stage of the proceedings, also cannot make credibility determinations or weigh the evidence. Commonwealth v. Landis, 48 A.3d 432, 448 (Pa. Super. 2012).

The Commonwealth did present additional evidence to the Court on the charge of Drug delivery resulting in Death. Defense Counsel's letter to the Court dated May 1, 2017, objected to the admission of the death certificate and the toxicology report alleging they are unsupported by any foundation concerning their authenticity or content and because they are supported by only hearsay evidence. Furthermore, Defense Counsel objects to their admission as he argues that such admissions violate

Defendant's 6th amendment and Article 1 Section 9 right to confront witnesses against him.

In Pennsylvania, the Commonwealth can establish its prima facie case on hearsay evidence. Commonwealth v. Ricker, 120 A.3d 349 (Pa. Super. 2015) (petition for allowance of appeal granted). Defendant submitted a brief in support of his position recognizing that although Ricker is controlling on this issue, he wishes to preserve the Confrontation Clause challenge if the Supreme Court overturns the Superior Court's ruling in Ricker.

Having determined that hearsay evidence was appropriately considered at the preliminary hearing, the Court now reviews the evidence presented for each element of the offense of Drug Delivery Resulting in Death.

To find someone guilty of Drug Delivery resulting in Death, the finder of fact must find that

First, that the defendant administered, dispensed, delivered, gave, prescribed, sold, or distributed a controlled substance or a counterfeit controlled substance to a person.

Second, that the defendant did so intentionally, that is, that it was his conscious object to administer, dispense, deliver, give, prescribe, sell, or distribute a controlled substance or a counterfeit controlled substance to a person.

Third, that the administration, dispense, delivery, prescription, sale, or distribution was in violation of the Controlled Substance, Drug, Device and Cosmetic Act.

Fourth, that a person has died as a result of using the substance.

Pa. SSJI (Crim) 15.2506 (Drug Delivery Resulting in Death for offenses committed on or after September 7, 2011).

The Court finds that the Commonwealth presented sufficient evidence to allow the case to go to the jury. Cranmer testified that she saw what she believed to be a handoff of drugs between Defendant and victim on the back porch of the Catherine Street residence. She proceeded to observe victim ingest those drugs. She did not see McKissick with anyone else after receiving the drugs from Defendant and ingesting them. She stated that victim was not breathing upon waking the next morning. The toxicology report established that McKissick died two days later from the ingestion of drugs that were consistent with what was contained in the packets that Defendant allegedly delivered to the victim. Taking all reasonable inferences in favor of the Commonwealth, it appears that drugs were delivered to McKissick by Defendant, he used those drugs, and McKissick's death is a direct result from using those drugs. The court finds the evidence presented at the preliminary hearing does establish a prima facie case for charging Defendant with Drug Delivery Resulting in Death.

III. Motion to Suppress Statements

As established by the video evidence presented by the Commonwealth at the hearing, at the time questioning began, Defendant was asked to sign a "Miranda Waiver"; while not entitled as such, it does advise Defendant of his 5th Amendment rights:

I wish to advise you that you have an absolute right to remain silent. Anything you say can and will be used against you in a court of law; you have the right to talk to an attorney before and have an attorney present with you during questioning; If you cannot afford to hire an attorney, one will be appointed for you, without charge, before any questioning if you so decide; If you decide to answer any questions, you may stop at any time you wish.

Commonwealth's Exhibit 5, 9/28/2016, time not indicated.

Defense Counsel argues that Defendant's statements to Bolt should be suppressed as he was intoxicated at the time of the police interview and that he was not properly advised of his Miranda rights.

To determine whether the Defendant has knowingly, intelligently, and voluntarily waived his Miranda rights, the Court looks to the totality of the circumstances, including "the duration and means of interrogation; the defendant's physical and psychological state; the conditions attendant to the detention; the attitude exhibited by the police during the interrogation; and any other factors which may serve to drain one's powers of resistance to suggestion and coercion." Commonwealth v. Perez, 845 A.2d 779, 787 (Pa. 2004) (citing Commonwealth v. DeJesus, 787 A.2d 394, 403 (Pa. 2001)). "The burden is on the Commonwealth to demonstrate that the accused's will was not overborne, either through physical or mental pressure and that the statement issued from free choice." Commonwealth v. Jones, 322 A.2d 119, 124 (Pa. 1974); see also Commonwealth v. Kuhn, 475 A.2d 103, 105 (Pa.Super. 1984).

Voluntariness "must be shown by a preponderance of the credible evidence." Kuhn at 105. In order to meet this burden, "the Commonwealth must demonstrate that the proper warnings were given, and that the accused manifested an understanding of these warnings." Commonwealth v. Eichinger, 915 A.2d 1122, 1136 (Pa. 2007).

Similarly, deception can render a waiver of rights involuntary. "The Pennsylvania courts, in interpreting Miranda, have held that, in order for an accused to exercise his Miranda rights intelligently, he must have knowledge of the particular transaction under investigation. This does not mean that the accused need know the technicalities of the offense or every conceivable consequence which might flow from a Miranda waiver, but he does have a right to know of the general nature of the incident giving rise to the investigation." Commonwealth v. Brown, 491 A.2d 189, 190-191 (Pa. Super. 1985). See also Commonwealth v. Dixon, 379 A.2d 553, 556 (Pa. 1977). "[T]here is no prophylactic requirement that the interrogating officers affirmatively provide information to the suspect as to the crime under investigation." Commonwealth v. Carr, 580 A.2d 1362, 1365 (Pa. Super. 1990).

The Commonwealth must prove by a preponderance of the evidence that the defendant knew the occasion for the interrogation. "This

burden may sometimes be satisfied by the establishment of circumstances attending the interrogation, such as the prior statements of the suspect, ... or the fact that interrogation follows hard upon the criminal episode and there is no circumstance lending ambiguity to the direction and purpose of the questioning." Carr at 1365-1366 (citations omitted).

The video revealed that Bolt was clear in his explanation of Defendant's Miranda rights. He not only read the form to Defendant but Defendant was able to read the form himself as well as the other documents provided to Defendant during the interview. Defendant demonstrated his understanding of what was being asked of him. He spoke with Bolt for 56 minutes. Although he was animated at times, he spoke clearly and forthrightly. In his statement to Bolt, he admits to his potential involvement in the death of victim but does not believe he is legally responsible for the delivery of heroin as no money was exchanged nor did Defendant directly deliver heroin to victim.

Bolt made clear at the outset of the interrogation as to what the warrant for the Defendant's arrest was issued for, the death of McKissick due to drug delivery. The Miranda warnings given to Defendant adequately advised the Defendant of his rights and Defendant agreed to speak with Bolt without an attorney present.

In order for the intoxication to render the confession involuntary, it must have had a certain precise impact on the individual. The test is whether there is sufficient mental capacity for the defendant to know what he was saying and to have voluntarily intended to say it. The applicable burden of proof and appellate standard of review in this matter have also been detailed by case law. The Commonwealth has the burden of proof as to voluntariness; it must be shown by a preponderance of the credible evidence.

Commonwealth v. Kuhn, *supra* at 105 (Pa. 1984) (citing Commonwealth v. Culberson, 358 A.2d 416 at 417 (Pa. 1976)).

In reviewing the video, the Defendant does not appear intoxicated. His responses are appropriate and appears to know what he is saying and doing it voluntarily. Bolt and Defendant also seem to have a rapport because they have known each other in the past. Defendant is aware of the evidence that has been brought against him; he disagrees that it is sufficient to make a criminal case against him. He is coherent and logical in his statements to Bolt. Finding that Defendant's waiver of his Miranda rights was knowing, voluntary and intelligent, the Court will not suppress the statements Defendant made at his police interview.

ORDER

AND NOW, this 24th day of August, 2017, based on the foregoing opinion Defendant's Habeas Motion and Motion to Suppress are hereby DENIED.

Defendant's additional Motion to Withdraw Stipulations for the Habeas hearing are hereby DENIED.

On the additional issues raised by Defendant in his Omnibus Pretrial Motion the Court rules as follows:

1. The Court will rule on the admission of Prior Bad Act evidence if and when the Commonwealth seeks to admit such evidence at trial.
2. The Court defers its decision on the use of photographs during trial until closer to the time of trial.
3. The Court defers its decision on the Fair Scope Rule until closer to the time of trial.
4. The Court will consider additional Motions if any are filed by Defense as a result of new or additional discovery provided prior to trial.

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA (NI)
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