

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**JULIAN RUFFIN,
Defendant**

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CR-1227-2016

MOTION TO DISMISS

OPINION AND ORDER

On October 17, 2016, Defendant's Counsel, filed a Motion to Dismiss the charges as the Commonwealth failed to present sufficient evidence at the preliminary hearing. The Court originally scheduled testimony and argument on the Motion for November 2, 2016; however, after two continuance requests, one from the Commonwealth and one from Defense Counsel, the hearing took place on March 2, 2017.

Background

Julian Ruffin (Defendant) is charged with Delivery of a Controlled Substance¹, Possession of a Controlled Substance², Criminal Use of a Communication Facility³, and Criminal Conspiracy⁴. The charges stem from an alleged incident on May 29, 2016. On that date, Pennsylvania State Trooper Tyson Havens (Havens) was on uniformed duty in a patrol vehicle when he identified a passenger of a black Chrysler 200 as a possible suspect in an investigation by the Pennsylvania State Police (PSP) Troop F Vice/Narcotics Unit. Defendant was alleged to have been with a Co-Defendant, Shakoor Johnson who also was the operator of the vehicle.

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780113(a)(16). One Felony Count and Two Misdemeanor Counts.

³ 18 Pa.C.S. § 7512.

⁴ 18 Pa.C.S. § 903(a)(1).

The preliminary hearing of co-defendants occurred on July 18, 2016, in front of MDJ Whiteman. The transcript of the hearing was presented to this Court at the March 2, 2017, hearing. The Commonwealth filed its notice of joinder on August 11, 2016, just prior to the formal court arraignment.

In a Motion to Dismiss filed October 17, 2016, Defense Counsel moved for the dismissal of Count 1, Delivery of Heroin, alleging that Defendant was never shown to have possessed or delivered heroin; for the dismissal of Count 2, as the Defendant was never in actual possession of heroin or as Defense Counsel alleges, in constructive possession of heroin. Defense Counsel objects to Count 3 as no *prima facie* evidence was presented to the MDJ in that that the Defendant was ever in possession or used a phone for making drug transactions. Defense Counsel also alleges that the Commonwealth has failed to present evidence that the co-Defendants conspired in some way to deliver heroin as charged in Count 4. Defense Counsel objects to Count 6, as Defendant is charged with possession of oxycodone. Defense counsel admits that although an oxycodone tablet was found in the vehicle the vehicle it did not belong to the Defendant and Defendant was not in control of the vehicle.

Testimony of Randall Moon II

Randall Moon II (Moon) testified on behalf of the Commonwealth. He testified that on May 29, 2016, he called the number 570-974-6925 and arranged to purchase 10 bags of heroin for \$80. He was directed to go the Quick Mart on Northway Road in Lycoming County, Pennsylvania. He met with two black males in a black Chrysler. He got in their car, handed the driver \$80, and he received in return 10 bags of heroin. N.T., 7/18/2016, at 1. He testified that he had also met with those same two men the

day before, to purchase heroin. Id. at 12. He testified that he had been using the same cell phone number for four years to arrange heroin purchases. Id. at 10.

Moon testified that on May 29, 2016, he sat in the back of the vehicle behind the driver. He stated that a bag of heroin was on the driver's lap "a pretty nice sized sandwich bag". Id. at 2. He stated that he gave \$80 to the driver. He said the driver was a black male with dreads. After the purchase both parties to the transaction, buyer and seller, proceeded to exit the Quick Mart parking lot. Moon testified that he got on his motorcycle; and the Chrysler pulled out behind him and followed him until they got to the "Golden Strip". Id. Moon testified that the black Chrysler turned left onto the Golden Strip.

Moon testified that he was apprehended by police and able to identify the driver in a photo lineup. Id.

Testimony of Trooper Tyson Havens

Trooper Tyson Havens (Havens) testified that he is employed with State Police Troop F. At 9:42 am on May 29, 2016, while on stationary patrol on the Golden Strip, Havens observed a black male with dreadlocks operating a black Chrysler 200. Id. at 13. Because of the "color of his skin and his hairstyle", Havens "pulled out on the vehicle, basically just to run registration, see if there is anything wrong with the vehicle that I could stop it." Id.

Havens testified that he proceeded to follow the vehicle up Tinsman Avenue. He testified that the vehicle was traveling at a high rate of speed. Id. at 13. Havens testified that he was in a marked unit with the lights activated. His sirens were not on because he was communicating on the radio. Id. at 14. He activated his siren after

he detected his first motor vehicle violation (the vehicle failed to stop at a stop sign at Tinsman Avenue and Sheridan Street.). Id. He followed the vehicle north into an unnamed alley. Havens testified that the vehicle “continued through two or three back yards and then struck a pole on the Becht School property” damaging the pole and rendering the vehicle inoperable. Id.

A foot chase ensued. Defendant ran in a northeast direction. Havens tased the co-Defendant to subdue him and called in a description of Defendant in to the other units responding. Id. at 15. Havens identified Defendant at the preliminary hearing. Id. at 14. Havens testified that Defendant that day was wearing a black t-shirt, black jogging pants, and blue shorts underneath his running pants. Trooper Zachariah took Defendant into custody approximately half a mile up from the foot chase on Northway Road just south of Four Mile Drive. Id. at 15, 23.

Defendant was found to be in possession of a cellular telephone, \$5 cash, and after search of his wallet, a Suboxone strip, for which Defendant did not possess a prescription. Id. at 15.

Justin Winters of 1945 Sheridan Street called the barracks at 10:45 am that same morning Id. at 23 and complained about a telephone that would not stop ringing. The phone was in the backyard of his residence; Winters’ backyard was adjacent to where the co-defendant was taken into custody. Id. at 16. After recovering the phone, Havens proceeded to answer it and respond to text messages. Id. Havens responded to 30 callers and/or text messages. Id. at 25. Havens determined that everybody that was calling was seeking heroin based on the street terminology that was used and then arranged to meet with potential buyers at Blaise Alexander Nissan lot by the

Lycoming Mall. Moon was one of those who used that phone. Moon showed up at the dealership and was arrested, *Mirandized*, and interviewed which resulted in the statement he testified to at the preliminary hearing. *Id.* Moon identified the co-defendant for Havens using a photo array at the time of his police interview 10 days later. *Id.* at 17.

Havens further testified that while reviewing the MVR of the events of May 29, 2016, he observed that a beige plastic bag lemon-sized fell out of Defendant's pants as he exited the vehicle. *Id.* at 17, 30. He notified the residents of the area asking if anybody found anything matching that description to contact police. As of the date of the preliminary hearing, 7/18/2016, no one had come forward. *Id.* at 18.

Additionally, Havens testified that there was contraband found on the passenger side of the car: one pill labeled 512, identified using drugs.com as acetaminophen and oxycodone [generic Percocet]. Defendant would have been sitting next to where the pill was found. Havens swiped Defendant's hands at the police barracks and they tested positive for the presence of cocaine and opiates. *Id.* at 18.

Discussion

I. Delivery of Heroin

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). A *prima facie* case 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.

To find that the Commonwealth presented *prima facie* evidence that the Defendant committed Delivery of Heroin, the Court must find that the Commonwealth presented evidence that the heroin a controlled substance by sale to street buyers. Pa. SSJI (Crim) 16.13(a)(30)B (delivering controlled substance).

Heroin is a controlled substance. See 35 P.S. 78-104 (schedule of controlled substances (1)(ii)(10) Heroin). The Court believes that the Commonwealth did show *prima facie* evidence that Defendant constructively possessed the heroin. Havens testified that he interviewed 30 people that described Defendant and co-defendant consistently as persons from whom they purchased heroin. N.T., 7/18/2016, at 39. Havens showed a photo array to Moon because he was the only of the thirty that retained any of the heroin he purchased. Id. at 32. Moon testified to purchasing heroin from co-defendants on May 26, 2016, and on the day prior. As such, the Court believes, the Commonwealth presented a *prima facie* case for delivery of heroin.

II. Possession of a controlled substance (heroin and oxycodone)

In order to find a *prima facie* showing of possession of heroin and oxycodone, the Court must find that the Commonwealth presented some evidence of each element below:

1. *First*, that the item is in fact a controlled substance.
2. *Second* that the item was possessed by the defendant.
3. *Third*, that the defendant was aware of the item's presence and that the item in fact was the controlled substance.

Even though no heroin was recovered either from the vehicle, Id. at 35, or the Defendant's person, the Court still finds that the testimony at the preliminary hearing is *prima facie* evidence that the Defendant did possess heroin. However, to show that the defendant was in possession of the Oxycodone⁵ the Commonwealth must present more evidence than he was just physically close to the item.

⁵ Oxycodone is a Schedule II controlled substance. See 75 P.S. § 780-104(2)(i)(1) (oxycodone).

First, in constructive possession cases involving drugs, all facts and circumstances surrounding the possession of drugs are relevant in determining whether contraband was possessed...Second, in conjunction with the quantity of drugs possessed, the courts have considered the presence of paraphernalia used in the narcotics trade as well as the presence of inordinately large sums of cash in ferreting out the element of intent. **Finally, albeit not dispositive, a defendant's presence at the location where drugs are discovered is a factor in establishing knowledge that contraband is present and his/her exercise of dominion and control over the same.**

Commonwealth v. Aviles, 615 A.2d 398, 402-03 (Pa. Super. 1992) (internal citations omitted).

Havens testified that the oxycodone pill was recovered from the side of the vehicle where Defendant was seated (i.e. the passenger side). However, all of the purchases of drugs from the Defendant or in the presence of Defendant were heroin. The Court finds that the Commonwealth has failed to show that he constructively possessed the oxycodone tablet.

III. Criminal Use of a Communication Facility

To find *prima facie* evidence of this offense, the Court must find some evidence of each of the following elements:

1. First, that the defendant intentionally, knowingly, or recklessly used a communication facility. In this case, the Commonwealth charged that the defendant used a cellular telephone.
2. Second that the defendant intentionally, knowingly, or recklessly used the cellular telephone to facilitate, that is, to bring about, the commission of the crime of delivery of heroin.
3. Third that the crime of delivery of heroin did, in fact, occur.

Pa. SSJI (Crim) 15.7512 (Criminal Use of a Communication Facility).

The Court finds that the Commonwealth presented a *prima facie* case to hold Defendant for court on criminal use of communication facility charge. Havens testified

that he interviewed thirty individuals who described Defendant as a person who they would meet with after arranging for a heroin transaction over the phone. Havens met these individuals after responding to their calls and text messages to the cellular telephone. Moon testified that Defendant was present when he had made his heroin purchases on the day in question and on the day prior. In fact, it was using a cellular phone that Havens first came in to contact with Moon. Moon used the telephone number to arrange for a heroin purchases. Havens responded to calls to that cellular telephone in order to investigate the sale of controlled substances. Although the Commonwealth has not proven that the Defendant communicated directly with anyone, it did present evidence that Defendant did appear for a drug transaction when the phone was used to arrange said transaction. Therefore, the Court believes that a *prima facie* case has been proven on this charge.

IV. Conspiracy to Deliver Heroin

A conspiracy exists once two conditions are met--there is an agreement, and one of the members then commits some act to help achieve the goal of the conspiracy. Pa. SSJI (Crim) 12.903A (conspiracy basic instruction). Through the testimony presented, it would appear that the co-defendant was the person who exchanged heroin for money on the date in question but that Defendant may have been the accomplice.⁶ The Court finds that Moon's testimony about the Defendant's presence at the drug transaction is sufficient to establish *prima facie* on the charge of Conspiracy. Again, as mere presence at the scene of the crime would be insufficient

⁶ A person who knowingly and voluntarily cooperates with or aids another person in committing an offense. Pa. SSJI (Crim) 4.01 (accomplice testimony).

at trial to prove that Defendant was an accomplice (Commonwealth v. Murphy, 844 A.2d 1228, 1234 (Pa. 2004) (defendant cannot be an accomplice simply based on evidence that he knew about the crime or was present at the crime scene...there must be some additional evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so), the Court believes from the description of the Defendant's actions at the transaction with Moon is sufficient evidence to establish *prima facie* was shown.

ORDER

AND NOW, this 5th day of May, 2017, based upon the foregoing Opinion, the Motion to Dismiss is GRANTED in part and DENIED in part.

On the charge contained in Count 6, Possession of a Controlled Substance, Oxycodone, the Court finds that the Commonwealth failed to present *prima facie* evidence of the Defendant's possession of the drug and the charge is DISMISSED.

In all other respects the Motion is DENIED.

BY THE COURT,

Nancy L. Butts, P.J.

cc: Nicole Ippolito, Esq. ADA
Andrea Pulizzi, Esq.
Gary Weber, Esq. Lycoming Law Reporter