

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 00-10,984

VS :

NORMAN JOHNSON :

OPINION AND ORDER

Before the Court is Defendant's Omnibus Pre-Trial Motion. A number of the issues raised in Defendant's motion have been previously disposed of by Order of this Court filed December 22, 2000. The remainder of the issues are as follows:

Motion to Remand to the Preliminary Hearing

Defendant first alleges that his case should be remanded for a preliminary hearing. Defendant argues that although he signed a waiver of the hearing, his waiver of the hearing was not knowing, intelligent and voluntary. After a review of the testimony presented, the Court finds that the Defendant was aware of, and was counseled with regard to his rights concerning the Preliminary Hearing. The Defendant testified that he and his counsel had discussed their strategy, and the Defendant testified that he understood the strategy that was employed. Further, on cross-examination, the Defendant admitted that he has been through the system—beginning at the preliminary hearing – on several occasions. He testified that he knew the purpose of the preliminary hearing. He testified that when he signed the waiver, he knew that he was waiving his right to have a preliminary hearing. Based on this evidence, the Court is satisfied that the Defendant voluntarily, knowingly, and intelligently waived his right to the preliminary hearing. Defendant's Motion to Remand to the Preliminary Hearing is therefore DENIED.

Motion to Quash the Search Warrant

Defendant asserts that the evidence obtained from a search of the Defendant's vehicle should be suppressed. Defendant argues that the warrant was not supported by probable cause. Before an issuing authority may issue a constitutionally valid search warrant he or she must be furnished with information sufficient to persuade a reasonable person that probable cause exists to conduct a search. Commonwealth v. Davis, 466 Pa. 102, 351 A.2d 642 (1976); Commonwealth v. Jackson, 461 Pa. 632, 337 A.2d 582, cert. denied, 423 U.S. 999, 96 S.Ct. 432, 46 L.Ed.2d 376 (1975); Commonwealth v. D'Angelo, 437 Pa. 331, 263 A.2d 441 (1970). The information offered to demonstrate probable cause must be viewed in a common sense, nontechnical, ungrudging and positive manner. Commonwealth v. Edwards, 493 Pa. 281, 426 A.2d 550 (1981); Commonwealth v. Conner, 452 Pa. 333, 305 A.2d 341 (1973).

It must also be remembered that probable cause is based on a finding of the probability, not a prima facie showing of criminal activity, Commonwealth v. Jones, 506 Pa. 262, 484 A.2d 1383, (1984), *citing* Commonwealth v. Mamon, 449 Pa. 249, 297 A.2d 471 (1972); Commonwealth v. Marino, 435 Pa. 245, 255 A.2d 911 (1969), cert. denied, 397 U.S. 1077, 90 S.Ct. 1526, 25 L.Ed.2d 811 (1970). After a review of the search warrant, the Court is satisfied that there was sufficient information to persuade a reasonable person that a search should be conducted of the vehicle owned by the Defendant. Defendant's Motion to Quash the Search Warrant and Suppress all Evidence Seized Pursuant to the Warrant of the Defendant's vehicle is therefore DENIED.

Motion to Suppress Evidence Seized from the Defendant's Person

Defendant next asserts that the evidence seized from his person should be suppressed, since the warrant was not supported by probable cause. The Court does not agree. After a review of the warrant, the Court finds that based on the statements of victim, there was probable cause to believe that a crime had been committed, and that the Defendant was the perpetrator. Defendant's Motion to Quash the warrant and Suppress all evidence seized from the Defendant's person is therefore DENIED.

Motion to Suppress Evidence Suggesting "sexual intercourse" Occurred

Defendant next asserts that the Commonwealth should be precluded from introducing evidence that sexual intercourse occurred. Defendant argues that since he admits that he engaged in sexual intercourse with the victim, evidence supporting the fact that intercourse occurred would be cumulative. The Court does not agree. The Court finds that the evidence is relevant and admissible to establish the fact that a sexual act occurred, therefore establishing an element of the Commonwealth's case. The evidence may also be relevant and admissible to circumstantially show how the act occurred. Defendant's Motion to Suppress all evidence tending to suggest that "sexual intercourse" took place is therefore DENIED.

Motion to Suppress Defendant's Testimony at the PFA Hearing

Defendant next asserts that the testimony given at the Protection From Abuse Hearing should be suppressed. The Defendant argues that although he was aware of, and he knowingly, intelligently and voluntarily waived his Fifth Amendment privilege, he waived the privilege conditioned upon the victim conducting the cross-examination. The Court finds this argument without merit. The Defendant testified that while at the PFA

hearing, he was advised by the Judge on several occasions against taking the stand. The Defendant was also advised at the hearing that members of the District Attorney's Office were present. The Defendant was additionally counseled by two defense attorneys, one of whom was appointed by the Court after the Defendant insisted on taking the stand. Once the Defendant testified on direct examination with regard to the incident that is alleged to have occurred, the Defendant opened the door, and subjected himself to cross-examination. Although the Assistant District Attorney conducted the cross-examination on behalf of the victim, she did not exceed the scope of the testimony offered on direct examination. Defendant's Motion to Suppress the testimony of the Defendant at the Protection From Abuse Hearing is DENIED

Motion to Suppress Taped Conversations

Defendant next alleges that the recordings of any phone conversations made by him while at the Lycoming County Prison should be suppressed. The Defendant argues that the recordings were made against his constitutional privacy rights. The Court rejects this argument. The interception, recording, monitoring, and divulging of telephone calls to or from an inmate in a county facility is lawful, subject to some restrictions, under 18 Pa.C.S.A. § 5704(14). After a review of the statute, the Court is satisfied that the County facility has abided by the restrictions as set forth in the statute, and that the tape recordings were lawfully made. Defendant's Motion to Suppress the recorded conversations of the Defendant from the County Prison is therefore DENIED. If the Defendant wishes to challenge specific information contained in the recordings, he may file a Motion In Limine well before the trial scheduled for January 16, 2001.

Motion to Introduce Sexual History Between the Parties

Defendant next requests that he be permitted to introduce testimony with regard to the sexual history between himself and the victim in this case. Defendant argues that the evidence is relevant and admissible to provide an explanation of what was going on during the course of the alleged incident. The Court finds that the immediate history between the parties may be relevant and admissible. The Court fails to see, however, how the relationship between the parties from 20 years prior to the incident has any relevance to this incident. Defendant's Motion to Introduce the sexual history between the Defendant and the victim is therefore GRANTED as to the time frame between September, 1999 and June, 2000. Defendant's Motion to introduce evidence of the sexual history between the Defendant and the victim prior to September, 1999 is DENIED.

Motion to Disclose Medical Records

Defendant next requests that the Commonwealth disclose all medical records of the victim pertaining to a medical condition that allegedly makes intercourse painful. The Commonwealth submits that they have no records, as the victim denies the existence of any medical condition, and denies the existence of any records. If the Defendant wishes to pursue this issue, he may subpoena the Doctor himself. The Court would visit the issue of any privileged information at that time.

Motion to Recuse the District Attorney

Defendant last alleges that the members of the District Attorney's Office, specifically, Tom Marino, Kenneth Osokow, and Diane Turner should recuse themselves from this case. Defendant argues that he was not given due process in his

filing of private criminal complaints against the victim. After a review of the testimony with regard to these allegations, the Court is satisfied that proper procedure was followed in the processing of the Defendant's private criminal complaints. There is no evidence substantiating Defendant's blind allegations of improper motives. Defendant's Motion to Recuse the District Attorney from the case is therefore DENIED.

ORDER

AND NOW, this _____ day of January 2001, based on the foregoing Opinion, it is ORDERED AND DIRECTED that the Defendant's Motion to Remand to the Preliminary hearing is DENIED; Defendant's Motions to Suppress are DENIED; Defendant's Motion to Suppress Evidence of Sexual Intercourse is DENIED; Defendant's Motion to Suppress Testimony of the Defendant from the PFA Hearing is DENIED; Defendant's Motion to Suppress Conversations taped from the County Prison telephone is DENIED; Defendant's Motion to Introduce Sexual History is GRANTED as to the time frame between September, 1999 to June, 2000, but DENIED as to any prior relationship; Defendant's Motion to Disclose Medical Records is DENIED; and Defendant's Motion to Recuse members of the office of the District Attorney is DENIED.

By The Court

Nancy L. Butts, Judge

xc: Matthew Zeigler, Esquire
Diane Turner, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire