

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 02-10,615

VS :

SAMUEL DERR :

OPINION AND ORDER

Before the Court is Defendant's Habeas Motion. On April 3, 2002, Defendant was arrested and charged with two counts of Aggravated Assault, two counts of Criminal Conspiracy (Aggravated Assault), Criminal Attempt (Homicide), Simple Assault, Recklessly Endangering Another Person, Ethnic Intimidation, and Firearms not to be Carried Without a License. A preliminary hearing was held April 9, 2002 before District Justice James Carn, after which all of the charges were bound over. The Defendant challenges the testimony presented by the Commonwealth, alleging they failed to present a prima facie case of Conspiracy, Criminal Attempt, Aggravated Assault, Simple Assault, and Ethnic Intimidation. After a review of the transcript from the preliminary hearing, the Court finds the following facts:

The Defendant called Dusty Sanchez at approximately 9:00 p.m. on April 2, 2002, and asked if he would meet him at "Shorties" for a drink. (N.T. 4/9/02, p 27) During the course of the hour following his arrival at "Shorties," Sanchez drove the Defendant and a third individual back and forth between "Shorties" and "The Shamrock."¹ The Defendant was seated in the front passenger seat of Sanchez's Gray Eagle Premier. On two occasions, as Sanchez passed by the Timberland

¹ Sanchez testified that racial issues came up in the conversation that evening. At some point they compared their swastika tattoos and their dislike of non-whites. Sanchez denied that any insinuations were made that the Defendant intended to kill anyone. (Id., p. 40)

Housing Complex, Sanchez slowed his car and the Defendant pulled a gun and yelled out the window.

On the first occasion that this occurred, the Defendant's comments were directed at Richard Lowrie, who was pushing his small children in a stroller. Lowrie testified that "out came a gun and the guy said 'what's up now'." (Id., p. 48) Lowrie was so concerned about what had happened that moments later, when he saw a patrol car approaching, he stopped to tell the officer. Lowrie estimated that it was approximately 20 minutes later, as he stood at his front door telling others about the incident, that he observed the same car approaching from the opposite direction.

Keriem Mathis was one of the individuals in a group that was targeted by the Defendant on the second occasion. Mathis was walking along the sidewalk in front of the housing complex with a group of friends.² Mathis testified that he heard one of the occupants of the vehicle yell out "f*****n' niggers." Moments later, shots were fired at Mathis and the others. (Id., p. 7) Mathis believed that there were three individuals in the vehicle, and the shots were fired from the front, passenger window of the vehicle. Mathis believed the gun to be a chrome revolver.³ A total of three shots were fired. (Id., p. 9) Two shots were fired initially, then the vehicle pulled ahead and a third shot was fired. (Id., p. 22) Mathis testified that when the first shots were fired, the gun was aimed at him. (Id., p. 8) Mathis testified that he did not know who the third shot was fired at, but it was not at him. (Ibid)

² Also with Mathis were Kenny Sampson, Walter Richardson, Jamel Peterson, and persons known to Mathis as "Jewels", and "G".

³ At the time of the preliminary hearing, it was stipulated that the Defendant does not have a license to carry a firearm. (Id., p. 26)

The Defendant first alleges that the evidence presented does not establish a prima facie case of Criminal Conspiracy to commit Aggravated Assault. In support of his allegation, Defendant argues that the Commonwealth did not present any evidence that the he conspired with one or more persons to engage in criminal conduct, nor did he plan with, agree to or aid others in their criminal conduct. The Court disagrees. To successfully establish a prima facie case, the Commonwealth must present sufficient evidence that a crime was committed and the probability that the Defendant could be connected with the crime. Commonwealth v. Wodjak, 502 Pa 359, 466 A.2d 991 (1983).

To establish the elements of criminal conspiracy the Commonwealth must show "(1) an intent to commit or aid in an unlawful act, (2) an agreement with a co-conspirator and (3) an overt act in furtherance of the conspiracy." Commonwealth v. Spotz, 562 Pa. 498, 756 A.2d 1139, 1162 (2000); see also 18 Pa.C.S.A. § 903(a), (e). "Because it is difficult to prove an explicit or formal agreement to commit an unlawful act, such an act may be proved inferentially by circumstantial evidence, i.e., the relations, conduct or circumstances of the parties or overt acts on the part of the co- conspirators." Spotz, supra.

Instantly, the Commonwealth presented evidence that the Defendant, Sanchez, and a third individual were together that evening driving back and forth between drinking establishments, and conversing about racial issues. On two occasions as they drove past black individuals, Sanchez slowed the vehicle as the Defendant pulled out his gun, yelled, and eventually fired shots. The Court finds these similar occurrences on two

separate occasions sufficient to establish a prima facie case that Sanchez knew that the Defendant was going to act, and he aided the Defendant in his endeavor by slowing his vehicle as he passed the pedestrians. The Court therefore rejects this argument.

Defendant next alleges that the evidence presented does not establish a prima facie case of Criminal Attempt Homicide. Defendant argues that there was no testimony averring that the Defendant, through actions or word, expressed an intent to commit a homicide. Under 18 Pa. C.S.A. § 901 a person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime. Therefore, to establish a prima facie case of attempt homicide, the Commonwealth must show that the Defendant, with the intent to kill another, did an act constituting a substantial step toward the commission of that crime.

Instantly, the Court finds that prima facie evidence of these elements was established by the testimony of Mathis that he witnessed the individual aim the gun and fire two shots at him. See [Commonwealth v. White, 229 Pa.Super. 280, 323 A.2d 757, \(1974\)](#). (Evidence establishing that the defendant fired a handgun from the front steps of his mother's house in the direction of several neighbors, that defendant pointed the handgun before firing, and that bullet narrowly missed striking head of one of the neighbors was sufficient to sustain a conviction for attempt with intent to kill). The Court therefore rejects this argument.

Defendant next alleges that the evidence presented does not establish a prima facie case of Aggravated Assault. Under 18 Pa.C.S.A. § 2702(a)(4) a person is guilty of aggravated assault if he attempts to cause or intentionally or knowingly causes bodily

injury to another with a deadly weapon. Instantly, the Court finds the evidence presented that the Defendant pulled out a handgun and fired shots at Mathis sufficient to establish a prima facie case that the Defendant attempted to cause serious bodily injury to another with a deadly weapon. See [Commonwealth v. Galindes, 786 A.2d 1004](#), (Pa. Super.2001). (Even though victim was not struck by any bullets, the act of firing a gun toward him constituted an attempt to cause serious bodily injury, thereby committing the offense of attempted assault.)

Defendant next alleges that the evidence presented does not establish a prima facie case of Aggravated Assault. Under 18 Pa. C.S.A. § 2702(a)(1), a person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. The Court finds prima facie evidence of these elements established by the testimony that the Defendant, after having conversations with regard to his dislike of minorities, pulled a gun and intentionally fired shots at a group of black individuals. The Court therefore rejects this argument.

Defendant next alleges that the evidence presented does not establish a prima facie case of Simple Assault. Defendant argues that there was no testimony of an act was committed that attempted to cause, or knowingly, intentionally, or recklessly caused bodily injury to another. Based on the foregoing opinion in the previous sections, the Court rejects this argument.

Defendant last alleges that the evidence presented does not establish a prima facie case of Ethnic Intimidation. The Court disagrees. 18 Pa. C.S.A. § 2701 provides that a person is guilty of ethnic intimidation if he, with malicious intention toward the

race, color, religion, or national origin of another individual or group of individuals, commits an offense under Chapter 33 (relating to arson, criminal mischief and other property destruction.) Instantly, the Court finds the testimony presented that the Defendant had engaged in conversations concerning his dislike of non-whites, followed by his actions of pulling out a gun and shooting at black individuals while yelling out racial comments, establishes a prima facie case of this charge. The Court therefore rejects this argument.

ORDER

AND NOW, this _____ day of August 2002, based on the foregoing Opinion, it is ORDERED AND DIRECTED that the Defendant's Petition for Writ of Habeas Corpus is DENIED.

By The Court,

Nancy L. Butts, Judge

cc: CA
William Miele, Esquire, PD
DA
Honorable Nancy L. Butts
Judges
Law Clerk
Gary Weber, Esquire