

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 02-10,323
	:
	:
vs.	: CRIMINAL DIVISION
	: Petition for Writ of Habeas Corpus
	: Bail Motion
WESLEY LANE BUSS,	:
Defendant	:

OPINION AND ORDER

Defendant has been charged with criminal homicide, aggravated assault and endangering the welfare of a child in connection with the death of his girlfriend's three year old son. After a preliminary hearing on February 21, 2002, all charges were held for Court. Defendant has filed the instant preliminary pre-trial motion, seeking a Writ of Habeas Corpus and also requesting that bail be set. A hearing on the motion was held April 2, 2002.

With respect to the request for Habeas Corpus, Defendant specifically contends the evidence presented at the preliminary hearing was insufficient to support the Count of Criminal Homicide, arguing that at the most, voluntary manslaughter and/or involuntary manslaughter maybe charged. Defendant alleges the Commonwealth failed to present evidence of the requisite mens rea.

At the preliminary hearing, the Commonwealth presented the testimony of Dr. Paul Bellino, a pediatrician who is also a child abuse specialist. Dr. Bellino testified that in his opinion, which he reached with a reasonable degree of medical certainty, the child suffered Shaken Impact Syndrome, leading to a subdural hematoma and diffuse axonal injury, causing his death. Dr. Bellino also testified that the injuries could not have been self-inflicted and could not have happened by the child having fallen off a toilet, the explanation offered by Defendant. Dr. Bellino testified that the amount of force used to cause the injuries would have been so severe that anybody would have recognized such as

inappropriate. The Commonwealth also presented testimony indicating that Defendant alone was responsible for the care of the child during the time he would have received the injury.

Criminal homicide is defined as follows:

Section 2501. Criminal Homicide

(a) Offense defined – A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being.

(b) Classification. – Criminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter.

18 Pa. C.S. Section 2501. Murder is defined as follows:

Section 2502. Murder

(a) Murder of the first degree. – A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) Murder of the second degree. – A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or as an accomplice in the perpetration of a felony.

(c) Murder of the third degree. – All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.

(d) Definitions. – As used in this section the following words and phrases shall have the meanings given to them in this subsection:

...

“Intentional killing.” Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.

The Commonwealth admits that second degree murder does not apply to the facts in the instant matter. They contend, however, that the evidence presented supports both a charge of first degree murder as well as third degree murder. As defined by the statute, first degree murder requires evidence of a specific intent to kill.¹ Such intent may be proven by circumstantial evidence. The

¹ See Commonwealth v Polimeni, 378 A.2d 1189, 1195 (Pa. 1977) (third degree murder is a felonious and malicious

Commonwealth argues that such intent may be inferred where a defendant knowingly applies deadly force to the victim and contends it has established the knowing use of deadly force by showing the Defendant engaged in the use of very violent shaking of a young child. While evidence was presented that Defendant knowingly applied force and that the force turned out to be deadly, no evidence was presented to show that Defendant applied force while knowing it would be deadly, that is, that he had the specific intent to cause the child's death. In cases where specific intent has been inferred from the circumstances, there is typically evidence of the use of a deadly weapon upon a vital part of the victim's body, or previous indications of intent, such as statements regarding the actor's feelings toward the victim. The Court therefore agrees with Defendant that a prima facie case of first degree murder was not established.

With respect to a charge of third degree murder, such requires evidence of malice. In Commonwealth v Scales, 648 A.2d 1205 (Pa. Super. 1994), malice is defined as comprehending not only a particular ill-will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. The Court also indicated that malice necessary to support a murder conviction may also exist where a reasonable principal acts in gross deviation from a standard of reasonable care, failing to perceive that such actions might create a substantial and unjustifiable risk of death or serious bodily injury. In the instant matter, the Court believes the Commonwealth has shown evidence of malice, as defined above, particularly in Dr. Bellino's statement that the amount of force used was so severe that anybody would have recognized that it was inappropriate. A charge of third degree murder is therefore supported by the evidence.

With respect to the request for bail, since the Court will be striking the count of first degree murder, the Court Scheduling Technician will be directed to schedule a bail motion forthwith.

ORDER

AND NOW, this 29th day of April, 2002, for the foregoing reasons, Defendant's Motion for

killing but without a specific intent to take life). (emphasis added)

Writ of Habeas Corpus is hereby granted in part and denied in part. The information is amended with respect to Count 1 to charge third degree murder.

The Court Scheduling Technician is requested to schedule a one (1) hour hearing to address Defendant's Motion for Bail, placing the matter on the Court schedule as soon as it is possible.

By the Court,

Dudley N. Anderson, Judge

cc: DA
George Lepley, Esq.
Craig Miller, Esq. 138 E. Water St., 2nd Floor, Lock Haven PA 17745
Gary Weber, Esq.
Nancy Borgess, Court Scheduling Technician
Hon. Dudley N. Anderson