IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**No. 03-10050**
	:	
vs.	:	
	:	
	:	**CRIMINAL**
	:	
RICHARD W. ILLES, SR.,	:	
Defendant	:	

OPINION AND ORDER

This matter came before the Court on the defendant's omnibus pretrial motion. This motion contains fourteen separate counts.

I. Petition for Writ of Habeas Corpus

The police charged Richard Wayne Illes, Sr. (hereinafter the defendant) with criminal homicide arising out of the shooting death of Miriam Illes on January 15, 1999. The defendant's preliminary hearing was held on February 19-20, 2003. The defendant asserts there was insufficient evidence to establish a prima facie case at the preliminary hearing. This Court cannot agree. Discussing the preliminary hearing standard in Commonwealth v. McBride, the Pennsylvania Supreme Court stated:

> The preliminary hearing is not a trial. The principal function of a preliminary hearing is to protect an individual's right against an unlawful arrest and detention. At this hearing the Commonwealth bears the burden of establishing at least a prima facie case that a crime has been committed and the accused is probably the one who committed it. It is not necessary for the Commonwealth to establish at this stage the accused's guilt beyond a reasonable doubt. In order to meet its burden at the preliminary hearing, the Commonwealth is

> required to present evidence with regard to each of the material elements of the charge and to establish sufficient probable cause to warrant the belief that the accused committed the offense.

528 Pa. 153, 157-158, 595 A.2d 589, 591 (1991). The highest degree of homicide is first-degree murder. If the evidence presented at the preliminary hearing were sufficient to establish first-degree murder, it would also be sufficient to establish lesser degrees of homicide. The material elements of first-degree murder are: (1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with specific intent to kill. Commonwealth v. McCrae, 832 A.2d 1026, 1030 (Pa. 2003); see also Commonwealth v. Spotz, 563 Pa. 269, 274, 759 A.2d 1280, 1283 (2000); Commonwealth v. Fletcher, 561 Pa. 266, 278, 750 A.2d 261, 267 (2000). An intentional killing is a killing by means of poison, or by lying in wait, or any other kind of willful, deliberate and premeditated killing. 18 Pa.C.S. §2502(d); McCrae, supra. Specific intent to kill can be inferred from the use of a deadly weapon upon a vital part of the victim's body. Spotz, supra; Fletcher, supra.

The Commonwealth presented prima facie evidence for all the elements of murder. Dr. Samuel Land, a forensic pathologist, testified that Miriam Illes died from a gunshot wound to the left side of her back. N.T., February 19-20, 2003, at 111. The bullet fragmented before it struck Ms. Illes' body, indicating the bullet passed through something before it struck her. N.T., at 111-112. The bullet fragments

passed through Ms. Illes' lungs and heart, destroying the pulmonary artery and the aorta. Id. Evidence from the vicinity of Ms. Illes' residence showed that someone waited near a tree in a dry streambed approximately 73 feet from the residence, and shot Ms. Illes through her kitchen window while using the tree as a brace or rest for the weapon that fired the fatal shot. N.T., at 42, 45-46. Thus, the evidence presented at the preliminary hearing establishes that Miriam Illes was unlawfully killed, the killing was intentional, and the perpetrator had the specific intent to kill.

The Commonwealth also presented evidence to link the Defendant to the crime. The police found a homemade silencer or suppressor in the snow in the corner of a tennis court a short distance away from the tree. The silencer was made of wire, PVC pipe and end caps, crushed acoustical tile, and spray foam. The police seized numerous items from Dr. Illes' residences, cabin, medical office and vehicles pursuant to several search warrants. The FBI compared pieces of wire seized by the police under the search warrant to pieces of wire from the silencer. They were chemically indistinguishable. N.T., at 227, 232-233. Similarly, acoustical tile seized from Dr. Illes' property had the same characteristics as the bits of acoustical tile from the silencer. N.T., at 150-151.

The Commonwealth presented evidence to show that Ms. Illes was shot on Friday, January 15, 1999 at approximately 10:20 p.m. On January 17, 1999, the police spoke to Dr. Illes.

He claimed he and his son left the Williamsport area at approximately 9:30 p.m. on January 15, 1999 to visit his sister for the weekend, but due to inclement weather he stopped in the Harrisburg area and spent the night in a hotel. Although the police verified Dr. Illes checked into a hotel at approximately 1:00 a.m., they could not verify the time he left the Williamsport area. N.T., at 86, 94. Normally, it only takes about 2 hours to drive to Harrisburg from Williamsport. N.T., at 87.

About four and one-half months after Ms. Illes' death, Matthew McKay found a rifle lying in a creek bed off Route 15.[1] The rifle had a clip with a bullet in it. Mr. McKay took the clip to the police. Mr. McKay then took the police to the area where he found the gun and the police took possession of the rifle. The weapon was a Savage Model 23D .22 Hornet caliber rifle. N.T., at 203. It was produced between 1940 and 1942. Id. Between 1932 and 1947, sixteen thousand and eighteen Savage Model 23Ds were sold. N.T. at 274. Joe Kowalski, an individual referred to as "Uncle Joe" but who Dr. Illes acknowledged was his biological father, had a Savage Model 23D .22 caliber hornet rifle. N.T. at 38, 258, 271. Joe Kowalski died in June 1998 and Dr. Illes received some of the contents of Mr. Kowalski's home. N.T., at 260-261.

The FBI compared the lead core of bullet in the clip from the Savage rifle found by Mr. McKay to the bullet core

1 Dr. Illes would have traveled south on Route 15 from Williamsport to Harrisburg on January 15, 1999.

from the victim. They were analytically indistinguishable. N.T., at 203.

The Savage rifle found by Mr. McKay had a screw protruding from the top of it. N.T., at 212. The silencer has a channel cut into it in the approximate shape of a J. Id. The screw on the rifle fits in the J channel of the silencer and tightly secures the silencer to the Savage rifle. N.T., 202-203, 212, 215.

The Commonwealth also presented evidence of motive. Dr. and Ms. Illes were divorcing. They had custody and support issues. Furthermore, a nurse testified she heard Dr. Illes say that he wished Ms. Illes were dead because his life would be a whole lot easier. N.T., at 17.

The information set forth above is a summary of only a portion of the circumstantial evidence the Commonwealth presented against the defendant. Based on this evidence, as well as the other evidence presented at the preliminary hearing, the Court denies the defendant's petition for writ of habeas corpus.[2]

II. Motion to Suppress All Search Warrants

The Defendant next asserts the affidavit in support of the search warrants contained stale information and did not support a finding of probable cause. Again, this Court cannot agree. In determining whether probable cause exists, the

2 As part of this portion of the motion, the defendant also asserted his rights were violated because he was not present when the decision to hold his case for court was made. This portion of the motion, however, was withdrawn at oral argument.

Court must examine the totality of the circumstances contained within the four corners of the affidavit in a practical, non-technical manner. Commonwealth v. Coleman, 830 A.2d 554, 560 (Pa. 2003); Commonwealth v. Glass, 562 Pa. 187, 197, 201, 754 A.2d 655, 661, 663 (2000). Viewing the affidavit in this light, the Court finds the affidavit sets forth probable cause for the issuance of all the search warrants.

The affidavit contains approximately five (5) pages of information regarding Mrs. Illes' death and why the police believed evidence concerning her death would be found in Dr. Illes' properties. The Court will briefly highlight the most pertinent information contained therein.

Mrs. Illes dies as a result of a single gunshot wound from a .22 caliber centerfire bullet. Based on an interview of a friend of the victim and the location of the victim's body, the police determined the time of death was approximately 10:20-10:25 p.m. on Friday, January 15, 1999. The police searched the area surrounding the victim's residence and found a home-made silencer, a hair, a cigarette butt and shoeprints. The silencer was made from PVC pipe, PVC fittings, metal screen, non-insulated wire, expanding foam, glue, duct tape, stone texture spray paint and what appeared to be crushed acoustical tile.

A piece of wire that was visually similar and of the same diameter as the wire in the silencer was found in Dr. Illes' trash. The PVC and metal components had tool marks on them. Dr. Illes had a workshop in his residence.

At the time of the murder, the victim and the Defendant were in the process of getting a divorce. The Defendant was paying approximately $12,000 per month in support payments.

When the Defendant was initially interviewed, he stated he was visiting his sister in Honeybrook that weekend. He claimed he left his residence at about 9:30 p.m. and stopped at McDonald's in Lewisburg sometime after leaving home, but he could not remember what time this was. At 11:30 p.m. he called his sister while just south of Selinsgrove and said he wouldn't make to her house that night. He checked into a Hampton Inn in the Harrisburg area at 1:00 a.m. At the

time of this interview, the time of Mrs. Illes' death had not yet been made public.

At a subsequent interview after the victim's time of death was made public, the Defendant stated he stopped at McDonald's in Lewisburg at 10:30 p.m. The state police interviewed employees of the McDonald's in Lewisburg, but note could recall an individual matching Dr. Illes' description being presented during the time period he claimed he was there.

On the weekend of the homicide, the Defendant's live-in girlfriend was visiting her relatives in Kansas. She departed for Kansas on January 11, 1999 and did not return until January 18, 1999.

The police also interviewed the Defendant's sister. She stated there was no specific family function that the Defendant was to attend that weekend. She called him around 7:25 p.m. on January 15, 1999 and recommended that he not come down that night because the road conditions were poor. The Defendant told her he was packing for the trip and insisted on coming down. When he arrived on Saturday, however, all he had was his shaving kit, and his sister did not observe him change his clothes that weekend.

The affidavit also explains how the silencer materials as well as documents related thereto could be stored in various properties and vehicles owned or controlled by the Defendant.

In summary, the affidavit shows motive and

opportunity for the Defendant to commit this crime as well as evidence linking him to the silencer found at the crime scene. Based on the totality of circumstances listed in the affidavit, the Court finds probable cause existed to support the issuance of the warrants to search the Defendant's properties. Therefore, the Court DENIES the Defendant's Motion to Suppress All Search Warrants.

III. Motion in Limine - Expert Testimony

The Defendant next contends that the testimony of the following individuals should be excluded pursuant to the Frye test: Diana Grant; Carlo Rosati;[3] Bruce W. Hall; Karen Lanning; Maureen Bradley; and Michael Smith. The Court rejects the defendant's contentions for several reasons. First, the Frye test only applies to **novel** scientific evidence. Commonwealth v. Blasioli, 522 Pa. 149, 153, 713 A.2d 1117, 1119 (1998); Trach v. Fellin, 817 A.2d 1102, 1109 (Pa.Super. 2003)(en banc). These witnesses compared bullet lead and trace evidence related to the murder with evidence connected to or seized from Dr. Illes. This evidence included fibers, wires, PVC pipe and end caps, acoustical tile and bits of plastic. The Court does not believe the scientific evidence to which these witnesses would testify is novel. Second, the Frye test only applies to principles and methodology utilized by the scientist; it does not apply to the conclusions he or she reaches. Trach, 817 A.2d at 1112. The defense cited

3 The defense withdrew the motion with respect to Mr. Rosati at the hearing/argument on the omnibus pretrial motion.

articles indicating a debate in the scientific community regarding bullet lead analysis. This alleged debate, however, centers on the **conclusions** to be drawn from the fact that two samples are analytically indistinguishable. The FBI scientists contend such a finding leads to the conclusion that the samples came from the same melt or source of lead, whereas the scientists cited by the defense believe the most that can be said is that the two samples might have come from the same source of lead. There is no dispute among the scientific community, however, that the amounts of additives and impurities in lead (including antimony, arsenic, tin, copper, bismuth and silver) can be measured through various forms of spectroscopy that are generally accepted in the scientific community.[4] Third, the Court believes the contentions raised by the defense go to the weight of the evidence not its admissibility, because these issues do not involve whether there is a match between two samples but rather the meaning and importance that should be given to such a match. Finally, although there is no Pennsylvania case law directly on point, there is persuasive case law from other jurisdictions that permits introduction of bullet lead analysis evidence. See State v. Noel, 723 A.2d 602 (N.J. 1999); United States v. Davis, 103 F.3d 660, 673-674 (8th Cir. 1996).

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4 William Tobin, one of the co-authors of the article cited by the defense, has said: "Where I have concerns is in using this data to make conclusions that are scientifically invalid." He did not have problems with the FBI's equipment or method of testing. Bailey, Steve. "Judge to rule on evidence in Ragland trial." The Courier-Journal. 30 January 2002. Retrieved 25 April 2003
<http://www.courier.journal.com/localnews/2002/01/30/ke013002s146900.htm>

IV. Motion in Limine - Stanley Schneider[5]

In this portion of his omnibus pretrial motion, the Defendant seeks a ruling from the court that the testimony of Stanley Schneider, a child psychologist, regarding statements made by the Defendant's son would be admissible at trial as an exception to the hearsay rule under Rule 803(4) of the Pennsylvania Rules of Evidence. Rule 803(4) indicates that statements made for purposes of medical diagnosis or treatment are not excluded by the hearsay rule. In Commonwealth v. Smith, 681 A.2d 1288 (Pa. 1996), the Commonwealth sought to introduce statements regarding the identity of the perpetrator under this exception, arguing that the statements were relevant to psychological and emotional treatment of the child victim. The Pennsylvania Supreme Court declined to extend the medical treatment exception to this situation. Id. at 1293. In so holding, the Court noted that to extend the rule in this manner would destroy the "pertinent to medical treatment" requirement, because experts in the psychological field view everything relating to the patient as relevant to the patient's personality. Id. at 1292. Here, defense counsel contends Ritchie's made statements to Dr. Schneider for purposes of psychological and emotional treatment.[6] The defense has failed to set forth what those statements were or

5 The defense made an oral motion at argument to correct the spelling of Dr. Schneider's last name. The omnibus pretrial motion incorrectly stated his last name was "Snyder."

6 The Court notes the Commonwealth disputes that Ritchie saw Dr. Schneider for psychological treatment. Rather, the Commonwealth contends Ritchie went to Dr. Schneider at the request of Mr. Costopoulos, former counsel for the

how they were necessary for his treatment. At the hearing and argument on the omnibus pretrial motion, the defense merely indicated Ritchie had issues related to the trauma of his mother's death and he made statements to Dr. Schneider regarding the events that lead up to his mother's death. Presumably, these statements would involve details of Ritchie and/or Dr. Illes' whereabouts on the night of Miriam Illes' death. Based on Smith, the Court finds the statements made by Ritchie are not reasonably pertinent to medical diagnosis or treatment. Therefore, Dr. Schneider's testimony would not be admissible under Rule 803(4).

V. Motion to Examine Physical Evidence

The Court believes the parties have resolved this motion. The Commonwealth, prosecuting office and the defense have made arrangements for the defense to go to the state police barracks and examine the physical evidence.

VI. Motion to Produce DNA Results

At the time of oral argument, the Commonwealth had given the defense everything in its possession related to this request. Therefore, this motion is moot. The Court, however, reminds both sides of its continuing obligation to provide discovery in this case.

VII. Motion to Produce Cell Phone Records

Defense counsel admitted that by the time of oral argument they had obtained the cell phone records. Therefore, this issue is moot.

VIII. Motion to Extend Time to File Alibi Defense

Defense counsel indicated at oral argument that it had filed an initial alibi notice and therefore, this issue was moot. The Commonwealth noted the notice did not contain the addresses for all the alibi witnesses. In light of the continuing obligation on both parties to provide discovery, the defense shall supplement its alibi notice within twenty days to comply with Rule 573(C)(1)(a).

IX. Motion to Dismiss Use of Discredited Testimony

The Defendant next contends that the charges against him should be dismissed because the Commonwealth presented the testimony of Diana Grant regarding bullet lead analysis after the defense had given the Commonwealth information indicating her testimony was repudiated by the scientific community. The Court believes the defense has overstated the alleged dispute over bullet lead analysis in the scientific community. Although there may be scientists who disagree with the FBI's conclusions, that is a far cry from repudiation by the scientific community. As the Court noted in Section III of this opinion, there is no dispute that trace amounts of additives and impurities can be precisely measured to determine whether two samples are analytically distinguishable, the only "debate" is over the conclusions to be drawn from such a determination. The Court finds this situation presents a classic battle of the experts and the issues raised by the defense go to the weight of the evidence, not its admissibility.

X. Motion to Suppress – Garbage

The Defendant contends evidence was seized from his garbage in violation of his rights under both the Constitution of the United States and the Constitution of Pennsylvania. The relevant facts are as follows. At the time of the victim's death, Kevin Peacock was the Defendant's garbage hauler until the Defendant moved from the Cody Country Development. Mr. Peacock would drive up the Defendant's driveway and pick up the garbage that the Defendant would put out in two containers behind his house, near the garage. Sometimes the garbage was loose; sometimes it was bagged. Sometimes the container had a lid on it and other times it would not.

During their investigation, the police learned that Mr. Peacock was the Defendant's garbage hauler. On January 22, 1999, the police contacted Mr. Peacock and asked him to keep Dr. Illes' garbage separate from the rest of the garbage he collected.[7] Mr. Peacock consented to this request. He picked up the Defendant's garbage and kept it separate from his other customer's on approximately four occasions between January 26, 1999 and February 23, 1999. Mr. Peacock would notify the police after he collected the Defendant's garbage and the police would obtain it from Mr. Peacock the next day.

Mr. Peacock testified at the suppression hearing that he has taken items out of customers' garbage in the past.

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7 They also asked Mr. Peacock if he noticed anything in the previous collection of the Defendant's garbage. Mr. Peacock said he saw a gun

He also testified that Dr. Illes never gave him any instructions regarding his garbage and he never said not to go through his garbage.

The Court finds there was no violation of the Defendant's constitutional rights with respect to any evidence seized from his garbage. It is well established that "no one has standing to complain of a search and seizure of property that he has voluntarily abandoned." Commonwealth v. Shoatz, 469 Pa. 545, 553, 366 A.2d 1216, 1220 (1976). The Superior Court has held that "placing trash for collection is an act of abandonment which terminates any fourth amendment protection." Commonwealth v. Minton, 288 Pa.Super. 381, 391, 432 A.2d 212, 217 (1981). Therefore, the Court finds the property was abandoned and the Defendant does not have standing to challenge any evidence seized from his garbage.

Even if the Defendant has standing, the Court does not believe the seizure of items from the Defendant's garbage violated his rights against an unreasonable search and seizure. To be entitled to such protection, the Defendant must have a privacy interest in his garbage. The privacy test is two-fold: "the expectation must not only be 'actual (subjective),' but also one that 'society is prepared to recognize as reasonable.'" Commonwealth v. Cihylik, 337 Pa.Super. 221, 227, 486 A.2d 987, 990 (1985)(citations omitted). There is no testimony in the record to show that the Defendant had an actual expectation of privacy in his

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barrel sticking up out of the garbage can.

garbage. Moreover, Courts have held that society does not find an assertion of privacy in one's garbage reasonable once it has been placed outside for collection. California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988); Commonwealth v. Perdue, 387 Pa.Super. 473, 564 A.2d 489 (1988); Cihylik, supra; Minton supra; see also Annotation, Searches and Seizures: Reasonable Expectation of Privacy in Contents of Garbage or Trash Receptacle, 62 A.L.R. 5th 1.

The defense contends these cases are distinguishable because the garbage was outside the curtilage, where here the garbage was still within the curtilage. The Court cannot agree. First, the Perdue case involved a garbage can within the curtilage.[8] Second, it is not clear that the Defendant's garbage was within the cartilage. Although Mr. Peacock testified he drove up the driveway and walked around the garage to collect the garbage, it is not clear whether the garage was connected to the house or how close the garbage was to either structure. Even assuming the garbage was within the curtilage, the Court does not believe society is prepared to recognize a privacy interest in **garbage** once it has been placed outside for collection. Once placed outside, the garbage is exposed to the elements, animals and, potentially,

8 The garbage can was under the porch of a church parsonage. Although it had not been placed in a location where the garbage collector would normally retrieve it, the Court still found no violation because the church, parsonage and surrounding area was subject to public inspection.

other persons. For example, the wind can blow the lid off or an animal could knock the garbage can over, exposing its contents to the entire neighborhood, or a destitute homeless person could forage through the garbage, looking for food or clothing. Furthermore, Mr. Peacock testified that garbage collectors occasionally take salvageable items from their customer's trash, with or without the customer's permission.

Based on the foregoing discussion, the Court DENIES the Defendant's Motion to Suppress the evidence obtained from his garbage.

XI. Motion for Extension of Time to File Additional Motions

The defense requested additional time to file further pretrial motions. The Court believes this issue is moot. The defense has filed additional motions after it received discovery and the Court heard these motions. If ongoing discovery yields new information that would give rise to additional pretrial motions, the Court believes the rules of criminal procedure would permit the defense to file additional motions. See Pa.R.Cr.P. 579(A).

XII. Motion for Change of Venue

The defense agreed to table this issue to a time closer to trial. Defense counsel indicated at oral argument that they were willing to attempt to obtain a jury from Lycoming County if there wasn't excessive publicity at or near the time of jury selection.

XIII. Motion to Sequester Jury

As with the Motion for Change of Venue, the defense agreed to table this issue until the time of trial.

XIV. Motion in Limine - Accomplice

In the final count of his omnibus pretrial motion, the defense requests an order from the Court requiring the Commonwealth to release any and all evidence that would indicate the Defendant was an accomplice in this matter and/or to prohibit the Commonwealth from pursuing an accomplice theory at trial. The Court denies the defense request. The Commonwealth has provided the defense with voluminous discovery. Based on various discovery motions filed in this case, the Court believes the Commonwealth has provided all discoverable material in its possession to the defense (and perhaps some additional material as well). In section I of this Opinion, the Court held that the evidence presented at the preliminary hearing was sufficient to hold the Defendant for homicide charges. The evidence presented at the preliminary hearing could also support an inference that the Defendant was an accomplice. Based on the evidence regarding the Defendant's connection to the silencer/suppressor, the Commonwealth could present the theory that the Defendant made the silencer that was used during the shooting of Mrs. Illes and was therefore an accomplice to the shooter, if he wasn't the shooter.

ORDER

AND NOW, this ___ day of December 2003, upon consideration of the Defendant's Omnibus Pretrial Motion, it is ORDERED and DIRECTED as follows:

The Court DENIES Counts I, II, III, IV, IX, X, and XIV.

Counts V, VI, VII and XI are resolved and/or moot.

With respect to Count VIII, the request for extension for file a notice of alibi is moot as the defense has filed an alibi notice; however, the defense shall supplement its alibi notice by December 28, 2003 to comply with Rule 573(c)(1)(a).

Counts XII and XIII pertaining to change of venue or venire and sequestration of the jury are tabled at the request of the defense until the time of jury selection.

By The Court,

_____
Kenneth D. Brown, Judge

cc: Michael Dinges, Esquire
Kenneth Osokow, Esquire
George Lepley, Esquire
Craig Miller, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)