

**IN THE COURT OF COMMON PLEAS  
LYCOMING COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

<b>COMMONWEALTH</b>	:	
	:	
v.	:	<b>No.: 03-11,096</b>
	:	
<b>MATTHEW CROSSEN,</b>	:	
<b>Defendant</b>	:	

**OPINION AND ORDER**

Defendant petitions the Court for Habeas Corpus relief on the charge of Drug Delivery Resulting in Death, which is contained in the above-captioned information.<sup>1</sup> Specifically, Defendant asserts that the charge of Drug Delivery Resulting in Death requires proof of malice, the mens rea for third degree murder. Defendant argues that the Commonwealth failed to make a prima facie showing of malice at the time of the preliminary hearing in this case and therefore the charge should be dismissed.

A preliminary hearing in this matter was held on July 17, 2003. The testimony at that time showed that on March 31, 2003 the victim, Joel Kitchen, was at the residence of William Ray Holt, Jr. in Picture Rocks, Pennsylvania. Mr. Holt was the first eyewitness to testify. He related that after a cellphone call placed by Mr. Kitchen, the Defendant and another individual named "Louie" (later identified as Lewis Metzger) also arrived at the residence. N.T., July 17, 2003, pp. 12 – 17. Kitchen, the Defendant, Mr. Metzger, and Mr. Holt then proceeded to an upstairs bathroom where Mr. Holt observed a transaction in which Mr. Kitchen handed the

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<sup>1</sup> The information filed under 03-11,096 also alleges that the Defendant committed the offenses of Possession of a Controlled Substance with Intent to Deliver (heroin) and Delivery of a Controlled Substance (heroin). Defendant's petition does not request habeas corpus relief on either of these charges.

Defendant an unknown sum of money in exchange for which the Defendant gave Mr. Kitchen a bag of heroin. (Id. at pp. 18 – 19). Mr. Kitchen then prepared a syringe and injected a heroin and water mixture into his right arm. (Id. at p. 20). Prior to the time that Mr. Kitchen injected the heroin, Mr. Holt did not notice anything unusual about the victim’s behavior, (Id. at p. 20), although he did think that Mr. Kitchen was drunk. (Id. at p. 10, 27). Later in the evening, Mr. Holt observed Mr. Kitchen inject himself with heroin for a second time. (Id. at p. 23). They went downstairs. Mr. Holt got some water from the kitchen, then went back to the other room to discover Mr. Kitchen lying on the ground unconscious. (Id. at p. 24). Mr. Holt and the others present put Mr. Kitchen on the couch, but he rolled off and shortly thereafter began to have noticeable difficulty breathing, making noises and “gasping for air”. (Ibid.). One of the people present suggested calling 911, but the Defendant told the group to “just leave him alone, let him sleep it off and just let him alone.” Mr. Holt left soon after and was told the next morning that Mr. Kitchen was dead. (Id. at p. 25 – 26).

Lewis Metzger, also known as “Louie”, testified that he and the Defendant had traveled to Philadelphia during the evening prior to Mr. Kitchen’s death and that the Defendant purchased heroin in Philadelphia for the purpose of selling it to others. (Id. at p. 39 – 40). Mr. Metzger testified that it was the Defendant’s decision to go to Mr. Holt’s house when Mr. Kitchen contacted them on the cellphone. (Id. at p. 44). Mr. Metzger testified that after the group injected themselves with heroin, he saw Mr. Kitchen on the floor, unconscious. (Id. at p. 48). He testified that Mr. Kitchen looked “pretty much like someone’s o-d-ing”. (Id. at p. 49). Mr. Metzger described

Mr. Kitchen as “pale, eyes rolled back in his head” and making “some sounds like he was having like a hard time breathing”, with lips that were “reddish, maybe turnin’ purple”. (Id. at p. 49). However, he also testified that once Mr. Kitchen was “situated so he didn’t like choke on his own tongue,” (Id. at p. 49), he was breathing better, although a little more shallowly than regular breathing. (Id. at p. 50). Mr. Metzger recalled that in response to a suggestion that 911 should be called, “somebody else said no he’ll be alright”, but he was unsure who made that statement. (Id. at p. 80.)

Another witness, Amber Motter, testified that she saw Mr. Kitchen while he was unconscious. She described him as not “breathing right, he was makin’ a noise, he was purplish blue.” (Id. at p. 65.) She also testified that when she saw Mr. Kitchen she was going to call for help, but she testified that “Bob said no, he’ll be okay, he’ll be fine,” so that she did not make the call. (Id. at p. 64.)

Robert Munns, the brother of Mr. Kitchen, testified that he was also there on March 31 to April 1, 2003, the night his brother died. He identified the Defendant as the person who sold Mr. Kitchen heroin. (Id. at pp. 74 – 75.) He testified that when his brother fell unconscious, he attempted without success to revive him. (Id. at p. 79.) He also testified that no call was made for help because Matt, the Defendant, told him that Mr. Kitchen would be fine. (Id. at p. 80.)

Pennsylvania Title 18 § 2506, Drug Delivery Resulting in Death, sets out in section (a) the General Rule that

A person commits murder of the third degree who administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance in violation of Section 13(a)(14) or (30) of the Act of April 14, 1972 (P.L. 233, No. 64), known as the Controlled

Substance, Drug, Device and Cosmetic Act, and another person dies as a result of using the substance.

The Defendant claims that he is entitled to habeas corpus relief on the charge of Drug Delivery Resulting in Death because the Commonwealth has failed to make a prima facie showing on the mens rea for that charge. He asserts that the Commonwealth must prove malice in order to sustain a charge of Drug Delivery Resulting in Death, just as it must do to prove the charge of Third Degree Murder. In support of his position, he cites the cases of Commonwealth v. Highhawk, 687 A.2d 1123 (Pa.Super. 1996) and Commonwealth v. Ludwig, 55 Pa.D&C4th 449 (2002)(Allegheny County). The Highhawk court specifically “decline(d) to address the issue of the degree of culpability required to support a conviction under (18 Pa.C.S.) section 2506”. Highhawk, supra., footnote 8. The Ludwig case, however, does support Defendant’s contention that section 2506(a) “requires that the Commonwealth establish that a defendant acts with malice,” Ludwig, supra., at 462. In Ludwig, the Court found that the Pennsylvania legislature incorporated the crime of Murder of the Third Degree into the statute prohibiting Drug Delivery Resulting in Death and held that because of this, 18 Pa.C.S. Section 2506 requires proof of malice in the same way that the offense of Murder of the Third Degree requires proof of malice. Ludwig, at 465. This Court similarly finds that the offense of Drug Delivery Resulting in Death, 18 Pa.C.S. 2506, requires that the Commonwealth prove malice.

In Pennsylvania, malice has been defined for juries and fact-finders in the Pennsylvania Standard Jury Instruction for third-degree murder, which provides:

The word 'malice' as I am using it has a special legal meaning. It does not mean simply hatred, spite or ill will. Malice is a shorthand way of referring to three different mental states that the law regards as being bad enough to make a killing murder. Thus, a killing is with malice if the killer acts with first, an intent to kill, or second, an intent to inflict serious bodily injury or third, (wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and of mind regardless of social duty, indicating an unjustified disregard of the probability of death or great bodily harm, and an extreme indifference to the value of human life) (a conscious disregard of an unjustified and extremely high risk that his actions might cause death or serious bodily harm). Pa. Standard Jury Instructions, section 15 2502C.

In this case, the Commonwealth does not contend that the Defendant acted with intent to kill or to inflict serious bodily injury. Instead, the Commonwealth's theory is that the Defendant acted with wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and of mind regardless of social duty, indicating an unjustified disregard of the probability of death or great bodily harm, and an extreme indifference to the value of human life. The Commonwealth's evidence in this regard is a statement attributed to the Defendant while Mr. Kitchen was in severe physical distress to the effect that Mr. Kitchen should be left alone and help need not be summoned. The Defendant correctly points out in his motion that another witness, Amber Motter, testified that the statements were made by Robert Munns. However, a determination of whether the statement was made by the Defendant, someone else, or not made at all is a question for the finder of fact. For purposes of this motion, the Commonwealth has presented evidence that the Defendant made the statement. The Court finds that this evidence is enough to make a prima facie showing on the element of malice in the context of the facts of this case. All of the eyewitnesses testified that at the time the statement was made, Mr. Kitchen was having significant difficulty breathing. Two of the witnesses testified

that because of this difficulty, Mr. Kitchen was turning blue or purple. He was unconscious and the others present could not rouse him. Further, the witnesses testified that this occurred soon after Mr. Kitchen had injected himself with heroin that the Defendant had sold to him. The evidence presented at the preliminary hearing shows that the Defendant would have been aware of these facts. Under these circumstances, the Court finds that evidence the Defendant made statements to persuade others not to call for assistance for Mr. Kitchen constitutes a prima facie showing of malice.

**ORDER**

AND NOW, this \_\_\_\_\_ day of December, 2003, for the reasons stated above, the Defendant's Petition for Habeas Corpus is DENIED.

By the Court,

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Nancy L. Butts, Judge J.

xc:       DA  
          PD (Spring)  
          Gary Weber, Esquire  
          Hon. Nancy L. Butts  
          Diane L. Turner, Esquire