

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. 02-11,731
: 02-11,732
:
vs. : CRIMINAL DIVISION
: Motion to Consolidate
JERRY LAMONT DAY, JR., :
Defendant :

OPINION AND ORDER

Before the Court is the Commonwealth's Motion to Consolidate the above-captioned informations¹ for trial. Argument on the motion was heard April 23, 2003.

In No. 02-11,731, Defendant has been charged with possession with intent to deliver a controlled substance, possession of a controlled substance and possession of drug paraphernalia.² In No. 02-11,732, Defendant has been charged with delivery of a controlled substance, possession with intent to deliver a controlled substance, possession of a controlled substance and possession of drug paraphernalia. It appears that the charges to No. 02-11,732 were brought after the police allegedly executed a controlled buy of cocaine from Defendant, on September 3, 2002. A warrant was then issued for his arrest and upon execution of that warrant on September 28, 2002, officers allegedly discovered cocaine in Defendant's possession, leading to the charges in No. 02-11,731.

The Commonwealth seeks to consolidate the cases for trial under Rule 582 of the Rules of Criminal Procedure. That rule provides, in pertinent part, that offenses charged in separate

¹ It is noted that no information has been filed to 02-11,731. Further, the information filed to No. 02-11,732 is defective in that it fails to indicate the date on or about which Defendant is alleged to have committed the crimes outlined therein, contrary to the requirements of Rule 560(B)(3) of the Pennsylvania Rules of Criminal Procedure. The Court will nevertheless assume the Commonwealth will be filing an information in No. 02-11,731, and amending the information in 02-11,732, and will therefore address the Motion to Consolidate.

² This information is gleaned from the Criminal Complaint filed in this matter and it is assumed that when the Commonwealth does file an information in this case, all charges held for Court will be included in that information.

informations may be tried together if the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion. Pa.R.Crim.P. Rule 582(A)(1)(a). While Defendant does not contend the charges are incapable of separation by the jury, he does contend that evidence of the possession with intent to deliver charges would not be admissible in a separate trial on the delivery charges. The Commonwealth argues that the possession with intent to deliver charges would be admissible, however, to show a common scheme or plan or to show identity, both of which are exceptions to the rule of evidence which typically excludes evidence of other crimes, wrongs or acts. P.R.E. Rule 404.

Evidence of other crimes, wrongs or bad acts may be admissible as proof of an actor's plan or of his identity. Commonwealth v Lockcuff, 813 A.2d 857 (Pa. Super. 2002); P.R.E. Rule 404(b)(2). To fall within the common scheme or plan exception, the crimes must be so related to each other that proof of one tends to prove the other. Commonwealth v Burton, 770 A.2d 771 (Pa. Super. 2001). To fall within the identity exception, the Commonwealth must show such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other. Id. The Court does not believe that either exception applies in the instant case.

With respect to the common scheme or plan exception, the Commonwealth has failed to show how delivery of cocaine to a confidential informant on one date is so related to possession of cocaine on another date that proof of the possession tends to prove the delivery. Unfortunately, cocaine is not such a rare substance that proof of possession of such by one individual would naturally show that anyone who possessed it must have also been the same individual who delivered it. With respect to the identity exception, the same lack of evidence prevents application of this exception as well. The Commonwealth must show more than that the crimes are of the same class; rather, there must be such a high correlation in the details of the crimes that proof that the defendant committed one makes it very unlikely that anyone else but the defendant committed the others. Commonwealth v Robinson, 521 A.2d 940 (Pa. Super. 1987), citing Commonwealth v Morris, 425 A.2d 715 (Pa. 1981). Here there is no detail other than the type of substance to show a connection between the crimes. This is hardly the type of

detail, which would mark the crimes as “the handy work of the accused”. Commonwealth v Morris, supra.

Inasmuch as evidence of the possession with intent to deliver would not be admissible in a trial on the delivery charge, the cases may not properly be consolidated under Rule 582.

ORDER

AND NOW, this 30th day of April, 2003, for the foregoing reasons, the Commonwealth’s Motion to Consolidate is hereby denied.

By the Court,

Dudley N. Anderson, Judge

cc: DA
PD
Eileen Grimes, Deputy Court Administrator
Gary Weber, Esq.
Hon. Dudley N. Anderson