

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. 02-11,351
	:	
vs.	:	CRIMINAL DIVISION
	:	
CODY E. HEFFNER,	:	
Defendant	:	Omnibus Pre-trial Motion

**OPINION AND ORDER**

Defendant has been charged with aggravated assault, two counts of aggravated assault with a deadly weapon, two counts of simple assault, terroristic threats, unlawful restraint, two counts of disorderly conduct, three counts of involuntary deviate sexual intercourse, and three counts of indecent assault, in connection with alleged acts of abuse against an eleven year old boy. In the instant omnibus pre-trial motion, Defendant seeks to dismiss the counts of aggravated assault by way of a petition for writ of habeas corpus as well as a motion to quash certain counts in the information, to compel discovery of the alleged victim's psychological records, and to determine the alleged victim's competency to testify.<sup>1</sup>

Initially, the Commonwealth objects to the timeliness of the motion under Rule of Criminal Procedure 579. That rule provides, in pertinent part:

**Rule 579. Time for Omnibus Pretrial Motion and Service**

(A) Except as otherwise provided in these rules, the omnibus pretrial motion for relief shall be filed and served within 30 days after arraignment, unless opportunity therefor did not exist, or the defendant or defense attorney, or the attorney for the Commonwealth, was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown.

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<sup>1</sup> At the hearing on the motion, Defendant withdrew his request for a determination of the alleged victim's testimony without prejudice to refile the request after receiving the discovery he is requesting.

Pa.R.Crim.P. Rule 579(A). The comment to the rule indicates that “cause shown” includes a finding that discovery has not been completed, or a bill of particulars has not been furnished, or that contested motions for discovery or for a bill of particulars are pending.

The Court initially notes the rule appears to contemplate a formal request by the defendant for permission from the Court to extend the time for filing a pretrial motion, made prior to the expiration of the thirty-day period, and a finding by the Court of cause for the delay in granting such permission, rather than an examination of the circumstances offered for the delay by the defendant only in response to the Commonwealth’s objection. The Court will nevertheless address Defendant’s request that the motion be considered on the merits even though untimely.<sup>2</sup>

Defendant contends he was unable to file the motion until he received certain medical reports in April 2003. It appears, however, that only the request for discovery of psychological records of the alleged victim was affected by the delay in receiving these medical reports. The petition for writ of habeas corpus, by its very nature, could have been filed immediately after the preliminary hearing, which concluded on July 29, 2003. That is, the petition for writ of habeas corpus contends the evidence offered by the Commonwealth at the preliminary hearing was insufficient to establish the charges of aggravated assault. Even if the medical report received in April somehow contradicts certain evidence offered at the preliminary hearing,<sup>3</sup> a determination of the sufficiency of the evidence which was actually offered is not affected by that report. Similarly, the motion to quash counts 2 and 3 of the information, which charge aggravated assault with a deadly weapon, contends that the instrumentalities used in the alleged assaults are not, by definition, deadly weapons. All information necessary to argue this point was known to Defendant at the conclusion of the preliminary hearing. In fact, Defendant argued to the magistrate against holding the second of the two charges for Court on this very

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<sup>2</sup> There is no dispute the motion was not filed within thirty days of arraignment. Defendant was arraigned on August 26, 2002. The omnibus motion was not filed until May 30, 2003.

<sup>3</sup> In his brief in support of his motion to quash, Defendant indicates on page 2 that Dr. Kathleen Lewis testified at the preliminary hearing that the alleged victim’s scar was along the “ventral” part of his wrist, but that her report indicates the scar is over the “dorsal right wrist”.

ground.<sup>4</sup> The receipt of the medical report in April thus does not excuse Defendant's delay in filing the motion to quash.

The Motion to Compel Discovery, on the other hand, which seeks the production of the alleged victim's psychological records, appears to have been prompted by information contained in the medical reports received by the defense in April 2003. The Court will therefore consider this motion on its merits.

Defendant seeks to examine the alleged victim's psychological records in an attempt to discover information which might affect his credibility as a witness. The court finds that such records are protected by the absolute privilege of 42 Pa.C.S. Section 5944, however. That section provides, in pertinent part:

**Section 5944. Confidential communications to psychiatrists or licensed psychologists**

No psychiatrist or person who has been licensed ... to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between and attorney and client.

Our appellate courts have determined that this privilege applies to records as well as testimony, and outweighs a defendant's rights of confrontation and compulsory process. See Commonwealth v. Wilson, 602 A.2d 1290 (Pa. 1992); Commonwealth v. Smith, 606 A.2d 939 (Pa. Super. 1992). The records sought by Defendant in the instant matter are thus not subject to discovery.

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<sup>4</sup>Defendant is alleged to have cut the victim on the wrist with a piece of glass and to have burned him on the ankle with a hot marijuana pipe. At the preliminary hearing, Defendant argued that the marijuana pipe was not a deadly weapon as defined by the Crimes Code. He did not argue that the piece of glass was not a deadly weapon, but more generally, that the alleged victim was not credible in his testimony regarding how he was cut. The information to support an argument that the small piece of glass used cannot be classified as a deadly weapon under the Crimes Code, was known to Defendant at that time, however. Even if the cut was made to the back of the victim's wrist, as was indicated in Dr. Lewis' report, rather than the front of his wrist, as was indicated in her testimony, evidence of the size and depth of the cut and of its proximity to the radial artery was offered at the preliminary hearing and it is those factors which play into the determination of potential for serious bodily injury, a necessary consideration in defining a deadly weapon, and not the location of the cut per se.

**ORDER**

AND NOW, this 14<sup>th</sup> day of July, 2003, for the foregoing reasons, Defendant's Petition for Writ of Habeas Corpus, Motion to Quash and Motion to Compel Discovery are hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA  
Joseph Nocito, Esq., 63 Pierce St., Kingston, PA 18704  
Jeffrey Yates, Esq.  
Gary Weber, Esq.  
Hon. Dudley Anderson