

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

COMMONWEALTH	:	
	:	
	:	
v.	:	No: 03-10,060
	:	
TODD ROBERT HILLMAN,	:	
Defendant	:	
	:	

OPINION AND ORDER

Before the Court is Defendant's Petition for Habeas Corpus alleging that the charges of Rape and Aggravated Indecent Assault were improperly held for court by the magistrate following a preliminary hearing in the above-captioned matter which was held on January 3, 2002. Counsel for the Defendant and for the Commonwealth agreed that this issue should be submitted to the Court on the transcript of the preliminary hearing. The Court has reviewed the transcript and makes the following findings of fact with respect to the charges of rape and aggravated indecent assault:

The alleged victim in the case testified that she was involved in a sexual encounter with Defendant on two separate occasions. She testified that on both occasions she repeatedly admonished the Defendant that what they were doing was wrong and that she did not wish to participate. She testified that on the occasion of the first encounter, there was a five to ten minute struggle over whether her shirt would stay down or be pulled up, N.T., 1/3/2003, pp. 5 – 6, which ended with her shirt and bra being pulled off by the Defendant. Id., p. 6. She further testified that after she and the Defendant moved to a nearby couch he pulled down her pants

despite her “constantly saying no.” Id., at p. 8. The alleged victim then testified that the Defendant attempted to carry her upstairs but that he dropped her and they sat on the steps for a period of time before he again picked her up and they continued up the steps to his bedroom. According to the alleged victim, both she and the Defendant were naked at this point. Id., at pp. 10, 37 – 40. The alleged victim testified that once she was in the Defendant’s bedroom that he laid her upon his bed, Id., at pp. 40 – 41, and that this was when “the alarm bells really started coming off.” Id., at p. 10. She testified that she repeatedly told the Defendant “no” and tried to resist him by pushing him off of her, but she also testified that he overcame that resistance by gently pushing her back onto the bed. Id., at p. 41. She testified that she offered no other type of resistance when he spread her legs and got on top of her and engaged in the act of sexual intercourse. Id., at pp. 41 – 43. but that he continued with his unwanted attention and eventually entered her with his penis. Id., at p. 11. Although the alleged victim does not specifically indicate what part of her body was entered by the Defendant’s penis, she does describe a “sharp, seering (sic) pain”, Id., at p. 11, in her lower abdomen and later describes bleeding from her “vaginal area like where you normally would have your period”, Id., at p. 12.

As to the occasion of the second sexual encounter, the alleged victim testified that this incident took place the following month when she went to the Defendant’s home to discuss the prior incident with him. Id., at p. 13. She testified that on this occasion, she and the Defendant were talking and eventually arguing over the first sexual encounter between them. Id., at pp. 16 – 17. She testified that the Defendant then began to remove first her shirt and then her pants against her

wishes. Id., at pp. 17 – 18. She testified that she ended up on the floor, Id., at p. 15, and that she could then “feel him tugging (her) pants down”. Id., at p. 18. She testified that she then had an experience similar to “an asthma attack”, Id., at p. 19, during which time “it felt like he did something with his hands” because she could “feel his hands around (her) bottom area.” Id., at p. 19. The alleged victim testified, however, she did not feel anything go inside of her, Id., at p. 20.

On cross examination, the alleged victim testified that at no time did she try to leave, kick the Defendant, scratch the Defendant, or bite the Defendant, Id., at pp. 30 – 31, 33, 42, nor did she attempt to scream, Id., at pp. 42, 49 – 50. She did testify, however, that she repeatedly told the Defendant “no” and repeatedly attempted to push away the Defendant’s hands. Id., at pp. 5 - 6, 8 - 11, 16, 28 - 31, 33 - 34, 36 - 37, 41 - 42.

Initially, the Court notes that in reviewing a habeas corpus petition such as this, the Commonwealth bears the burden of establishing a prima facie case that a crime has been committed and that it is probably the accused who has committed it. Commonwealth v. Wojdak, 502 Pa. 359, 466 A.2d 991, (Pa. 1983), citing Commonwealth v. Prado, 481 Pa. 485, 393 A.2d 8 (Pa. 1978). While the Defendant seems almost to concede in his motion that he is properly identified as the individual with whom these acts may have occurred, he correctly implies that the Commonwealth must prove not only that there is probable cause to believe that the Defendant committed these acts but that there is prima facie evidence as to each and every element of the offenses charged. “(A)bsence of evidence as to the existence of a material element is fatal.” Wojdak, at 370.

In this case, the Defendant asserts that a prima facie showing of forcible compulsion, a material element to the crime of rape, has not been made. This issue has been extensively discussed in the case of Commonwealth v. Berkowitz, 537 Pa. 143, 641 A.2d 1161 (Pa. 1994). In Berkowitz, the Defendant was convicted of raping a fellow college student. The victim had gone to a dormitory room to visit with the Defendant's roommate and instead came into contact with Defendant. When Defendant began to lift the victim's shirt and fondle her breasts, she told him no. Their activity progressed with the Defendant eventually putting the victim on his bed and the victim continually telling him "no." The victim in the Berkowitz case did not physically resist in any way while she was on the bed, nor did she scream. As the sex act itself occurred, the victim repeatedly said "no, no," to the Defendant, but he did not cease his actions until after he had ejaculated. The Pennsylvania Supreme Court held that this set of circumstances did not constitute the element of forcible compulsion or threat of forcible compulsion required to prove rape. The Berkowitz court noted that "the degree of force required to constitute rape is relative and depends on the facts and particular circumstance of the case." Berkowitz, Id., at 1163, citing Commonwealth v. Rhodes, 510 Pa. 537, 510 A.2d 1217 (1986). The court found that the victim's continued use of the word "no" was "relevant to the issue of consent, (but) it is not relevant to the issue of force," and held that "where there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the "forcible compulsion" requirement under 18 Pa.C.S. Section 3121 is not met." Berkowitz, id., at 1164. See also Commonwealth v. Mlinarich, 518 Pa. 247, 542 A.2d 1335 (1988)(plurality opinion).

This comports with the definition of forcible compulsion found in Title 18 of the Pennsylvania Consolidated Statutes, Chapter 31, which defines forcible compulsion as “(c)ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied.” 18 Pa.C.S.A. Section 3101. In this case, the alleged victim has certainly testified to her own lack of consent. As indicated above, she testified that she repeatedly admonished the Defendant that she did not wish to continue and they should stop, frequently telling him “no”. The question becomes, however, whether the totality of the alleged victim’s statement can constitute the element of forcible compulsion or threat of forcible compulsion as a matter of law. This Court finds that, as a matter of law, the testimony of the alleged victim is not sufficient to make a prima facie showing of the forcible compulsion element of the crime of rape charged against the Defendant. 18 Pa.C.S.A. Section 3121(1)(2). Here, as in Berkowitz, supra., there is ample evidence for a prima facie showing of the alleged victim’s lack of consent, but there has been no evidence presented by the Commonwealth of physical force, a threat of physical force, or psychological coercion.¹ As a matter of law, there has been no prima facie showing of rape, and Count One of the information is dismissed.

The Court now turns to Defendant’s contention that the Commonwealth failed to present any evidence that he engaged in Aggravated Indecent Assault with the alleged victim. An individual commits the crime of Aggravated Indecent Assault when he or she engages in penetration, however slight, of the genitals or anus of a

¹ Significantly, shortly after Berkowitz was decided, the Pennsylvania state legislature passed legislation enacting the crime of sexual assault and criminalizing non-consensual sex where the perpetrator uses little force or threat of force, if any. See 18 Pa.C.S.A. Section 3124.1. Defendant in this case has been charged with that offense in Count 2 of the information.

complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures, and, under subsection (1) the person does so without the complainant's consent, or, under subsection (2) the person does so by forcible compulsion. 18 Pa.C.S.A. Section 3125. Defendant has been charged under both subsection (1) and (2) in the criminal information. As already discussed, this Court has found that there is insufficient evidence presented by the Commonwealth, as a matter of law, to find the element of forcible compulsion generally. Therefore, Count 4 of the information, Aggravated Indecent Assault by Forcible Compulsion, is dismissed.

We now turn to whether there has been a sufficient presentation of evidence to maintain the charge contained in Count 3 of the information, Aggravated Indecent Assault (without consent) under 18 Pa.C.S.A. Section 3125(1). As noted above, the alleged victim in this case specifically testified that at the time of the first sexual encounter between herself and the Defendant, he penetrated her genitals with his penis, and at the time of the second encounter, she did not feel anything go inside of her. It is not clear from the information whether the Commonwealth is asserting that the offense of Aggravated Indecent Assault occurred at the time of the first or second encounter between the Defendant and the alleged victim. However, from the evidence presented, it is clear that at the time of the second incident, there was no penetration of the alleged victim's genitals and, therefore, insufficient proof to sustain the charge of Aggravated Indecent Assault. The alleged victim testified that on the occasion of the first sexual encounter, the Defendant penetrated her genitals with his penis without her consent. This penetration is what is ordinarily meant by

the term sexual intercourse, 18 Pa.C.S.A. Section 3101, and, as such, falls squarely within the conduct required for a conviction of the crimes of rape, 18 Pa.C.S.A. Section 3121 and sexual assault, 18 Pa.C.S.A. Section 3124.1, assuming the remaining elements of those offenses were also satisfied. In contrast, the crime of Aggravated Indecent Assault criminalizes penetration of a complainant's genitals with "a part of the person's body", but, importantly, criminalizes that behavior only when certain other sections under Title 31 do not apply. 18 Pa.C.S.A. Section 3121, Rape, is one of the sections which is specifically enumerated within the Aggravated Indecent Assault statute, and therefore conduct which is criminalized under 18 Pa.C.S.A. Section 3121, is specifically not covered by 18 Pa.C.S.A. Section 3125, the Aggravated Indecent Assault statute. There is no evidence contained in the transcript which shows that any part of the Defendant's body other than his penis penetrated the genitals or anus of the alleged victim. Consequently, the Commonwealth cannot sustain its burden with respect to Count 3 of the criminal information, Aggravated Indecent Assault Without Consent, and this charge is hereby dismissed.

The Court notes that the Defendant has made no motion with respect to Count 6, Indecent Assault by forcible compulsion. However, in light of the Court's findings as set forth above that there has been no showing of forcible compulsion as a matter of law, Count 6 of the criminal information is also dismissed.

ORDER

AND NOW, this ____ day of March, 2003, after a review of the transcript of the preliminary hearing held January 3, 2003, the Defendant's Petition for Habeas Corpus is GRANTED and it is ORDERED and DIRECTED that the charges of Rape, contained in Count 1 of the information, Aggravated Indecent Assault, contained in Counts 3 and 4 of the information, and Indecent Assault, contained in Count 6 of the information are hereby DISMISSED.

By the Court,

_____, J.

xc: William Miele, Esquire
DA
Court Administrator
Honorable Nancy L. Butts
Diane L. Turner, Esquire
Gary Weber, Esquire