

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

COMMONWEALTH	:	
	:	
v.	:	No.: 03-12,047
	:	
TODD HILLMAN,	:	
Defendant	:	

OPINION AND ORDER

Before the Court is the Defendant's Petition for Habeas Corpus relief. He asserts that the Commonwealth failed to present any evidence that he had sexual intercourse with the alleged victim by forcible compulsion and that therefore the charge of Rape and Involuntary Deviate Sexual Intercourse, 18 Pa.C.S.A. Section 3121 and 3123 respectively, should be dismissed. Counsel for the Defendant and for the Commonwealth have agreed that this issue may 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 those charges.

The preliminary hearing in this case was held on December 13, 2002, at which time the alleged victim, T.H., testified. T.H. identified the Defendant and bluntly stated that he had raped her. (Notes of Testimony, December 13, 2002, p. 4) She then described the events leading to the charges in more detail, explaining that she was at his home for dinner, after which she began to slow dance with the Defendant at his request. He started to kiss her and then began to try and lift up her shirt to gain access to

her breasts. (N.T. pp. 4 – 5) T.H. testified that she did not want the Defendant to remove her shirt and that she told him so and kept pulling the shirt down and saying no when he persisted in his behavior. (N.T. p. 5) She testified that he eventually removed her shirt and her bra despite her protests (N.T. p. 5) and that ultimately he laid her on the couch and began to kiss her breasts. (N.T. p. 7) She testified that she attempted to cover her breasts with her arm but that the Defendant would pull her arms away so that her breasts were uncovered. (N.T. pp. 7 – 8) T.H. testified that she was frightened to the point that she was crying, shaking and continually saying “no” to the Defendant. (N.T. p. 8) The Defendant then asked T.H. if she would go upstairs to his room with him, to which she answered “no” and kept crying and shaking. (N.T. p. 8 - 9) She testified that despite her answer, the Defendant carried her up to his room. (N.T. p. 9, 39) Once upstairs, the Defendant allegedly began to undo the victim’s pants and when she held her hands over the pants to prevent him from continuing, he moved her hands away until he accomplished his task. (N.T. p. 10) She resisted the entire time. (N.T. p. 42 - 43) At that point, the Defendant laid her upon the bed. (N.T. p. 11, 44) She testified that as he removed her underwear, she rolled around trying to avoid him and told him “no, I don’t want you to.” (N.T. p. 44) T.H. testified that once her clothing was removed, the Defendant removed his own clothing. She testified that as he did that, she attempted to grab her pants, but he kicked them away off to the side. (N.T. p. 44) The Defendant then got on top of her and soon began to perform oral and digital intercourse

upon her. (N.T. p. 12) She testified that she repeatedly told him no and that she was crying while it happened. She also testified that this portion of the incident took approximately fifteen minutes. (N.T. pp. 12 – 13) Significantly, she also testified that she tried without success to push away the Defendant while he was engaging in this behavior. (N.T. p. 12). She testified that the Defendant then got back on top of her and began to perform sexual intercourse upon her, which lasted about thirty minutes. (N.T. p. 13) She later clarified that the entire incident lasted about thirty minutes, not just the intercourse. (N.T. p. 46) The alleged victim testified that she kept her legs closed, but that the Defendant moved them apart with his hands. (N.T. p. 48 - 49) During the sexual intercourse, the alleged victim testified that she continued to cry and also told him of an incident when she was younger when she had been raped. (N.T. p. 14) This did not cause the Defendant to stop. (Id.) On cross examination, the alleged victim testified that at one point while they were slow dancing, she told the Defendant that she wanted to leave. However, she also indicated that she did not leave because she had no way home and was scared to use the phone to call her mother. (N.T. p. 34) She testified that she told the Defendant “no” a number of times but that he would respond by continuing his behavior and saying that he was persistent. (N.T. pp. 32, 37) The alleged victim testified that she was scared because she hadn’t known the Defendant for very long and didn’t know what he would do or what he was like. (N.T. p. 42) She testified that it

was for this reason that she did not run or scream. She was frightened that the Defendant would hurt her if she tried anything. (N.T. p. 50)

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). The Defendant does not contest that he is properly identified as the individual with whom these acts may have occurred, however 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. The question then becomes 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 at the preliminary hearing is 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). T.H. testified that she was crying and shaking. She repeatedly told the Defendant “no” as he progressed with his physical activity. When the Defendant removed her clothing, she tried to stop him but he pushed her hands away. Similarly, when she tried to shield her body with her hands, the Defendant removed them. The victim also testified that she rolled around and tried to avoid having the Defendant remove the last of her clothing and attempted to retrieve her pants while he was undressing, but that she could not because the Defendant kicked them farther away. Under these circumstances, a prima facie showing is made of the forcible compulsion element of rape.

The Defendant similarly contends that the charge of Involuntary Deviate Sexual Intercourse should be dismissed because of lack of proof of the element of forcible compulsion. For the reasons stated above, the Court finds as a matter of law that a prima facie showing has been made as to forcible compulsion with respect to the charge of Involuntary Deviate Sexual Intercourse as well.

ORDER

AND NOW, this _____ day of _____, 2003, for the reasons set forth above, the Defendant's Petition for Habeas Corpus is DENIED.

By the Court,

_____ J.

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