

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. 03-11,873  
:   
vs. : CRIMINAL  
:   
SCOTT MULL, : OMNIBUS PRETRIAL MOTION  
Defendant :

**OPINION AND ORDER**

This matter came before the Court on the defendant's Omnibus Pre-trial motion. The Court held hearings on April 7, 2004 and May 17, 2004. The relevant facts follow.

On October 13, 2003, Officer Dustin Kreitz of the Williamsport police came in contact with an individual named Ronald Burton, because he was involved in the delivery of two packets of heroin. Mr. Burton had an additional two packets of heroin on his person. All the packets were stamped "Hannibal." Mr. Burton told the police he was delivering for an individual called "Gap," also known as Scott Mull. While the police were speaking with Mr. Burton, he received a phone call from "Gap," who asked if he needed more heroin.

Mr. Burton told the police he wanted to cooperate, so they signed him up as a confidential informant. Although Officer Kreitz hadn't spoken with Mr. Burton before October 13, Corporal McKenna had used Mr. Burton as a confidential informant in the past. Corporal McKenna told Officer Kreitz that Mr. Burton was very reliable and two individuals were arrested and successfully prosecuted due to Mr. Burton's previous service as a confidential informant.<sup>1</sup>

Mr. Burton told Officer Kreitz that he would travel to Newark New Jersey

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<sup>1</sup> Mr. Burton testified that he was a confidential informant from June-

with Mr. Mull in Mull's burgundy sedan with a dent on the passenger side to purchase bricks of heroin.<sup>2</sup> Mr. Mull would ask Mr. Burton to go to Newark with him when he went to purchase drugs because Mr. Burton is black and Mr. Mull would have fewer problems buying drugs with Mr. Burton with him.

On October 21, 2003, Mr. Burton called Officer Kreitz. Mr. Burton informed Officer Kreitz that Mr. Mull had called him from the White Deer motel and talked to him about going to Newark the next day to get two bricks of heroin. Mr. Mull told Mr. Burton that he would pick him up the next morning at the Dunkin Donuts or the dollar store in the Newberry section of Williamsport.

Officer Kreitz told Mr. Burton to contact him once Mr. Mull called him the next day to make the trip. Officer Kreitz then went to the White Deer motel. He observed a burgundy sedan with a dent in the passenger side in the parking lot. He contacted the manager of the motel, who told him Mr. Mull was staying there with Sharon Rubio. The manager also stated Mr. Mull drove a burgundy sedan and a blue vehicle that were out in the parking lot. Officer Kreitz ran the registration on the burgundy sedan, a Kia Optima, and it was registered to Sharon Rubio.

Mr. Burton called Officer Kreitz at around 10:30-11:00 a.m. on October 22. He told Officer Kreitz that Mr. Mull was picking him up at the M & T Bank across the street from the Dunkin Donuts in the Newberry section of Williamsport within thirty minutes to go to Newark and purchase drugs. Officer Kreitz observed Mr. Burton get into the burgundy Kia Optima and leave Williamsport, traveling east on Route 180.

Based on Corporal McKenna's prior use of Mr. Burton as a confidential

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December 1998 and he made three controlled buys from the same individual.

informant, Burton's statements and his own observations, Officer Kreitz concluded that Mr. Mull would return to Williamsport eight to twelve hours later with at least one brick of heroin. Therefore, Officer Kreitz applied for and obtained a search warrant for when the vehicle returned to the Williamsport area.

At approximately 7:45 p.m., Mr. Burton called Officer Kreitz. He told him he was in the car with Mr. Mull and Ms. Rubio, they were at the interchange of Route 80 and Route 15 and Mr. Mull had a brick of heroin. Officer Kreitz and an arrest team, including Troopers from the Pennsylvania State Police, were waiting on Route 15 approximately two miles south of the Econolodge. When they observed the burgundy Kia Optima with a dent in the passenger side, they activated their lights and pulled the vehicle over across from the Econolodge. Officer Kreitz spoke to Mr. Burton briefly before the police executed the search warrant on the vehicle. Mr. Burton told Officer Kreitz that when the police activated their lights, Mr. Mull tossed the package of heroin to Ms. Rubio. Ms. Rubio asked Mr. Mull what she should do with it and he told her to put it under her seat. Mr. Mull was in the driver's seat and Ms. Rubio was in the front passenger seat.

The police searched the vehicle pursuant to the warrant obtained by Officer Kreitz. They found 35 bags of heroin wrapped up in a magazine paper under the front passenger seat. They also found four partial bags under the front passenger seat that were open as if someone had used some of the heroin.<sup>3</sup> The police also seized a cell phone from

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<sup>2</sup> A brick is 50 baggies of heroin.

<sup>3</sup> Officer Kreitz testified that he believed all three of the occupants of the vehicle were using heroin on the trip back from Newark, New Jersey.

the center console. When the police allowed Ms. Rubio to collect some personal items from the vehicle on November 25, they found three more bags of heroin under the front passenger seat. All the bags of heroin found in the car were stamped “Hannibal” just like the ones Mr. Burton sold and possessed on October 13.

Officer Kreitz testified that a bag of heroin sells for \$5-\$10 in cities like Newark, Philadelphia and New York, but they are sold in Williamsport for \$25 per bag. Based on the number of unopened bags found in the vehicle (38) and the street value of that quantity in Williamsport (\$950), it was Officer Kreitz’s opinion that Mr. Mull and Ms. Rubio possessed the heroin with the intent to sell it. Officer Kreitz believed this opinion was also supported by the fact that the bags were stamped “Hannibal” just like the bags Mr. Burton was selling for Mr. Mull on October 13.

The police arrested Mr. Mull and Ms. Rubio and charged them with possession with intent to deliver a controlled substance, possession of a controlled substance, possession of drug paraphernalia and conspiracy.

Officer Timothy Miller filed the original criminal complaint against Mr. Mull. On November 17, 2003, District Justice Kenneth Schriener was scheduled to hold a preliminary hearing on the complaint. At the time of the preliminary hearing, the Commonwealth withdrew the complaint because one of its witnesses failed to appear.<sup>4</sup>

On November 19, 2003, Officer Dustin Kreitz filed a second criminal complaint against Mr. Mull. The second complaint charged the same offenses as the original complaint, which was filed by Officer Miller and withdrawn by the Commonwealth on

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<sup>4</sup> At the hearing on the defendant’s Omnibus Pretrial Motion, the Commonwealth stated it believed the witness who failed to appear was the affiant, Officer Timothy Miller.

November 17. A preliminary hearing was scheduled for December 1, 2003. District Justice James Carn was specially assigned to preside over the hearings scheduled before District Justice Schriener on December 1, 2003. See Commonwealth's Exhibit 2, Order of President Judge Clinton W. Smith temporarily assigning District Justice Carn to serve as issuing authority for magisterial district 29-3-02. The Commonwealth started its case and presented some evidence. However, the Commonwealth again withdrew the charges after it realized Mr. Burton was not subpoenaed for the hearing and it was unlikely that District Justice Carn was going to hold over for court the possession with intent to deliver heroin and possession of heroin charges without his testimony.

Officer Kreitz immediately filed a third criminal complaint against Mr. Mull. The third complaint charged the same offenses as the previous two complaints. A preliminary hearing was scheduled for December 15, 2003. District Justice Allen Page was specially assigned to conduct preliminary hearings for the office of District Justice Schriener on December 15, 2003 from 8:30 a.m. until 12:00 noon. See Commonwealth's Exhibit 3. Peter Campana, counsel for Mr. Mull, requested that the complaint be dismissed for a violation of Rule 544 of the Pennsylvania Rules of Criminal Procedure. District Justice Page denied the motion and held the preliminary hearing. At the conclusion of the hearing, District Justice Page found that the Commonwealth established a prima facie case on all the charges against Mr. Mull.

Defense counsel filed an Omnibus Pre-trial Motion containing three counts.

The first count is a motion to dismiss pursuant to Rule 544. Rule 544 states:

(A) When charges are dismissed or withdrawn at, or prior to a preliminary hearing, the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the refile of a complaint with the issuing

authority who dismissed or permitted the withdrawal of the charges.

(B) Following the re-filing of a complaint pursuant to paragraph (A), if the attorney for the Commonwealth determines that the preliminary hearing should be conducted by a different issuing authority, the attorney shall file a Rule 132 motion with the clerk of courts requesting that the president judge, or a judge designated by the president judge, assign a different issuing authority to conduct the preliminary hearing. The motion shall set forth the reasons for requesting a different issuing authority.

Pa.R.Crim.P. 544. Defense counsel argues that the rule was violated in two respects: (1) the attorney for the Commonwealth did not approve, **in writing**, the re-filing of the complaint; and (2) the charges had to be refiled before District Justice Carn, because he was the issuing authority who dismissed or permitted the withdrawal of the second complaint; therefore, the charges against Mr. Mull must be dismissed. The Court cannot agree. Although not signed by the Commonwealth's attorney, each criminal complaint states in writing that assistant district attorney Simmers approved it. Even if the Court were to construe the rule to require the signature of one of the Commonwealth's attorneys, there is no prejudice to Mr. Mull from this alleged defect. Rule 109 states: "A Defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless the defendant raises the defect before the conclusion of ... the preliminary hearing in a court case, **and the defect is prejudicial to the rights of the defendant.** Pa.R.Crim.P. 109 (emphasis added). In Lycoming County, an assistant district attorney attends each preliminary hearing. If the prosecuting attorney were not in agreement with the re-filing, he would've simply dropped the charges. The reason the charges were withdrawn twice was due to the failure of one of the Commonwealth witnesses to appear at the first two preliminary hearings.

With respect to defense counsel's argument that the charges needed to be re-

filed before District Justice Carn, the Court concedes that Rule 102 defines the term ‘issuing authority’ as “any public official having the power and authority of a magistrate ... or a district justice.” However, under the unique circumstances of this case, the re-filing in District Justice Schriener’s office was understandable and was not prejudicial to Mr. Mull. The charges did not arise in District Justice Carn’s magisterial district. The only reason District Justice Carn presided over the second preliminary hearing was because he was specially assigned to District Justice Schriener’s district for the day on which the preliminary hearing was scheduled due to District Justice Schriener’s unavailability. By filing the charges before District Justice Schriener, the Commonwealth was complying with Rule 130, which mandates that criminal proceedings shall be brought before the issuing authority for the magisterial district in which the offense is alleged to have occurred.<sup>5</sup> District Justice Schriener was unavailable for the morning of December 15, 2003, so District Justice Page was specially assigned to handle the preliminary hearings scheduled for that morning, including Mr. Mull’s.

Even assuming arguendo that the charges should have been filed with District Justice Carn, dismissal is not required because there is no prejudice to the defendant in this case. “As a general matter, a defendant may be rearrested after charges have been dismissed at a preliminary hearing so long as the statute of limitations has not expired.”

Commonwealth v. Thorpe, 549 Pa. 343, 346, 701 A.2d 488, 489 (1997), citing

Commonwealth v. Revtai, 516 Pa. 53, 74, 532 A.2d 1, 11 (1987). However, if the

Commonwealth has repeatedly arrested the defendant in order to harass him or if the rearrest

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<sup>5</sup> If the Commonwealth had filed the charges before District Justice Carn, it is likely that defense counsel would have argued the charges should be dismissed for a violation of Rule 130.

results in prejudice, the prosecution may be barred. Thorpe, supra; Commonwealth v. Singletary, 803 A.2d 769, 770 (Pa.Super. 2002). The Court finds the re-filing of the charges was not in bad faith or to harass the defendant. The Commonwealth filed the charges on three times because a witness failed to appear at each of the first two preliminary hearings. The Court finds the case at bar is analogous to Singletary, where the charges were re-filed against the defendant because the prosecutor inadvertently neglected to present certain evidence. There also is no allegation by the defense that any witnesses are missing or otherwise unavailable or anything of that sort. Although the charges were filed three times in this case, only a relatively short period of time elapsed between Mr. Mull's arrest on or about October 22, 2003 and District Justice Page holding the charges for court at the conclusion of the preliminary hearing on December 15, 2003. In fact, the only prejudice asserted by the defense is that District Justice Carn was inclined to dismiss the charges of possession with intent to deliver heroin and conspiracy. The Court does not believe the defendant was prejudiced in this case because, as discussed infra, the Court believes that the Commonwealth presented a prima facie case to establish these charges.

The next count in the defendant's omnibus pretrial motion is a petition for a writ of habeas corpus with respect to the charges of possession with intent to deliver heroin and conspiracy. The defendant contends the evidence was insufficient to establish the defendant intended to deliver the heroin or that he and Ms. Rubio were involved in a conspiracy. The Court cannot agree. With respect to the possession with intent to deliver charge, the Commonwealth presented evidence that Mr. Mull possessed at least thirty-five (35) bags of heroin when the police activated their lights to pull over the vehicle. In Williamsport, a bag of heroin sells for \$25. Therefore, Mr. Mull had possession of heroin



with a street value of at least \$875. Officer Kreitz testified that the most heroin he has seen an individual have for their own personal use is 10 bags, with most users whom he's had contact possessing only 1-4 bags. Mr. Burton testified that he sold heroin for Mr. Mull. Mr. Mull would give him 10 bags of heroin. He would sell 8 bags and get to keep 2 bags as payment. The Court finds this evidence is sufficient to establish a prima facie case that Mr. Mull possessed the heroin with the intent to deliver it.

With respect to the conspiracy charge, Mr. Burton testified that Ms. Rubio was driving when Mr. Mull and Ms. Rubio picked him up in the bank parking lot to go to Newark. When they got to Newark, Mr Mull gave Ms. Rubio \$350, which she then gave to Mr. Burton to purchase 50 bags of heroin. Mr. Burton took the money and purchased a brick (50 bags) of heroin. He got back in the vehicle and handed the heroin to Mr. Mull. Mr. Mull then gave Mr. Burton four bags of heroin. Mr. Burton further testified that Mr. Mull could not give him a lot of heroin because he had to make his money back. When the police activated their lights to stop the vehicle as it was returning to Williamsport from Newark, Mr. Mull was driving. Mr. Mull gave the package of heroin to Ms. Rubio. Ms. Rubio asked Mr. Mull what she should do with it and he told her to put it under her seat. Officer Kreitz testified that the burgundy Kia Optima used to travel to Newark to purchase drugs was registered to Ms. Rubio. He also testified he did not believe Ms. Rubio was employed. From this evidence, the jury could infer that Mr. Mull and Ms. Rubio had an agreement to use her car to travel to Newark to purchase heroin for re-sale in Williamsport.

To summarize, although Mr. Mull claimed he was an addict and at most the evidence shows he possessed the heroin for personal use, a jury could infer from the evidence presented that Mr. Mull intended to deliver the heroin and that he and Ms. Rubio

were involved in a conspiracy to purchase heroin in Newark for re-sale in Williamsport. Therefore, the Court denies the petition for a writ of habeas corpus on the charges of possession with intent to deliver and conspiracy.

The final count of the defendant's Omnibus Pre-trial Motion seeks to suppress any and all evidence seized as a result of the search of the vehicle, because the defendant contends the warrant was issued without probable cause and there are no exceptions to the warrant requirement to legitimize the search.

"Probable cause is a practical, non-technical conception requiring a consideration of the totality of the circumstances." Commonwealth v. Coleman, 574 Pa. 261, 271, 830 A.2d 554, 560 (2003). "[A]n informant's tip constitutes probable cause where police have been able to provide independent corroboration of the tip, or where the informant has previously provided police with accurate information of criminal activity, or where the informant himself participated in the criminal activity." In Interest of J.H., 424 Pa.Super. 224, 228, 622 A.2d 351, 353 (1993).

The Court finds the warrant established probable cause. There are aspects of all three ways to determine an informant is reliable in this case. The police independently corroborated some of the information Mr. Burton, the confidential informant, provided. Mr. Burton informed Officer Kreitz that Mr. Mull called him from the White Deer motel to discuss plans to make a trip to Newark the next day to purchase heroin. Mr. Burton reported that Mull drives a burgundy sedan with a dent in the passenger's door. Mr. Burton advised Officer Kreitz that Mull was supposed to pick him up in the burgundy sedan at the Dunkin Donuts or the Dollar Bazaar the next day. Officer Kreitz confirmed the following information: Mr. Mull was staying at the White Deer motel with Ms. Rubio; the burgundy

sedan was located at the motel; Mr. Mull drives the burgundy sedan and a blue vehicle; the burgundy sedan was registered to Sharon Rubio. Mr. Burton called Officer Kreitz the next day and advised him that Mr. Mull was picking him up in thirty minutes at the M&T bank located across the street from Dunkin Donuts. Officer Kreitz observed Mull pick up Mr. Burton at the M&T bank and he followed them as they traveled out of the city of Williamsport east on Interstate 180. When Officer Kreitz first had contact with Mr. Burton on October 13, he reported that he was regularly obtaining heroin from Mr. Mull, who is also known as "Gap." While Mr. Burton was in the presence of Officer Kreitz, he received a phone call from "Gap", where he asked Mr. Burton if he needed anymore heroin.

Defense counsel argues that the police only corroborated innocent activity. Although the corroboration regarding the car Mr. Mull was driving and the motel where he was staying was corroboration of innocent activity, Mr. Mull's phone conversation in which he asked Mr. Burton if he needed anymore heroin was not innocent activity. From the affidavit of probable cause, as well as the testimony presented at the suppression hearing, it appears that Mr. Burton identified the caller as Mr. Mull, but the police overheard the conversation.

There are other factors present to indicate the informant's reliability. The informant previously provided reliable information to the police. The affidavit of probable cause indicates the confidential informant made controlled buys of controlled substances while working with the Lycoming County Drug Task Force in 1998. Defense counsel argues this information should not be considered because the affidavit does not assert that the prior information had resulted in arrests or convictions. The defense relies upon Commonwealth v. Grindlesperger, 706 A.2d 1216 (Pa.Super. 1997). The Court believes Grindlesperger is

distinguishable from this case. In Grindlesperger, the affidavit stated that the confidential informant had provided information in the past that had been proven reliable and would result in the arrests of individuals for violations of the drug law. The affidavit did not specify what information had been provided or how it had been proven reliable. It was the lack of detail regarding the prior information provided by the informant in conjunction with the failure to provide an assertion that the information resulted in arrests or convictions which led the Superior Court to conclude the informant's reliability was not established by the affidavit, even under a totality of the circumstances test. Id. at 1226. Here, the affidavit indicates how the informant assisted the police in the past, i.e. by making controlled buys of controlled substances. Furthermore, unlike the case at bar, there was no other information to establish the informant's reliability in Grindlesperger.<sup>6</sup>

The informant also admitted participation in criminal activity. When the police interviewed him on October 13, the informant reported that he had regularly been obtaining heroin from Mr. Mull, aka Gap. The affidavit also states:

The CI last purchased heroin from Mull and observed quantities of heroin in Mull's possession within the last week of the date of this interview. The CI reported that he has went to Newark, New Jersey on approximately five prior occasions with Mull where Mull purchased large amounts of heroin (2-3 bricks – approximately 150 bags) and transported the heroin back to Lycoming County to redistribute the heroin. ...The CI advised me that the reason that Mull asks the CI to accompany him to Newark is because he is black, and the fact that he is black makes it less likely that Mull will have problems making the purchase in Newark.

Defense counsel argues that the officer failed to inform the magistrate that the

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<sup>6</sup> The Court does not want the police to get the wrong impression from this decision. The police should include information regarding the number of arrests and/or convictions that result from an informant previously providing information to the police in the affidavit of probable cause. Under the facts and circumstances of this case, however, the Court finds that the reliability of the confidential informant is established under the totality of the circumstances despite this the lack of arrest and conviction information in the affidavit of probable cause.

confidential informant had prior convictions and was either suspected of robbery or had pending robbery charges. The Court acknowledges evidence that tends to show an informant's information is untrue or that he had a reason to falsify the information or mislead the police is relevant in assessing credibility and reliability. Commonwealth v. Baker, 532 Pa. 121, 129, 615 A.2d 23, 26 (1992). However, despite Officer Kreitz' testimony that he ran a records check on Mr. Burton and he had prior convictions, there is no evidence in the record to establish what those convictions were or how they would affect Mr. Burton's credibility or reliability. Additionally, the record does not establish that Mr. Burton was suspected of robbery or had pending robbery charges, let alone that Officer Kreitz withheld this information from the magistrate. The evidence introduced at the suppression hearing showed that Mr. Burton was interviewed by Trooper Whipple of the Pennsylvania State Police in June 2003 about his contact with the individuals, who involved in the robbery, after the robbery occurred. Mr. Burton told Trooper Whipple the individuals gave him their car and some money to make a trip to Newark, New Jersey. Mr. Burton testified that he did not know about the robbery at the time the individuals provided the car. Officer Kreitz testified that he did not know about Trooper Whipple's interview of Mr. Burton until after October 22, 2003, the date he applied for the search warrant. Furthermore, it was his understanding that Mr. Burton was a potential witness in one of Trooper Whipple's cases; he was not a suspect.<sup>7</sup> Moreover, the Court believes that Mr. Burton's admitted participation in the criminal activity rebuts any inference the defense is attempting to make that the police selectively omitted information from the affidavit. As the Pennsylvania Supreme Court

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<sup>7</sup> In fact, this Court had the trial of one of the co-conspirators in the robbery, Michael McCloskey. Mr. Burton was a witness for the Commonwealth in this trial.

noted in Baker :

where an informant implicates himself as a participant in a crime, his admission against penal interest is accorded some indication of reliability, and can serve to rebut the inference that the police selectively omitted information about an informant so as to mislead the magistrate.

532 Pa. at 129, 615 A.2d at 27.

In conclusion, although there is some information that the police could have provided in the affidavit which would have precluded some of the defense arguments such as the arrest and convictions from the informant's previous work with the Drug Task Force, the Court finds that under the totality of the circumstances the affidavit set forth probable cause for the issuance of the search warrant.

**ORDER**

AND NOW, this \_\_\_\_ day of September 2004, the Court DENIES the defendant's Omnibus Pre-trial Motion.

By The Court,

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Kenneth D. Brown, P.J.

cc: Peter Campana, Esquire  
William Simmers, Esquire (ADA)  
Jay Stillman, Esquire  
Work file  
Gary Weber, Esquire (Lycoming Reporter)