IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. 02-10,585
	:	
vs.	:	CRIMINAL DIVISION
	:	
EARL R. KRAMER, III,	:	
Defendant	:	Pre-trial motions

OPINION AND ORDER

Defendant has been charged with two counts of criminal homicide and one count of burglary in connection with the killing of Gail Matthews and her daughter, Tamara Berkheiser, on or about September 1, 1994. Before the Court are various issues raised in Defendant's Omnibus Pre-trial Motion, filed July 25, 2002, an Amended Omnibus Motion to Suppress, filed September 30, 2002, a supplemental Motion to Suppress, filed June 23, 2003, a Motion in Limine, filed June 23, 2003, and a Motion to Dismiss, filed July 15, 2003. Hearings on these motions were held July 21, 22, and 23, and October 16, 2003.[1]

Omnibus Pre-trial Motion

Those issues raised in Defendant's Omnibus Pre-trial Motion, filed July 25, 2002, which are now before the Court include Defendant's request to dismiss the charges for a violation of Rule 600, his request to dismiss the charges for a violation of due process, and his request to suppress any statements made at the time of his arrest on March 23, 2002. Each of these requests will be addressed seriatim.

[1] Subsequent to the hearing on October 16, 2003, Defendant filed a "Motion to Supplement Record of Amended Omnibus Motion to Suppress Hearing", on November 24, 2003. (Although Defendant refers to the Amended Omnibus Motion to Suppress, filed September 30, 2002, it is clear from the motion itself that he seeks to re-open the record made in support of his Supplemental Motion to Suppress, filed June 23, 2003.) A hearing was held December 8, 2003 and Defendant's request to supplement the record was granted by Order issued that date. A further hearing on the Supplemental Motion to Suppress was then held on January 5, 2004.

Rule 600

In his request to dismiss the charges for a violation of Rule 600, Defendant contends the Commonwealth has not brought his case to trial within the required 365 days, Pa.R.Crim.P. Rule 600, specifically arguing that the Court must consider the time between the Commonwealth's withdrawal of its appeal (filed March 8, 1999) as it relates to the first complaint (filed March 10, 1998) and the filing of the second complaint (filed March 22, 2002).

The most recent pronouncement of the standard for determining when the Rule 600 period begins to run in a case where multiple complaints have been filed against a defendant is found in Commonwealth v. Lynn, 815 A.2d 1053 (Pa. Super. 2003). There, in reliance upon Commonwealth v. Simms, 500 A.2d 801, 803 (Pa. 1985), the Court indicated:

> When an initial complaint has been withdrawn or otherwise dismissed, the [Rule 600 time] period begins to run anew with the filing of a subsequent complaint only if (1) the earlier complaint was properly dismissed by a competent magisterial or judicial authority, and (2) the record does not reveal evidence of a prosecution attempt to circumvent Rule [600].

Commonwealth v. Lynn, supra. In the case before it, the Lynn Court found not only that the first complaint had been withdrawn by the Commonwealth rather than dismissed by judicial authority, but also found clear evidence of a prosecution attempt to circumvent the rule in the arresting officer's testimony that he had been instructed to withdraw and refile the complaint due to "time problems." The Lynn Court therefore found Rule 600 to run from the filing of the initial complaint, rather than from the filing of the second complaint.

In Commonwealth v. Schafer, 576 A.2d 392 (Pa. Super 1990), the Court found Rule 1100 (now 600) to run from the filing of the second complaint, however, where the initial complaint was dismissed because the Commonwealth did not establish a prima facie case. The Court reiterated its holding in a prior case that a discharge for failure to demonstrate a prima facie case constitutes a proper ground for dismissal for purposes of Rule 1100 (now 600) and went on to find no indication in the record that the Commonwealth's actions represented an attempt to circumvent the requirements of the rule. Similarly, in Commonwealth v. Whiting, 500 A.2d 806 (Pa. 1985), the Court concluded that since the Commonwealth's motion to dismiss was based on lack of evidence (it could not sustain a prima facie case) and was not

motivated by bad faith considerations, the computation time under Rule 1100 (now 600) began at the date of filing the second complaint.

In the instant case, the first complaint was dismissed by the Court when it granted Defendant's Petition for Habeas Corpus for lack of a prima facie case.[2] The Commonwealth appealed that decision but then withdrew the appeal. The defense appears to base their claim of a Rule 600 violation on the withdrawal of the appeal, apparently contending that the filing of the appeal somehow breathes new life into the case, preventing the prosecution from thereafter withdrawing the appeal without running afoul of Rule 600. The Court can find no effective legal distinction, however, between a scenario where a case is dismissed on a Habeas Corpus and no appeal is filed (which, according to Commonwealth v. Schafer, supra, and Commonwealth v. Whiting, supra, does not lead to a Rule 600 violation), and a scenario where a case is dismissed on a Habeas Corpus, an appeal is filed by the prosecution but later withdrawn. Further, the Court can find no evidence of bad faith with respect to the filing of the appeal. It does not appear to have provided the Commonwealth with any advantage, nor to have caused the defense any prejudice. Although Defendant argues the Commonwealth simply decided to look for more evidence against him and therefore withdrew the appeal in order to have more time to do so, even if that were the case, such does not constitute bad faith. Where a matter is dismissed for lack of evidence, the Court sees nothing other than the statute of limitations which prevents the Commonwealth from taking the time which is needed to further investigate the matter and refiling charges when such evidence is developed. Thus, since the first complaint was properly dismissed and the Court finds no evidence of a prosecution attempt to circumvent Rule 600, the run date begins with the filing of the second complaint, and as of this date, there has been no violation of the rule.

Due Process

With respect to his motion to dismiss for a violation of due process, Defendant contends the passage of time has caused him substantial prejudice and that the delay was either

[2] Actually, in granting Defendant's Petition for Habeas Corpus, the Court had remanded the matter for a further preliminary hearing. When the Commonwealth indicated in a letter to the Court that it would not present

intentional on the Commonwealth's part, or the result of their negligence in failing to pursue a reasonably diligent investigation. A similar argument was recently addressed by the Pennsylvania Supreme Court in Commonwealth v. Scher, 803 A.2d 1204 (Pa. 2002). There, the Court held that

> in order to prevail on a due process claim based on pre-arrest delay, the defendant must show that the delay caused him actual prejudice, that is, substantially impaired his or her ability to defend against the charges. The court must then examine all of the circumstances to determine the validity of the Commonwealth's reasons for the delay. Only in situations where the evidence shows that the delay was the product of intentional, bad faith, or reckless conduct by the prosecution, however, will we find a violation of due process. Negligence in the conduct of a criminal investigation, without more, will not be sufficient to prevail on a due process claim based on pre-arrest delay.

Commonwealth v. Scher, supra, at 1221-1222. The Court went on to explain that actual prejudice requires a showing that one has been meaningfully impaired in his or her ability to defend against the state's charges to such an extent that the disposition of the criminal proceedings was likely affected. Id. at 1222. Further, it is not sufficient for a defendant to make speculative or conclusory claims of possible prejudice as a result of the passage of time. Id. A defendant claiming prejudice based on the absence of witnesses must show in what specific manner the missing witnesses would have aided the defense and that the lost testimony or information is not available through other means. Id. Finally, the defendant must also show that the loss of the evidence is related to the delay in filing the charges. Id. at 1223.

Based on the evidence presented at the hearing on this matter, the Court finds Defendant has not shown the prejudice required by Scher to support a finding that his due process rights have been violated and that the charges must be dismissed. Defendant presented evidence that three potential witnesses have died since the murders took place in 1994: Detective William Miller of the Williamsport Bureau of Police, Detective Glen Buntz also of the Williamsport Bureau of Police, and Steve Baney, who gave a written statement to police on April 12, 1996. Although Detective Miller prepared a report of his interview of Defendant in

---

additional evidence, the matter was dismissed by the Court. While Defendant seeks to distinguish the dismissal based on this fact, the Court sees no substantive distinction.

September 1994, it contains no quotation marks, and Defendant contends if he were able to call Miller to testify, Miller would remember exactly what Defendant said in the interview. Defendant provides the Court with no basis for this assertion, however. Miller also interviewed one Jason Matthews in August 1995 and prepared a report which refers to an attachment, but no such attachment has been located. Defendant contends if he were able to call Miller to testify, Miller would be able to say what was contained in the attachment. Again, Defendant provides no basis for this assertion. Further, Defendant fails to explain why the information given to Miller by Jason Matthews cannot simply be obtained from Matthews at this time. Finally with respect to Detective Miller, Miller interviewed one Floyd Gallagher who provided information regarding statements made to him by Jason Matthews. Defendant does not indicate why he would like to call Miller as a witness with respect to this interview, nor does he explain how the testimony would be admissible in any event, since any statements by Matthews to Gallagher would be hearsay.

With respect to Detective Buntz, Defendant contends Buntz interviewed Jason Matthews on September 2, 1994, and Matthews told Buntz he could not remember what happened the night before, but that Matthews has given inconsistent statements since then. While Matthews" statement to Buntz might be admissible as an inconsistent statement, and Buntz's testimony might be helpful to the defense, Defendant cannot show that any prejudice as a result of Buntz's death related to the delay in filing the charges, since Buntz died in November 1997, only three years after the murders.

With respect to Steve Baney, it appears his testimony would involve repeating a statement allegedly made to him by his sister. Defendant does not indicate why such a statement would not be inadmissible hearsay.

Defendant also claims that there are witnesses whose memories are faulty due to the passage of time, specifically Steven Swisher, Phillip Manotti, Elizabeth Bartholomew, Brenda Briel, Pamela McCabe, Veronica Baney, and Kenneth Brown. Mr. Swisher had no trouble answering questions about events at the time of the murders, except when questioned about the clothing Defendant was wearing that night. He said he probably would have remembered if he had been asked the day after the murders, and that he did talk to police two days after, but that

he was never asked and does not remember now. There is nothing to indicate, however, that he would have remembered even several months later, and thus nothing on which to base a finding that any prejudice from lack of memory was caused by the delay. Mr. Manotti, owner of a pizza place, was unable to remember who the delivery drivers were in September 1994. Although he testified that he would have been able to remember if he had been asked in September 1994, he also testified that the delivery slips were destroyed routinely as soon as the money was balanced, and thus there is nothing to indicate that he would have been able to say who the delivery drivers had been if asked even a few months later. Elizabeth Bartholomew's testimony showed no memory loss. Neither did Brenda Briel's, Pamela McCabe's or Veronica Baney's. Finally, while Kenneth Brown testified that he now does not remember what Defendant was wearing that night and that if he had been asked in September 1994 he is sure he would have remembered at that point, there is again nothing to indicate that he would have remembered a year later, and thus nothing to show any prejudice was caused by the delay.

Defendant's final claim in support of his motion to dismiss for a violation of due process is that he will in all likelihood be unable to locate one witness, Shirley Cottam. The testimony indicates, however, that attempts at locating her had been minimal, and were begun only ten days prior to the hearing.

Since the Court finds Defendant has not shown prejudice as envisioned by Scher, or that any prejudice resulted from the delay in prosecution, the motion to dismiss will be denied. [3]

Suppression

With respect to Defendant's request to suppress any statements made at the time of his arrest on March 23, 2002, Defendant specifically contends any statements made after he indicated he did not wish to speak to the police but instead wanted to speak with an attorney, should be suppressed. Two issues are presented to the Court by this contention: whether Defendant invoked his right to counsel and, if so, whether Defendant was thereafter subjected to interrogation by the police. If the Court finds that Defendant did invoke his right to counsel,

[3] In light of this disposition, there is no need for the Court to examine the reasons for the delay.

but was nevertheless subjected to interrogation, any statements made in response to such interrogation must be suppressed. Edwards v. Arizona, 451 U.S. 477 (1981). See also Commonwealth v. Gwynn, 723 A.2d 143 (Pa. 1998).

According to the testimony of Agent David Ritter of the Williamsport Bureau of Police, after police obtained a warrant for Defendant's arrest Defendant's vehicle was stopped by police and Defendant was arrested, handcuffed, and placed in a police vehicle. While en route to City Hall Defendant was read his Miranda rights. Defendant indicated he understood those rights. Agent Ritter apologized to Defendant for having had to arrest him when his daughter was in the car with him[4] and there was a brief conversation regarding this. Agent Ritter then gave Defendant an explanation of certain things contained in the affidavit of probable cause and told Defendant he would receive a copy of the charges at City Hall. Agent Ritter told Defendant there was new evidence (referring to the fact that Defendant had been previously arrested but then released after the charges were dismissed) and when Defendant inquired what that might be, indicated the police had found glitter in his car. There was no further conversation until they reached City Hall. Defendant was taken to the interview room and his handcuffs were removed and shackles were placed on his ankles. Agent Ritter began going over the affidavit of probable cause and asked Defendant if he had any comments about it. Defendant responded that he had been told not to talk to him, not even if he simply ran into him on the street, not even to say hello. Agent Ritter then asked Defendant "what do you want to do?" Although Defendant looked at Agent Ritter, he made no response. Agent Ritter then asked Defendant if he understood the affidavit and Defendant said that he did. Agent Ritter then left the room to contact the District Attorney, while Agent Sorage remained in the room. When he returned, Agent Ritter remarked that it was a good thing that Tamara had not been sexually assaulted and then asked Defendant about contacts between Brenda Briel and Ken Brown, if such surprised him. Defendant answered that he was not surprised, and according to Agent Ritter, seemed irritated. Defendant then talked about Brenda Briel "a fair amount". Agent Ritter then asked Defendant what he would do if he were the officer; Defendant responded that he thought the person who did it deserved to die. According to Agent Ritter,

[4] The Muncy Police were called and assisted in returning Defendant's daughter to the residence.

Defendant then told him he was not what he expected, that he thought he would be more aggressive and bullying, and Agent Ritter told Defendant he was just seeking the truth. Defendant made no response. Agent Ritter then told Defendant that if at any point he wanted to tell his side of the story, even if Defendant were in a jail cell and Ritter were retired, he could contact him. Defendant said if he were in a jail cell he could not call Ritter. Ritter asked Defendant if he would talk to him now; Defendant said he would talk about "anything but this." Ritter again asked Defendant what he wanted to do, and Defendant said he was sorry, but he felt he needed his attorney. Defendant was then taken to the district magistrate's office for arraignment and while waiting there, Agent Ritter told Defendant that if anyone else was involved and he "talked", Ritter would ask the District Attorney if he'd be willing to not seek the death penalty. Defendant then said if he got the death penalty he would not fight it. Defendant said he would not want to spend the rest of his life with someone he would not spend time on the street with, that death would be like euthanasia. Defendant then asked to use a telephone, spoke to someone at his home and then was arraigned and taken to the jail.

According to the testimony of Defendant, just prior to or immediately after being informed of his Miranda rights, Defendant said, "I'd like to have my attorney, Bill, here."

According to the testimony of Agent Sorage, offered into evidence by stipulation as to what he would say if called to testify, Defendant never requested "his attorney, Bill" in the car.

With respect to the first issue, whether Defendant invoked his right to counsel, case law indicates that to constitute an "invocation of the right to counsel" such that further questioning must cease, the request must be clear, unequivocal and unambiguous. See Commonwealth v. Hubble, 504 A.2d 168 (Pa. 1986), and Commonwealth v. Zook, 553 A.2d 920 (Pa. 1989). While the statement, "I'd like to have my attorney, Bill, here", is certainly clear enough, the Court cannot find that such a statement was made. Defendant contends the request for counsel was in any event made when Defendant told Agent Ritter he had been told not to talk to him. The Court does not agree that such a statement constitutes a clear, unequivocal and unambiguous request for counsel. The Court does find such a request, however, when Defendant told Agent Ritter he would talk about "anything but this" and that he was sorry, but

he felt he needed his attorney. At that point, any further interrogation should have ceased. The issue therefore becomes whether Defendant was thereafter subjected to interrogation.

"Interrogation" is defined as "questioning initiated by law enforcement officials" and also "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Commonwealth v DeJesus, 787 A.2d 394 (Pa. 2001), quoting Miranda v Arizona, 384 U.S. 436, 444 (1966) and Rhode Island v Innis, 446 U.S. 291, 300-01 (1980). Agent Ritter's remark to Defendant at the magistrate's office, that if Defendant gave up any others who might have been involved he would ask the district attorney to consider not seeking the death penalty, appears "likely to elicit an incriminating response" and thus, constitutes "interrogation." Any statements made by Defendant in response to that remark will therefore be suppressed.

Amended Omnibus Motion to Suppress

In his Amended Omnibus Motion to Suppress, filed September 30, 2002, Defendant contends all statements obtained following his arrest must be suppressed, contending the arrest was unlawful as violative of the Statewide Municipal Police Jurisdiction Act. 42 Pa.C.S. Section 8953. The Court agrees the arrest, which was made outside the jurisdiction of the arresting officer, did not comply with the requirements of the Act. The Court does not agree that suppression is warranted, however.

According to the testimony of Agent David Ritter of the Williamsport Bureau of Police, in March 2002 he obtained an arrest warrant and, planning to arrest Defendant by stopping his vehicle just after he left his residence in Clinton Township, spoke with the Chief of Police of the Borough of Montgomery, in whose jurisdiction the arrest was planned. On March 23, 2002, Ritter and another agent of the Williamsport Bureau of Police set up surveillance of the intersection of Armstrong Road (on which Defendant's residence was located) and Route 405. Since they planned to stop Defendant after he turned south onto Route 405, in the Borough of Montgomery, another agent waited in his vehicle approximately one mile south of the intersection. Defendant did appear at the intersection, but turned north onto Route 405, and by

the time the agent slated to make the stop caught up to him, he had left the Borough of Montgomery and entered the Borough of Muncy. The stop and arrest was effectuated nevertheless.

Section 8953(a)(1) allows a duly employed municipal police officer to enforce the laws of this Commonwealth or otherwise perform the functions of that office beyond the territorial limits of his primary jurisdiction in certain circumstances, but specifically provides that the service of an arrest warrant shall require the consent of the chief law enforcement officer of the municipality in which the warrant is to be served. In the instant case, although the Williamsport Police had the consent of the Chief of the Montgomery Police, no such consent had been obtained from the Chief of the Muncy Police. The arrest was thus not in compliance with the Act. The Commonwealth argues the agent was in "fresh pursuit" of Defendant from a jurisdiction in which the arrest would have been authorized into the unauthorized jurisdiction, and thus the arrest was lawful under subsection (a)(2). That subsection, however, requires "hot pursuit of any person for any offense which was committed, or which he has probable cause to believe was committed, within his primary jurisdiction and for which offense the officer continues in fresh pursuit of the person after the commission of the offense", 42 Pa.C.S. Section 8953(a)(2)(emphasis added). Since the victims were killed in 1994, the Court is hard pressed to find this subsection applicable.

In spite of the violation of the Act, the Court does not agree that suppression of any statements made by Defendant following his arrest is appropriate. The appellate courts of this Commonwealth have held suppression to be the appropriate remedy only where the violation of the Act is deemed to be "substantive", and not merely "technical". In making the distinction, the Courts have focused on whether the type of police behavior involved is action contemplated by the Act and the violation is merely a failure to proceed properly, as well as whether the actions taken by the police were in response to specific criminal behavior. Commonwealth v. McPeak, 708 A.2d 1263 (Pa. Super. 1998)(supporting the pronouncement of Commonwealth v. Merchant, 560 A.2d 795 (Pa.Super. 1989), reversed by Commonwealth v. Merchant, 595 A.2d 1135 (Pa. 1991)(finding the stop statutorily authorized and the Superior Court's discussion concerning the proper remedy theoretical, not to be considered a binding interpretation of the

law on the issue)). In the instant case, service of an arrest warrant outside the officer's primary jurisdiction is both action contemplated by the Act, as well as action in response to specific criminal behavior. The violation results only as a result of failure to follow the proper procedure by obtaining the consent of the chief law enforcement officer of the jurisdiction in which the warrant was actually served. The Court therefore finds the violation to be "technical", rather than "substantive", and suppression thus inappropriate. The motion will therefore be denied.

Supplemental Motion to Suppress

In his supplemental Motion to Suppress, filed June 23, 2003, Defendant contends any statements made by him to one Chessidy Hamilton or one Ernest Welch, both fellow inmates at the Lycoming County prison at the time of the statements, should be suppressed as having been given in violation of his state and federal rights to counsel. Specifically, Defendant argues both Hamilton and Welch were acting as agents of the Commonwealth at the time he made statements to them, and since he was in custody, he was entitled to counsel prior to making any statements, in accordance with Commonwealth v. Franciscus, 710 A.2d 1112 (Pa. 1998).

In Franciscus, the Court granted the defendant therein a new trial based on the admission of the testimony of a jailhouse informant regarding statements made to the informant by the defendant, which statements had been obtained in violation of the defendant's Sixth Amendment right to counsel. In so holding, the Court concluded the jailhouse informant had been acting as an agent of the Commonwealth when he obtained incriminating statements from the defendant, based on evidence that the police had agreed to testify on behalf of the informant concerning his continuing efforts on their behalf, and because the police actively assisted the informant in his efforts to obtain incriminating statements from his fellow inmates. In Commonwealth v. Lopez, 739 A.2d 485 (Pa. 1999), however, the Court found the defendant's motion to suppress to have been properly denied, based on a finding that an informant was not acting as an agent of the Commonwealth, where the authorities made no promises to the informant and took no action to assist him in obtaining incriminating information from the defendant or any other inmates. The Court found that the informant therein apparently believed

it would benefit him at his sentencing and decided on his own to attempt to obtain incriminating information from other inmates.

In the instant case, the Court believes the situation to be more akin to that presented in Lopez than in Franciscus. Information about statements made by Defendant to Chessidy Hamilton came to the attention of the police after Hamilton wrote several letters to Agent William Weber of the Williamsport Bureau of Police asking for their help and indicating that he had information in which they would be interested. A meeting with Hamilton was then arranged and at that meeting Hamilton asked for help with respect to his sentencing hearing, which was at that time scheduled in the near future. According to Agent Weber's testimony, Hamilton was not promised anything with respect to his sentencing. Hamilton provided the police with certain information about several cases, including certain alleged statements made to him by Defendant in the prison. Since Hamilton indicated he had more information written down in his cell, he was told another meeting would be arranged and that he should bring this information to that meeting. According to Agent Weber's testimony, although Hamilton was told that if he did have information about other cases and provided such to the police it could possibly help him in his own case, Hamilton was not asked to try to obtain more information. A second meeting was then arranged with the prosecuting officer in this matter, Agent David Ritter, and Agent Leonard Dincher. Although Hamilton brought with him the written information he had in his cell, he did not provide to police any additional information about Defendant beyond that which had been provided at the first meeting. Again, Defendant was not promised anything for having provided the information. Several weeks later, a third meeting was held as Hamilton had told police he might have information on other cases, and during that meeting Hamilton did tell police of a statement made by Defendant since the second meeting, but it appears that statement was a casual remark made by Defendant while he and Hamilton were watching a movie together, and was not the product of questioning by Hamilton, even if Hamilton were acting as an agent of the Commonwealth, which the Court finds he was not. As in Lopez, there has been nothing presented which would indicate an agreement or promises by the Commonwealth to act on Hamilton's behalf, nor any action by the Commonwealth to assist Hamilton in obtaining statements from defendant or any other

inmate. Indeed, Hamilton himself testified that when he was gathering information he "hoped it would help" him, but that "it was never told to" him.

Information about statements made by Defendant to Ernest Welch came to the attention of the police when Welch was sweeping the sidewalk in front of the Courthouse in the spring of 2003 and Agent Dincher walked by. Welch told Dincher he had something he needed to talk to him about concerning Defendant. Agent Dincher told Welch he would pass the request on to Agent Ritter, and he did so. Agent Ritter then met with Welch on May 13, 2003. At that time, Welch was on probation but had a criminal charge pending against him in Clinton County. At the May 13 meeting, according to Agent Ritter, Welch stated he was not necessarily looking for anything, but would take it if it would help him. Welch himself testified that he told Ritter he "hoped it would help" him but that "it didn't matter if it did," as he was providing the information simply because he believed it was "the right thing to do." There is absolutely no evidence that police promised Welch anything, nor that they assisted Welch in gathering the information about Defendant, and thus no basis on which to find Welch was acting as an agent of the Commonwealth at the time Defendant may have made any incriminating statements.[5] Defendant's Supplemental Motion to Suppress will therefore be denied.

Motion in Limine

In his Motion in Limine, filed June 23, 2003, Defendant seeks exclusion of three items of evidence: glitter found in his vehicle, a fiber found in a bag containing his clothing, and a statement made by Defendant to a polygraph examiner. In his brief filed September 9, 2003, however, Defendant concedes that arguments concerning the fiber evidence are a matter of weight rather than admissibility, apparently withdrawing his motion with respect to the fiber evidence. Only the remaining two claims will therefore be addressed.

[5] The Court is mindful of Agent Dincher's testimony that when arresting someone he always asks if they know anything else, that the arrestee always asks "what's in it for me?" and that they are always told it is up to the District Attorney but their cooperation will be noted. The Court does not believe such a course of conduct to establish an agency, however. Moreover, neither Hamilton nor Welch indicated they gathered information about Defendant on this basis.

With respect to the glitter found in Defendant's vehicle, such was determined by the FBI lab to be "consistent" with glitter found at the scene of the murders. Defendant claims the evidence has no relevance and that the prejudicial effect of the evidence outweighs its probative value. To support his claim of irrelevance, Defendant points to other evidence that glitter was observed on the sidewalk in front of the double residence at the time of the murders, that the glitter was not discovered in Defendant's vehicle until 1999 and Defendant had been using the vehicle, including for the purpose of transporting his children, for approximately eight months after the murders, and that the vehicle had sat, inoperable, in his yard for some time after that until it was towed to a junkyard where it remained until the police towed it to their facility for inspection, that his children played with glitter during that time and that they had occasionally played in the vehicle while it sat inoperable in his yard, and that no glitter was found in the vehicle when it was first searched right after the murders in 1994. While all of this evidence may diminish the weight of the Commonwealth's evidence, it does not render it inadmissible. That a substance found at the scene of the murders and a substance found in Defendant's vehicle were determined to be "consistent" is clearly relevant.

Defendant also seeks to exclude the glitter evidence on the ground that its prejudicial effect outweighs its probative value. Pennsylvania Rule of Evidence 403 indicates that "[a]lthough relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, … ." Pa.R.E. 403. The Comment to that rule explains "unfair prejudice" to mean "a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Id. The Court sees absolutely nothing prejudicial about glitter having been found in Defendant's vehicle. While it may tend to link Defendant to the crime, such is not the "prejudice" to which the rule refers. Thus, the evidence is not excludable under Rule 403 and the motion in limine with respect to the glitter will be denied.

With respect to the statement made to a polygraph examiner, the Commonwealth offered at the preliminary hearing, and Defendant seeks to exclude at trial, a statement made to one Nathan Gordon after Defendant took a polygraph test and was informed of the results by Mr. Gordon (who concluded Defendant was being deceptive). Specifically, Mr. Gordon

indicated in the remarks section of his report dated September 16, 1994, "[Defendant] stated that he could not remember whether he did it or not, and that he has mentally convinced himself that he did it, but in his heart does not feel that he could have." Defendant claims this statement must be excluded as it is "inextricably linked to the results of a polygraph examination and is therefore, per se, inadmissible." While the fact that a polygraph was taken and the results of such are indeed inadmissible, a statement given after being advised that one has failed a polygraph test may nevertheless be admitted into evidence. Commonwealth v. Schneider, 562 A.2d 868 (Pa. Super. 1989).

The Commonwealth does not seek to introduce evidence that Defendant took a polygraph, nor that he failed it, nor that he was told that he failed it. Defendant argues, however, that he will be required to explain the remark as having been an explanation to Mr. Gordon of why Defendant felt he failed the polygraph test, thus introducing the fact of the test and Defendant's failure of such, which would clearly be prejudicial. The Court does not agree reference to the polygraph is necessary, however. If the statement was an explanation of Defendant's state of mind prior to taking the test, it is not inextricably linked to the results. While Defendant will not be able to say that he made the statement in response to being told he failed a polygraph, why he made the statement is not important. What is important is what he meant by the statement, and that may be explained without reference to the test or the results. As far as Defendant's concern that the statement will be "out of context" if the jury does not know it was made after being told of the results, one would assume that in all of the cases allowing statements given after being advised that one has failed a polygraph but where no evidence of the test itself is introduced, the statements are, to some extent, "out of context." They have been held admissible nonetheless. The motion in limine with respect to the statement made to Nathan Gordon will therefore be denied.

Motion to Dismiss

Defendant asks this Court to dismiss the charges pursuant to Pa.R.Crim.P. Rule 587, which allows a trial court to order dismissal of charges when an information has not been filed within a reasonable time. In support of his contention that the information in the instant matter

was not filed within a reasonable time, Defendant relies on his allegations of prejudice as contained in his motion to dismiss based on a violation of his rights to due process. Since this Court has not found a violation of Defendant's rights to due process based on the delay in filing the charges, the Court also will not find the information to have been filed within an unreasonable time. Relief on this basis will, therefore, be denied.

ORDER

AND NOW, this 9th day of January, 2004, for the foregoing reasons, Defendant's Motion to Suppress, contained in his Omnibus Pre-trial Motion, is hereby GRANTED in part, as detailed above. All other requests addressed herein are hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
PD
Gary Weber, Esq.
Hon. Dudley Anderson