

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

COMMONWEALTH

v.

**KEVIN HOPKINS,
Defendant**

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No.: 04-11,739

OPINION AND ORDER

Before the Court is Defendant's motion for extraordinary relief filed to the above-captioned case on August 8, 2005. Defendant alleges that a prior criminal record of the prosecution's witness was not made available to Defendant by the District Attorney's office until after trial and that this conduct entitles Defendant to a new trial. A conference with counsel was held regarding Defendant's motion on August 23, 2005.

Defendant submits his written motion prior to sentencing pursuant to Rules 704(B) and 720(C). Rule 704(B) provides for an *oral* motion for extraordinary relief. Further, the rule is intended to address "only those errors so manifest that immediate relief is essential." See Official Comment, Pa.R.Crim.P. 704. In *Commonwealth v. Howe*, 2004 PA Super 19, 842 A.2d 436 (2004), the Court held that the Rule's plain terms do not permit the filing of a *written* motion for extraordinary relief prior to sentencing. Further, this Rule "was not intended to provide a substitute vehicle for

convicted defendant to raise matters which could otherwise be raised via post sentence motions.” 842 A.2d at 441. In the present case, Defendant’s motion should properly be raised orally prior to sentence and furthermore, should Defendant raise it at sentencing, does not allege an error so manifest that it could not be raised in a post-sentence motion. Insofar as Defendant moves pursuant to Rule 720(C), this claim of after-discovered evidence is also properly filed post-sentence. Because Defendant’s motion is not properly before the Court pursuant to either Rule cited in the motion, it shall be denied.

Recognizing that these issues are likely to be reasserted in a post-sentence motion pursuant to 720(C), the Court will briefly address Defendant’s contentions. Defendant alleges that following trial, defense counsel found an envelope from the District Attorney’s office containing the prior criminal record of Commonwealth’s witness Craig Hardee. Defendant asserts that the criminal record attacks the credibility of the witness. Because the evidence was not made available to Defendant prior to trial, Defendant asserts a violation of due process and seeks entitlement to a new trial.

The Court is required to determine if the after-discovered evidence was, in fact, “discovered after trial and could not have been discovered with reasonable diligence at or before trial, whether it is merely cumulative of other evidence admitted at trial, and whether it is merely used to impeach.” *Commonwealth v. Kohan*, 2003 PA Super 203, 825 A.2d 702, 707 (2003). Secondly, “an after-discovered evidence claim must be viewed in the context of the whole trial for relief may only be granted if the outcome of the proceeding would have been changed by the after-discovered evidence.” *Id.* Pa.R.E. 609 allows evidence that a witness has been convicted of a crime if said crime

involved dishonesty or false statement, or crimen falsi. Rule 609 also sets a time limit; that the conviction or release of the witness from confinement imposed for that conviction must have occurred within ten years, unless the court determines in the interests of justice that the probative value of the conviction substantially outweighs the prejudicial effect.

In the present case, the witness's prior record does not contain convictions involving crimen falsi within ten years of the proceeding. The most recent was a theft by unlawful taking to which the witness apparently pled guilty in 1990. Further, the Court can find no basis on which to find that the probative value would substantially outweigh prejudicial effect.

The Court also finds that the evidence could have been obtained by Defendant prior to trial through reasonable diligence. The witness was personally known by Defendant, was criminally charged in the transaction on which Defendant's charges were based, and was incarcerated leading up to and at the time of trial. A search for the witness's prior record is certainly within the parameters of reasonable diligence and said record was not within the exclusive possession of the Commonwealth. Finally, the Court does not find that the outcome of the proceeding would have been changed by the after-discovered evidence. Even had the Court made exception to the ten year time limit of Rule 609, the fact that the witness had theft convictions over a decade ago would not have rendered him so much less credible to significantly change the weight of his testimony. As mentioned before, the witness's involvement in the drug transaction at issue was known to the trier-of-fact. It was also known that he was incarcerated at the time of the hearing. The additional challenge to the witness's credibility of adding

into evidence a fifteen-year-old theft conviction does not rise to the level necessary to grant Defendant's motion under RCrim.P. 720(C).

ORDER

AND NOW, this _____ day of August 2005, based on the foregoing, Defendant's motion for extraordinary relief is hereby DENIED.

By the Court,

Nancy L. Butts, Judge

cc:

DA (KO)
J. Campana, Esq.
Honorable Nancy L. Butts
Judges
William Becker, Law Clerk
Gary Weber, Esq.