

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, : CRIMINAL ACTION – LAW
: vs. : NO. 69-2006
ERIC COLLINS, :
Defendant : OPINION AND ORDER
: CONTINUANCE

DATE: September 25, 2006

OPINION

This opinion and order are entered as a result of an on the record conference and argument heard on September 22, 2006 by this court at the impromptu request of defense counsel. The conference request was joined in by counsel for the Commonwealth. The court would note that the jury had been selected for trial in this case on September 14, 2006 and that trial is scheduled to be heard before the Honorable Richard A. Gray on Tuesday, September 26, 2006 beginning at 9:00 a.m. By way of background, the information charges Defendant with committing five crimes on January 3, 2006, specifically:

- Count 1 – Receiving stolen property, a handgun; the custodian/owner and the value are stated as being unknown.
- Count 2 – Criminal conspiracy with Rhodesia Brookes to commit “PWID”
- Count 3 – Possession with intent to deliver a controlled substance (un-named)
- Count 4 – Possession of a controlled substance, marijuana
- Count 5 – Possession of drug paraphernalia

The Affidavit of Probable Cause asserts that the Lycoming County Drug Task Force made a controlled buy of cocaine on January 3, 2006. The Drug Task Force was able to determine that the source of the cocaine was located at 2501 West Fourth Street as one of the individuals involved in the controlled buy was seen exiting the location mentioned before the controlled buy. Members of the task force then went to that residence and obtained consent to search from an occupant, a Rhonesia Brookes. During the search, task force officers found the hand gun in the bedroom of Ms. Brookes and the Defendant, who was also at the residence. The gun was verified stolen through the Lycoming County Communications Center. A search warrant was then obtained and the task force found two boxes of hand gun ammunition, a loaded magazine, a trigger lock, and an electronic scale in the same bedroom. The hand gun the officers found was wrapped in a pair of mens blue jeans that were identical in size to a pair of jeans being worn by the Defendant. They also found two small safes in the residence, which contained large gallon sized zip lock bags and contained residual traces of marijuana. Located in the bedroom next to a dresser was a clear plastic sandwich bag containing suspected marijuana that field tested positive and smaller packaging bags. The task force officers also discovered evidence that would support a conclusion of occupancy of Brookes and the Defendant, but there was no evidence of other adults residing at that address.

A criminal complaint was issued based upon these allegations. The criminal complaint asserted the substance involved in the possession with intent to deliver charge was marijuana and that the drug paraphernalia was packaging material.

The Defendant was arrested on January 3, 2006 and waived his preliminary hearing on January 10, 2006. At the time of the waiver, he was represented by counsel Michael Morrone, Esquire. Defendant was arraigned on March 6, 2006, at the time of the first pretrial conference. At that time indicated he was representing himself and that Mr. Morrone was not his counsel. It was anticipated that Mr. Morrone might enter his appearance. A court order of that date set the case for trial in the May 2006 trial term and directed the Commonwealth to furnish discovery without delay. Subsequently, on April 28, 2006, Attorney Kyle Rude entered his appearance and on May 8 made a motion for continuance and an extension of time to file pretrial motions. This motion asserted discovery was given to Attorney Rude on May 3 by the defendant; further that the District Attorney had given the discovery to Attorney Morrone at some point rather than to the Defendant. After argument, this court denied that request by an order dated May 11, 2006 filed May 18, 2006.

By an order of the Honorable Richard A. Gray entered on June 22, 2006 at a status conference, the Defendant, being represented by Attorney Rude, was scheduled for trial for the September term with a pretrial conference to be held September 7, 2006. The jury was selected on September 14, 2006.

The court determined on the record at the instant proceeding on September 22nd that the Commonwealth that day and the day prior had furnished discovery information to defense counsel Rude which had not been previously disclosed, but that had been in the possession of the Lycoming County Drug Task Force, an agency of the Lycoming County District Attorney's Office, for many months and even since the initial investigation into this matter. Specifically, on

September 21, the Commonwealth furnished the defense a photograph which was seized in the search conducted on January 3, 2006 that resulted in the Defendant's arrest on these charges. The photograph in question depicts the Defendant in possession of a hand gun which is similar in appearance to the hand gun at issue in this case. The Commonwealth also, for the first time, on the day of September 21 and/or September 22 had furnished information to the Defendant regarding statements made by Derrick Boone. Boone has now been disclosed as the reputed owner of the stolen handgun. The discovery information included a report dated June 1, 2005 by Police Officer Douglas in which Boone reported this gun and two others had been stolen from him shortly after he had purchased them also now disclosed is a June 30, 2005 report by Officer Hagan, stating that he had interviewed Boone about the stolen guns and indicated he was suspicious that Boone was not being truthful. The discovery information also included a police report of October 18, 2005 in which a Matthew Jackson, who was arrested on October 15, 2005, had indicated that Boone had told Jackson he sold the hand guns shortly after he had bought them and reported them stolen saying that the police could not prove anything. Also disclosed was a memorandum from Officer Douglas to Captain Bowers that was dated May 31, 2005 indicating that they suspected Boone of making a false report and were going to ask him to take a polygraph test.

The court would also note that in two other cases, *Commonwealth v. Murphy*, 303-06 and *Commonwealth v. Johnson*, 349-06, the Commonwealth has represented for several months that the whereabouts of the same Matthew Jackson were unknown and that they had issued a warrant for his apprehension. In *Murphy* and *Johnson* the Commonwealth had sought an order from this court permitting them to use preliminary hearing testimony given by Jackson, as the victim in those

cases, asserting Jackson was unavailable. A decision by this court has been pending. On September 21st, it was disclosed to this court by letter that Matthew Jackson had been found and the motion moot. At the argument on the 22nd in this case, it was implied that in fact Jackson's whereabouts had been known apparently for some period of time by an officer from the Williamsport Bureau of Police.

The Commonwealth further disclosed that on September 21, 2006, they received from the Lycoming County Drug Task Force by a fax to Assistant District Attorney, Henry Mitchell, Esquire, a Lycoming County Drug Task Force supplemental report in this case dated January 5, 2006, apparently signed by Officer Brown, although the signature is somewhat illegible. The supplemental report indicated that when the Defendant was searched on January 3, 2006 they found in his possession two small bags of marijuana, a bottle of pills and a cellophane bag containing pills. The Commonwealth also turned over to the defense on September 21st a corresponding lab report dated January 19, 2006, which confirmed that the two plastic bags contained 1.6 grams of marijuana and that the tablets, the pills seized from the Defendant, also contained a schedule 4 controlled substance, Alprazolam.

At argument on the 22nd, the Commonwealth for the first time disclosed that it would be asserting that the marijuana found on the Defendant's person when he was arrested would form the basis for the possession with intent to deliver marijuana charges. This would be in addition to the marijuana allegedly found in an apartment occupied by the defendant. Prior to this time, based upon the Affidavit of Probable Cause and all other information relating to the charges as asserted

in this case, the Commonwealth had indicated it intended to pursue those counts of the information against the Defendant based only upon the marijuana found in the apartment.

Finally, the Commonwealth has, also for the first time, disclosed a police report containing a statement assertedly made by the Defendant, when the police were conducting their search on January 3, 2006, this report had been furnished in discovery, but the copy of the report given to defense counsel did not contain the statement. The statement attributed to the Defendant was that on the date of arrest he was heard to state that Ms. Brookes should tell police officers that the money upstairs was for her abortion. The statement appears in the last two lines on a page of the report. These two lines were missing from the copy of the report furnished to defense counsel in discovery.

This court has previously denied two requests by the Defendant to file an Omnibus Motion out of time. One, as already noted, was made by Attorney Rude in May. At the time of jury selection, Attorney Rude made a second motion to have the case continued in order to allow him time to file an Omnibus Pretrial Motion based upon information he had recently been given in the way of discovery, which suggested that the entry into the apartment by the drug task force officers in January 2006 may not have been done with the consent of Ms. Brookes or was otherwise improper. The court has ascertained that the District Attorney had initially improperly sent the discovery information to Attorney Morrone rather than directly to the Defendant and that it had taken some time for the information to get to Attorney Rude. Nevertheless, the court denied the motion primarily because it believed that the Defendant and his counsel would have been on notice

that there could be a suppression issue concerning the entry into the apartment based upon the Affidavit of Probable Cause language.

The Defendant now seeks a dismissal of the charges, the exclusion of evidence, and/or a continuance so that counsel can investigate this most recently disclosed information. The Commonwealth has stated that it has no objection to the continuance and feels that a continuance because of the late disclosure of this information is proper. However, the Commonwealth argues that it should not be held responsible for the late disclosure because the information was not in the office of the District Attorney, but rather was in the office of the Lycoming County Drug Task Force. The court finds this reasoning a disingenuous assertion by the Commonwealth. The Lycoming County Drug Task Force operates under the auspices and control of the Lycoming County District Attorney's Office. The District Attorney's Office has an obligation to ascertain what discovery information is available from the prosecuting law enforcement agencies. *See, Kyles v. Whitley*, 514 U.S. 419 (1995); *Commonwealth v. Burke*, 781 A.2d 1136 (Pa. 2001). The withholding of this discovery information was highly improper and without any legitimate reason which this court can ascertain. Nevertheless, this court is constrained by the Rules of Criminal Procedure from granting defendant's request to dismiss the charges or exclude the recently disclosed evidence because the defendant can not point to any prejudice actually preventing him from defending himself as a result of the discovery violation.

The court believes that the only relief to which defendant is entitled is a continuance. The court believes that any prejudice to the defendant is likely to be able to be cured by a continuance; however, in the future, if actual prejudice should be shown to result to the defendant because of

this late disclosure of evidence and the continuance of this trial, the defendant may renew his motion for exclusion of evidence or dismissal of the charges.

Accordingly, the following order will be entered.

ORDER

This case is continued. A pretrial conference shall be held on October 12, 2006 (the next available pretrial conference date) at 9:00 a.m. in Courtroom 3, Lycoming County Courthouse. The reason for this continuance is because of the failure of the Commonwealth to furnish required discovery information on a timely basis as referenced in the above opinion.

The Defendant may file an Omnibus Motion if desired provided that said Omnibus Motion shall be filed not later than October 10, 2006 and if filed the same will be conferenced at the October 12 pretrial conference.

The jury selected on September 14, 2006 is hereby discharged.

BY THE COURT,

William S. Kieser, Judge

cc: District Attorney
Michael Morrone, Esquire
Judge Richard A. Gray
Eileen Dgien, Deputy Court Administrator
Judges
Christian Kalas, Esquire
Gary Weber, Esquire, Lycoming Reporter