

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :  
 :  
 vs. : NO. 1387-2006  
 :  
 BRITTANY SPITLER, : CRIMINAL ACTION - LAW  
 :  
 Defendant :  
 : OMNIBUS PRE-TRIAL MOTION

**DATE: January 19, 2007**

**OPINION and ORDER**

Before the Court for determination is the Omnibus Pre-trial Motion of Defendant Brittany Spitler (hereafter "Spitler") filed November 3, 2006. The Motion will be granted in part and denied in part. The pre-trial identification of Spitler made by David Etzler is suppressed as having been obtained by an unduly suggestive procedure. However, Etzler may provide an in-court identification of Spitler as it would have an independent origin sufficiently distinguishable from the unduly suggestive pre-trial procedure. The Commonwealth has presented sufficient evidence to establish a *prima facie* case for the delivery of a controlled substance, possession with the intent to deliver a controlled substance, possession of a controlled substance, and criminal use of a communication facility charges arising out of two controlled buys of crack cocaine that occurred on March 23, 2006.

**I. BACKGROUND**

**A. Facts**

On March 23, 2006, the Pennsylvania State Police were conducting an investigation into drug trafficking activity in the city of Williamsport, Pennsylvania. Corporal Ronald Clark,

Trooper James Wool, Trooper Michael Hutson, and Trooper Burcher took part in this investigation. The initial target of the investigation was David Etzler. On two prior occasions, the Pennsylvania State Police had used a confidential informant to purchase crack cocaine from Etzler. Notes of Testimony, 5, 10 (7/28/06). On March 23, 2006, the Pennsylvania State Police arranged to make a third controlled buy of crack cocaine from Etzler.

**1. The 12:40 p.m. Controlled Buy from Etzler**

This third controlled buy took place between 12:40 p.m. and 1:00 p.m. on March 23, 2006. N.T., 6, 11. Trooper Wool strip searched the confidential informant and gave him one hundred dollars of pre-recorded money. Id. at 6, 7. The confidential informant then placed a phone call, presumably to Etzler. Id. at 6. Trooper Hutson drove the confidential informant to the area of Academy Street in Williamsport. Id. at 7. Troopers Wool and Burcher then drove their vehicle approximately one block west of 322 Academy Street and took up a surveillance position. Ibid.

Etzler resided at 332 Academy Street. N.T., 18. The confidential informant went to Etzler's residence, and made contact with Etzler. Ibid. The confidential informant told Etzler that he wanted some crack cocaine. Id. at 18-19. To accommodate this request, Etzler placed a phone call. Id. at 19. Etzler had used this phone number on prior occasions to arrange for the delivery of narcotics. A female answered Etzler's phone call. Ibid. Etzler knew this female as "Bridget." Ibid. He told her what he wanted and she told him that they would come by. Ibid. Following the phone call, Etzler exited his residence to await the delivery, while the confidential informant waited inside the residence. Id. at 20.

Etzler was waiting in a nearby parking lot when a vehicle pulled up to his location. N.T., 20-21, 26. The driver of the vehicle was a white female who was wearing a baseball cap with her hair in a ponytail coming through the back of the cap. *Id.* at 21, 22. Etzler recognized this female from past narcotics deliveries. Those deliveries had followed the pattern that this one was following. Etzler would place a call to the phone number and this female would arrive and deliver the narcotics he requested. Etzler knew this female as “Bridget,” and would later identify her as Spitler.

Etzler approached the vehicle and made contact with Spitler on the driver’s side of the vehicle. N.T., 21. Etzler provided Spitler with the money the confidential informant had given him and Spitler provided Etzler with crack cocaine. After completing their transaction, Etzler returned to his residence and Spitler drove away.

Corporal Clark had taken up a surveillance position in the vicinity of Academy and West Fourth Streets. N.T., 53. His location was about one block away from where the transaction had occurred. *Id.* at 57. Corporal Clark was advised by other officers involved in the investigation that a target vehicle, which had just taken part in the transaction, was heading in his direction. *Id.* at 53, 60. This vehicle was identified as a dark blue Subaru. *Id.* at 53. The Subaru passed Corporal Clark’s location about ten seconds after he had received the message that it was leaving the scene of the transaction. *Id.* at 57. Corporal Clark followed the Subaru onto West Fourth Street. *Id.* at 58. Corporal Clark observed two females inside the Subaru. *Ibid.* Corporal Clark was also able to observe the Subaru’s license plate number. *Id.* at 53. Corporal Clark relayed the license plate number to the Pennsylvania State Police Barracks in Montoursville, so that a registration check

could be made. Corporal Clark was advised that the blue Subaru he was following was registered to Spitler. Id. at 56.

While Corporal Clark was following Spitler, Etzler returned to his residence. N.T., 20. Once inside, Etzler gave the crack cocaine he had purchased from Spitler to the confidential informant. Ibid. The confidential informant then left Etzler's residence and made contact with the State Police, specifically Trooper Hutson. Trooper Hutson collected the suspected crack cocaine from the confidential informant and field tested it. Id. at 7, 15. The test came back positive for crack cocaine. Id. at 49.

## **2. The Turning of Etzler**

Following the controlled buy from Etzler, Trooper Wool was advised by other members of the surveillance team involved in the investigation that the individual who made the delivery of crack cocaine to Etzler was not the same individual who provided Etzler with drugs on the two previous controlled buys. N.T., 6. That individual was a black male who had driven a black Yukon model sports utility vehicle. Id. at 8. Trooper Wool and Trooper Burcher decided to make contact with Etzler. Id. at 6. Troopers Wool and Burcher went to Etzler's residence and knocked on the door. Id. at 11. Etzler answered the door and the troopers identified themselves. Ibid. Etzler allowed Troopers Wool and Burcher to enter his residence.

Once inside, Trooper Wool observed a female occupant smoking crack cocaine. N.T., 12. Trooper Burcher approached the female, while Trooper Hutson escorted Etzler into the bedroom of the residence. Ibid. Trooper Wool then told Etzler that he and Trooper Burcher were there because of the three controlled buys of drugs that they made from him. Ibid. Trooper Wool then

told Etzler that he could help himself out with judicial consideration regarding the criminal charges that would follow from the three controlled buys if he was willing to become an informant. Ibid. Etzler agreed to become an informant. Trooper Wool told Etzler that he wanted him to arrange a purchase of drugs from the black male that drove the black Yukon. Id. at 8, 13. This individual was Matthew Jackson.

### **3. The Controlled Buy from Jackson**

Etzler telephoned Jackson to arrange for the delivery of crack cocaine. N.T., 8. Jackson met with Etzler and provided him crack cocaine in exchange for money. Id. at 8, 14. Following this controlled buy, Jackson was taken into custody by the Pennsylvania State Police. Id. at 14. The State Police took Jackson back to the station and discussed with him the option of being a confidential informant for them. Id. at 8. Jackson agreed to become a confidential informant.

### **4. The 6:30 p.m. Controlled Buy from Spitler**

Trooper Wool strip searched Jackson and provided him with \$350 of pre-recorded money. N.T., 8, 40. Trooper Wool and Trooper Hutson drove Jackson to the area of Washington Boulevard just west of the Choice Market. Id. at 9. At around 6:30 p.m., while in the vehicle, Jackson made a phone call to a female he knew. Id. at 9, 37, 38. He had called this female on previous occasions and had met her in person probably five times before March 23, 2006. Id. at 38. Jackson told his female acquaintance that he wanted to buy drugs. Ibid. She told him okay and the two arranged to meet. Ibid.

After making the phone call, Jackson exited the vehicle. N.T., 9, 39. Jackson proceeded eastbound on Washington Boulevard and then up Railway Street. Ibid. Once he turned up

Railway Street, Jackson was no longer within Trooper Wool or Trooper Hutson's sight. Id. at 9, 15. Jackson made another phone call to his female acquaintance while he was walking to inform her of his location. Id. at 42, 44. Shortly after turning onto Railway Street, Jackson made contact with his female acquaintance. Id. at 39. He handed her the prerecorded money and she handed him crack cocaine. Id. at 39, 44, 46, 47. Jackson knew his female acquaintance as "Bridget," and would later identify "Bridget" as Spitler. After the exchange was made, Jackson left Spitler and returned to the vehicle where Troopers Wool and Hutson were waiting. Id. at 39, 45.

Upon returning to the vehicle, Jackson handed Trooper Wool the crack cocaine he had just purchased from Spitler. N.T., 9, 15. Trooper Wool filed tested the crack cocaine. Ibid. The field test came back positive for crack cocaine. Id. at 10.

#### **5. Etzler's Pre-trial Photographic Identification of Spitler**

Sometime after the controlled buys that occurred on March 23, 2006, Trooper Wool contacted Etzler. N.T., 28-29. Trooper Wool told Etzler that he wanted Etzler to meet him at the Williamsport Bureau of Police Headquarters so that he could show Etzler a photograph of the woman Trooper Wool believed Etzler had identified as "Bridget." Ibid. Etzler met with Trooper Wool. Trooper Wool showed Etzler a single photograph of a woman. Id. at 31. The photograph just contained the image; there was no demographic information like name, address, or date of birth on it. Ibid. This photograph was a photograph of Spitler. Id. at 30. When Trooper Wool showed Etzler the photograph, he asked Etzler if he knew this individual. Id. at 35. Etzler said yes. Ibid. Etzler pointed at the photograph and said that it was "Bridget." Ibid. Etzler identified

the individual in the photograph as the person who sold him crack cocaine on March 23, 2006. Id. at 30.

### **B. Charges**

On May 8, 2006, Trooper James Wool filed a criminal complaint against Spitler charging her with the following crimes: Count 1 Delivery of a Controlled Substance, 35 P.S. § 780-113(a)(30); Count 2 Possession with Intent to Deliver a Controlled Substance, 35 P.S. § 780-113(a)(30); Count 3 Possession of a Controlled Substance, 35 P.S. § 780-113(a)(16); Count 4 Criminal Use of a Communication Facility, 18 Pa.C.S.A. § 7512(a); Count 5 Delivery of a Controlled Substance, 35 P.S. § 780-113(a)(30); Count 6 Possession with Intent to Deliver a Controlled Substance, 35 P.S. § 780-113(a)(30); Count 7 Possession of a Controlled Substance, 35 P.S. § 780-113(a)(16); Count 8 Criminal Use of a Communication Facility, 18 Pa.C.S.A. § 7512(a). Counts 1 through 4 arise out of Spitler's alleged sale of crack cocaine to Etzler on March 23, 2006. Counts 5 through 8 arise out of Spitler's alleged sale of crack cocaine to Jackson on March 23, 2006.

### **C. Spitler's Argument**

In the Omnibus Pre-trial Motion, Spitler asserts a motion to suppress evidence, a petition for *habeas corpus*, and a motion for severance.<sup>1</sup> In the motion to suppress evidence, Spitler is seeking, one, to preclude Trooper Wool from testifying that Etzler identified Spitler as the individual who sold him crack cocaine based upon him being shown a photograph and, second, to preclude Etzler from providing an in-court identification of Spitler as this individual because such

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<sup>1</sup> Spitler also asserted a motion to compel discovery in her Omnibus Pre-trial Motion. The motion to compel discovery was addressed by a separate order.

an identification would be tainted. Spitler asserts that the procedure of showing Etzler a single photograph employed by Trooper Wool was unduly suggestive so as to deprive her of her due process rights. Spitler then asserts that this unduly suggestive procedure has prejudiced and tainted Etzler such that any in court identification he may give would be the product of this suggestive procedure.

In the petition for *habeas corpus*, Spitler's first contention is that the Commonwealth has failed to establish a *prima facie* case for the charge of criminal use of a communication facility. Spitler asserts that the evidence presented failed to establish that she used a telephone to arrange for the drug transaction. Specifically, Spitler asserts that Etzler only said he talked to a female, but never said that female was Spitler, and when Etzler testified at the preliminary hearing he could not remember the telephone number he dialed to arrange for the delivery of crack cocaine. Spitler's second contention is that the Commonwealth has failed to establish a *prima facie* case for the possession with intent to deliver a controlled substance, delivery of a controlled substance, and possession of a controlled substance charges. Spitler asserts that the evidence fails to establish that she was the individual who sold the crack cocaine to Etzler and Jackson.

In the motion for severance, Spitler asserts that the charges arising from the two controlled buys made on March 23, 2006 should not be joined for trial. Spitler asserts that she would be prejudiced if all of the offense were tried together. Spitler asserts that the charges are not based on the same transaction or occurrence and the evidence related to those charges would not be admissible in separate trials to show motive, intent, absence of mistake, common scheme or place, identity, or opportunity.

## **II. ISSUES**

There are five issues before the court. They are:

- (1) Whether the out-of-court identification Etzler made after viewing a single photograph of a female at the Williamsport Bureau of Police Headquarters was so unduly suggestive as to require suppression of that identification?
- (2) If the out-of-court photographic identification was impermissibly suggestive, whether that procedure has so tainted Etzler that he may not be permitted to provide an in-court identification of Spitler as the individual who sold him crack cocaine on March 23, 2006?
- (3) Whether the Commonwealth has presented sufficient evidence to establish a *prima facie* case for the charge of criminal use of a communication facility against Spitler?
- (4) Whether the Commonwealth has presented sufficient evidence to establish a *prima facie* case for the charges of possession with intent to deliver a controlled substance, delivery of a controlled substance, and possession of a controlled substance against Spitler?
- (5) Whether the charges arising out of the alleged 12:30 p.m. controlled buy between Spitler and Etzler must be severed from the charges arising out of the alleged 6:30 p.m. controlled buy between Spitler and Jackson?

## **III. DISCUSSION**

The discussion section of this opinion will be divided into three main parts. The first part will address the motion to suppress evidence. The second part will address the petition for *habeas corpus*. The third part will address the motion for severance.

## **A. Motion to Suppress Evidence**

### **1. Standard of Review**

When a motion to suppress evidence has been filed, the Commonwealth bears both the burden of production and persuasion to prove that the challenged evidence was not obtained in violation of the defendant's rights. Pa.R.Crim.P. 581(H); *Commonwealth v. West*, 834 A.2d 625, 629 (Pa. Super. 2003), *app. denied*, 889 A.2d 1216 (Pa. 2005). The Commonwealth bears the burden of establishing by a preponderance of the evidence that the challenged evidence is admissible. *Commonwealth v. Lindblom*, 854 A.2d 604, 605 (Pa. Super. 2005), *app. denied*, 868 A.2d 1198 (Pa. 2005); *Commonwealth v. Smith*, 784 A.2d 182, 186 (Pa. Super. 2001).

### **2. Etzler's Pre-trial Identification of Spitler Must be Suppressed**

When a defendant challenges the propriety of a pre-trial identification, the Commonwealth bears the burden of establishing "... that such an identification was not accomplished through an unduly suggestive procedure." *Commonwealth v. Williams*, 470 A.2d 1376, 1383 (Pa. Super. 1984). A pre-trial identification that has been obtained by an unduly suggestive procedure denies the defendant due process of law and will be suppressed. *Commonwealth v. Burton*, 770 A.2d 771, 782 (Pa. Super. 2001), *app. denied*, 868 A.2d 1197 (Pa. 2005). "A photographic identification is unduly suggestive if, under the totality of the circumstances, the identification procedure creates substantial likelihood of misidentification." *Commonwealth v. Harris*, 888 A.2d 862, 866 (Pa.

Super. 2006). The use of a single photograph of a suspect in obtaining an identification from a witness constitutes an impermissibly suggestive procedure. *Commonwealth v. Bradford*, 451 A.2d 1035, 1036 (Pa. Super. 1982) (“We deplore the single photograph procedure utilized by the police officer in this case.”); *Commonwealth v. Jones*, 426 A.2d 1167, 1170 (Pa. Super. 1981).

Etzler’s pre-trial identification of Spitler as the individual who sold him crack cocaine on March 23, 2006 must be suppressed as having been obtained by an unduly suggestive procedure. A few days after the controlled buy from Spitler on March 23, 2006, Etzler went to the Williamsport Bureau of Police Headquarters to meet Trooper Wool. While there, Trooper Wool showed Etzler a single photograph of a female he believed to be of “Bridget.” It was a photograph of Spitler. Trooper Wool then asked Etzler if he knew the female in the photograph, and Etzler said he did. Etzler identified her as the individual who sold him crack cocaine on March 23, 2006. Trooper Wool’s use of a single photograph was an unduly suggestive procedure. *See, Bradford, supra; Jones, supra.* Therefore, Etzler’s pre-trial identification of Spitler must be suppressed.

### **3. Etzler’s In-court Identification of Spitler would be Admissible**

Despite the preclusion of Etzler’s pre-trial identification of Spitler due to its procurement by an unduly suggestive procedure, this in and of itself may not preclude Etzler from providing an in-court identification of the individual who sold him crack cocaine on March 23, 2006. “Following a suggestive pre-trial identification procedure, a witness should not be permitted to make an in court identification unless the prosecution establishes by clear and convincing evidence that the totality of circumstances affecting the witness’s identification did not involve a substantial likelihood of misidentification.” *Commonwealth v. Fowler*, 352 A.2d 17, 19 (Pa. 1976). That is,

“if the court finds that the pre-trial identification procedure was tainted with suggestiveness, the Commonwealth is then required to prove by clear and convincing evidence that a witness’s in-court identification of the accused has an independent origin sufficiently distinguishable from the illegal pre-trial identification so as to be purged of the primary taint.” *Williams*, 470 A.2d at 1383.

In considering the totality of the circumstances, a court must closely examine:

‘(1) the suggestive factors involved in the identification process, and (2) whether or not, despite the suggestive factors involved in the process, other factors are present which clearly and convincingly establish that the witness’s identification has an “independent origin” in the witnesses’ observations at the time of the crime.’

*Commonwealth v. Spiegel*, 457 A.2d 531, 535 (Pa. Super. 1983) (quoting *Bradford*, 451 A.2d at 1037). The suggestiveness alone of a challenged identification procedure does not warrant preclusion of an in-court identification, but is one factor to be considered in determining the admissibility of identification testimony. *Ibid*. Among the other factors a court should consider are:

(1) the opportunity the witness had to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.

*Fowler*, 352 A.2d at 21; *Burton*, 770 A.2d at 780. “The most important factor in the totality test is the opportunity of a witness to view the suspect at the time of the crime.” *Bradford*, 451 A.2d at 1037. “Against these factors is to be weighed the corrupting effect of the suggestive identification

itself.”” *Commonwealth v. Sample*, 468 A.2d 799, 801 (Pa. Super. 1983) (quoting *Commonwealth v. Thompkins*, 457 A.2d 925, 928 (Pa. Super. 1983)).

The totality of the circumstances demonstrates that an in-court identification by Etzler of Spitler as the individual who sold him crack cocaine on March 23, 2006 has an independent origin so as to purge any taint created by the unduly suggestive single photograph identification procedure. The controlled buy on March 23, 2006 provided Etzler with an ample opportunity to view the individual who sold him crack cocaine. This particular delivery of crack cocaine occurred mid-day, between 12:40 p.m. and 1:00 p.m. Etzler had made contact with the female driver of the vehicle by walking up to the driver’s side window. Etzler then handed the female driver the money and the female driver handed him the crack cocaine. Etzler was an arm’s length away from the female driver in broad daylight when the controlled buy occurred. From this vantage point, Etzler likely would have been able to get a good look at the female driver.

However, it could be argued that Etzler’s look at the female driver was not all that good. The interaction between Etzler and the female driver was brief and the female driver was wearing a baseball cap, which could have obstructed her face. But, Etzler’s familiarity with the female driver minimizes any impact these two factors may have upon Etzler’s ability to identify her. Etzler had met with the female driver on three to four prior occasions, during which he purchased narcotics from her. Etzler’s familiarity with the female driver allowed him to recognize her as “Bridget,” and “Bridget” is Spitler.

Etzler’s opportunity to view the female driver during the controlled buy and his familiarity with her is evident in his level of certainty concerning the identity of the female driver. At the

evidentiary hearing regarding the motion to suppress evidence, Etzler identified Spitler as the individual who sold him crack cocaine on March 23, 2006. At the preliminary hearing, Etzler was unable to definitively identify Spitler as this individual. Etzler testified, “It might be that lady there but she had her hair a lot different.”; “I think so. People look a lot different when they’re in like jeans and stuff like that and then – and dressed.”; “I think – I don’t know. The driver looked younger, had a baseball hat on and a ponytail coming out of the back.” N.T., 22. At the evidentiary hearing on the motion, Etzler explained that he could not make a definitive identification at the preliminary hearing because Spitler’s hairstyle was different from what she had worn on March 23, 2006. But, Etzler testified that Spitler’s hairstyle the day of the evidentiary hearing was more akin to how she wore it on March 23, 2006. At the evidentiary hearing on the motion, Etzler was able to confidently identify Spitler as the driver of the vehicle and the person who sold him crack cocaine on March 23, 2006.

Accordingly, the totality of the circumstances demonstrates that an in-court identification by Etzler of Spitler as the person who sold him crack cocaine on March 23, 2006 has an independent origin sufficiently distinguishable from the single photograph identification procedure and may be permitted at trial.

## **B. Petition for *Habeas Corpus***

### **1. Standard of Review**

“The writ of *habeas corpus* exists to vindicate the right of personal liberty in the face of unlawful government deprivation.” *Commonwealth v. Jackson*, 809 A.2d 411, 416 (Pa. Super. 2002) (quoting *Commonwealth v. Morman*, 541 A.2d 356, 358 (Pa. Super. 1988)). “It

is settled that a petition for writ of *habeas corpus* is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a *prima facie* case.” *Commonwealth v. Keller*, 822 A.2d 1004, 1010 (Pa. Super. 2003), *app. denied*, 832 A.2d 435 (Pa. 2003). “[T]he finding of a *prima facie* case is the prerequisite for requiring the accused to stand trial for the charges leveled against him.” *Commonwealth v. Cordoba*, 902 A.2d 1280, 1284 (Pa. Super. 2006). “A trial court may grant a defendant’s petition for *habeas corpus* when the Commonwealth has failed to present a *prima facie* case against the defendant.” *Commonwealth v. Santos*, 876 A.2d 360, 363 (Pa. 2005).

The evidentiary sufficiency of the Commonwealth’s *prima facie* case is a question of law. *Commonwealth v. Nieves*, 876 A.2d 423, 424 (Pa. Super. 2005), *app. denied*, 891 A.2d 731 (Pa. 2005).

A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense. [(citation omitted)]. The evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury. [(citation omitted)]. Moreover, ‘inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth’s case.’ [(citation omitted)].

*Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003). The Commonwealth is not required to prove the defendant’s guilt beyond a reasonable doubt in order to establish a *prima facie* case. *Santos*, 876 A.2d at 363. Rather, the “more-likely-than-not” test is the minimum standard to be used in assessing the reasonableness of the inferences relied upon to establish a *prima facie* case. *Commonwealth v. Wodjak*, 466 A.2d 991, 996 (Pa. 1983); *Commonwealth v. Lacey*, 496 A.2d

1256, 1261 (Pa. Super. 1985).

In determining whether the Commonwealth has presented sufficient evidence to establish a *prima facie* case, the trial court is not limited to the evidence presented at the preliminary hearing. *Keller*, 823 A.2d at 1011. The trial court may accept "... into evidence the record from the preliminary hearing as well as any additional evidence which the Commonwealth may have available to further provide its *prima facie* case." *Ibid*. However, suspicion and conjecture are not evidence and are unacceptable as such in determining the existence of a *prima facie* case. *Commonwealth v. Packard*, 767 A.2d 1068, 1071 (Pa. Super. 2001), *app. denied*, 782 A.2d 544 (Pa. 2001).

## **2. A Prima Facie Case Exists for the Controlled Substance Charges**

Spitler does not contend that the alleged acts fail to meet the elements of the delivery of a controlled substance, possession with the intent to deliver a controlled substance, and possession of a controlled substance offenses.<sup>2</sup> Rather, Spitler contends that the evidence presented fails to establish that she was the perpetrator of these acts. This contention fails.

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<sup>2</sup> Section 780-113(a)(30) of The Controlled Substance, Drug, Device and Cosmetic Act defines the offenses of delivery of a controlled substance and possession with the intent to deliver a controlled substance. It provides as follows:

The following acts and the causing thereof within the Commonwealth are hereby prohibited:

Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with the intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30). Section 780(a)(16) of The Controlled Substance, Drug, Device and Cosmetic Act defines the offense of possession of a controlled substance. It provides as follows:

The Commonwealth has presented sufficient evidence to establish that Spitler was the individual who sold crack cocaine to Etzler and Jackson on March 23, 2006, and thereby, establish a *prima facie* case for the delivery of a controlled substance, possession with intent to deliver a controlled substance, and possession of a controlled substance charges. Etzler testified that when the vehicle pulled up to his location, he walked up to the driver's side window, handed driver the money, and driver handed him the crack cocaine. Etzler testified that the driver was a white female. At the evidentiary hearing, Etzler identified Spitler as the driver of the vehicle and the individual who sold him the crack cocaine. Shortly after Spitler sold Etzler the crack cocaine, Corporal Clark observed a blue Subaru registered to Spitler come from the area of the transaction being driven by a female. As to the second transaction, Jackson testified that he met Spitler on Railway Street. There, he handed Spitler the money and she handed him crack cocaine. Etzler and Jackson, both eye witnesses and participants in the transactions, identified Spitler as the individual who sold them crack cocaine on March 23, 2006.

Accordingly, the Commonwealth has presented sufficient evidence to establish a *prima facie* case for the delivery of a controlled substance, possession with the intent to deliver a controlled substance, and possession of a controlled substance charges against Spitler.

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The following acts and the causing thereof within the Commonwealth are hereby prohibited:

Knowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, unless the substance was obtained directly from, or pursuant to a valid prescription order or order of a practitioner, or except as otherwise authorized by this act.

35 P.S. § 780-113(a)(16).

### **3. A Prima Facie Case Exists for the Criminal Use of a Communication Facility Charge**

The Pennsylvania Crimes Code defines the offense of criminal use of a communication facility as follows:

A person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.

18 Pa.C.S.A. § 7512(a). In order to convict a defendant for the criminal use of a communication facility, the Commonwealth must prove beyond a reasonable doubt that:

(1) the defendant intentionally, knowingly, or recklessly used a communication facility; and in so doing

(2) the defendant intelligently, knowingly, or recklessly facilitated the commission or attempted commission of an underlying felony.

*Commonwealth v. Moss*, 852 A.2d 374, 381 (Pa. Super. 2004). Facilitation is “any use of a communication facility that makes easier the commission of the underlying felony.” *Id.* at 382 (quoting *United States v. Davis*, 929 F.2d 544, 559 (10<sup>th</sup> Cir. 1991)).

The Commonwealth has presented sufficient evidence to establish a *prima facie* case for the criminal use of a communication facility charge against Spitler related to the sale of crack cocaine to Etzler. Etzler testified that on March 23, 2006 he dialed a telephone number he that had previously used to obtain narcotics. He testified that a female voice answered the phone. Etzler testified that he recognized the voice to be “Bridget’s” voice. He told her that he wanted drugs and she said okay. Etzler testified that, a short time later, “Bridget” arrived and provided him with

crack cocaine in exchange for money. Etzler testified that the person he knew as “Bridget” was Spitler.

Spitler used a telephone to arrange the drug transaction. Without the use of the telephone, Etzler would not have been able to communicate to Spitler his desire to obtain crack from her nor would Spitler have been able to inform him that she could meet his request. The use of the telephone was instrumental in arranging for the drug transaction between Etzler and Spitler

Accordingly, the Commonwealth has presented sufficient evidence to establish a *prima facie* case for the criminal use of a communication facility charge against Spitler related to the sale of crack cocaine to Etzler.

### **C. Motion for Severance**

#### **1. General Rules and Principles Regarding Severance of Offenses**

The Pennsylvania Rules of Criminal Procedure set forth the procedures and standards governing the consolidation and severance of offenses. *Commonwealth v. Lark*, 543 A.2d 491, 496 (Pa. 1988). In that regard, the Rules provide, in relevant parts, as follows:

#### **Rule 563. Joinder of Offenses in Information**

- (A) Two or more offenses, of any grade, may be charged in the same information if:
  - (1) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion: or
  - (2) the offenses charged are based on the same act or transaction.
- (B) There shall be a separate count for each offense charged.

**Rule 582. Joinder – Trial of Separate Indictments or Informations**

(A) Standards

(1) Offenses charged in separate indictments or informations may be tried together if:

(a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or

(b) the offenses charged are based on the same act or transaction.

(2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

**Rule 583. Severance of Offenses or Defendants**

The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.

Pa.R.Crim.P. 563; Pa.R.Crim.P. 582(A); Pa.R.Crim.P. 583.

In reading these Rules *in pari materia*, when a defendant moves to sever offenses that are not based on the same act or transaction that have been joined in a single indictment or information, a court must determine:

(1) whether the evidence of each of the offenses would be admissible in a separate trial for the other;

(2) whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and if the answers to these two inquiries are in the affirmative

(3) whether the defendant will be unduly prejudiced by the consolidation of offenses.

*Commonwealth v. Lark*, 543 A.2d 491, 496 (Pa. 1988); *Commonwealth v. Lauro*, 819 A.2d 100, 107 (Pa. Super. 2003), *app. denied*, 830 A.2d 975 (Pa. 2003).

**2. Evidence Related to the 12:40 p.m. Controlled Buy and Evidence Related to the 6:30 p.m. Controlled Buy would be Admissible in Separate Trials**

In general, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Pa.R.E. 404(b)(1); *see also, Commonwealth v. Watkins*, 843 A.2d 1203, 1215 (Pa. 2003) (“Evidence of a defendant’s prior criminal activity may not be admitted solely to establish his bad character or criminal propensity.”); *Commonwealth v. Richter*, 711 A.2d 464, 466 (Pa. 1998) (“Evidence of prior bad acts are generally not admissible if offered merely to show bad character or a propensity for certain bad acts.”). “An exception to the general prescription exists in special circumstances where the evidence is relevant for some other legitimate purpose and not merely designed generally to prejudice the defendant by showing him to be a person of bad character.” *Richter*, 711 A.2d at 466. Evidence of other crimes is available to demonstrate: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) the identity of the person charged with the commission of the crime on trial. *Lauro*, 819 A.2d at 107; *see also*, Pa.R.E. 404(b)(2).

The evidence related to the 12:40 p.m. controlled buy and the evidence related to the 6:30 p.m. controlled buy would be admissible in separate trials regarding offenses arising out of the controlled buys as evidence demonstrating a common scheme. Both the 12:40 p.m. and 6:30 p.m. controlled buys followed a similar pattern. The 12:40 p.m. controlled buy was initiated when Etzler telephoned Spitler and told her that he was looking to purchase some crack cocaine. Spitler told Etzler she could accommodate his request. Shortly after the telephone call, Spitler met Etzler and provided him with crack cocaine in exchange for money. The 6:30 p.m. controlled buy was initiated when Jackson telephoned Spitler and told her that he wanted to buy crack cocaine. Spitler told Jackson she could accommodate his request, and the two arranged to meet. Shortly after the telephone call, Spitler met Jackson and provided him with crack cocaine in exchange for money. The evidence presented related to the 12:40 p.m. and 6:30 p.m. controlled buys demonstrates that Spitler had developed and followed a particular method to sell narcotics. Such was the case in *Commonwealth v. Boyle*.

In *Boyle*, the Monroe County Drug Task Force purchased cocaine from the defendant on five different occasions through the use of under cover agents and a confidential informant. 733 A.2d 633, 634 (Pa. Super. 1999). The defendant was charged with five counts of delivery of a controlled substance, as well as related offenses, arising out of these five purchases. The defendant moved to sever the offenses, and the trial court denied that motion.

The Superior Court held that the trial court did not err in failing to sever the charges related to the various purchases of cocaine from the defendant. *Boyle*, 733 A.2d at 637. The Superior Court found that the testimony established a common scheme as to how the defendant delivered

drugs. *Id.* at 636. In each of the purchases, a deal for a specific dollar amount of powder cocaine was set up by using the defendant's pager number; the Drug Task Force and the confidential informant had to wait for the defendant to contact them; once the defendant contacted them, a meeting place was set up where the undercover agent and the confidential informant drove in an unmarked police car and waited for the defendant; when the defendant arrived at the meeting place, he delivered the cocaine to the undercover agent or the confidential informant. *Ibid.* Therefore, the Superior Court determined that the evidence related to each of the controlled buys was admissible to demonstrate a common scheme related to the defendant's delivery of cocaine.

Similar to *Boyle*, the evidence produced so far establishes a common scheme as to how Spitler would deliver crack cocaine. In both the 12:40 p.m. and 6:30 p.m. controlled buys, a telephone call to Spitler initiated the transaction, Spitler agreed to meet Etzler and Jackson at a predetermined spot, once at that spot, Spitler provided Etzler and Jackson crack cocaine in exchange for money. As such, the evidence related to the 12:40 p.m. controlled buy and the evidence related to the 6:30 p.m. controlled buy would be admissible to demonstrate a common scheme, and thereby, admissible in a separate trial related to the offenses arising out of the controlled buys.

### **3. Evidence Related to the 12:40 p.m. Controlled Buy and Evidence Related to the 6:30 p.m. Controlled Buy is Capable of Separation**

The evidence related to the 12:40 p.m. controlled buy and the evidence related to the 6:30 p.m. controlled buy is capable of separation. The controlled buys occurred at two different times during the day on March 23, 2006. The controlled buys occurred at two different locations. The 12:40 p.m. controlled buy occurred at a parking lot near 322 Academy Street. The 6:30 p.m.

controlled buy occurred on Railway Street, not far from the intersection of Railway Street and Washington Boulevard. The controlled buys involved different principals. The 12:40 a.m. controlled buy involved Etzler. The 6:30 p.m. controlled buy involved Jackson. Although the controlled buys' patterns are similar, the evidence related to each particular controlled buy has enough distinctions as to allow a jury to separate the facts concerning each controlled buy and apply them to that buy. As such, the evidence related to the controlled buys is capable of separation.

#### **4. Spitler would not be Prejudiced by Consolidation of the Offenses**

The prejudice that concerns Rules 563, 583, and 586 is not simply “prejudice in the sense that [a defendant] will be linked to the crimes for which he is being prosecuted, for that sort of prejudice is ostensibly the purpose of *all* Commonwealth evidence.” *Lauro*, 819 A.2d at 107 (quoting *Commonwealth v. Collins*, 703 A.2d 418, 423 (Pa. Super. 1997)) (emphasis in original). The prejudice envisioned by these Rules is “that which would occur if the evidence tended to convict appellant only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence.” *Lark*, 543 A.2d at 499. Such prejudice does not exist here.

The evidence related to the 12:40 p.m. and the 6:30 p.m. controlled buys does not merely show Spitler's propensity to commit crimes. The evidence related to the two controlled buys demonstrates a common scheme as to how Spitler allegedly sold crack cocaine. The evidence related to the 12:40 p.m. and the 6:30 p.m. controlled buys is capable of separation and there is little risk of the jury cumulating the evidence. While similar in pattern, each controlled buy

involves distinct facts that differentiate one from the other. This will allow the jury to compartmentalize the evidence related to each controlled buy. It will then be up to the jury to examine the evidence and determine the facts specific to each controlled buy in order to convict Spitler of the offenses arising out of that controlled buy. As such, Spitler suffers no prejudice from the joinder of the offenses arising out of the 12:40 p.m. and the 6:30 p.m. controlled buys.

Accordingly, the motion for severance is denied since the evidence related to the 12:40 p.m. controlled buy and the evidence related to the 6:30 p.m. controlled buy is admissible to demonstrate a common scheme, the evidence related to the two controlled buys is capable of separation, and Spitler suffers no prejudice from the joinder of offenses arising out of the two controlled buys.

#### **IV. CONCLUSION**

The Omnibus Pre-trial Motion is granted in part and denied in part.

#### **ORDER**

It is hereby ORDERED that the Omnibus Pre-trial Motion of Defendant Brittany Spitler filed November 3, 2006 is GRANTED IN PART and DENIED IN PART.

The Motion is GRANTED IN PART in that the pre-trial photographic identification David Etzler made of Defendant Brittany Spitler is SUPPRESSED.

The Motion is DENIED IN PART in that David Etzler may provide an in-court identification of Defendant Brittany Spitler

The Motion is DENIED IN PART in that the Commonwealth has presented sufficient evidence to establish a *prima facie* case for the delivery of a controlled substance, possession with the intent to deliver a controlled substance, possession of a controlled substance, and criminal use of a communication facility charges against Defendant Brittany Spitler.

The Motion is DENIED IN PART in that the charges arising out of the alleged 12:40 p.m. controlled buy of crack cocaine and the charges arising out of the alleged 6:30 p.m. controlled buy of crack cocaine may be joined for trial.

BY THE COURT,

William S. Kieser, Judge

cc: Eric Linhardt, Esquire  
District Attorney  
Judges  
Gary L. Weber, Esquire (Lycoming Reporter)  
Christian J. Kalas, Esquire