

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	CRIMINAL ACTION - LAW
	:	
vs.	:	NO. 1088-2007
	:	
KES,	:	
	:	
Defendant	:	HABEAS CORPUS MOTION

DATE: December 21, 2007

OPINION and ORDER

I. BACKGROUND

The matter before the court is the Defendant's Petition for Habeas Corpus filed August 1, 2007. In the petition, Defendant requests dismissal of Count 1, Conspiracy to Commit Rape, Count 2, Conspiracy to have Unlawful Contact with a Minor, Count 3, Conspiracy to Commit Aggravated Indecent Assault as well as Count 4, Sexual Exploitation of Children, and Count 6, Conspiracy to Commit Delivery of a Controlled Substance. The allegations in the information alleged to have occurred between March 1, 2007 and May 31, 2007. The Defendant is accused of compelling her 16 year old daughter to engage in sexual acts with an adult male in exchange for receiving cocaine. The Defendant contends the evidence introduced by the Commonwealth at the preliminary hearing and a hearing held on this motion is insufficient to establish either that the crimes occurred or conclude that the Defendant engaged in such crimes.

A. Procedural History

On July 20, 2007 a preliminary hearing was held before District Magisterial Judge Sortman regarding the charges against the Defendant, KS (hereafter "Defendant"). The charges as described in the criminal complaint included the following:

(1) Criminal Conspiracy. The Co-Conspirator being Jay Black and the crime intended rape of a minor, the Defendant's daughter, 16 year old H. The purpose of the conspiracy was for H to have sexual intercourse with Jay Black in exchange for crack cocaine for H and her mother.

(2) Criminal Conspiracy. Co-Conspirator being Jay Black and the crime intended being unlawful contact of a minor, H for the same purpose as stated above.

(3) Criminal Conspiracy. Co-Conspirator being Jay Black and the crime intended being aggravated indecent assault, H, for the same purpose as stated above.

(4) Sexual Exploitation of Children. Procuring her daughter, H, for sexual exploitation by Jay Black in order to obtain cocaine.

(5) Endangering Welfare of Children: By Guardian. Defendant allowed her daughter, 16 year old H, to smoke crack cocaine and engage in sexual activity with Jay Black.

(6) Criminal Conspiracy. Co-Conspirator Jay Black and the intended crime being the delivery of a controlled substance; crack cocaine.

(7) Corruption of Minors. Defendant knowingly aided and abetted her daughter, H, in the commission of a crime-abuse of controlled substance crack cocaine.

A charge of conspiracy to commit involuntary deviate sexual intercourse was dismissed but the other charges were held for court. An information was filed with the seven charges held for court on July 20, 2007. On August 1, 2007, Defendant filed a Petition for Habeas Corpus. On October 4, 2007 further testimony was provided to this court by the Commonwealth in support of the above charges. The Defendant is scheduled for a pretrial conference on December 18, 2007.

B. Facts

The evidence presented by the Commonwealth would permit a reasonable person to conclude the facts are as follows. On March 14, 2007, Defendant drove her then 16 year old daughter, H, and another lady friend, Cara, to Jay Black's house. Jay Black was 28. Notes of Testimony (hereafter "N.T.") 2, 10. Defendant had previously called Jay Black to make arrangements for this visit. N.T. 5. The purpose for going to Jay Black's house was to obtain cocaine. This was the first time that H had met Jay Black. According to H's testimony, it was pretty much of a normal day, where she and her mother were trying to find crack. She and her mother had used crack together before. N.T. 4, 11. Defendant had previously started H on cocaine by giving her the drug the first time she used. N.T. 23. When her mother first brought H to Jay Black's house to procure cocaine, H understood the purpose and destination of the trip; this was to obtain drugs with her mother; H was not compelled by her mother to go. N.T., 3-4, 16. H had had an "addiction" to cocaine for some time before the March 14th incident. N.T. 13-15.

When they arrived at Jay Black's house he had cocaine laid out and available for them. N.T. 5. H's mother had told her to act mature and not let on that she was her mother. N.T. 6. When they arrived, the three women took off their clothes and had a discussion as to who was going to have sex with Jay Black first in exchange for the cocaine. After H and Cara discussed it, H decided to have sex first. H did recognize that her mother "would get mad" if she had not had sex with Jay Black on March 14th. N.T. 19. The actual decision to have sex for crack on March 14th was made by H, not her mother; she could have said no if she had wanted. N.T. 18-19.

A couple of weeks after that, Defendant invited Jay Black to move into the trailer residence shared by the Defendant and H. A couple of days after he had moved in, H had sex with Jay Black

and testified that she had gotten used to having sex with him in order to obtain cocaine. Defendant's boyfriend, Eric, also lived at the trailer. H willingly had sex with Jay Black after he had moved into the residence she and mother shared. N.T. 8, 20. H's several encounters with Jay Black took place in their home when Jay Black would knock on the wall between H's and his room and H would go to Jay Black for the sexual encounter without her mother's knowledge. N.T. 9, 20-22. Defendant found out H was having sex with Jay Black on her own accord, as Defendant caught them several times. N.T. 22. Defendant got upset that H was having sex with Jay Black and getting crack as it was not fair that she could have crack for sex and not share it with Defendant since Defendant could not have sex with Jay Black because Eric was present. H estimated she had sex with Jay Black 20 times for crack.

H was very independent and would not obey her mother's wishes, leaving the house for days at a time and not telling her mother her whereabouts. Testimony of Eric Horn, Defendant's boyfriend, 10/04/07. H skipped school, had sex with Jay Black without her mother's knowledge, disappeared from the residence without telling her mother her whereabouts and generally made her own life choices. *Id.* H flirted with Jay Black when she was not under the influence of cocaine. *Id.* Eric Horn, Defendant's boyfriend, also testified convincingly that he believed H's actions to be evidence of her free will and not drug addiction.

Ultimately, we conclude, as H stated at the preliminary hearing, the decision to engage in sex with Jay Black on March 14, 2007 and subsequently was H's own decision. See, N.T. 23-24.

II. DISCUSSION

The Defendant maintains insufficient evidence exists to find she placed her daughter, H,

under forcible compulsion to have sex with Jay Black for drugs. Instead, Mother asserts the uncontradicted evidence is that H willingly and voluntarily engaged in sex with Jay Black, often without the Defendant's knowledge and further that her daughter self-indulged in cocaine use.

The theory of their case is that Defendant entered into an agreement with Jay Black to take advantage of H's drug addiction H to have sex with Jay Black in order to obtain crack cocaine for herself and Defendant. The Commonwealth contends that the evidence before this court would support a finding that Defendant knowingly caused her daughter to become addicted to crack cocaine and facilitated her daughter's use of the drug. Commonwealth further argues that Defendant then agreed to use her daughter's known addiction to cocaine to procure cocaine for herself and H from drug dealer, Jay Black, in exchange for H submitting to sex with Jay Black. The Commonwealth argues that H's addiction negates any consent she manifested to have sex with Jay Black. Further, that the use of H's addiction amounts to forcible compulsion. The Commonwealth also argues this compulsion is enhanced by Defendant's parental authority. The Commonwealth would have us hold that this evidence is sufficient for a reasonable fact finder to conclude the force exerted by Defendant and her co-conspirator, Jay Black, is sufficient to negate H's consent, thereby causing the sex acts to constitute the rape and aggravated indecent assault of H by Jay Black. The Commonwealth supports its contentions by citing *Commonwealth v. Ables*, 590 A.2d 334 (1991) to support its conspiracy charges alleged in counts 1 through 4.

The basic determination to be made by the court is whether the Commonwealth's evidence is sufficient to allow a reasonable fact finder to conclude that the Defendant and Jay Black acted together to take advantage of H's cocaine addiction to forcibly compel her to engage Jay Black in

sexual acts in exchange for cocaine. We conclude that under the facts of this case H was not forcibly compelled to engage in sex for drugs. The preliminary hearing and October 4, 2007 evidence negates a prima facie showing of the conspiracy charges because H's actions demonstrate her valid consent to sex that was not the result of forcible compulsion. The Commonwealth's evidence at best is that Defendant facilitated H's sex with Jay Black in order to procure drugs to satisfy her own and H's addiction. This is sufficient evidence to support a prima facie finding that Defendant conspired with Jay Black to permit unlawful contact with a minor sexually exploited children, endangered the welfare of and corrupted H. There is not sufficient evidence to find a conspiracy to rape or commit aggravated indecent assault.

The elements of 18 Pa. C.S.A. § 901, conspiracy, are readily apparent from the evidence. Although there is no direct evidence as to the explicit nature of the agreement between the Defendant and Jay Black, the circumstances establish the implicit agreement. Defendant had called Jay Black on March 14, 2007 to arrange for cocaine to be delivered by him to herself and H. Defendant acted upon this agreement by taking H to Jay Black's residence and encouraging her to have sex and use cocaine and stood by while this was accomplished. The conspiracy became ongoing as Defendant permitted Jay Black to become a resident of her household even when she was aware of the on going sexual liaison between he and H, especially when coupled with Defendant getting the benefit of receiving cocaine from Jay Black in exchange her facilitation of H's sexual activities.

This evil agreement clearly supports a finding to charge under Count 2, conspiracy. Although there is sufficient circumstantial evidence to support a fact finder's determination of an

implicit understanding between Defendant and Jay Black that Defendant would act to facilitate Jay Black having sex with H for drugs and that part of the facilitating function was H's own cocaine addiction, it cannot be said that the object or result of the agreement was rape or aggravated indecent assault. The essential element of both rape under § 3121 in the Crimes Code and aggravated indecent assault under § 3125 of the Crimes Code at issue in this case is the aspect of forcible compulsion. See, 18 Pa.C.S. § 3121(a)(1), (2); 18 Pa.C.S. § 3125(2), (3). The Crimes Code defines forcible compulsion as including expressed or implied compulsion by use of physical, intellectual, moral, emotional, or psychological force. 18 Pa.C.S. §3101.

The Commonwealth has not directed our attention to any case in which furnishing of drugs for sex has been held to constitute forcible compulsion nor has our own independent survey of the cases disclosed such a holding. The Commonwealth's reliance upon *Ables*, supra, is misplaced. In *Ables* the Defendant was the adult uncle of the victim who had perpetrated a series of sexual encounters with the victim, starting when she was age 13. The encounters began in the Defendant's home while the victim was an overnight guest and continuing at various times and places when Defendant's uncle was in charge of the victim over a period of at least a year. *Ables*, supra, at 335, 336. The Defendant's actions in *Ables* included removing the victims clothing when she refused to and forcing her to perform oral sex. *Id.* At 330. The Defendant had also threatened the victim to not disclose the sex acts. *Ibid.* In *Ables*, our Superior Court had no difficulty in concluding the Defendant's abuse of the trust and confidence of the familial relationship coupled with his persistence and verbal statements overcame her resistance, intimidating and frustrating the victims will to resist. *Ables* held these actions amounted to forcible compulsion.

The facts of our case are clearly distinguishable from *Ables*. Nevertheless, the principles enunciated in *Ables* demonstrate the applicable law and must be applied in this case. It is clear as the Pennsylvania Supreme Court has stated,

[T]he degree of force involved in rape...is defined, not in terms of the physical injury to the victim, but in terms of the effect it has on the victim's volition. Accordingly, the force necessary to support convictions of rape...need only be such as to establish lack of consent and to induce the woman to submit without additional resistance...the degree of force required to constitute rape is relative and depends upon the facts and particular circumstances of the case.

Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986). (citation omitted), as cited in *Commonwealth v. Ables* 590 A.2d. 334 (Pa. Super. 1991). Of special significance to our facts is the *Ables* court quotation from *Rhodes* as follows:

In *Rhodes*, the court further opined,
'Such a determination is based on the totality of the circumstances that have been presented to the fact finder. Specific factors to be weighed in that determination would include the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incidence was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress. This list of possible factors is not exclusive.'

Id.

Rhodes and *Ables* involved an 8 year old and 13 year old victim, respectfully, both of whom were under a custodial/familial relationship with their perpetrator. Both cases included words and actions from which it could clearly be inferred that those young victims were intimidated or at least coerced into submission by virtue of the locations and manners in which the sexual assaults occurred.

In our case there is an argument that both Defendant as well as Jay Black had some position

of authority domination and custodial control over H. But this alone and by itself does not establish forcible compulsion. See, *Commonwealth v. Titus*, 556 A.2d 425 (Pa. Super 1989). From the overall testimony in this case, we are satisfied that there was not any adult in H's life that was in such a position of authority over her that she was dominated or controlled by them. Certainly, Mother is at fault for introducing H to the drug life, including cocaine usage. Nevertheless, H, once introduced to this lifestyle, actively pursued it. She often procured drugs for herself without her mother's knowledge, even to the extent of alienating Mother through her ability to so do.

It further appears from the overall testimony we have heard that H chose to have sex when and if she wanted to, whether or not drugs were involved. This later aspect of H's independence is also supported by testimony introduced at the October 4, 2007 hearing through the crack smoking friend of Defendant, Jasmine Ali Alauerio. She had testified that when the Defendant was with Ms. Alauerio smoking crack at the Econo Lodge, Defendant made inquiry of Ms. Alauerio if she would be willing to supply H with cocaine if H came to that location. Ms. Alauerio testified she did so and it appears from that testimony that H decided to journey to that location of her own volition and knowing that in doing so she would obtain cocaine.

There is no evidence of any words or other compulsion exerted upon H by her Mother. H's recognition that her Mother would likely have been angry if H had not had sex with Jay Black could be a circumstance tending to prove that H was intimidated or compelled to have sex with Jay Black against her will on that date. Yet under the totality of the circumstances, there is more evidence that H's actions were the result of her own will than the result of her mother's force or

use of her authority in a parent capacity. In *Commonwealth v. Titus*, 556 A.2d 425 (Pa. 1989), evidence was insufficient to convict appellant of rape of his 13 year old daughter where the only evidence of forcible compulsion was the parent-child relationship. Furthermore in our case, there is evidence H did not treat her mother as an authority figure who dictated her decisions.

Even though Defendant was H's mother and an authority figure, evidence was presented to show that H was independent and did not obey her mother, or any other authority figure, concerning such things as school attendance, her whereabouts freely coming and going from her home, and choosing her own way in life, including her sexual partners.

In our case there is no indication of H being intimidated by Defendant nor by Jay Black. The Commonwealth's evidence only establishes that H had consensual sex with Jay Black.

There is no evidence to support a finding that Mother had previously introduced H to using cocaine in order to have H start to submit to sexual demands from Mother's various drug suppliers.

There is also no specific evidence that Mother used any overt words or actions which might be regarded as forcible compulsion of H to use drugs or to submit to sex for drugs. Rather, what Mother did was to facilitate the opportunity for H to do so both for Mother's drug addiction satisfactions as well as H's own drug addiction satisfactions.

Altogether in this case, there is insufficient evidence to support a finding of conspiracy to commit rape and conspiracy to commit aggravated indecent assault. There is evidence to support a finding that the sex act was a result of Defendant and Jay Black implicitly agreeing to take advantage of H's addiction to exchange sex for drugs. Even if engaging in the sex acts was motivated by H's addiction, there is no evidence of the exertion of forcible compulsion upon H to

engage in sex by her mother or Jay Black.

Although a minor, H was not of so young an age that the sex act itself would constitute rape (victim less than 13 years) nor aggravated indecent assault (victim less than 16 years). H is of an age and self-determination that she could in many ways be regarded as emancipated. *C.F. Trosky v. Mann*, 581 A.2d 177 (Pa. Super. 1990). We also recognize that H's drug addiction no doubt has had a deleterious effect upon her mental well being, impacted the stability of the relationship with her mother and has contributed to her reprehensible promiscuous sexual conduct. See, *Ibid*. It has not, however, made her consent ineffectual.

The evidence of Defendant's actions does support a finding of conspiracy to commit unlawful contact with a minor.

A person commits unlawful contact with a minor under § 6318 if the person "is intentionally in contact with a minor...for the purpose of engaging in an activity prohibited under any of the following..."

(6) Sexual exploitation of children as defined in § 6320 (relating to sexual exploitation of children). 18 Pa.C.S. § 6318(a).

"Contacts" for purposes of § 6318 is defined as "[d]irect or indirect contact or communication by any means... including contact or communication in person or thorough an agency or agency..." 18 Pa.C.S. § 6318(c).

A person commits sexual exploitation of a child under § 6320 if he "procures for another person a child under 18 years of age for the purpose of sexual exploitation." 18 Pa.C.S. § 6320(a).

The word "procure" under this section is defined as "to obtain or make available for sexual

exploitation.” § 6320(c). “Sexual exploitation” is defined as “actual or simulated sexual activity or nudity arranged for the purpose of sexual stimulation or gratification of any person.” § 6320(c).

Defendant intentionally introduced her daughter, H, to Jay Black for the purpose of engaging in activity prohibited by § 6320, relating to sexual exploitation of children. H was 16 years old on the date in question and thus a minor for purposes of § 6318 and a child for purposes of § 6320. Defendant was in direct communication with H under the definition of § 6318 because she drove H to Jay Black’s house and personally communicated to H the purpose of the visit, which was to have sex in order to obtain crack cocaine. H testified at the preliminary hearing that she had heard her mother make prior arrangements with Jay Black over the telephone to come over to his house with H so that they could obtain crack and “hang out”, meaning have sex. Defendant personally communicated this purpose to H by telling H not to be shy, not to mention that Defendant was her mother, and to act mature around Jay. Upon arrival at Jay Black’s, both Defendant and H took off their clothes and discussed who was going to have sex with him first.

Defendant thus “procured” H for the purpose of sexual exploitation under § 6320, especially by the action of driving H to Jay Black’s house with this pre-arranged transaction in mind which made H “available” to Jay Black for sexual exploitation under the meaning of § 6320. Accordingly, Defendant, KS’s actions on March 14, 2007 in regard to her daughter H are sufficient to satisfy the elements of § 6318, conspiracy to commit unlawful contact with a minor.

Clearly, Defendant participated in the other criminal conduct charged against her. Defendant used H’s drug addiction to facilitating the sex for drugs transactions. H would procure drugs from Jay Black without her mother’s knowledge, keeping the drugs for herself.

The Commonwealth has provided evidence of the following:

(A) Defendant exposed and facilitated H's drug abuse and sexual relationship with Jay Black. Defendant allowed Jay Black to reside at the residence where he continued to supply drugs for she and H. As H testified, her mother "got her started" on her crack cocaine habit by giving her the drugs to try for the first time; Defendant smoked crack with her daughter. These acts establish the non-conspiracy charges;

(B) Defendant's facilitation of H's drug use by introducing her to drugs, introduction to Jay Black as someone from whom H and Mother could obtain drugs for sex, and failure to remove Jay Black from her home when the sexual liaison between H and Jay Black was apparent, certainly constitutes sexual exploitation of children, endangering welfare of children, and corruption of minors. This evidence also establishes a prima facie case for the charges of conspiracy to deliver a controlled substance, cocaine. Furthermore, the evidence would have established a conspiracy to have unlawful contact with children, endangering welfare of children, sexual exploitation of children and corruption of minors.

ORDER

Defendant's Motion of Habeas Corpus filed August 1, 2007 is granted as pertaining to Count 1, conspiracy to commit rape and Count 3, conspiracy to commit aggravated indecent assault is granted and those charges are dismissed. Otherwise, the Motion is denied.

BY THE COURT,

William S. Kieser, Judge

cc: William Miele, Esquire (PD)
District Attorney
Judges
Gary L. Weber, Esquire (Lycoming Reporter)