IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
	:	
v.	:	**No. 615-2007**
	:	**CRIMINAL**
JAVIER CRUZ-ECHEVARRIA,	:	
Defendant	:	

OPINION AND ORDER

Before this Honorable Court is the Defendant's Omnibus Pre-Trial Motion filed November 5, 2007. A hearing on the Motion was held on January 24, 2008. At the time of the hearing, some of the issues raised in the Omnibus Motion had been resolved, or were agreed to be handled at a later date as outlined in the Order following this Opinion. The main issues remaining before the Court at this time will be addressed in the order in which they were raised in the motion.

Background

The following is a summary of the facts presented at the Preliminary Hearing on May 15, 2007, the Suppression Hearing in the Durrant (Co-Defendant) case on October 10, 2007 and October 24, 2007[1], and the Suppression Hearing in this case on January 24, 2008. On March 31, 2007 at approximately 1:56 a.m., Officer Thomas Bortz (Bortz) and his partner, Officer Jimmie Rodgers (Rodgers), were patrolling the west end of the City of Williamsport in a marked patrol unit. Bortz was driving with the windows down on the patrol car, going westbound on Park Ave towards a stop sign at High Street, at the northeast corner of the business Textron Lycoming

[1] The Commonwealth and the Defense agreed that whatever was considered in the Durrant case could be considered in this case for purposes of these Motions.

grounds, when he heard a shotgun blast, and then a few seconds later a second shotgun blast. Bortz then flipped out the lights on his patrol unit and radioed Lycoming County Control that there was a shotgun blast northwest from him in the small unnamed alley.[2] He also testified that the unnamed alley is consistent with where he heard the shots, that the shots were close enough to him, and that he wondered if they were shooting at him.[3]

Bortz testified that at the time of the shotgun blasts, there were no dogs barking, he saw nothing, no people running, no cars, and then all of the sudden a blue Mercury Mountaineer SUV, came out of the unnamed alley. He explained that the vehicle came out of the alley within approximately ten seconds of the second shotgun blast. Upon exiting the unnamed alley, the vehicle turned east, coming in front of his patrol unit, at which time, Bortz flipped on the headlights, and saw two black males looking directly south at his patrol unit. The vehicle passed in front of the patrol unit and Bortz began to follow it. Bortz testified that at that time he simply followed the vehicle, as City Police do not effectuate traffic stops at that time of night, until a second police unit arrives. He followed the vehicle as it turned south on Krouse Ave, then stopped before turning east onto Park Ave, then went past Wildwood Boulevard to Cemetery St.,[4] at the stop sign the vehicle turned south down to Memorial Ave and then turned east, traveling to the Fifth Ave intersection. Once the vehicle got to Fifth Ave, two units arrived, a Pennsylvania College of Technology patrol unit and a city patrol unit. At that time, Bortz activated the overhead lighting and siren to effectuate a traffic stop. They continued to follow the vehicle, while it traveled from the Memorial Ave and Fifth Ave intersection, and then turned

---

[2] Bortz testified that the unnamed alley was overgrown with weeds, the pavement was rough, and was only about the width of an automobile. Additionally, he stated that the unnamed alley extends from Dale Place to High Street.

[3] Bortz stated that he believed the shots were close enough to be only 50 yards away.

[4] Bortz testified that he activated the in-car camera at some point around this area.

north onto Third Ave, where the driver indicated he was going to turn into Waltz Place.[5] Bortz followed the vehicle into Waltz Place where he turned the siren off and over the loud speaker, ordered the driver to "stop the vehicle [and] pull to the side of the street." N.T. 10/10/07, p. 33. Bortz testified that the vehicle did not stop until it got to Waltz Place and Second Ave. He also explained that the vehicle could have pulled over on any of the streets it traveled on, however, it continued on even with the patrol unit indicating by its lights and audible signal the vehicle should pull over.

Bortz described that once the vehicle came to a stop, the passenger side door opened, the barrel of a shotgun came out along with the passenger, who was dressed in black. Bortz explained that the passenger quickly got out, looked towards the Police, and ran east, away from the officers. As the passenger was running, there is a place in the street for the water to run down, and at that time, "it looked like . . . the ground went out from under him and the – shotgun spilled out along with like these blue gloves . . .." Id. at 35. Bortz testified that Officers Jody Miller and Jeremy Brown (Brown) were in the second unit back, and at that time, Brown ran right past him, to give foot chase to the passenger. Bortz stated that he stayed trained on the driver, "trained meaning I have my duty pistol drawn on the driver." Id. Bortz testified that he and Rodgers approached the vehicle and checked inside for individuals. As he approached the driver's side, the window was up, and at this point Bortz stated his face was about 16 inches away from the window, which "had this substance on it, the truck was covered with dust, but right away I was met with this pinkish foreign substance, didn't make any connection as to what

---

[5] Bortz testified that Waltz Place is a narrow and dark alley. He also described that the vehicle was traveling at 10 to 15 miles per hour at most and did not violate any traffic laws.

it was at the time,[6] made contact with the driver and ordered him not to move." N.T. 5/15/07, p.8.

Bortz testified that when he approached the vehicle, the driver's hands were raised and he saw a cell phone in one of them. Bortz further described that as he opened the door, the driver gently slid his leg out and Bortz slid the leg back in with his hands. He then ordered the driver to put his forehead on the steering wheel, at which time the driver dropped the cell phone into his lap. Bortz handcuffed the driver and took possession of the cell phone. Bortz then "led [the driver] from the vehicle and back to [the] patrol unit where he was patted down and taken into custody." Id. at 9. Bortz identified the driver as the Defendant, Javier Cruz-Echeverria.

Bortz also testified as to his training and experience prior to the start of his service in January 2003 with the Williamsport Bureau of Police. Bortz served in the United States Navy from 1988 to 1994, where he was a fire control man, which meant that he worked with weapon systems; it is "the directional radar and directional systems for missiles and guns." N.T. 10/10/07, p.22. He related that his duties involved the firing of guns and ascertaining distance to a particular target. At some point after his service with the Navy, he was employed by Textron Lycoming as a Security Officer for six years. While at Textron, Bortz became very familiar with the area around the plant and the various sounds originating from the area. He also testified that through that employment, he became very familiar with the unnamed alley where Sawyer was found.

Officer Brian Aldinger (Aldinger) of the Williamsport Bureau of Police testified at the Preliminary Hearing. Aldinger testified that "sometime shortly after 2:00 [a.m. he] was sent to

---

[6] Bortz testified that eventually he found out that the matter was "flesh-type material, human brain matter." N.T. 5/15/07, p.8.

the area of the 1500 block of High Street." N.T. 5/15/07, p. 35. He testified that when he arrived he "parked in the 1500 block of Louisa and met other officers there." Id. Aldinger testified that he walked with the other officers to the alley and walked "probably 200 feet into the alley towards the east and observed a white Dodge van parked in the middle of the alley." Id. He further testified that he walked around the south side of the van before proceeding to the front of the vehicle and walked another 20 or 30 feet when he "observed a body of a black male laying in the alley face up." Id. Aldinger testified that he saw "[r]eal traumatic head trauma to the side of his face especially the side of his head, back of his head. There was shotgun – spent shotgun casing laying right about his belt buckle." Id. He also testified that there was "[a] second shell casing, spent shotgun casing, . . . found probably seven, eight feet south of him on the south side of the alley." Id. at 36.

Charles Kiessling, Jr. (Kiessling), County Coroner testified at the Preliminary Hearing that when he responded to the unnamed alley he found the deceased body of Eric Sawyer. Kiessling testified that he secured the scene, which included identifying the decedent, and checking his pockets where he "found various cards held together by a rubber band . . . and also a cell phone . . .." Id. at 40. Kiessling also testified that an autopsy was conducted by a pathologist, Dr. Sara Funke. He explained that the autopsy report indicated the cause of death "is shotgun wounds, two to the head." Id. at 41. The report also indicated the "manner of death is homicide." Id.

Agent Leonard Dincher (Dincher) testified at the Preliminary Hearing that he was contacted at home on March 31, 2007 around 2:15 or 2:30 a.m. He would have responded that evening and had an opportunity to observe both crime scenes: where the victim's body was found and where the vehicle had stopped. Dincher testified that he first went to the 1500 block of

High Street where he saw a white Dodge Caravan, Mr. Sawyer's body, and observed that "[t]he left side of Mr. Sawyer's face was gone." N.T. 5/15/07 at 46. Dincher "observed two shotgun shell casings, spent casings." Id. He testified that the caliber was a 12 gauge. Next, Dincher explained that he went to Second Ave and Waltz Place. He "observed a blue Mountaineer, there was matter on it, I described it as spatter. In the middle of the roadway there was a 12 gauge." Id. at 47. Dincher testified further that the shotgun was sawed off. Dincher then departed for the police station where he interviewed Co-Defendant (Durrant). Dincher testified that "Mr. Durrant stated that he had called Mr. Sawyer, had Mr. Sawyer come out and meet him[,] and . . . told Mr. Sawyer to bring heroin." Id. at 49. "Mr. Durrant stated [to Dincher] that he laid in wait with a shotgun. Upon Mr. Sawyer's arrival he subsequently shot Mr. Sawyer two times with a shotgun and left the scene in the SUV, in the Mountaineer." Id.

Dincher testified that he also reviewed the cell phone records with respect to the cell phones obtained from the various parties. He was able to determine the cell phone numbers of the cell phones that were obtained from 1) the victim's body, 2) the phone found on the ground when in pursuit of Co-Defendant, and 3) from the lap of Defendant. Dincher described the calls between Co-Defendant, Defendant, and the victim, as the phone records indicated.

> The phone that was found on Mr. Cruz called the phone that was found on Mr. Sawyer on 3/30[/]2007 [at] 10:35 p.m. The phone found on Mr. Sawyer called the one found on Mr. Cruz on 3/30[/]2007 at 11:38 p.m. The phone found on Mr. Cruz called the phone found on Mr. Sawyer on 3/31[/]2007 at 1:26 a.m. The phone found on Mr. Cruz calls the phone found on Mr. Sawyer 3/31[/]2007 at 1:27 a.m. The phone found on Mr. Cruz calls the phone found on Mr. Sawyer on 3/31[/]2007 at 1:45 a.m. The phone found on Mr. Sawyer called the phone found on Mr. Cruz on 3/31/[20]07 at 1:49 a.m. The phone found on Mr. Cruz calls the phone found in – proximity of Mr. Durrant during the foot pursuit on 3/31/[20]07 at 1:53 a.m.

Id. at 51-2.

Discussion

Motion for Issuance of Writ of Habeas Corpus

In Defendant's Motion for Issuance of Writ of Habeas Corpus he asks the Court to dismiss both the Criminal Homicide count and the Criminal Conspiracy count against him. Defendant alleges that the Commonwealth failed to present a prima facie case that Defendant intentionally, knowingly, recklessly, or negligently caused the death of Eric Sawyer. Defendant also alleges that the Commonwealth failed to present a prima facie case that Defendant and another individual entered into an agreement to commit a crime, any solicitation to commit a crime, or any agreement to aid in the planning or commission of a crime.

At the preliminary hearing the Commonwealth must establish a prima facie case, which requires sufficient evidence that a crime has been committed and that the accused is the one who probably committed it. Commonwealth v. Mullen, 333 A.2d 755, 757 (Pa. 1975). See also Commonwealth v. Prado, 393 A.2d 8 (Pa. 1978). The evidence must demonstrate the existence of each of the material elements of the crimes charged and legally competent evidence to demonstrate the existence of the facts which connect the accused to the crime. See Commonwealth v. Wodjak, 466 A.2d 991, 996-97 (Pa. 1983). Absence of any element of the crimes charged is fatal and the charges should be dismissed. See Commonwealth v. Austin, 575 A.2d 141, 143 (Pa. Super. 1990). A person commits the crime of Criminal Homicide and violates 18 Pa. C.S. § 2501 (a) "if he intentionally, knowingly, recklessly or negligently causes the death of another human being." According to the Pennsylvania Supreme Court,

> [t]he jury may convict the defendant as an accomplice so long as the facts adequately support the conclusion that he or she aided, agreed to aid, or attempted to aid the principal in planning or committing the offense, and acted with the intention to promote or facilitate the offense. The amount of aid 'need not be substantial so long as it was offered to the principal to assist him in committing or attempting to commit the

> crime.' However, simply knowing about the crime or being present at the scene is not enough.

Commonwealth v. Markman, 916 A.2d 586, 598 (Pa. 2007) (quoting Commonwealth v. Murphy, 844 A.2d 1228, 1234 (Pa. 2004)). A person violates 18 Pa. C.S. § 903(a)(1) and

> is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime[.]

The Court finds that sufficient evidence was presented to establish a prima facie case of Criminal Homicide and Criminal Conspiracy. At the Preliminary Hearing, Bortz testified that on March 31, 2007, he heard two shotgun blasts in the area of the unnamed alley and that within ten seconds the vehicle operated by Defendant was observed leaving the unnamed alley. The vehicle did not stop after numerous attempts with the lights and sirens and after a traffic stop, Co-Defendant exited the vehicle with a shotgun. When Bortz approached the driver's side, the window was up, at which time he noticed a substance on it, which was later identified as brain matter of Sawyer. Bortz then found a cell phone on Defendant. Co-Defendant (Durrant), this Defendant, and the victim exchanged numerous phone calls throughout the night of March 30, 2007 and early morning hours of March 31, 2007. This Court finds from this evidence that the Defendant and Co-Defendant were communicating with each other and the victim shortly before travelling to the unnamed alley where Sawyer was killed. There is sufficient circumstantial proof that the Defendant knew what was happening and was an active participant in the events of that evening.

Motion to Suppress Evidence Discovered as a Result of the Stoppage of the Motor Vehicle

Defendant alleges that the police lacked a sufficient legal basis for effectuating a stop of the vehicle in which he was operating. Defendant argues that Bortz acknowledged that he would

not have known if someone else left the area of the unnamed alley in a vehicle or by foot and that the city does not have areas designated as "high-crime". Further, Defendant argues that Bortz had no information other than hearing the shotgun blasts and observing the Defendant's vehicle leaving the area where he heard the shotgun blasts. In opposition, the Commonwealth argues that the Officers had reasonable suspicion based on the Officer hearing two blasts, which he specifically identified as shotgun blasts and then observing the Defendant's vehicle leaving the precise area where the shots were heard. Additionally, the Commonwealth argues that the Defendant was fleeing and eluding as he did not stop for several blocks after the Officers put their sirens and lights on.

According to the Pennsylvania Supreme Court, '"where a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible.'" Commonwealth v. Bryant, 866 A.2d 1143, 1145 (Pa. Super. Ct. 2005) (quoting Commonwealth v. DeWitt, 608 A.2d 1030, 1031 (Pa. 1992)).

According to the Pennsylvania Superior Court, "the Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." Bryant, 866 A.2d at 1146 (citing Commonwealth v. Dennis, 433 A.2d 79, 82 (Pa. Super. 1981)). "On the contrary, Terry and its progeny recognize that the essence of good police work is for the police to adopt an intermediate response where they observe a suspect engaging in 'unusual and suspicious behavior.'" Bryant, 866 A.2d at 1146 (citing Dennis, 433 A.2d at 81 n.6, 82).

The analysis used in determining whether reasonable suspicion exists for an investigatory stop, is the same under both Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution. See Commonwealth v. Lynch, 773 A.2d 1240,

1244 (Pa. Super. Ct. 2001). The standard is whether the officers "'observed unusual and suspicious conduct by such person which may reasonably lead [them] to believe that criminal activity is afoot.'" Dennis, 433 A.2d at 81 n.5, (quoting Commonwealth v. Galaydna, 375 A.2d 69, 71 (Pa. Super. Ct. 1977)); See also Lynch, 773 A.2d at 1245. According to the Pennsylvania Superior Court,

> it cannot be said that whenever police draw weapons the resulting seizure must be deemed an arrest rather than a stop and thus may be upheld only if full probable cause was then present. The courts have rather consistently upheld such police conduct when the circumstances (e. g., suspicion that the occupants of a car are the persons who just committed an armed robbery) indicated that it was a reasonable precaution for the protection and safety of the investigating officers.

Dennis, 433 A.2d at 81 n.5 (quoting Galaydna, 375 A.2d at 71 (Pa. Super. Ct. 1977)); See also Commonwealth v. Ferraro, 352 A.2d 548 (Pa. 1975) (Court did not believe that the police officer by withdrawing "his service revolver while directing appellant to alight from the Lincoln turned the investigatory stop into an arrest.").

While the Defendant argues that some of the factors needed to find reasonable suspicion/probable cause are not present here, this Court finds that argument without merit. The Court is satisfied that the facts and circumstances present in this case gave the Officers reasonable suspicion to conduct the traffic stop. Both the lateness of the hour and sounds heard by Bortz and Rodgers coming from the unnamed alley supports a finding of reasonable suspicion. The Court in Dennis, considered "the lateness of the hour" as one of the many factors in finding the presence of reasonable suspicion. 433 A.2d at 82. In Bryant, which is similar to our case, the Officers were on routine patrol "when they heard six 'popping' sounds that [the] Officer . . . concluded were gunshots." 866 A.2d at 1145. Moments after the Officers observed three males running from the general vicinity of where the shots originated. Id. The Court in

Bryant, found that the Officers had reasonable suspicion to stop the Appellee as the Officer observed the Appellee running on a populated street from the area where the gunshots originated and was in a high-crime area. Id. Here, Bortz testified that shortly before 2 a.m. he heard two shotgun blasts coming from the direction of the unnamed alley; he saw nothing, no people running, heard no dogs barking, saw no cars, and then all of the sudden a blue Mercury Mountaineer SUV, came out of the same alley. Although, the Defendant was not found on a populated street in a high-crime area, the vehicle's subsequent and almost immediate exit from the area of the shotgun blasts was suspicious. The vehicle's subsequent failure to comply with the Officer's request to pull over provided additional facts to justify the reasonable suspicion to effectuate a traffic stop. The Pennsylvania Superior Court has determined that

> "[e]ven when a police officer's initial stop or pursuit of an individual is not based upon either a reasonable suspicion of crime or probable cause, subsequent actions by the detainee during the encounter may be the basis for a lawful arrest and the subsequent denial of a suppression motion regarding evidence seized after the arrest.

Commonwealth v. Hall, 929 A.2d 1202, 1207 (Pa. Super. Ct. 2007), (citing Lynch, 773 A.2d at 1246-48). Moreover, Co-Defendant's subsequent abandonment of the shotgun upon exiting the vehicle, gave police probable cause to arrest the Defendant. Therefore, the Court finds that the Commonwealth has met its burden, as such the Defendant's Motion to Suppress is denied.

Motion to Suppress the Fruits of the Search of a 1999 Mercury Mountaineer

The Defendant alleges that the search warrant issued for the search of the 1999 Mercury Mountaineer was issued in violation of Pa. R. Crim. P. 203 in that the warrant was issued without probable cause. Specifically, the Defendant alleges that while the search warrant application asks for authority to search and seize the listed items from inside the listed vehicle,

there is no showing of probable cause to believe any such items would be located in the vehicle. The Court disagrees.

Pa. R. Crim. P. 203 states in relevant part that:

> (B) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.
>
> (D) At any hearing on a motion for the return or suppression of evidence, or for suppression of the fruits of evidence, obtained pursuant to a search warrant, no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (B).

Courts should not "take an overly technical approach on evaluating the information supplied to the magistrate in a search warrant application but should evaluate it in a common sense and practical manner." Commonwealth v. Gannon, 454 A.2d 561, 564 (Pa. Super. Ct. 1982) (and cases cited therein). The Pennsylvania Supreme Court states that the determination in to "whether a warrant was supported by probable cause, . . . is confined to the four corners of the affidavit." Commonwealth v. Coleman, 830 A.2d 554, 560 (Pa. 2003) (citing Commonwealth v. Stamps, 427 A.2d 141, 143 (Pa. 1981)). Pennsylvania Courts employ the totality of the circumstances analysis to determine whether a search warrant was sufficiently supported by probable cause. See Commonwealth v. Tiffany, 926 A.2d 503,506 (Pa. Super. Ct. 2007); Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985) (adopting the Illinois v. Gates, 462 U.S. 213 (1983) totality of circumstances test). According to the Superior Court,

> [t]he 'totality of the circumstances' test has been summarized as follows: The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, that there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Tiffany, 926 A.2d at 506.

After a review of the search warrant, the Court is satisfied that there was sufficient information for the Magisterial District Judge to conclude that a search should be conducted of the vehicle owned by the Defendant. The affidavit of probable cause sets forth the facts and circumstances of that evening, which included evidence that the Defendant's vehicle was used to drive Co-Defendant to and from the killing. Additionally, the application stated that "the front seat passenger occupant of the vehicle exited the vehicle and dropped a Remington shotgun, pump action, and a pair of gloves." SW-21-07. Therefore, considering the totality of the circumstances, it is reasonable to conclude that the listed items could be found in the vehicle, as such, the Motion to Suppress is denied.

Motion to Suppress the Cell Phone Seized from the 1999 Mercury Mountaineer

The Defendant alleges that the seizure of the cell phone was improper because a warrant was not properly issued for its seizure. Defendant also argues that the seizure of the cell phone incident to his arrest was improper as the cell phone was not illegal, not contraband, and not carried on his person. In opposition, the Commonwealth argues that the police had probable cause to believe the cell phone was evidence in that it was being used in the commission of the offense, because the Defendant was holding it at the time the Officers approached the vehicle. Additionally, the Commonwealth argues that the police may seize any items found on the person at the time of a lawful arrest. The Court has already determined that the Officers had probable cause to arrest the Defendant. Therefore, the Court need only address whether the cell phone was seized incident to a valid arrest.

According to the United States Supreme Court "'it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.'" United States v. Robinson, 414 U.S. 218, 226 (1973) (quoting Chimel v. California, 395 U.S. 752 (1969)). Further, the Supreme Court of Pennsylvania states that "officers '. . . when making a lawful arrest with or without a search warrant [may] discover and seize any evidence, articles or fruits of crime found upon the prisoner or upon the premises under his control at the time of his lawful arrest . . .' Commonwealth v. Aljoe, 216 A.2d 50, 53 (Pa. 1966) (quoting Commonwealth v. Gockley, 192 A.2d 693, 699 (1963)).

At both the Preliminary Hearing and the Suppression Hearing, Bortz testified that the cell phone was seized incident to the arrest of the Defendant. Bortz testified that when he approached the vehicle, the Defendant was holding the cell phone in his hand. He further testified that the Defendant dropped the phone into his lap when ordered to place his hands behind his back. According to this testimony, the cell phone was found in Defendant's control, either in his hand or on Defendant's lap and in plain view. The Court agrees with the Commonwealth that the police had probable cause to believe the cell phone was being used because the Defendant was holding it, and as such is evidence. Therefore, the cell phone was properly seized incident to Defendant's arrest, warranting the denial of Defendant's Motion to Suppress.

Motion to Suppress the Seizure of Blood and Hair from the Defendant

The Defendant alleges that the search warrant issued for the seizure of blood and hair samples from the Defendant is devoid of sufficient probable cause and therefore, invalid. The Commonwealth argues the warrant was valid and pointed to the last paragraph of the affidavit of probable cause which states:

> BASED ON THIS AGENTS OBSERVATION AT BOTH CRIMES SCENES, SEEING THE BODY OF ERIC D. SAWYER WHO WAS SHOT WITH A SHOTGUN AND THEN OBSERVING HUMAN MATTER ON THE MERCURY MOUNTAINEER IT IS PROBABLE THAT THERE WAS A TRANSFER OF HUMAN MATTER FROM SAWYER . . . TO JAVIER CRUZ-ECHEVARRIA. IN ORDER TO IDENTIFY THE TRANSFER OF HUMAN MATTER OR BLOOD OR HAIR, AND TO BE ABLE TO COMPARE THE SAMPLES THIS AGENT REQUESTS A SEARCH WARRANT FOR . . . JAVIER CRUZ-ECHEVERRIA.

SW-45-07. The Commonwealth argues that the testing labs do not have enough matter to compare and therefore need samples from all known individuals to determine who is a suspect or to rule out suspects.

Using the same “totality of the circumstances” test, the Court is satisfied that there was sufficient information for the Magisterial District Judge to conclude that blood and hair samples should be seized from the Defendant in order to compare the samples and identify foreign substances which may be found on the Defendant. Therefore, the Defendant’s Motion to Suppress the Seizure of Blood and Hair from the Defendant will be denied.

Motion to Suppress the Seizure of Internal Information from a Motorola Cell Phone

The Defendant argues that the cell phone was unconstitutionally and illegally seized and that the search warrant for the seizure of the internal information from the cell phone is without probable cause. Specifically, the Defendant states that Dincher failed to disclose in his affidavit of probable cause that Co-Defendant confessed to having placed the phone call to Mr. Sawyer and that a cell phone was recovered from Co-Defendant. The Commonwealth asserts that it was reasonable to conclude that one or both cell phones could be used in setting up the meeting. Additionally, the Commonwealth argues that while the search warrant states that Co-Defendant said a phone call was made to Mr. Sawyer, there is no indication that the phone call was made on Co-Defendant’s phone. As the Court has already determined that the Officers had probable cause

to arrest the Defendant and that the cell phone was seized incident to a valid arrest, the Court need only address whether the warrant for the seizure of internal information from the cell phone is valid.

After review of this particular search warrant, the Court is satisfied that there was sufficient information contained with the warrant for the Magisterial District Judge to conclude that Defendant's cell phone could be used in setting up the meeting location. The affidavit specifically states that a cell phone was taken from Defendant's lap and that a phone call was made to Mr. Sawyer to set up a meeting location. Therefore, as the Court finds this evidence sufficient, the Defendant's Motion to Suppress the Seizure of Internal Information from a Motorola Cell Phone is denied.

Motion to Dismiss/Brady Violation

Lastly, the Defendant alleges that the Commonwealth suppressed exculpatory evidence in violation of the United States Supreme Court decision in Brady.[7] Specifically the Defendant alleges that prior to the preliminary hearing the Commonwealth suppressed the content of Co-Defendant's confession. In his confession, Co-Defendant made numerous statements that Defendant had no knowledge and was not involved in the killing of Mr. Sawyer. The Defendant alleges that by withholding this evidence the Commonwealth violated Brady which constitutes prosecutorial misconduct, warranting a dismissal of the charges against Defendant. The Commonwealth argues that it did not believe this was Brady material, because it is not material to guilt or innocence. Further, The Commonwealth argues that even if the evidence was Brady material, the Defendant was not prejudiced by the lack of disclosure at that stage of the proceedings.

[7] Brady v. Maryland, 373 U.S. 83 (1963).

The United States Supreme Court in Brady held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The three elements of a Brady claim are (1) the evidence must be favorable to the accused either because it is exculpatory or because it impeaches; (2) the evidence was either willfully or inadvertently suppressed by the state; and (3) prejudice inured to the Defendant. See Strickler v. Greene, 527 U.S. 263, 281-282 (1999) and Commonwealth v. Burke, 781 A.2d 1136, 1141 (Pa. 2001). The Prosecutor's duty to learn of favorable evidence extends to all those acting on the government's behalf. See Youngblood v. West Virginia, 547 U.S. 867 (2006) and Kyles v. Whitley, 514 U.S. 419, 437 (1995). Further, evidence is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" Strickler, 527 U.S. at 280 (quoting United States v. Bagley, 473 U.S. 667, 682 (opinion of Blackmun, J.)).

While the statement by Co-Defendant that the Defendant was not involved and did not know anything, was not disclosed to the Defense prior to the preliminary hearing, the Court finds the Commonwealth's lack of disclosure to be without prejudice. The Court finds the outcome of the proceeding would not have been different as it believes the Commonwealth would still have established a prima facie case. Moreover, the Court is unable to find any authority which requires the Commonwealth to disclose evidence materially favorable to accused prior to the Preliminary Hearing. Therefore, the Motion to Dismiss/Brady Violation shall be denied.

ORDER

AND NOW, this ____day of March 2008, based on the foregoing Opinion, it is ORDERED and DIRECTED as follows:

I. The Court does not need to address the Defendant's Motion to Compel Discovery, as Counsel has indicated that the items requested are being provided as they become available. Defense Counsel's record is preserved as to this issue.

II. Defendant's Motion for Issuance of Writ of Habeas Corpus is DENIED.

III. Defendant's Motion to Suppress Evidence Discovered as a Result of the Stoppage of the Motor Vehicle is DENIED.

IV. Defendant's Motion to Suppress the Fruits of the Search of a 1999 Mercury Mountaineer is DENIED.

V. Defendant's Motion to Suppress the Cell Phone Seized from the 1999 Mercury Mountaineer is DENIED.

VI. As stipulated to by the parties, the Commonwealth will not present any evidence from the search of 1450 Kaiser Avenue, South Williamsport, PA as no evidence was obtained.

VII. As stipulated to by the parties, the Commonwealth will not use in its case-in-chief Defendant's oral statement given to Agent Kontz after Defendant requested a Lawyer.

VIII. Defendant's Motion to Suppress the Seizure of Blood and Hair from Defendant is DENIED.

IX. Defendant's Motion to Suppress the Seizure of Internal Information from a Motorola Cell Phone is DENIED.

X. As stipulated to by the parties, the Commonwealth will not in its case-in-chief use anything seized from the 1999 Mercury Mountaineer while it was stopped at Second Avenue and Waltz Place, other than the cell phone, Defendant, Defendant's clothes, and car keys.

XI. Defendant's Motion to Dismiss/Brady Violation is DENIED.

XII. The Court does not need to address the Defendant's Motion for Change of Venue at this time. Defense Counsel's record is preserved as to this issue.

XIII. The Court does not need to address the Defendant's Motion for Individual Voir Dire at this time. Defense Counsel's record is protected as to this issue.

XIV. The Court does not need to address the Defendant's Motion for Supplemental Jury Questionnaire at this time. Defense Counsel's record is protected as to this issue.

XV. The Defendant's Motion to Exclude Photographs is DEFERRED until the time of trial. The Commonwealth shall provide copies of the photographs (similar size and manner of presentation) that they intend to introduce at trial to the Defense counsel for review on the date of jury selection for this case.

By the Court,

Nancy L. Butts, Judge

cc. DA (KO)
Ronald C. Travis, Esq.
Hon. Nancy L. Butts
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber (LLA)