IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYSLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CR #1278-2008
	:	
vs.	:	
	:	
STEVEN BLAGMAN,	:	
	:	COMMONWEALTH'S
Defendant	:	MOTION IN LIMINE

OPINION AND ORDER

Defendant is charged with Possession with Intent to Deliver a Controlled Substance and Possession of Drug Paraphernalia.

In simple form the case revolves around a vehicle stop made by the Pennsylvania State Police at 4:05 p.m. on July 2nd. The vehicle stop was made for a traffic violation as the State Police recognized that the driver, a Mr. Pearsall, was driving while his operating privilege was suspended.

Defendant was the front-seat passenger in the vehicle. While talking to the driver, the police noticed that Defendant attempted to place something beside him by the center arm rest. The trooper asked Defendant to exit the vehicle. The trooper then saw a plastic baggie with white powder and chunks.

The officer realized the white powder and chunks were probably cocaine and arrested Defendant.[1] The trooper then conducted a pat down of Defendant. Defendant kicked off his sneaker from his foot, and the sneaker contained crack cocaine. The trooper then subdued Defendant and placed him on the ground.

[1] The substances field-tested positive for cocaine.

A search of Defendant revealed $450.00 in assorted currency. Mr. Pearsall told the trooper that Defendant had a child with his daughter and had asked for a ride, but that he did not know that he had drugs on his person or in the vehicle.

Defendant was placed in the Lycoming County Prison on a parole detainer. The State Police had also seized a cell phone from Defendant when they arrested him. While at the barracks the cell phone rang and Trooper Tyson Havens answered the call. The subject on the line asked for S, who was later identified as Defendant. Trooper Havens said he was not S, but he was T and he asked what the caller wanted. The caller indicated he wanted to purchase a "heavy ball," meaning crack cocaine. The trooper made arrangements to meet the caller at the rear of the Shamrock bar. The subject gave the trooper a detailed description of himself.

The trooper went to the agreed location and saw the subject. They then placed the subject under arrest. The subject was in possession of $180.00. The subject, after being Mirandized, agreed to talk with the trooper.

The subject, Lonnie Hoey, related that he was there to purchase crack cocaine and that was what the $180.00 was for. Mr. Hoey identified S as the Defendant and related he had purchased crack cocaine from Defendant[2] in the past.

On August 15, 2008, Mr. Hoey gave a more detailed statement to the State Police. Mr. Hoey indicated he first started purchasing crack cocaine from Defendant during the second week of May 2008. Typically, he would tell Defendant how much cocaine he wanted. Defendant then would leave to get the cocaine and return to sell the requested cocaine to Mr.

[2] All this information is contained in the affidavit of probable cause filed at the time of the arrest of Defendant. It is clear the Commonwealth's theory of intent to deliver relies on these facts.

Hoey. Mr. Hoey never saw who Defendant got the cocaine from. Mr. Hoey usually purchased 8-balls which cost $180.00-$200.00. Mr. Hoey would call Defendant on Defendant's cell phone to initiate the transaction. He would typically meet Defendant at the Whiteman building, the apartment building Defendant lived in.

Mr. Hoey related he purchased crack cocaine from Defendant about two times a week from the second week of May 2008 until July 2, 2008.

The police report detailing Mr. Hoey's August 15th statement was provided to defense counsel in discovery.

The affidavit of probable cause, which contained the information derived from the cell phone call, was made available to Defendant shortly after his arrest.

The jury was selected for this trial on April 22, 2009. Mr. Hoey was identified as a Commonwealth witness during jury selection.

On May 12, 2009, the Commonwealth sent a letter to defense counsel stating that they planned to call Mr. Hoey at trial, not just in regard to the telephone call of July 2nd, but also "to his history of purchasing drugs from Defendant."

Defendant objects to this evidence as being in violation of Pa. R. Crim. P. 404(b) as he claims insufficient notice of this proffered evidence and on the basis that all the evidence, including the cell phone call of July 2nd, is irrelevant and/or unduly prejudicial.

The Court does not see a notice problem under Rule 404(b)(4). This Rule requires the Commonwealth to give a defendant reasonable notice in advance of trial as to evidence of other crimes or acts.

Clearly, there is no unfair surprise to the defense. The phone call and the resulting contact with a purported buyer were made known to Defendant shortly after his arrest. The inclusion of this information in the initial arrest affidavit informs Defendant that this is a part of the Commonwealth's evidence to prove Defendant possessed crack cocaine with intent to deliver. The police report with the details of Mr. Hoey's statement, which was provided in discovery, further informed Defendant of all the specifics being alleged. While the Commonwealth's letter of May 12th formalizes this intention, it is no surprise to the defense.

The next issue concerns relevance and undue prejudice to Defendant from this offer. Defendant acknowledges his defense is to deny he possessed cocaine with intent to deliver. He claims he is an addict. The Court finds this evidence is undeniably relevant on the issue of Defendant's intent. This is not simply an offer to bring in third parties to say Defendant is a drug dealer. The nexus of Mr. Hoey's testimony is the fact that he called Defendant on his cell phone to set up a purchase of cocaine within hours after Defendant's arrest with cocaine. While Defendant may claim the cocaine was not his or the jury may not be satisfied that the cocaine possessed by Defendant on July 2nd at the vehicle stop was possessed with the intent to deliver it to a third person, the evidence of Mr. Hoey is undeniably relevant to this issue.

The final issue pursuant to Pa. R. Crim. P. 404(b)(3) is whether the probative value of the evidence outweighs its potential for prejudice. The Court finds this evidence to be highly probative. There is also some danger or a potential for prejudice from this evidence. Obviously, the Court is concerned the jury will decide Defendant is a drug dealer and not limit their finding to Defendant's intent in regard to the cocaine he possessed at the time of the

traffic stop. The Court will give the jury the attached cautionary instruction unless the defense does not want such an instruction.

The Court will also limit the offer of Mr. Hoey as follows. The Court will allow Mr. Hoey to identify S and testify to his phone call of July 2nd. He may testify to his appearance at the Shamrock bar to purchase cocaine. The Court will allow him to testify that since May 2008, he purchased crack cocaine from Defendant several times and the typical quantities he purchased to explain the $180.00 he carried on July 2nd. The Court will not allow him to go into the details of the prior deliveries contained in the police report.

The Court believes this ruling to be in compliance with Pa. R. Crim. P. 404(b).

By the Court,

Kenneth D. Brown, P.J.

cc: Kenneth A. Osokow, Esquire
James Protasio, Esquire
Gary L. Weber, Esquire
Work File

CAUTIONARY INSTRUCTION

The Commonwealth has presented testimony from Trooper Havens and Lonnie Hoey as to a phone call Mr. Hoey made to Defendant's cell phone on July 2, 2008 and Mr. Hoey's subsequent appearance at the Shamrock bar to purchase crack cocaine. Mr. Hoey also testified to some prior contacts with Defendant since May 2008.

This evidence is offered and may be considered by you for one purpose only, that is whether any cocaine possessed by Defendant on July 2nd was possessed by him with the intent to deliver cocaine to a third party.

Defendant is not charged with any crime for any of those times other than July 2, 2008. He is not charged with delivery of cocaine on any date or time testified to by Mr. Hoey.

The issue before you in this regard is only whether Defendant possessed cocaine on July 2, 2008 and, if so, whether he possessed the cocaine with intent to deliver.

You may only consider the evidence from Mr. Hoey in this regard.

You may not infer from this evidence that Defendant is a person of bad character or that he is a person disposed to commit this type of crime.