IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
v.	**:**	**No. 86-2009**
	:	**CRIMINAL**
ELIJAH GAYMAN,	**:**	
Defendant	**:**	

OPINION AND ORDER

The Defendant filed a Motion for Habeas Corpus/To Dismiss the Charges on March 20, 2009, a Suppression Motion on May 6, 2009, a second Suppression Motion on June 25, 2009, and a Motion for Special Relief on May 6, 2009. A hearing on all four Motions was held on July 14, 2009.

Background

The following is a summary of the facts presented at the Preliminary Hearing on January 9, 2009 and the Suppression Hearing held on July 14, 2009.

Around 7:30 p.m., on August 31, 2008, Savonte Dixon (Dixon), Sharif Welton (Welton), Curtis Love (Love), Theodore Shockley, III (Ted), and another black male with the nickname Ledge were all in the area of Herdic and Horton Alleyways off of High Street. Dixon and Ted were fighting when shots were fired. Dixon was hit in the upper arm, Welton's arm was grazed by one of the bullets, and Love was shot three times; once in his elbow, once in his rib, and once in his spine.

Dixon testified at the Preliminary Hearing that she gave a written statement which stated the shooter was an individual named "Ledge" and that she picked "Ledge" out of the photo array. Welton also testified that he saw the shooter out of the corner of his eye and the shooter

was a male individual that was with Ted. Welton explained that he identified the shooter from a photo array. Love testified that he was not shot by any of his brothers, who are Dixon and Welton, but did not see who the shooter was.

Thomas Lyons (Lyons) testified that he lives in the 800 block of High Street. Lyons explained that he was away from his home on the evening of August 31, 2008, but when he returned home that night with his wife, they observed glass on their kitchen floor. The next day, Lyons' wife found two holes in their kitchen windows and a metal fragment, which he believed to be a bullet fragment, in the garbage disposal.

Agent Leonard A. Dincher (Dincher) testified at both the Preliminary Hearing and Suppression Hearing. Dincher received a call around 8:00 p.m. on August 31, 2008 regarding a shooting. Officer Joseph Ananea (Ananea) had related to Dincher that the Lyons' home is located approximately five houses to the west of the crime scene. Dincher related the kitchen window of the Lyons' home is on the southern end of the residence and faces east. Dincher then believed the window with the two bullet holes in it was in the general line of fire of the shooting. Dincher examined the fragment found in the Lyons' home and determined that it was in fact a bullet fragment.

As a result of his investigation, Dincher developed suspects and compiled a photo array, which initially did not include the Defendant's picture. That same date, Dincher went to Dixon's residence on High Street where he interviewed Dixon first, then Welton. Neither Dixon nor Welton identified a shooter from the photo array. Both individuals told Dincher that all the males in the photo array were brown and the individual who shot them was black.

On September 1, 2008, Dincher interviewed Love at the Williamsport hospital. Love stated the individual was not in the photo array and was "crispy" black. Also on that same date,

Dincher spoke with Officer Kenneth Maines (Maines) about a traffic stop on five or six young black males and one of the individuals in the vehicle had the street name "Ledge." Dincher determined "Ledge" to be this Defendant, as some of the victims related the shooter went by the name "Ledge." Dincher created a second photo array using CPIN. This photo imaging system contained a picture of the Defendant dated July 2, 2004, when the Defendant was about four years younger.

Dincher returned to each of the victims on September 1, 2008 to show them the second photo array. Dincher went first to Dixon's house again where Dixon and Welton were having a cookout. Dincher showed Welton the photo array first; he stated the Defendant was not in one of the photos, but he focused on number seven, the younger picture of the Defendant. Dixon was also drawn to photo number seven, but again did not positively identify the Defendant. Dincher met with Love, with the second array and was told, "he's not there." Dincher advised each of the victims to imagine the person in photo seven as being older, that the features would not change, just get bigger. Despite Dincher's coaching, none of the victims were able to identify the shooter.

On September 2, 2008, Maines supplied Dincher with a current photo of the Defendant from a traffic stop and a third photo array was compiled and again shown separately to each victim. Love stated that the shooter was not in the photo array, but focused in the top right hand corner of the array. Welton identified the Defendant and signed the photo array. Dixon also identified the Defendant.

On December 10, 2008, the Defendant was arrested by the Philadelphia Police Department; he was subsequently turned over to the Williamsport Bureau of Police on December 11, 2008, along with a cell phone. The Defendant was preliminarily arraigned by video following

his arrest. The Defendant was then advised of his Miranda[1] rights and he stated he did not wish to talk, and needed an attorney. Dincher proceeded to ask the Defendant for his cell phone number, which he expected to elicit a response from the Defendant. The Defendant responded with a phone number. Once Dincher turned on the Defendant's phone, he discovered the actual phone number was one digit off from the number given by Defendant. Subsequently, a subpoena of the phone records was requested.

Defendant was charged with three counts of Attempted Criminal Homicide, six counts of Aggravated Assault, three counts of Recklessly Endangering Another Person, three counts of Simple Assault, one count of Discharge of a Firearm Into Occupied Structure, one count of Firearms Not to be Carried Without a License, and one count of Possession of a Weapon. At the Preliminary Hearing on January 9, 2009, Magisterial District Judge Allen Page, III, dismissed counts one and two, both Attempted Homicide.

Discussion

Motion for Issuance of a Writ of Habeas Corpus

In Defendant's Motion for Issuance of Writ of Habeas Corpus he asks the Court to dismiss the Attempted Criminal Homicide count, the six counts of Aggravated Assault, three counts of Recklessly Endangering Another Person, three counts of Simple Assault, the Discharge of a Firearm Into Occupied Structure count, the Firearms Not to be Carried Without a License count, and the Possession of a Weapon count. Defendant alleges that the Commonwealth failed to present a prima facie case that Defendant was the one who committed the crime as none of the shooting victims could positively identify him as the shooter. In opposition, the Commonwealth

[1] Miranda v. Arizona, 384 U.S. 436, (1966).

states the identifications are not hearsay and relies on the Pennsylvania Rule of Evidence 803.1(2) which states: "[a] statement by a witness of identification of a person or thing, made after perceiving the person or thing, provided that the witness testifies to the making of the prior identification [,]" is "not excluded by the hearsay rule if the declarant testifies at trial or hearing . . .." Pa.R.Evid 803.1.

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 conviction for attempted murder requires the Commonwealth to prove beyond a reasonable doubt that the defendant had the specific intent to kill and took a substantial step towards that goal." Commonwealth v. Blakeney, 946 A.2d 645, 652 (Pa. 2008) (citing 18 Pa.C.S. §§ 901, 2502). A person is guilty of Aggravated Assault and violates 18 Pa.C.S. § 2702(a) if that person: (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; . . . (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon . . ...." A person commits the offense of Simple Assault and violates 18 Pa.C.S. § 2701(a) (2), if that person "negligently causes bodily injury to another

with a deadly weapon . . ..” The Offense of Recklessly Endangering Another Person is committed when a person “recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.” 18 Pa.C.S. § 2705. A person is guilty of Discharge of a Firearm into an Occupied Structure and violates 18 Pa.C.S. § 2707.1, if that person “knowingly, intentionally or recklessly discharges a firearm from any location into an occupied structure.” 18 Pa.C.S. § 6106 is violated and a person is guilty of Firearms not to be Carried Without a License if that person “carries a firearm in any vehicle, carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license . . .” Finally, a person is guilty of Possession of a Weapon and violates 18 Pa.C.S. § 907, if that person “possesses a firearm or other weapon concealed upon his person with intent to employ it criminally.”

The Court finds that sufficient evidence was presented to establish a prima facie case of Attempted Criminal Homicide, Aggravated Assault, Simple Assault, Recklessly Endangering Another Person, Discharge of a Firearm into an Occupied Structure, Firearms not to be Carried Without a License and Possession of a Weapon. The testimony presented at the Preliminary Hearing reveals that Dixon, Welton, and Love were all shot, with Love receiving the most serious injuries. Dixon identified the shooter as an individual named Ledge and picked the Defendant, who goes by that nickname, out of a photo array. Welton also identified the Defendant as the shooter, and Love related he was not shot by Welton and Dixon. Furthermore, while the victims stated at the Preliminary Hearing that they could not be sure the person they identified shot them, they testified to having made that prior identification, which the Court finds is not excluded by the hearsay rule. Lyons also testified that his wife found two holes in their kitchen windows and a metal fragment, which Dincher determined to be a bullet fragment, in the

garbage disposal. Dincher confirmed that Lyons' home was in the general line of fire of the shooting incident. The Court finds sufficient circumstantial evidence that the Defendant was the shooter and took the shots that injured each of the three victims. The evidence presented by the Commonwealth is also sufficient to show that the Defendant was carrying a weapon and discharged a firearm into the Lyons' home. Therefore, the Court finds there was sufficient evidence for a prima case of Attempted Criminal Homicide, Aggravated Assault, Simple Assault, Recklessly Endangering Another Person, Discharge of a Firearm into an Occupied Structure, Firearms not to be Carried Without a License and Possession of a Weapon.

Motion to Suppress statement of Defendant and information obtained from opening Defendant's cell phone

First, the Defendant asserts his rights were violated when Dincher asked him his cellular phone number after he (Defendant) stated he would not talk to the police. Furthermore, the Defendant asserts Dincher opened the cellular phone without permission and therefore, any information obtained from the phone should be suppressed. The Commonwealth conceded at the Suppression Hearing that the Defendant's *statement* regarding his cellular phone number is not admissible. However, the Commonwealth asserts Dincher's opening of the cellular phone and receipt of the records was obtained subsequent to a lawful arrest and therefore, not in violation of the Defendant's rights.

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 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)).

When Defendant was taken into custody by the WBP in Philadelphia, the Philadelphia Police Department provided the Officers with a cell phone that was found pursuant to the lawful arrest of the Defendant. Dincher asked Defendant his cellular phone number after he had exercised his right to remain silent. The issue before the Court is whether the Commonwealth required an additional search warrant to turn on the cellular phone discovering the information contained within the device, including the phone number assigned to the phone itself.

Although there is no case law directly on point, the Court believes that Commonwealth v. McEnany can give this Court some direction. 667 A.2d 1143, 1149 (Pa. Super. Ct. 1995). In McEnany, police validly seized a cellular phone found in plain view pursuant to a search warrant. Id. at 1147. The Superior Court found that an additional search warrant was not necessary to obtain the information contained in the memory card within the phone. Id. at 1149. The McEnany Court relied on Commonwealth v. Copenhefer, in which the Supreme Court upheld the lower courts ruling that a warrant authorizing the seizure of a personal computer authorizes reproduction of the documents stored within. 587 A.2d 1353, 1356 (1991) rev'd on other grounds. Copenhefer goes on to comment that the Commonwealth should not be prohibited

from utilizing technological advances in analysis techniques on validly seized physical evidence. Id. The McEnany court determined that the memory chip in a cellular phone is analogous to the memory of a personal computer in that both simply store information for later use; once you validly obtain the computer/cellular phone, you are entitled to search for the additional information without a warrant. 667 A.2d at 1149. McEnany authorized the police to not only turn on the phone but to discover the last phone numbers called by the cellular phone without a warrant. Id. Using the McEnany logic, this Court would find that since the Commonwealth validly possessed the cellular phone incident to a lawful arrest, they were acting within the law to turn the phone on to discover the information held within. Therefore, Dincher obtained the phone number of the cellular phone lawfully.

Motion to Suppress photo array

Defendant also argues that the photo array should be suppressed as unduly suggestive. Specifically, Defendant alleges the photo array is improper as the background is different for the Defendant's picture than the other individuals in the photo array. The Commonwealth asserts in opposition that the focus is not on the background and that a different background would not cause someone to pick that person out of the array.

A photographic identification is not unduly suggestive unless '"the procedure creates a substantial likelihood of misidentification."' Commonwealth v. Patterson, 940 A.2d 493, 503 (Pa. Super. Ct. 2007) (quoting Commonwealth v. Fisher, 769 A.2d 1116, 1126 (2001). Photo arrays '"are not unduly suggestive if the suspect's picture does not stand out more than the others, and the people depicted all exhibit similar facial characteristics."' Patterson, 940 A.2d at 1126 (quoting Fisher, 769 A.2d 1116). Although in Patterson, the Defendant's neck and

shoulders were more visible than the other photographs, the Court found that the photo array containing photographs of eight black men who appeared to be of similar age, similar facial features, hairlines, and facial hair was not unduly suggestive. Id. at 1126, n.6.

In the instant case, the background used for the Defendant's photograph was a block wall and the rest of the photographs had just a plain wall. The Court finds the slight variation of the background was not unduly suggestive as the other five men in the pictures were all black males around the same age, with similar facial characteristics, facial hair, and hair lines. Therefore, the photo array shall not be suppressed.

Motion for Special Relief

Defendant's final argument is that the two charges dismissed by MDJ Page are listed on the criminal information and should be stricken from said information. In opposition, the Commonwealth asserts the charges are cognate and therefore, should not be stricken from the information.

According to the Pennsylvania Rules of Criminal Procedure, "[w]hen charges are dismissed or withdrawn at, or prior to a preliminary hearing, the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the refiling of a complaint with the issuing authority that dismissed or permitted the withdrawal of charges." Pa.R.Crim.P. 544(A). However, the Pennsylvania Rules of Criminal Procedure, also state that the Commonwealth is to prepare and file an information that includes "(5) a plain and consise statement of the essential elements of the offense substantially the same as or cognate to the offense alleged in the complaint." Therefore, "an information could be amended without refiling under Pa.R.Crim.P. 560(B)(5) if the offense was a cognate of an otherwise properly

included offense . . .." Commonwealth v. Jones, 912 A.2d 815, 817-18 (Pa. 2007). "Pursuant to the cognate-pleading approach, there is no requirement that the greater offense encompass all of the elements of the lesser offense. Rather, it is sufficient that the two offenses have certain elements in common." Commonwealth v. Sims, 919 A.2d 931, 938 (Pa. 2007).

First, the Court finds that the Attempted Homicide counts are cognate offenses and thus did not require refiling. In this case, after two of the Attempted Homicide charges were dismissed, there still remained one count of Attempted Homicide and six counts of Aggravated Assault. The two dismissed Attempted Homicide charges are similar to the Attempted Homicide counts remaining on the criminal information, and therefore, are cognate offenses. As such, Defendant's Motion for Special Relief shall be denied.

ORDER

AND NOW, this ____day of September 2009, based on the foregoing Opinion, it is ORDERED and DIRECTED as follows:

1. Defendant's Motion for Issuance of Writ of Habeas Corpus is DENIED.
2. Defendant's Motion to Suppress is GRANTED in part and DENIED in part:
    a. Defendant's Motion to Suppress the photo array is DENIED.
    b. Defendant's Motion to Suppress the statement of the Defendant as to his phone number is GRANTED.
    c. Defendant's Motion to Suppress the information obtained by Agent Dincher by opening and powering up the Defendant's phone is DENIED.
3. Defendant's Motion for Special Relief is DENIED.

By the Court,

Nancy L. Butts, Judge

xc: DA (KO)
PD (WM)
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber, Esq. (LLA)