IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
	:	
v.	:	**No. 1061-2008**
	:	**CRIMINAL**
MAURICE PATTERSON,	:	
Defendant	:	

<u>OPINION AND ORDER</u>

On March 17, 2009, the Defendant filed an Omnibus Pre-Trial Motion. A hearing on the Motion was held on April 30, 2009 and May 14, 2009. 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 this Court's Order issued on April 30, 2009. 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 June 27, 2008 and the Suppression Hearings held on April 30, 2009 and May 14, 2009. Co-Defendant, Sean Durrant (Durrant) testified at the Preliminary Hearing that he met the Defendant at SCI-Huntington, while the Defendant was serving a sentence on a Homicide. Durrant related that sometime after his incarceration he saw the Defendant again in Williamsport. Durrant explained that the Defendant then introduced him to Co-Defendant, Javier Cruz-Echevarria (Cruz). Durrant related that prior to March 31, 2007, the Defendant and Cruz came by Durrant's house with Eric Sawyer (Sawyer) and requested that he take a ride with them to get some heroin in New Jersey.

At some point after that, Cruz informed Durrant that the relationship between the Defendant, Cruz, and Sawyer went sour. Durrant testified that the Defendant and Cruz told Durrant they wanted Sawyer killed because he was a snitch. Durrant explained that he agreed to do the killing.

Durrant explained that on March 27, 2007, he received a letter from the Defendant who was housed at the Lycoming County Prison. Cruz and Durrant read the letter which was talking about drugs and about taking care of the situation with Sawyer. On that same date, the Defendant called Kendra's[1] cell phone to speak to Durrant while he was in front of Kendra's mother's house. The Defendant spoke to both Cruz and Durrant telling them to make sure that the business was taken care of with the drugs and to take care of Sawyer.

Sometime after the phone call, Cruz brought a full barreled shotgun to Durrant's house to use in killing Sawyer. That same evening, Durrant and Cruz modified the shotgun by cutting it down.

Durrant testified that on March 30, 2007, he was helping his sister-in-law, Denise Bondy move things out of a house on High Street. On that same date, after driving around for a while, Cruz and Durrant determined that the killing of Sawyer was going to take place in the alleyway behind Bondy's house.

On the night of March 30, 2007, Cruz called Sawyer and set up a drug deal in the alleyway where Durrant intended to kill Sawyer. Later that night, Sawyer called Cruz back and agreed to come out under the pretense of the drug deal. Later that night, Cruz dropped Durrant, who had the 12-guage shotgun with him, off in the alleyway. Cruz dropped Durrant off so he could get in position while Cruz went to meet Sawyer at the Shamrock and then have Sawyer follow him back up into the alleyway.

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[1] Kendra is the Defendant's girlfriend.

In the early morning hours of March 31, 2007, Cruz called Durrant to let Durrant know that he was on his way and getting ready to turn up the alleyway. Durrant explained that he proceeded out of the house and into this little wooden fence area where there was a cut way between the bushes. Then, Cruz returned to the alleyway with Sawyer following behind in his own vehicle. As Sawyer got out of the vehicle and started walking toward Cruz's vehicle, Durrant walked up behind him and shot him twice in the head.

After the shooting, Durrant got in the vehicle with Cruz and they drove off. As the Cruz vehicle began driving up High Street, Durrant looked over and saw a police vehicle. The police began following the vehicle until Third Ave and Waltz Place, whereupon Durrant got out and ran from the vehicle. Durrant explained that as he was running he dropped the shotgun. Durrant was later apprehended by the police and taken into custody.

David Lehman (Lehman) also testified at the Preliminary hearing. He related that in December of 2006, while Marion Diemer (Diemer) was living with him, several firearms and other items were taken from his home. Specifically, Lehman explained that a shotgun was taken from his house. He also testified that he was notified by Agent Dincher to identify some evidence whereupon he identified the shotgun that was taken.

Diemer related that in December of 2006 she removed some guns, including a shotgun from Lehman's residence. Diemer explained that she originally took the weapons to a woman named J, but that J did not want the weapons so she took them to Gregory Ricks' house. Ricks made a phone call to a man named B and then Diemer and Ricks went to the Kwik Fill on West Fourth Street in Newberry. Diemer went into the store and then got back into her vehicle, after a few minutes an individual, she later identified as the Defendant got into the back of the Jeep. Ricks showed the Defendant the shotgun and they traded the gun for drugs. Diemer explained

that she saw the Defendant through the review mirror a little when he first got in the Jeep and the two sets of lights were on. Diemer related she remembered that the Defendant had glasses.

Agent Leonard A. Dincher (Dincher) testified at the Suppression hearing that he interviewed Diemer on April 2, 2008. Dincher related he had Diemer look at a photo array because in the earlier interview she said she stole Lehman's shotgun that was later used in a murder. Dincher created a photo array using CPIN. Dincher explained that Diemer picked out # 3 of the photo array, which was the Defendant, as looking like the male who traded the gun, but related he needed glasses. Detective Ed McCoy then printed off the same picture but added glasses. Diemer signed the picture with the glasses indicating that was the guy.

Dincher testified at the Preliminary Hearing that at the time Durrant was taken into custody a shotgun was recovered in the middle of the roadway at Second Ave and Waltz Place. Dincher explained that he ran a check on the serial number which revealed the shotgun was owned by Lehman. Dincher related that the shotgun was found in a modified state with the barrel cut off.

Dincher also testified that Sawyer's body was found in the unnamed alley near the 1500 block of High Street. He explained that Sawyer's body was found just northeast of Denise Bondy's home. Dincher related that he found two spent shotgun casings at the scene which according to ballistic tests matched those discharged from the shotgun Durrant had dropped. Dincher related an autopsy was done on Sawyer which revealed the cause of death was two shotgun wounds to the head and the manner of death was homicide.

Dincher also explained that the Defendant was convicted of murder on October 24, 1997 in Philadelphia and that the prior conviction precludes the Defendant from lawfully possessing a firearm.

Dincher also testified at the Suppression Hearing that on May 21, 2008 he obtained a warrant for the Defendant's arrest. On May 22, 2008, Dincher along with Captain Kontz (Kontz), Officer Edward Lucas, and Officer James Roy went to the State Correctional Institution at Smithfield to execute the warrant. Dincher related that all of the Officers were in plain clothes and unarmed when they arrived at the institution at 9:00 a.m. When arriving, the Officers were taken into an inmate meeting room within a large meeting room. Inside the meeting room was a interview room about eight feet by twelve feet or ten feet by twelve feet which had glass to the left so you could see out. The interview room contained a table and three chairs. The Defendant was taken into the interview room where Dincher and Kontz joined him. Officers Lucas and Roy stayed outside to the side of the room. A Correctional Officer at the institution also remained outside the interview room.

Dincher related the Defendant appeared alert that day and aware of the nature of the investigation. At 9:35 a.m., the Defendant was advised of his rights. Dincher explained that he read the Defendant the Miranda[2] form and the Defendant signed that he understood his rights and would talk. Dincher related that he and Kontz talked with the Defendant and showed him CD's for three and a half to four hours with a brief break for lunch. Dincher explained that he was relaxed and did not raise his voice as he wanted the Defendant to talk to him and did not want the Defendant to "shutdown." Dincher testified that the Defendant's demeanor was cordial and he was laid back. Dincher also related that the Defendant appeared to understand all of the questions and never asked for an attorney. Dincher explained that the death penalty was never discussed. Finally, Dincher related he took handwritten notes and Kontz typed notes on his computer.

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

Dincher also testified as to how he obtained the Defendant's phone records, a list of cell block inmates, and visitation information while he was incarcerated at SCI Smithfield. Dincher related that he spoke with the Superintendent's Assistant to determine what the procedure was for retrieving those records. Dincher was informed that neither a Court Order nor a Search Warrant would be needed, rather just a memo listing the items he wished to obtain. In accordance with the procedures, Dincher sent a fax to Captain Myers, Head of Safety & Security at SCI Smithfield on February 16, 2008 requesting a list of completed and uncompleted calls, visiting lists, cell block inmates, mail log, and taped visitations.

Officer Edward Lucas (Lucas) testified he stayed outside of the interview room in the larger visiting area while the Defendant was being interviewed by Dincher and Kontz. Lucas explained that after Dincher and Kontz completed their interview, he and Roy went to the intake area and entered a small room where they found the Defendant holding in his hands a yellow notebook. The Officers then took the notebook from him and placed the Defendant in handcuffs and shackles.

The Defendant testified that on May 22, 2008, while he was preparing for yard his cellie told him he had a visit. The Defendant related he had no idea who was coming to visit and was not prepared for a visit as it was a Tuesday and those days are not visiting days. The Defendant related he went to the visiting room and was put in visiting attire. As he entered the room there was six people in the room, most of them Officers.

The Defendant explained that Dincher asked him to enter the interview room which is only about five to seven cinder blocks across. The Defendant related that you have to slide down to get out from the table and that the table was too big for the room. He explained that only

Dincher and Kontz were in the room and the other Officers stayed outside. The Defendant testified the room had a big window and the bottom and top of the room were glass.

The Defendant related that before he was given his Miranda rights he was played a tape of Kendra. The Defendant testified that he was then told that he would be looking at the death penalty and Kendra would be charged with murder if he did not cooperate. He related that about fifteen minutes into the interview he asked Dincher if he was a Public Defender and it was only then when Dincher and Kontz identified themselves. The Defendant also related that he knew he had been implicated in the Williamsport newspaper for this crime, but even though he was not charged he still thought Dincher was a Public Defender. The Defendant testified that he was then read his Miranda rights. The Defendant explained that he felt he had no choice but to cooperate and tell them what they wanted to know because he did not want charges for himself and/or for Kendra.

In rebuttal, Dincher testified that the Defendant never asked if Dincher was a Public Defender and that he, upon meeting the Defendant identified himself. Finally, Dincher related that the report was prepared from his notes, the information within was written in chronological order, and after preparing the report his hand written notes were destroyed.

Kontz testified that he went along with Dincher, Lucas, and Roy to SCI Smithfield on May 22, 2008. Kontz related that when the Defendant was brought into the interview room, they immediately identified themselves to the Defendant. Kontz explained that the Defendant was then mirandized before any CD's were played and the interview began.

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 Criminal Homicide count, the Conspiracy to Commit Criminal Homicide count, the Criminal Solicitation count and the Persons Not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms 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. Finally, Defendant alleges that Diemer's testimony at the Preliminary Hearing was insufficient to establish the charge of Possessing a Firearm.

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, Criminal Conspiracy, and Criminal Solicitation. At the Preliminary Hearing, Durrant testified the Defendant and Cruz were friends with Sawyer before their relationship with him went bad, and wanted Sawyer killed because he was a snitch. Durrant explained that the Defendant and Cruz spoke to him (Durrant) about having Sawyer killed and he agreed to do the killing. Durrant related that on March 27, 2007, he received a letter from the Defendant who was housed at the Lycoming County Prison, addressed to Cruz and Durrant which discussed among other things taking care of the situation with Sawyer. Further, the Defendant called to speak to Durrant and Cruz on that same date to tell them to take care of Sawyer. Cruz brought Durrant a shotgun sometime after the phone call, which according to the testimony of Diemer was traded by her to the Defendant for drugs. The shotgun was used by Durrant in the killing of Sawyer.

This Court finds from this evidence that the Defendant and both Co-Defendant's Durrant and Cruz were communicating regarding this murder for several days before it occurred. There is sufficient circumstantial evidence that the Defendant was an active participant in the killing by writing and calling Durrant and Cruz to tell them take care of the business of killing Sawyer along with providing the shotgun used in the killing. Therefore, the Court finds there was sufficient evidence for a prima case of Criminal Homicide, Criminal Conspiracy, and Criminal Solicitation.

A person violates 18 Pa.C.S. § 6105(a)(1) and is guilty of Possession of a Firearm when that person has been convicted of certain offenses as enumerated in the statute "within or without this Commonwealth, regardless of the length of sentence . . . shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth."

Based upon the testimony presented at the Preliminary Hearing and the Suppression Hearing the Court finds there was sufficient evidence for a prima facie case of Possession of a Firearm by a Person Not to Possess. Diemer related that in December of 2006 she removed some guns, including the 12-gauge shotgun used in this murder from Lehman's house. Diemer explained she took them to Ricks who called a man named "B". Diemer and Ricks then went to the Kwik Fill where "B" got in the vehicle and traded drugs for the gun. Diemer related that she later picked the Defendant out of a photo array as the individual with whom she made the trade. As the Defendant was convicted of murder in 1997 he is considered a Felon Not to Possess as defined by the statute. The Court finds the Commonwealth presented a prima facie case that the Defendant possessed the shotgun as a convicted felon.

Motion to Suppress the Statement of the Defendant

Defendant alleges in his Motion to Suppress that notwithstanding the fact that he signed a Miranda waiver the situation was so unduly coercive that the confession is rendered involuntary and inadmissible.

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)).

In order for a waiver of Miranda rights to be valid, it must be made knowingly, voluntarily, and intelligently. 384 U.S. at 475; See also Commonwealth v. Scarborough, 491 Pa. 300, 421 A.2d 147 (1980) (holding that "the Commonwealth need only show by a preponderance of the evidence that a voluntary, knowing and intelligent waiver of a constitutional right was made"). There are two requirements to determine if a Miranda waiver is valid. First, the waiver of one's Miranda rights must have been voluntary, in that '"it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.'" Colorado v. Spring, 479 U.S. 564, 573 (U.S. 1987) (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979)). The Court in determining the validity of a waiver under Miranda and the voluntariness of a confession looks to the "'totality of the circumstances surrounding the interrogation.'" Spring, 479 U.S. at 573 (quoting Fare, 442 U.S. at 725). See also Commonwealth v. Carter, 546 A.2d 1173 (Pa. Super. Ct. 1988). Factors the Court must consider include the following: "the duration and methods of interrogation, the conditions of detention, the manifest attitude of the police toward the accused, the accused's physical and

psychological state, and any other conditions which ‘may serve to drain one's powers of resistance to suggestion and undermine his self-determination.’” Commonwealth v. Probst, 580 A.2d 832, 836 (Pa. Super. Ct. 1990) (quoting Commonwealth v. Carter, 546 A.2d 1173 (1988)).

The Court finds the Defendant’s Miranda waiver was valid. The testimony of Dincher was that the Defendant was alert and aware of the nature of their investigation. Dincher and Kontz both explained that contrary to the Defendant’s assertions, after introductions, and prior to any questioning, he was advised of his Miranda rights, understood those rights and agreed to talk. Dincher also explained that while the interview lasted almost four hours, the Defendant was given a break for lunch. Dincher testified the interview was relaxed, the Defendant’s demeanor was cordial and laid back. Finally, Dincher explained that the Defendant appeared to understand all of the questions and never asked for an attorney. As the Court finds the testimony of Dincher and Kontz to be credible; the Court further finds the Defendant was not coerced but rather made the waiver of his Miranda rights knowingly, intelligently, and voluntarily.

Motion to Suppress the phone records and yellow notebook of the Defendant

The Defendant asserts that although he was incarcerated at SCI Smithfield, the police still needed a search warrant or a Court order in order to collect the phone records and the yellow notebook. The Commonwealth asserts that the police did not need a warrant as they complied with SCI Smithfield’s procedures for procuring the phone records and the yellow notebook was obtained incident to a valid arrest.

The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures. However, as determined by the United States Supreme Court, “the Fourth Amendment proscription against unreasonable searches does not apply within

the confines of the prison cell because the recognition of privacy rights for prisoners in their individual cells cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." Johnson v. Desmond, 658 A.2d 375, 377 (Pa. Super. Ct. 1995) (citing Hudson v. Palmer, 468 U.S. 517, 526 (1984). (See also Commonwealth v. Boyd, 580 A.2d 393, 394-95 (1990) (search by State Trooper reasonable where trooper was investigating an attempted suicide by prisoner). Further, 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)). 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)).

The Court finds that a search warrant was not required in order for the police to procure the Defendant's phone records and yellow notebook. Dincher testified that he complied with SCI Smithfield's procedures by faxing a list of the requested items to the institution in order to obtain the records. Furthermore, as Defendant is an inmate at SCI Smithfield, he has no legitimate expectation of privacy housed in state prison. According to the testimony of Lucas, the yellow notebook was in the Defendant's hands when he and Roy went to the intake area to place the Defendant under arrest. Therefore, the yellow notebook was seized incident to a lawful arrest. As such, the phone records and yellow notebook were properly seized and shall not be suppressed.

Motion to Suppress the letter provided by Co-Defendant Sean Durrant

The Defendant argues that the letter police obtained from Co-Defendant Durrant while he was at the Lycoming County Prison is inherently unreliable. The Defendant specifically relies on the fact that the letter was not found pursuant to a search warrant of the Durrant residence, but was provided to Durrant by Nicole Durrant seven months later after it was received. Defendant also asserts that since the Pennsylvania State Police originally indicated the writing was that of Sawyer, and later was that of the Defendant, only to be revealed on April 14, 2008, that Shaun Cormier indicated he authored the letter places into question its authenticity. The Commonwealth asserts that the testimony reveals the ownership of the letter and it is therefore, reliable.

Pennsylvania Rules of Evidence Rule 901(b) in relevant part states that a writing can be authenticated by (1) "[t]testimony that a matter is what it is claimed to be." Pennsylvania Courts have also determined that a writing can be authenticated by circumstantial evidence. See Commonwealth v. Brooks, 508 A.2d 316, 319-20 (Pa. Super. Ct. 1986). Circumstantial proof can come in the form of:

> the timing and method of delivery of the document, information in the contents of the writing that is known by the purported sender and the recipient, events preceding or following the execution or delivery of the writing, other communications by the purported sender prior to or following the execution or delivery of the document, the appearance of the purported sender's name or letterhead on the document, the handwriting technique, or the style of expression used in the language of the writing.

Brooks, 508 A.2d at 320.

The Court finds that the letter police found as a result of the search of Durrant's cell is not inherently unreliable as it can be authenticated through Durrant's testimony. Durrant testified that he received the letter on March 27, 2007 from the Defendant. Durrant explained that the

letter talked about "taking care of the business" with Sawyer. Durrant also related that the same day he received the letter he also received a phone call from the Defendant whereupon the Defendant spoke with both him (Durrant) and Cruz telling them the same thing to make sure to take care of Sawyer. The Court finds that Defendant's communication with Durrant regarding the same information on the day Durrant received the letter bolsters his credibility and is sufficient to authenticate the letter. Therefore, the letter shall not be suppressed.

Motion to Suppress the in and out of Court identification of the Defendant

Finally, Defendant asserts that the out of court and in court identification of the Defendant by Diemer should be suppressed as unnecessarily suggestive. Specifically, the Defendant alleges that in Diemer's first interview she indicated that she never saw the person that the gun was exchanged with but knew "Reese"[3] and that she had purchased crack cocaine from him on several occasions. Then, Diemer was interviewed a second time in which time she stated that when she returned from the store, there was a black male in the rear passenger seat who exchanged "rocks" for the gun. Diemer could not identify the male by name, but did indicate that it was a black male with glasses. Diemer was shown individual photographs of Cruz, Durrant, Ricks, Michelle Pierson, and Sawyer and finally a photo array which included the Defendant. Only after viewing the photo array, did Diemer identify the Defendant. The Commonwealth asserts in support of its position that Diemer saw the Defendant for sufficient time to properly identify him later.

[3] Reese is a street name used by the Defendant.

A "photographic identification of a person is unduly suggestive if, under the totality of the circumstances, the identification procedure creates a substantial likelihood of misidentification." Commonwealth v. Chmiel, 889 A.2d 501, 523 (Pa. 2005). "Photographs used in line-ups are not unduly suggestive if the suspect's picture does not stand out more than those of the others, and the people depicted all exhibit similar facial characteristics." Commonwealth v. Fisher, 769 A.2d 1116, 1126-27 (Pa. 2001).

The Court finds that the identification of the Defendant by Diemer was not unduly suggestive. Diemer testified that in December of 2006, she went to the Kwik Fill parking lot where an individual with glasses got into the back of her Jeep and traded drugs for the shotgun. Diemer also explained that two sets of interior lights came on when the individual got in and out of the vehicle. Dincher explained that Diemer was asked to look at a photo array because in an earlier interview she said she stole Lehman's shotgun which was later determined to have been used in a murder. Dincher created a photo array using CPIN, utilizing photos of individuals very closely resembling one another. Dincher explained that Diemer believed that photo # 3 resembled the male who traded the gun, but added that he needed glasses. Detective Ed McCoy then printed off the same picture, added glasses, showed only the picture of the Defendant with glasses to Diemer and Diemer related that it looked like the male. The Court finds that the photo array was not unduly suggestive as the photo array containing photographs of people who are similar in looks was first shown to the witness. Only after Diemer related that # 3 looked like the male who traded the gun but that he needed glasses was she shown a picture of just the Defendant but now wearing glasses. As the Court finds the out of court identification was not unduly suggestive, as it was only clarifying the witnesses choice, using her own description it was not tainted, and shall not be suppressed. See Commonwealth v. DeJesus, 860 A.2d 102, 113

(Pa. 2004) (holding that the court did not need to address the Defendant's assertions that the in court identifications should have been suppressed, when the out of court identifications were not tainted).

ORDER

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

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

II. Defendant's Motion to Suppress the statement of the Defendant is DENIED.

III. Defendant's Motion to Suppress the phone records of the Defendant and yellow notebook is DENIED.

IV. Defendant's Motion to Suppress the letter authored by Shaun Cormier and sent to Nicole Durrant is DENIED.

V. Defendant's Motion to Suppress the Out of Court and In Court identification of the Defendant by Marion Diemer is DENIED.

By the Court,

Nancy L. Butts, Judge

xc: DA (EL) & (KO)
Michael J. Rudinski, Esq.
Kyle Rude, Esq.
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber, Esq. (LLA)