

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**RASHAD PAYNE,
Defendant**

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**No. 1355-2008
CRIMINAL**

OPINION AND ORDER

Defendant filed a Petition for Writ of Habeas Corpus on October 20, 2008. A hearing on the Motion was scheduled for January 8, 2009; however, prior to the hearing the parties agreed to submit the motion on the transcript of the Preliminary Hearing.

Background

The following is a summary of the facts presented at the Preliminary hearing. On June 16, 2008, Department of Conversation and Natural Resources (DCNR) Chief Ranger, Stacy Duffield (Duffield) currently assigned to the Bureau of Forestry in South Williamsport, PA was on special detail in the vicinity of Skyline Drive, due to lots of complaints and arrests for open lewdness and indecent exposure in the last several years. Around 11:50 a.m., Duffield observed from about 200 feet away¹, Rashad Payne (Defendant) walking into the woods from the parking lot. Soon thereafter, the Defendant was joined by another man, Ronald Ott (Ott), who after engaging in conversation with the Defendant walked up to Skyline Drive. The Defendant remained in the wooded area and Ott returned several minutes later. The two men got within

¹ Duffield explained that she had a very clear view and while she had binoculars, she was close enough that she did not need them.

close proximity of each other and then dropped their shorts. Duffield observed Ott's bared buttocks and then what appeared to be masturbation going on between the two.

Duffield called for DCNR Rangers Jeff Raisch (Raisch) and Craig Fishel (Fishel), who also were posted in that particular area. Duffield told them to get into position so the Defendant and Ott could be taken into custody. While the other two Rangers were getting into position, Duffield noticed the Defendant turn his back to Ott. Duffield explained it appeared they were performing anal sex, Ott to the Defendant. Then both of the men saw Fishel in the Skyline area and immediately pulled up their shorts and ran. The Defendant ran towards the parking lot and Ott towards Duffield. Duffield stopped Ott and the Defendant was subdued in the parking lot by Fishel and Raisch.

Duffield explained that after the two men were in custody, each was separately read his Miranda² rights. The Defendant then admitted that the two men were not having anal sex; rather Ott was rubbing his genitals on the Defendant's buttocks.

Discussion

In Defendant's Motion for Issuance of Writ of Habeas Corpus he asks the Court to dismiss the Open Lewdness charge against him. Defendant, in reliance on Commonwealth v. Allsup, 392 A.2d 1309 (Pa. 1978), alleges there was no testimony at the Preliminary Hearing that the lewd conduct was observed by any other individuals nor observed by anyone who was affronted or alarmed. Further, the Defendant alleges the acts did not occur in a place and time when it was observed or likely to be observed by others.

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

The burden the Commonwealth bears at the Preliminary Hearing is they must establish a prima facie case; the Commonwealth must present 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 violates 18 Pa. C.S. § 5901 and is guilty of Open Lewdness, “if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.” According to the Pennsylvania Supreme Court, the elements of the offense are met only if the Defendant’s lewd conduct

occurs in a place and at a time when it is likely to be observed by persons who have not consented to its occurrence, or who have not specially positioned themselves in such a manner as to be able to observe it, and who are likely to be affronted by such conduct or to find such conduct alarming.

Allsup, 392 A.2d at 1311. Additionally, being informed of the Defendant’s lewd conduct is not sufficient; some member of the public must actually observe said conduct. Id.

In Allsup, the Defendant appeared naked, on a stage, in a bar, where she performed various acts the Court described as “vaginal acrobatics” before an audience of 25 or 26 adult males, who paid an admission fee. Id. The Supreme Court found that since the conduct “occurred in a confined space not accessible to the general, unsuspecting public and which was viewed only by persons who were neither ‘affronted’ nor ‘alarmed’ but rather who viewed [Defendant’s]

performance as a form of entertainment, did not as a matter of law violate the ‘open lewdness’ statute . . .” Id. at 1312.

The Court finds the testimony presented in this case is distinguishable from the facts of Allsup. The testimony in the instant case reveals that the Defendant was observed in a public area, with his pants down, involved in what Duffield believed to be anal sex. The Defendant’s conduct occurred in a public place in the middle of the day, not the confined space of an enclosed room. Further, the Defendant’s conduct was likely to be observed by those who have not consented to its occurrence and who are likely to be “affronted” or “alarmed” by such conduct, as they were in an area open to the general public with no specific requirement for admission or viewing the acts. Therefore, the Court finds the Commonwealth presented a prima facie case as to the Open Lewdness charge.

ORDER

AND NOW, this ____day of January 2009, based on the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant’s Petition for Writ of Habeas Corpus is hereby DENIED.

By the Court,

Nancy L. Butts, Judge

cc. DA (PP)
Edward J. Rymsza, Esq.
Trisha D. Hoover, Esq. (Law Clerk)
Gary L. Weber (LLA)