

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
: No. CR-2006-2009  
vs. :  
:   
MICHAEL BROWN, :  
Defendant :

**OPINION AND ORDER**

On November 10, 2010, the Commonwealth filed a Motion to Admit Bad Acts. Hearings were held before the Court on November 18, 2010 and December 1, 2010.

By Order of Court dated December 8, 2010, this Court denied the Commonwealth's request to present the testimony of Katherine Gilberti.

At the December 1, 2010 hearing, Ms. Gilberti testified that approximately 10 to 20 times between September and November of 2009, she purchased heroin from the Defendant. In order to effectuate the purchases, she would call a telephone number, speak with an individual and be directed to go to a Locust Street address. When she went to the address, she would either go to the door or sometimes wait inside. It was always the Defendant who delivered the heroin to her. Ms. Gilberti also testified that with respect to the substances purchased from the Defendant, they were always heroin and never non-controlled substances.

In the Court's December 8, 2010 Order, the Court concluded that the proposed testimony of Ms. Gilberti was not relevant to the issue of the relationship between the Defendant and a Mr. Webster. Mr. Gilberti failed to identify Mr. Webster as being involved in any of the incidents, she did not know who she spoke with when she called, nor

was the number that she called identified.

The Court also concluded that the testimony of Ms. Gilberti was not relevant to the Defendant's intent to possess cocaine with the intent to deliver. According to Ms. Gilberti, the Defendant never sold her cocaine. The Defendant allegedly sold only heroin to Ms. Gilberti.

Finally, the Court concluded that any probative value of the testimony would be outweighed by its prejudicial effect. More specifically, the Court concluded that with Ms. Gilberti's testimony it would be a greater risk that the jury would find Defendant guilty simply because the evidence showed that he had a propensity to commit drug crimes.

Before the Court is a December 15, 2010 Motion to Reconsider the Court's Order that Ms. Gilberti's testimony is not admissible.

In support of its argument on the Motion to Reconsider, the Commonwealth asserts facts which are belied by the record. More specifically, the Commonwealth argues that the Defendant is charged with delivering heroin. (Motion to Reconsider, Paragraph 5). The Defendant is not charged with delivering heroin. To the contrary, the Defendant is charged with delivering a non-controlled substance.

The Commonwealth also alleges that a "CI", who is not identified in the Motion to Reconsider, called certain telephone numbers to reach a third named party who subsequently advised the CI that he would let another named party know that the CI wanted "something." No testimony was produced from Ms. Gilberti indicating that she knew the CI or one or both of the named third parties.

The Commonwealth further alleges that the “CI” informed State Troopers that Ms. Gilberti was present when the “CI” was speaking with the third parties. The CI did not testify to this fact nor did Ms. Gilberti testify that the CI was present and speaking to the third parties in Ms. Gilberti’s presence.

In connection with the CI information, the Commonwealth again asserts that the Defendant is charged with “delivering heroin to the CI.” The Defendant is not so charged.

The Commonwealth argues that the evidence should be admitted to show that the Defendant delivered heroin on other occasions, close in time to the Defendant’s alleged delivery “in cohorts with Webster on 11/23/10”, to show that the Defendant was not a “mere presence” conspirator, and to show that the Defendant lived at the 708 ½ Locust Street address.

There is nothing alleged in the Motion to Reconsider, however, which would cause the Court to reconsider and change its prior Opinion and Order.

**ORDER**

**AND NOW**, this 21<sup>st</sup> day of December 2010 upon consideration of the Commonwealth’s Motion to Reconsider, said Motion is **DENIED**. This Order does not preclude the Commonwealth from introducing evidence to rebut the testimony of the Defendant if any.

By The Court,

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Marc F. Lovecchio, Judge

cc: Mary Kilgus, Esquire (ADA)  
James Protasio, Esquire  
Work file  
Gary Weber, Esquire (Lycoming Reporter)