

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-2055-2009
:
vs. : Decision denying the
: Commonwealth's Motion to Amend and
KEVIN DWIGHT WEBSTER, : Motion to Consolidate
Defendant :
:

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

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COMMONWEALTH :
: No. 2066-2009
vs. :
:
ELDRICH BOBBY THOMPSON :
Defendant :
:

OPINION AND ORDER

This matter came before the Court on the Commonwealth's motion to consolidate the above-captioned cases and to amend each case to add a count alleging that each Defendant conspired with the other two to deliver or possess with the intent to deliver controlled substances.

By way of background and to elucidate each defendant's involvement (or lack thereof) in the various drug transactions, the Court will review the charges filed against each defendant and the factual basis for the charges as alleged in the affidavits of probable cause.

In case number 2066-2009, Eldrich Thompson is charged with three counts of delivery of a controlled substance, three counts of possession with intent to deliver a controlled substance, three counts of possession of a controlled substance and three counts of criminal use of a communication facility as result of three sales of heroin to a confidential informant. The affidavit of probable cause alleges that on October 13, 2009, the confidential informant (CI) called Kevin Webster's phone number to make arrangements to purchase heroin. The CI went to the intersection of Cherry and High Streets in the city of Williamsport to meet Webster to purchase the drugs. Webster and Thompson were present at the intersection. Webster acted as look out and the CI purchased from Thompson a bundle (ten packets) of heroin labeled "Trouble Paradise" in green ink.

On November 2, 2009, Thompson called the CI and told him that when he was ready to buy some heroin Thompson would be waiting in his white car at the intersection of Third and Memorial Avenues in the city of Williamsport. The CI went to that intersection, entered Thompson's car and purchased a bundle of heroin labeled "Block Party" in red ink.

On November 13, 2009, the CI told the police that he received a phone call from Thompson earlier in the day to be at the corner of Third and Memorial Avenues at 2:00 p.m. Thompson further said to wait if he wasn't right there because it wouldn't be long before he arrived. The CI explained to the police that Thompson taught a class at the county prison from approximately 1:00 to 2:00 p.m. At 2:26 p.m. the police located Thompson's white Mercury Grand Marquis at the prison and saw it leave the area. A few minutes later, Thompson arrived at the intersection of Third and Memorial Avenues. The CI entered the

vehicle and purchased ten packets of heroin from Thompson.

On November 17, 2009, the CI viewed a photo array and selected Thompson's photograph as the person from whom he purchased the heroin on all three occasions listed above.

In case number 2006-2009, Michael Brown is charged with three counts of conspiracy with Kevin Webster – one to deliver a controlled substance, one to possess a controlled substance with the intent to deliver it and one to possess a controlled substance; one count of delivery of a controlled substance; two counts of possession with intent to deliver a controlled substance; two counts of possession of a controlled substance; and one count of possession of drug paraphernalia.

The facts supporting these charges as alleged in the affidavit of probable cause are that the CI went to 708 ½ Locust Street on December 3, 2009 to purchase heroin. He provided the currency to Webster and received a bundle (10 packets) of heroin from Brown. Seven packets were labeled "Hellboy" in red ink and three packets were labeled "Rush" in red ink. This incident gave rise to all the conspiracy counts, as well one count each of delivery of a controlled substance, possession with intent to deliver a controlled substance and possession of a controlled substance.

On December 10, 2009, a search warrant was executed at 708 ½ Locust Street. Webster and Brown were found sleeping. The police found approximately 21.9 grams of packaged cocaine, along with empty Ziploc bags consistent with the cocaine packaging, rubber bands consistent with that used in the packaging of heroin, and electronic scales.

In case number 2055-2009, Kevin Webster is charged with two counts of delivery of a controlled substance, three counts of possession with intent to deliver a controlled substance, three counts of possession of a controlled substance, two counts of criminal use of a communication facility, one count of delivery of a noncontrolled substance, one count of possession of drug paraphernalia, and four counts of conspiracy with Eldrich Thomspen.

All the conspiracy counts arise from the incident on October 13, 2009 where the CI called Webster to purchase heroin and during the transaction Webster allegedly acted as a look out and Thompson allegedly delivered a bundle of heroin to the CI. There are separate conspiracy counts to deliver a controlled substance, to possess a controlled substance with the intent to deliver it, to possess a controlled substance and to criminally use a communication facility.

The affidavit of probable cause also alleges that on November 3, 2009, the CI called Thompson, who told the CI to go to 708 ½ Locust Street. The CI went to that location and purchased a bundle of heroin from Webster. Two packets were labeled “block party” in red ink, seven packets were labeled “black dynamite” in red ink and one packet was labeled “LOL” with a smiley face in red ink. This incident resulted in one count each of delivery, possession with intent to deliver, possession, and criminal use of communication facility.

On November 10, 2009, Webster called the CI and asked if the CI needed anything because he was on his way out and could meet at the bus stop at Catherine and Sheridan Streets. The CI met Webster, who was in a black, Chevrolet Monte Carlo. Webster

pulled into Faxon Bowling lanes. The CI got into the vehicle. Webster allegedly delivered ten packets of heroin labeled “7 UP, SEVEN UP” in green ink, but the substance in the packets, when field tested, resulted in a negative result, so Webster was charged with delivery of a noncontrolled substance.

On December 2, 2009, Webster called the CI and advised that he would be out of town and if the CI needed anything to just to go “L block,” meaning 708 ½ Locust Street. On December 3, 2009, the CI went to that location to buy a bundle of heroin. The CI gave the money to Webster and received a bundle of heroin from Brown. Seven of the packets were labeled “Hellboy” in red ink and the other three were labeled “Rush” in red ink.

On December 10, 2009, the police executed a search warrant at 708 ½ Locust Street and discovered 21.9 grams of packaged crack cocaine, empty Ziploc bags, rubber bands consistent with the packaging of heroin and electronic scales. Webster is charged with the same charges as Brown: possession with intent to deliver a controlled substance, possession of a controlled substance, and possession of drug paraphernalia.

The Commonwealth seeks to amend the Information filed against each defendant to add a conspiracy charge that each conspired with the other two. Although the allegations in the affidavits of probable cause show that there were some transactions that involved Thompson and Webster, some transactions that involved Webster and Brown and other transactions that appeared to involve only one defendant, there is nothing in the record to indicate that Thompson and Brown even knew each other, let alone that they entered an express or implied agreement to deliver or to possess controlled substances with the intent to

deliver them.¹ Therefore, the Court will deny the Commonwealth's Motion to Amend the Information in each case to add a count asserting an overarching conspiracy involving all three defendants.

In the same motion, the Commonwealth seeks to consolidate all three cases for trial. The Court finds that there would be prejudice to Thompson and Brown if the cases were consolidated. None of Thompson's charges include cocaine or paraphernalia for packaging such as empty Ziploc bags or electronic scales. There is nothing in the record before the Court to show that Thompson was in any way involved in the possession or possession with intent to deliver cocaine. Similarly, Thompson was involved in three deliveries of heroin in October and November of 2009, in which Brown had no readily apparent involvement. Moreover, given the number of heroin charges and the variety of ways that it was delivered,² the Court finds there is a significant danger that the jury will become confused and not be able to easily separate which defendant was involved in which delivery. To assist in deciding the Commonwealth's motion, the Court had to create a flow chart to keep the transactions straight. The Court also does not believe each transaction would be admissible against each defendant in a separate trial. Therefore, the Court will deny the Commonwealth's motion to consolidate these cases for trial

ORDER

¹ The Commonwealth did not introduce any testimony or police reports in support of their motion to amend and motion to consolidate. Therefore, the record only consists of matters contained in the court files. The Court cannot consider facts and circumstances that a party argues in a brief or an oral argument if they are not made part of the record.

² The various deliveries occurred on a street corner, in Thompson's vehicle, in Webster's vehicle, and in a residence located at 708 ½ Locust Street.

AND NOW, this ___ day of July 2010, for the foregoing reasons, the Court DENIES the Commonwealth's motion to amend and its motion to consolidate the above-captioned cases for trial.

By The Court,

Marc F. Lovecchio, Judge

cc: Mary Kilgus, Esquire (ADA)
Edward J. Rymza, Esquire
James Protasio, Esquire
Andrea Pulizzi, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)