

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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

OPINION AND ORDER

Before the Court is the Commonwealth's November 10, 2010 Motion to Admit Prior Bad Acts. By way of background, Defendant was originally charged with three counts of conspiracy with Kevin Webster – one to deliver a controlled substance, one to possess a controlled substance with intent to deliver 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 case was scheduled for a jury trial and a jury was selected on October 27, 2010. The trial was set to begin on November 18, 2010 and was scheduled for two days. By Order of Court entered on November 10, 2010, the Court granted the Commonwealth's oral Motions to Amend the Information. In addition to amending a relevant date, the Information was amended to reflect the substance at issue, with respect to Counts 1 and 2, criminal conspiracy, Count 4, possession with intent to deliver and Count 5, delivery of a controlled substance, to be a non-controlled substance and not heroin. As a result, Counts 3 and 6 of the Information were dismissed with prejudice.

On November 10, 2010, the Court also entered an Order with respect to the

Commonwealth's previously filed October 27, 2010 Motion in Limine. The Court both granted and denied certain portions of the Commonwealth's Motion.

The Commonwealth's Motion in Limine filed on November 10, 2010 was heard before the Court on November 17, 2010. During this proceeding, the Court denied the Commonwealth's Motion with respect to the proposed testimony of Katherine Gilberti. With respect to this proffered testimony, the Court concluded that the Commonwealth failed to provide reasonable notice in advance of trial as required by Rule 404 (b) (4) of the Pennsylvania Rules of Evidence. The Court noted that the purpose of the notice requirement was to prevent unfair surprise and to give the Defendant sufficient time to prepare an objection or rebuttal to the evidence, citing Commonwealth v. Mawhinney, 915 A.2d 107, 110 (Pa. Super. 2006), *appeal denied*, 932 A.2d 1287 (Pa. 2007). Given the fact that the trial was scheduled to begin the next day, the Court determined that the Defendant would not have sufficient time to rebut the evidence.

With respect to the proposed bad act evidence set forth in paragraphs four through twelve of the Motion, the Court concluded that it needed more information and prior to ruling on the Motion, the Court would need to hear the proffered testimony from the witnesses in camera outside the presence of the jury.

Because the Defendant did not want to proceed to trial without an appropriate ruling and desired to be more fully prepared for trial, he requested a continuance. The continuance was granted over the objection of the Commonwealth.

In camera hearings were held before the Court on November 18, 2010 and

December 1, 2010.

The Commonwealth first presented the testimony of Nicholas Brown. In June or July of 2009, he moved to 710 Locust Street which was an apartment adjoining 708 ½ Locust Street. Mr. Brown admitted that he was a “pretty heavy” drug user. More specifically, he admitted to having both a cocaine and heroin addiction during the time in question.

Prior to moving to the Locust Street address, he purchased both cocaine and heroin from Mr. Webster. After moving in he “immediately” started purchasing both crack cocaine and heroin from the Defendant. For the last three months preceding December 10, 2009 (the date of Defendant’s arrest) he purchased mostly from Defendant. Prior to that time, 70 % of the purchases were from alleged coconspirator Kevin Webster.

In order to make his purchases, he utilized different methods. Sometimes he would call Webster, sometimes he would knock on the door or sometimes he would simply knock on the adjoining wall. He would then meet the Defendant and/or Mr. Webster, on the back steps to the building or occasionally they would come to the back door.

Mr. Brown could not pinpoint how many times a day he purchased the drugs from either or both of the Defendant and Mr. Webster although he did note that on December 9, 2010, the day before Defendant was arrested, he purchased crack cocaine from Defendant. He recalled another few occasions when he was outside with his dog, saw the Defendant with Mr. Webster, asked Mr. Webster for heroin and the Defendant went into the apartment and came out with the heroin.

When Mr. Brown purchased the heroin and/or crack cocaine from the Defendant and/or Mr. Webster, it varied in potency but was never a non-controlled substance.

Katherine Gilberti next testified on behalf of the Commonwealth. She testified that approximately ten to twenty times between September and November of 2009, she purchased heroin from the Defendant. In order to effectuate the purchase, she would call a telephone number, speak with an individual and be directed to go to the 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 testified that with respect to the substances purchased from the Defendant, they were always heroin and never non-controlled substances.

Alberto Diaz also testified on behalf of the Commonwealth. He is presently employed as a Lycoming County detective. He was previously employed by the Pennsylvania State Police and worked as a Drug Law Enforcement Officer for twenty plus years. He has extensive training in drug law enforcement and drug interdiction. He has worked with Federal, State and local law enforcement and has been qualified as an expert in drug enforcement and drug interdiction matters in many different jurisdictions.

He was offered and admitted as an expert in drug enforcement and drug interdiction matters.

He explained in detail the mechanics of purchasing cocaine and heroin, noting that it is not at all unusual to have cutting agents utilized by distributors as the product moves

down the chain. He indicated that often times because of the way heroin is packaged, the buyer and perhaps even the seller may not know what is being purchased.

He testified that it is certainly “not unheard of” for non-controlled substances to be present and in this particular matter, because of the lack of cutting agents and cutting paraphernalia located at the residence, it was his opinion that the Defendant simply sold what he had purchased previously.

To put the aforementioned evidence in context, a review of the alleged facts supporting the charges is necessary. As alleged in the affidavit of probable cause, a 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 suspected heroin from the Defendant. Seven packets were labeled “Hell Boy” in red ink and three packets were labeled “Rush” in red ink. The lab report verified that the substance contained in the “Hell Boy” packets was a non-controlled substance while in the “Rush” packets there was heroin residue.

This incident gave rise to the two conspiracy counts as well as one count of delivery of a non-controlled substance and possession with intent to deliver a non-controlled substance.

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

Rule 404 (b) (1) prohibits evidence of other crimes, wrongs or acts except under limited circumstances, in order to show action in conformity therewith. Generally speaking, a Defendant should not be forced to defend against other alleged crimes as well as the ones for which he stands charged. *See* Commonwealth v. Wright, 393 A.2d 833, 837 (Pa. Super. 1973).

Evidence of other crimes, wrongs or acts may be admitted for limited purposes, however, such as intent. Rule 404 (b)(2). In criminal cases, such evidence can only be admitted upon a showing that the probative value of said evidence outweighs its potential for prejudice. Rule 404 (b) (3).

Pennsylvania case law has made it clear that in a prosecution for possession with intent to deliver controlled substances, intent may be shown through an uncharged prior drug transaction that revealed an alleged existing business relationship. Commonwealth v. Pattakos, 754 A.2d 679, 682 (Pa. Super. 2000), *appeal denied*, 764 A.2d 49 (Pa. 2000); Commonwealth v. Camperson, 650 A.2d 65, 71 (Pa. Super. 1994), *appeal denied*, 659 A.2d 984 (Pa. 1995); Commonwealth v. Echevarria, 575 A.2d 620, 623 (Pa. Super. 1990), *appeal denied*, 592 A.2d 1301 (Pa. 1991).

The exception language of 404 (b) (2) is also not exclusive. *See* Commonwealth v. Watkins, 843 A.2d 1203, 1215 n.11 (Pa. 2003), *cert. denied*, 543 U.S. 960 (2004). For example, numerous cases permit prior bad acts evidence to explain a course of conduct, to complete the story, to evidence the natural development of the case, or the

relationship between conspirators. Commonwealth v. Williams, 896 A.2d 523, 539-40 (Pa. 2006)(complete the story), *cert. denied*, 539 U.S. 919 (2003); Commonwealth v. Drumheller; 808 A.2d 893, 905 (Pa. 2002)(natural development of the case), *cert. denied*, 549 U.S. 1213 (2007); Commonwealth v. Judd; 897 A.2d 1224 (Pa. Super. 2006)(common plan or scheme), *appeal denied*, 912 A.2d 1291 (Pa. 2006).

Defendant argues that because the charges involved in the present case with respect to the December 3, 2009 incident involved non-controlled substances, the prior sales involving controlled substances are not relevant. The Court disagrees. The Court finds that the proffered evidence to a limited extent is relevant with respect to the formation, background and development of the alleged illegal conspiracy between the Defendant and Mr. Webster. If accepted by the factfinder, it would tend to prove that the Defendant knowingly participated in a common scheme with Mr. Webster to sell drugs. It explains the history between the coconspirators whose relationship is directly at issue and material to the case.

Furthermore, with respect to the transactions involving Mr. Nick Brown, the evidence is also probative of the Defendant's intent to deliver cocaine.

Among factors that the Court has considered in making this determination are the proximity and time between the incidents, the similarities and the circumstances surrounding the incidents and the methods allegedly utilized by Defendant and Webster to sell their products.

A finding of relevancy, however, does not end the inquiry. In the context of

bad acts evidence, the evidence is only admissible where the probative value of the evidence outweighs its prejudicial impact. Commonwealth v. Treiber, 874 A.2d 26, 32 (Pa. 2005), *cert. denied*, 547 U.S. 1076 (2006).

In weighing the probative value of evidence of other acts against the prejudice, probative value is equated with need. *See* Commonwealth v. Schwartz, 615 A.2d 350, 356 (Pa. Super. 1991), *appeal denied*, 629 A.2d 1379 (Pa. 1993). The greater the need for the evidence of other acts, the more prejudice the judicial process will tolerate. *See* Commonwealth v. Gordon, 673 A.2d 866, 869-70 (Pa. 1996); Commonwealth v. O'Brien, 836 A.2d 966, 972 (Pa. Super. 2003), *appeal denied*, 845 A.2d 817 (Pa. 2004).

Unfair prejudice means a tendency to suggest a decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially. Pa. R.E. 403, comment.

The evidence that the Commonwealth has with respect to the intent to distribute cocaine charge is circumstantial. The need for the proffered evidence is significant. While there is prejudice attendant to any evidence offered against a Defendant in a criminal matter, in this case, the Court finds that the potential for prejudice does not outweigh the Commonwealth's need for the proffered evidence.

The evidence with respect to the conspiracy is also largely circumstantial. The Court finds that the need for the relevant evidence is substantial and the prejudice to the Defendant does not outweigh the probative value. The Court is of the conclusion, however, that certain limitations will need to be imposed on the proffered evidence in order to ensure

that the prejudice does not outweigh the probative value.

First, the Court will issue a limiting instruction directing the jury to consider the evidence only for the limited purposes of demonstrating intent and the relationship between the parties. Secondly, no evidence will be permitted which does not include conduct of the Defendant with respect to the transaction and lastly, the evidence must be limited to the three months prior to December 3, 2009.

With respect to the proposed testimony of Katherine Gilberti, the Court fails to see how the testimony is relevant to the issues of the relationship between the Defendant and Mr. Webster. Ms. 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. Nor is the testimony relevant to Defendant's intent to possess cocaine with the intent to deliver it. The Defendant allegedly only sold heroin to Ms. Gilberti.

The Commonwealth has requested the Court to reconsider its previous ruling denying the Commonwealth the opportunity to present this evidence on the basis that the Defendant is no longer prejudiced. While Defendant is correct that his Motion to continue the trial was based solely on the proposed testimony of Nicholas Brown, the trial in fact has been continued. The fact of the continuance, for whatever reason, negates any prejudice that the Defendant may have suffered because of the Commonwealth's dilatory notice with respect to the 404 (b) evidence.

Nevertheless, the Court will still preclude the testimony of Ms. Gilberti because the Court finds the probative value of her testimony does not outweigh its prejudicial

effect. Unlike Nick Brown's testimony that Defendant sold him cocaine and that there were drug transactions where both Defendant and Mr. Webster were active participants, Ms. Gilberti's testimony regarding Defendant's prior sales of heroin is not relevant to show Defendant possessed the cocaine found at 708 ½ Locust Street or that he intended to deliver it. Her testimony also does not involve any drug transactions where Defendant and Mr. Webster both were active participants. Therefore, this testimony also is not particularly relevant to the conspiracy charges. With Ms. Gilberti's testimony there is a greater risk that the jury would simply find Defendant guilty because it shows he has a propensity to commit drug crimes.

Accordingly, the Court will grant the Commonwealth's Motion to Reconsider but will not permit the testimony in that it is not relevant to the facts in controversy. Even if minimally relevant, the prejudicial impact of the evidence would far outweigh any probative value. The jury could easily convict the Defendant solely because of his alleged status as a drug dealer, and not on the basis of the evidence.

ORDER

AND NOW, this ____ day of December 2010 for the reasons set forth in this Opinion, the Court grants in part and denies in part the Commonwealth's Motion in Limine to Admit 404 (b) evidence. The admission of the evidence must be within the parameters as set forth in this Opinion.

By The Court,

Marc F. Lovecchio, Judge

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