

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
vs. : **No. 1745-2009**
 :
NAIFECE HOUSTON, :
Defendant :

OPINION AND ORDER

Before the Court is Defendant's Omnibus Pretrial Motion filed on January 5, 2010. The hearing was held on February 5, 2010 at which time the Court disposed of all of the Motions contained in the Omnibus Motion except Defendant's Motion for Writ of Habeas Corpus. This Opinion and Order addresses Defendant's Motion for Writ of Habeas Corpus.

At the February 5, 2010 hearing, the Commonwealth and Defendant stipulated that this Court could decide the Motion for Writ of Habeas Corpus based upon the transcript of the preliminary hearing that was held on October 27, 2009 before District Justice James Carn. The original transcript was marked as Defendant's Exhibit 1 and admitted into the record.

Defendant is charged with four counts of Robbery, one count of Criminal Conspiracy, one count of Simple Assault (physical menace), one count of Recklessly Endangering Another Person, one count of Theft by Unlawful Taking or Disposition and one count of Receiving of Stolen Property. Defendant submits that Counts 1 through 7 should be dismissed because there is insufficient evidence to support said charges.

Under a separate Information, Hafiz M. El was charged with, among other things, the same counts of Robbery, Conspiracy, Simple Assault and Recklessly Endangering charged against the Defendant. Mr. El's case is docketed at No. CR-1746-2009 (Lycoming County). Mr. El filed a Petition for Writ of Habeas Corpus with respect to Counts 1, 2, 5, 6 and 7 of his Information. By Order of Court dated December 17, 2009, the Honorable Kenneth D.

Brown, then President Judge, granted the Petition for Writ of Habeas Corpus with respect to Counts 1, 2, 6 and 7.

After review of the transcript of the preliminary hearing, this Court dismisses Counts 1, 2, 6 and 7 of the Information for the same reasons set forth by Judge Brown in his Order of December 17, 2009. This Court notes that the facts with respect to Counts, 1, 2, 6 and 7 of the Information are identical to the facts alleged against Mr. El under Information No. CR-1746-2009.

In El, the Defendant did not attack the sufficiency of the evidence with respect to Counts 3, 4 or 5 to the extent Count 5 encompassed a conspiracy to commit the crimes alleged in Counts 3 and 4. It is noted that Judge Brown determined in El that the conspiracy count would be “deemed to be robbery, felony of the second degree”.

A Petition for Habeas Corpus attacks the sufficiency of the evidence. The Commonwealth must present a prima facie case that a crime has been committed and the Defendant is the one who probably committed it. Commonwealth v. Mullen, 333 A.2d 755 (1975). 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 Defendant to the crime. Commonwealth v. Wodjak, 466 A.2d 991 (Pa. 1983).

Under Count 3, Robbery (Bodily Injury) in order to survive a Petition for Habeas Corpus, the Commonwealth must prove by prima facie evidence that the Defendant, in the course of committing a theft, did inflict bodily injury upon another or threatened another or intentionally put another in fear of immediate bodily injury. With respect to Count 4, Robbery, (Force However Slight) the Commonwealth must prove by prima facie evidence that the

Defendant, in the course of committing a theft, did physically take or remove property from the person of another by force, however slight.

The alleged victim in this case is an individual by the name of Tessa Vermilya. Ms. Vermilya testified at the October 27, 2009 hearing. During her testimony, Ms. Vermilya consistently stated that she could not identify the people that robbed her, that she did not know how it happened, that she did not remember getting robbed, that she did not recall anyone making any threats to her and at one point she did not even know if she got robbed. Under cross-examination she conceded that she had no independent recollection of what took place on the day of the alleged event. All that Ms. Vermilya remembered was being in the house and then leaving with no money.

In further support of its case against the Defendant, the Commonwealth also presented the testimony of Williamsport Police Officer, Mark Lindauer. Officer Lindauer testified that while he was on patrol on the date in question, Ms. Vermilya frantically waved at him and once he confronted her she stated that “they” were going to kill her and asked Officer Lindauer to let her in the police cruiser. Upon being asked what was going on Ms. Vermilya told him that she had just been robbed and that they were running north. Following a search of the area, Officer Lindauer observed the Defendant at which point Ms. Vermilya pointed him out as the “other person that was involved in the robbery”. Apparently, as Officer Lindauer and Ms. Vermilya were searching for the first suspect, they came across the Defendant at which time Ms. Vermilya indicated that the Defendant was “the other one right there.”

After being detained, the Defendant was searched and \$1,200.00 was found on him. This is the amount of money that Ms. Vermilya claimed she first had on her and which

she noted “was missing” at a later time. At some point, Ms. Vermilya also told Officer Lindauer that when she was robbed they put a gun to her head.

In the context of a Petition for Writ of Habeas Corpus or a sufficiency of evidence challenge, the Commonwealth may rely on hearsay testimony. Hearsay, however, cannot constitute the only basis upon which a case is held for Court. Commonwealth v. Carmody, 799 A.2d 143 (Pa. Super. 2002).

The evidence in this case is far from sufficient in order to sustain a prima facie case against the Defendant for either Count 3 or 4. Ms. Vermilya could not testify whether or not she was even robbed let alone robbed by the Defendant. Even if the Court considered her apparent excited utterance to Officer Lindauer about being robbed, there is no evidence whatsoever as to the mechanics of the robbery. More specifically, there is no evidence whatsoever to prove how the robbery occurred, if at all. The statement attributed to Ms. Vermilya that “they put a gun to her head” is clearly hearsay and insufficient as a matter of law in and of itself to support the charges of robbery against the Defendant.

With respect to Count 5, the Commonwealth would need to prove by prima facie evidence that the Defendant and Mr. El unlawfully agreed that they would engage in conduct which constitutes a robbery and that they did an overt act in pursuance thereof. There is no evidence whatsoever to support this charge.

Accordingly, this Court will grant Defendant’s Petition for Writ of Habeas Corpus with respect to Counts 3, 4 and 5 of the Information.

ORDER

AND NOW, this ____ day of March, 2010, upon consideration of Defendant's Motion for Writ of Habeas Corpus, and following a hearing and review of the transcript of the preliminary hearing held on October 27, 2009, the Court grants the Defendant's Motion for Writ of Habeas Corpus and dismisses Counts 1, 2, 3, 4, 5, 6 and 7 of the Information against the Defendant.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: Edward J. Rymysz, Esquire
DA
Court Administrator's Office
Gary Weber, Esquire (Lycoming Reporter)
Work File