

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
vs. : **No. CR-250-2010**
:
DE'ANDRE MORRISON, :
Defendant :

OPINION AND ORDER

Before the Court is the Defendant's Motion for Habeas Corpus filed on April 13, 2010.

The Defendant stands charged by Information filed on March 18, 2010 with one count of Rape by Forcible Compulsion in violation of 18 Pa. C.S.A. § 3121 (1), one count of Rape of an Unconscious Person in violation of 18 Pa. C.S.A. § 3121 (3), and related counts.

The Defendant requests the Court to dismiss the rape charges submitting that the Commonwealth has failed to present sufficient evidence to support a prima facie case with respect to said charges.

A hearing and argument were held before the Court on June 2, 2010. The Commonwealth presented the transcript of the preliminary hearing held before District Magistrate James Carn on February 16, 2010. The transcript was marked as Commonwealth Exhibit No. 1. No further evidence was submitted by the Commonwealth.

On January 15, 2010, the 13-year old victim, D.W. visited her friend at her friend's residence in Williamsport. While there, she was drinking beer and became intoxicated. Among several individuals who were at the residence were the Defendant and another individual by the name of Jhalil.

According to D.W., she remembered being in a bedroom but does not remember how she got there. She denied being "passed out" but clearly was in and out of awareness. She

realized that Jhalil was on top of her having sex with her. She could not breathe, could not push him off of her and was getting scared. She started calling for her friend, apparently “passed out again” and then woke up when the light went on in the room.

She did not remember if she gave permission to Jhalil or anyone else to have sex with her that night.

While the incident was occurring with respect to Jhalil, D.W. testified that somebody was trying to put his penis in her face but she pushed him away. She did not know who the individual was.

DaMar Moore also testified on behalf of the Commonwealth. He was present at the residence during the alleged incident. At some point he went upstairs and entered the bedroom and observed the alleged victim, the Defendant and Jhalil.

When he entered the room, he saw Jhalil on top of D.W. and saw the Defendant with his penis in D.W.’s mouth. While Mr. Moore did not hear D.W. say anything, he noted that she was moving and obviously “wasn’t” passed out.

Someone came in and turned the lights on at which time the Defendant and others ran out of the room. D.W. then started crying and screaming.

Agent Kevin Stiles of the Williamsport Bureau of Police also testified on behalf of the Commonwealth. He testified that following his arrest of the Defendant, he secured a statement in which the Defendant admitted to being in the bedroom with D.W. The Defendant stated that D.W. wanted to have sex with him. The Defendant stated that he had consensual sexual intercourse with D.W.

In order to meet its burden in connection with a Petition for Writ of Habeas Corpus, the Commonwealth must establish a prima facie case. In other words, 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. Prado, 481 Pa. 485, 489, 393 A.2d 8, 10 (1978). The evidence must demonstrate the existence of each of the material elements of the crime charged and the existence of the facts which connect the accused to the crime. Commonwealth v. Wodjak, 502 Pa. 359, 369, 466 A.2d 991, 996-997 (1983). The absence of any element of the crimes charged is fatal and the charges should be dismissed. Commonwealth v. Austin, 394 Pa. Super. 146, 151, 575 A.2d 141, 143 (1990).

A person commits the crime of rape when he engages in sexual intercourse with another person by forcible compulsion or by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution. 18 Pa.C.S.A. §3121(a)(1) and (2).

Forcible compulsion required for rape includes not only physical force of violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will. Commonwealth v. Riley, 434 Pa. Super. 414, 417, 642 A.2d 1090, 1091 (1994).

Where there is lack of consent, but no showing of either physical force, threats of physical force or psychological coercion, the forcible compulsion requirement of rape is not met. Commonwealth v. Smolko, 446 Pa. Super. 156, 164, 666 A.2d 672, 676 (1995).

There is no evidence, direct or circumstantial, upon which the Court could conclude prima facie that the Defendant engaged in sexual intercourse with D.W. by forcible compulsion. Accordingly, Count 1 will be dismissed.

In order to meet its burden with respect to count 2, the Commonwealth needs to prove by prima facie evidence that the Defendant engaged in sexual intercourse with the alleged victim who was either unconscious or where the Defendant knew that the alleged victim was unaware that the sexual intercourse was occurring. 18 Pa. C.S.A. § 3121 (a) (3).

A person is “unconscious” for purposes of rape when they lack the conscious awareness they would possess in a normal waking state. Commonwealth v. Widmer, 560 Pa. 308, 323, 744 A.2d 745, 753 (2000).

There does not appear to be any evidence to conclude prima facie that the Defendant knew that the victim was unaware that the sexual intercourse was occurring. Accordingly, the sole issue to be determined is whether there is prima facie evidence that D.W. was unconscious.

A review of the preliminary hearing transcript reveals that there is sufficient prima facie evidence that D.W. was “unconscious” within the meaning of Pennsylvania’s rape statute. D.W. indicated that she was intoxicated. Even though she had the ability to perceive some aspects of the incident, she clearly could not recall all of the events, most notably, the events testified to by Mr. Moore. D.W. was unaware of the extent, duration or details of her sexual interaction with both the Defendant and Jhalil. Significantly, she did not even recall the sexual intercourse as admitted to by the Defendant. D.W. apparently was passed out or was unaware when she woke up that while one individual was having intercourse with her, she was having oral sex with the Defendant. For prima facie purposes, D.W. lacked the conscious awareness that she would possess in the normal waking state. See, Widmer, supra;

Commonwealth v. Erney, 548 Pa. 467, 472-73, 698 A.2d 56, 58-59 (1997); Commonwealth v. Price, 420 Pa. Super. 256, 261-62, 616 A.2d 681, 683-84 (1992).

ORDER

AND NOW, this ____ day of June, 2010 following a hearing, the Court grants the Defendant's Petition for Habeas Corpus with respect to Count 1, Rape by Forcible Compulsion. Accordingly, count 1 is dismissed. The Court denies Defendant's Motion with respect to Count 2, Rape of an Unconscious Person.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: PD
DA (P.Petcavage)
Gary Weber, Esquire (Lycoming Reporter)
Work File