

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-94-2010
vs. :
:
RUTH E. WHITNEY, :
Defendant :

OPINION AND ORDER

Defendant is charged by Information filed on April 8, 2010 with one count of Endangering the Welfare of Children (as parent), one count of Simple Assault and one count of Harassment. The charges relate to allegations that the Defendant intentionally burned her daughter with a cigarette as discipline and/or out of anger.

By Order of Court dated November 17, 2010, the Court concluded that Defendant's seven-year old daughter, K.U., the alleged victim, was not competent to testify. As part of that conclusion, the Court determined that the child's ability to remember the events being considered was completely compromised by the conduct of her stepmother and father thus tainting the child. The Court noted in its Opinion and Order that multiple witnesses credibly testified that the child's stepmother instructed the child during her preliminary hearing testimony and that the child's father engaged in a course of conduct designed to unduly influence and taint the child in order that the child parrot a story about the mother burning the child.

Defendant filed an Omnibus Pretrial Motion on June 9, 2010. The Omnibus Motion included a Motion to Determine Competency and Motion for Determination of Taint both of which were decided in the Court's November 17, 2010 Order.

Defendant's Omnibus Pretrial Motion also included a Petition for Writ of Habeas Corpus/Motion to Dismiss. By Order of Court dated July 20, 2010, the parties were notified that following a determination by the Court of the competency and taint issues, the Court would issue an Opinion with respect to the Petition for Habeas Corpus.

During the hearing on the competency and taint issues, the Commonwealth submitted a transcript of the preliminary hearing held in this matter before District Magistrate Judge Kenneth Schriener on March 1, 2010. This transcript was marked as Commonwealth's Exhibit 1. The Commonwealth and Defendant stipulated to the admission, as well, of the preliminary hearing tape and/or CD. Such was to be provided to the Court and marked as Commonwealth's Exhibit 2 within thirty (30) days of the July 20, 2010 Order. The tape and/or CD was never, however, provided as directed.

In the Court's November 17, 2010 Order, it directed the Commonwealth to notify the Court as to whether the Court could consider only Commonwealth's Exhibit No. 1, in connection with Defendant's Petition for Habeas Corpus or if the Commonwealth was requesting a hearing upon which to produce further evidence.

As of the writing of this Opinion and Order, the Commonwealth has not complied with the Court's directives. Accordingly, the Court concludes that the Commonwealth is not requesting a hearing upon which to produce further evidence and will determine Defendant's Petition for Habeas Corpus by considering only the testimony produced at the preliminary hearing as set forth in Commonwealth's Exhibit 1.

In connection with Defendant's Omnibus Pretrial Motion, Defendant argues that the Commonwealth failed to present any evidence establishing a prima facie case for any of the charges filed against the Defendant. Defendant argues that the alleged child victim's testimony cannot be used as evidence. The Court notes that during the July 1, 2010 hearing in this matter, Defendant orally amended the Habeas to request a dismissal in that the alleged child victim's testimony was tainted by family members and accordingly not competent evidence.

When reviewing a Motion for Habeas Corpus, the Court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. See Commonwealth v. Santos, 583 Pa. 96, 101; 876 A.2d 360, 363 (2005). At this stage of the proceedings, the Commonwealth must present a prima facie case that a crime has been committed and Defendant was the one who probably committed it. Commonwealth v. Mullen, 460 Pa. 336; 333 A.2d 755 (Pa. 1975). A prima facie case exists when the Commonwealth presents evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant a belief that the accused committed the offenses. Santos, supra., quoting Commonwealth v. Huggins, 575 Pa. 395, 836 A.2d 862, 866 (2003).

In support of the charges against the Defendant, the Commonwealth first presented the testimony of Dr. Maher Alhashimi. Dr. Alhashimi is an emergency room physician who was working at the Williamsport Hospital on December 25, 2009. According to Dr. Alhashimi, on that date, the child's father brought the child to the emergency room because he witnessed a lesion on her right upper chest area.

Dr. Alhashimi examined the child and determined that the injury appeared to be an old burn. According to the doctor, it did not appear to be deeper than a brush burn. Dr. Alhashimi concluded that it was a cigarette burn although a couple days old.

The Commonwealth also presented the testimony of the child. With respect to the alleged occurrence, the child testified that "mom spanked me with her cigarette." (Preliminary Hearing transcript, p. 15). The remainder of the child's testimony cannot be deciphered via a reading of the transcript. Indeed, with respect to a vast majority of the child's answers, no response could be heard.

Officer Carl J. Finnerty of the South Williamsport Police Department also

testified on behalf of the Commonwealth. He indicated that he was called to investigate allegations of injuries to the child.

He initially met with the child's father who explained to Officer Finnerty that "they found a burn" on the child's right shoulder. (Preliminary Hearing transcript, p.26). According to his investigation, the father and his wife explained to Officer Finnerty that they had picked up the child before Christmas and they noted that she was rubbing at the injured area. They checked it out and found the injury at which point the child victim apparently indicated that Defendant had burned her because she was bad.

Officer Finnerty spoke with the child. According to Officer Finnerty, the child indicated that her mom burned her because she was bad.

Without needing to set forth the elements of the charges against the Defendant, clearly the Commonwealth must prove prima facie that the Defendant committed the act of burning the child. The Commonwealth evidence falls far short of meeting this burden.

First, the child's testimony cannot be considered in that she was not competent to testify at the time because of the fact that her testimony was tainted by the conduct of her father and stepmother. Even if her testimony could be considered, the transcript of the preliminary hearing indicates nothing more than the fact that the child was burned by the Defendant. There is no testimony whatsoever upon which the Court could conclude that the circumstances regarding the alleged burning were such that criminal culpability could be ascribed to the Defendant because of either intentionally or recklessly burning the child.

The testimony of Dr. Alhashimi confirmed that the child suffered a burn injury although there is no indication as to whether the injury was consistent with either an intentional or reckless act.

Officer Finnerty confirmed the statements of the child. The child's statements,

however, are hearsay. Although the Commonwealth could argue that the child's statements should be considered and admissible under the tender years doctrine or perhaps some other exceptions to the hearsay rule, the Commonwealth has not made such an argument.

Regardless of whether there is a hearsay exception that could apply in this case, the child's statements to Officer Finnerty likely would not be admissible at trial, as the statements are testimonial in nature and their introduction would violate Defendant's rights under the Confrontation Clause. See Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 221 (2006); Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); Commonwealth v. Allshouse, 604 Pa. 65, 985 A.2d 847 (Pa. 2009); In the Interest of S.R., 920 A.2d 1262 (Pa. Super. 2007). Moreover, even if it could be considered, the issue of taint is determinative. Any direct or hearsay statements of the child cannot be considered for any substantive purposes in that the child's ability to accurately recall the events has been permanently compromised and tainted by the misconduct of the father and stepmother.

Thus, the only evidence against the Defendant is that within a few days after returning from the Defendant's care, the child had a cigarette burn on her body. This evidence is insufficient to establish a prima facie case in connection with any of the charges against the Defendant.

ORDER

AND NOW, this 16th day of December 2010, the Court **GRANTS** Defendant's Petition for Habeas Corpus and dismisses with prejudice the Criminal Information against the Defendant.

By The Court,

Marc F. Lovecchio, Judge

cc: PD (RB)
DA
Gary Weber, Esquire (Lycoming Reporter)
Work File

MFL/bsl