

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-499-2010
vs. :
 :
 :
PAUL COLEMAN, : Opinion and Order Re
Defendant : Commonwealth's Motion in Limine

OPINION AND ORDER

This matter came before the Court on November 9, 2010 for a hearing on the Commonwealth's motion in limine. Defendant is charged with two counts of receiving stolen property, two counts of persons not to possess a firearm, three counts of possession with intent to deliver a controlled substance, three counts of possession of a controlled substance, and three counts of possession of drug paraphernalia arising out of the alleged discovery of two handguns, heroin, cocaine and marijuana when the police executed a search warrant at an apartment that Defendant was leasing.

In its motion in limine, the Commonwealth seeks to introduce evidence at Defendant's jury trial that: (1) Defendant is a gang member and gang members are involved with guns and drugs; (2) Defendant made statements while he was incarcerated that he would "plead guilty for 5-10 years but the District Attorney would not offer that" and he "would be going upstate;" (3) Defendant was involved in selling drugs around the time of the discovery of the drugs in his apartment; and (4) Defendant admitted he was a user of marijuana when he was arrested.

I. Indicia of gang membership or activity

The Commonwealth seeks to introduce evidence that: Defendant has gang related tattoos such as "Crip," "Pretty Boy Gangster" and "BK" (which allegedly stands for

Blood killer); he had a blue drawstring bag in his apartment which was consistent with the colors of the Crips; a witness will testify Defendant is a member of the Crips; and Officer Hagan will testify that the Crips and Bloods are gangs and the Crips are involved in drug activity and regularly possess weapons. The Commonwealth argued that this evidence is relevant to the issue of who possessed the drugs and firearms found in the apartment and is also relevant to motive and intent of the Defendant to possess guns and drugs. The Court cannot agree.

The Court finds that this evidence is either not relevant or its relevance is outweighed by its substantial prejudicial effect. The Commonwealth has not shown that there is anything about the drugs or the firearms that would make them unique to the Crips. Therefore, the gang evidence does not show that Defendant was the one who possessed the drugs and firearms. Instead, this is propensity evidence. Merely because some gang members possess guns and drugs does not show that Defendant was the one who possessed the guns and drugs found in the apartment.

Even if this evidence were relevant to show identity, motive or intent, the Court finds that any relevance would be outweighed by its substantial prejudicial effect. Although the Commonwealth may have a need for this evidence because the drugs and firearms were not found on Defendant's person, the risk that this evidence will enflame the passions of the jury and divert them from impartially weighing the evidence is great. Therefore, the Court will preclude the Commonwealth from utilizing this evidence at trial. See Pa.R.E. 403 and 404(b)(3).

II. Defendant's statements

The Commonwealth seeks to present tapes from conversations Defendant had with his sister while he was incarcerated pending trial in which Defendant said he would plead guilty for five to ten years and another statement to an individual named Lewis where Defendant said "I'll be upstate by then." The Court finds these statements would be admissible under Commonwealth v. VanDivner, 599 Pa. 617, 962 A.2d 1170, 1180-81 (2009), cert. den'd, 130 S.Ct. 2060 (2010).

III. Evidence that Defendant was involved in selling drugs at or around the time of this incident

The Commonwealth seeks to introduce the taped statement of a witness, who stated Defendant was actively involved in selling drugs. Case law in this jurisdiction would permit the introduction of this type of evidence provided the drug selling was close in time to the date of this offense and the Commonwealth's evidence is substantial. See Commonwealth v. Donahue, 519 Pa. 532, 549 A.2d 121, 127 (1988). At this time, the Court can neither determine the proximity of the alleged drug selling or whether the evidence thereof is substantial. The Court finds that the best way to address this issue is for the Commonwealth to make a detailed offer of proof at the time of trial outside the presence of the jury.

IV. Defendant's statement to police admitting that he is a user of marijuana

The Commonwealth argues that Defendant's admission that he is a user of

marijuana is relevant to show that the marijuana found in the apartment was Defendant's. The Court agrees. If the defense wishes, however, the Court would be willing to give the jury a cautionary instruction that this evidence can only be used for one purpose, that is, to determine whether or not the marijuana found in the apartment belonged to Defendant.

ORDER

AND NOW, this ___ day of January 2010, upon consideration of the Commonwealth's Motion in Limine, the Court **GRANTS** the motion in part and **DENIES** the motion in part. The Court **PRECLUDES** the Commonwealth from introducing evidence relating to Defendant's alleged involvement in gang activity. The Court will permit the Commonwealth to introduce evidence of Defendant's statements that he would plead for five to ten years and he would "be upstate by then" as well as his admission that he is a marijuana user. The Court defers ruling on the Commonwealth's request to present evidence that Defendant was selling drugs. At the time of trial, outside the presence of the jury, the Commonwealth shall make a detailed offer of proof regarding this proposed evidence.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Nicole Spring, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file