

IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PA

COMMONWEALTH :
: CR# 700-2009
: vs. :
: THERIM R. POWELL :

COMMONWEALTH :
: CR# 826-2009
: vs. :
: AMIEN PATTON :

OPINION AND ORDER

Defendant Powell was arrested under the above-titled information number with Possession with Intent to Deliver, Receiving Stolen Property, Possession of Firearm, Alter Mark of Identification, Firearms not to be Carried without a License, and Possession of a Controlled Substance, specifically cocaine. On February 15, 2011 the Commonwealth filed a Notice of intent to introduce certain evidence at trial. On April 1, 2011 Defendant Powell filed a Motion in Limine essentially raising two (2) issues – the admissibility of statements made by Defendant Patton that the Defendants had been “smoking marijuana with some girls earlier in the evening” and evidence regarding a “MOB” tattoo on Defendant Patton’s neck that the Troopers indicated in their report was indicia of gang involvement.

Following a hearing on this matter, Defendant Powell’s Motion in Limine, is GRANTED. As this Court finds that evidence regarding possession and use of marijuana earlier in the day is not relevant, such evidence is inadmissible. The

remainder of statements made by Defendant Patton may, however, be admissible at trial.

Evidence regarding Defendant Patton's "M.O.B" tattoo and additional evidence referred to in Paragraphs 2 and 3 of the Commonwealth's Notice of February 15, 2011 is excluded. Although the Commonwealth argues that evidence of gang indicia, such as tattoos, and alleged statements by Defendant Powell that "I'm in the mix" are relevant and admissible to prove a common plan or scheme, this Court finds that such evidence is propensity evidence, and even if such evidence were relevant to show motive or intent, any such relevance would be outweighed by its substantial prejudicial effect.

Although the Commonwealth relies upon Commonwealth v. Cousar, 928 A.2d 1025 (Pa. 2007), in which the Pennsylvania Supreme Court upheld the lower's court's inclusion of evidence of the defendant's "M.O.B." tattoo, evidence of the tattoo in Cousar was deemed admissible to show that the another participant in the robbery at issue had the same tattoo as the defendant, thus supporting an inference that the defendant was not merely present at the scene, but an active participant, acting in concert with the other participant in the robbery. In the present action, only one of the Defendants bears the M.O.B. tattoo. Merely because one of the Defendants bears a tattoo that may or may not be indicative of gang involvement is not probative of whether the Defendant is guilty of the crimes charged. Moreover, "the risk that this evidence will enflame the passions of the jury and divert them from impartially weighing the evidence is great." See Commonwealth v. Coleman, Lyc. County, No. CR-499-2010 (1/3/11, Lovecchio, J.). Accordingly, this Court precludes the

Commonwealth from introducing evidence relating to the Defendants alleged involvement in gang activity or indicia of gang membership.

As to the remaining items in the Commonwealth's Notice, Paragraph 1 is deemed admissible, in part. If the Commonwealth intends to introduce evidence that Daniel Moytka and/or Nathan Diefenderfer purchased heroin from Defendant Powell in 2008, such evidence is deemed relevant and admissible pursuant to Commonwealth v. Echevarria, 575 A.2d 620 (Pa.Super. 1990). Evidence that a 9mm pistol was traded for drugs and money is admissible, but no reference shall be made to Defendant Powell in the absence of any specific identification.

BY THE COURT,

Richard A. Gray, J.

cc: District Attorney (MK)
Michael Morrone, Esquire
George Lepley, Esquire
Gary Weber, Esquire