

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
vs. : **No. CR-1466-2010**
:
CHRISTOPHER WHITE, :
Defendant :

OPINION AND ORDER

Before the Court is Defendant's Motion In Limine filed on February 22, 2011.

By way of background, Defendant is charged by Information filed on October 29, 2010 with Delivery of a Controlled Substance (cocaine), Possession with Intent to Deliver Cocaine, Criminal use of a Communication Facility, Possession of Cocaine and Possession of Drug Paraphernalia.

On March 20, 2010, Defendant is alleged to have sold to a confidential informant one bag of cocaine weighing approximately 5.6 grams. Following the transaction, according to the confidential informant, the Defendant became suspicious. The Defendant allegedly pulled out "a silver in color semi-automatic pistol with black grips" and directed the confidential informant to show the Defendant that he/she was not wearing a wire.

During a separate incident on April 4, 2010, following a traffic stop, a search of the Defendant's person and his vehicle resulted in the seizure of eight grams of cocaine separately packaged in one gram or less packets, all contained in a small distribution bag, empty baggies, an Uzi-type semi-automatic gun and scale. As well, law enforcement seized a motel key. The motel key was to a motel room rented in the Defendant's name which also was searched.

The search of the motel room resulted in the police seizing a green backpack containing two loaded .40 caliber magazines, a box of .40 caliber ammunition, two boxes of

.22 caliber ammunition, an electronic scale with white residue, two nickels with white residue, a box of distribution bags, empty liquid prescription bottles, an empty olive drab cloth bag, prescription Atenolol, Zantac pills, 14 small Ziploc baggies containing residue, a leatherman type tool, a small Ziploc bag with residue and two pennies with residue.

The Motion In Limine asks that the Court preclude any and all of the evidence seized from the Defendant on or about April 4, 2010 as a result of the search of the Defendant, the search of the Defendant's car and the search of the Defendant's motel room.

A jury was selected in this matter on February 15, 2011. The jury trial is scheduled for March 1, 2011. The argument and hearing on Defendant's Motion In Limine was held before the Court on February 24, 2011.

The Commonwealth indicated that it intended on presenting the evidence at trial for the purpose of proving a common scheme or plan. The Commonwealth conceded that the evidence was prior bad acts evidence and that it intended on filing a notice of the Commonwealth's intention to utilize said evidence no later than February 24, 2011 but decided not to do so in light of the fact that a Motion In Limine had been filed by the Defendant.

The admission of bad acts evidence is governed by Rule 404 (b) of the Pennsylvania Rules of Criminal Procedure. In criminal cases, the prosecution must provide reasonable notice in advance of trial, or during trial if the Court excuses pretrial notice on good cause, of the general nature of any such evidence it intends to introduce at trial. 404 (b) (4). The purpose of the notice requirement is to prevent unfair surprise and to give a Defendant sufficient time to prepare an objection or rebuttal to the evidence. Commonwealth v. Mawhinney, 915 A.2d 107, 110 (Pa. Super. 2006), appeal denied, 932 A.2d 1287 (Pa. 2007).

In response to the notice issue, the Commonwealth argues that the evidence was provided during discovery and further that the filing of the Motion In Limine excuses the Commonwealth from providing notice. The providing of the evidence through discovery does not satisfy the requirement that the Commonwealth notify the Defendant in advance of trial of the Commonwealth's intention to use such evidence at trial. Moreover, the Commonwealth has not provided the Court nor has the Court found any authority to support the argument that the filing of a Motion In Limine by the Defendant excuses the Commonwealth from providing the required notice. Indeed, by doing so, Defendant would be placed in the untenable position of choosing between not filing a Motion In Limine to preclude evidence or hoping that the Commonwealth would not timely file a required notice.

Accordingly, because the Commonwealth has not complied with its obligation to provide reasonable notice in advance of trial of the general nature of such evidence it intended to introduce, the evidence will not be deemed admissible. Oral notice by the Commonwealth at a hearing on a Motion In Limine three working days before trial following the selection of a jury is not only unreasonable but prejudicial to the Defendant.

Assuming, however, that notice may be deemed sufficient or excused under the circumstances, the Court will address the substance of the Motion.

Rule 404 (b) (1) prohibits evidence of other crimes, wrongs or acts in order to show acts in conformity therewith. Generally speaking, a Defendant should not be forced to defend against other alleged crimes as well as the one for which he stands charged. See Commonwealth v. Wright, 393 A.2d 833, 837 (Pa. Super. 1973).

Evidence of other crimes, wrongs or acts may be admitted for limited purposes,

however, such as to show a common scheme or plan. Pa.R.E. 404 (b) (2); Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835, 840 (1989). In criminal cases, such evidence can only be admitted upon the showing that the probative value of said evidence outweighs the potential for prejudice. Pa.R.E. 404 (b) (3).

The exception language of 404 (b) (2) is not exclusive. See Commonwealth v. Watkins, 843 A.2d 1203, 1215 n. 11 (Pa. 2003), cert denied 543 U.S. 916 (2004). Numerous cases, for example, admit bad acts evidence to explain a course of conduct, to complete the story, to evidence the natural development of the case, or even a relationship between co-conspirators. Commonwealth v. Williams, 896 A.2d 523, 539 (Pa. 2006), cert denied 549 U.S. 1213 (2007); Commonwealth v. Drumheller, 808 A.2d 893, 905 (Pa. 2002), cert denied 539 U.S. 919 (2003).

The Commonwealth has limited its argument in this case, however, contending only that the proffered evidence is relevant to prove a common plan, scheme or design. This exception, while not expressly listed in Rule 404 (b) (2), has been judicially recognized. Commonwealth v. Judd, 897 A.2d 1224, 1231 (Pa. Super. 2006); Commonwealth v. Robinson, 581 Pa. 154, 864 A.2d 460, 481 (2004), cert denied 546 U.S. 983 (2005); Commonwealth v. Aikens, 990 A.2d 1181, 1185 n.2 (Pa. Super. 2010) (“Pa. R.E. 404 (b) embodies the common scheme or plan exception to the prohibition against use of prior crime evidence.”)

In determining whether evidence of one crime is admissible to prove a common plan, scheme or design, the Court must be satisfied that the two crimes or bad acts are so related to each other that proof of one tends to prove the other. Judd, supra. The following factors should be considered in establishing similarities: the lapse of time between the crimes, the geographical

proximity of the crime scenes, and the manner in which the crimes were committed. Judd, supra. citing Commonwealth v. Clayton, 506 Pa. 24, 33, 43 A.2d 1345, 1345-1350 (1984).

The Court concludes that the evidence of the separate crimes are not so related to each other that proof of one tends to prove the other. The facts of each crime are not so sufficiently comparable, nor are there matching characteristics that elevate the incidents to a unique pattern that distinguishes them from the typical drug delivery pattern. Indeed the similarities at issue are confined to insignificant details that would likely to be common elements regardless of who committed the crimes. See Commonwealth v. Aikens, supra. at 1186; Commonwealth v. Hughes, 555 A.2d 1264, 1283 (Pa. 1989).

The instant case involves an alleged sale of \$400.00 worth of cocaine that was packaged in one baggie and weighed approximately 5.6 grams. This sale was made following the CI telephoning the Defendant and arranging to meet in the rear of the Brandon Café in Williamsport. The Defendant allegedly arrived in a black Volvo at which time the CI got into the front passenger seat. The sale took place, although following the sale the Defendant forced the CI to allegedly take a “hit” of cocaine from a pipe. As well, during the incident the Defendant allegedly pulled out a silver semi-automatic handgun with black grips.

The information regarding the April 4, 2010 searches of the Defendant, his car and motel room was not such that it could be concluded that the crimes were so related to each other that proving one would tend to prove the other or that they were so nearly identical in method as to earmark them as the handy work of the Defendant.

The April 4, 2010 incident occurred sixteen days after the March 20 incident. There was no evidence presented establishing any geographical proximity of the crime scenes. One crime

involved a delivery to a confidential informant that was arranged by the confidential informant, whereas the other crime was possession with intent to deliver. One crime involved the sale of one package of cocaine weighing 5.6 grams. The other crime involved 8 grams of cocaine that was packaged in numerous smaller bags of one gram or less, marijuana, empty baggies, an Uzi submachine gun, a scale, various items of drug paraphernalia and residue.

The Commonwealth could not point to any similarities in connection with the various crimes, such as identifying marks on the packaging; the same pipe; similarities in color, shape, or number of the packets; similarity in texture, color, or purity of the substances; similarity in the method or manner in which the crimes were committed; or similarities in the scene of the crime.

Indeed, the only evidence that the Commonwealth can point to in support of its argument that there is a common plan, scheme or design is that the Defendant was driving a black Volvo automobile and that the cocaine was in a baggy “similar” to the baggies found in connection with the April 4, 2010 incident. Therefore, the Court finds that the proffered evidence does not show a common plan or scheme.

Moreover, the Court finds that the relevance of the proffered evidence is far outweighed by any prejudicial impact. The Court finds that there would be a substantial danger that the proffered evidence would result in the jury convicting the Defendant on a basis not related to the charges. See Pa.RE. 403, comment (“unfair prejudice” means a tendency to suggest decision on an improper basis or to avert the jury’s attention away from its duty of weighing the evidence impartially.”).

ORDER

AND NOW, this 24th day of February 2011, following a hearing and argument, the Court **GRANTS** Defendant's Motion In Limine. The Commonwealth is precluded from offering any evidence regarding the incidents which involved the Defendant on April 4, 2010, including, but not limited to, the items seized from Defendant's person, his car and/or his motel room.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: District Attorney (PP)
Public Defender (RB)
The Honorable Nancy L. Butts
Gary Weber, Esquire (Lycoming Reporter)
Work File