

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH**

**v.**

**ALBERT KENNEL,  
Defendant**

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**CR-1182-2011**

**CRIMINAL DIVISION**

**OPINION AND ORDER**

The Defendant filed a timely Omnibus Pretrial Motion on October 28, 2011. A hearing on the Motion was held December 15, 2011, after which time both parties were granted leave to file briefs on the matter: the Defendant's brief in support of the Motion was filed December 27, 2011 and the Commonwealth's brief in opposition was filed January 6, 2012. No reply brief was filed by the Defense as of the date of this Opinion.

***Background***

On Friday, July 23, 2011, Grace Hockenberry (Hockenberry), who lives at 443 Market Street in the City of Williamsport, on the second floor above Ann McKay Studio, arrived home around 12:15 a.m., parked in the parking lot off of Court Street, and entered through the back gate entrance to her building. Hockenberry testified at the Preliminary hearing on this case, held on August 26, 2011 before Magisterial District Judge Allen Page, that her apartment is located next door to ACME Barbeque (ACME), a restaurant, and that the back gate behind her building leads into a courtyard, and that from the courtyard she can enter through either the front or back entrance to her building. On July 23, as she entered through the back gate, Hockenberry heard the front gate open on the opposite side of the courtyard and saw someone walking down the

walkway beside her apartment building. Hockenberry passed the individual on the walkway from a distance of about three feet but did not recognize the individual as it was quite dark. Hockenberry then went inside to her apartment. A short time later, Hockenberry heard a loud noise outside and looked out of her bedroom window, from which she can see very well into the yard behind ACME as the area is well lit. Hockenberry saw an individual wearing a red hat and a white shirt walking very quickly toward the gate behind ACME. Hockenberry testified that the individual looked back over his shoulder, and that she then recognized the individual as someone she had previously seen wearing an apron outside of ACME. Hockenberry admitted that she did duck behind her bedroom curtain at that point, but not before recognizing the individual leaving ACME.

On Monday following the weekend of July 23, George Logue (Logue), the owner of ACME, discovered that his business had been robbed as the store's cashbox was missing which contained \$795.00 and various receipts. Logue testified that he was away the weekend of July 23, as he was getting married, and that all of his employees were aware that he was out of town. Logue came into Ann McKay Studio where Hockenberry was working too see if anyone there had information about the burglary, as the building was located next to ACME. At that point, Hockenberry relayed what she witnessed the night of July 23, and described the individual she observed as the "shorter black guy who works for you." Logue realized that Hockenberry was describing Albert Kennel (Defendant) and at that point called Michael Orwig (Orwig) of the Williamsport Bureau of Police.

Agent Trent Peacock (Peacock), also of the Williamsport Bureau of Police, testified at the hearing on the Omnibus Motion. Once he received this assignment, he learned that the glass in the back door of ACME had been broken, and that a cash box containing over \$700.00 was

taken from inside the restaurant. Orwig advised Peacock that the Defendant was a possible suspect and Peacock then created a photo array using the Defendant's picture and seven other similar images of individuals. Peacock showed the array to Hockenberry, who identified the Defendant's photo as the person she saw leaving ACME on the 23<sup>rd</sup>. The Defendant was subsequently arrested and charged with Burglary, Receiving Stolen Property, Theft by Unlawful Taking, and Criminal Mischief.

### *Discussion*

#### *Petition for Habeas Corpus*

Defense Counsel argues that the evidence presented at the preliminary hearing failed to establish a prima facie case for the charges alleged. Defense alleges that as the evidence presented was based on nothing more than mere speculation, the charges against him for Burglary, Theft, Receiving Stolen Property, and Criminal Mischief should be dismissed.

“A prima facie case consists of evidence produced by the Commonwealth which sufficiently establishes that a crime has been committed and that the accused is probably the perpetrator of that crime.” Commonwealth v. McConnell, No. 1795 C 2009, 2009 Pa. Dist. & Cnty. Sept. LEXIS 252 at 9 (Pa. Dist. & Cnty. Sept. 10, 2009) (See Commonwealth v. McBride, 595 A.2d 589, 591 (Pa.1991). “Every element of the crime charged must be supported by the evidence; however the Commonwealth need not establish guilt beyond a reasonable doubt.” McConnell at 9. (See Commonwealth v. Lopez, 654 A.2d 1150, 1153 (Pa. Super. 1995). “The Commonwealth establishes a prima facie case as long as the evidence presented establishes sufficient probable cause to warrant the belief that the accused committed the offense.” McConnell at 9. ( See Lopez at 1153.)

A person commits the offense of Burglary under 18 Pa.C.S. §3502(a)(1) if that person enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. Defense Counsel asserts that the only evidence presented by the Commonwealth in this case to support the charge of Burglary was the Defendant's proximity to the crime, and that this evidence amounts to nothing more than mere speculation. The Defense cites to Commonwealth v. Fuentes, No. 3927 of 2008, 2009 Pa. Dist. & Cnty. Dec. LEXIS 376 (Pa. Dist. & Cnty. June 2, 2009) in support of their argument. In Fuentes, several employees of a pharmacy observed individuals engaging in suspicious conduct. The employees relayed their observations, along with the license tag number of the vehicle driven by the suspicious individuals, to the police. Id. at 4-6. The police then made contact with the driver of the vehicle who relayed that his friend, the passenger in the vehicle, had intended to rob the pharmacy and had a gun with him. Id. at 6-9. The driver was then charged with conspiracy to commit robbery. The Fuentes Court determined that the case against the defendant was based almost exclusively on circumstantial evidence and that when "[a] conviction is based entirely on circumstantial evidence, 'the theme of guilt must flow from the facts and circumstances proved, and be consistent with them all.' If the conviction is based wholly on inferences, suspicion, and conjecture, it cannot stand." Citing Commonwealth v. Simpson, 260 A.2d 751, 754 (Pa. 1970). The Fuentes Court stated:

[t]he evidence fails to establish not only that the acts of the two persons, the one who entered the pharmacy and the other who walked around the outside of the pharmacy, were performed in concert toward achieving a common, unlawful purpose, but also that the Defendant was one of those persons. The acts acquired meaning and purpose only after the Defendant's statements were admitted as evidence. In light of the lack of direct and circumstantial evidence connecting the Defendant with any effort to rob the pharmacy or indicating that robbing the

pharmacy was the planned criminal act, the preliminary hearing evidence is insufficient to establish the *corpus delicti* for the crime of Criminal conspiracy. The Commonwealth failed to satisfy the evidentiary prerequisite for admission of the Defendant's inculpatory statements and, in the absence of such evidence, failed to present sufficient evidence to establish a *prima facie* case for the crimes charged.

Id at 18. Therefore, the Fuentes Court found that the Commonwealth failed to establish a prima facie case for conspiracy to commit robbery due to the deficiency of direct and/or circumstantial evidence presented.

The Court finds that the case at hand is distinguishable from Fuentes, as the circumstantial evidence presented here satisfies the Commonwealth's prima facie burden. While the Defense acknowledges that presence at the scene of a burglary may be established by circumstantial evidence, they also assert that mere presence alone is insufficient to convict on a charge of burglary. In support of their position, the Defense distinguishes the facts of the Defendant's case to those in Commonwealth v. James, 326 A.2d 548 (Pa. Super. 1974) where the Superior Court reasoned that the "element of time, proximity to the scene of the crime and proximity to the goods stolen form a sufficient basis in law to sustain the counts of burglary and larceny." The Court notes that the standard used to review sufficiency of the evidence, as was the standard used by the Superior Court in James, is whether the elements of the crime were established beyond a reasonable doubt; this standard is more stringent than the prima facie standard of sufficient probable cause to believe that the accused committed the offense, as is the standard in this case. The Court also believes that, in addition to those found in James, there are several examples of circumstantial evidence which, if presented, would provide sufficient evidence to establish a prima facie case of a Burglary. In Commonwealth v. Fontana, 327 A.2d 154 (Pa. Super. 1974) the Superior Court found that where "a part-time patrolman heard his

neighbor's burglar alarm and spotted an individual attempting to flee from the vicinity; within fifteen or twenty minutes, the appellant was apprehended in close proximity to the scene and was positively identified by an eyewitness," these facts provided a "[d]irect link between appellant and the commission of the crime." The Fontana Court reasoned that "[u]nder the circumstances of this case, it was permissible for the jury to infer that appellant had actually entered the building and had triggered the alarm." The court in Commonwealth v. Stanley, 309 A.2d 408 (Pa. 1973) noted several factors which could provide circumstantial evidence of the commission of a burglary, including the report of a burglary in process, a defendant being placed in the doorway of the burglarized building by a witness, and the defendant being seen "fleeing" from the scene. See also Commonwealth v. Cimaszewski, 288 A.2d 805 (Pa. 1972).

The Court believes that the evidence presented in this case does in fact provide sufficient probable cause to establish that a Burglary occurred and that the Defendant was probably the person who committed the Burglary. The testimony of both Peacock and Logue established that, over the weekend of July 23, 2011, force was used to break into ACME as the glass on the back door to the restaurant was shattered. Logue's testimony also established that a cash box containing approximately \$795.00 and receipts was stolen from the restaurant. Hockenberry's testimony provided sufficient circumstantial evidence for the Court to infer that the Defendant was the individual who committed the Burglary. Around 12:15 a.m. on July 23, 2011, Hockenberry heard a loud noise outside her apartment which caused her enough unease that she looked out of her window to see what had caused the noise. Hockenberry then observed the Defendant, who she recognized as someone she had previously seen outside ACME wearing an apron, quickly walking away from ACME. While it is true that the Defendant was an employee of ACME, the restaurant was closed at the time Hockenberry observed him fleeing, and there

appears to be no valid reason for the Defendant to have been at the restaurant at 12:15 a.m. on the day in question. For these reasons, the Court finds that the Commonwealth established sufficient probable cause to believe that the Defendant did in fact commit the offense of Burglary.

A person commits the offense of Theft by Unlawful Taking under 18 Pa.C.S. §3921 if that person unlawfully takes, or exercises unlawful control over, the movable property of another, with the intent to deprive them thereof. A person commits the offense of Receiving Stolen Property under 18 Pa.C.S. §3525(a) if he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner. A person commits the offense of Criminal Mischief under 18 Pa.C.S. §3304(A)(1) if he damages tangible property of another intentionally, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means listed in section 3302(a) of this title (relating to causing or risking catastrophe).

As stated above, the Court finds that the evidence presented by the Commonwealth was sufficient to establish that someone used force to break into ACME by shattering the glass on the back door to the restaurant, causing tangible damage to the restaurant, that a cash box containing \$795.00 was missing from the restaurant, and that the Defendant was probably the person who broke into the restaurant and took the cash box. Therefore, the Court believes that the Commonwealth presented sufficient evidence to establish probable cause to believe that the Defendant also committed the offenses of Theft by Unlawful Taking, Receiving Stolen Property, and Criminal Mischief.

*Motion to Suppress*

*Photo array was unduly and impermissibly suggestive*

In the Motion to Suppress, Defense Counsel argues that the photo array presented to Hockenberry was unduly and impermissibly suggestive as the Defendant was the only individual in the array of his size and stature and who possessed a full head of hair. Defense Counsel also argues that the Defendant was the only individual in the array who lived and worked in the same neighborhood as Hockenberry. Defense Counsel believes that as the Defendant's photo stands out from the rest of the array, any out of court identification amounts to irreparable mistaken identity and should be suppressed. Defense Counsel argues that due to the conditions surrounding Hockenberry's identification of the Defendant, i.e. the time of day and lighting conditions, that the photo array should have included such factors as age, race, height and weight, and that the other ACME employee of the same race as the Defendant should have also been included in the array.

“[A] photo array is unduly suggestive if it creates a substantial likelihood of misidentification.” Commonwealth v. Schantz, No. 2802/2009, 2009 Pa. Dist. & Cnty. Dec LEXIS 396 (Pa. Dist. & Cnty., October 16, 2009. “Photographs used in line-ups are not unduly suggestive if the suspect's picture does not stand out more than those of others, and the people depicted exhibit similar facial characteristics.” Id. at 5. (See also Commonwealth v. Robinson, 781 A.2d 152 (Pa. Super. 2001). The central inquiry in determining whether an array is unduly suggestive is whether, under the totality of the circumstances, the identification was reliable. Schantz at 5 (See Commonwealth v. Pierce, 786 A.2d 203, 217 (Pa. 2001). “[I]t is only where the identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification that suppression will result.” Schantz at 6. (See



Commonwealth v. Burton, 770 A.2d 771 (Pa. Super. 2001). “[I]ndeed, not every person in the photo array must be identical in appearance....the existence of one possibly suggestive element in an identification procedure does not automatically require suppression of the identification evidence obtained through that procedure.” Schantz at 6.

The evidence presented established that the photo array was created after Hockenberry identified the Defendant as the individual she observed leaving ACME on July 23, 2011. Peacock testified that he put the Defendant’s photo into the Pennsylvania Justice Network (JNET) system, along with information such as age, race and facial hair, and that the JNET system then found seven other photographs of individuals with features similar to those of the Defendant to create the photo array. Peacock testified that height and weight are not put into the JNET system as this information is irrelevant as only head shots are included in the photo arrays. The photo array in this case was admitted into evidence at the time of the Omnibus Motion. After a review of the array, this Court does not find that the array was unduly suggestive so as to create a substantial likelihood of misidentification. The Court believes that all of the individuals in the photo array are of the same race and have facial hair similar to that of the Defendant and even have ear piercings similar to those of the Defendant. Therefore, the Court finds that the array was not unduly or impermissibly suggestive.

**ORDER**

AND NOW, this \_\_\_\_ day of January, 2012, after hearing and review of the briefs submitted by Counsel, both the Defendant's Petition for Habeas Corpus and Motion to Suppress are hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: Martin Wade, Esq.  
Jeana A. Longo, Esq.