IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	**CR: 1990-2012**
	:	**CRIMINAL DIVISION**
ALIEK CARR,	:	
Defendant	:	

OPINION AND ORDER

The Defendant filed a Motion for Reconsideration of Court's Order Denying Motion to Suppress and for Other Relief on June 28, 2013.

Background

On January 2, 2013, the Defendant filed an Omnibus Pre-Trial Motion, which included various motions: 1) Motion to Suppress Physical Evidence; 2) Motion for Discovery; 3) Motion to Disclose existence of and Substance of Promises of Immunity, Leniency or Preferential Treatment and Complete Criminal History From the National Crime Information Center and/or the Pennsylvania Justice Network; 4) Motion for Disclosure of Other Crimes Wrongs, or Acts Pursuant to Pa.R.E. 404(b); 5) Petition for Writ of Habeas Corpus; and 6) Motion to Reserve Right. On May 2, 2013, this Court granted the Defendant's Motion to Suppress finding that the Commonwealth did not sufficiently prove that Montoursville Borough Police had jurisdiction to conduct the controlled buy and arrest. On May 16, 2013, the Commonwealth filed a Motion to Reconsider or Reopen. After argument on May 22, 2013 and in the interest of justice, the Court granted the Commonwealth's Motion and heard testimony from Chief Chris McKibben (McKibben) of the Muncy Township Police Department.

On June 19, 2013, the Court denied the Defendant's Motion to Suppress based on the additional testimony provided by McKibben. On June 28, 2013, the Defendant filed a Motion

requesting the Court to reconsider all previous decisions that were rendered against his interest. The Court will address the Defendant's outstanding Petition for Writ of Habeas Corpus and his request for reconsideration.

At the preliminary hearing Chief Gyurina (Gyurina) of the Montoursville Borough Police Department testified that a complaint was made about a suspicious person in the Wal-Mart parking lot. Gyurina made contact with Douglas Paulhamus (Paulhamus), during which he discovered drug paraphernalia on Paulhamus. Paulhamus agreed to arrange a transaction with his supplier, for whom he was waiting in the Wal-Mart parking lot. Gyurina searched his vehicle and pre-recorded money to be used for the transaction. Paulhamus then called his supplier and the location of the transaction was changed from the Wal-Mart in Montoursville to a Best Buy store parking lot in Muncy Township. Police kept close watch of Paulhamus' car as it traveled to the Best Buy.

Police directed Paulhamus to park in a specific area of the Best Buy parking lot so that police could observe his vehicle from their location behind the McDonalds restaurant. Gyurina observed a white sedan pull up next to Paulhamus' vehicle and when the transaction was completed Paulhamus called Officer Kurt Hockman. Following the transaction Paulhamus turned over eight (8) blue wax paper packets of heroin to police. Police went to the Best Buy lot and told the Defendant to stop but he began backing up as though he was attempting to exit. The Defendant stopped his vehicle and he was placed under arrest.

The Defendant's vehicle was towed to Montoursville Police Department. Police asked the Defendant for consent to search and he signed a consent to search. The police found thirty-five (35) packets of heroin in a dashboard vent packaged identically to the heroin packaging for

the drugs sold to Paulhamus. The police also found the recorded money given to Paulhamus in the Defendant's vehicle. The narcotics field tested positive for heroin.

Petition for Writ of Habeas Corpus

The principal function of a preliminary hearing is to protect an individual's right against an unlawful arrest and detention. Commonwealth v. Mullen, 333 A.2d 755 (Pa. 1975). A preliminary hearing is not a trial and the Commonwealth only bears the burden of establishing at least a *prima facie* case that a crime has been committed. Commonwealth v. Prado, 393 A.2d 8 (1979).

> A prima facie cases exists 'when the Commonwealth produces evidence of each of the material element of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury.'

Commonwealth v. Weigle, 997 A.2d 306, 311 (Pa. 2010) (citing Commonwealth v. Karetny, 880 A.2d 505, 513 (Pa. 2005). The Commonwealth need not establish guilt beyond a reasonable doubt.

As a general argument for dismissal, Defendant contends that the preliminary hearing testimony was entirely hearsay testimony from officers. The Court finds that argument without merit. The testimony presented was actual observations made by the officers of the Defendant's vehicle as it pulled up next to Paulhamus' vehicle. In addition, the officers stopped the Defendant's vehicle shortly after the transaction, searched his vehicle, found heroin that matched the narcotics given to Paulhamus, and found the recorded money given to Paulhamus. See Pa.R.Crim.P. 542(E); Commonwealth v. Nieves, 876 A.2d 423 (Pa. Super. 2005) (finding a *prima facie* case for Possession with Intent to Deliver with the testimony of an officer who saw some of the transaction and relied on hearsay to prove the rest); Commonwealth v. Jackson, 849

A.2d 1254, 1257 (Pa. Super. 2004) (finding that the sole testimony from an officer about a criminal trespass was sufficient for a preliminary hearing and did not require the home owner's testimony). Therefore, the Court will determine whether the Commonwealth has sufficiently established a *prima facie* case against the Defendant based on the facts provided at the preliminary hearing.

a. Possession with Intent to Deliver

The Defendant has alleged that the Commonwealth failed to establish two (2) counts of Possession with Intent to Deliver. For the offense of Possession of a Controlled Substance with Intent to Deliver, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance with the intent to deliver. The Controlled Substance, Drug, Device and Cosmetic Act specifically prohibits:

> Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State Board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30). "The intent to deliver can be inferred from an examination of the surrounding facts and circumstances." Commonwealth v. Perez, 931 A.2d 703, 708 (Pa. Super. 2007). Facts that may be considered include the method of packaging, the form of the drug, and the behavior of the defendant. Id.

The Court finds that the Commonwealth has sufficiently established a *prima facie* case for the Possession with Intent to Deliver charges. Paulhamus set up a controlled buy with the Defendant. The Defendant's vehicle was seen parked next to Paulhamus' vehicle. Paulhamus gave police heroin that had matching packaging as the heroin found in the Defendant's vehicle.

Finally, money found in the Defendant's vehicle matched the recorded money used by Paulhamus.

In addition, the Court finds that the number of packets (35) of heroin possessed by the Defendant is sufficient proof of the Possession with Intent to Deliver charge. As stated above, the Court may consider the method of packaging, the form of the drug, and the behavior of the Defendant. The amount of drug found in the Defendant's vehicle, the method of packaging, and the hidden compartment in the vehicle supports the MDJ's finding of a *prima facie* case.

b. Delivery of a Controlled Substance

The offense of Delivery of a Controlled Substance is set forth in 35 P.S. § 780-113(a)(30). For a defendant to be liable as a principal for the delivery of a controlled substance there must be evidence presented that he knowingly made an actual, constructive, or attempted delivery of a controlled substances to another person without the legal authority to do so. See Commonwealth v. Murphy, 844 A.3d 1228, 1243 (Pa. 2004). As previously discussed, the evidence has shown that a drug transaction occurred and that it involved Paulhamus and the Defendant. The Court finds that the Commonwealth has sufficiently established a *prima facie* case for the single count of Delivery of a Controlled substance.

Motion for Reconsideration

The Defendant's first contention is that the Court erroneously re-opened the record "[o]ver a vigorous Defense objection." Motion for Reconsideration of Court's Order Denying Motion to Suppress and for Other Relief, p. 2. Defense counsel has alleged that "the Court's decision to re-open the record was insupportable." Id. The Defendant's Motion, however, does not cite any legal authority to persuade the Court.

Defense counsel has mischaracterized the case cited by the Court in justifying the decision to re-open to argue that a court may not re-open the record if it is due to a Commonwealth mistake. Commonwealth v. Campbell, 444 A.2d 155 (Pa. Super. 1982). In Campbell, the arresting officer failed to appear for a suppression hearing and the defendant's motion to suppress was granted. The officer was later found and the court reopened the record. The Superior Court of Pennsylvania affirmed the court's decision and found that a court, in its discretion, may reopen the record to permit either side to present additional evidence. In addition, the Court cited Ferguson, a case where the Commonwealth specifically failed to introduce a search warrant at a suppression hearing. Commonwealth v. Ferguson, 331 A.2d 856, 859 (Pa. Super. 1974). The Superior Court sent the case back to the lower court so that the warrant could be admitted into the record in the interests of justice. Defense counsel's argument that the mistake made must not be within the Commonwealth's control is unfounded and not supported by either Campbell or Ferguson.

Next, the Defendant has requested that the Court reconsider its determination that the requirements of 42 Pa.C.S. § 8953(a)(4) of the Statewide Municipal Police Jurisdiction were satisfied here. Defense counsel cites Merchant and Pratti to state that "section (a)(4) requires that the official business be that of the officer's usual responsibilities while on routine patrol." Motion for Reconsideration of Court's Order Denying Motion to Suppress and for Other Relief, p. 4; Commonwealth v. Merchant, 595 A.2d 1135 (Pa. 1991); Commonwealth v. Pratti, 608 A.2d 488 (Pa. 1992). The Pennsylvania Supreme Court, however, was applying section (a)(5) in those cases, which "must be read in conjunction with (a)(4). . ." Merchant, 595 A.2d at 1138. Section (a)(5) clearly requires that the officers be on "official business" and not (a)(4):

> (4) Where the officer has obtained the prior consent of the chief law enforcement officer, or a person authorized by him to give consent, of the organized law enforcement agency

> which provides primary police services to a political subdivision which is beyond that officer's primary jurisdiction to enter the other jurisdiction for the purpose of conducting official duties which arise from official matters within his primary jurisdiction.
>
> (5) Where the officer is on official business and views an offense, or has probable cause to believe that an offense has been committed, and makes a reasonable effort to identify himself as a police officer and which offense is a felony, misdemeanor, breach of the peach or other act which presents an immediate clear and present danger to persons or property.

This Court found that Montoursville Police has jurisdiction solely based on section (a)(4) and therefore no analysis of section (a)(5) is required.

Similarly, defense counsel cites to McCandless to state that "the 'official business' under (a)(4) must be 'separate and apart' from the pursuit of the defendant." Motion for Reconsideration of Court's Order Denying Motion to Suppress and for Other Relief, p. 5 (emphasis included); Commonwealth v. McCandless, 648 A.2d 309 (Pa. 1994). The Court believes this is not the correct holding of the case. In McCandless, an officer saw a car driving faster than the other vehicles on the road. The officer followed the vehicle but by the time he caught up with it, he had entered another jurisdiction. The Supreme Court analyzed section (a)(2):

> (2) Where the officer is in hot pursuit of any person for any offense which was committed, or which he has probable cause to believe was committed, within his primary jurisdiction and for which offense the officer continues in fresh pursuit of the person after the commission of the offense.

After the Supreme Court found that section (a)(2) did not apply they addressed the Commonwealth's additional argument:

> It has been suggested by the Commonwealth that the officer's entry into Sandycreek Township might have been justified on another basis, to wit, that he was there on "official business" *separate and apart* from his pursuit of appellant. See Commonwealth v. Pratti, 530 Pa. 256, 608 A.2d 488 (1992); Commonwealth v. Merchant, 528 Pa. 161, 595 A.2d 1135 (1991); *42 Pa.C.S. § 8953(a)(5)* (permitting police officers to exercise authority in neighboring municipalities when they are there on "official business"). We

> find no basis in the record, however, to conclude that the officer entered Sandycreek Township for any purpose other than to determine whether appellant was speeding.

McCandless, 648 A.2d at 311 (emphasis added). In context, the Supreme Court was not requiring an additional requirement of "separate and apart." The Commonwealth was merely arguing a justification for jurisdiction distinct from that under section (a)(3). Further, the Commonwealth's argument was again based upon section (a)(5).

Finally, the Defendant requests that the Court reconsider its decision that the Defendant voluntarily consented to the search of his vehicle. Defense counsel focused on distinguishing the Mack case relied upon by this Court to argue that the decision was incorrect. Commonwealth v. Mack, 796 A.2d 967 (Pa. Super. 2002). The Court reaffirms its opinion that the Defendant's consent was voluntary and finding that he was both informed of his Miranda rights and that he was not required to consent to the search. These factors were deemed significant in both Mack and Strickler. Id.; Commonwealth v. Strickler, 707 A.2d 553 (Pa. Super. 1997). The Court's analysis is also similar to that set forth in Acosta, where the Superior Court found that a consent to search was not voluntary and distinguished it from Mack and Strickler determining the defendant was neither given his Miranda rights nor told that he did not have to consent to the search. Commonwealth v. Acosta, 815 A.2d 1078, 1087 (Pa. Super. 2003).

ORDER

AND NOW, this _____ day of July, 2013, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Petition for Habeas Corpus and Motion for Reconsideration of Court's Order Denying Motion to Suppress and for Other Relief are hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: DA (AB)
Edward J. Rymsza, Esq.
Eileen Dgien, Dep. CA