

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-2037-2012
:
vs. :
:
ATAA COLEMAN, : Omnibus Motion
Defendant :
:

OPINION AND ORDER

Defendant is charged by Information filed on December 21, 2012 with one count of criminal conspiracy to deliver a controlled substance, two counts of criminal use of a communication facility, one count of delivery of a controlled substance and one count of possession with intent to deliver a controlled substance. The charges are based on two alleged controlled buys of controlled substances on March 21, 2012 and April 14, 2012.

The first controlled buy is alleged to have occurred near the Jiffy Lube at 1829 East Third Street in Williamsport. The confidential informant allegedly purchased two bags of suspected crack cocaine from Allena Marshall for the price of \$100.00.

The second controlled buy is alleged to have occurred at the Burger King located at 50 Maynard Street in Williamsport. The confidential informant is alleged to have purchased ten bags of heroin from Defendant for the price of \$160.00.

On February 21, 2013, Defendant filed an omnibus pretrial motion consisting of a petition for writ of habeas corpus; a motion to suppress identification; a motion for discovery; a motion to compel disclosure of and substance of promises of immunity, leniency or preferential treatment and criminal history; a motion for disclosure of Rule 404 (b) evidence; and a motion to reserve right. By Order dated March 15, 2013, the Court disposed

of all of the motions set forth in the omnibus pretrial motion except for the petition for writ of habeas corpus and the motion to suppress.

A hearing on the petition for writ of habeas corpus and the motion to suppress was held before the Court on May 17, 2013. The parties submitted to the Court a transcript of the preliminary hearing held on November 27, 2012 before Magisterial District Judge James Carn. No further evidence was presented. The parties argued their respective positions and subsequently submitted letter briefs on May 21, 2013.

The Court will first address Defendant's petition for habeas corpus. Defendant argues that the evidence is insufficient to hold Defendant for Court in connection with Count 1 criminal conspiracy and Count 2 criminal use of a communication facility. Both of these counts relate to the alleged buy on March 21, 2012.

A criminal defendant may challenge the sufficiency of the evidence presented at a preliminary hearing by filing a petition for writ of habeas corpus. Commonwealth v. Landis, 48 A.3d 432, 444 (Pa. Super. 2012), citing Commonwealth v. McBride, 528 Pa. 153, 595 A.2d 589 (1991).

The Commonwealth must "show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to the jury." Commonwealth v. Winger, 957 A.2d 325, 328 (Pa. Super. 2008).

When reviewing a petition for habeas corpus, the court must view the

evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. Commonwealth v. Santos, 583 Pa. 96, 101, 876 A.2d 360, 363 (2005), citing Commonwealth v. Huggins, 575 Pa. 395, 836 A.2d 862, 866 (2003). A prima facie case “merely” requires evidence of each element of the offense charges; not evidence beyond a reasonable doubt. Id.

“A conspiracy conviction requires proof of (1) an intent to commit or aid in an unlawful act, (2) an agreement with a co-conspirator and (3) an overt act in furtherance of the conspiracy.” Commonwealth v. Galindes, 786 A.2d 1004, 1010 (Pa. Super. 2001), appeal denied, 569 Pa. 691, 803 A.2d 733 (2002), quoting Commonwealth v. Spotz, 562 Pa. 468, 756 A.2d 1139, 1162 (2000).

A mere association with a perpetrator, presence at the scene, or knowledge of the crime is insufficient to establish that the defendant was part of a conspiratorial agreement to commit the crime. The conduct of the parties, however, and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt, and even if the conspirator did not act as a principal in committing the underlying crime, he is still criminally liable for the actions of his coconspirators in furtherance of the conspiracy. Commonwealth v. Knox, 50 A.3d 749, 755 (Pa. Super. 2012), quoting Commonwealth v. McCall, 911 A.2d 992, 996-97 (Pa. Super. 2006)(citation omitted).

Moreover, seldom, if ever, can an agreement can be proved by direct evidence. More often, it can be proved only from a review of the surrounding circumstances.

“Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation.” Id.

Under the circumstances of this particular case and after reviewing the preliminary hearing testimony, the Court is satisfied that the conduct of Defendant and the circumstances surrounding such conduct are sufficient for prima facie purposes to hold Defendant for Court on the conspiracy charge.

On March 21, 2012, the confidential informant called 570-506-6994 for the purpose of arranging the purchase of a controlled substance. The number, according to the confidential informant, belonged to Defendant. While at first he did not speak with Defendant, he did speak with a female. The confidential informant indicated that he was looking for heroin but the female indicated “they only had crack.”

The female directed the confidential informant to go to Aamco Transmissions. When he got there, however, he called the number back at which time Defendant answered and directed the confidential informant to go to Taco Bell.

The Taco Bell is located right next to a Jiffy Lube. After being directed to go there, the confidential informant showed up at which time a female was in the vehicle and Defendant was outside.

The confidential informant stepped inside the vehicle after which an exchange took place wherein he handed the female \$100.00 and she handed to him two bags of crack cocaine. The confidential informant then left. Further, on redirect examination, the

confidential informant testified that when he was outside the vehicle at the Taco Bell/Jiffy Lube on March 21, it was Defendant who actually directed him to get into the vehicle.

The confidential informant also testified about an incident that occurred on April 14, 2012 when the confidential informant called the same phone number, spoke with an individual who “sounded exactly like” Defendant and arranged to meet him at the Burger King in Williamsport to purchase heroin. While at the Burger King, an exchange of money and heroin took place between the confidential informant and Defendant. The Court is of the preliminary opinion that this evidence would be relevant and admissible in connection with the earlier incident as proof of identity, as well as common plan or scheme.

With respect to criminal use of a communication facility, in order for Defendant to be found guilty, the Commonwealth must prove that Defendant used a communication facility such as a telephone to commit, cause or facilitate the commission of a felony under the Drug Act. 18 Pa. C.S.A. § 7512 (a).

Based upon the above-referenced evidence, the Court finds the Commonwealth has established a prima facie case on this charge as well. Indeed, a phone call was made to a telephone number known to be one which Defendant used. A conversation took place between the confidential informant and another individual. That individual directed the confidential informant to a specific location. Subsequently, Defendant spoke with the confidential informant and directed the confidential informant to a different location. At that different location, the transaction took place. See, for example, Commonwealth v. Moss, 852 A.2d 374 (Pa. Super. 2004).

Accordingly, the Court will deny Defendant's petition for writ of habeas corpus in connection with Counts 1 and 2.

With respect to Defendant's motion to suppress, Defendant argues first that the photographic lineup procedures used to identify him were unnecessarily suggestive, thereby violating his constitutional rights. He also claims that any in-court identification should be suppressed as being illegally tainted by the initial suggestive lineup.

During the hearing in this matter, the Commonwealth conceded that the photo array was unduly suggestive and that it would be precluded from utilizing such at trial. Nonetheless, the Commonwealth argued that any in-court identification of Defendant by the confidential informant would be permissible.

"Following a suggestive pretrial identification procedure, a witness should not be permitted to make an in-court identification unless the prosecution establishes by clear and convincing evidence that the totality of the circumstances affecting the witness' identification did not involve the substantial likelihood of misidentification."

Commonwealth v. Bradford, 305 Pa. Super. 593, 451 A.2d 1035, 1037 (1982), citing Commonwealth v. Fowler, 466 Pa. 198, 352 A.2d 17, 19 (1976)(citations omitted).

"A consideration of the totality of the circumstances requires a close examination of (1) the suggestive factors involved in the identification process, and (2) whether or not, despite the suggestive factors involved in the process, other factors are present which clearly and convincingly established that the witness' identification has an 'independent origin' in the witness' observations at the time of the crime." Bradford, supra.,

quoting Fowler, 466 Pa. at 204, 352 A.2d at 20 (citations omitted).

As the Commonwealth notes in its memorandum, to determine whether a witness had an independent basis for an in-court identification, the Court must consider several factors including “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” Commonwealth v. James, 506 Pa. 526, 486 A.2d 376, 380 (1985), quoting Commonwealth v. Slaughter, 482 Pa. 538, 546, 394 A.2d 453, 457 (1978).

Rather than present any live testimony from the confidential informant or the police officers at the hearing on this motion, the Commonwealth elected to submit the transcript of the preliminary hearing. In his preliminary hearing testimony, the confidential informant indicated that when he arrived at the Taco Bell/Jiffy Lube area, Defendant and his girlfriend were there. He indicated that prior to that incident he met Defendant and knew who he was, having seen him before. During the incident, he indicated not only was Defendant outside of the vehicle, but that he directed him to get into the vehicle. Further, he indicated that the individual he spoke to on the phone sounded exactly like Defendant.

In connection with the Burger King incident, he identified Defendant being there with another individual. He described the transaction being conducted with Defendant, who was in the driver’s seat. He also indicated that he could clearly see Defendant’s face.

During defense counsel’s cross-examination at the preliminary hearing,

however, the informant admitted that he did not personally know Defendant, he was not friends with him, and he never hung out with him.

While the preliminary hearing transcript contains some general statements which indicate that the confidential informant knew Defendant from having seen him before and the confidential informant could clearly see Defendant's face, the Court cannot conclude that these statements clearly and convincingly establish an independent origin despite the suggestive factors. Indeed, the Commonwealth inexplicably presented no evidence whatsoever as to the suggestive factors or lack of suggestive factors involved in the identification. Furthermore, the information contained in the preliminary hearing transcript does not contain any details about the nature or length of the confidential informant's prior contacts or relationship with Defendant, the level of certainty demonstrated by the confidential informant at the photographic identification, the length of time between the crime and the identification, or the length of time the confidential informant had to view Defendant during the incidents. Given the dearth of evidence presented by the Commonwealth and the clear mandate that the Court must closely examine not only the factors which could provide an independent basis for the identification but also the suggestive factors involved in the identification process, the Court grants Defendant's motion and precludes the confidential informant from making an in-court identification of Defendant.

ORDER

AND NOW, this ____ day of June 2013, following a hearing, submission of the preliminary hearing transcript and subsequent Briefs, the Court DENIES Defendant's motion for writ of habeas corpus and GRANTS Defendant's motion to suppress. The Commonwealth is precluded from introducing any testimony from the confidential informant as to any identification of Defendant.

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney (MW)
Edward J. Rymza, Esquire
Gary Weber, Lycoming Reporter
Work File