

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

**COMMONWEALTH OF PENNSYLVANIA**

v.

**KHALIL FULKS,  
Defendant**

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**No. CR-105-2013; CR-106-2013  
CRIMINAL**

**OPINION AND ORDER**

The Defendant filed a Petition for Habeas Corpus on March 18, 2013. By agreement of both parties, the Court will decide the Petition based on the transcripts of the Preliminary Hearing held in this matter on November 30, 2012 and December 14, 2012 before Magisterial District Judge Allen Page III.

***Background***

Khalil Fulks (Defendant) has been charged with thirty-eight (38) drug related offenses under docket number 105-2013 and 252 drug related offenses under docket number 106-2013. The Defendant has alleged for various reasons that the Commonwealth failed to establish a *prima facie* case for 275 of these offenses. Specifically, the Defendant has challenged sixty (60) counts of Criminal Conspiracy – Possession with Intent to Deliver, sixty-three (63) counts of Criminal Conspiracy – Possession of a Controlled Substance, twenty-one (21) counts of Criminal Conspiracy - Delivery of a Controlled Substance, one (1) count of Criminal Conspiracy – undisclosed criminal objective, nineteen (19) counts of Possession with Intent to Deliver, twenty-one (21) counts of Possession of a Controlled Substance, eleven (11) counts of Delivery of a Controlled Substance, seventy-five (75) counts of Criminal Use of a Communication Facility, one (1) count of Corrupt Organizations – Controlled Substance Act, and one (1) count of

Endangering Welfare of Children.<sup>1</sup> Based on the specific counts being challenged, which are a vast majority of the charges, the Court will address only the relevant background:

**1. Docket number 105-2013**

**a. August, 25, 2011: Counts 1-3**

Brent Long (Long) was an informant for Trooper Herbst (Herbst) and Trooper Fishel (Fishel) of the Pennsylvania State Police (PSP). Long would do controlled buys for PSP, which entailed a common procedure. First, Long would be strip searched and his car would be searched before a controlled buy was conducted. Long would then make a recorded phone call setting up the controlled buy. After the controlled buy, Long would immediately call PSP and set a location to meet so he could give them the narcotics and be searched along with his vehicle.

On August 25, 2012, Long met Naafi Lowe (Naafi) at a Burger King to purchase crack cocaine. N.T., November 30, 2012, p. 6. Long had seen the Defendant and Naafi in a gold car, which had been used by Naafi on other occasions. The Defendant had been driving the vehicle. Long obtained the narcotics from Naafi, placed them on his person, and gave them to PSP.

Fishel did surveillance of the controlled buy and saw Naafi and the Defendant arrive in a gold Buick sedan. *Id.* at 65. Naafi exited the Buick and then entered Long's vehicle. Long's vehicle traveled around the rear of the Burger King, Naafi exited, and then re-entered the Buick.

**b. November 17, 2011: Counts 4-6**

Long had purchased crack cocaine from Naafi. N.T., November 30, 2012, p. 11. The Defendant had driven Naafi to the transaction in the gold car.<sup>2</sup> Fishel testified that surveillance officers observed this transaction. *Id.* at 65. At 1:30 PM the surveillance team observed the

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<sup>1</sup> The Defendant's motion challenges counts 52 and 53 twice.

<sup>2</sup> Long testified that he did not see the Defendant but changed his testimony after being reminded by the Commonwealth.

vehicle leave 1010 Elizabeth Street and followed it to the area of where the drug transaction was to occur. Naafi was seen but the driver was not identified. The vehicle was the gold Buick used by the Defendant in August. Fishel testified that 1010 Elizabeth Street is the residence of the Defendant and Tahira Hines (Hines), his girlfriend at the time.

***c. March 15, 2012: Counts 7-9***

Long stated that he purchased crack cocaine from Tariq Lowe (Tariq) and that he later gave the narcotics to PSP. N.T., November 30, 2012, p. 18. Tariq is the brother of Naafi. Fishel testified that surveillance officers observed a gold sedan driven by Joseph Wilson (Wilson). Id. at 76. Tariq, a passenger of the vehicle, got out of the gold sedan and conducted the drug transaction in Long's vehicle. Afterwards Wilson and Tariq drove to 1010 Elizabeth Street and "met with [the Defendant] and exchanged money." Id.

For background purposes, Long testified that he started purchasing with Naafi but when he was unavailable his phone was left with Tariq. Naafi also had the Defendant and Joseph Wilson (Wilson) sell drugs to Long when he was out of town. Eventually Naafi told Long that he was moving to Philadelphia and gave him the phone number of the Defendant. Once Naafi left, Long continued to purchase drugs from the Defendant.

***d. April 12, 2012: Counts 10-16***

Long called Tariq to set up a drug buy and was told that Wilson could not do the transaction but his brother, the Defendant, could do it. N.T., November 30, 2012, p. 20. Long had conducted a drug transaction with the Defendant.<sup>3</sup> Following the transaction, Long gave the crack cocaine to police. Surveillance officers observed the Defendant leave 1010 Elizabeth Street and drive to Wendy's to meet Long. Id. at 78.

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<sup>3</sup> Initially, Long testified that Wilson conducted the controlled buy but changed it to the Defendant.

*e. April 19, 2012: Counts 20-23*

Long met the Defendant at Choice tobacco outlet and was told to get gas. N.T., November 30, 2012, p. 21. Long stated that he did not have much money for gas and was told to instead buy a soda. Long exited the store and entered a van, where the Defendant placed a bag of crack cocaine on the floor of the vehicle. Long observed that the crack cocaine appeared to have been tampered with because of how it was tied. While Long was meeting with the Defendant, he observed up to four (4) individuals also meet with the Defendant. Long was unable to identify these individuals.

Fishel testified that surveillance officers observed Long and Fulks at Burger King. *Id.* at 79. After a brief conversation, they both traveled to the Choice tobacco outlet on Washington Boulevard. While at Choice, the Defendant met with Richard Johnson (Johnson). Fishel obtained surveillance footage from a camera in the store that shows the Defendant reach into Johnson's shirt pocket and retrieve a glassine bag containing a white substance. The Defendant then went to his own car and delivered an ounce of crack cocaine to Long.

*f. May 10, 2012: Counts 25-27*

Long met with Tariq on Elizabeth Street and purchased crack cocaine. N.T., November 30, 2012, p. 10. Long gave money to Tariq, who then went into 1010 Elizabeth Street and brought him the narcotics. Following the transaction, Long brought the crack cocaine to PSP. Fishel testified that surveillance observed Long drop Tariq off at the corner of Adams and Elizabeth Street. *Id.* at 88. Tariq was seen entering 1010 Elizabeth Street.

**2. Docket number 106-2013**

**a. September 16, 2011: Counts 1-3**

Long went to 1010 Elizabeth Street and purchased crack cocaine from Tariq. N.T., November 30, 2012, p. 10. Long has been to that location multiple times and had seen people walking in and out. In addition, all of his meetings took place in the neighborhood of that address. After receiving the narcotics, Long gave it to PSP. Fishel himself conducted surveillance on this transaction. *Id.* at 67. Long was observed picking up Tariq and driving him to 1010 Elizabeth Street. The crack cocaine had condensation in the back which indicates that it was recently cooked.

**b. September 7, 2011: Counts 4-6**

The Defendant's motion alleges that the Commonwealth did not meet its burden for the charges stemming out of September 7, 2011. The Court, however, was unable to find any testimony or evidence related to this date. It appears to the Court that the Defendant's Motion meant December 7, 2011.

On December 7, 2011, Long purchased crack cocaine from 1010 Elizabeth Street. N.T., November 30, 2012, p. 12. Naafi went into the residence and returned with the narcotics. Fishel testified that surveillance officers observed Long pick up Naafi at West Fourth and Stevens Streets. *Id.* at 70. Long drove Naafi to 1010 Elizabeth Street and Naafi entered the residence. After Naafi exited the residence, the Defendant exited 1010 Elizabeth Street and picked him up at the intersection of Eldred and Elizabeth Streets.

**c. February 8, 2012: Counts 7-9**

Long purchased crack cocaine from Tariq. N.T., November 30, 2012, p. 13. Following the transaction Long placed the drugs on his body and gave it to PSP. Long did not have any

interaction with the Defendant. Fishel testified that there was also surveillance performed on this transaction. Id. at 71. An unidentified individual driving a green Chevy Impala with Tariq was seen with a maroon Chevy Malibu operated by the Defendant behind the known address of Naafi and Tariq at approximately 2 PM.

***d. February 17, 2012: Counts 10-12***

Long went to 1010 Elizabeth Street and observed Tariq enter the house and return with crack cocaine, which was sold to Long. N.T., November 30, 2012, p. 16. Afterwards Long gave the crack cocaine to PSP. Fishel testified that surveillance was conducted and that officers observed that Tariq exited Long's vehicle, went into 1010 Elizabeth Street, and returned to Long's vehicle. Id. at 72.

***e. February 23, 2012: Counts 13-15***

Long called Tariq to set up a controlled buy and was directed to call Wilson. N.T., November 30, 2012, p. 17. Tariq gave Wilson's phone number and Long set up a transaction. Long purchased the crack cocaine from Wilson in the Wendy's parking lot. Fishel testified that surveillance observed Wilson leave 1010 Elizabeth Street and walk towards Long's vehicle. Id. at 72.

***f. March 8, 2012: Counts 16-18***

Long went to 1010 Elizabeth Street and purchased crack cocaine from Tariq. N.T., November 30, 2012, p. 17. After the transaction Long gave the narcotics to PSP. Fishel testified that surveillance saw Tariq walking the Defendant's dog at 1010 Elizabeth Street. Id. at 73. After the dog was secured inside the residence he walked on Elizabeth Street towards Long. Tariq was later dropped off at 1010 Elizabeth Street by Long's vehicle.

***g. March 22, 2012: Counts 19-21***

Long went to the ten hundred block of Elizabeth Street and purchased crack cocaine from Tariq. N.T., November 30, 2012, p. 18. Following the transaction Long gave the purchased narcotics to PSP. Fishel testified that surveillance observed Tariq enter 1010 Elizabeth Street for two (2) minutes, exit, and meet Long. Long picked up Tariq on Franklin Street and then drop him off in front of 1010 Elizabeth Street. Id. at 76.

***h. April 5, 2012: Counts 22-24***

Long went to the ten hundred block of Elizabeth Street and purchased crack cocaine from Tariq. N.T., November 30, 2012, p. 19. After the controlled buy Long gave the narcotics to PSP. Fishel testified that surveillance observed Tariq enter Long's vehicle on Franklin Street, just southeast of 1010 Elizabeth Street. Id. at 78.

***i. May 22, 2012: Counts 25-27***

Long went to the ten hundred block of Elizabeth Street and purchased crack cocaine from Tariq. N.T., November 30, 2012, p. 26. Following the transaction Long gave the narcotics to PSP. Fishel testified that surveillance observed Tariq enter Long's vehicle and was driven to Adams Street, a block from the Defendant's residence. Id. at 89. Tariq was then seen walking on Elizabeth Street towards the address of 1010 Elizabeth.

***j. June 7, 2012: 28-30***

Long purchased crack cocaine from Tariq. N.T., November 30, 2012, p. 30. The location of the drug buy was not disclosed. After the transaction Long gave the crack cocaine to PSP. Fishel testified that Long parked his vehicle on Berger Street, near the residence of Tariq and Naafi. Id. at 90. Tariq and Naafi were observed meeting behind the residence with a green

Ford 500. That vehicle was routinely observed by officers driven by Naafi and was seen at 1010 Elizabeth Street approximately an hour before he met with Long.

On June 21, 2012, Tariq gave Long the Defendant's number and told him that he would be dealing with him now. As noted earlier, Tariq was moving back to Philadelphia and it was arranged that he would give Long contact information for someone else he could purchase crack cocaine. On that date, the Defendant had sold Long crack cocaine.

***k. July 23, 2012: Counts 31-33***

On July 23, 2012, PSP received permission by Superior Court Judge Mundy to install a non-consensual wire on the Defendant's phone. N.T., December 14, 2012, p. 6. This wire was to enable PSP to monitor calls from noon to midnight each day. On the same date, at 3:52 PM, an incoming call from an unidentified individual requested to purchase an eight ball of crack cocaine. The caller indicated that he was on Hepburn Street. At 3:58 PM, the same individual called and informed the Defendant that he was outside of his residence.

At 5:07 PM, another unidentified individual called the Defendant and requested seven (7) grams of crack cocaine. The Defendant indicated that he could sell the seven (7) grams.

At 5:21 PM Damon Jackson (Jackson) text the Defendant about purchasing an eight ball of cocaine. Jackson and the Defendant argued about the weight of the crack cocaine purchased. Further, Jackson stated that he would send the rest of the money for the narcotics with his brother.

At 7:50 PM, the Defendant received a call from Tariq. The Defendant requested marijuana from Tariq but stated that he did not have money. At 9:06 PM, the Defendant received a call from an unknown caller requesting one eight ball of crack cocaine. The Defendant responded that he did not have an eight ball but he would in a minute. The same



individual called back at 9:22 PM and wanted to meet the Defendant near his house. The Defendant stated that he was at the Shamrock and that he should meet him there. At 9:55 PM, the same individual called and stated that he was on his way.

At 10:51 PM, Eric Coates (Coates) called the Defendant and requested crack cocaine. Coates asked for a half, which Fishel stated meant a half an eight ball. The Defendant told Coates to pull out behind the Shamrock. At 11:01 PM, Coates called the Defendant and asked where he was. The Defendant stated that he was walking around the front and the phone call was terminated.

At 11:35 PM, the Defendant called Christopher Williams (Williams). The Defendant asked Williams if he needed one or two eight balls of crack cocaine, which Williams responded by asking for one. The Defendant told Williams that he would have to get the cocaine from his brother at 1010 Elizabeth Street. The Defendant also asked Williams if Williams owed him any money. At 11:37 PM, the Defendant called his brother Wilson and asked him to go to the house and sell a ball for him. Wilson agreed to do the transaction and the phone call ended. At 11:43 PM, Williams called the Defendant and asked if he had someone to sell him the drugs. The Defendant told Williams he had and called his brother again and told him that the narcotics were in a pair of shoes near the stairs and not to accidentally grab a seven (7) gram bag.

***1. July 27, 2012: Counts 38-39***

Long contacted the Defendant to purchase crack cocaine. N.T., November 30, 2012, p. 57. Long met the Defendant and purchased the cocaine and afterwards gave it to PSP. Surveillance officers observed Long call the Defendant and set up the controlled buy. *Id.* 93. In addition, Long was seen meeting with the Defendant on Franklin Street while he was walking his dog.

***m. July 29, 2012 through August 17, 2012: Counts 40-252***

The charges that arise from these dates come from the wiretap of the Defendant's phone. Fishel testified that permission to install a non-consensual intercept was obtained by a judge of the Superior Court of Pennsylvania.

***n. August 26, 2012: Counts 173-175***

The Court did not find any testimony regarding August 26, 2012 in the preliminary hearing transcripts supplied to the Court by the Defendant. Defense counsel has requested the Court to continue with issuing the opinion despite not providing the testimony. Therefore, the Court will not address whether the Commonwealth established a *prima facie* case on these charges.

On September 7, 2012, Corporal Anthony Fritz (Fritz) of PSP executed a search warrant at 1010 Elizabeth Street. During the search a loaded firearm, three eight balls of crack cocaine, and scales were found. Fritz also testified that he had participated in surveillance of the Defendant for months and had seen him engage in numerous drug transactions. In addition, Sergeant Ryan Maxwell of PSP testified regarding the search of 1010 Elizabeth Street. During the search several hundred dollars and nine (9) to eleven (11) grams of pre-packaged crack cocaine was found in a pair of the Defendant's pants.

***Discussion***

By way of background, 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* case exists ‘when the Commonwealth produces evidence of each of the material elements 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. With this in mind, the Court will evaluate whether the Commonwealth established a *prima facie* case for the numerous counts that the Defendant calls into question.

### ***1. Criminal Conspiracy charges***

The Criminal Conspiracy charges that the Defendant has alleged to have been insufficiently proven by the Commonwealth have typically arisen out of the same dates and controlled buys. In general, the Commonwealth has charged the Defendant for each controlled buy with three (3) separate charges of conspiracy to Possession with Intent to Deliver, conspiracy to Possession of a Controlled Substance, and conspiracy to Delivery of a Controlled Substance. As a result, the Court will first address the elements for the three Criminal Conspiracy charges before determining whether the Commonwealth has proven a *prima facie* case for the questioned counts.

For all the conspiracy charges the Commonwealth must establish that the Defendant 1) entered into an agreement to commit or aid in an unlawful act with another person or persons, 2) with a shared criminal intent, and 3) an overt act was done in furtherance of the conspiracy. See Commonwealth v. Murphy, 795 A.2d 1025 (Pa. Super. 2002). ‘Proof of conspiracy may be based upon circumstantial evidence since the nature of the crime is susceptible to proof usually

only circumstantially.” Commonwealth v. Allen, 625 A.2d 1266, 1268 (Pa. Super. 1993). The Commonwealth, however, must prove more than a mere association or the mere presence of the defendant at the scene. Id. at 1269. There must be a showing that the defendant was an active participant in the criminal enterprise and that he had knowledge of the agreement. Id. Besides the conspiracy element the Commonwealth must also establish the elements of the crime itself for Possession with Intent to Deliver, Possession of a Controlled Substance, and Delivery of a Controlled Substance.

Under docket number 105-2013, the Defendant has alleged that the Commonwealth did not establish the charges of Criminal Conspiracy for Possession with Intent to Deliver for counts of 2, 5, 8, 15 and 25. The Defendant has alleged the same under docket number 206-2013 for the counts of 1, 4, 7, 10, 13, 16, 19, 22, 25, and 28. For the offense of Possession of a Controlled Substance with Intent to Deliver it must be shown 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. Possession may be established as either actual or constructive:

Constructive possession requires proof of the ability to exercise conscious dominion over the substance, the power to control the contraband, and the intent to exercise such control. Constructive possession may be established by the totality of the circumstances.

We have held that circumstantial evidence is reviewed by the same standard as direct evidence—a decision by the trial court will be affirmed so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt.

Commonwealth v. Bricker, 882 A.2d 1008, 1014 (Pa. Super. 2005) (citations omitted).

In addition, the Defendant challenges the *prima facie* case for the charges of Criminal Conspiracy to Possession of a Controlled Substance. The Defendant challenges under docket number 105-2013 counts 3, 6, 9, 16, and 26; and under docket number 106-2013 counts 2, 5, 8, 11, 15, 17, 20, 23, 26, 29, and 39. An individual has committed the crime of Possession of a Controlled Substance if they are “knowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State Board, unless the substance was obtained directly from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by this act.” 35 P.S. § 780-113(a)(16). “A person who intends to possess a controlled substance, believes he possesses a controlled substance, and in fact possesses a controlled substance is guilty of possession of a controlled substance.” Commonwealth v. Sweeting, 528 A.2d 978, 980 (Pa. Super. 1987).

Finally, the Defendant has challenged numerous counts of Criminal Conspiracy for Delivery of a Controlled Substance. Under 105-2013, the Defendant has challenged counts 1, 4, 7, 14, and 21. Under 106-2013, the Defendant has challenged counts 3, 6, 9, 12, 15, 18, 21, 24, 27 and 30. The offense of Deliver of a Controlled Substance is provided for in 35 P.S. § 780-113(a)(30), which is provided above. For a defendant to be liable as a principal for the delivery of a controlled substance there must be evidence 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).

With the elements for the conspiracy charges outlined the Court must now determine whether the Commonwealth established a *prima facie* case for all the challenged conspiracy counts. Here, the Commonwealth has provided testimony from Long and from police surveillance of the Defendant's involvement. In general, for the Criminal Conspiracy charges the Commonwealth has provided evidence of three types of transactions with the Defendant's involvement. First, there are occasions where the Defendant drove another individual to a drug transaction or actually conducted the sale in place of Tariq/Naafi/Wilson. Second, the Commonwealth provided evidence of occasions where the Defendant's residence at 1010 Elizabeth Street or the surrounding area was involved in the controlled buy. The Defendant resided at this location with his girlfriend Hines. If the location is considered individually for each single count it appears that its involvement is not helpful. The Commonwealth, however, showed that the residence is regularly used to obtain narcotics before a transaction is to occur; that Tariq, Naafi, and Wilson would go to 1010 Elizabeth Street to obtain narcotics from the Defendant before they sold it to Long. Third, the Commonwealth has provided evidence of transactions that occurred without the Defendant or his residence prior to the transaction. The only link the Defendant has to these transactions is that he was involved with other similar transactions.

The Court finds that Commonwealth sufficiently established a *prima facie* case for counts 1-3, 4-6, and 14-16 under docket number 105-2013. Under these counts the Commonwealth provided evidence of the Defendant physically participating in the controlled buys, whether by driving Tariq or Naafi to the transaction (i.e. August 25, 2013, November 17, 2011) or whether he actually conducted the transaction himself after being contacted by Tariq (i.e. April 12, 2012).

The Defendant's routine involvement in the transactions is more than mere presence but actions in the furtherance of the conspiracy.

The Court also finds a *prima facie* case for count 25-27 under docket number 105-2013. Under docket 106-2013, the court finds sufficient evidence for counts 1-3, 4-6, 7-9, 10-12, 13-15, 16-18, 19-21, 22-24, 25-27, and 28-30. In these circumstances, the Defendant's residence of 1010 Elizabeth Street was somehow connected to the transaction. Occasionally, Tariq or Naafi went into the residence and came out with the narcotics to sell to Long (i.e. May 10, 2012, September 16, 2011, December 7, 2011, February 17, 2012). On other occasions Tariq or Naafi were either at the residence or located nearby prior to the controlled buy (i.e. February 8, 2012, February 23, 2012, March 8, 2012, March 22, 2012, April 5, 2012, May 22, 2012, and June 7, 2012).

The Court, however, is unable to find that the Commonwealth established a *prima facie* case for counts 7-9 under docket number 105-2013. On March 15, 2012, Long purchased crack cocaine from Tariq. Police surveillance stated that Wilson drove Tariq to the transaction using a gold sedan. There is no evidence that the Defendant or his residence was involved prior to the transaction. According to the testimony provided at the preliminary hearing, Wilson and Tariq drove to 1010 Elizabeth Street only *after* the transaction.

## **2. Possession with Intent to Deliver**

The Defendant challenges his Possession with Intent to Deliver charges under docket number 105-2013 for counts 11 and 22 and under docket number 106-2013 for count 31.<sup>4</sup> For all of these counts, the Court finds the Commonwealth has provided evidence that the Defendant physically conducted drug transactions. Long testified that on April 12, 2012 he met the

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<sup>4</sup> For a list of the elements for Possession with Intent to Deliver see supra p. 12.

Defendant and he sold him crack cocaine. On April 22, 2012, the Defendant sold crack cocaine to Long at the Choice tobacco outlet. On July 23, 2012, the non-consensual wire intercept recorded multiple conversations between the Defendant and other individuals about selling crack cocaine. Therefore, the Commonwealth has established a *prima facie* case for all counts of Possession with Intent to Deliver.

### ***3. Possession of a Controlled Substance***

The Defendant has challenged the Possession of a Controlled Substance charges for counts 12 and 32 under docket numbers 105-2013 and 106-2013, respectively.<sup>5</sup> These transactions have been discussed in the previous section and show that the Defendant sold crack cocaine to Long or to other individuals. On April 12, 2012, the Defendant met Long and sold him crack cocaine. Surveillance observed the Defendant leave his residence and drive to the Wendy's that Long was located for the transaction. On July 23, 2012, the Defendant had multiple phone calls regarding selling narcotics. Specifically, the Defendant had conversations setting drug transactions with himself with two (2) unidentified individuals, Jackson, and Coates. Based upon the evidence presented at the preliminary hearing, the Court finds that the Commonwealth has established a *prima facie* case for the charges of Possession of a Controlled Substance.

### ***4. Delivery of a Controlled Substance***

The Defendant alleges that the Commonwealth failed to establish a *prima facie* case for the charges of Delivery of Controlled Substance for counts 10 and 27 under docket number 105-2013.<sup>6</sup> On April 12, 2012, the Defendant met Long at Wendy's and sold him crack cocaine. On May 10, 2012, Long dropped Tariq off at 1010 Elizabeth Street and he returned with the crack

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<sup>5</sup> For a list of the elements for Possession of a Controlled Substance see *supra* p. 13.

<sup>6</sup> For a list of the elements for Delivery of a Controlled Substance see *supra* p. 13.



cocaine sold to Long. The Court finds that the Commonwealth established a *prima facie* case for the charges of Delivery of a Controlled Substance.

### ***5. Criminal Use of a Communication Facility***

The Defendant challenges multiple counts of Criminal Use of Communication Facility. Specifically, the Defendant challenges counts 12 and 20 under docket number 105-2013 and counts 33 and 38 under 106-2013. A person commits the crime of Criminal Use of Communication Facility if that person uses a communication facility to:

commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act of April 14, 1972 (P.L.233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.

18 Pa.C.S. § 7512(a). “Facilitation has been defined as ‘any use of a communication facility that makes easier the commission of the underlying felony.’” Commonwealth v. Moss, 852 A.2d 374, 382 (Pa. Super. 2004). “If the underlying felony never occurs, then Appellants have facilitated nothing and cannot be convicted under § 7512.” Id.

The Court finds that the Commonwealth established a *prima facie* case for the Criminal Use of Communication Facility charges. All of the counts were a result of Long setting up a controlled buy with the Defendant himself. Further, Long testified that all the transactions he arranged were through phone conversations monitored by PSP. The Court finds that the fact that some of the controlled buys were not specified as to how they were planned is cured by Long’s initial testimony. Long testified that all the transactions he was involved in were arranged through phone conversations with the Defendant/Tariq/Naafi/or Wilson.

## 6. *Corrupt Organizations*

The charge of Corrupt Organizations states that “[i]t shall be unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” 18 Pa.C.S. § 911(b)(3). Racketeering activity includes any offense indictable under The Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-113. An enterprise is defined as “any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, engaged in commerce and included legitimate as well as illegitimate entities and government entities.” Commonwealth v. Dellisanti, 876 A.2d 366 (Pa. 2005).

[I]t is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an ongoing basis is adequate to satisfy the separate existence requirement.

Commonwealth v. Dennis, 618 A.2d 972, 975-76 (Pa. Super. 1992) (citing U.S. v. Riccobene, 709 F.2d 214, 223-24 (3d Cir. 1983).

In Dennis, a defendant was in control of the distribution of methamphetamine in Clearfield County through an organization that included various individuals. Dennis, 618 A.2d at 976. Over a period of time, the defendant and three other individuals were in control of the process by which the drugs would be picked up and delivered so that they can be even further distributed throughout the county. Id. “[The defendant] controlled how the drugs were to be picked up, by whom, how he was to be contacted, and who had access to contact him.” Id. The Superior Court of Pennsylvania determined that there was an enterprise present and that there

was sufficient evidence for the defendant's conviction of Corrupt Organizations under 18 Pa.C.S. § 911(b)(3). See also Commonwealth v. Urbina-Nevarez, 2009 Pa. Dist. & Cnty. Dec. LEXIS 53 (Pa. C.P. 2009) (upholding the conviction of Corrupt Organizations for a drug trafficking enterprise).

Further, in Donahue, the defendant was being supplied large amounts of marijuana from a supplier on multiple occasions over six to seven years. Commonwealth v. Donahue, 630 A.2d 1238, 1246 (Pa. Super 1993). The Defendant argued that he did not personally know any of his suppliers and thus there could be no association with an ongoing criminal enterprise. Id. The Superior Court disagreed and found that it was sufficient that the defendant was aware of the basic structure of the enterprise. Id. "It was not necessary that he specifically know each person associated with the enterprise." Id.

Here, the Commonwealth introduced evidence that the Defendant was engaged in a distribution chain. The Defendant would supply drugs to certain individuals who would then continue to distribute the drugs to other individuals. The Defendant was aware of this activity as his residence was a main location or hub for many drug dealers to obtain the crack cocaine shortly before they resold it to the informant or other individuals. Further, the Defendant even drove his associates to drug sales or even filled in when they were unavailable. The Commonwealth has established a *prima facie* case for the charge of Corrupt Organization.

### ***7. Endangering the Welfare of Children***

The charge of Endangering Welfare of Children states that "[a] parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support." 18 Pa.C.S. § 4304(a)(1). "Section 4304 is a

comprehensive provision designed to penalize those who knowingly breach a legal duty to protect the well-being of children who are entrusted to their care.” Commonwealth v. Pahel, 689 A.2d 963, 964 (Pa. Super. 1997).

The Commonwealth charged that between July 29, 2011 and September 7, 2012, the Defendant sold and conspired to sell controlled substances from his residence at 1010 Elizabeth Street, where he lived with Hines and her three (3) children. The Commonwealth presented police testimony that Hines resided at the residence but not the children. N.T., November 30, 2012, p. 69. However, Fritz testified that on September 7, 2012 the three children were found in 1010 Elizabeth Street when a search warrant was executed. Id. at 85-85. As a result of the search warrant a loaded firearm, multiple individual packages bags of crack cocaine, scales, and several hundred dollars were found. Based upon the loaded firearm, drugs, and drug paraphernalia used for dealing narcotics being present at a location where small children could be found, the Court finds that the Commonwealth established a *prima facie* case for the single charge of Endangering the Welfare of Children.

#### **8. Counts 40-252**

The Defendant alleges that the Commonwealth relied solely on hearsay evidence for counts 40 through 252. The only evidence in regards to many of these counts came from audio recordings that were the result of a non-consensual intercept. The admissibility of hearsay testimony has been traditionally allowed at a preliminary hearing. Commonwealth v. Tyler, 587 A.2d 326, 328 (Pa. Super. 1991); Commonwealth v. Troop, 571 A.2d 1084 (Pa. Super. 1990). In 2011, the Pennsylvania Rules of Evidence was amended to reflect this practice:

(E) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be

sufficient to establish any element of an offense requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

Pa.R.Crim.P. 542(E). Within the Comment for this rule it states the specific type of elements which may be established by hearsay and the list “is not comprehensive, and hearsay is admissible to establish other matters as well.”

Past Pennsylvania cases, however, have established that there is a limit to the amount of hearsay evidence that may be used. “[H]earsay evidence *alone* may not be the basis for establishing a *prima facie* case in a preliminary hearing.” Commonwealth v. Jackson, 849 A.2d 1254, 1257 (Pa. Super. 2004) (citing Commonwealth v. Tyler, 587 A.2d 326, 328 (Pa. Super. 1991)). It has been determined that “hearsay evidence is admissible in a preliminary hearing when there is more than hearsay evidence used to establish the *prima facie* case.” Id.

In Jackson, a real estate broker determined that an individual was inside a residence and called police. Id. at 1255. It was determined that the original locks of the residence had been changed. Id. A police officer knocked on the door and the defendant answered and stated that he was trying to find out who he could see about getting into the property. Id. It was determined that the defendant did not have permission to be in the residence and was charged with Criminal Trespass and Criminal Mischief. Id. The Superior Court determined that at the preliminary hearing there “was more than enough non-hearsay evidence to establish a *prima facie* case” just from the testimony of the police officer. Id. at 1257; see also Commonwealth v. O’Shea-Woomer, 2009 Pa. Dist. & Cnty. Dec. LEXIS 48, 7-8 (Pa. County Ct. 2009) (determining that not all hearsay evidence was given at a preliminary hearing dealing with charges that include Criminal Homicide and Delivery of Controlled Substance); 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).

Here, the evidence against the Defendant was not based solely on hearsay evidence. The Pennsylvania Rules of Evidence states that the following are not excluded by the hearsay rule:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(25) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity . . . or, (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. . . .

Pa.R.E. 803(1), (25). The non-consensual intercept resulted in statements that are not excluded under hearsay because they were the Defendant's statements and offered against him. See Commonwealth v. Marcos, 2005 Pa. Dist. & Cnty. Dec. LEXIS 423 (Pa. C.P. 2005). In addition, the statements were made by the Defendant and the other party while they were setting up their drug transactions and discussing drug quality/quantity.

Finally, in Serrano, the Superior Court upheld a conviction based on telephone recordings. Commonwealth v. Serrano, 61 A.3d 279, 289 (Pa. Super. 2013). The Commonwealth presented recordings of a buyer ordering forty (40) grams of heroin from the defendant. Id. at 89. Additional phone conversations discussed the quality of the heroin previously purchased. Id. Finally, the Commonwealth presented evidence of a woman that would occasionally accompany the buyer when he had purchased heroin in Philadelphia. Id. at 90. She testified that she had consumed heroin in the defendant's house once and that when the buyer returned to Altoona from Philadelphia he would package controlled substances for distribution in her presence. Id.

As in Serrano, the bulk of the Commonwealth's evidence presented at the preliminary hearing consists of phone recordings. Unlike Serrano, the Commonwealth here has also introduced evidence from an informant and of surveillance that occurred during many of the transactions. The Court finds the reliance by the Commonwealth on phone recordings obtained through a non-consensual wire intercept to support many of the charges was not improper and was sufficient to establish a *prima facie* case.

**ORDER**

AND NOW, this \_\_\_\_\_ day of August, 2013, based on the foregoing Opinion, the Defendant's Petition for Habeas Corpus is hereby GRANTED in part and DENIED in part. The Defendant's Petition is GRANTED as to counts 7, 8, and 9 under 105-2013 as the Defendant and his residence were not shown to be involved prior to the transaction. Therefore, it is ORDERED AND DIRECTED that counts 7, 8, and 9 are hereby DISMISSED. The Defendant's Petition is DENIED for all remaining charges at issue.

By the Court,

Nancy L. Butts, President Judge

cc. Ken Osokow, Esq.  
Jeana Longo, Esq.  
Eileen Dgien, DCA