

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**JASON GARDNER,
Defendant**

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**CR: 410-2013
CRIMINAL DIVISION**

OPINION AND ORDER

The Defendant filed an Omnibus Pre-trial Motion on April 11, 2013. A hearing on the motion was heard on July 11, 2013 and July 12, 2013.

Background

On January 9, 2013, Terell Henderson-Littles (victim) was shot to death in the rear parking lot of 1107 W 4th Street. On January 19, 2013, Easton Police Department contacted Williamsport Bureau of Police (WBP) and advised them that they had one of the suspected shooters, Mirad Shabazz (Shabazz). At approximately 6:00 PM, Agent Kontz (Kontz), Agent Peacock (Peacock), Agent Dincher (Dincher), and Captain Miller (Miller) of the WBP arrived in Easton, PA. Kontz and Peacock interviewed Shabazz while Dincher and Miller went to 1125 Ferry Street to find the other suspect in the shooting, Jason Gardner (Defendant).

At approximately 6:36 PM, Dincher, Miller, and three Easton Police officers arrived at 1125 Ferry Street, where the Defendant was suspected to be located. A black male answered the door and identified himself as "Shawn." The black male began to walk up the stairs as a black female came to the door and identified "Shawn" as the Defendant. The Defendant grabbed and threw a small child at one of the Easton Police officers and began to run to the back of the house. Dincher pursued and as they entered the kitchen in the rear of the house Dincher grabbed the

Defendant and they broke through the back door landing on an outside patio. Easton Police arrested the Defendant and he was transported to the Easton Police Department (EPD).

Kontz and Peacock interviewed the Defendant after he arrived at the EPD. Kontz first advised the Defendant of his Miranda rights, which the Defendant waived and signed a waiver form at 7:11 PM. The Defendant was interviewed for approximately an hour and forty-five (45) minutes. During the interview the Defendant stated that he was in Williamsport around the time of the shooting. On January 9, 2013, the Defendant, Shabazz and two (2) other individuals went to purchase marijuana. Commonwealth Ex. 3. The Defendant stated that he and Shabazz left the other individuals prior to the purchase and they walked directly back to the apartment at which they were staying. The Defendant stated that he did not see the victim or the shooting. While the interview was ending Kontz and Peacock told the Defendant that they would continue to talk on the two and a half (2 ½) hour drive back to Williamsport.

Following the interview, Kontz and the rest of the WBP ate pizza provided by the EPD while the Defendant's shoes were being obtained from a locker. After the Defendant's shoes were returned, Miller and Kontz transported the Defendant by vehicle back to Williamsport at 9:30 PM. Kontz estimated that it took approximately thirty (30) minutes from the end of the interview till the Defendant was in the vehicle.

Kontz and Miller stopped at a McDonald's approximately two (2) minutes away from EPD and got the Defendant food. While the Defendant was eating he called his girlfriend and talked to her for five (5) to ten (10) minutes. Following the phone call, Kontz asked the Defendant about his daughter. The Defendant stated that he would not see his daughter again and that his life was over. Kontz responded that he was just at a bad place at a bad time. The

Defendant then said Shabazz was like a brother to him and that they were at the scene of the shooting.

On January 21, 2013, the Defendant was brought back to WBP from the county prison to finish being processed due to computer issues on January 19th. The Defendant was told that Shabazz had talked to police and he stated that he also wanted to talk. The Defendant again waived his Miranda warnings and made a statement to police.

On April 11, 2013, the Defendant filed an Omnibus Pre-Trial Motion that argued that “statements were obtained in violation of Defendant’s rights as provided in Article 1 Sections 8 and 9 of the Pennsylvania constitution as well as the Fourth, Fifth and Fourteenth Amendments of the United States Constitution as well as Miranda v. Arizona.” Following the hearing, the Defendant specified that he should have been rewarned of his Miranda rights before he made statements to police in the vehicle. In addition, the Defendant’s inadmissible statements resulted in the January 21, 2013 confession and should also be suppressed.

Motion to Suppress

Defense counsel alleges that the Defendant was not properly re-advised of his Miranda rights prior to being questioned while he was being driven back to Williamsport. The purpose of Miranda “is to assure that the individual’s right to choose between silence and speech remains unfettered throughout the interrogation process.” Commonwealth v. Wideman, 334 A.2d 594, 597 (Pa. 1975).

An accused, of course, need not be re-informed of his rights, and asked whether he wishes to assert them each time he is asked a question. On the other hand, we have held that the accused must be so re-informed, and given a new opportunity to assert constitutional rights when warranted by the circumstances. Several “objective indicia” have been noted as significant in determining the issue: we have considered (1) the time lapse between the last Miranda warnings and the accused’s statement; (2) interruptions in the continuity of the interrogation; (3) whether there was a change of location between the place where

the last Miranda warnings were given and the place where the accused's statement was made; (4) whether the same officer who gave the warnings also conducted the interrogation resulting in the accused's statement; and (5) whether the statement elicited during the complained of interrogation differed significantly from other statements which had been preceded by Miranda warnings.

Id. at 598 (citations omitted).

In Wideman, the defendant and his wife arrived at the police administration building at 5:15 AM. Id. at 596. At 5:45 AM, the defendant was given Miranda warnings by Detective Bacher but no questions were asked. At 6:45 AM, Detective Basmajian re-warned the defendant and asked him questions for about a half an hour. At 10:30 AM, the defendant was taken to an interrogation room and given a lie detector test. The defendant was then interrogated again by Detective Melfi, spoke with his wife, and took a three and a half (3 ½) hour nap. From 5:30 to 6:00 PM the defendant was interrogated by Detective Kuester. Id. at 596-97. At 6:45 PM, Detective Smith interrogated the defendant and he admitted to a shooting. Id. at 597. The Defendant had not been given his Miranda warnings since 6:45 AM.

The Supreme Court of Pennsylvania found that the defendant should have been re-advised of his Miranda rights. Id. at 598-99. The Supreme Court noted that continuity of interrogation was broken on several occasions, the delay was twelve (12) hours, a different officer gave the Miranda warnings than interrogated the defendant, and there was a material difference between the statement made when Miranda warnings were given and twelve (12) hours later. See also Commonwealth v. Wideman, 334 A.2d 594, 599 (Pa. 1975) (determining that rewarning was necessary when twelve hours elapsed from the time of the Miranda warnings and the interrogation, a different officer questioned the defendant, and the defendant was moved to another location). In addition, the Supreme Court suppressed the defendant's subsequent formal, written statement as it was a product of the inadmissible oral confession.

On the other hand, in Gray, the defendant was questioned about a murder and given his Miranda warnings at 6:00 PM. Commonwealth v. Gray, 374 A.2d 1285 (Pa. 1977). The defendant denied any knowledge of the homicide during the forty-five (45) minute interrogation. After an approximate hour and a half break, the defendant was re-questioned by another officer and was not re-advised of his Miranda warnings. The Defendant then stated that he was in the victim's house.

The Supreme Court of Pennsylvania ruled that the interrogation should not have been suppressed. The Supreme Court noted that “[w]hile a different officer conducted the second interview, the statements did not materially differ. In the first, [defendant] admitted being with the victim outside her house. In the second, he added that he accompanied her inside and saw her fall against a table. After placing her on the couch, [defendant] stated that he left.” Id. at 1289. Further, the time between the Miranda warnings and the interrogation was two (2) hours and it was conducted in the same room. Id.; see also Commonwealth v. Ferguson, 282 A.2d 378, 379-80 (Pa. 1971) (finding that rewarning was not necessary when a different officer than the one that gave the warnings conducted the interrogation).

Here, the Defendant was interviewed by the same officer that gave the Miranda warnings, the second interview occurred approximately two and a half (2 ½) hours after the warnings were initially given, and the interviews occurred in different locations. The different locations of the interviews support the Defendant's position that he should have been re-advised of his rights. This factor, however, is mitigated by the officers' reference that they would continue talking in the police vehicle. The Defendant was advised prior to the trip back to Williamsport and during the first interview that they would continue to talk in the police vehicle. In addition, the same

officer conducting both interviews and the time between the interviews supports the Commonwealth's position that police were not required to re-advise the Defendant of his rights.

Another of the "objective indicia" used by courts is whether the first and second statements significantly differ. In the Defendant's first statement he stated that he and Shabazz went straight to their friend's apartment and did not see the victim or a shooting.¹ In the Defendant second statement he stated that he and Shabazz were at the scene of the shooting. The Defendant's subsequent statement is different than the first; however, he merely states that he was at the scene of the shooting. The Defendant did not state that he was involved in the shooting in any way. In Gray, the defendant denied any knowledge of a homicide and then later said that he was inside the house and saw the victim fall to the ground. The facts here are similar to Gray, in that the Defendant first denied knowledge and then stated that he was at the scene. Therefore, this Court finds that the first and second statements by the Defendant were not significantly different.

Based on the facts of this case, the Court finds that police did not have to re-inform the Defendant before talking to him in the police vehicle. The first interview of the Defendant ended with police stating that they would continue to talk during the drive to Williamsport. In addition, the statements were not significantly different, occurred within a short period of time from each other, and were conducted by the same officer.

Motion to Dismiss

The Defendant contends that the Commonwealth failed to establish a *prima facie* case for the robbery charges. Specifically, it is alleged that the Commonwealth did not provide any

¹ The Defendant's initial statement to police was that he was in the general area of the shooting but did not know anything about it.

evidence that there was any sort of taking or theft in this matter. A person is guilty of robbery if during the course of committing a theft he either:

- (i) inflicts serious bodily injury upon another;
- (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
- (iii) commits or threatens immediately to commit any felony of the first or second degree;
- (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury;
- (v) physically takes or removes property from the person of another by force however slight; or
- (vi) takes or removes the money of a financial institution without the permission of the financial institution by making a demand of an employee of the financial institution orally or in writing with the intent to deprive the financial institution thereof.

18 Pa.C.S. § 3701(a)(1). Further, “[a]n act shall be deemed ‘in the course of committing a theft’ if it occurs in an attempt to commit theft or in flight after the attempt or commission.”

After reviewing the Preliminary Hearing transcript, the Court finds that the Commonwealth has sufficiently established a *prima facie* case for all the robbery charges. Isaiah Fulton (Fulton) testified that before the co-Defendants went to buy marijuana from the victim, Gardner asked Shabazz if he would go with him to rob him. N.T., March 8, 2013, p. 45, 59. After the shooting occurred Shabazz told Fulton that Gardner shot the victim after he refused to give them more marijuana and reached for the gun:

HOFFA: So you didn’t ask anybody what happened?

FULTON: Yeah. I asked ‘em what happened and they told me.

HOFFA: Who told you?

FULTON: Mirad.

HOFFA: And when you say Mirad you're talking about Shabazz?

FULTON: Yeah.

HOFFA: And what did he tell you again?

FULTON: He said that Jason shot the boy.

HOFFA: Did he say why?

FULTON: He said because he tried to reach for the gun.

HOFFA: Did he – well, what – did he tell you if they took the pot or did they pay for the weed? Did he tell you that?

FULTON: No, he say they took it.

HOFFA: He took it.

FULTON: And handed him the weed and he didn't want to give the rest of it so he tried to, like, wrestle for the gun and he got shot.

.....

HOFFA: And then what else did you say happened after that? He gave you the weed and he wouldn't give him the rest?

FULTON: Right. That's what he told me – he said that he – I guess he tried to – I don't really know. He just said that he – he wasn't trying to give the rest of the weed up and he tried to wrestle him for the gun.

HOFFA: He didn't want to give up the rest of the weed and he tried to wrestle him for the gun.

FULTON: Yeah.

HOFFA: And that's what Shabazz is telling you?

FULTON: Right.

Id. at 70-71. In addition, Shabazz made similar statements to Agent Raymond Kontz of the Williamsport Bureau of Police:

COMMONWEALTH: And in that interview with Mr. Shabazz did he make any – what did he tell you with regard to the homicide of Terrell Littles?

KONTZ: He indicated that the shooter would have been Jason Gardner, that at one point during the commission of a robbery that the victim had gotten brave and reached out to grab the gun and at that point that Mr. Gardner had to shoot him.

COMMONWEALTH: Did Mr. Shabazz indicate to you whether he knew or didn't know that this was going to be a robbery?

KONTZ: He indicated that they were going there to commit the robbery, that as they approached the victim was still inside a vehicle and that he had actually told Mr. Gardner that as long as they were in the vehicle that the robbery wouldn't take place. They weren't familiar with the area. They were afraid they would be taken somewhere where they couldn't find their way back to the residence that they were staying. When Mr. Littles got out of the vehicle Shabazz – or I'm sorry, Mr. Gardner turned to Shabazz and said it was on, so at that time the robbery was going to take place.

Id. at 84. The Defendant points out that Colton Engel (Engel) did not observe a taking. The testimony, however, established that Engel was not observing them the entire time and also he did not see what Gardner was doing while he was watching Shabazz. Id. at 22, 35.

Motion for Severance

The Defendant contends that the co-Defendants' case should be severed due to a potential violation of Bruton, which states that an incriminating statement by a non-testifying co-defendant violates the other defendant's right to cross-examine as guaranteed by the Confrontation Clause of the Sixth Amendment. Bruton v. U.S., 391 U.S. 123 (1968). There is no violation, however, if the incriminating statement is redacted and the trial court gives an accurate and repeated cautionary charge. See Commonwealth v. Travers, 768 A.2d 845 (Pa.

2001); Commonwealth v. Johnson, 378 A.2d 859 (Pa. 1977); Commonwealth v. Whitaker, 878 A.2d 914 (Pa. Super. 2005).

Based on the law, the Court finds that severance of the co-Defendant's cases is not necessary if the Commonwealth redacts Shabazz's statement for use at trial. The Court will require that the Commonwealth provide defense counsel the redacted version of the statement at least sixty (60) days before the start of trial. This will give the Defendant adequate time to raise any issues from the redacted statement.

ORDER

AND NOW, this _____ day of September, 2013, based upon the foregoing Opinion, the Court finds that the Williamsport Bureau of Police was not required to re-advise the Defendant of his rights prior to interviewing him again in their police vehicle. In addition, the Commonwealth established a *prima facie* case for the robbery charges. Therefore, the Defendant's Omnibus Pre-trial Motion is DENIED.

It is ORDERED and DIRECTED that the Commonwealth provide defense counsel with the redacted version of Shabazz's incriminating statement at least sixty (60) days before the start of trial.

By the Court,

Nancy L. Butts, President Judge

xc: DA
Robert Hoffa, Esq.