IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-2177-2012**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
AKMED B. GREENE,	:	
Defendant	:	

OPINION AND ORDER

This matter came before the court on March 5, 2013 for a hearing and argument on Defendant's omnibus pretrial motion, which included a petition for writ of habeas corpus.[1] The relevant facts follow.

On November 1, 2012, Trooper Mitch McMunn was on duty in an unmarked state police vehicle entering Route 180 westbound at the Wal-Mart exit when he noticed a silver Chevrolet Impala that appeared to be speeding. The vehicle, however, slowed down and pulled in behind him in the right hand lane. He pulled out into the passing lane, increased his speed to about 70-75 miles an hour, and the Impala followed suit. After the Impala followed him at this speed for about three-tenths of a mile in an area where the posted speed limit was 55 miles per hour, Trooper McMunn pulled over into the right hand lane. When he activated his lights and siren to stop the driver of Impala for speeding, the vehicle just took off and proceeded to flee from him. A high speed chase ensued.

During the pursuit, the vehicle got off the highway at the Third Street exit and turned onto Willmont Drive, which provides access to Aldi's and Woodland's Bank. The

[1] The motion also contained a motion to compel discovery, which the court addressed in a separate order.

vehicle nearly struck several pedestrians in the Aldi's parking lot. Upon realizing that there was only one entrance/exit from that parking lot, the driver of the Impala drove over a curb, through the grass behind a dentist's office and then up the driveway to the dentist's office.

Trooper McMunn did not follow the vehicle over the curb, because Trooper McGee had joined the pursuit and was already proceeding to the dentist's office. Instead, Trooper McMunn drove back onto Willmont Drive and temporarily lost sight of the vehicle.

Trooper McGee radioed that the vehicle had stopped near the dentist's office and the three occupants were fleeing on foot in different directions. All three occupants were captured, taken into custody and transported to the Montoursville State Police Barracks.

Carol Bolejack lived near Aldi's. About a half-hour after all the commotion stopped and everyone was gone, Ms. Bolejack began walking to Aldi's. On her way there, she walked across the dentist's driveway and parking lot. Ms. Bolejack saw a bunch of little baggies and stuff lying on the pavement. Some of the baggies were in a clear sandwich bag and some were lying on the ground. Ms. Bolejack went into the dentist's office and the police were called.

The police responded and recovered a total of 125 baggies, the contents of which field tested positive for heroin. The baggies were discovered approximately 15 to 20 yards from where the vehicle came to a stop and the occupants fled.

Defendant was one of the occupants of the silver Chevy Impala. He was arrested and charged with possession with intent to deliver a controlled substance, conspiracy to possess a controlled substance with the intent to deliver, possession of a controlled substance, possession of drug paraphernalia, and conspiracy to tamper with physical

evidence.

Montez Moore, one of Defendant's alleged co-defendants, testified at Defendant's preliminary hearing, along with Trooper McMunn, Trooper McGee, and Ms. Bolejack. Mr. Moore testified that he was the driver of the vehicle, Defendant was seated in the front passenger seat, and the third individual was seated behind him. He fled from the police because he owed a lot of money in traffic tickets in Philadelphia and he had a warrant for his arrest. He testified that before he stopped the vehicle, Defendant rolled down the window and threw a bag out of the vehicle. Mr. Moore also testified that he had a conversation with Defendant after the incident where Defendant asked him to "take his case for him" because Defendant believed Mr. Moore had a zero prior record score.

On February 13, 2013, Defendant filed his omnibus pretrial motion, which included a request for habeas corpus relief on Count 5, conspiracy to tamper with physical evidence. Defendant relied on the case of Commonwealth v. Delgado, 544 Pa. 591, 679 A.2d 223 (1995).

In Delgado, the police utilized a confidential informant (CI) to make a controlled purchase of cocaine from Delgado. When the CI gave the pre-arranged signal and the police moved in to arrest Delgado, he fled on foot. During Delgado's flight, he threw a plastic bag containing cocaine on the roof of a little outbuilding or garage. The police were right behind Delgado when he tossed the contraband and they saw where it landed. Delgado was convicted of tampering with or fabricating physical evidence based on him throwing the plastic bag of cocaine. In overturning Delgado's conviction, the Pennsylvania Supreme Court stated:

> Delgado's act of discarding contraband in plain view of the pursuing officer fails to demonstrate the intent necessary to maintain a conviction under 18 Pa.C.S. 4910(1). This section requires that an individual 'alter, destroy, conceal or remove" a piece of evidence to be guilty of tampering with or fabricating evidence. Delgado's act of discarding contraband in plain view of the pursuing officer did not rise to the level of conduct that constitutes the destruction or concealment of evidence as contemplated by the statute. The act of throwing the bag of cocaine while being chased by the police was nothing more than an abandonment of the evidence."

679 A.2d at 225.

The court finds that Delgado is distinguishable. First, Delgado is factually distinguishable. Defendant did not discard the drugs in plain view of the police. When the preliminary hearing testimony is viewed as a whole, it indicates that neither Trooper McMunn nor Trooper McGee saw Defendant throw the bag of heroin out of the window. Preliminary Hearing Transcript, pp. 5, 12-13, and 42. Trooper McGee testified that none of the occupants discarded anything when they were fleeing on foot. Id. at p.42. Therefore, unlike Delgado, Defendant did not discard the drugs when he fled on foot and the police were right behind him; rather, he threw them out of the window of a moving vehicle at a time when neither Trooper McMunn nor Trooper McGee was close enough to the dentist's office to see what he was doing.

Defense counsel argued that the drugs must have been discarded in plain view of the police because the affidavit of probable cause specifically states "[o]ne of the occupants then threw out a plastic bag containing 125 individually wrapped ziptop baggies of heroin before the vehicle came to a stop in front of 26012 Wilmont Drive" and none of the occupants were cooperating with police when that statement was written; therefore, Delgado is directly on point. There is nothing in the record to indicate when Mr. Moore began

cooperating with the police. Nevertheless, even if Mr. Moore was not cooperating at the time the affidavit was written, such does not necessarily mean that the police personally observed one of the occupants throw out the bag of heroin. Instead, the police could simply have drawn that inference from all the facts and circumstances of the case.

The occupants of the vehicle were involved in a high speed chase from the police. They got trapped in the Aldi's parking lot and tried to escape by jumping the curb and driving through the dentist's property. When the car stopped, the occupants fled on foot, but none of the troopers saw them discard anything while they were running away. Within a half-hour of the incident, the drugs were discovered on the dentist's driveway approximately 15 to 20 yards from where the vehicle stopped and the occupants jumped out and fled. Given the timing and location of the discovery of the 125 baggies of heroin, a reasonable person could conclude that the drugs were thrown from the vehicle just before the vehicle came to a stop.[2]

Second, at this stage of the proceedings, the Commonwealth only needs to establish a prima facie case. The prima facie standard "does not require that the Commonwealth prove the elements of the crime beyond a reasonable doubt nor that evidence is available that would prove each element at trial beyond a reasonable doubt." Commonwealth v. Austin, 394 Pa. Super. 146, 575 A.2d 141, 143 (1990).

Finally, and perhaps most importantly, Defendant is not charged with

[2] In the long run, the troopers' preliminary hearing testimony that they did not see the drugs being thrown from the vehicle might be more beneficial to Defendant than if the drugs were discarded in their plain view. If the troopers testify that they saw Defendant throw the drugs out of the car's window, they can be impeached with their preliminary hearing testimony. If they testify that they did not personally observe the drugs being discarded, the Commonwealth's case against Defendant might hinge on the credibility of a co-conspirator or an accomplice, who could be considered a "corrupt and polluted" source.

tampering with physical evidence, but rather conspiracy to tamper with physical evidence, which does not require completion of the underlying crime. See Commonwealth v. Tolbert, 448 Pa. Super. 189, 670 A.2d 1172, 1185 (1995)("A conspirator agrees with another to commit a crime and make an overt act in furtherance thereof. The inchoate crime of conspiracy is thus committed regardless of whether the substantive crime occurs.").

Therefore, while Defendant raises an interesting issue, the court will deny Defendant's motion at this stage of the proceedings. Accordingly, the following order is entered:

O R D E R

AND NOW, this ___ day of April 2013, the court DENIES the portion of Defendant's omnibus pretrial motion which seeks habeas corpus relief on Count 5, conspiracy to tamper with physical evidence. This ruling is without prejudice to Defendant raising this issue at a later stage of the proceedings such as at trial or in post-sentence motions.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Anthony Cuica, Esquire (ADA)
Donald F. Martino, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file