

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
COMMONWEALTH : No. CR-343-2013
:
vs. : CRIMINAL DIVISION
:
:
ERICA L. MOORE, :
Defendant :

OPINION AND ORDER

This matter came before the Court on July 5, 2013 for a hearing and argument on Defendant’s omnibus pretrial motion. The relevant facts follow.

On December 18, 2012, Defendant put “phencyclidine” (PCP) on a cigarette, placed the cigarette on her coffee table, then walked into the kitchen. When Defendant returned from the kitchen, she observed that her one-year old daughter had placed the cigarette in her mouth and was chewing on the cigarette. Defendant removed the cigarette and tobacco from the child’s mouth, but a short time later the child became unresponsive. Defendant called 911 and requested an ambulance. When the ambulance did not arrive within five minutes, Defendant advised County Communications that she was driving the child to the hospital herself. Defendant took the child to the Williamsport Hospital emergency room and told the nurse that the child ate PCP. Due to her life-threatening condition, the child was transported to Geisinger Medical Center.

Defendant was charged with endangering the welfare of children, a misdemeanor of the first degree; recklessly endangering another person, a misdemeanor of the second degree; and possession of a controlled substance, an ungraded misdemeanor.

At the time scheduled for her preliminary hearing, Defendant waived her

hearing and the parties signed a guilty plea recommendation. While the recommendation stated that Defendant would plead guilty to recklessly endangering another person (REAP) for adult supervision, it also stated that the recommendation was subject to the final approval of the District Attorney and could be withdrawn by the Commonwealth prior to the entry of the guilty plea. Furthermore, the guilty plea recommendation contained a provision that stated:

The Defendant, by signing this plea recommendation, understands and agrees that he/she MAY NOT remand this matter for a preliminary hearing should this plea recommendation be withdrawn by the Commonwealth prior to the entry of the guilty plea.

The District Attorney did not approve the guilty plea recommendation.

On June 10, 2013, Defendant filed an omnibus pretrial motion, which included a motion to dismiss the Information and remand for a preliminary hearing due to the Commonwealth's failure to "honor the agreement made at the preliminary hearing;" a petition for writ of habeas corpus challenging the endangering the welfare of a child charge; a motion for discovery of photographs taken by the police during the execution of the search warrant at Defendant's residence; a motion for inspection of Children and Youth records; and a motion to reserve right.

The Court held a hearing and argument on Defendant's omnibus motion on July 5, 2013. At the hearing, Agent Kevin Stiles testified about the filing of the charges and conversations he had with defense counsel and members of the District Attorney's office regarding the guilty plea recommendation. Agent Stiles testified that he had a conversation with defense counsel before the charges were filed during which they discussed probation as a fair sentence in this case. He also testified about conversations with defense counsel and

Assistant District Attorney Aaron Biichle at the time the preliminary hearing was to be held. Agent Stiles indicated that neither he nor Mr. Biichle had a problem with Defendant receiving probation. Agent Stiles also acknowledged that the agreement recommending probation was contingent upon Defendant waiving her preliminary hearing. Agent Stiles testified that he did not have a conversation after the preliminary hearing with the District Attorney, but he probably had a conversation with him before the charges were filed. The District Attorney never told Agent Stiles that probation wasn't acceptable to him, but Agent Stiles also didn't strike an agreement with the District Attorney for a misdemeanor plea for probation. He explained that he doesn't get a plea agreement from the District Attorney when he files the charges; he just gets approval or recommendation for the charges to be filed.

Defendant first argues that the Information should be dismissed and the case remanded for a preliminary hearing, because the Commonwealth failed to honor the agreement made at the preliminary hearing. If defense counsel had known the agreement would not be honored, he would not have advised Defendant to waive her preliminary hearing. Defendant now wants to exercise "her absolute right to a preliminary hearing."

The Court rejects Defendant's argument. "There is no constitutional right, federal or state, to a preliminary hearing." Commonwealth v. Jacobs, 640 A.2d 1326, 1327 (Pa. Super. 1994), quoting Commonwealth v. Ruza, 511 Pa. 59, 64, 511 A.2d 808, 810 (1986); see also Commonwealth v. Mayberry, 459 Pa. 91, 327 A.2d 86, 92 (1974). Defendant signed a document stating that she knowingly, voluntarily, and intelligently waived her right to a preliminary hearing. See Commonwealth's Exhibit 2. The guilty plea

recommendation expressly stated that it was subject to the final approval of the District Attorney and could be withdrawn at any time prior to the entry of the guilty plea. Moreover, the guilty plea recommendation specifically stated the following:

The Defendant, by signing this plea recommendation, understands and agrees that he/she **MAY NOT** remand this matter for a preliminary hearing should this plea recommendation be withdrawn by the Commonwealth prior to the entry of the guilty plea. (emphasis original).

Therefore, Defendant was fully aware when she waived her preliminary hearing of the possibility that if the contemplated guilty plea to a charge of REAP in exchange for adult supervision did not come to fruition due to the recommendation being withdrawn by the Commonwealth, such would not be a basis for remanding her case for a preliminary hearing.

The Court also notes that it is precluded from “remanding” the case back to the issuing authority unless the parties agree. Pa.R.Cr.P. 541(D). Since the Commonwealth is opposed to Defendant’s right to a preliminary hearing being reinstated, it has not agreed to a preliminary hearing being held before the issuing authority. For these reasons, the Court rejects the portion of Defendant’s omnibus pretrial motion that seeks dismissal of the Information and a remand to the issuing authority for a preliminary hearing.

Defendant next seeks a petition for writ of habeas corpus on count 1, by asserting that the evidence as alleged in the affidavit of probable cause is insufficient to establish a prima facie case of endangering the welfare of children because she did not intentionally place her child in danger and unknowingly placing her in danger is not enough.

The Commonwealth countered Defendant’s argument by asserting that she waived her right to challenge the sufficiency of the prima facie case when she waived her preliminary hearing

in writing. The Commonwealth also cited Commonwealth v. Stephen Timlin, CR-734-2012 (Butts, P.J., June 10, 2013) in support of its position that Defendant was not entitled to challenge the sufficiency of the prima facie case or request a writ of habeas corpus pursuant to Rule 541.

After review of the Pennsylvania Constitutions, Rules of Criminal Procedure and case law, the Court will permit Defendant, under the facts and circumstances of this case, to challenge the sufficiency of the evidence alleged in the affidavit of probable cause through a petition for writ of habeas corpus, but it finds that the evidence set forth in the affidavit of probable cause is sufficient to establish a prima facie case.

The Pennsylvania Constitution provides that the “privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.” PA. CONST. Art. 1, §14. A petition for writ of habeas corpus is the proper means for challenging whether the Commonwealth’s evidence is sufficient to establish a prima facie case. See Commonwealth v. McBride, 528 Pa. 153, 595 A.2d 589, 590 n.2 (1991); Commonwealth v. Marti, 779 A2.d 1177, 1178 n.1 (Pa. Super. 2001).

The Commonwealth argues that Defendant is precluded from challenging the sufficiency of its evidence due to Rule 541(C) and the waiver signed by Defendant. The Court acknowledges that, in accordance with Rule 541(C)(2), the waiver of preliminary hearing signed by Defendant states: “I understand that when I am represented by counsel and I waive the right to preliminary hearing, I am thereafter precluded from raising challenges to the sufficiency of the prima facie case.” Rule 541(A), however, contains exceptions to this preclusion.

Rule 541(A) of the Pennsylvania Rules of Criminal Procedure states:

(A) The defendant who is represented by counsel may waive the preliminary hearing at the preliminary arraignment or any time thereafter.

(1) The defendant thereafter is precluded from raising the sufficiency of the Commonwealth's *prima facie* case unless the parties have agreed at the time of the waiver that the defendant later may challenge the sufficiency.

(2) If the defendant waives the preliminary hearing by way of an agreement, made in writing or on the record, and the agreement is not accomplished, the defendant may challenge the sufficiency of the Commonwealth's *prima facie* case.

Pa.R.Cr.P. 541(A).

The Commonwealth, relying on Judge Butts' opinion in Timlin, contends that Rule 541(A)(2) does not apply in this case. The Court cannot agree for several reasons. First, Timlin is distinguishable in that the defendant in that case received a benefit other than the plea offer; i.e., his bail was significantly reduced. Second, the defendant in Timlin only sought a remand for a preliminary hearing. There is nothing in the Timlin decision to suggest that the defendant filed a petition for writ of habeas corpus and the court refused to consider it based on the waiver or Rule 541. Finally, unlike Judge Butts, the undersigned cannot conclude that the agreement was accomplished in this case. Defendant, defense counsel, Assistant District Attorney Aaron Biichle and Officer Stiles all signed the guilty plea recommendation. Below Officer Stiles' signature he circled the word **AGREES**. Officer Stiles' also used the term agreement in his testimony when he stated that the plea agreement recommending probation was contingent upon Defendant waiving her preliminary hearing. Regardless of what the document is entitled, it is an agreement. If Defendant had failed to comply with her bail conditions or failed to cooperate as a witness in another

criminal matter in violation of paragraphs 4 or 5, the Commonwealth would be arguing that Defendant is not entitled to the benefit of the parties' agreement or recommendation because she failed to uphold her end of the bargain. The same should hold true for the Commonwealth. The only benefit to Defendant for waiving her preliminary hearing was contained in Paragraph 7 of the "guilty plea recommendation" which states "The Defendant will plead guilty to: GP to Ct 2 REAP (M2) for Adult Supervision. Other Disposition: All remaining charges will be dismissed." Clearly, that was not accomplished. The District Attorney withdrew or revoked that offer and would not permit Defendant to plead guilty to REAP in exchange for adult supervision and dismissal of the remaining charges. The Court also notes that defense counsel did not make a general or vague challenge to all the charges in this case. Instead, Defendant's petition for writ of habeas corpus is focused solely on the *mens rea* for endangering the welfare of children. Under the circumstances of this case, both Rule 541(A)(2) and fundamental fairness dictate that Defendant be permitted to challenge the sufficiency of the Commonwealth's *prima facie* case for Count 1, endangering the welfare of children.¹

Section 4304 of the Crimes Code defines the crime of endangering the welfare of children as follows:

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.A. §4304(a)(1). The term "knowingly" is defined in section 3021(b)(2), which

¹ Nothing in this decision should be construed to permit a defendant to challenge the Commonwealth's *prima facie* case in every instance where the guilty plea recommendation does not come to fruition. The result might be different if the agreement is not accomplished due to the fault of the defendant or if the defendant tries to

states:

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

18 Pa.C.S.A. §302(b)(2). The facts as set forth in the affidavit of probable cause, which include Defendant's statements to medical personal and a Children and Youth worker, as well as the reasonable inferences that can be drawn from the facts, establish that: Defendant placed a PCP laced cigarette onto a coffee table within reach of her one year old daughter; Defendant walked into the kitchen and left the child unattended in the living room; the child picked up the PCP laced cigarette, placed it in her mouth and began to eat it; when Defendant returned to the living room, the child was chewing on the cigarette; Defendant removed the cigarette and tobacco from the child's mouth, but a short time later, the child became unresponsive; Defendant took the child to the hospital and told the ER nurse that the child ate PCP; the child was in serious condition and was transported to Geisinger Medical Center due to her life-threatening condition.

Based on these facts and circumstances, a jury could reasonably conclude that Defendant knowingly endangered the welfare of her child. She knew the cigarette was laced with PCP; she intentionally placed it on the coffee table; she knew the PCP-laced cigarette was within reach of her daughter; she knew her daughter was a one-year old toddler and she went into the kitchen and left the child unattended. The practically certain outcome of this

challenge the sufficiency of the evidence with respect to charges to which he or she agreed to enter a guilty plea.

combination of facts is exactly what occurred -- the child picked up the cigarette, put it in her mouth and ingested PCP. Defendant was just fortunate that her child did not die.

Defendant also filed a request for discovery of photographs taken during the execution of a search warrant of Defendant's residence. The Court will hold this motion in abeyance. Defense counsel had received a disc containing the photographs but it was defective and he could not open it. The parties were in the process of providing defense counsel with another disc of photographs. Therefore, it appears that this issue is resolved. If defense counsel does not get copies of the photographs, he shall notify the Court in writing so that it can schedule a conference or argument with the attorneys.

Defendant also requests copies of all reports and information contained in the Lycoming Children and Youth's files related to Defendant's daughter and any allegations of abuse in accordance with Commonwealth v. Kennedy, 604 A.2d 1036 (Pa. 1991). If these records are in the possession of the Commonwealth, they shall be provided to the defense within twenty (20) days. If these records are not within the Commonwealth's possession, defense counsel would need to issue a subpoena to obtain Children and Youth's investigative file.

Finally, Defendant filed a motion to reserve the right to file additional pretrial motions at a later date. The Court will deny this motion without prejudice to Defendant renewing her request if the receipt of new or additional discovery discloses a pretrial issue that could not have been raised within thirty days of arraignment.

ORDER

AND NOW, this ____ day of September 2013, upon consideration of Defendant's omnibus pretrial motion and in accordance with the foregoing opinion, it is ordered and directed as follows:

1. The Court denies Defendant's request to dismiss the Information and remand this matter for a preliminary hearing.
2. The Court permits Defendant to challenge the sufficiency of the evidence set forth in the affidavit of probable cause to establish a *prima facie* case for count 1, endangering the welfare of children. Nevertheless, after review of the affidavit of probable cause and the relevant provisions of the Crimes Code, the Court finds that the evidence is sufficient to establish a *prima facie* case for that count.
3. The Court believes the parties have resolved the discovery motion pertaining to photographs taken during the execution of a search warrant at Defendant's residence. If this issue is not resolved, defense counsel shall notify the court in writing so that the Court can schedule an argument on this issue.
4. Within twenty (20) days, the Commonwealth shall notify defense counsel in writing whether it has any records from the Children and Youth investigative file and provide any such records that are in its possession. If the Commonwealth does not possess these records, defense counsel will

need to subpoena the records directly from Lycoming County Children and Youth.

5. The Court denies Defendant's request to reserve the right to file additional pretrial motions. This ruling is without prejudice to Defendant renewing her request if the defense receives new or additional discovery which discloses a pretrial issue that could not have been raised within thirty days of arraignment.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Edward J. Rymysza, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file