

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1085-2013
:
vs. :
:
MONTE BYRD-BONNER, : Motion to Compel Discovery
Defendant :

OPINION AND ORDER

Before the Court is Defendant's Motion to Compel Discovery filed on July 24, 2013.

By Information filed on July 19, 2013, Defendant is charged with one count of Possession with Intent to Deliver Heroin, one count of Possession of Heroin and one count of Possession of Drug Paraphernalia.

By Order of Court dated July 29, 2013, the Court ordered that the Commonwealth provide to defense counsel all items of mandatory discovery. The argument on Defendant's Motion was held before the Court on August 23, 2013.

At the time of the oral argument, defense counsel indicated that the only disputed items of discovery concerned Paragraphs 11 and 12 of his Motion. Specifically, Defendant contends that he must be provided with any and all expert reports along with the CV of the individual who created and signed the report. Alternatively, defense counsel argues that if no such report was prepared, the expert should be compelled to prepare a report or the Commonwealth should provide to defense counsel written verification of the substance of the facts to which the expert is expected to testify and a summary of the expert's opinions and the grounds for each opinion.

The Commonwealth contends that defense is not entitled to either a report or a written summary. The Commonwealth argues that defense counsel had an opportunity to question the expert at the preliminary hearing and chose not to do so, thus waiving his right to discovery. Moreover, the Commonwealth argues that it should not be required to “lock” its expert in with respect to what the expert will testify to at trial.

Rule 573 of the Pennsylvania Rules of Criminal Procedure governs pretrial discovery. The Commonwealth must produce for Defendant any reports of expert opinions. Rule 573 (B)(1)(e). Furthermore, the Court may in its discretion order additional expert discovery. “If an expert whom the attorney for the Commonwealth intends to call has not prepared a report, the court, upon motion, may order that the expert prepare, and that the attorney for the Commonwealth disclose, a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert’s opinions and the grounds for each opinion.” Rule 573 (B) (2) (b).

In exercising its discretion to grant or deny a request for discretionary discovery, the Court is guided by the principle to allow as much discovery prior to trial as will, consistent with the protection of persons, effective law enforcement, and the adversary system, provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination and meet the requirements of due process. Commonwealth v. Theil, 323 Pa. Super. 92, 470 A.2d 145, 148 (1983).

In reviewing the Affidavit of Probable Cause filed in this matter, it is clear

that the case against the Defendant will not involve direct testimony of any delivery or sale of controlled substances. Moreover, it does not appear that there are any statements made by the Defendant upon which the Commonwealth could prove intent. Accordingly, intent to distribute will need to be proven by circumstantial evidence.

The Commonwealth, consistent with the evidence it presented at the preliminary hearing, will undoubtedly call an expert who will testify that under all of the circumstances the controlled substances that the Defendant allegedly possessed were done so with the intent to deliver to others. Clearly, Defendant is entitled to the expert opinion as well as a report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify and a summary of the expert's opinions and the grounds for each opinion.

Such discovery at this time is clearly consistent with the principles of providing adequate information for informed pleas, expediting trial, minimizing surprise, affording the opportunity for effective cross-examination and meeting the requirements of due process.

The Commonwealth's objection that the Defendant had an opportunity at the preliminary hearing to obtain discovery of the expert but waived such, while somewhat meritorious, is not determinative. Clearly, the Commonwealth's burden at a preliminary hearing is to present a prima facie case that a crime has been committed and that the accused is probably the one who committed it. Commonwealth v. Oliver, 869 A.2d 1167, 1171 (Pa. Cmwlth. 2005). A preliminary hearing is not a proceeding upon which the Defendant is

entitled to discovery. Commonwealth v. Jackson, 785 A.2d 117, 119 (Pa. Super. 2001), appeal denied, 568 Pa. 735, 798 A.2d 1288 (2002). Moreover, a Defendant does not waive his claim for discovery for failing to pursue such at the preliminary hearing stage.

Accordingly, Defendant's Motion will be granted and the Court will enter the following Order.

ORDER

AND NOW, this ___ day of September 2013, following a hearing and argument, Defendant's Motion to Compel Discovery is GRANTED.

Within thirty (30) days of today's date, the Commonwealth shall notify defense counsel of who it intends to utilize as its expert to offer the opinion that Defendant possessed the heroin in question with intent to deliver it. The Commonwealth shall provide an expert report that complies with Rule 573 (B) (2) (b) to defense counsel within sixty (60) days of the date of this Order, unless it requests and obtains an extension from the Court for good cause shown. Alternatively, the Commonwealth shall provide to defense counsel a written summary that complies with said Rule and which is adopted and/or signed by the expert.

The Commonwealth shall also provide to Defendant within thirty (30) days of today's date copies of any and all lab reports that it intends to use at the trial in this matter.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Ronald Travis, Esquire (APD)
Gary Weber, Lycoming Reporter
Work File