

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-1160-2013
vs.	:	
	:	
DERRICK DRAFT,	:	
Defendant	:	Petition for Writ of Habeas Corpus

OPINION AND ORDER

Before the Court is Defendant's Petition for Writ of Habeas Corpus filed on August 28, 2013. Defendant is charged with Robbery and related counts arising out of the alleged assault of an individual on January 2, 2012.

A preliminary hearing was held before District Magistrate James Carn on June 24, 2013. The parties stipulated that the Court would consider the testimony from said preliminary hearing in determining Defendant's Habeas Petition.

The alleged victim, Tyler Fowler, was walking on Memorial Avenue in Williamsport on January 2, 2012 at approximately 1:00 p.m. He was walking by himself and texting his girlfriend on his cell phone.

Two "guys approached" him and demanded that he give to them all of his "stuff." Both of them pointed separate guns at him. He gave them his cell phone and two packs of Marlboro cigarettes. They also demanded that he take off his shoes and socks.

Mr. Fowler was unable to give a detailed description of either of his assailants. He did not recognize their voices. He did not remember if they wore gloves. He did recall that one was wearing a black hoodie and the other was wearing a light grey hoodie. While at first he could not describe their race, he did recall that he initially described them as two black males.

With respect to the two packs of Marlboro cigarettes that were in his pocket and which he gave to his assailants, he testified that he “got them” from his mother and that they were “intact.” (Transcript, p. 4). While he also initially testified that no one had handled the cigarettes prior to him having them, (Transcript, p. 4) upon cross-examination, he conceded he did not know for sure if anybody ever handled them before he got them. (Transcript, p. 9). As well, while he initially testified that he did not see what his assailants did with the cigarettes, he subsequently testified that he believed they threw them on the ground. (Transcript, pp. 5, 7).

Agent Kevin Stiles of the Williamsport Bureau of Police next testified on behalf of the Commonwealth. He indicated that an initial investigation was done at the scene. He recovered two packs of Marlboro cigarettes on the ground. The packs of cigarettes were dusted for latent fingerprints, and the prints were submitted to the Pennsylvania State Police for analysis. The police identified one of the latent prints as a print from Defendant’s left ring finger.

On cross-examination, Agent Stiles did not know where the print was found on the cigarette pack and conceded of not knowing when that fingerprint would have gotten on the box. (Transcript, p. 16).

No testimony was submitted by the Commonwealth other than as previously set forth. With respect to the cigarette pack on which the fingerprint was found, no testimony at all was presented by any witness as to where the pack originated from, who sold it to the mother, how the mother obtained it, whether Defendant was a

prior customer or employee of the store, whether Defendant had access to the pack of cigarettes otherwise, how long the mother had possession of the pack before she gave it to the victim, whether others touched the pack prior to it being given to the victim, whether others had access to the pack prior to the mother giving it to the victim, how long the victim had possession of the pack prior to it being stolen, whether others touched or possessed the pack prior to it being stolen, whether others had access to the pack prior to it being stolen or where the pack was discarded following the incident.

With respect to the investigation which resulted in seizing the pack and obtaining a fingerprint, there was no testimony presented by any source as to where the pack was located in relation to where the incident occurred, how soon after the incident the pack was found, whether others handled or did not handle the pack following the incident, whether before the police obtained the pack others had access to it as a result of it being in a public place, whether others may have moved the pack or had the opportunity to move it following the incident, the condition of the pack when it was found, whether the pack was still as packaged, opened or unopened or damaged or modified in any way, or any other specifics relating to the pack itself, the area it was located and how it was located.

The Commonwealth contends that Defendant's identity has been sufficiently established for prima facie purposes because he is a black individual and his fingerprint was found on a pack of cigarettes that was taken from the victim. Defendant counters that the identity evidence falls woefully short of what is required.

The proper means to attack the sufficiency of the Commonwealth's evidence pretrial is through the filing of a Petition for Habeas Corpus. Commonwealth v. Marti, 779 A.2d 1177, 1178 n.1 (Pa. Super. 2001). At a habeas corpus proceeding, the issue is whether the Commonwealth has presented sufficient evidence to prove a prima facie case against the defendant. See Commonwealth v. Williams, 911 A.2d 548 (Pa. Super. 2006).

"A prima facie case consists of evidence, read in a light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime." Commonwealth v. Packard, 767 A.2d 1068, 1070 (Pa. Super. 2001). "Stated another way, a prima facie case in support of an accused's guilt consists of evidence that, if accepted as true, would warrant submission of the case to the jury." Packard, supra. at 1071.

The specific issue to be determined in this case is whether the evidence presented by the Commonwealth sufficiently establishes that Defendant is probably the perpetrator of the crimes.

In Commonwealth v. Coll, 2010 Pa. Dist. & Cnty. Dec. Lexis 189 (August 6, 2010, Lehigh County), the Court held that the Commonwealth presented sufficient prima facie evidence to warrant the belief that the defendant burglarized a Hess Express. The testimony established that the store was closed for business, there was an unauthorized entry through the front glass doors that were broken, approximately \$500.00 worth of Newport cigarettes were removed without authorization or payment, a fingerprint was

obtained from one of the packs that were located on the floor, that fingerprint matched the defendant, the cigarettes were not self-serve but maintained behind the counter, the defendant was not an employee of the store, and the store's representative had never seen the defendant at the store prior to the date of the incident.

This case is far different. There was no testimony presented as to where the pack was located, whether others may have had access to the pack after it was taken, the condition of the pack, whether the cigarettes were self-serve and maintained where a customer could not obtain them, whether Defendant was an employee of the store or whether Defendant had ever been seen in the store prior to the incident.

As well, there are a series of cases examining the sufficiency of evidence where the primary, if not sole, evidence supporting the alleged perpetrator's identity consisted of fingerprints. While the Court recognizes that a sufficiency of evidence argument is a different legal analysis than *pima facie*, the cases are instructive.

Generally speaking, unless the circumstances are such that the fingerprint could only have been impressed at the time and place the crime was committed, the evidence would be deemed insufficient to sustain a conviction. Commonwealth v. Sloan, 2013 PA Super 50, 67 A.3d 808, 814 (2013), quoting Commonwealth v. Donahue, 2013 PA Super 31, 62 A.3d 1033 (2013). On the other hand, where the circumstances indicate that the fingerprint was impressed or imposed at the time of the crime and the defendant's innocent presence has been excluded, such evidence has been held to be sufficient. Sloan, 67 A.3d at 815, quoting Donahue, 62 A.3d at 1036.

The Court agrees with Defendant's argument under the circumstances as presented in this case. The evidence, or the lack thereof, cannot even for prima facie purposes establish that the fingerprint could have been impressed at the time and place the crimes were committed. Indeed, there are far too many variables that were not addressed through the testimony. The fingerprint could have gotten on the pack through a plethora of innocent ways. It cannot even be remotely concluded that Defendant's "innocent presence" is excluded. See for example Sloan, supra; In Re: M.J.H., 2010 PA Super 7, 988 A.2d 694 (2010); Commonwealth v. Cichy, 227 Pa. Super. 480, 323 A.2d 817 (1994); Commonwealth v. Dolan, 287 Pa. Super. 202, 429 A.2d 1171 (1981).

ORDER

AND NOW, this ____ day of December 2013, following a hearing, argument and review of the Preliminary Hearing transcript, the Court GRANTS Defendant's Petition for Habeas Corpus. The charges against Defendant are DISMISSED. Defendant is released to the extent he is being held only on these charges.

By The Court,

Marc F. Lovecchio, Judge

cc: PD (KB)
DA (MK)
Gary Weber, Esquire (Lycoming Reporter)
Work File