

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No's. CR-1835-2012
 : CR-245-2013
 vs. :
 : Motion to Consolidate
 MICHAEL T. WILLS, : Motion in Limine
 Defendant :

OPINION AND ORDER

Before the Court are two motions. The first is a motion by the Commonwealth to consolidate the above-captioned Informations. The second is a motion in limine filed by Defendant to preclude introduction of prior bad acts.

The Court held an argument and hearing on both motions on March 5, 2013.

The Court will first address the Commonwealth's motion for consolidation. In connection with such, the parties agreed that the Court could consider the averments as set forth in the respective affidavits of probable cause.

Under Information 1835-2012, Defendant is charged with one count of delivery of a controlled substance (heroin), one count of possession with intent to deliver and one count of criminal use of a communication facility. According to the affidavit of probable cause, a first controlled buy between Defendant and a confidential informant (CI) occurred on January 17, 2012. The CI called Defendant on Defendant's cell phone to arrange a purchase of heroin. Defendant directed the CI to meet him in the Rite Aid parking lot on Fifth Street in Williamsport. Defendant walked up to the right front passenger door of the CI's vehicle at which time the sale was made with the CI buying a bundle or ten bags of heroin for \$100.00.

The second buy was made on February 15, 2012. It involved a different CI.

The CI called Defendant at a different cell phone number. Through a series of subsequent phone calls, Defendant directed the CI to meet him near the intersection of Prospect Avenue and Newberry Street in Williamsport. The CI drove to the area and parked. Defendant drove up to the CI's vehicle, and an exchange of ten bags or a bundle of heroin for \$150.00 was made through the respective drivers' windows.

At Information 245-2013, Defendant is charged with one count of a delivery of a controlled substance, one count of possession with intent to deliver a controlled substance and one count of criminal use of a communications facility. The affidavit of probable cause recites the allegations regarding the January 17, 2012 controlled buy at the Rite Aid. Reviewing the affidavits, it is clear that the charges under 1835-2012 relate to the alleged delivery on February 15, 2012 while the charges under 245-2013 relate to the alleged delivery on January 17, 2012.

In sum, Defendant is alleged to have made two deliveries of the same amount of heroin, ten bags or one bundle, for different purchase prices to different CIs on different dates, the first being January 17, 2012 and the second being February 15, 2012. Both transactions were initiated by the CI who called Defendant. The first sale allegedly took place in a Rite Aid parking lot while the CI was in a car and Defendant walked up to him. The second delivery also took place in the city of Williamsport but in a different area. With respect to this transaction, the CI and Defendant were in different vehicles and the transaction was made through the car windows. The first transaction allegedly took place at 14 Fifth Street in Williamsport and the second transaction allegedly took place at 900 Prospect Avenue in Williamsport. The separate locations are approximately 3.3 miles from each other.

Separate indictments or informations may be joined and tried together if “(a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or (b) the offenses charged are based on the same act or transaction.” Pa. R. Cr. P. 582. Conversely, a court may order separate trials of offenses if it appears that any party may be prejudiced by offenses being tried together. Pa. R. Cr. P. 583.

The Supreme Court has established a three-part test under these Rules in addressing consolidation or severance motions. First, the court must determine whether the evidence of each of the offenses would be admissible in a separate trial for the other. Second, the court must determine whether such evidence is capable of separation by the jury so as to avoid danger of confusion. Third, if the answers to the previous two questions are in the affirmative, the court must determine if the defendant will be unduly prejudiced by the consolidation of the offenses. Commonwealth v. Collins, 550 Pa. 46, 703 A.2d 418, 422 (1997), cert. denied, 525 U.S. 1015, 119 S. Ct. 538 (1998).

In deciding the first question of whether the evidence of each offense would be admissible in a separate trial for the other, the Court is guided by the Pennsylvania Rules of Evidence. “Other crimes” evidence is admissible to show motive, intent, absence of mistake or accident, common scheme or plan, or identity. Pa.R.Cr.P. 404(b)(2); Commonwealth v. Dozzo, 991 A.2d 898, 902 (Pa. Super. 2010), citing Commonwealth v. Melendez-Rodriguez, 856 A.2d 1278, 1283 (Pa. Super. 2004) (en banc).

In determining whether evidence of one crime is admissible to prove a common plan, scheme or design, the court must be satisfied that the crimes or bad acts are so

related to each other that proof of one tends to prove the other. Commonwealth v. Judd, 897 A.2d 1224, 1231-32 (Pa. Super. 2006). The following factors should be considered in establishing similarities: the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed. Id. at 1232, citing Commonwealth v. Clayton, 506 Pa. 24, 33, 43 A.2d 1345, 1345-1350 (1984).

The Court finds that the details of Defendant's involvement in one transaction tend not to prove his propensity to commit crimes, but instead prove that he was actively involved in each related transaction. The drug deliveries were clearly related and revealed a common plan through which Defendant would receive a phone call from a third party, arrange a meeting place to sell a specified type and amount of drugs and then conduct the transaction while the third party was in a vehicle. Moreover, the alleged transactions both occurred in the city of Williamsport within three to four miles of each other. As well, the details of each transaction would tend to establish Defendant's identity as the perpetrator. See, for example, Commonwealth v. Boyle, 733 A.2d 633 (Pa. Super. 1999); Commonwealth v. Janda, 14 A.3d 147 (Pa. Super. 2011).

Accordingly, the Court finds that the first prong of Collins is met as the evidence of one drug delivery would have been admissible in a separate trial for the other.

With respect to the second prong, the Court finds that the evidence would be capable of separation by the jury or there would not be any danger of confusion. The facts are relatively simple and straightforward. The alleged incidents took place with different confidential informants and in different areas of the city. It is expected that the affiant and

other involved officers can clearly set forth the alleged details of each transaction. The testimony will certainly present to the jury facts which are not complex. There is no risk of confusing the jury.

The third prong requires the Court to determine if the consolidation of the offenses will unduly prejudice Defendant. Collins, 703 A.2d at 422. “Prejudice...is not simply prejudice in a sense that [the defendant] will be linked to the crimes for which he is being prosecuted. The prejudice...is rather that which would occur if the evidence tended to convict [the defendant] only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence.” Boyle, 733 A.2d at 638. The Court sees no danger of this. Further, the jury will be instructed to consider each charge separately and not to use any other crime evidence as proof of Defendant’s bad character or propensity.

Accordingly, the Court will grant the Commonwealth’s motion to consolidate.

With respect to Defendant’s motion in limine, Defendant seeks to preclude evidence of the separate alleged transactions. Based on the Opinion set forth above, Defendant’s motion in limine will be denied.

By way of a final note, the Court will address Defendant’s previously filed motion for discovery; more specifically the one remaining issue regarding said motion which was addressed in the Court’s January 30, 2013 Order. Defendant requested that the Commonwealth provide to him information regarding previous criminal cases against Defendant that were tried and resulted in a not guilty verdict, and upon which the

Commonwealth relied upon the testimony of the confidential informant, termed by the Defendant as “unsuccessful prosecution.” The Court directed Defendant to provide case authority in support of his position to the Court and the Commonwealth within fourteen (14) days of January 30. The Commonwealth was provided fourteen (14) days after receipt of said case authority to provide any opposing case authority.

Despite the Court directing that Defendant provide case authority in support of his request and despite defense counsel indicating at the time of the January 30, 2013 argument that there was in fact case law in support of his position, no legal authority whatsoever was provided to the Court.

Pursuant to Pa. R. Cr. P. 573 (B) (2)(a)(iv), the Court may order the Commonwealth to provide to the defendant “any other evidence specifically identified by the defendant, provided the defendant can additionally establish that it’s disclosure would be in the interest of justice.”

While the identity of the confidential informant, being a material witness, is certainly discoverable in the interest of justice, the Court cannot determine that Defendant’s blanket request for a case name and information number in which the confidential informant was utilized but was “unsuccessful” should be disclosed.

First, it is entirely unclear as to what the term “unsuccessful prosecution” means. Next, a prosecution may be deemed unsuccessful for a myriad of reasons, none of which have anything to do with a confidential informant. For example, a confidential informant may have been deemed credible by the jury but the Commonwealth may have failed to prove the identity of the alleged controlled substance. Indeed, it appears that

Defendant's request is nothing more than a mere fishing expedition. Without more specifics and certainly without case law supporting Defendant's position, the Court will not order said information to be produced by the Commonwealth.

ORDER

AND NOW, this ____ day of March 2013, following a hearing and argument, the Court GRANTS the Commonwealth's motion to consolidate the two Informations. Information No's. 1835-2012 and 245-2013 shall be consolidated for trial purposes. The Court DENIES Defendant's motion in limine. The Court DENIES in part Defendant's motion for discovery as it relates to information regarding previous criminal cases in which the confidential informant was utilized by the Commonwealth but the cases resulted in a "unsuccessful prosecution."

By The Court,

Marc F. Lovecchio, Judge

cc: CA
DA (MW)
PD (RC)
Gary Weber (Lycoming Reporter)
Work file