

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

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CR-279-2014

v.

BH,

Defendant

CRIMINAL DIVISION

OPINION AND ORDER

On April 3, 2014, the Defendant filed a Petition for Habeas Corpus. Argument on the petition was held on April 14, 2014.

I. Background

On October 11, 2013, Chief Christopher McKibben of the Muncy Township Police Department interviewed AH, who is the Defendant's daughter. At the time, AH was eight years old and lived with the Defendant. AH told McKibben that she had been in the Defendant's truck when the Defendant purchased green stuff that had hard stems and was bushy like trees. AH also told McKibben that the Defendant had weird pipes in his residence and smoked the green stuff with AH's uncle.

McKibben applied for and obtained a warrant to search the Defendant's residence. From the Defendant's bedroom, McKibben seized nine pipes, two bongos, a set of digital scales, and other items. From the Defendant's bedroom, McKibben also seized a small amount of a substance. McKibben used his training and experience to determine that the substance was marijuana. The Defendant was charged with Possession of a Controlled Substance,¹ Possession of Drug Paraphernalia,² Endangering the Welfare of Children (Endangering),³ and Endangering

¹ Possession of a Controlled Substance is defined in 35 P.S. § 780-113(a)(16). It is a misdemeanor. *Id.* § 780-113(b).

² Possession of Drug Paraphernalia is defined in 35 P.S. § 780-113(a)(32). It is a misdemeanor. *Id.* § 780-113(h)(i).

³ Endangering the Welfare of Children is defined in 18 Pa. C.S. § 4304.

the Welfare of Children as a Course of Conduct (Endangering as a Course of Conduct).⁴

Endangering is a misdemeanor of the first degree.⁵ Endangering as a Course of Conduct is a felony of the third degree.⁶

During the preliminary hearing, AH testified that she was in the Defendant's truck when the Defendant purchased green stuff in a bag. AH testified that the green stuff looked like trees. Additionally, AH testified that on numerous occasions in the Defendant's residence, she saw the Defendant and AH's uncle smoke something that smelled funny. AH testified that the Defendant would hold a pipe in between his legs and try to hide it from AH when AH was nearby.

During the preliminary hearing, McKibben testified that AH told him that the Defendant usually goes into one room and locks the door to the room when he smokes the green stuff. McKibben also testified that AH told him that she knew when the Defendant was smoking the green stuff because the room smelled funny. McKibben testified that AH told him that the Defendant would try to hide pipes in between his legs.

In his petition, the Defendant argues that the facts presented during the preliminary hearing failed to establish a prima facie case of Possession of a Controlled Substance, Endangering, and Endangering as a Course of Conduct. Specifically, the Defendant argues that the Commonwealth failed to produce evidence that the Defendant knew he was endangering the welfare of AH. The Defendant also argues that the Commonwealth failed to show that the Defendant actually endangered AH.

II. Discussion

“A prima facie case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that

⁴ Endangering the Welfare of Children as a Course of Conduct is defined in 18 Pa. C.S. § 4304.

⁵ 18 Pa. C.S. § 4304(b)

⁶ 18 Pa. C.S. § 4304(b)

the accused committed the offense.” Commonwealth v. Karenty, 880 A.2d 505, 514 (Pa. 2005). “[T]he evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury.” Id.

A. The Commonwealth has Established a Prima Facie Case of Possession of a Controlled Substance

A prima facie case of possession of a controlled substance can be established by showing that a defendant had a controlled substance on his or her person. See Commonwealth v. Davis, 480 A.2d 1035, 1045 (Pa. Super. 1984). AH testified that the Defendant purchased green stuff in a bag. AH testified that the green stuff looked like trees. Additionally, AH testified she saw the Defendant smoking something that smelled funny. Marijuana sellers typically store marijuana in bags. Marijuana could be described as green stuff that looks like trees. Marijuana is often smoked. The odor of marijuana could be described as funny. Additionally, the items seized by McKibben were consistent with AH’s description of the substance. McKibben used his training and experience to identify the substance that he found in the Defendant’s bedroom as marijuana, which was the substance described by AH. With the combination of both AH and McKibben’s testimony, the Court is satisfied that the Defendant possessed marijuana.

B. The Commonwealth has Established a Prima Facie Case of Endangering the Welfare of Children

In Commonwealth v. Marlin, the Supreme Court of Pennsylvania wrote:

[T]he purpose of juvenile statutes . . . is basically protective in nature. Consequently these statutes are designed to cover a broad range of conduct in order to safeguard the welfare and security of our children. Because of the diverse types of conduct that must be circumscribed, these statutes are necessarily drawn broadly. It clearly would be impossible to enumerate every particular type of adult conduct against which society wants its children protected. We have therefore sanctioned statutes pertaining to juveniles which proscribe conduct producing or tending to produce a certain defined

result . . . rather than itemizing every undesirable type of conduct. 305 A.2d 14, 18 (1973).

In Commonwealth v. Mack,⁷ the Supreme Court of Pennsylvania held that the Endangering statute “will be given meaning by reference to the common sense of the community and the broad protective purposes for which it was enacted.” Commonwealth v. Campbell, 580 A.2d 868, 869 (Pa. Super. 1990).

To establish a prima facie case of Endangering, the Commonwealth must establish each of the following:

(1) the accused must be aware of [his] duty to protect the child; (2) the accused must be aware that the child is in circumstances that could threaten the child’s physical or psychological welfare; and (3) the accused must have failed to act or must have taken action so lame or meager that such action cannot reasonably be expected to protect the child’s welfare. Commonwealth v. Winger, 957 A.2d 325, 329 (Pa. Super. 2008).

A father is aware of his duty to protect his child. See Commonwealth v. Wallace, 817 A.2d 485, 492 (Pa. Super. 2002) (stating that as child’s father, defendant was aware of his duty to protect the child).

This Court finds that the Commonwealth has established a prima facie case of Endangering. Regarding the first element, the Defendant is the father of AH. Therefore, the Defendant was aware of his duty to protect AH.

Regarding the second element, the Commonwealth has shown sufficient evidence that the Defendant was aware that AH was in circumstances that could threaten AH’s psychological welfare. AH testified that she was in the Defendant’s truck when the Defendant purchased green stuff in a bag. Furthermore, AH testified that on numerous occasions at the residence she shared with the Defendant, she saw the Defendant smoke something that smelled funny. McKibben testified that AH told him that the Defendant usually goes into one room and locks the door to

⁷ 359 A.2d. 770 (Pa. 1976)

the room when he smokes the green stuff. The Defendant's behavior directly acknowledges he was aware that AH was close to him when he smoked marijuana. The actions of going into another room and locking the door show that the Defendant was aware that AH was nearby when he smoked marijuana. Being present during both the purchase of marijuana and the smoking of marijuana exposes AH to the commission of a crime and could threaten AH's psychological welfare. As the Commonwealth argued, AH is being taught that the "smoking and purchasing [of] illegal drugs [are] normal activit[ies] rather than an illegal activit[ies]."

Regarding the third element, the Commonwealth has presented prima facie evidence that the Defendant took actions so meager to shield AH from his criminal conduct that they could not reasonably be expected to protect AH's welfare. AH testified that the Defendant would hold a pipe in between his legs and try to hide it from AH when he knew that AH was present.

McKibben testified that AH told him that the Defendant usually goes into one room and locks the door to the room when he smokes the green stuff. AH could still smell the odor of marijuana even though the Defendant smoked in a separate room. Additionally, AH sometimes knew that the Defendant had a pipe even though the Defendant tried to hide it.

C. The Commonwealth has Established a Prima Facie Case of Endangered the Welfare of Children as a Course of Conduct

"'[C]ourse of conduct' is not an element of the offense of endangering the welfare of a child, but it is an additional fact, a jury question, that impacts the grading of the offense."

Commonwealth v. Popow, 844 A.2d 13, 18 (Pa. Super. 2004). The grading of Endangering as a felony of the third degree is meant "to punish a parent who over days, weeks, or months, abuses his children" Id. at 17. The grading of Endangering as a felony of the third degree is not

meant to punish a parent “for an event that occurs within minutes, or, perhaps in a given case, even hours.” Id.

The Commonwealth has met its burden of showing that the Defendant endangered the welfare of AH as a course of conduct. AH testified that on more than one occasion, she saw the Defendant smoke something that smelled funny. McKibben testified that AH described on a number of occasions what the Defendant did while using marijuana. AH’s recognition of the procedure that the Defendant used to smoke marijuana shows that the Defendant repeatedly smoked marijuana and did so when AH was close enough to observe not only his actions but also the device that he used.

III. Conclusion

The Court finds the Commonwealth has established a prima facie case of Possession of a Controlled Substance, Endangering, and Endangering as a Course of Conduct.

ORDER

AND NOW, this _____ day of June, 2014, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant’s Petition for Habeas Corpus is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

cc: Nicole Ippolito, Esq.
Robert Cronin, Esq.