

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1222-2013
 :
 JAMAL THOMAS, :
 Defendant :

OPINION AND ORDER

Defendant is charged by Information filed on August 23, 2013 with one count of possession with intent to deliver heroin, one count of possession of heroin and one count of simple assault.

According to the affidavit of probable cause attached to the criminal complaint, the incident involving Defendant allegedly occurred on June 23, 2013. Police units were dispatched to a local commercial building known as the “Pajama Factory.” According to the dispatch, a drug deal “went bad” and a subsequent altercation took place between Defendant and another individual.

Upon arriving at an area near the Pajama Factory, officers observed the Defendant running southbound, carrying a white shirt. When he jumped a wooden fence, he left his shirt hanging or caught on top of the fence, and the officer lost sight of him.

Subsequently, the police found heroin and heroin paraphernalia “on the same flight path” where Defendant fled.

Upon subsequently speaking with the alleged victim, the police were advised that he was attacked by Defendant inside one of the studio apartments located in the building. The victim implicated Defendant not only in an assault upon him, but also in alleged drug

dealing.

Defendant's preliminary hearing was held on July 23, 2013. Following the preliminary hearing, Defendant was held for court. Defendant's initial pretrial conference and court arraignment were held on August 26, 2013.

On August 27, 2013, Defendant filed a request for pretrial discovery.

On September 3, 2013 Defendant requested a bill of particulars from the Commonwealth. On September 6, 2013, the Commonwealth filed an answer to Defendant's request, verifying that Defendant was provided with discovery on September 3, 2013 and that the requested particulars "have already been discovered to the Defendant." As a result, on September 10, 2013, Defendant filed a motion to compel "specific answers" to his request for a bill of particulars.

The Court held a hearing on Defendant's motion to compel on November 26, 2013. At the hearing, the particulars were identified on the record sufficient for the parties, and an Order was entered verifying such.

On or about January 17, 2014, Defendant submitted a continuance request, which was granted. As a result, the pretrial conference was continued to March 18, 2013 and the case was placed on the April trial term, which runs from April 14 through May 2, 2014.

Prior to filing his continuance request, Defendant filed an alibi notice on January 9, 2014. Defendant listed Andrea Williams and Dominique Thomas as his two alibi witnesses. On February 18, 2014, Defendant filed an amended alibi notice, which listed Dominique Thomas and Archie Downey as his two alibi witnesses.

The combination of both alibi notices contends that Defendant was picked up from the Pajama Factory by Archie Downey. They both traveled to the Defendant's house where the Defendant was with his mother, Dominique Thomas and Ramon Weaver.

A series of motions were filed by the parties following Defendant's first and subsequent alibi notice. On January 14, 2014, the Commonwealth filed a motion in limine requesting that the Court preclude Defendant from providing any testimony from the witnesses listed on his alibi notice. On February 19, 2014, the Commonwealth filed a response to the amended alibi notice, requesting that the Court preclude Archie Downey from testifying as an alibi witness. On March 5, 2014, the Commonwealth filed a motion to preclude Archie Downey from testifying as an alibi witness.

On March 11, 2014, Defendant filed a motion in limine to preclude the Commonwealth from presenting to the jury any facts supporting a mandatory minimum based on the weight of the alleged controlled substances.

Argument on the respective motions was held before the Court on March 17, 2014. Based upon this Court's prior rulings holding weight mandatories unconstitutional, the Court granted Defendant's motion in limine.

One of the arguments the Commonwealth made in support of its contention that Defendant should be precluded from presenting his alibi witnesses related to Defendant's failure to provide the addresses of the witnesses. Defendant remedied this deficiency on March 12, 2014 by providing the Commonwealth with the telephone number and complete address for Archie Downey. Further, Defendant previously provided the

complete contact information for Dominique Thomas. With respect to Ramon Weaver, Defendant explained that he would not be called as an alibi witness.

The Commonwealth argues that Defendant's alibi notices were untimely and accordingly, Defendant should be precluded from presenting his alibi witnesses. Defendant countered that although the alibi notices were not provided in the timeframe set forth in the Rules of Criminal Procedure, they were provided within a reasonable timeframe from November 26, 2013 when the final particulars were provided to him by the Commonwealth. As well, Defendant asserts that the notices were filed after an investigation was conducted by defense counsel and the information was confirmed through Defendant and the alleged witnesses. Defendant contends that the Commonwealth is not prejudiced in light of the fact that it agreed to a continuance through the May term and that defense counsel's caseload, which included numerous cases and a recent homicide trial, limited his available time. Defendant further argued that the limited resources of the Public Defender's office precluded an investigator from being hired. Given defense counsel's limited time and resources, the information contained in the alibi notices was provided as expeditiously as possible.

Rule 567 of the Pennsylvania Rules of Criminal Procedure states, in relevant part:

(A) Notice by Defendant. A defendant who intends to offer the defense of alibi at trial shall file with the clerk of courts not later than the time required for filing the omnibus pretrial motion provided in Rule 579 a notice specifying an intention to offer an alibi defense, and shall serve a copy of the notice and a certificate of service on the attorney for the Commonwealth.

* * * *

(2) The notice shall contain specific information as to the place

or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses whom the defendant intends to call in support of the claim.

(B) Failure to File Notice

(1) If the defendant fails to file and serve the notice of alibi as required by this rule, the court may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, may grant a continuance to enable the Commonwealth to investigate such evidence, or may make such other order as the interests of justice require.

Pa.R.Cr.P. 567(A)(2), (B)(1). The time for filing a Notice of Alibi within an Omnibus Pretrial Motion is thirty (30) days after arraignment. Pa.R.Cr.P. 579 (A).

The comment to Rule 567 notes that the reference to Rule 579 also contemplates consideration of the exceptions to the time for filing as set forth in Rule 579. These exceptions include circumstances where the defendant was not aware of the grounds for the motion or if the time for filing has been extended by the court for cause shown. Pa.R.Cr.P. 579(A).

When arguing why the late notice should be excused, defense counsel asserted that given his position as a public defender with limited time and resources, he was not able to comply with the rules. He further argued that under the circumstances, the Commonwealth was not prejudiced. Finally, he argued that if the Court precludes the evidence he was clearly ineffective; thus, Defendant would be entitled to retrial if he is convicted.

The rules specifically permit the Court to enter an Order in the interests of justice if in fact an alibi notice is not filed in a timely manner. Given the fact that the Commonwealth has not stated any specific prejudice that it would incur as a result of the late

notice, as well as the fact that the Commonwealth conceded that it had sufficient time between now and the trial term to locate the witnesses and conduct a proper investigation, the Court finds that it would not be in the interests of justice to preclude the alibi testimony.

Nonetheless, the Court cannot condone the cavalier attitude by defense counsel with respect to his obligation to comply with the Rules of Criminal Procedure. Obviously, the role of serving as a public defender, by its very nature, is very difficult. “The day-to-day work of public defenders is highly stressful because of unwieldy caseloads, uncooperative clients, and an unsupportive criminal justice system. Furthermore, while there is enthusiastic support for providing greater resources to the state to carry out its responsibilities in the criminal justice system, there is very little corresponding support for increasing the resources available to public defenders.” Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 *Law and Contemporary Problems* 81, 85 (Winter 1995). Moreover, this Court is not unaware of the paucity of resources, investigative personnel and institutional supports, which inhibit our public defenders’ ability to defend their indigent clients effectively. Yet, all of these limitations should not, and cannot, result in cynicism, thoughtlessness or a lack of attention. This Court’s ultimate concern is not so much with the fact that the alibi notices were filed late, but the casual and insouciant manner in which it was handled and then rationalized. Defense counsel is cautioned to proceed in a more proactive manner in the future.

ORDER

AND NOW, this ____day of April 2014, following a hearing and argument,
the Court **DENIES** the Commonwealth's motions to preclude Defendant's alibi witnesses.

By The Court,

Marc F. Lovecchio, Judge

cc: DA (NI)
PD (RC)
Work file
Gary Weber, Esquire (Lycoming Reporter)