

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-85-2015
	:
vs.	:
	: Pretrial Motion
JOHN BUDD,	:
Defendant	:

OPINION AND ORDER

By Information filed on February 6, 2015, Defendant is charged with five counts of criminal conspiracy. With respect to the underlying object of the conspiracy, Count 1 is drug delivery resulting in death, Count 2 is criminal use of a communications facility, Count 3 is delivery of a controlled substance, Count 4 is possession with intent to deliver and Count 5 is recklessly endangering another person.

By notice of joinder also filed on February 6, 2015, Defendant's Information was joined with that of his alleged co-conspirator, Ann Smith, at Docket No. 86-2015.

On March 9, 2015, Defendant filed an omnibus pretrial motion which included a motion to sever and a petition for habeas corpus. Defendant contends that he would be prejudiced by the joinder of his case with that of Ms. Smith. With respect to the petition for habeas corpus, Defendant contends that a prima facie case cannot be established except for the conspiracy to commit reckless endangerment. Specifically, Defendant contends that the evidence failed to establish for prima facie purposes any agreement to deliver heroin, possess with intent to deliver heroin or to deliver heroin resulting in death.

A hearing and argument were held on April 23, 2015. The Commonwealth introduced as C-1 a transcript of the preliminary hearing held before MDJ James Carn on January 13, 2015. No further evidence was introduced by either party.

With respect to the motion to sever, after hearing a brief argument, the Court decided to defer a decision with respect to such until an argument could be held which included the presence of Defendant Ann Smith and her counsel. Accordingly, an order was entered with respect to such.

The proper means to attack the sufficiency of the Commonwealth's evidence pretrial is through the filing of a petition for a writ of *habeas corpus*. Commonwealth v. Marti, 779 A.2d 1177, 1179 n. 1 (Pa. Super. 2001). At a *habeas corpus* hearing, the issue is whether the Commonwealth has presented sufficient evidence to prove a *prima facie* case against the defendant. Commonwealth v. Williams, 911 A.2d 548, 550 (Pa. Super. 2006). "A *prima facie* case consists of evidence, read in a light most favorable to the Commonwealth, that sufficiently establishes both a 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).

When deciding whether a *prima facie* case has been established, the court must view the evidence and any reasonable inferences that can be drawn from the evidence in a light most favorable to the Commonwealth. Commonwealth v. Santos, 583 Pa. 96, 876 A.2d 360, 363 (2005); Commonwealth v. Landis, 48 A.3d 432, 444 (Pa. Super. 2012) (citation omitted). The *prima facie* standard does not require that the Commonwealth prove the elements of the crime beyond a reasonable doubt; it merely requires evidence of each of the elements of the offense charged. Marti, 779 A.2d at 1180 (citations omitted).

As well, in the context of a petition for writ of *habeas corpus* or a sufficiency of evidence challenge, the Commonwealth may rely on hearsay testimony. Hearsay,

however, cannot constitute the only basis upon which a case is held for court.

Commonwealth v. Jackson, 849 A.2d 1254, 1257 (Pa. Super. 2005).

“A conspiracy conviction requires proof of (1) an intent to commit or aid in an unlawful act, (2) an agreement with a co-conspirator, and (3) an overt act in furtherance of the conspiracy.” Commonwealth v. Galindes, 786 A.2d 1004, 1010 (Pa. Super. 2001), appeal denied, 569 Pa. 691, 803 A.2d 733 (2002)(quoting Commonwealth v. Spatz, 562 Pa. 468, 756 A.2d 1139, 1162 (2000)).

A mere association with the perpetrator, presence at the scene, or knowledge of the crime is insufficient to establish that the defendant was part of a conspiratorial agreement to commit the crime. The conduct of the parties, however, and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt, and even if the conspirator did not act as a principal in committing the underlying crime, he is still criminally liable for the actions of his co-conspirators in furtherance of the conspiracy. Commonwealth v. Knox, 50 A.3d 749, 755 (Pa. Super. 2012)(quoting Commonwealth v. McCall, 911 A.2d 992, 996-97 (Pa. Super. 2006) (citation omitted)).

Moreover, seldom if ever, can an agreement be proved by direct evidence. More often, it can be proved only from a review of the surrounding circumstances. “Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation.” Id.

The evidence establishes for prima facie purposes both an intent to commit or

aid in a drug delivery resulting in death, criminal use of a communications facility, delivery of a controlled substance and possession with intent to deliver a controlled substance. The evidence also demonstrates for prima facie purposes an agreement with Ann Smith with respect to said offenses.

Preliminarily, and in response to Defendant's argument regarding the conspiracy to commit the offense of drug delivery resulting in death, it does not require an intent to kill or even malice. The statute defining drug delivery resulting in death was amended in 2011 to clear up any confusion. A person commits that offense if the person intentionally delivers the controlled substance and the other person dies as a result of using that substance. Compare, for example, Commonwealth v. Ludwig, 583 Pa. 6, 874 A.2d 623 (2005) (malice previously required). Obviously with respect to the underlying offenses of delivery and possession with intent to deliver, intent to deliver must be established, but intent may be inferred from an examination of the surrounding facts and circumstances. Commonwealth v. Perez, 931 A.2d 703, 707-708 (Pa. Super. 2007). In connection with the criminal use of a communications facility, the Commonwealth must prove, among other things, that "the defendant intentionally, knowingly, or recklessly used a communications facility and that, in so doing, the defendant intentionally, knowingly, or recklessly facilitated the commission or attempted commission of an underlying felony. Commonwealth v. Moss, 852 A.2d 374, 381 (Pa. Super. 2004). Facilitation is "any use of a communication facility that makes easier the commission of the underlying felony." Id. at 382.

Eva Smith testified at the January 13, 2015 preliminary hearing. On the date in question, March 21, 2014, she and Tommy Castle went to Defendant's house. Prior to

going to Defendant's residence, Mr. Castle was on a cell phone. They went to Defendant's residence "after" Mr. Castle was on the cell phone. When they arrived at the house, Ann Smith was there.

There was an exchange of money, \$80.00, from Mr. Castle to Defendant. After the exchange occurred, Defendant left for approximately half an hour. While Defendant was gone, Ms. Smith remained in the residence with Mr. Castle and Eva Smith.

When Defendant returned, he handed "something" to Mr. Castle. Mr. Castle ran into the bathroom although prior to doing so he handed Defendant a bag of heroin.

Both Defendant and Ann Smith "received heroin from the initial purchase" and used it.

After Mr. Castle came out of the bathroom, he looked "awful" and shortly thereafter collapsed to the floor. Ann Smith and Defendant dragged Mr. Castle outside in an attempt to revive him. While outside, a neighbor came downstairs and asked if they needed "an ambulance or anything." Defendant indicated "no because he didn't want any trouble." Neither Ann Smith nor Defendant called 911.

After a while, Ann Smith and Defendant dragged Mr. Castle back inside the residence and into the bathtub. Mr. Castle remained in the bathtub for several hours. Although they tried "to get him up", Mr. Castle never regained consciousness.

While Ann Smith and Defendant were in the bathroom with Mr. Castle, "they were shooting heroin." During the time that Mr. Castle was in the bathroom, both Ann Smith and Defendant removed items from Mr. Castle's pants. These items included a needle, spoon and "blue bags."

Agent Raymond Kontz of the Williamsport Bureau of Police next testified on behalf of the Commonwealth. During the course of his investigation, he spoke with Ann Smith. She advised Agent Kontz that on March 21, 2014, Defendant was using her phone to set up a drug deal. According to Ms. Smith, Defendant was using her phone to set up a drug deal between himself and Mr. Castle as well as between himself and the person who was “giving him the drugs.”

The testimony clearly establishes for prima facie purposes that Defendant utilized Ann Smith’s cell phone to have a conversation with Tommy Castle which involved Mr. Castle purchasing heroin from Defendant. Shortly after the telephone call, Mr. Castle went to Defendant’s residence.

While at the residence, Mr. Castle gave Defendant \$80.00. Defendant then left the residence to obtain the heroin. Ann Smith was present in the residence and remained at the residence while Defendant left. Mr. Castle remained in the residence as well. When Defendant returned, he gave the heroin to Mr. Castle. Mr. Castle then gave back to Defendant some of the heroin. Mr. Castle then went to use his portion of the heroin while both the Defendant and Ann Smith used their portion.

Mr. Castle went unconscious after using his heroin. Both Defendant and Ann Smith tried to revive him for several hours. During this entire time period however, they refused assistance from neighbors and failed to seek emergency help. In fact, during these several hours, they continued to use heroin and also took from Mr. Castle his paraphernalia and remaining heroin.

These facts and the reasonable inferences that can be drawn from them

establish for prima facie purposes that Defendant and Ms. Ann Smith intended and agreed to use a telephone to set up a drug deal, to possess heroin with the intent to deliver it, and to deliver the heroin to Mr. Castle. The evidence also clearly establishes that in furtherance of their intent and agreement, Defendant used Ms. Ann Smith's phone to set up the drug deal, left the residence, obtained heroin, and delivered it to Mr. Castle, who died as a result of using the heroin that was intentionally delivered to him. In an effort to conceal their conspiracy and illegal drug activity, they refused assistance from neighbors and failed to seek emergency help that might have saved Mr. Castle's life.

On a final note, Defendant argues that the testimony of Ann Smith was hearsay testimony. During the argument, the parties argued co-conspirator exceptions to the hearsay rule. The Court does not deem it necessary to address any hearsay exception at this point. As noted previously, hearsay is admissible for prima facie purposes. Moreover, it is clear that the hearsay statement of Ann Smith is only a portion of the evidence against Defendant and does not constitute the entirety of the evidence.

As well, Defendant noted that he and Ann Smith are now married. The parties conceded, however, that the spousal privilege did not exist at the time of the preliminary hearing. Any issues regarding hearsay, the spousal privilege, and the unavailability of Ann Smith will need to be addressed in a motion in limine or at trial.

ORDER

AND NOW, this ___ day of April 2015, following a hearing and argument,

Defendant's petition for habeas corpus is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

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