

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**SHAVON SHORT,
Defendant**

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CR-909-2016

OPINION AND ORDER

On July 20, 2016, Defendant’s Counsel, filed an Omnibus Pretrial Motion in the form of a Petition for Habeas Corpus. The Court heard argument on the Motion on August 18, 2016.

Background

Shavon Short (Defendant) is charged with Retaliation against Witness or Victim¹ and Simple Assault.² The charges stem from an incident on May 4, 2016. On that date, at approximately 10 pm, the Defendant engaged in a physical altercation with Terry Moore outside the Timberland Apartments. The altercation was captured on video. The video evidence was not submitted into evidence on the day of the hearing; however, Defense Counsel submitted a transcript of the preliminary hearing.

A. Testimony of Tiana Moore

Tiana Moore testified that she is familiar with the Defendant, having gotten into a physical altercation with her in the past. She also stated that she has not received threats from the Defendant but has received information that Defendant called her a “...rat, this that a third on Twitter...” N.T., 5/24/2016, p. 2.

¹ 18 Pa.C.S. § 4953(a).

² 18 Pa.C.S. § 2701(a)(1).

B. Testimony of Tajai Still

Tajai Still testified that on May 4, 2016, she heard Defendant say that she [Defendant] wanted to fight [Tiana Moore] because she was a rat and she was going to fight everybody until she could get to her. Id. at 3. Tajai Still saw Defendant fight Terry Moore in the back parking lot of Timberland. Id. at 4-5.

C. Testimony of Terry Moore

Terry Moore, cousin of Tiana Moore, testified that Defendant wanted to fight over Quay and Dwayne. Id. at 7. She testified to the injuries she sustained in the physical altercation with Defendant. She testified that she agreed to fight Defendant. Id. at 9.

Discussion

I. Petition for Habeas Corpus

The elements of a violation of Title 18, Section 4953(a) are as follows:

§ 4953. Retaliation against witness, victim or party.

(a) Offense defined. --

A person commits an offense if he harms another by any unlawful act or engages in a course of conduct or repeatedly commits acts which threaten another in retaliation for anything lawfully done in the capacity of witness, victim or a party in a civil matter.

(b) Grading. --

The offense is a felony of the third degree if the retaliation is accomplished by any of the means specified in section 4952(b)(1) through (5) (relating to intimidation of witnesses or victims). Otherwise the offense is a misdemeanor of the second degree.

18 Pa.C.S. § 4953.

At argument, Defense Counsel had no objection to the grading of the offense as a felony of the third degree in the criminal information. Defense

argues that because the alleged victim, Tiana Moore, was not on site at the time of the physical altercation that the Commonwealth is unable to establish the elements necessary to proceed with retaliation against a witness, victim or party in violation of 18 Pa.C.S. § 4953. Omnibus Pretrial Motion, 7/20/2016, at Paragraph 9. Defense Counsel provided the Court with Commonwealth v. Ostrosky, 589 Pa. 437; 909 A.2d 1224 (Pa. 2006), which held that to satisfy the requirements of the statute as the Commonwealth has charged³, it must show that a person (1) caused harm and (2) such harm resulted from unlawful act. No harm to Victim was testified to at the Preliminary Hearing, much less any harm to the Victim from an act of Defendant. In Ostrosky, Defendant had been found guilty of vandalizing Victim's property and sentenced to restitution in a prior criminal prosecution. At a football game, after the order of sentence for restitution, Ostrosky continued to make disparaging comments to the crime victims. The Supreme Court of Pennsylvania held that the Retaliation against Victim was not shown as no actual harm was shown to the Victims. In order for mere threats to be actionable, they must be shown to have occurred repeatedly. Ostrosky at 1233.

The Commonwealth provided the Court with a recent Superior Court opinion, Commonwealth v. Walls, 144 A.3d 926 (Pa. Super. 2016) (rehearing denied by Commonwealth v. Walls, 2016 Pa. Super. LEXIS 542 (Pa. Super. Ct., Sept. 22, 2016), where the Superior Court extended the protection afforded to prosecutors and judicial officials under the Section 4953.1(a) to not only the

³ Actor harms another by any unlawful act in retaliation for anything lawfully done in the capacity of witness or victim. Witness or victim: Tiana Moore.

specific prosecutor or judicial official whose protected actions motivated the defendant, but would apply to retaliatory action against **any** individual in retaliation for the actions taken by **any** prosecutor or judicial official in his or her official capacity. Walls at 926.⁴ The Commonwealth here would like the Court to extend the logic of Walls to the above captioned matter and find that because Defendant harmed a family member of the Victim that is sufficient to find retaliation against Victim under the retaliation statute or in the alternative that the Commonwealth listed the incorrect Victim in the criminal information and should have listed Terry Moore. Rather than find an extension at this time, the Court finds that the Commonwealth did not present evidence at the preliminary hearing that the original Victim it listed in the criminal information was protected under the statute so it will not find that her family members are also protected. Additionally, the Court notes that the Walls decision followed the decision in Ostrosky: when charging that an actor harms another by unlawful that (1) harm must be shown and (2) the act must be unlawful.

Subchapter B, Victim and Witness Intimidation, of Chapter 49 of the Crimes and Offenses title defines "Victim" as any person against whom any crime as defined under the laws of this State or of any other state or of the United States is being or has been perpetrated or attempted. "Witness" is defined as

Any person having knowledge of the existence or nonexistence of facts or information relating to any crime, including but not limited to those who have reported facts or information to any law enforcement officer, prosecuting official,

⁴ A person commits an offense if he harms or attempts to harm another or the tangible property of another by any unlawful act in retaliation for anything lawfully done in the official capacity of a prosecutor or judicial official. 18 Pa.C.S. § 4953.1.

attorney representing a criminal defendant or judge, those who have been served with a subpoena issued under the authority of this State or any other state or of the United States, and those who have given written or oral testimony in any criminal matter; or who would be believed by any reasonable person to be an individual described in this definition.

18 Pa.C.S. § 4951.

The Commonwealth presented no evidence at the Preliminary Hearing that Victim, Tiana Moore, was a crime victim or a witness for purposes of the statutory definitions above. Some evidence of her status as such would need to have been presented at the preliminary hearing in order for the charge of Retaliation against Witness or Victim to be held for court. Additionally, no harm to Tiana Moore was testified to at the preliminary hearing. Defendant may have engaged in an unlawful act and the the charge in Count 2 of Simple Assault is properly held for court for the alleged commission of such act.

The Court will not decide at this time whether “another” for the purposes of the Section 4953 Retaliation against witness, victim or party would include harm to people other than actual victim, witness or party because there was no prima facie evidence that Tiana Moore was a victim, witness, or party at preliminary hearing. Regardless of whether it needed to be a harm against her or a harm against her cousin there was insufficient prima facie evidence that there was a retaliation made illegal by statute.

II. Motion for Extension of Time to File Additional Motions

As of the date of the hearing, discovery had not been provided to Defense Counsel and the Court will grant Defendant’s request.

ORDER

AND NOW, this _____ day of November, 2016, based upon the foregoing Opinion, it is ORDERED and DIRECTED as follows:

1. Defendant's Petition for Habeas Corpus in regards to Count 1 is GRANTED.
The Court finds insufficient evidence presented at the preliminary hearing to hold the Defendant on the charge of Retaliation against Witness or Victim and the charge is DISMISSED.
2. The Motion for Extension of Time to File Additional Motions is GRANTED.
The Commonwealth must produce discovery to Defense Counsel by **November 22, 2016**. Any Pretrial Motions must be filed by **December 6, 2016**.

BY THE COURT,

Nancy L. Butts, President Judge

cc: Anthony Ciuca, Esq., ADA
Robert Hoffa, Esq., Defendant's Counsel
Gary Weber, Esq., Lycoming Law Reporter
Work file (law clerk)