

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
 :  
 vs. : No. CR-882-2015  
 :  
 MICHAEL SPENCER, : Omnibus Pretrial Motion  
 Defendant :

**OPINION AND ORDER**

This matter came before the court on Defendant's omnibus pre-trial motion filed on October 21, 2015. The relevant facts follow.

On April 18, 2015 at approximately 2:15 a.m., a shooting incident occurred outside of Club Imbibe on Pine Street in the city of Williamsport. Five people had been shot and sustained various injuries as a result of their gunshot wounds. The police investigated the incident. Their investigation included, but was not limited to, interviewing witnesses, retrieving bullets and shell casings from the crime scene, viewing video from various surveillance cameras situated around the crime scene, and reviewing Club Imbibe's records regarding the patrons who were present at the club.

On April 23, 2015, the police filed a criminal complaint against Defendant Michael Spencer, and obtained a warrant for his arrest. The police charged Defendant with two counts of attempted homicide, ten counts of aggravated assault, two firearm counts and related offenses.

On April 29, 2015, United States Marshals arrested Defendant in Philadelphia, Pennsylvania on the outstanding arrest warrant. At approximately 2:00 p.m., the Marshals called the Williamsport police and informed them that they had Defendant in

custody. Agent Raymond Kontz and Lieutenant Arnold Duck of the Williamsport Bureau of Police (WBP) drove to Philadelphia to take custody of Defendant and drive him back to Williamsport. At approximately 5:22 p.m., Defendant waived his right to be taken before a Magisterial District Judge (MDJ) in the judicial district of his arrest for the purpose of posting bail (see Commonwealth Exhibit 1). Agent Kontz and Lt. Duck then drove Defendant back to Williamsport where he was interviewed, processed, and arraigned.

Defendant filed an omnibus pretrial motion on October 21, 2015, which consisted of a motion to suppress the statements he gave to the police on April 29, 2015; a motion to suppress the wiretap conversation between Bahtem Sims and Killa/Killer; a motion to compel discovery; a motion in limine to preclude the Commonwealth witnesses from narrating or making statements at trial regarding what they believe is depicted in video or still photographs; a motion in limine to exclude any photographs that have been altered, marked or enhanced by Commonwealth witnesses; and a motion to preserve the right to amend the omnibus motion.

The court held hearings and/or arguments on this motion on December 11, 2015 and December 30, 2015. At the conclusion of the proceedings held on December 30, defense counsel requested that the record be kept open. Defense counsel had received records from Glenn Mills School, Thomas Jefferson Hospital and a state correctional institution that needed to be reviewed and submitted to an expert. Another hearing was scheduled for April 5, 2016 to take any testimony from the expert or any other evidence. The expert review, however, did not pan out as defense counsel had hoped, and the hearing was

cancelled. The parties, however, requested an opportunity to file briefs. The court issued a briefing schedule requiring defense counsel's brief to be submitted by May 25, 2016 and the Commonwealth's brief to be submitted by June 30, 2016. Defense counsel filed her brief on May 25. The Commonwealth, which requested and received a one week extension, filed its brief on July 6, 2016. The matter is now ripe for decision.

Defendant first asserts that his statements to the police should be suppressed. He contends that he was in custody from the moment he was apprehended by U.S. Marshals in Philadelphia and that he was subsequently interrogated by Williamsport police officers without being advised of or waiving his Miranda rights. He also asserts that any statements he made were not voluntary based on his psychological and physical state, the tactics of the police officers and the failure to promptly present him for a preliminary arraignment. Defendant claims that any confession was the result of illegal coercion and suggestion.

The court will first address Defendant's Miranda claims.

"The law is clear that Miranda is not implicated unless the individual was in custody and subjected to interrogation." *Commonwealth v. Snyder*, 60 A.3d 165, 170 (Pa. Super. 2013). "Interrogation under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to illicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 2912, 301(1980); *Commonwealth v. DeJesus*, 787 A.3d 394, 402 (Pa. 2001); *Commonwealth v. Umstead*, 916 A.2d 1146, 1149 (Pa. Super. 2007). "As a general rule, the prosecution may not use

statements, whether inculpatory or exculpatory, stemming from a custodial interrogation of a defendant unless it demonstrates that he was apprised of his right against self-incrimination and his right to counsel.” *Umstead*, supra.

Defendant argues that while he was being transported to Williamsport from Philadelphia he was both in custody and was being interrogated. He argues that he should have been Mirandized prior to any such interrogation.

The Commonwealth readily concedes that Defendant was in custody as he was being transported from Philadelphia to Williamsport. The Commonwealth asserts, however, that Defendant was not interrogated during this time.

Agent Kontz testified that he and Lt. Duck travelled to Philadelphia and took Defendant into custody on April 29, 2015. At approximately 5:22 p.m., Defendant read and signed a Rule 517 waiver form and agreed to be transported to Lycoming County without first being brought before an issuing authority in Philadelphia (Commonwealth Exhibit 1). Defendant was placed in the rear of the patrol unit and driven back to Williamsport. The ride back took about 3 ½ hours but may have been a bit longer because of the city traffic at that time of day. During the trip, the only conversations with Defendant were related to his comfort and well-being, such as if he wanted anything to eat or drink, if needed to use the bathroom, or if the music on the radio was okay.

Based on Agent Kontz’ credible testimony, the court finds that there was no express or implied questioning of Defendant. Furthermore, the court finds that the officers did not say or do anything that they should have known was reasonably likely to illicit an

incriminating response from Defendant. They did not discuss Defendant's case. At most they engaged in "small talk" concerning his needs and comfort during a trip that occurred at dinnertime. Accordingly, the motion to suppress any statements that Defendant made during transport from Philadelphia to Williamsport will be denied.

Defendant next asserts that the statements made to the police at City Hall should be suppressed. Defendant first claims that he did not recall being Mirandized and did not waive his right to remain silent.

The credible testimony and evidence from the hearing belies Defendant's contentions. Agent Kontz credibly testified that once at City Hall, Defendant was first taken to the processing/booking area. Defendant agreed to talk and was taken to an interview room. Once in the room, Agent Kontz read Defendant his Miranda rights. Defendant read the Miranda waiver form, wrote on it, and then signed it in the presence of Agent Kontz and Lt. Duck, who signed the form as witnesses. The waiver form, which was admitted into evidence as Commonwealth Exhibit 2, was signed at approximately 9:11 p.m.

Defendant suggests that Miranda warnings were not given or waived because the audio/videotape of his interview at City Hall does not depict such. The court cannot accept this argument. First, the waiver form is clear. Second, Agent Kontz' testimony is equally clear and credible. Third, it appears that the form is being completed and signed by Defendant and the police officers on the CD of Defendant's interview at City Hall (Commonwealth Exhibit 3), although there is no sound during the first approximately 30 seconds of the CD. Agent Kontz explained in his testimony that, like the equipment in their

patrol units, the video system in the interview room can back track and capture video but not audio of the thirty seconds to a minute right before he activates the recording of the activities in the room. Finally, Defendant is not a novice to the criminal justice system. Although he is only 33 years old, he has a history of involvement with law enforcement which includes seven (7) prior adult arrests. One can infer from this history that Defendant is well aware of his constitutional right to remain silent.

Defendant's final argument with respect to suppression of his statements is that the waiver of his rights and his confession were involuntary. In support of this argument Defendant claims that: the officers built a rapport with him during transport; they failed to take him immediately to an MDJ for a preliminary arraignment; they made promises to him that were untrue such as promising "to help;" they engaged in implicit threats such as stating they were going to "have to do this the hard, ugly way;" they offered to show a video of the shooting to him but didn't; they failed to follow up on their promises; he was under the influence of alcohol, marijuana and Percocet; he wanted to sleep but was not given an opportunity to do so; and he was coerced and simply gave in and told the police what they wanted to hear. The court cannot agree.

"When a defendant alleges that his waiver or confession was involuntary, the question is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unrestrained decision to confess." *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1137 (Pa. 2012). The fact that the accused has been drinking

alcohol and/or using controlled substances does not automatically invalidate his subsequent incriminating statements. *Commonwealth v. Cruz*, 71 A.3d 998, 1005 (Pa. Super. 2013); *Commonwealth v. Manning*, 435 A.2d 1207, 1209 (Pa. 1981). “The test is whether there was sufficient mental capacity for the defendant to know what he was saying and to have voluntarily intended to say it.” *Manning*, supra (quoting *Commonwealth v. Culberson*, 358 A.2d 416, 417 (Pa. 1976)).

The court notes that Defendant waived his right to be taken before an MDJ in Philadelphia for the purpose of posting bail (see Commonwealth Exhibit 1). While the rules state that a defendant shall be afforded a preliminary arraignment without unnecessary delay, see Pa.R.Cr.P. 516 and 519, a violation of these rules does not result in the confession being inadmissible per se. “Rather, in determining the admissibility of all statements, regardless of the time of their making, courts must consider the totality of the circumstances surrounding the confession.” *Commonwealth v. Perez*, 845 A.2d 779, 787 (Pa. 2004). In cases such as this one, the court should consider factors such as: the unavailability of a magistrate; the accused’s actual knowledge of his rights and the charges; the time spent transporting the accused to the jurisdiction where the warrant was issued; the duration and means of interrogation; the defendant’s physical and psychological state; the conditions attendant to the detention; the attitude exhibited by the police during the interrogation; and any other factors which may serve to drain one’s powers of resistance to suggestion and coercion.

There is nothing in the record to indicate that Defendant was under the

influence of drugs and alcohol at the time he made the statements to the police. The United States Marshals called the Williamsport police around 1:30-2:00 p.m. to tell them that they had Defendant in custody. It took approximately seven (7) hours for the Williamsport police to drive to Philadelphia, take custody of Defendant and drive back to Williamsport. The interview of Defendant began at 9:11 p.m. Therefore, one can reasonably infer that Defendant had not consumed or ingested any alcohol or controlled substances for more than seven (7) hours. Furthermore, at least seven (7) hours of the time that Defendant spent in custody before his preliminary arraignment (which occurred at approximately 11:30 p.m.) was due to the time it takes to make a round trip from Williamsport to Philadelphia.

Agent Kontz also testified that he was trained to document signs of drug and alcohol intoxication and had extensive experience dealing with intoxicated individuals. In his opinion, Defendant did not appear to be under the influence of alcohol or controlled substances. Defendant was not slurring his speech. Although Agent Kontz did not believe that Defendant's initial answers to questioning were truthful, his answers were responsive to the questions. Furthermore, Defendant never indicated that he did not understand Agent Kontz' questions.

Agent Kontz' observations and opinion are supported by the CD recording of the interview. Defendant never said anything during the interview about being under the influence of drugs or alcohol. Defendant's speech was not slurred, and he did not appear to have any problems with walking or his coordination. He answered questions coherently and articulately. His answers and his thought processes were not disjointed. He provided



explanations and excuses regarding his locations and movements on the night in question. He also initially challenged some of Agent Kontz' statements about the evidence and video surveillance. Additionally, he invited Agent Kontz to test him and the white shirt he was allegedly wearing at the time of the shooting for gunshot residue, and he agreed to submit to DNA testing.

Defendant also did not appear to be in need of sleep. The court extensively reviewed the CD of the interview. Not once did Defendant yawn, rest his head on the desk, or close his eyes (other than to blink). He never complained that he was tired or even asked for a break. Instead, Defendant appeared to be comfortable, engaging, and alert. His arms were open, and he answered Agent Kontz' questions quickly and decisively.

There also was nothing coercive about the interview itself. The door to the interview room remained open throughout the interview. Defendant was seated in the chair closest to the door. He had in his possession what appeared to be a paper bag of food and a drink. Agent Kontz told Defendant that he could eat and drink while they talked. Defendant's hands were not handcuffed during the interview.

Agent Kontz' tone and demeanor were neither threatening nor coercive. Agent Kontz' voice was soft-spoken and his questions were deliberately to the point. Although he believed that Defendant's initial answers were lies and he made a single, off-hand comment about having to do this "hard, ugly way," he never raised his voice to Defendant or became aggressive in any way.

While Agent Kontz did not show Defendant the video surveillance, he

testified that Defendant did not want to see it. Furthermore, during the interview Agent Kontz appeared to show Defendant some still photographs from some of the surveillance.

After questioning Defendant for about an hour and ten minutes, Agent Kontz gave Defendant a break. He took Defendant outside to let him smoke some cigarettes that Agent Kontz provided to him. Agent Kontz testified that Defendant got emotional about not being able to see his family for a long time. Agent Kontz told Defendant it was best for him to put his story on tape. Agent Kontz estimated that this “smoke break” last only a few minutes – “five minutes at most.”

When the videotaped interview resumed, Agent Kontz noted that he took Defendant out for a smoke. He stated: “we’ve kinda been talking. I haven’t beaten you up and I haven’t threatened you. I haven’t promised you anything either, have I?” Defendant replied, “No.” Agent Kontz then said, “All I did is I kind of appealed to your – to your good nature, okay, because you seem like a decent guy--.” Defendant replied, “Yes.” Over the next seven (7) or eight (8) minutes, Defendant stated that “Johnny” passed him the gun and pointed to a group of black males. Defendant then admitted that he fired the gun probably out of fear for his life from “Johnny” and not a fear of anybody in the crowd. He also said he placed the gun under the passenger seat of “Johnny’s” car and he got out of the car on Pine Street near a big church across from the old city hall. This second portion of the interview lasted between eight (8) and nine (9) minutes and concluded at about 10:50 p.m.

During his testimony at the hearing on Defendant’s motion, Agent Kontz admitted that he had the ability to take Defendant to the MDJ for a preliminary arraignment,

but that's generally not the way the Williamsport police do things. They process the individual and interview them first and then take them to the MDJ.

Based on the totality of the circumstances, the court finds that Defendant's statements were voluntarily given. Except for his estimation that the break lasted at most five (5) minutes,<sup>1</sup> Agent Kontz' testimony was credible and uncontradicted. The total amount of time from the beginning of the interview until its conclusion, including the cigarette break, was only about 1 hour and forty minutes. Defendant did not appear to be under the influence of alcohol or controlled substances. He did not have any difficulty understanding or answering Agent Kontz' questions. The interview was not coercive, and Defendant admitted such during the videotaped interview. Despite the allegations in Defendant's motion, there is nothing in the record to suggest otherwise. Accordingly, the court will deny Defendant's motion to suppress the statements that he gave to the police on April 29, 2015.

Defendant next asserts that the intercepted wiretap conversation between Bahtem Sims and Killa/Killer must be suppressed. He alleges that the Commonwealth intercepted a wire communication between Mr. Sims and "Killa" without "Killa's" consent or knowledge. He also claims that the Commonwealth has failed to provide Defendant with any documentation necessary to justify the wiretap under Pennsylvania's Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S.A. § 5701 et. seq. He contends that because he was not provided with said documentation, he "must conclude" that the Commonwealth

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<sup>1</sup> Based on the start time of 9:11 p.m., the duration of the first portion of the interview of about 1 hour and ten minutes, the duration of the second portion of the interview of approximately eight (8) or nine (9) minutes, and the end time of 10:50 p.m., there is a break or "gap" of about 20 minutes.

failed to comply with the provisions of the Act. Defendant seeks suppression of the intercept as it violates his constitutional rights or, in the alternative, he want the court to order the Commonwealth to provide the appropriate documentation substantiating the Commonwealth's compliance with the Act.

At the hearing in this matter, the court questioned defense counsel as to the basis for the suppression motion and, more particularly, whether Defendant had a sufficient privacy interest to be entitled to suppression. Defense counsel indicated that Defendant was "standing on his motion as filed."

The court denies this motion to suppress because Defendant is not an aggrieved person under the Act and he does not have a sufficient privacy interest to be entitled to suppression. 18 Pa. C.S. § 5702 (an "aggrieved person" is a "person who was a party to any intercepted wire, electric or oral communication or a person against whom the interception was directed."); see also *Commonwealth v. Powell*, 994 A.2d 1096, 1107-08 (Pa. Super. 2010)(a defendant may not vicariously assert the privacy rights of others).

Defendant's motion to compel discovery was previously withdrawn at the December 11, 2015 hearing upon request of defense counsel. Therefore, this issue is moot.

The next portion of Defendant's omnibus motion is a motion in limine to preclude Commonwealth witnesses, particularly police officers, from narrating the surveillance videos.

A motion in limine is a "pretrial request that certain inadmissible evidence not be referred to or offered at trial." BLACK'S LAW DICTIONARY 1109 (9<sup>th</sup> Ed. 2009).

Any analysis of the admissibility of a particular type of evidence must start with a threshold inquiry as to its relevance and probative value. *Commonwealth v. Robinson*, 554 Pa. 293, 721 A.2d 344, 350 (1998). Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action. Pa. R. E. 401; *Robinson*, supra.

The court may exclude relevant evidence if its probative value is outweighed by a danger of unfair prejudice, misleading the jury or confusing the issues. Pa. R. E. 403. Unfair prejudice means “an undue tendency to suggest a decision on an improper basis.” Pa. R. E. 403, comment; *Commonwealth v. Harston*, 624 Pa. 143, 84 A.3d 657, 666 (2014).

Defendant contends that the surveillance videos stand for themselves and need no narration. The jurors can view these videos and discern for themselves the actions occurring therein. Furthermore, relying on *Commonwealth v. Spencer*, 639 A.2d 820, 824 (Pa. Super. 1994), Defendant argues that testimony in the form of opinions or inferences from any witness who is not testifying as an expert is limited to those opinions and inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his or her testimony or the determination of a fact in issue.

The Commonwealth asserts that its witnesses, including law enforcement officers, may narrate the surveillance videos. The Commonwealth acknowledges that if its witnesses offer opinions or inferences based on the surveillance videos, the testimony must satisfy the test from the *Spencer* case. However, there is no case that prevents a witness from using a video to help explain facts about which he or she has personal knowledge.

The court has not seen the surveillance videos and it is not aware of the quality of the images or the detail contained therein. The court also does not know precisely how the parties intend to use the surveillance videos at trial. Therefore, at this time, the most the court can do is set forth general statements and parameters regarding narration of the surveillance videos.

Clearly, individuals who were present at the time of the shooting may use the surveillance videos to assist the jury in understanding their testimony. For example, the victims can identify themselves on the videos and point out where they are hobbling or falling to the ground as a result of being shot. Similarly, law enforcement officers can make references and comments that are based on their own personal knowledge. For example, if an officer is familiar with Defendant's tattoos from personally observing them during booking or Defendant's interview and the tattoos are visible in the surveillance videos, the police can point them out to the jury and make comparisons. Law enforcement officers cannot, however, narrate the surveillance videos as if they were present during the shooting when they were not or make comments about details in the video that are based on the observations or statements of others.

Defendant's second motion in limine regarding marked, enhanced or adulterated photographs is moot as the parties have reached an agreement on this issue.

### **ORDER**

**AND NOW**, this \_\_\_ day of July 2016, for the reasons set forth above, the court **DIRECTS** as follows:

- (1) Defendant's motion to suppress the statements he made in an interview with the police on April 29, 2015 is **DENIED**.
- (2) Defendant's motion to suppress the wiretap conversation between Bahteem Sims and Killa/Killer is **DENIED**.
- (3) Defendant's motion to compel discovery is marked **WITHDRAWN** without prejudice.
- (4) Defendant's motion in limine regarding narration of the surveillance videos is **GRANTED IN PART and DENIED IN PART**.
- (5) Defendant's motion in limine regarding marked or enhanced photographs is **MOOT** as the parties have come to an agreement regarding this issue.

By The Court,

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Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)  
Greta Davis, Esquire (APD)  
Gary Weber, Esquire (Lycoming Reporter)  
Work file