

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-572-2016
	:	
vs.	:	
	:	
	:	
WILLIAM BLACKWELL, Defendant	:	Petition for Habeas Corpus

OPINION AND ORDER

By Information filed on April 15, 2016, Defendant is charged with attempted homicide, aggravated assault and related charges. On October 29, 2015 at approximately 10:24 a.m., Defendant is alleged to have pulled his vehicle next to the victim’s vehicle while at an intersection. Defendant is alleged to have then rolled down his window, pointed a firearm at the victim and fired the gun three times at the victim. The victim was allegedly struck in his left shoulder.

Defendant filed a petition for habeas corpus on July 27, 2016. The hearing and argument on said petition was held before the court on September 12, 2016.

At the habeas corpus hearing, a transcript of the March 29, 2016 preliminary hearing was marked and admitted as Commonwealth Exhibit 1. Neither party submitted any additional evidence.

Agent Raymond Kontz of the Williamsport Bureau of Police testified at the preliminary hearing. He testified over a hearsay objection by Defendant that the victim told Agent Kontz that on October 29, 2015, the victim was northbound on Grier Street in Williamsport when a vehicle was heading down Park Avenue westbound. The vehicle turned onto Grier Street heading south and cut the victim off.

The victim stated that as the vehicle pulled up alongside him, the driver's side window went down and the driver pulled a handgun and fired three rounds at the victim's vehicle. The victim was shot twice in the back on the left side of his shoulder.

Eventually, Defendant was identified as the possible shooter. The victim subsequently identified Defendant as the individual who fired the gun. The identification was pursuant to a photo array.

Prior to the preliminary hearing, approximately a week earlier, the victim spoke with Agent Kontz. He told Agent Kontz that he was not going to be very cooperative with law enforcement and was not going to "show up" and testify or "assist in the prosecution of the case." According to Agent Kontz, the victim "didn't feel that it was proper for him to be doing all of this and that he wouldn't point out [Defendant] as the individual that shot him."

Relying on the Superior Court case of *Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. 2015), Magisterial District Judge (MDJ) Christian Frey held all of the charges for court. Specifically, MDJ Frey concluded that *Ricker* was controlling law and that a prima facie case could be established entirely through hearsay.

Defendant's petition for habeas corpus argues that the charges against Defendant must be dismissed for lack of a prima facie showing because at the preliminary hearing, Agent Kontz testified that the alleged victim would not appear and not assist in the prosecution. At the hearing on the petition for habeas corpus, the Commonwealth conceded that the alleged victim was not cooperating with the Commonwealth. Furthermore, the Commonwealth conceded that it could not represent that the alleged victim would be

available to testify during the trial in this matter. A material witness warrant has been issued for the alleged victim's arrest but the alleged victim has yet to be apprehended.

At this juncture of the case, two facts are undisputed. First, the hearsay testimony offered at the preliminary hearing and again at the habeas corpus hearing is the only evidence for establishing the prima facie case against Defendant. Second, the Commonwealth cannot ensure at trial or at any other point in this case that Defendant will be given the opportunity to confront the alleged victim.

Ricker clearly holds that hearsay evidence alone is sufficient to establish prima facie for all of the elements of a particular crime. 120 A.3d at 357; Pa. R. Crim. P. 542 (E).

Ricker also concluded that an accused does not have the right to confront the witnesses against him at his preliminary hearing. *Id.* at 362. In recognizing that there is tension between the Rules of Criminal Procedure, one of which permits hearsay testimony and the other of which entitles a defendant to confront witnesses, **Ricker** concluded that the Defendant did not explore that issue or develop any due process argument. *Id.* at 364.

Ricker specifically noted that “the probable intent of the makers of the respective confrontation clauses and the original meaning placed on the text by those who ratified the provisions in question did not constitutionally guarantee a right to confront witnesses before trial.” *Id.* at 363.

Defendant argues that because there will allegedly be no victim available at any future proceeding or trial that the case should be dismissed at this point.

The court is of the opinion Rule 542(E) is not applicable to Defendant's

petition for habeas corpus and **Ricker** is factually distinguishable from the unique facts and circumstances of this case.

Rule 542(E) states:

Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

Pa.R.Crim.P. 542(E). This case, though, is no longer at a preliminary hearing before the issuing authority. It is before the court of common pleas on a petition for writ of habeas corpus. Therefore, under the facts and circumstances of this case (i.e., where the Commonwealth cannot in good faith represent that the victim will be available at trial), the court is not bound to consider the victim's hearsay statements presented by Agent Kontz at the preliminary hearing.

The court also finds that **Ricker** is factually distinguishable from this case. In **Ricker**, the hearsay evidence presented at the preliminary hearing was a taped statement of a Pennsylvania State Police trooper. There was no indication in **Ricker** that the trooper would not be available for trial. In fact, in opposing the appellant's argument that extraordinary circumstances existed for him to appeal a decision denying his petition for habeas which generally would be considered an interlocutory order, the Commonwealth countered that extraordinary circumstances did not exist because Appellant would be afforded an opportunity to confront the witness against him at trial. 120 A.3d at 354. Here, in stark contrast, the Commonwealth cannot make a good faith certification that the victim will be available at trial.

The court also notes that in Superior Court precedent prior to *Verbonitz* the availability of the victim or witness at the time of trial seemed to be an important, if not critical, factor in its decisions to permit the Commonwealth to establish a prima facie case at the preliminary hearing through hearsay.

In *Commonwealth v. Rick*, 366 A.2d 302 (Pa. Super. 1976), the Superior Court noted, “If, at the preliminary hearing, it had been clearly established that the Commonwealth would be able to produce only hearsay evidence at trial, the result in this case might be different.” *Id.* at 304 n.1.

In *Commonwealth v. Branch*, 437 A.2d 748 (Pa. Super. 1981), a police officer testified, over objection, at Branch’s preliminary hearing that the decedent’s brother had witnessed Branch shoot the victim. Based on *Rick*, the Superior Court found the hearsay was properly admitted at Branch’s preliminary hearing. In the court’s recitation of the facts, however, it specifically noted: “Although the decedent’s brother did not testify at the preliminary hearing, the Commonwealth represented that he would be available at the time of trial.” 437 A.2d at 749.

In *Commonwealth v. Davis*, 454 A.2d 92 (Pa. Super. 1982), the Superior Court stated, “We note that the preparer of the autopsy report did in fact testify at appellant’s trial. We do not pass judgment on the admissibility of hearsay evidence suffering from a defect that will not be cured at trial. *Id.* at 97 n.5.

In *Commonwealth v. Troop*, 571 A.2d 1084 (Pa. Super. 1990), Troop alleged that he received an improper preliminary hearing because a police officer read into evidence the statement of one of Troop’s accomplices, Renee Buckner, that implicated Troop in the

robberies he was charged with committing. The court rejected Troop’s claim, but stated the following:

We recognize that in light of the critical nature of the preliminary hearing in assuring that the Commonwealth has a legal basis for prosecuting a person, the *better course* may be for the Commonwealth, whenever possible, to produce evidence to establish its prima facie case that would also be admitted at trial. However, there is no requirement that the Commonwealth do so in all instances.... Moreover, here, as in *Branch*, the Commonwealth certified in good faith that Buckner would be available at the time of trial. This certification helps to minimize the chances that the primary evil that preliminary hearings are designed to prevent – i.e., the prosecution of persons unconnected with a crime – will occur.

Id. at 1088-89.

Based on the facts of *Ricker* and these cases, the court finds that this case is factually distinguishable from *Ricker*.¹

Moreover, applying *Ricker* under the facts and circumstances of this case would eviscerate the primary function of a preliminary hearing.

“The principal function of a preliminary hearing is to protect the individual against unlawful detention.” *Commonwealth v. Ruza*, 511 A.2d 808, 810 (Pa. 1986). “It seeks to prevent a person from being imprisoned or required to enter bail for a crime which was never committed, or for a crime with which there is no evidence of his connection.”

Commonwealth ex rel. Maisenhelder v. Rundle, 198 A.2d 565, 567 (Pa. 1964).

Defendant was arrested on these charges on February 10, 2016 and he remains incarcerated. At the time of the preliminary hearing on March 29, 2016, the Commonwealth was aware that the alleged victim would not willingly appear for trial. It was until August

¹ The court also notes that the Pennsylvania Supreme Court has granted a petition for allowance of appeal in *Ricker*. 135 A.3d 175 (Pa. 2016).

11, 2016, though, that the Commonwealth applied for and obtained a material witness warrant. The victim still has not been apprehended.

The court contemplated modifying bail instead of dismissing the charges to allow the Commonwealth more time to locate the alleged victim. That, however, would require, in contravention of *Rundle*, bail to be entered when the Commonwealth cannot represent or certify that it will be able to present at trial competent evidence of his connection to the crime.²

Accordingly, based on the unique facts and circumstances of this case, the court finds that Defendant's continued detention at this point is illegal and improper.

ORDER

AND NOW, this ___ day of September 2016, following a hearing, the court **GRANTS** Defendant's petition for writ of habeas corpus. The charges against the Defendant are dismissed without prejudice. Defendant is hereby released from incarceration.

By The Court,

Marc F. Lovecchio, Judge

cc: Aaron Biichle, Esquire (ADA)
Roan Confer, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Suzanne Fedele, Clerk of Courts
Work file

²If the Commonwealth had evidence other than the victim's statements to connect Defendant to the crime, it should have presented it at the hearing on Defendant's petition for habeas corpus.