

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

LISA O'DAY,
Defendant

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CR-829-2014

PRETRIAL MOTION

OPINION AND ORDER

On August 18, 2016, the Defendant filed a Motion to Amend the Information. Argument on the motion was held during Motions Court on August 29, 2016. The parties agreed to submit the matter on briefs without further hearing.

Background

On October 28, 2013, Lisa O'Day (Defendant) was the parent of a daughter, AO, who was 14 years of age at the time. At some time later that day, AO attempted to commit suicide by ingesting an allegedly toxic quantity of Tylenol PM at her residence. After Defendant discovered what her daughter had done, she apparently chose not to seek medical advice of any kind that day.

Sometime in the afternoon of the next day, Defendant contacted their family primary care physician to report the overdose. The doctor's office would have advised Defendant to take the child to the Williamsport Hospital and Medical Center emergency department for the overdose. Defendant would have been advised that AO could be suffering from delayed effects of the toxic levels of Tylenol PM which could cause severe damage to AO's liver. Despite the advice, Defendant instead waited until the next day, October 30, 2013, and she took her daughter to Muncy Valley Hospital's emergency department. Once at Muncy Valley it was decided she needed a higher level of care and was transported by ambulance to Williamsport Hospital. The next day,

after a diagnosis of fulminant hepatic failure, it was determined she was in need of a liver transplant. AO was transported by air ambulance to Children's Hospital of Pittsburgh and several days later, on November 3, 2013, she received the transplant. AO presumably has recovered from the surgery. As a result of the actions taken by Defendant, the Pennsylvania State Police were called and the charges of Endangering the Welfare of a Child¹ graded as a felony 3 and Recklessly Endangering another Person², a misdemeanor of the first degree followed.

Discussion

In Defendant's Motion to Amend the Information, she requests that this Court reduce the charge of Endangering the Welfare of a Child to a misdemeanor, as the Commonwealth has failed to establish the required element of "course of conduct" making the offense a felony of the third degree. While the Commonwealth acknowledges that it is a "close call", it argues that as a result of the Defendants two separate omissions, Defendants behavior constitutes more than one event on one night and is in fact a course of conduct.

A prima facie case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime. In determining the presence or absence of a prima facie case, inferences reasonably drawn from the evidence of record that would support a verdict of guilty are to be given effect, but suspicion and conjecture are not evidence and are unacceptable as such. Stated another way, a prima facie case in support of an accused's guilt consists of evidence that, if accepted as true, would warrant submission of the case to a jury. Therefore, proof of the accused's guilt need not be established at this stage.

Commonwealth v. Miller, 2002 PA Super 333, 810 A.2d 178, 181 (Pa. Super. 2002) (citations omitted).

¹ 18 Pa. C.S. Section 4304 (a)(1).

² 18 Pa. C.S. Section 2705.

The offense of endangering the welfare of children (EWC) is defined as follows:

- (a) Offense defined.-- A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.
- (b) Grading.-- An offense under this section constitutes a misdemeanor of the first degree. However, where there is a course of conduct of endangering the welfare of a child, the offense constitutes a felony of the third degree.

18 Pa.C.S.A. § 4304.

While the Commonwealth acknowledges that it is a “close call”, it argues that as a result of the Defendants two separate omissions, Defendants behavior constitutes more than one event on one night and is in fact a course of conduct. Course of conduct is defined for the jury in the suggested criminal jury instructions as “a pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct”. Pa. SSJI (Crim) 15.4304B. The Subcommittee added the course of conduct jury instruction in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), which requires that each fact that changes the grading of a statute or punishment under the law must be found by the trier of fact beyond a reasonable doubt.

In Commonwealth v. Popow, 844 A.2d 13 (Pa. Super. 2004) the Superior Court found that the trial court improperly graded the EWOC offense as a felony of the third degree. The matter was remanded to the trial court for imposition of a sentence within the legal sentencing range and consideration of the sentencing guidelines of this crime as a misdemeanor of the first degree, rather than as a felony of the third degree. Popow at 18. Popow found the mother of his children engaged in sexual intercourse with another person when he came to pick up his daughter. Popow fell down the steps

while holding his daughter and taking her away from the apartment. The Superior Court found that because the conduct that led to the endangering the welfare of a child happened over a matter of minutes it constrained common sense to grade the event as a felony/course of conduct event. Popow at 16.

Here it does not constrain common sense if the trier of fact would find a course of conduct in failing to take a child to a hospital for three days when one knows on Day One that the child has overdosed and on Day Two has been directed by a medical professional to bring the child for emergency evaluation. Though the event occurred as one episode as evidenced by the Defendant only being charged with one count of EWOC, the question of whether Defendant engaged in a course of conduct over those three days will reach the trier of fact.

Conclusion

Whether Defendant's failure to obtain medical treatment over the span of several days constitutes a course of conduct is a question for the trier of fact and will be submitted to the trier of fact as such. Therefore, the charge shall remain a felony 3.

ORDER

AND NOW, this 9th day of December, 2016, based upon the foregoing Opinion, the Defendant's Motion to Amend the Information is hereby DENIED.

BY THE COURT,

Nancy L. Butts, P.J.

cc: George E. Lepley, Esq.
Martin Wade, Esq.