

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-1051-2015
v.	:	
	:	
BRANDON LOVE,	:	PRETRIAL MOTION
Defendant	:	

OPINION AND ORDER

Brandon Love (Defendant), through Counsel, filed an Omnibus Pretrial Motion on May 10, 2017. Hearing and argument took place on August 10, 2017.

Background

Defendant is charged with Criminal Homicide¹, a felony of the first degree; two counts of Criminal Conspiracy², both charged as felonies of the first degree; two counts of Aggravated Assault³, one charged as a felony of the first degree and the second as a felony of the second degree; and Obstructing the Administration of Law⁴, a misdemeanor of the second degree. The charges arise out of the shooting death of Jamil Bryant on May 11, 2015.

Testimony

Agent Raymond Kontz, III (Kontz) testified on behalf of the Commonwealth. Kontz filed the criminal complaint against Defendant and arrested Defendant on May 14, 2015.

¹ 18 Pa.C.S. § 2501(a).

² 18 Pa.C.S. § 903(a)(1).

³ 18 Pa.C.S. § 2702(a)(1) and 18 Pa.C.S. § 2702(a)(4).

⁴ 18 Pa.C.S. § 5101.

On the date of the suppression hearing, Kontz was no longer employed as a Williamsport Bureau of Police agent, having retired after 23 years of service. He is the prosecuting officer in the Commonwealth's case against Defendant and his involvement with the matter began on the night of the shooting.

Kontz testified that he had interviewed Defendant on May 12, 2015. The police had received his name as part of the investigation; several people talked about an incident between Jamil Bryant and Rory Herbert. Police went to Defendant's Wilson Street residence and made contact with him there. Defendant was asked to come to City Hall. His girlfriend at that time accompanied him and they were transported by police. Defendant was not under arrest or in custody at that time of his first police interview on May 12, 2015. As result of this initial interview, the Defendant was released that night and returned to his home by police. At that time, the police requested his cell phone and he consented to the search of the phone.

Prior to the second interview, which is the subject of the suppression motion, Kontz obtained a warrant for Defendant's arrest. Kontz tried to arrange a non-custodial interview through the Defendant's probation officer. The Defendant was scheduled to meet with his probation officer at 4 pm on May 14th but failed to show up and indicated that he would arrive at 9 pm. Kontz testified that when he arrested Defendant at 9 pm, he told Defendant that he had a warrant for his arrest and told him what it was for. Defendant was transported in a police car and in handcuffs. He was still in shackles while being interviewed. The Commonwealth submitted into evidence as Commonwealth's Exhibit #2 the videotaped interview of Defendant after his arrest. At minute 3:27 Kontz "I have explained to you what the warrant was about".

During the hearing, the Court took judicial notice of page two of the three page Affidavit of Probable Cause in which Kontz wrote

On 5/13/2015 I interviewed COSME BERRONES. BERRONES at first stated that he was with [DEFENDANT] and said they had gone to Bloomsburg the night of the shooting. BERRONES allowed me to look through his cellular phone during this interview, and when confronted regarding information on his phone, BERRONES stated that he lied to us and that he never went to Bloomsburg.

On page three of the Affidavit of Probable Cause, Kontz went on to say that he was told by a person named Berrones that Defendant and Terrance Perez (Perez) had been at his apartment earlier in the day on May 11, 2015. Berrones indicated that Defendant said Jamil Bryant had “threatened him and his family and they ‘needed to strap up’ meaning to arm themselves with firearms”. Berrones said Defendant and Perez left the residence and returned at approximately 10:44 pm and that they “looked hype” Berrones said that Defendant received a telephone call from Evan Bryant saying that his brother had been shot and killed. Defendant denied killing Jamil Bryant and stated to Evan Bryant that he was in Bloomsburg with “Black”. “Black” is Berrones’s street name.

After getting off the phone, Defendant told Berrones that it was Perez that pulled the trigger and that if anyone asked him where they were tonight to say that they were in Bloomsburg. Affidavit of Probable Cause, at 3.

Defense Counsel questioned Kontz regarding a police report he had prepared dated 6/18/2015, in which he stated the he needed to advise the District Attorney about Berrones’s change of story. He said that Berrones fed him lies and that he had used them in the affidavit or probable cause to arrest Perez and Defendant. The police report was not submitted into evidence. As a result of the 6/18/2015, interview

with Berrones, Kontz believed that Berrones was a third co-conspirator involved in the shooting death of Jamil Bryant and did obtain a warrant for Berrones's arrest.

Discussion

Habeas

At the time of the hearing on the Habeas, the Court granted the Commonwealth's request to dismiss as Defendant had waived his right to a preliminary hearing and cannot now challenge the Commonwealth's *prima facie* case.

A defendant who is represented by counsel may waive the preliminary hearing at the preliminary arraignment or at any time thereafter.

- (1) The defendant thereafter is precluded from raising the sufficiency of the Commonwealth's *prima facie* case unless the parties have agreed at the time of the waiver that the defendant later may challenge the sufficiency.
- (2) ...

Pa.R.Crim.P. 541 (waiver of preliminary hearing).

Finding that there was no agreement that Defendant qualified his waiver of preliminary hearing or that the parties agreed that Defendant would later be able to challenge the sufficiency of the Commonwealth's *prima facie* case, the habeas motion is without merit.

Suppression of Statements Obtained During Arrest

Whether the police officers were required to advise Defendant of the existence of the criminal complaint prior to advising him of his constitutional rights and their failure to have done so renders his waiver of his right to counsel not knowing, voluntary and intelligent.

A waiver of Miranda rights is valid where the suspect is aware of the general nature of the transaction giving rise to the investigation. Commonwealth v. Dixon, 475 Pa. 17, 379 A.2d 553, 556 (Pa. 1977). "[O]nly when such knowledge is possessed by a suspect ... can [he] be said to understand the consequences of yielding the right to counsel." *Id.* This is because "[i]t is a far different thing to forgo a lawyer where a traffic offense is involved than to waive counsel where first degree murder is at stake." Commonwealth v. Collins, 436 Pa. 114, 259 A.2d 160, 163 (Pa. 1969). When a defendant challenges the validity of his Miranda waiver on this basis, the Commonwealth must establish, by a preponderance of the evidence, that the defendant was aware of the reason for the interrogation. Dixon, 379 A.2d at 556. The Commonwealth can meet this burden through evidence of the circumstances surrounding the interrogation, such as "the fact that the interrogation follows hard upon the criminal episode and there is no circumstance lending ambiguity to the direction and purpose of the questioning." *Id.*

Commonwealth v. Johnson, 160 A.3d 127, 138 (Pa. 2017).

The Court finds that the Defendant was advised of the nature of the criminal complaint at the time of his arrest and that his waiver of his constitutional rights was done knowingly, voluntarily and intelligently. The Court finds Kontz credible in his testimony that he arrested Defendant prior to bringing him to City Hall to be interviewed. The Court having viewed the beginning portion of Defendant's videotaped interview with Kontz finds that there can be no doubt that 1) Defendant knew what the interrogation was regarding and 2) that an arrest warrant was indeed issued for him for his connections with those crimes. Kontz clearly read Defendant his Miranda⁵ rights. Defendant is observed on the video initialing the form. Kontz

⁵ Miranda v. Arizona, 384 U.S. 436 (1966).

reiterates that Defendant can stop the interview at any time even though he initially agreed to speak with police without an attorney present. The Court finds Defendant to have made his statements pursuant to a knowing, voluntary and intelligent waiver of his Miranda rights.

Whether the arrest warrant was issued based upon a misstatement of material facts.

Recently the Supreme Court of Pennsylvania in Commonwealth v. Hopkins⁶ considered whether Article I, Section 8 requires the suppression of evidence when an affiant relies on a third party's statements to establish probable cause for the issuance of a search warrant, and those statements are discovered to be false after execution of the warrant. Commonwealth v. Hopkins, No. 32 MAP 2016, 2017 Pa. LEXIS 1512, at *7 (June 30, 2017). The Supreme Court reiterated the law in this area:

“Misstatements of fact will invalidate a search warrant if they are deliberate and material. See, e.g., Commonwealth v. Baker, 24 A.3d 1006, 1017 (Pa. Super. 2011), aff'd, 621 Pa. 401, 78 A.3d 1044 (Pa. 2013). "A material fact is one without which probable cause to search would not exist." Id. (quoting Commonwealth v. Tucker, 384 A.2d 938, 941 (Pa. Super. 1978)).

The Court cannot find a statement in the Affidavit of Probable Cause that was material to the issuing authority's decision as to whether probable cause existed. Kontz reported the facts as he had collected them at the time to the issuing authority.

At the time in question, May 14, 2015, Kontz did believe, based on what Berrones had reported to him the facts as presented in the Affidavit of Probable Cause. Though one month later, he determined that Berrones had downplayed his

⁶ No. 32 MAP 2016, 2017 Pa. LEXIS 1512, at *8 (June 30, 2017).

involvement in the shooting that were initially only brought against Defendant and Perez, the Court finds no misstatement of a fact material to whether probable cause existed. Though police determined that Berrones was more culpable and charged him criminally after having charged Defendant, those after discovered facts in the 6/18/2015 do not contradict or make false the facts presented in the Affidavit of Probable Cause *supra* that supported the belief that Defendant had committed the charged crimes.

The issuing authority must find that police officer has personal knowledge of facts and circumstances what would warrant a prudent person to believe that a crime had been committed and that Defendant had committed it. The Affidavit of Probable Cause supports the initiation of a criminal case; it does not have to be actually factual beyond a reasonable doubt. Though it was determined later that Berrones was more involved than he had initially reported, that involvement does not negate the involvement of Defendant as outlined in the Affidavit of Probable Cause.

Even if had Berrones had admitted his involvement more candidly earlier, the Court finds that the facts would have been presented differently to the issuing authority but not such that it would not negate Defendant's alleged involvement in the crime.

Rule 600

Pennsylvania Rule of Criminal Procedure 600 (prompt trial) dictates that trial must commence within 365 days of the filing of a criminal complaint. Additionally, defendants held in pretrial incarceration for longer than 180 days have a qualified right to make a written motion requesting that they be released on nominal bail.

Defendant, as of this writing, has been incarcerated for 496 days. He is not eligible to make a motion for nominal bail because the crime he is charged with, Criminal Homicide, is not aailable offense. "All prisoners shall beailable by sufficient sureties, unless for capital offense or for offenses which the maximum sentence is life imprisonment..." Art. I. § 14. Constitution of the Commonwealth of Pennsylvania.

Regarding the delay in time for the commencement of trial, the Court will exclude from its computation of time only periods of delay caused by the lack of due diligence on the part of the Commonwealth. Pa.R.CrimP.600(C)(1) (computation of time; commencement of trial). At the hearing, the Commonwealth submitted into evidence, six requests Defense Counsel made requesting continuance of the trial. The requests for continuance were granted by Court Order that the time for continuance is excludable time against the Defendant. The Court finds that no delay in the trial of Defendant has been caused by a lack of due diligence on the part of the Commonwealth, and as such, that Defendant's request that charges against him be dismissed under Rule 600 necessarily fails.

Defense Counsel argues that the time from October 2016 to the present should be excludable because the Commonwealth has stopped providing discovery because of Defendant's anticipated cooperation. The Court finds this argument to be without merit. Defendant was set for trial in October of 2016 with co-Defendant Perez. On the date of Jury Selection, 10/18/2016, Defense Counsel requested a severance for trial that was granted by this Court, with no objection by co-Defendant's Counsel or the Commonwealth. Defense Counsel could have continued to receive discovery during

the time period in which Defendant intended to cooperate. Entering into plea negotiations does not stop the mandatory or discretionary discovery process. Pennsylvania Rule of Criminal Procedure 573 (pretrial discovery and inspection) does not make the exchange of discovery contingent on going to trial. Lastly, Defendant's anticipated cooperation, in this case to enter a plea, would toll the running of time for speedy trial purposes. Commonwealth v. Bowes, 839 A.2d 422 (Pa. Super. 2003).

Discovery

At hearing, the Commonwealth agreed to confirm with police whether an inventory was taken when they took Defendant's vehicle into possession. If such an inventory was created it shall be produced to Defense Counsel. The Court was advised at hearing that the parties are continuing to resolve discovery issues.

ORDER

AND NOW, this 22nd day of September, 2017, based upon the foregoing opinion, the following is ORDERED and DIRECTED:

1. The Motion for Habeas is hereby DISMISSED.
2. The Motion to Suppress Statements Obtained During Arrest is hereby DENIED.
3. The Motion to Dismiss Charges based upon Rule 600 is hereby DENIED.
4. It is further ORDERED and DIRECTED that the parties exchange discovery in accordance with the Pennsylvania Rules of Criminal Procedure.

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA (KO, MW)
Christian Lovecchio, Esq. PCRA Counsel
Gary Weber, Esq.