IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-529-2018**
	:	
vs.	:	
	:	
	:	
BENJAMIN ALLEN,	:	
Defendant	:	

OPINION AND ORDER

This matter came before the court on the defendant's Omnibus Pretrial Motion (OPM), which contains a motion to compel discovery, a motion for notice in advance of trial of any Rule 404(b) evidence that the Commonwealth intends to introduce at trial, a motion to amend the Information, and two petitions for writ of habeas corpus.

By way of background, the defendant is charged with one count of criminal attempt-interference with custody of children, graded as a felony of the third degree. This charge arose out of an incident late in the afternoon of March 22, 2018 where the defendant arrived at Blessed Beginnings Day Care and asked to see his son.

At the hearing on the defendant's omnibus pretrial motion, the Commonwealth called as a witness the director of the daycare, Julie Waldman. Ms. Waldman testified that there was an incident on March 22, 2018 at the daycare with the defendant regarding his son. The defendant appeared at the daycare and asked to see his son. The defendant was not listed on the child's emergency contact slip, and Ms. Waldman believed that the defendant was not permitted to pick up his son from the daycare. Ms. Waldman pulled the child's file and put the daycare on lockdown. Ms. Waldman asked the defendant who he was and if he had any identification. The defendant showed Ms. Waldman

a Pennsylvania identification card. Ms. Waldman asked the defendant if he drove there. The defendant denied driving there but became flustered. Ms. Waldman asked if he was allowed to drive with just an identification card. The defendant then made hand signals to his mother who was in the passenger seat of the vehicle and she moved over to the driver's seat. Ms. Waldman told the defendant she could not allow the defendant to see the child without a court order regarding custody. The defendant represented to Ms. Waldman that he had paperwork and he was allowed to see the child. When Ms. Waldman asked for the paperwork, however, the defendant said he did not have it with him. Ms. Waldman called the nonemergency number for the Pennsylvania State Police (PSP). When the defendant realized that Ms. Waldman was calling the police he put his hands in the air and said, "I'll leave. I'll leave. I don't want to cause any trouble." The defendant then got into his vehicle and he and his mother went over to a nearby parking lot and waited.

The incident began, however, several days earlier with phone calls from the defendant and his relatives initially trying to locate the child and then becoming more adamant, with the child's grandfather claiming that the daycare was withholding custody of the child and stating he was "going to call the cops on us." Furthermore, the day before the incident, someone was approaching clients of the daycare. After Ms. Knott picked up the child, there was yelling or an argument between Ms. Knott and some other people. Ms. Knott sped away quickly with the child and her boyfriend, and two vehicles followed them.

In addition to Ms. Waldman's testimony, the Commonwealth introduced the preliminary hearing transcript as Commonwealth's Exhibit 1 and the prior custody order as Commonwealth's Exhibit 2.

At the preliminary hearing in this matter, the Commonwealth presented the testimony of Janessa Knott and Trooper Devin Park. Ms. Knott, the child's mother, testified that she contacted the police on March 22, 2018 because when she arrived at her son's day care, the defendant was at the door and appeared to be arguing with the day care manager after he had been warned the day before, and that day by her, that he couldn't pick up the child. She told the police she went to pick up her son and the defendant was there. He "was not to be there" and she was concerned about going in. She testified that the parties' custody order only permitted the defendant to have supervised custody of the child. Specifically, the conditions of the defendant's supervised custody were: (1) Mother shall supervise all contact between Father and minor child; (2) all period of supervised custody shall occur at the locations designated by Mother; and (3) the duration of Father's periods of supervised physical custody shall be determined by Mother. The custody order was signed by both parties on January 11, 2016, and issued by Judge Craig Miller of the Clinton County Court of Common Pleas on January 18, 2016. Ms. Knott testified that she did not agree to have the defendant meet her at the daycare, she had not planned any supervised custody or visitation for that date, and she had not told the defendant where the child was going to daycare. She also testified that the defendant's family was at the daycare the day before and were chasing her.

Trooper Park testified that he was dispatched to the Blessed Beginnings Day Care in Loyalsock. He spoke to the day care manager who related that she had received a phone call earlier in the day from the defendant and then he showed up later in the day and was requesting to pick up his son and stating that he had permission to do so. He did not see

the defendant have any contact with his son that day. The defendant and his mother were parked in the Jersey Shore State Bank parking lot, across the street from the daycare. Trooper Park placed the defendant under arrest for interference with child custody. When he first approached, the defendant was on the phone with his attorney. The defendant also stated that he was speaking with Children and Youth about the Protection From Abuse order (PFA) involving the parties. The defendant told Trooper Park that he thought he was allowed to pick the child up, and he wanted to pick the child up because of the pending PFA. Trooper Park acknowledged that there were several PFAs pending, one of which had the child as a protected party and Ms. Knott's boyfriend as the alleged perpetrator.

With respect to the motion to compel discovery, defense counsel only argued five paragraphs of the motion – paragraphs 12, 14, 16, 17, and 21. In paragraph 12, defense counsel requested a "copy of all police reports, supplemental reports or documents relating to any investigation regarding the above referenced matter or any incident that occurred on March 21, 2018" at the Blessed Beginnings Day Care involving the child. March 21, 2018 was the incident the day before the defendant was arrested for appearing at the Daycare. In paragraph 14, defense counsel requested a copy of all written communications between the Blessed Beginnings Day Care and the defendant or any member of the defendant's family. The attorney for the Commonwealth indicated that to his knowledge no such communications exist. In paragraph 16 and 17, defense counsel requested a copy of all recorded phone calls in the possession or control of the Commonwealth that are attributed to the defendant whether these calls were recorded by the Lycoming County Prison, another prison, or by another entity (hereinafter collectively referred to as "the prison calls") and a

copy of all recorded phone calls in the possession or control of the Commonwealth or the PSP that are attributed to the defendant or any of member of the defendant's family made to the PSP relating to the incidents on March 21, 2018 and March 22, 2018 (hereinafter collectively referred to as "the PSP calls"). In paragraph 21, defense counsel requested copies of all video recordings related to the above-captioned matter, including but not limited to, all surveillance videos from the Blessed Beginnings Day Care and any adjacent business or entity including but not limited to the Jersey Shore State Bank, as well as all other recordings which offer any additional information related to the above referenced charges related to the incidents on March 21 and March 22, 2018.

The court will grant these requests. The Commonwealth shall determine whether any of the requested items exist and within 30 days must either provide the requested items to defense counsel or notify defense counsel that such documents do not exist.

The defendant's request for advance notice of any evidence the Commonwealth intends to introduce pursuant to Pa. R. E. 404(b) was already addressed in the Order dated April 23, 2018. Consistent with that order, no later than the pretrial date, the Commonwealth must file a 404(b) motion requesting admission of any 404(b) evidence the prosecutor intends to introduce at trial.

The defendant's OPM also contains a motion to amend the Information so that the grading of the offense is a misdemeanor of the second degree rather than a felony of the third degree, and two petitions for writ of habeas corpus. The court notes that the first petition for habeas corpus related to the Commonwealth's failure to call the manager of the

daycare as a witness at the preliminary hearing or even to name her and represent that she would be available for trial. As the director of the daycare testified at the hearing on the defendant's OPM, the court finds that the first habeas petition is moot.

With respect to the remaining habeas corpus motion and the motion to amend, defense counsel argued that the charge was filed and held for court by the Magisterial District Judge (MDJ) as a misdemeanor of the second degree; however, when the Commonwealth filed the Information in this case it covered the misdemeanor grading with white-out and handwrote a felony three grading overtop of it. Furthermore, defense counsel argued that the Commonwealth did not present any evidence at the preliminary hearing to support the offense being graded as a felony of the third degree. Defense counsel also argued that the Commonwealth failed to present prima facie evidence that the defendant attempted to take or entice his son from the daycare in that there was no interruption of lawful custody and no evidence was presented to establish or even suggest that the defendant had contact with his son, saw his son, said anything to his son or made any gestures toward or within sight of his son.

The prosecutor argued that the inference that is warranted from all the facts and circumstances of this case is that the defendant attempted to take his son from the daycare. The defendant appeared at the daycare late in the day but before Ms. Knott arrived, and the parties' custody agreement which became a court order gave the defendant no right to see the child without Ms. Knott's approval and presence. The defendant is charged with attempt to interfere with custody of a child, not the completed crime. An attempt is any substantial step. By going to the daycare and asking to see his son when he was not permitted

to see his son without the approval and presence of Ms. Knott, the defendant took a substantial step toward taking the child.

Interference with custody of children is governed by section 2904 of the Crimes Code, which states:

> (a) Offense defined.--A person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 years from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so.
>
> (b) Defenses.--It is a defense that:
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> (1) the actor believed that his action was necessary to preserve the child from danger to its welfare; or
>
> (2) the child, being at the time not less than 14 years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offense with or against the child; or
>
> (3) the actor is the child's parent or guardian or other lawful custodian and is not acting contrary to an order entered by a court of competent jurisdiction.
>
> (c) Grading.--The offense is a felony of the third degree unless:
>
> (1) the actor, not being a parent or person in equivalent relation to the child, acted with knowledge that his conduct would cause serious alarm for the safety of the child, or in reckless disregard of a likelihood of causing such alarm. In such cases, the offense shall be a felony of the second degree; or
>
> (2) the actor acted with good cause for a period of time not in excess of 24 hours; and
>
> (i) the victim child is the subject of a valid order of custody issued by a court of this Commonwealth;
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> (ii) the actor has been given either partial custody or visitation rights under said order; and
>
> (iii) the actor is a resident of this Commonwealth and does not remove the child from the Commonwealth.
>
> In such cases, the offense shall be a misdemeanor of the second degree.

18 Pa. C.S.A. §2904.

Although it is a close call, the court finds that the Commonwealth presented enough evidence to establish a prima facie case of criminal attempt to commit interference

with custody of children.

The court disagrees with defense counsel's argument that the defendant had to actually have contact or communication with the child to commit the crime of attempt. While such may be necessary to commit the underlying crime of interference with custody of children, the court finds that such is not required for attempt. Rather, all that is necessary is a substantial step. To elucidate this point, consider the following hypothetical: an individual is caught trying to break into the Lindbergh nursery by prying open the window. The individual's car is located nearby and contains numerous items to transport and care for a baby such as a car seat, diapers, bottles and formula. There is no ransom note. The individual does not wish to harm the child; instead, the individual wants to raise a child but is unable to have a child of his or her own. Clearly, in such a situation, the Commonwealth would have presented a prima face case of criminal attempt to interfere with the custody of a child despite the fact that the individual did not say or do anything to entice the baby to the window and did not have any actual physical contact with the baby.

What makes this case a close question is that the director of the daycare testified that the defendant stated that he wished to "see" his son; he did not say anything to her about picking up or taking his son. However, Trooper Park testified at the preliminary hearing that the defendant made a statement to him that "he was picking his son up because he thought he was allowed to." Preliminary Hearing Transcript, at 19. This statement is some evidence that the defendant was not present at the daycare merely to see his son or verify his well-being but that the defendant intended to take his son from the daycare.

Furthermore, the defendant arguably lied when he told the director that he had

paperwork which permitted him to see his son. When viewed in the light most favorable to the Commonwealth, such evidence could be considered consciousness of guilt. The custody order did not permit the defendant to have any contact with his son absent the approval and supervision of the child's mother. While PFA orders were alluded to in the testimony presented at both hearings, no one introduced any PFA order into evidence. Therefore, the court does not know whether the PFA order granted temporary custody of the child to the defendant or if it merely precluded the mother's boyfriend from abusing the child or having any contact with him. Therefore, based on the evidence before the court, the Commonwealth presented a prima facie case of attempted interference with the custody of a child.

The court also finds that, absent an agreement by the parties, the proper grading of the offense is an issue for trial. The typical grading for the offense is a felony of the third degree. 18 Pa. C.S. §2904(c). Defense counsel argued that this offense should be graded as a misdemeanor of the second degree because the child is the subject of a valid custody order, the defendant was granted partial custody or visitation in the order, and the defendant is a resident of this Commonwealth and did not remove the child from the Commonwealth, which meets all the requirements of (c)(2). This argument, however, ignores the initial language of (c)(2), which requires that Defendant acted with "good cause." There is insufficient evidence in the record to determine that there are no genuine issues of fact that the defendant acted with good cause. Again, while there are vague references to a PFA order of which the child was a protected party, there are not sufficient details about the PFA in the record to determine whether the defendant was in fact acting with good cause, assuming such a determination could be made at the preliminary hearing stage of the

proceedings. The court does not know when the PFA order was issued, what circumstances caused its issuance, or what relief it provided.[1]

ORDER

AND NOW, this ___ day of November 2018, upon consideration of the defendant's Omnibus Pretrial Motion, it is ordered and directed as follows:

1. With respect to the motion to compel discovery, specifically paragraphs 12, 14, 16, 17 and 21, related to documents related to any incident at the daycare on March 21, 2018 (the day before the defendant was arrested at the daycare), written communications between the daycare and the defendant or members of his family, prison phone calls, PSP calls, and video surveillance from the daycare and adjacent businesses on March 21 and 22, the court will grant these requests. The Commonwealth shall determine whether any of the requested items exist and within 30 days must either provide the requested items to defense counsel or notify defense counsel that such documents do not exist.

2. With respect to the defendant's request for advance notice of any evidence the Commonwealth intends to introduce pursuant to Pa. R. E. 404(b), such was already addressed in the Order dated April 23, 2018. Consistent with that order, no later than the pretrial date, the Commonwealth must file a 404(b) motion requesting admission of any 404(b) evidence the prosecutor intends to introduce at trial.

3. The court denies the defendant's requests for habeas corpus relief.

[1] If the order awarded the defendant temporary custody of the child, he should provide a copy to the Commonwealth so that this case can be resolved as soon as possible. The court doubts that the Commonwealth would be pursuing this case, let alone a felony grading, if the PFA order awarded temporary custody of the child to the defendant.

4. The court denies the defendant's motion to amend the grading of the offense to a misdemeanor of the second degree. Under the circumstances of this case, the proper grading of the offense is an issue for trial.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)
Donald F. Marino, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file