

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-2141-2017; CR-275-2018
 :
 EUGENE CLAY, : Opinion and Order re Commonwealth's
 Defendant : Motion to Consolidate

OPINION AND ORDER

This matter came before the court on the Commonwealth's motion to consolidate the above-captioned cases.

Under Information 275-2018, the defendant is charged with two counts each of delivery of a controlled substance, possession with intent to deliver a controlled substance, possession of a controlled substance and criminal use of a communications facility arising out of a confidential informant (CI) allegedly making controlled buys of heroin from the defendant on November 15, 2017 and November 21, 2017. The CI arranged the purchases of heroin by calling (570)-447-8434 and speaking with the defendant.

On November 15, 2017, the CI called the defendant to purchase heroin, and the defendant told the CI to meet him at the Rite Aid on Market Street in Williamsport. The CI drove to the Rite Aid and entered the defendant's white Ford SUV with registration number KHP2820. Once inside the vehicle, the CI handed the defendant \$80, and the defendant handed 10 blue waxen bags of heroin to the CI. The bags were stamped with a "Sunoco" sign.

On November 21, 2017, the CI called the defendant, who told the CI to meet him at the Lycoming Mall. The CI drove to the mall and parked about five stalls away from

the defendant's white Ford Escape. The CI called the defendant. The defendant, who was inside the mall, asked the CI if he wanted to "go inside." When the CI said no, the defendant asked the CI if the CI could see the defendant's car. The CI told the defendant he could see the defendant's white Ford Escape about five stalls away from the CI's vehicle. The defendant then came out of the mall, entered the CI's vehicle, and counted out 20 bags of heroin. The defendant handed the bags of heroin to the CI, and the CI handed the defendant \$160.

Under Information 2141-2017, the defendant is charged with possession with intent to deliver controlled substances, tampering with or fabricating evidence, possession of a controlled substance, and possession of drug paraphernalia. On December 6, 2017, Officer Clinton Gardner of the Williamsport Bureau of Police was conducting surveillance of the defendant at the Uni-Mart at the corner of 6th Avenue and High Street, which is a high drug trafficking area. Officer Gardner followed the defendant's vehicle to the Memorial Avenue Townhouses, where the defendant parked. Officer Gardner drove past the buildings but backed up several seconds later to observe the defendant's activities as he prepared to exit his vehicle, a white Ford Escape with registration number KHP2820. Due to having prior information regarding the defendant's drug trafficking activities, the defendant's movements in the console area of his vehicle, his reactions to seeing Officer Gardner, and the defendant's efforts to "disassociate himself" from the vehicle, Officer Gardner suspected that controlled substances may be in the vehicle. He called for a canine unit. Once the defendant went inside Apartment 302, Officer Gardner and Corporal Eric Derr, who had arrived as

back up, went over to the defendant's vehicle, and observed in plain view a black rubber band, which they knew from their training and experience is commonly used in the packaging of heroin. Shortly thereafter, Officer Devin Thompson of the South Williamsport Police Department arrived on the scene with his drug detection dog, Dany. Dany alerted on the driver's side of the vehicle. The police searched the vehicle and discovered numerous additional packaging bands as well as five blue waxen bags of heroin. The bags were stamped with "Sunoco". Additional identically packaged controlled substances were found in a garbage can located outside of Apartment 302. The police obtained a search warrant for the vehicle and inside the vehicle they discovered a Kyocera cellular phone with the number 570-447-8434.

Rule 582 of the Pennsylvania Rules of Criminal Procedure, which governs the consolidation of separate informations, states:

Offenses charged in separate indictments or informations may be tried together if:

- (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
- (b) the offenses charged are based on the same act or transaction.

Pa. R. Crim. P. 582(A)(1).

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. Pa.R.E. 401. "All relevant evidence is admissible, except as otherwise provided by law." Pa. R. E. 402. Although evidence of a crime, wrong or other act is not admissible to prove a person's character to show that the person acted in accordance with the character, such evidence is admissible for

other purposes such as proving motive, intent, knowledge, plan, identity, or lack of accident. Pa.R.E. 404(b). For this type of evidence to be admissible in a criminal case, the probative value of the evidence must outweigh its potential for unfair prejudice. Pa.R.E. 404(b)(2). “Unfair prejudice means a tendency to suggest a decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.” Pa. R. E. 403, comment.

The court finds that the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion. At a minimum, the evidence would be admissible to show identity, intent, and knowledge or lack of accident.

The vehicle, the cell phone, and the heroin packaging were the same in both cases. The first delivery occurred inside a white Ford SUV with registration KHP2820. The same vehicle was at the mall at the time of the second delivery and the defendant referred to it to meet the CI in the mall parking lot. On December 6, 2017, Officer Gardner saw the defendant driving this vehicle. He ran the registration and it came back to the defendant. Furthermore, when Officer Gardner and Corporal Derr were looking at the vehicle, the defendant yelled to them, “What are you guys doing with my car?”

The CI called cell phone number 570-447-8434 to purchase heroin from the defendant on November 15 and 21. The cell phone with that number was found inside the defendant’s vehicle on December 6, 2017.

The heroin delivered to the CI was packaged in blue waxen bags stamped with

“Sunoco”. The bags of heroin found in the defendant’s vehicle and in the trash outside Apartment 302 were packaged in the same manner.

On November 15, 2017, another person was in the vehicle with the defendant. On December 6, 2017, the defendant met with another person and went behind Apartment 302 where the trash was located. The defendant may try to argue that the “other person” on each of those occasions was the one who possessed the bags of heroin and delivered them to the CI or placed them in the trash. The other person, however, was not present for the delivery on November 21, 2017. In all three incidents, the heroin is packaged in the same manner. The “other crimes” evidence is relevant to show the identity of the person who possessed the heroin and either delivered it to the CI or placed it in the trash. It is relevant to show that the defendant possessed the heroin on December 6, 2017 with the intent to deliver it. It is also relevant to show that the defendant was aware that the bags contained heroin and that the defendant was the individual on the phone with the CI.

The evidence is readily capable of separation by the jury. These cases occurred on separate dates and involved different law enforcement officers. There were two deliveries in case 275-2018. The buys were conducted under the direction of the Lycoming County Narcotics Enforcement Unit. According to the affidavit of probable cause, the witnesses and participants in the delivery that occurred on November 15, 2017 were the CI, Detective Burns, Detective Rachel, and Detective Kent. The witnesses and participants in the delivery that occurred on November 21, 2017, were the CI, Detective Burns, Detective Cashera, and Detective Dent. The incident at issue in case 2141-2017 occurred on December

6, 2017 and involved Officer Gardner, Corporal Derr, and Officer Thompson.

Accordingly, the following Order is entered.

ORDER

AND NOW, this ___ day of September 2018, the court grants the Commonwealth's motion to consolidate.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire(ADA)
Mary Kilgus, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work File