

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:
	:
vs.	: No. MD-358-2018
	:
RICHONNE JOHNSON,	: Commonwealth's Motion to Assign
Defendant	: Different Issuing Authority

OPINION AND ORDER

Before the court is the Commonwealth's Motion to Assign a different issuing authority. The Commonwealth contends that the defendant was charged, among other things, with simple assault. A preliminary hearing was held before MDJ Allen Page on June 21, 2018. On June 26, 2018, MDJ Page dismissed the case concluding that "prima facie [was] not established."

In its motion, the Commonwealth contends that "MDJ Page erred as a matter of law by *sua sponte* raising an affirmative defense and employing it in a determination guilt or innocence." At the argument on its motion, the Commonwealth also argued that reassignment was needed to ensure fair and impartial proceedings and to promote the efficient administration of justice.

The charge against the defendant was refiled on July 2, 2018. The Commonwealth now requests that a judge of the court of common pleas be assigned the case to sit with concurrent jurisdiction and preside over a preliminary hearing or, in the alternative, that the court assign a different MDJ to conduct the preliminary hearing. The Commonwealth argues that a judge of the court of common pleas should be assigned the case

to ensure fair and impartial proceedings or to otherwise promote the efficient administration of justice. The Commonwealth specifies that in addition to the potential for confusion of the legal issues central to the case, the issuing authority to whom the case is “reassigned” will need to decide a motion to set bail and a motion to allow testimony by contemporaneous alternative methods.

Argument on the Commonwealth’s motion was held on July 18, 2018.

Rule 132 of the Pennsylvania Rules of Criminal Procedure permits the president judge to temporarily assign the issuing authority of any magisterial district to serve another magisterial district whenever any such assignment is needed to, among other things, ensure fair and impartial proceedings, conduct a preliminary hearing or otherwise for the efficient administration of justice.

This Rule was intended to cover what might otherwise be referred to as a change of venue at the magisterial district level. Pa. R. Crim. P. 132, comment; *Sufrich v. Commonwealth*, 68 Pa. Cmwlth. 42, 447 A.2d 1124 (1982).

Neither party disputes that a judge of a court of common pleas has the power of a judge or a magisterial district judge of the minor judiciary. 42 Pa. C.S. §912. Judges of the court of common pleas have concurrent jurisdiction as issuing authorities with the magisterial district judges of each magisterial district within their judicial districts. *Commonwealth v. Ritter*, 268 Pa. Super. 563, 408 A.2d 1146, 1147 (1979); *Commonwealth v. Allem*, 367 Pa. Super. 173, 532 A.2d 847, 850 (1987).

“[T]he president judge of a court of common pleas is designated as the

executive and administrative head of the court of common pleas and is specifically empowered to make all judicial assignments.” *Allem, id*; 42 Pa. C.S.A. §325(e).

The president judge of Lycoming County is the Honorable Nancy L. Butts. She designated the undersigned to address the Commonwealth’s motion in this case. See Pa. R. Crim. P. 544(B).

The powers over the assignment of issuing authorities are plenary. *Allem, id*. The only limitation of such discretion with respect to a request for a temporary assignment is that the parties must be given notice and an opportunity to be heard. *Id*.

This court will exercise its plenary discretion by granting in part and denying in part the Commonwealth’s motion.

At this time, the court does not see any reason for a judge of the court of common pleas to preside over the preliminary hearing in this matter. The issues are far from either factually or legally complex. This is a straightforward simple assault case against a parent. The parties amicably resolved the motion to allow testimony by alternative means, and MDJs routinely conduct preliminary hearings and set bail, including imposing conditions precluding or limiting contact with victims and witnesses. The Commonwealth has failed to convince this court that assigning the case to a judge of the Court of Common Pleas sitting as an issuing authority would better ensure a fair or impartial proceeding or otherwise benefit the efficient administration of justice.

The court also rejects the Commonwealth’s assertion that an MDJ errs as a matter of law whenever he or she considers facts related to a defense. By rule, a defendant is

permitted to cross-examine the Commonwealth's witnesses, as well as call witnesses and offer evidence on his own behalf. Pa. R. Crim. P. 542(C). The purpose of this rule is to give the defendant the opportunity to negate the existence of a prima facie case. Pa. R. Crim. P. 542, comment. Undisputed facts that show a justification defense can negate a prima facie case. For example, suppose that the Commonwealth charges a defendant with homicide. During the preliminary hearing, the Commonwealth's sole witness testifies that the defendant pointed a gun at the victim, pulled the trigger, and shot the victim in the chest, killing the victim. On cross examination, however, the Commonwealth's witness admits that the defendant only fired his weapon in an immediate response to the victim pulling out a firearm and shooting at the defendant. Such facts would negate the existence of a prima facie case for homicide. Although there was a killing, it was not an unlawful one.

Like self-defense, section 509 of the Crimes Code provides a justification defense. Section 509 provides a justification defense to the use of force by persons with special responsibility for care, discipline or safety of others, which includes parental discipline of a minor child. 18 Pa. C.S. §509(1). The Commonwealth does not dispute that the defendant is the victim's father or that the charges relate to an incident where the victim was spanked with a belt. The Commonwealth, however, does not believe what the child did was "misconduct" that deserved the use of force, and, in any event, believes that the amount of force used was excessive. The court is not saying one way or another whether the defense applies in this case. In most cases, such an issue would be a factual question for the jury. The court is only saying that there are situations where the additional facts, evidence or

testimony presented by the defendant clearly establish a defense such as justification which negates the Commonwealth's prima facie case and, absent some additional information to show a factual dispute, consideration of the defense and dismissal of the charges by the MDJ is appropriate.

This court must consider the fairness and impartiality of MDJ Page.

Commonwealth v. Thorpe, 549 Pa. 343, 701 A.2d 488 (1997). There is no evidence that MDJ Page had a predisposition to dismiss the case or favor the defense over the prosecution. There is no evidence that MDJ Page was biased in making his determination that the Commonwealth failed to prove a prima facie case. In fact, the Commonwealth failed to present any evidence, such as a preliminary hearing transcript or "record before the MDJ," so that the court could at least review such to determine if MDJ Page was biased against the Commonwealth.

Additionally, the contention that MDJ Page improperly advanced an affirmative defense is based on speculation and conjecture. MDJ Page was not called as a witness, nor was his written decision ever attached as an exhibit for the court to consider. The Commonwealth surmises that MDJ Page based his decision on an affirmative defense based on a conversation the first assistant district attorney had with MDJ Page. The conversation, however, was not memorialized in writing or otherwise; nor was it testified to by any party to it. The arguments or statements of counsel are not evidence. *See Commonwealth v. LaCava*, 542 Pa .160, 182, 666 A.2d 221, 231 (1995).

Next, the court must consider whether there are any due process concerns,

which require the reassignment notwithstanding MDJ Page's impartiality. *Thorpe*, supra. The court finds that there are due process concerns to warrant the assignment of a different MDJ.

The Commonwealth may present its case again even after it has initially failed to present a prima facie case. *Liciaga v. Court of Common Pleas*, 523 Pa. 258, 566 A.2d 246 (1989).

Typically, the Commonwealth obtains additional evidence before proceeding with another preliminary hearing or the refile of the charges, but such is not required. *Liciaga*, 566 A.2d at 249 ("a determination that the Commonwealth has failed to establish a prima facie case does not preclude a reassessment of that judgment before another district justice either by presenting the same evidence or by presenting a case with additional evidence"). The court believes the Commonwealth indicated that it does not intend to present additional evidence.

The Commonwealth believes, however, that the child victim's testimony may be somewhat different because the Commonwealth contended that the child was intimidated by the whole situation, particularly by having to testify in the presence of the defendant. Defense counsel also had concerns with the child's testimony during first preliminary hearing, but asserted that the child's mother "coached" the child during the preliminary hearing by mouthing answers to her. As a result, the parties reached an agreement that the child could testify by alternative means outside of the presence of the defendant. The parties also agreed that the child's mother would not be in the room with her while she testified, but that the child's therapist and defense counsel would be present. In light of the fact that the Commonwealth will be presenting the same evidence but that the child's testimony could change somewhat once she is outside of the presence of both of her parents, the court finds that it would be

appropriate to assign a different MDJ to conduct the preliminary hearing on the re-filed charges. In addition, the parents of the child victim shall not discuss this case or the children's testimony with her. Counsel for the parties shall instruct the parents accordingly.

ORDER

AND NOW, this ____ day of August 2018, following a hearing and argument, the Commonwealth's Motion to Assign a different issuing authority, to set bail or to permit testimony by contemporaneous alternative methods is **DENIED** in part and **GRANTED** in part. The court DENIES the Commonwealth's motion to assign a judge of the court of common pleas to conduct the preliminary hearing on the re-filed charges. The court will, however, assign a different MDJ. The court assigns MDJ Christian Frey as the issuing authority to preside over the preliminary hearing on the re-filed charges and to decide the issue of bail. The court will grant the Commonwealth's motion to permit testimony by contemporaneous alternative methods. This is upon agreement of the parties. In addition, given the concerns raised by both parties regarding the parents' influence over the child's testimony at the first preliminary hearing and the opportunity for them to otherwise affect the child's testimony, the court, *sua sponte*, directs counsel for the parties to instruct the child's parents not to discuss her testimony or this case with her.

By The Court,

Marc F. Lovecchio, Judge

cc: Neil T. Devlin, Esquire (ADA)
Andrea P. Pulizzi, Esquire
Christian Frey, MDJ
Allen Page, MDJ
Work file
Gary Weber, Esquire, Lycoming Reporter