

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CR-1020-2019
	:	CR-742-2008
v.	:	
	:	
COLIN BEST,	:	MISCELLANEOUS MOTIONS
Defendant	:	

OPINION AND ORDER

Colin Best (Defendant) filed a Request for Bail Modification on September 24, 2018, a Request for Discovery on September 24, 2019, a Request for a Bill of Particulars on September 24, 2019, a Motion to Suppress in Court Identification on October 1, 2019, a Petition for Emergency Special Relief and to Order Compliance with Pennsylvania Rules of Criminal Procedures 572 and 573 or Dismiss Information on October 1, 2019, a Motion to Quash and/or Writ of Habeas Corpus on October 2, 2019, a Motion to Dismiss Counts One(1) & Two(2) on October 7, 2019, and a request for transcripts on November 22, 2019.¹ A hearing on Defendant's motions was held on December 12, 2019.

At the outset this Court will address each of the motions above and layout what relief is actually being requested and/or needed. Defendant's Request for Bail Modification shall be scheduled in front of Judge Marc F. Lovecchio, as he was responsible for originally modifying Defendant's bail in CR-1020-2019 on August 26, 2019 and denying him bail under CR-742-2008 on October 29, 2019. Paragraphs one through seven of Defendant's motion pertains to CR-742-2008 and the remainder pertains to CR-1020-2019. Defendant's Request for Discovery and Request for Bill of Particulars were addressed at the time of the hearing and at that time no outstanding issues existed with either Motion. Defendant's Motion to Suppress in Court

¹ Defendant was permitted to proceed with his case *pro se* and was appointed stand-by counsel, Helen Stolin, Esq., on September 20, 2019, by Judge Marc F. Lovecchio. All above mentioned filings were submitted after that date *pro se*.

Identification asks the Court to find that the in-court identification of Defendant at the preliminary hearing was unduly suggestive and the identification of him as the suspect is based on mere presence. Additionally, the Motion asks for an independent review of the record, which this Court shall treat as a Petition for Writ of Habeas Corpus. This Motion shall be addressed in depth below. Defendant's Petition for Emergency Special Relief and to Order Compliance with Pennsylvania Rules of Criminal Procedures 572 and 573 or Dismiss Information seeks dismissal of Defendant's charges, alleging that the Commonwealth failed to satisfy his Request for Discovery and Request for Bill of Particulars. As stated above at the time of the hearing, both motions had already been addressed, and therefore this Court dismisses Defendant's Motion Petition for Emergency Special Relief and to Order Compliance with Pennsylvania Rules of Criminal Procedures 572 and 573 or Dismiss Information. Defendant's Motion to Quash and/or Writ of Habeas Corpus requests this Court to find sufficient evidence was not presented at the preliminary hearing, which will be addressed below. Defendant's Motion to Dismiss Counts One(1) & Two(2) reiterates the identification and Writ of Habeas Corpus issue above, which shall be addressed below. Defendant's request for transcripts asks for transcripts only pertaining to his probation violation under CR-742-2008, which is separate to the present case under CR-1020-2019 and therefore his request is denied.

Background and Testimony

At the hearing on the motions, the Commonwealth presented the testimony of Detective William Weber (Weber) of the Lycoming County District Attorney's Office. In addition, the Commonwealth submitted the surveillance video from Kohl's (Video), a transcript of

Defendant's preliminary hearing, and three still frame pictures taken from a video, which was found on Defendant's cellphone.

Preliminary Hearing Testimony

At the preliminary hearing, Vickie Dgien (Vickie), Nicole Dgien (Nicole), and Kohl's Loss Prevention Officer Erica Cormier (Cormier) testified on behalf of the Commonwealth. On May 26, 2019 Vickie was with her daughters, including Nicole, at Kohl's department store in Williamsport, Pennsylvania. P.H. 7/11/19, at 3. That night Vickie was in the dressing room area with her daughters who were trying on bathing suits. *Id.* at 4. While in the dressing room area a gentleman came in and entered his own dressing room. *Id.* at 4-5. Vickie saw a phone come up over top of the dressing room front door, which she assumed was the man taking a selfie. *Id.* at 5. Nicole, who was in one of the dressing rooms at the time, saw a phone in the reflection of her mirror with the camera portion over the top of her stall. *Id.* at 11. She then said "hello" and the phone disappeared. *Id.* at 12. Nicole then pulled her top up and went to the door of the stall next to her and waited for an individual to come out. *Id.* A gentleman then came out of the changing room and Nicole asked him if he took a picture of her, which he stated "no" and left the dressing room area. *Id.* While in a dressing room with one of her daughters, Vickie heard Nicole say "did you just take a picture of me very loudly." *Id.* at 5. Nicole identified the gentleman as Defendant at the preliminary hearing. *Id.* at 12. Cormier testified there is no men's clothing near the dressing rooms where Nicole and Vickie were trying on items that day, but the changing rooms are unisex. *Id.* at 15, 20. Defendant was the only male seen going into that dressing room area during that time frame and was carrying the same pair of jeans on both occasions when he walked into the area. *Id.* at 20.

Kohl's Video

Defendant with a reddish beard and ball cap is seen entering Kohl's. Video at 6:45:50. About ten minutes later Defendant is seen walking towards and entering the dressing area in the misses' section with a pair of jeans. *Id.* at 6:58:50. He walks in one side of the dressing area, out the other, and then turns back around and exits. *Id.* at 6:59:05. Sometime later, Defendant is seen walking back with the same pair of jeans again towards the misses' dressing rooms area. *Id.* at 7:25:20. Twelve minutes later, Defendant is seen walking out of the dressing room area quickly and looking back at the dressing room area. *Id.* at 7:37:25. Defendant then throws the jeans down on the nearest table. *Id.* at 7:37:30. Once outside Defendant, began running back to his vehicle. *Id.* at 7:37:58.

Testimony of Weber

Defendant was stopped in Toms River, New Jersey for committing similar acts. The authorities in Toms River seized Defendant's cellphone and iPad. From Defendant's cellphone, Weber received a video, which contained a video of the alleged incident. Commonwealth's Exhibits #1, #2, and #3 are still frame photographs taken from that video. Commonwealth's Exhibit #1 is a photograph of Defendant with his phone in his hands catching his reflection back in the changing room mirror. Commonwealth's Exhibit #2 is a photograph of one of the alleged victims, H.D., taken from above the divider of a changing room. H.D. is wearing a bikini in the photograph and is facing away from the cellphone. Commonwealth's Exhibit #3 is a photograph of Nicole looking into the mirror back at the cellphone. Nicole is wearing a bathing suit top in the photograph. H.D. was fifteen years old at the time of the incident and Nicole was twenty-four years old.

Writ of Habeas Corpus

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove Defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused likely committed the offense. *Id.* Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001). “A *prima facie* case in the criminal realm is the measure of evidence, which if accepted as true, would warrant the conclusion that the crime charged was committed.” *Commonwealth v. MacPherson*, 752 A.2d 384, 391 (Pa. 2000). While the weight and credibility of the evidence are not factors at this stage and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. *Commonwealth v. Ripley*, 833 A.2d 155, 159-60 (Pa. Super. 2003). Moreover, “inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.” *Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003). An individual has committed the offense of Invasion of Privacy when

for the purpose of arousing or gratifying the sexual desire of any person, knowingly . . . [p]hotographs, videotapes, electronically depicts, films or otherwise records or personally views the intimate parts, whether or not covered by clothing, of another person without that person's knowledge and consent and which intimate parts that person does not intend to be visible by normal public observation.

18 Pa. C.S. § 7507.1(a)(2).

Intimate parts of an individual as described by statute are “[a]ny part of: (1) the human genitals, pubic area or buttocks; and (2) the nipple of a female breast.” 18 Pa. C.S. § 7507.1(e).

The Commonwealth has charged Defendant with two counts of Invasion of Privacy. The counts stem from the photographing/filming of Nicole and H.D. Defendant argues that the Commonwealth has failed to prove that the photographing/filming was for the arousal or gratification of a sexual desire, has failed to demonstrate he photographed/video recorded their intimate parts, and the Commonwealth has failed to demonstrated he committed the photographing/filming. None of Defendant’s arguments are of merit. First the Court will analyze Defendant’s argument that the Commonwealth’s failed to demonstrate arousal or gratification of a sexual desire. When viewing reasonable inferences in a light most favorable to the Commonwealth, Defendant walking into the changing room nearest to the misses’ section, putting his phone over the divider and into another’s stall to film young females in their changing rooms, and hastily exiting after being confronted for his behaviors, all demonstrate Defendant acted with the intent to arouse or gratify his sexual desires. Next, Defendant’s argument that the Commonwealth failed to demonstrate “intimate parts” is similarly misplaced. It is clear from Commonwealth’s Exhibits #2 and #3 and the testimony of Weber that Defendant filmed Nicole and H.D. while in their changing rooms where they did not intend to be visible to the normal public. Additionally, it is irrelevant if Defendant only filmed them while they were clothed, because the statute clearly states “whether or not covered.” 18 Pa. C.S. § 7507.1(a)(2). Nicole was trying on bathing suit tops, which covers intimate parts and H.D. was trying on bathing suit tops and bottoms, which cover intimate parts. Lastly, Defendant’s contention that the Commonwealth failed to demonstrate he committed the acts is also meritless. Cormier testified that Defendant was the only male that

went into that dressing area during that time frame, which is verified by the surveillance. P.H. 7/11/19, at 20. Nicole testified on the day in question she confronted the man outside of the dressing room face to face and she identified that man as Defendant. *Id.* at 12. Surveillance shows Defendant going into the changing at the time of the alleged incidents and fleeing quickly afterwards, and physically running to his vehicle once he got outside of Kohl's. Video at 7:25:20-37:50. Additionally, the still frame photographs of the video taken from Defendant's phone clearly shows Nicole in her dressing room, H.D. in her dressing room, and Defendant in his dressing room through the reflection in the mirror. Therefore Defendant's request for Writ of Habeas Corpus as raised in many of his motions is denied.

Motion to Suppress in Court Identification

Defendant claims that Nicole's in-court identification of him at the preliminary hearing was unduly suggestive as he was handcuffed, in a prison uniform, and the sole individual at defense table with his attorney at the time. In evaluating the reliability of a pretrial identification a court must consider a totality of the circumstances. *Commonwealth v. Steward*, 775 A.2d 819, 828-29 (Pa. Super. 2001). "A pre-trial identification violates due process only when the facts and circumstances demonstrate that the identification procedure was so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification." *Commonwealth v. Johnson*, 139 A.3d 1257, 1278 (Pa. 2016). Yet, such suggestiveness will be overcome and the "subsequent in-court identification will be admissible if there exists an independent basis for the identification." *Commonwealth v. Abdul-Salaam*, 678 A.2d 342, 349 (Pa. 1996). In evaluating the sufficiency of a witness's independent basis a court must consider:

- (1) the opportunity of the witness to view the suspect at the time of the offense;
- (2) the witness' focus or attention upon the suspect; (3) the accuracy of the

witness' description of the suspect; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation

Johnson, 139 A.3d at 1278-79.

In Defendant's Motion he relies heavily upon *Commonwealth v. McGaghey*. In *McGaghey*, the victim was assaulted by a group of individuals in a parking lot. *Commonwealth v. McGaghey*, 507 A.2d 357, 358 (Pa. 1986). A black male came up from behind him, after he fell to the ground and took his wallet. *Id.* The entire incident lasted approximately one minute, but the victim only had the opportunity to view the black male for approximately two seconds. *Id.* The incident did not occur in a well-lit area and the victim had about eight mugs of beers prior to it occurring. *Id.* The victim identified the individuals as "younger people" wearing "dark clothing." *Id.* The defendant in the case was brought in and never identified prior to his preliminary hearing, which occurred one and a half months later. *Id.* at 359. The defendant was brought into the preliminary hearing and was seated at defense table, shackled, and the only black man in the room. *Id.* The Pennsylvania Supreme Court considered the following factors: that the victim never saw the black male prior to the assault; that he only observed the individual for two seconds; that he had been drinking; and that his description to police was vague. *Id.* at 359-60. Based on these facts the Court found the in-court identification was a result of the preliminary hearing and not the incident itself. *Id.* at 360.

This Court agrees with Defendant that the circumstances of the pretrial identification were suggestive, but finds that Nicole had an independent basis for her identification. Nicole testified to her face to face encounter with the individual outside the changing rooms in Kohl's. P.H. 7/11/19, at 12. She had not seen the man before that night. *Id.* The man was described to police as a white male with a reddish tinted beard. Affidavit of Probable Cause 7/3/19, at 2.

Nicole's identification of Defendant occurred approximately forty-six days after the alleged incident. The Court finds that although some of the above facts are in line with *McGaghey*, important facts are not. When viewing the factors, Nicole had opportunity to view Defendant at the time of the offense and even confronted Defendant face to face as he was coming out of his dressing room. *See Commonwealth v. Wheeler*, 541 A.2d 730, 734 (Pa. Super. 1988) (when witness was "standing but a few feet from the shooter when the crime took place, and that she observed his face at least momentarily" court found an independent basis); *Johnson*, 139 A.3d at 1279 (when witness "was able to observe [the defendant] at all of the critical points on the night in question, albeit for brief periods of time" court found an independent basis). As opposed to, only seeing an individual for mere seconds when he approaches from behind. *See McGaghey*, 507 A.2d at 358. The witness had the right conditions to focus on Defendant, as the department store was well-lit and nothing in the record indicates her attention would have been hindered, as opposed to, being in a dimly-lit area after imbibing copious amounts of alcohol. *See id.* Defendant at the time was a white male with a reddish tinted beard, which matches the description given. No hesitation in identifying Defendant is apparent from the transcript of the preliminary hearing and instead Nicole's identification of Defendant is direct and clear. Lastly, the Court finds the period of time between the crime and confrontation, forty-six days, is not overly cumbersome as to affect Nicole's identification of Defendant taken in consideration of the other factors above. Based on the foregoing the Court denies Defendant's Motion to Suppress in Court Identification.

Conclusion

This Court finds the Commonwealth has presented enough evidence to establish a *prima facie* case, and Nicole had a sufficient independent basis for identifying Defendant,

therefore Defendant's Petition for Writ of Habeas Corpus and Motion to Suppress in Court Statements are denied.

ORDER

AND NOW, this 31st day of December, 2019, based upon the foregoing Opinion, this Court finds the following:

- Defendant's Request for Bail Modification is to be scheduled back in front of Judge Lovecchio.
- Defendant's Request for Discovery has been satisfied and is therefore **DISMISSED**.
- Defendant's Request for a Bill of Particulars has been satisfied and is therefore **DISMISSED**.
- Defendant's Motion to Suppress in Court Identification is hereby **DENIED**.
- Defendant's Petition for Emergency Special Relief and to Order Compliance with Pennsylvania Rules of Criminal Procedures 572 and 573 or Dismiss Information has been satisfied and is therefore **DISMISSED**.
- Defendant's Motion to Quash and/or Writ of Habeas Corpus is hereby **DENIED**.
- Defendant's Motion to Dismiss Counts One(1) & Two(2) is hereby **DENIED**.
- Defendant's request for transcripts is hereby **DENIED**.

BY THE COURT,

Nancy L. Butts, P.J.

cc: DA (JR)
Colin Best
Lycoming County Prison
April McDonald, Court Scheduling

NLB/kp