

COMMONWEALTH OF PA : No. CP-41-CR-0001950-2018
:
vs. :
: Opinion and Order re:
RASHEEM JOHNSON : Defendant's Omnibus Pretrial Motion

OPINION AND ORDER

Defendant is charged by Information filed on January 7, 2019 with criminal attempt to deliver a controlled substance, possession of a controlled substance and criminal use of a communications facility.

In his Omnibus Pretrial Motion filed on February 15, 2019, Defendant argued that the evidence is insufficient to establish count 1, criminal attempt, delivery of a controlled substance, cocaine. A hearing and argument was held on April 11, 2019. The Commonwealth introduced a transcript from a November 29, 2018 hearing on Defendant's Petition for return of property. Defendant subsequently provided a transcript of the preliminary hearing.

Viewing the evidence in a light most favorable to the Commonwealth, on July 5, 2018, Officer Joshua Bell and Officer Clinton Gardner of the Williamsport Bureau of Police were operating an unmarked police vehicle and at approximately 8:30 p.m. observed two males walking back and forth from the intersection of Park Avenue and First Avenue to the area of 821 Park Avenue. One of those males was identified as a Mr. Dogan. The officers were familiar with Mr. Dogan and knew him to be a narcotics trafficker. They also knew Park Avenue and First Avenue to currently be a high narcotics trafficking area. They made numerous cocaine and heroin related arrests in that area in the recent past.

Suspecting that the individuals were arranging a narcotics transaction, the officers remained in the area. Approximately thirty minutes later, they observed the second

male, later identified as the defendant speaking on his phone. As a vehicle passed the intersection and pulled to the one side of Park Avenue, the defendant hastily approached the rear passenger door and entered the vehicle. A traffic stop was subsequently conducted.

Contact was made with the operator, Jeremy James and the front seat passenger Lisa Karbusky. Neither of these individuals knew the defendant's name stating they knew him as "Gray." Both claimed to know the defendant for "a couple years."

The defendant exited the vehicle upon request by the officers. One of the defendant's cell phones was left on the rear seat. A consent search was conducted of the defendant in which the police located two different "wads of cash." In total, the defendant was found in possession of \$1,926.00 in U.S. currency with \$100, \$50, \$20, \$10 and \$5 denominations. The defendant advised the officers that he was not employed.

Karbusky was interviewed and advised that she had contacted the defendant earlier that date and requested an eight-ball of cocaine for \$210.00. In speaking with the defendant, he directed them to First Avenue and Park Avenue where he entered the vehicle and advised Karbusky that she would need to drive him to his residence to pick up the cocaine.

Karbusky indicated that she had purchased narcotics from the defendant in the past. She showed the officers the call log containing the number and showed the police that she had conversed with the defendant approximately ten minutes prior to the interaction observed by the police.

At the time, the defendant's cell phone number was listed on Karbusky's phone. A call was made from Karbusky's phone to the defendant's phone. When the defendant's phone began ringing, the name "Lisa" appeared on the display, confirming the contact between Karbusky and the defendant and confirming Karbusky's statement to the officers.

After the defendant was taken into custody, he was also found in possession of one Suboxone strip.

A defendant may challenge the sufficiency of the evidence presented by the Commonwealth pretrial through the filing of a petition for writ of habeas corpus.

Commonwealth v. Predmore, 199 A.3d 925, 928 (Pa. Super. 2018). The burden of the Commonwealth at this stage is to set forth a *prima facie* case of defendant's guilt.

Commonwealth v. Nieves, 876 A.2d 423, 424 (Pa. Super. 2005). "A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense." *Id.* (citing *Commonwealth v. Huggins*, 836 A.2d 862, 865 (Pa. 2003)).

The evidence, if presented at trial and accepted as true, must be such that the trial judge would be warranted in permitting the case to be decided by the jury. *Nieves, id.* (citing *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001)); see also *Predmore*, 199 A.3d at 929. The evidence must be read in a light most favorable to the Commonwealth and inferences reasonably drawn from the evidence which would support a verdict of guilty must be given effect. *Nieves, id.*

When considering a challenge to the sufficiency of the evidence, any question of doubt is for the trier of fact, unless the evidence is so weak and inconclusive that as a matter of law, no probability can be drawn from the combined circumstances. *Commonwealth v. Kirkland*, 831 A.2d 607, 610 (Pa. Super. 2003).

A person commits an attempt when, with the intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime. 18 Pa. C.S.A. § 901. In order to prove the delivery of a controlled substance, the Commonwealth

must prove that one individual transferred possession of a controlled substance to another. 35 Pa. C.S.A. § 780-113(a)(30).

Accordingly, in order for the Commonwealth to prove that the defendant attempted to deliver a controlled substance, the Commonwealth must prove that the defendant intended to commit the crime of delivery of a controlled substance by transferring a controlled substance to others and that his conduct constituted a substantial step toward completing that crime.

In this particular case, the defendant argues that the Commonwealth has not established prima facie evidence that the defendant took a substantial step toward committing the crime of delivery of a controlled substance.

“The substantial step test broadens the scope of attempt liability by concentrating on the acts the defendant has done and does not any longer focus on the facts remaining to be done before the actual commission of the crime.” *Commonwealth v. Gilliam*, 417 A.2d 1203, 1205 (Pa. Super. 1980).

In this case, the court does not hesitate in concluding that the Commonwealth has established that the defendant took a substantial step toward delivering the controlled substances. Specifically, not only did he call the potential purchasers and arrange for a location in which to pick him up, but he also presented himself at the location, got in the vehicle and directed the potential purchasers to the defendant’s home where he could obtain the controlled substances.

ORDER

AND NOW, this ___ day of May 2019, following a hearing and argument, Defendant’s Omnibus Pretrial Motion is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Andrea Pulizzi, Esquire
District Attorney
Gary Weber, Lycoming Reporter
Work File