

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CP-41-CR-375-2019**
v. :
 :
TIMOTHY KELLY, : **OMNIBUS PRETRIAL**
Defendant : **MOTION**

OPINION AND ORDER

Timothy Kelly (Defendant) was arrested on February 22, 2019 on one count of Criminal Attempt, Delivery of a Controlled Substance,¹ one count of Possession of a Controlled Substance with the Intent to Deliver,² one count of Criminal Use of a Communication Facility,³ and one count of Possession of a Controlled Substance.⁴ The charges arise from an attempted controlled buy that occurred within Williamsport, PA. Defendant filed this Omnibus Pretrial Motion on April 24, 2019. A hearing on the motion was held by this Court on June 6, 2019. At the hearing, both the Commonwealth and Defendant agreed to rest on the contents of the transcript from the preliminary hearing held on March 5, 2019.

In his Omnibus Pretrial Motion, Defendant challenges whether a *prima facie* case has been established. Specifically, Defendant believes the Commonwealth has failed to establish that Defendant took a substantial step towards delivering the suspected heroin, that Defendant possessed the suspected heroin, that the suspected heroin was a controlled substance, and that Defendant used a communication facility for an improper purpose.

Background and Testimony

The Commonwealth provided a copy of the transcript from the preliminary hearing as an exhibit. At the preliminary hearing Detective Michael Caschera (Caschera) of the Lycoming

¹ 18 Pa. C.S. § 901(a).

² 35 P.S. § 780-113(a)(30).

³ 18 Pa. C.S. § 7512.

⁴ 35 P.S. § 780-113(a)(16).

County Narcotics Enforcement Unit (NEU) testified. Caschera has been in law enforcement for seven years and has been with the NEU for approximately two years. He worked over one hundred cases involving controlled substances and has had a variety of narcotics training. On February 22, 2019 Caschera was acting as an undercover officer. Based on his testimony the following was established.

Approximately a week prior to February 22, 2019, Caschera received information of a black male with dreadlocks that was selling heroin nearby the Shamrock Grill. N.T. 3/5/19, at 2. Caschera received the phone number for who he believed to be that individual, which he knew as “Craig.” *Id.* at 9. “Craig” then told Caschera that his “boy” would be calling him. *Id.* At some point Caschera received a group text message from an unknown number. *Id.* at 2. Caschera saved this number as “Craig’s boy.” *Id.* at 10. Caschera called “Craig’s boy” on February 22, 2019 to set up a controlled buy for \$100 worth of heroin. *Id.* at 2, 4. Caschera was then directed from the Wegman’s parking lot to High St., where he parked at the YMCA. *Id.* “Craig’s boy” then directed Caschera to walk south on Walnut St. *Id.* at 2-3. Defendant and Shyheem Gadson (Gadson) met Caschera on the street and Defendant initiated contact. *Id.* at 12. Both individuals were asking Caschera “who [he] was, how [he] got the number, how [he] knew them.” *Id.* at 3. Defendant then said he wanted to see his phone, which Caschera did not allow, but showed Gadson the number he called listed as “Craig’s boy.” *Id.* Caschera then pulled out \$100 of prerecorded funds, which Defendant told him to put away saying “are you trying to get us stopped?” *Id.* Caschera put the money away and at this point Defendant and Gadson were again asking to see his phone. *Id.* Caschera then decided to terminate the encounter and walk away, at which point Defendant yelled to get his attention and Defendant and Gadson were motioning for him to come back. *Id.* at 3-4. Caschera instead signaled to

Defendant and Gadson to call him and he returned to his vehicle. *Id.* at 5. When Caschera got back to his vehicle, he believes “Craig’s boy” attempted calling him back, but he was on the line with his unit. *Id.* Caschera’s unit then informed him that both individuals were back at an apartment building near the Shamrock Grill. *Id.* When Caschera drove by, Defendant and Gadson were motioning for him to stop and after Caschera circled the block again Defendant was in the street to stop Caschera. *Id.* Defendant got in Caschera’s front passenger’s side and Gadson got in the rear driver’s side. *Id.* Defendant was then directing Caschera where to drive and at one point pulled out two cellphones and stated “I don’t [want] your . . . fuckin phone, I got two, why would I need your, we are the drug dealers.” *Id.* at 6. Gadson pulled out, what Caschera in his training and experience believed was a bundle of ten to fourteen bags of heroin wrapped in a black rubber band, which Defendant told him to put it away. *Id.* at 6, 17. Defendant directed Caschera to turn down Thomas Alley and had him stop. *Id.* at 7. He then told Gadson “this is my boys place.” *Id.* Defendant directed Gadson to “get it out” and he pulled out the bundle of suspected heroin. *Id.* After Defendant told Caschera to use the heroin, he retreated from the car and saw Defendant and Gadson exit and go east through a nearby yard. *Id.* at 8, 18.

Both Gadson and Defendant were taken into custody approximately ten minutes later. *Id.* at 8, 28. Neither individual had heroin on them nor was any located in the immediate area. *Id.* at 20-21. Defendant had two cellphones on him, while Gadson had one. *Id.* at 20, 24. Defendant while being taken into custody stated “I don’t know anything about a drug deal, I didn’t have any heroin, I don’t know if the guy in the back did but I didn’t have any on me, I just wanted a ride to the store.” *Id.* at 8.

Whether the Commonwealth has Satisfied a *Prima Facie* Case of Probable Cause

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). *Prima facie* in the criminal realm is the measure of evidence, which if accepted as true, would warrant the conclusion that the crime charged was committed. 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).

Under 18 Pa. C.S. § 306(b)(3) an individual can be held liable for the actions of another when they act as an accomplice, otherwise known as acting “with the intent of promoting or facilitating the commission of the offense, he: solicits such other person to commit it; or aids or agrees or attempts to aid such other person in planning or committing it.” 18 Pa. C.S. § 306(c)(1). “A principal and his accomplice share equal responsibility for their criminal acts

and a charge for accomplice liability is proper even though defendant is charged in the indictment or information only as a principal.” *Commonwealth v. Munchinski*, 585 A.2d 471, 482 (Pa. Super. 1990). There is no error by the Commonwealth in only indicting a defendant as a principal. *Id.* Keeping that in mind, “a defendant cannot be an accomplice simply based on evidence that he knew about the crime or was present at the crime scene.” *Commonwealth v. Murphy*, 844 A.2d 1228, 1235 (Pa. 2004). In *Murphy*, a defendant was convicted of Delivery of a Controlled Substance under the accomplice liability theory although he never actually or constructively possessed the controlled substance. *Id.* at 1232-33. The Pennsylvania Supreme Court found when a defendant asked if the undercover cop was a cop and then called over an individual who could get him drugs it was sufficient to establish that he acted with the “intent to promote or actively aid in the commission of the crime as well as evidence that the defendant actually aided the principal in committing the crime.” *Id.* at 1236.

Defendant challenges the sufficiency of the evidence of all four charged crimes. At the outset this Court will address Defendant’s claim that the Commonwealth has failed to prove the suspected controlled substances were controlled substances, because they were not recovered and field tested. The analysis is the same as if the suspected controlled substances were recovered and not field tested this Court has found:

Although the higher courts have yet to address this issue, a well known current issue in law enforcement is the danger of field testing suspected narcotics due to the potential existence of Fentanyl. To the extent many agencies and departments have discontinued the practice. *See Jim Salter, Opioids Dangers Force Police to Abandon Drug Field Tests*, US News, Feb. 21, 2018 (“field testing has been banned by the DEA, state police in Oregon, Arizona, Michigan and Missouri, and several big-city departments, including New York and Houston”). Probable cause is established by a “totality of the circumstances.” As such in absence of a field test, probable cause that Defendant had in his possession contraband or narcotics may still be established through [the officer]’s training and experience, the circumstantial evidence surrounding the transactions, and [the confidential informant]’s averments as to the contents.

Probable cause is commonly found without field testing for arrests and a “totality of the circumstances” test was good law prior to the wide spread implementation of field testing in law enforcement. Therefore this Court will not find an absence of field testing is *per se* grounds to find there is no probable cause as the Commonwealth is not required the suspected [narcotic] is such beyond a reasonable doubt until trial.

Commonwealth v. Drummond, CP-41-CR-681-2018, at 6 (Oct. 3, 2018).

In this event the Court relies on the circumstances and experience of the officer. The circumstances surrounding the interaction with Caschera, what Caschera observed and believed to be a bundle of heroin, and the statements made by Defendant are sufficient to establish for a *prima facie* case that the suspected heroin was a controlled substance.

As for the remainder of Defendant’s claims this Court finds Defendant acted with the intent to promote or actively aid in the commission of the crime as well as actually aided Gadson in the commission of the crimes. The actions that clearly demonstrate this are: his meeting Caschera after Caschera setting up the buy, asking questions upon initial encounter, asking to go through Caschera’s phone, getting Caschera’s attention as he was attempting to walk away, stopping Caschera as he circled the block, getting in Caschera’s vehicle, directing Caschera where to drive, and telling Gadson to “get it out” so Caschera could use the suspected heroin. N.T. 3/5/19, at 2-8, 12, 18. Therefore there is substantially more involvement than what was present in *Murphy*. This is sufficient to establish a *prima facie* case for attempted Delivery of a Controlled Substance. Additionally, having Gadson take the suspected heroin out and telling Caschera to use it, is certainly a substantial step towards delivering a controlled substance that satisfies a criminal attempt on its own. These same principals apply to and therefore are sufficient evidence to establish a *prima facie* case for the charges of Possession of a Controlled Substance with the Intent to Deliver and Possession of a Controlled Substance. See *Commonwealth v. Hennigan*, 753 A.2d 245, 254 (Pa. Super. 2000) (the defendant did not

sell the officer drugs, but participated so was properly convicted of Possession with the Intent to Deliver a Controlled Substance); *see also Commonwealth v. Pitner*, 928 A.2d 1104, 1109 (Pa. Super. 2007) (same holding); *Commonwealth v. Koch*, 39 A.3d 996, 1007 fn. 1 (Pa. Super. 2011) (“One may conceivably be found guilty of PWID as an accomplice”). Lastly, Defendant is contending that the Commonwealth did not establish a *prima facie* case for Criminal Use of a Communication Facility. The Commonwealth is required to prove that Defendant used “a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or . . . The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.” 18 Pa. C.S. § 7512(a). Caschera called “Craig’s boy” whom instructed him to go to High St. and then walk south on Walnut St. N.T. 3/5/19, at 2-3. Then Caschera met with Defendant and Gadson. *Id.* at 3. Upon leaving and signaling to have Defendant and Gadson call him, “Craig’s boy” then called Caschera back. *Id.* at 5. Then lastly when Defendant and Gadson got into Caschera’s vehicle, Defendant pulled out two phones and said “we are the drug dealers.” *Id.* at 6. The Commonwealth, when viewing reasonable inferences in their favor, have established a *prima facie* case that Defendant either committed the offense of Criminal Use of a Communication Facility or was an accomplice to the commission of the crime.

Conclusion

The Commonwealth has provided sufficient evidence to establish a *prima facie* case that Defendant acted with intent to promote or actively aid in the commission of the crime of Attempted Delivery of a Controlled Substance, Possession with the Intent to Deliver a Controlled Substance, Possession of a Controlled Substance, and Criminal Use of a

Communication Facility. Therefore, there has been no violation of Defendant's constitutional rights. The charges shall not be dismissed.

ORDER

AND NOW, this 28th day of June, 2019, based upon the foregoing Opinion, Defendant's Omnibus Pretrial Motion, in the nature of a Petition for Writ of Habeas Corpus, is hereby **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: Joseph Ruby, Esquire, ADA
Robert Hoffa, Esquire

NLB/kp