

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
COMMONWEALTH OF PA** :

vs. :
: **No. CR-848-2019**
:
ROBERT VETTESE, : **Habeas Corpus Petition**

OPINION AND ORDER

As a follow-up to this Court’s December 3, 2019 Order, this Opinion and Order will address the Petition for Habeas Corpus filed by Defendant as part of his Omnibus Pretrial Motion on August 21, 2019.

A brief hearing was held before the court on December 3, 2019. The Commonwealth introduced the transcript of the preliminary hearing as well as Defendant’s prior criminal history, respectively as Commonwealth’s Exhibits 1 and 2.

Defendant submits that the Commonwealth has failed to establish a prima facie case with respect to all 16 counts against him.

With respect to Count 1, attempted homicide, Defendant alleges that the Commonwealth has failed to prove prima facie that Defendant did an act that constituted a substantial step toward homicide.

With respect to the conspiracy counts, Counts 2, 4, 7, 10, 12, 14 and 16, Defendant alleges that the Commonwealth has failed to prove prima facie that there was an agreement between the parties or an overt act committed in pursuance of that agreement.

With respect to Counts 3 and 6, both aggravated assault charges, Defendant vaguely argues that the Commonwealth failed to produce evidence that Defendant took any action that would establish a prima facie case. With respect to Count 5, persons not to

possess, Defendant argues that the Commonwealth failed to produce evidence to establish a prima facie case.

Pa. R.Crim.P. 575 (A)(2)(c) requires that all motions state with particularity the grounds for the motion, the facts that support each ground, and the types of relief or order requested. The failure to properly state the grounds for relief in a motion constitutes a waiver of such. Rule 575 (A)(3). Defendant's petition for habeas corpus with respect to Counts 3, 5 and 6 shall be deemed waived pursuant to this Rule.

This is true as well with respect to Counts 9, 11, 13 and 15. With respect to Counts 9, 11 and 13, all simple assault counts, Defendant argues that the Commonwealth has failed to establish by prima facie evidence that Defendant attempted to cause or intentionally, knowingly or recklessly caused bodily injury to another or intentionally caused bodily injury to another with a deadly weapon or, by physical menace put another in fear of imminent serious bodily injury. With respect to Count 15, recklessly endangering another person, Defendant argues that the Commonwealth has failed to present prima facie evidence that Defendant recklessly engaged in any conduct which would have placed another person in danger of death or serious bodily injury.

Defendant's arguments with respect to Counts 9, 11 and 13 and 15 are all impermissibly vague and violative of Rule 575. These petitions for habeas corpus shall be deemed waived pursuant to Rule 575.

Accordingly, the court will address only Defendant's objections in the nature of a petition for writ of habeas corpus with respect to Counts 1 attempted homicide and, 2, 4,

7, 10, 12, 14 and 16, all conspiracy charges, and Count 5, persons not to possess.

A pretrial habeas corpus motion is the proper means for testing whether the Commonwealth has sufficient evidence to establish a *prima facie* case. *Commonwealth v. Starry*, 196 A.3d 649, 655 (Pa. Super. 2018), *appeal granted*, 204 A.3d 369 (Pa. 2019).

“To demonstrate that a *prima facie* case exists, the Commonwealth must produce evidence of every material element of the charged offenses as well as the defendant’s complicity therein.” *Commonwealth v. Dantzler*, 135 A.3d 1109, 1112 (Pa. Super. 2016)(en banc). To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and also may submit additional proof. *Id.*

A prima facie case consists of evidence, **read in a light most favorable to the Commonwealth**, that sufficiently establishes both the commission of the crime and that the accused is probably the perpetrator of that crime. The Commonwealth need not prove defendant’s guilt beyond a reasonable doubt. Rather, the Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, **and accepted as true**, the judge would be warranted in allowing the case to go to jury. In determining the presence or absence of a *prima facie* case, inferences easily drawn from the evidence of record that would support a verdict of guilty are to be given effect, but suspicion and conjecture are not evidence and are unacceptable as such.

Commonwealth v. Hendricks, 927 A.2d 289, 291 (Pa. Super. 2007)(emphasis original)
(citations and internal quotation marks omitted).

Count 1 of the Information charges Defendant with attempted homicide. “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(a). Generally, a person is guilty of attempted murder if he takes a substantial step toward

the commission of an intentional killing. *Commonwealth v. Hobson*, 413 Pa. Super. 29, 604 A.2d 717, 719 (1992).

More specifically, attempted murder is composed of two primary elements: a specific intent to kill, and the commission of one or more acts which collectively constitute a substantial step towards the commission of a killing. *Commonwealth v. Predmore*, 199 A.3d 925, 929 (Pa. Super. 2018).

Defendant argues that the Commonwealth has failed to prove prima facie that he “did” or took a substantial step toward the commission of a killing. A substantial step is any act in furtherance of the intended result. *Commonwealth v. Holley*, 945 A.2d 241, 247 (Pa. Super. 2008).

The victim testified that while he was walking up Robbins Road, a car hit him from behind in his calves. He was immediately knocked to the ground. As he was getting up from the ground and while the car was stopped “maybe ten feet” away, he saw the passenger door open and saw a gun. He could not see anyone in the vehicle. He then heard one gunshot and fled down the hill.

While there is sufficient prima facie evidence to prove that Defendant was the passenger in the car that struck the victim and that Defendant possessed and fired the gun, this evidence is insufficient to prove prima facie that Defendant took a substantial step toward intentionally killing the victim. There is no evidence that Defendant pointed the gun at the victim, that Defendant shot at or near the victim, that Defendant inflicted a gunshot wound on any part of the victim’s body, or that Defendant shot at the victim while the car

was passing the victim while the victim was fleeing down the roadway.

Furthermore, the criminal complaint against Defendant is based on the defendant allegedly shooting at the victim and not striking or attempting to strike the victim with the car. There is no evidence that Defendant was operating the vehicle.

Counts 2, 4, 7, 10, 12, 14 and 16 all charge Defendant with conspiracy to commit certain crimes. A conspiracy is generally an agreement between two or more people to commit an unlawful act. *Commonwealth v. Lamb*, 309 Pa. Super. 415, 455 A.2d 678, 685 (1983).

“To sustain a conviction for conspiracy, the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person, (2) with a shared criminal intent and, (3) an overt act was done in furtherance of the conspiracy.” *Commonwealth v. Fisher*, 622 Pa. 366, 80 A.3d 1186, 1190-1191 (2013).

Defendant argues that the Commonwealth has failed to establish a prima facie case against him by failing to prove either an agreement or an overt act.

While the Commonwealth need not prove an explicit or formal agreement, the evidence must show more than a mere association. *Commonwealth v. Bossick*, 451 A.2d 489, 491 (Pa. Super. 1982), *overruled on other grounds in Commonwealth v. Serianni*, 486 A.2d 1349 (Pa. Super. 1984)(en banc). An agreement may be proved through circumstantial evidence. *Commonwealth v. Knox*, 50 A.3d 749, 755 (Pa. Super. 2012). Factors from which an agreement may be inferred include the relationship between the parties, the circumstances surrounding the crime, knowledge of a participation in the crime, and the totality of the

circumstances surrounding the activities. *Commonwealth v. Schoff*, 911 A.2d 147, 160 (Pa. Super. 2006).

The court finds that there is sufficient prima facie evidence to prove an agreement between Defendant and Mr. Dennis with respect to Counts 4, 6, 10, 12, 14 and 16. This agreement has been established by evidence that the alleged victim was struck from behind while walking on Robbins Road by a moving vehicle described by the victim as a black vehicle and a witness as a black Nissan with dark tinted windows and with license plate number KVC6612. The impact was forceful enough to throw the victim to the ground causing him the most pain he ever felt in his life. The witness saw the Nissan backing down Robbins Road traveling at a high rate of speed, the vehicle backed onto an adjacent roadway and fled in the direction of Montoursville.

This was the same vehicle with the same license plate that the witnesses had seen earlier parked near Robbins Road. Upon confronting the victim who was running down Robbins Road, he stated that he was hit by a car, a gun was aimed at him and “they shot at him.”

At the scene, police found evidence supporting the alleged victim’s version including a .40 caliber shell casing. There was no evidence that the Nissan attempted to avoid the alleged victim. There were no skid marks in the roadway.

Soon after the incident, the Nissan was located in a Walmart parking lot. It was still warm. It was registered to Defendant Dennis. There was damage to it that was consistent with striking someone or something. There were cracks in the bumper and

molding below the one headlight.

Surveillance from the Walmart showed Defendant Dennis getting out of the driver's side, going into the store, purchasing a drink and then leaving "very, very quickly" headed in the direction of the Verizon store. The passenger, subsequently identified as the defendant, while wearing a black hoodie with white drawstrings walked into the Walmart and immediately went into the men's restroom at the front of the Walmart. When he exited a few minutes later, he was wearing a white hooded sweatshirt. The black hooded sweatshirt as well as a black knit mask were subsequently recovered from the trash bin in that bathroom.

Defendant then exited the Walmart but soon returned and then went to the rear men's bathroom. He remained in the bathroom for a couple of minutes. He then left the store and walked in the same direction as Defendant Dennis toward the Verizon store. A Taurus .40 caliber pistol was subsequently discovered in the trash bin in the rear bathroom where Defendant had been. It was loaded with one round in the chamber and eight rounds in the magazine.

Both defendants were previously acquainted with each other. Defendant Dennis' Facebook account included Defendant on his "friend list." The Facebook account also included multiple pictures of Defendant and Mr. Dennis together in Williamsport driving during the days in question wearing "the same clothing" that they were wearing inside the Walmart.

As to Count 2, for the same reasons as set forth with respect to Count 1, it will be dismissed. There is insufficient prima facie evidence that the parties conspired to

intentionally kill the victim.

Defendant also argues that the Commonwealth failed to prove by prima facie evidence an overt act. “No person may be convicted of conspiracy to commit a crime unless an overt act in pursuance of such a conspiracy is alleged and proved to have been done by him or a person with whom he has conspired.” 18 Pa. C.S.A. § 903 (e). An overt act is an act which is done openly by a co-conspirator in furtherance of the object of the conspiracy. *Commonwealth v. Cohen*, 203 Pa. Super. 34, 199 A.2d 139, 154 (1964).

Contrary to Defendant’s claims, numerous overt acts were proven to be committed by Defendant in furtherance of the conspiracy. Generally speaking, the conspiracy was to injure the intended victim by, at the very least, hitting him with a moving car. Among other things, Defendant laid in wait for the victim, Defendant accompanied the driver of the car during the “hit and run” incident, Defendant fired a shot from a pistol while in the vehicle soon after the striking of the victim by the car, Defendant accompanied the co-defendant as they fled the scene, Defendant discarded evidence linking him and his co-defendant to the crime, and Defendant fled the area after abandoning the car at Walmart.

Defendant’s final request relates to Count 8, firearms without a license. Defendant argues that the evidence fails to establish for prima facie purposes that Defendant carried a firearm in the vehicle or concealed about his person. The court disagrees. Considering the evidence as well as all reasonable inferences, there is prima facie evidence that Defendant possessed the gun while a passenger in the vehicle.

ORDER

AND NOW, this ____ day of December 2019, following a hearing and argument, the Court **GRANTS** Defendant's Petition for Habeas Corpus with respect to Counts 1 and 2 but **DENIES** Defendant's Petition with respect to the remaining counts.

By The Court,

Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire ADA for Robert Vettese
Robert A. Hoffa, Esquire, attorney for Robert Vettese
Gary Weber, Lycoming Reporter
Work File