

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CR-1115-2019**
 :
 v. :
 :
 :
 ROBERT FORLINA, : **OMNIBUS PRETRIAL**
 Defendant : **MOTION**

OPINION AND ORDER

Robert Forlina (Defendant) was arrested by the Lycoming County District Attorney’s office on June 4, 2019 for Theft by Failing to Make a Require Disposition,¹ Theft by Deception,² Receiving Stolen Property,³ and Theft of Services.⁴ The charges of Theft by Failing to Make a Require Disposition and Theft of Services were dismissed following a preliminary hearing. The above charges arise from Defendant disputing charges through American Express of purchased licenses or “fills” through Miele Manufacturing (Miele) located in Lycoming County. Defendant filed an Omnibus Pretrial Motion on November 5, 2019. In his Motion, Defendant alleges the Commonwealth has failed to demonstrate a *prima facie* case that Defendant committed the remaining charges.⁵ A hearing on the Motion was scheduled for January 7, 2020. At that time the Commonwealth submitted a copy of the preliminary hearing transcript and both parties were granted the opportunity to submit briefs. Defendant submitted his brief on January 17, 2020. The Commonwealth failed to submit a brief

¹ 18 Pa. C.S. § 3927(a).

² 18 Pa. C.S. § 3922(a)(1).

³ 18 Pa. C.S. § 3925(a).

⁴ 18 Pa. C.S. § 3926(a)(1).

⁵ Defendant also made requests for additional discovery that were addressed by this Court’s Order on January 7, 2020 directing the Commonwealth to either turn over the requested discovery or let Defendant know of the need for a further hearing. No need for a further hearing has yet to be brought to the Court’s attention. Therefore only the Petition for Writ of Habeas Corpus shall be addressed.

on the issue. For the subsequent reasons Defendant's Petition for Writ of Habeas Corpus is hereby granted.

Background

The Commonwealth submitted a copy of the preliminary hearing transcript, upon which both parties rely. Jeffrey Scott Malay (Malay) an employee of Miele testified at the preliminary hearing on July 18, 2019. His testimony established the following. Miele is a company that manufactures and sells games of skill. P.H. 7/18/19, at 1. Individuals playing the games would insert money in exchange they would play the game with the chance to win money. *Id.* at 2. Once machines were purchased, an owner of one of the machines needed to continue to renew the machines' licenses based on the amount of revenue paid out. *Id.* at 3. Without repurchasing a license the machine would be inoperable. *Id.* at 3. In order to purchase licenses or "fills," the owner has to be in front of the machine and has to contact Miele by phone. *Id.* at 6. In order to apply a new license to a machine, the old license would have to be completely used up. *Id.* at 10. Sometimes when licenses are paid for Miele will receive a chargeback through a third party, such as a credit card company, when the owner disputes a charge. *Id.* at 6-7. When this occurs, Miele finds the charged amount and provides the paperwork to the third party. *Id.* at 7. Then the amount is taken from Miele's account and placed in escrow pending disposition. *Id.*

Defendant had purchased fourteen skill games from Miele around August of 2017. *Id.* at 2. He then purchased the licenses for each of the machines to be operable with a credit card. *Id.* at 3. Later purchases were specifically made with an American Express credit card. *Id.* at 4. In November of 2018, Defendant initiated five chargebacks through his credit card company in regards to purchases from Miele. *Id.* at 7. Three had been resolved by Defendant prior to Miele being notified, but two were still outstanding. *Id.* at 8. When Miele received notice of the two

chargebacks, Malay contacted Defendant asking him to pay back the two licenses and notifying him that in his experience in dealing “with American Express that it would be easier to solve the problem if he repurchased the licenses instead of going through the chargeback process.” *Id.* at 8, 11. Defendant then told Malay “more chargebacks are coming.” *Id.* at 9, 11. After the phone call, thirteen more chargebacks occurred in January of 2019. *Id.* Of those thirteen chargebacks, one particular machine had three disputed licenses. *Id.* at 10. The licenses were purchased on June 16, 2018, July 22, 2018, and November 5, 2018. *Id.* Of those disputed amounts, \$8,000 worth is still outstanding and has been resolved in Defendant’s favor. *Id.* at 12.

Discussion

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).

Defendant contends that the Commonwealth failed to establish a *prima facie* case, for Theft by Deception because it failed to prove he created a false impression and intentionally withheld property by deception. Additionally, Defendant argues that the Commonwealth failed to establish a *prima facie* case for Receiving Stolen Property because it failed to demonstrate he intentionally received stolen goods. An individual commits the offense of Theft by Deception if he/she “intentionally obtains or withholds property of another by deception.” 18 Pa. C.S. § 3922(a). The act of deceiving occurs when an individual “intentionally . . . creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise.” 18 Pa. C.S. § 3922(a)(1). An individual commits the offense of Receiving Stolen property when he/she “intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner.” 18 Pa. C.S. § 3925(a). Receiving is defined under the statute as “acquiring possession, control or title, or lending on the security of the property.” 18 Pa. C.S. § 3925(b).

The Court has found two cases similar to the present issue. First in *Commonwealth v. Bruce*, the defendant, a wholesaler of lumber, was convicted for Theft by Deception. 607 A.2d

294, 295 (Pa. Super. 1992). The defendant would purchase and obtain lumber from a sawmill and then resell and distribute it to purchasers. *Id.* At some point during their business transactions, the defendant provided the sawmill with a check for three loads of lumber and received that lumber, in addition to thirteen loads he received without advanced payment. *Id.* at 296. The check was later returned for insufficient funds. *Id.* Negotiations between the parties continued until the sawmill filed a private criminal complaint against the defendant for an outstanding balance of \$47,340.00. *Id.* At trial, the Commonwealth argued, and won on the theory that the defendant deceived the sawmill by providing it with a bad check and promising to pay in a timely manner, but not doing so. *Id.* The Pennsylvania Superior Court overturned the defendant's conviction on the grounds that the defendant's "intention not to pay for the lumber at the time he received it cannot be inferred from the fact alone that he did not pay for all the lumber." *Id.* at 297. Important to the Superior Court's analysis was the fact the defendant paid for some loads of lumber before and after the unpaid thirteen loads, the parties attempted to negotiate and settle the balance, only after a compromise could not be reached was criminal action taken, and at no time did the defendant conceal his whereabouts or identity from the sawmill. *Id.* The Superior Court held that "[c]learly, this case represents nothing more than a failed business relationship and is properly the subject of a civil suit, not criminal action." *Id.*

Second in *Commonwealth v. Wilkes*, the defendant, an international automobile parts exporter, was convicted of both Theft by Deception and Theft by Unlawful Taking. 676 A.2d 266, 267 (Pa. Super. 1996). The defendant in the case entered into a one-time transaction with an automobile parts store for 1,200 cases of motor oil bearing a specific advertisement on the bottles. *Id.* at 267-68. When the defendant's employee picked up the shipment, he gave the store owner a check for the motor oil. *Id.* at 268. Upon further inspection, the defendant found

out the motor oil was nonconforming as it did not possess the right advertisement. *Id.* The defendant cancelled his check and attempted to negotiate an agreement with the automobile parts store. *Id.* After negotiations broke down, the owner of the auto parts store contacted the local authorities and criminal proceedings ensued. *Id.* The Pennsylvania Superior Court overturned the defendant's conviction on the grounds that it could not "infer that appellant did not intend to pay for the motor oil at the time he took possession of the oil from the fact that he subsequently refused to pay for the oil." *Id.* at 269. The Superior Court, relying heavily on its earlier rationale in *Bruce*, pointed to the facts that a check was issued, which at the time was good, the parties were negotiating, criminal charges were only brought after negotiations dissipated, and the defendant did not "conceal his whereabouts or his true identity." *Id.* at 269-270. In concluding the Superior Court held that there was "absolutely no reason why a civil action could not adequately insure full compensation to [the auto parts store and] . . . the present facts reveal nothing more than a business transaction which went awry, and we find nothing in the record which justifies the use of criminal prosecution to collect a simple business debt." *Id.* at 270.

The Commonwealth charged Defendant with Receiving Stolen Property and Theft by Deception for the payments he made through American Express and received back by going through the chargeback procedures. However, the issue is whether Defendant received the licenses or "fills" from Miele through his intending to deceive the company and whether the licenses are considered "stolen property." When looking at the case through this proper lens, it is indistinguishable from *Bruce* and *Wilkes*. Defendant received a product, the licenses, and offered Miele compensation for that product at the time of purchase. Therefore at the time of purchase there existed no intent to deceive Miele. Additionally, the licenses are not stolen

property as Miele gave the licenses to Defendant after what it deemed was proper payment. As in *Wilkes*, Defendant going through the chargeback process after rendering payment is no different in this legal context than cancelling a check. Clearly there is an issue between Defendant and Miele regarding amount of payment, negotiations were attempted, Defendant never concealed his whereabouts or true identity, and only after negotiations broke down was criminal action pursued. As in the above cases “[c]learly, this case represents nothing more than a failed business relationship and is properly the subject of a civil suit, not criminal action.” *Bruce*, 607 A.2d at 297. Miele can be properly compensated through civil action and “criminal prosecution to collect a simple business debt” is not a proper means to that end. *Wilkes*, 676 A.2d at 270.

Conclusion

The Commonwealth has failed to satisfy its *prima facie* burden. Based on Pennsylvania Superior Court case precedent neither the crimes of Theft by Deception or Receiving Stolen Property can be found in this situation. Miele has proper civil recourse to reach an appropriate equitable remedy, but it does not exist in the criminal system. Therefore Defendant’s Petition for Writ of Habeas Corpus in his Omnibus Pretrial Motion is granted.

ORDER

AND NOW, this 14th day of February, 2020, based upon the foregoing Opinion, Defendant's Petition for Writ of Habeas Corpus on both remaining counts is hereby **GRANTED**. It is hereby **ORDERED AND DIRECTED** that the Defendant's charges of Theft by Deception and Receiving Stolen Property are hereby **DISMISSED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (LF)
Robert Hoffa, Esquire

NLB/kp