

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-107-2020
	:
vs.	:
	:
ANTWINE JACKSON,	:
Defendant	: Omnibus Pretrial Motion

OPINION AND ORDER

Defendant is charged by Information filed on February 20, 2020 with criminal conspiracy to deliver a controlled substance, delivery of a controlled substance, possession with intent to deliver a controlled substance and related charges. Defendant filed an omnibus pretrial motion on February 25, 2020 followed by an addendum on July 22, 2020. A hearing was held on July 6, 2020 along with argument. At this hearing, the court admitted the transcript of the preliminary hearing. By Order dated that same date, the court indicated it would review the matters and enter an Order in the near future. The hearing on the defendant’s petition for writ of habeas corpus was continued for further testimony until July 27, 2020. At the July 27, 2020 hearing, the Commonwealth presented the testimony of Brandy Bevan, the lab technician. The court subsequently granted the Commonwealth’s motion to supplement/re-open the record and a hearing was held on August 28, 2020. At that hearing, the Commonwealth presented the testimony of Josh Feigles, the confidential information utilized by the Commonwealth with the alleged transactions involving Defendant.

The court will first address Defendant’s petition for habeas corpus as it may be dispositive. At the July 6, 2020 hearing, the Commonwealth introduced in evidence the

transcript from the preliminary hearing in this matter. At the hearing on July 27, 2020, the Commonwealth presented the testimony of Brandy Bevan, a Forensic Scientist II employed by the Pennsylvania State Police. At the August 28, 2020 hearing, the Commonwealth presented the testimony of Josh Feigles, the confidential informant.

At the January 7, 2020 preliminary hearing, Detective Tyson Havens of the Lycoming County Narcotic Enforcement Unit testified. He indicated that on November 4 of 2019, he was working with a confidential informant who arranged for the purchase of methamphetamine from a person known to the confidential informant as “Bobby Jackson.” Detective Havens was aware of him as Antwine Jackson, Defendant.

According to Detective Havens, the confidential informant spoke with Defendant and arranged to meet with him at the Nittany Minit Mart in Williamsport. Trooper Havens transported the confidential informant to the area, strip searched him and equipped him with electronic surveillance capable of audio and video recording, as well as \$200 in prerecorded money.

According to the confidential informant, he eventually met an individual by the name of Kadar Gates-Davis who purportedly sold the confidential informant methamphetamine. The transaction was recorded on the electronic surveillance equipment. The confidential informant returned to Detective Havens’ vehicle and provided him with the controlled substance, which was crack cocaine instead of methamphetamine.

Trooper Havens directed the confidential informant to place another call to Defendant. The confidential informant did so explaining to Defendant that they received the “wrong substance.” “The person on the other end” ultimately informed the confidential

informant to go to the Family Dollar in Williamsport.

The confidential informant was again strip searched, equipped with electronic surveillance capable of audio and video recording and provided with another \$200.00 of prerecorded money. He was released in the area of the Family Dollar. According to the confidential informant, both he/she and Defendant entered the Family Dollar and conducted the transaction. The audio portion of the transaction was “captured” but the video was not.

Members of the Narcotics Unit maintained surveillance and followed Defendant away from the scene and confirmed that the individual leaving the grocery store was Defendant.

While Detective Havens conducted surveillance and listened to at least some of the phone calls, he was not able to recognize Defendant’s voice. Further, Detective Havens did not personally view any of the alleged transactions. He did ultimately obtain both the crack cocaine and methamphetamine and forwarded them to the Wyoming Regional Laboratory for testing.

At the July 27, 2020 hearing, Brandy Bevan testified by telephone that she has been employed as a Forensic Scientist II at the Wyoming Regional Laboratory for the Pennsylvania State Police. She tested the items that were forwarded to her and confirmed that the one chunky substance weighed 2.15 grams and contained cocaine, a Schedule II controlled substance. She confirmed that the other substance was a crystalline substance that weighed 4.29 grams and contained methamphetamine, a Schedule II controlled substance.

Josh Feigles testified on August 28, 2020 via remote technology by consent

of the parties. During the incidents in question, he was cooperating with the Pennsylvania State police as a confidential informant.

On November 4, 2019, he called Defendant and they arranged for a meeting at the Nittany Minit Mart in Newberry for the purchase of methamphetamine. He confirmed the details of the arrangement as testified to by Detective Havens.

He explained when he got to the Minit Mart, he spoke to Defendant on the phone and was directed to walk down an adjacent street. While walking down the street, he “met another guy” who handed him suspected methamphetamine and Mr. Feigles handed the individual \$200.00. Upon leaving and meeting up with Detective Havens, Mr. Feigles realized that it was crack cocaine, not methamphetamine. At Detective Havens’ direction, he called Defendant to complain and to arrange for the purchase which was previously agreed upon. Defendant directed Mr. Feigles to meet him at the Dollar Store in Williamsport.

Mr. Feigles identified Defendant in court as the individual with whom he arranged the transactions. He knew him from previous transactions, he had actually met him, he knew his telephone number and he had enough telephone conversations and personal interactions with him to recognize his voice.

After Defendant directed Mr. Feigles to meet him at the Dollar Store, Mr. Feigles gave Defendant 15 minutes to do so. Then he drove with Detective Havens to Rose Street, was dropped off and walked to the Dollar Store approximately a block away.

Defendant was in a car with another individual who the confidential informant identified as Daquan Kelly. Defendant walked into the store, as did Mr. Feigles. They met in an aisle and quickly conducted the transaction wherein Defendant sold Mr.

Feigles \$200.00 worth of methamphetamines.

Following the transaction, Mr. Feigles returned to the vehicle where Detective Havens was waiting, and Detective Havens debriefed him.

In connection with his petition for habeas corpus, Defendant argues that the Commonwealth has failed to establish a prima facie case against him by failing to produce legally competent evidence that demonstrated each of the material elements of the crime charged and the existence of facts that connected Defendant to the crimes charged.

The quantum of proof necessary to establish a prima facie case has been the subject of a debate for two decades. For years, the law required that, in establishing a prima facie case, the Commonwealth could not solely rely on hearsay testimony. Since 2015, however, the law permitted the Commonwealth to establish its prima facie case through hearsay evidence alone. Recently, however, in a decision dated July 21, 2020, the Pennsylvania Supreme Court determined that both the Constitution and Rule 542 (E) of the Pennsylvania Rules of Criminal Procedure do not permit hearsay evidence alone to establish all the elements of all crimes for purposes of establishing a prima facie case. *Commonwealth v. McClelland*, No. 2 WAP 2018, 2020 WL 4092109 (Pa. July 21, 2020).

The court reasoned that “the primary reason for the preliminary hearing is to protect an individual’s right against unlawful arrest and detention.” *Id.* at *13, citing *Commonwealth ex rel. Maisenhelder v. Rundle*, 198 A.2d 565, 567 (Pa. 1964). The preliminary hearing seeks to prevent a person being in prison or required to enter bail for a crime which was never committed or for a crime with which there is no evidence of his connection. *Id.* While the full panoply of trial rights do not apply at a preliminary hearing, it

is a critical stage of the proceeding and more than a mere formality. *Id.* Due process clearly attaches and hearsay evidence alone violates due process.

Further, Rule 542 (E) does not permit hearsay evidence alone to establish all elements for all crimes for purposes establishing a prima facie case. *Id.* Although, it can be argued that the use of the word “any” provides a basis for proving any element by non-hearsay, it is delimited by the phrase “hearsay as provided by law.” *Id.* It is intended to allow some use of hearsay but only in a manner that comports with the Constitution. *Id.*

In reaching its decision, the Supreme Court reaffirmed the decision in *Commonwealth ex rel. Buchanan v. Verbonitz*, 525 Pa. 413, 581 A.2d 172 (1990). In that case, the Supreme Court concluded that the testimony of a witness as to what a third party told him about an alleged act is clearly inadmissible hearsay and does not constitute legally competent evidence. 581 A.2d at 174. In order to satisfy its burden of establishing a prima facie case, the Commonwealth must produce legally competent evidence. *Id.*

Furthermore, a criminal defendant has a right to confront and cross-examine the witnesses against him and this right justifies the presentation of witnesses and a full exploration of their testimony on cross-examination. *Id.* at 175.

While the Commonwealth initially intended on proceeding with this case with the testimony of the preliminary hearing coupled with the testimony of the lab technician, it sought and obtained permission to re-open the record and present the testimony of Mr. Feigles. Clearly, the Commonwealth was aware of the *McClelland* decision, which had recently been published, and did not want to risk the dismissal of the case.

It is well-settled that in determining whether the Commonwealth has

established a prima facie case, the court must view the evidence and inferences reasonably drawn from the evidence in the light most favorable to the Commonwealth. *Commonwealth v. Montgomery*, No. 4 EAP 2019, 2020 WL 4139731, *10 (Pa. July 21, 2020); *Commonwealth v. Predmore*, 199 A.3d 925, 929 (Pa. Super. 2018).

With the testimony of Detective Havens, the lab technician and the confidential informant, the Commonwealth has met its burden of proving a prima facie case. The Commonwealth has clearly established for prima facie purposes all of the elements of the crimes alleged against Defendant. For prima facie purposes, the Commonwealth has proven that with the intent of promoting or facilitating the commission of the delivery of a controlled substance, Defendant agreed with Kadar Gates-Davis to deliver a controlled substance to the confidential informant. The Commonwealth has proven by prima facie evidence that Defendant, directly or indirectly, delivered controlled substances to him on two separate occasions, that Defendant possessed with intent to deliver those controlled substances, that Defendant possessed controlled substances and that Defendant used a communications facility to facilitate the delivery or possession with intent to deliver the controlled substances. Accordingly, the court will deny Defendant's petition for habeas corpus.

With respect to Defendant's remaining motions (including a motion to compel discovery and a motion for notice in advance of Rule 404 (b) evidence), some of the arguments presented by the parties during the July 6, 2020 proceedings may be moot since Defendant now knows the identity of the confidential informant and where the confidential informant is presently located. Additionally, the court understands that the Commonwealth

has provided certain discovery to Defendant between the July 6, 2020 proceedings and the most recent proceedings.

Taking into account these facts, as well as the arguments raised by the parties, the court's directives with respect to the motion to compel and the 404 (b) notice shall be as set forth below.

ORDER

AND NOW, this ___ day of September 2020 following hearings and argument, the court **DENIES** Defendant's Petition for Habeas Corpus.

Given that both Detective Havens and the confidential informant testified that the alleged transactions were audio and/or video recorded, the court **GRANTS** Defendant's motion for discovery of these recordings. Within twenty (20) days of the date of this Order, the Commonwealth shall provide to defense counsel copies of any and all recordings or an Affidavit signed by Detective Havens verifying that the recordings or portions of them do not exist and explaining in detail why they do not exist. The Affidavit must also include the facts relating to what occurred which lead law enforcement to determine that the recordings no longer exist. This must include specifics as well as a timeline and the names of all law enforcement officers who were involved in making the determination.

The court also **GRANTS** Defendant's *Brady* request. Within twenty (20) days of today's date, the Commonwealth must review its files, review all files of law enforcement involved in this particular case or in connection with any criminal matters in the past or present involving the confidential informant, and provide to defense counsel all favorable evidence that is material to the guilt or punishment of Defendant. This includes, but it is not

limited to all promises of leniency or even suggestions of leniency to the confidential informant by any government official. Formal documentation is not entitled for an agreement or understanding to qualify as *Brady* material. Due process requires the jury to be informed of any promise or understanding that the government would extend leniency in exchange for a witness's testimony. Any implication, promise or understanding that the government would extend leniency in exchange for testimony is relevant to a witness's credibility.

Commonwealth v. Bagnall, No. 38 WAP 2019, 2020 WL 475608, *9 (Pa. Aug. 18, 2020).

Within twenty (20) days of today's date, the Commonwealth must provide to defense counsel all prior record information regarding Defendant, Kadar Gates-Davis, Daquan Kelly, and Josh Feigles.

Within twenty (20) days of today's date, the Commonwealth must provide to defense counsel all reports of any and all experts the Commonwealth intends to utilize at trial, as well as a written summary of the expert opinions that the Commonwealth intends to offer at trial. This specifically includes any and all experts that the Commonwealth intends to utilize at trial to establish its claim that Defendant possessed controlled substances with intent to deliver.

Within twenty (20) days of today's date, the Commonwealth shall provide to defense counsel written verification of any and all cell phones that it seized from Defendant and/or Mr. Gates-Davis as well as any and all records that were obtained from those cell phones by law enforcement accessing them and through any forensic "dump."

Within twenty (20) days of today's date, the Commonwealth shall provide to defense counsel copies of all written correspondence, emails, texts, written summaries or any

other scripted memorandum of verbal communications between the Commonwealth and law enforcement regarding any aspects of this case. This specifically excludes work product.

This case is on the pretrial list. It is scheduled for Call of the List on a certain date. No later than thirty days prior to that scheduled Call of the List, the Commonwealth must provide defense counsel with any and all 404 (b) evidence that it intends to utilize against Defendant at trial.

This Order does not preclude either party from requesting additional items of discovery, amending this Order or clarifying this Order following the filing of an appropriate motion.

By The Court,

Marc F. Lovecchio, Judge

cc: Devin Walker, Esquire (ADA)
Donald F. Martino, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file