

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :  
 : CP-41-CR-897-2020  
v. :  
 :  
KHALIF AKINS, :  
 : OMNIBUS MOTION  
Defendant :

**OPINION AND ORDER**

Khalif Akins (Defendant) was charged on July 9, 2020 with Delivery of a Controlled Substance<sup>1</sup> and Criminal Use of a Communication Facility<sup>2</sup>. The charges arise from a controlled purchase of cocaine between Defendant and a confidential informant. Defendant filed this Omnibus Pretrial Motion on September 24, 2020. This Court held a hearing on the motion on November 10, 2020. In his Omnibus motion, Defendant argues that the Commonwealth has not provided sufficient evidence to satisfy the *prima facie* burden at the preliminary hearing and the charges should be dismissed.

**Background and Testimony**

At the preliminary hearing, Officer Joshua Bell (Bell) of the Williamsport Police Department testified on behalf of the Commonwealth. In November of 2019, Bell was working undercover with the Narcotics Enforcement Unit. N.T. 7/23/2020, at 1. Between November 7 and November 14, 2019, a confidential informant (CI) reached out to the Defendant by phone to set up a controlled purchase of \$100 worth of cocaine. *Id.* at 2-3. Defendant directed the CI to a location in Williamsport to meet up. *Id.* Before meeting with Defendant, the CI was searched, given pre-recorded funds, and equipped with electronic surveillance gear to record the exchange. *Id.* In his undercover capacity, Bell watched the CI meet with Defendant at the agreed place. *Id.* Following the controlled purchase, the CI immediately met with Bell to turn

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<sup>1</sup> 35 Pa.C.S.A. § 780-113(a)(30).

<sup>2</sup> 18 Pa.C.S. § 7512(a).

over the drugs. Id. Bell indicated that, upon reviewing the footage, Defendant's face is clearly displayed on the video recording of the transaction. Id.

## **Discussion**

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove a 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). To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and may also submit additional proof. Commonwealth v. Dantzler, 135 A.3d 1109, 1112 (Pa. Super. 2016). "The Commonwealth may sustain its burden of proving every element of the crime...by means of wholly circumstantial evidence." Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001); *see also* Commonwealth v. Jones, 874 A.2d 108, 120 (Pa. Super. 2016). The weight and credibility of the evidence may not be determined and are not at issue in a pretrial habeas proceeding. Commonwealth v. Wojdak, 466 A.2d 991, 997 (Pa. 1983); *see also* Commonwealth v. Kohlie, 811 A.2d 1010, 1014 (Pa. Super. 2002). 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 challenges the sufficiency of the evidence on both charges brought against him. Firstly, Defendant argues that the Commonwealth failed to show a *prima facie* case for Delivery of a Controlled Substance. Pursuant to 35 Pa.C.S. § 780-113(a)(30), the “manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act...” is considered a crime. Defendant asserts that, under Commonwealth v. McClelland, the Commonwealth failed to substantiate hearsay with additional evidence as is required that showed Defendant delivered a controlled substance to the confidential informant. Commonwealth v. McClelland, 233 A.3d 717 (Pa. 2020). In particular, defense counsel takes issue with the fact that only Bell, and not the CI, testified at the preliminary hearing. Defendant alleges that only the CI is able to testify to the actual exchange of drugs for money. Defendant also challenges the Commonwealth’s failure to provide the exact date the controlled buy occurred. Bell testified that the exact date of the controlled purchase was not divulged in order to protect the identity of the CI who was still involved in active investigations. N.T. 7/23/2020, at 3. The Commonwealth argues that they are not required to put forth their whole case at the preliminary hearing stage and mandate the CI to testify. Their position is that the evidence provided at the preliminary hearing was enough to satisfy the *prima facie* burden. This Court agrees with the Commonwealth. McClelland does not identify how much additional evidence is required to substantiate hearsay at a preliminary hearing. Bell was able to see Defendant’s face clearly depicted on the video footage of the transaction. Further, Bell could see Defendant waiting for the CI at the previously agreed location. Taking Bell’s testimony of what he personally saw of the exchange viewed in the light most favorable to the Commonwealth as required, the Court believes that the

Commonwealth has provided sufficient additional evidence to substantiate the hearsay to meet their *prima facie* burden.

Secondly, Defendant argues that the Commonwealth did not present enough evidence to satisfy their burden for Criminal Use of a Communication Facility. According to 18 Pa.C.S. § 7512, it is a criminal offense for a person to use “a communication facility to commit, cause, or facilitate the commission or the attempt of any crime.” Defendant argues that the Commonwealth failed to produce any evidence to tie Defendant to the phone that the CI contacted to set up the drug purchase. He asserts that no evidence showed that Defendant utilized the phone used nor did the evidence show Defendant even had access to the phone. Alternatively, the Commonwealth contends that Bell’s testimony shows that the CI was instructed to go to a location after contacting the phone’s user and upon arrival at the directed location, Defendant was waiting there for the CI. Furthermore, the CI asked the phone’s user for cocaine and Defendant delivered cocaine to the CI. The Court agrees with the Commonwealth that sufficient evidence was shown to link Defendant to the phone used to set up the drug transaction. However, if the Commonwealth wishes for a jury to convict on these counts, more evidence will be required to satisfy their burden at trial. Nevertheless, that is not the question presented to the Court at this time. Therefore, the Defendant’s motion to dismiss all charges is denied.

### **Conclusion**

The Court finds that the Commonwealth presented enough evidence at the preliminary hearing to establish a *prima facie* case for the charges against Defendant. Therefore, Defendant’s Petition for Writ of Habeas Corpus is denied.

### **ORDER**

**AND NOW**, this 2nd day of March, 2021, based upon the foregoing Opinion, it is **ORDERED AND DIRECTED** that Defendant's Petition for Writ of Habeas Corpus in his Omnibus Pretrial Motion is hereby **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA  
Robert A. Hoffa, Esq.  
Law Clerk (JMH)