

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
 :
 vs. : No. CR-433-2021
 :
 NICHOLAS DEPARASIS, :
 :
 Defendant : Omnibus Pretrial Motion

OPINION AND ORDER

Defendant was charged by Information filed on April 16, 2021 with possession with intent to deliver and related counts arising out of an incident that allegedly occurred between January 23, 2021 and January 24, 2021.

On January 24, 2021, officers from the Tiadaghton Valley Regional Police Department (TVRPD) were dispatched to the Uni-Mart located at 101 Bridge Street in Jersey Shore for a report of a male in the store having an unknown issue. Dispatch informed the officers that the caller was a third party but that the clerk was concerned about a male customer who was asking about her taking his money that was supposed to be left in the cupcake aisle.

Contact was made with the clerk. She directed the officers to an individual by the name of Levi McDermit who resided on the 1200 block of Allegheny Street in Jersey Shore. McDermit matched the description of the male in the store. An officer contacted McDermit. McDermit advised that he was looking for money that a friend left in the store near the cupcakes.

Officer Cody Smith went to check the cupcake aisle. He located a plastic bag containing individualized packaged controlled substances. There were 18 individualized bags

of methamphetamine. Also found in one of the bags were two Buprenorphine pills and one pill containing a mixture of Acetaminophen and Hydrocodone Bitartrate, known as M367.

Before the court is what is styled as an “Omnibus Pretrial Motion for Habeas Relief.” 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. 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 preliminary hearing was held on March 31, 2021 before MDJ Lepley. The hearing in this matter was held on July 20, 2021. At the hearing, the Commonwealth introduced the transcript of the preliminary hearing.

At the preliminary hearing, the Commonwealth called two witnesses, Jordan Martin and Officer Smith. Jordan Martin testified that Defendant had previously called him and asked him to go to the local Uni-Mart store to retrieve “something”. Martin stated that he found “nothing” and left the Uni-Mart in “frustration.” Martin admitted that he was a past drug user and “could not recall” whether he was or was not intoxicated on the date that he spoke to Defendant.

Officer Smith testified next. Officer Smith testified that he was a highly trained narcotics intervention officer and that the “drop scheme” described by Jordan Martin was a common method for drug dealers in the Lycoming County area. He described conversations between himself and Levi McDermit who was present in the Uni-Mart

complaining to store employees that he was digging around in the cupcakes because he was searching for “money” left there by a friend.

McDermitt was later interviewed by the police and told Officer Smith that he was “a little sped up” referencing intoxicated. Officer Smith testified that he observed a security video purporting to reveal that Defendant had placed contraband drugs in the baked goods section of the Uni-Mart.

On cross-examination, Officer Smith conceded that he never recovered contraband drugs from Defendant at any point. He stated that Defendant told him that he was there to purchase lottery tickets. Officer Smith also testified that while in the Uni-Mart, Defendant suspiciously removed something from his front pocket, the identity of which he stated was not certain, placed such in the cupcake area for what he believes was a “drop” for future retrieval.

Finally, Officer Smith stated that he recovered contraband drugs from the cupcake area on that date, but could not rule out whether those drugs were there from three or five days previously. He stated that: “I would say no that that’s not possible, we have to rely upon the evidence in the video.” Further, he stated “nine grams of meth wouldn’t be just left behind.”

At the hearing in this matter, the Commonwealth played selected portions of the surveillance video and presented additional testimony from Officer Smith. The alleged incident occurred between the late evening hours of January 23, 2021 and the early morning hours of January 24, 2021.

On January 23, 2021, Officer Smith saw Sonya Smith in the Uni-Mart with Defendant waiting outside in a car. He set up surveillance across the street. Over a period of time, he saw Defendant go into the store and come out at least three times.

The third time was at approximately 10:57 p.m. on the 23rd. Defendant is depicted on the surveillance video milling around the aisle containing cupcakes, playing a video game, reaching his left hand into his pocket and then placing both of his arms deeply into an area of the cupcakes. He was manipulating his arms for a short period, pulled them out, grabbed a cupcake package and returned to play the video game. He remained at the game, got up, placed the cupcake package back on the shelf, went to the register where he was met by Ms. Smith and soon left the store with her.

Approximately thirty minutes later, Mr. Martin walks into the store. He gets on his cell phone and while talking, thoroughly looks through the same area where Defendant had his arms with respect to the cupcake area. Mr. Martin is looking throughout the cupcake area, pulling packages out, returning them and at one point gestures his hands in frustration. He is seen leaving the area while on the phone and then returning and repeating his efforts trying to locate something in the area.

Approximately an hour and a half after Mr. Martin was in the store, Mr. McDermit comes in. He is much more persistent in his efforts to apparently locate something in the cupcake area. He is seen routing around for quite a long period of time in different areas near the cupcakes. He calls someone on the phone and is obviously distressed because he cannot find what he is apparently looking for. Mr. McDermit stays in the store for a much

longer period of time than Mr. Martin. His conduct depicts an individual clearly trying to find something in the area of the cupcakes and extremely frustrated that he cannot do so. At one point, he goes to the register and is given access to a landline type phone. Eventually and because of his suspicious conduct, the clerk utilized her cell phone to call another clerk who “lives across the street.” This clerk came to the store and then contacted the police.

Officer Smith indicated that he reviewed the entire surveillance camera footage from the 23rd to the 24th. He indicated that it was several hours long and there was nothing further on it other than depicted with respect to anyone placing any items or removing any items, or attempting to remove any items from the cupcake area. He indicated, however, that he did not review any tapes that depicted activity prior to the late evening hours on the 23rd.

Defendant argues that the Commonwealth has failed to sustain its burden of proving a *prima facie* case. 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. *Commonwealth v. Ouch*, 199 A.3d 918, 923 (Pa. Super. 2018). The Commonwealth establishes a *prima facie* case when it produces evidence that, if accepted as true, would warrant the trial judge to allow the case to go to a jury. *Id.*

The Commonwealth need not prove the elements of the crime beyond a reasonable doubt; rather, the *prima facie* standard requires evidence of the existence of each and every element of the crime charged. *Id.* Moreover, 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. *Id.*

Finally, at the *prima facie* level, 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 a light most favorable to the Commonwealth's case.

Commonwealth v. Perez, 249 A.3d 1092, 1102 (Pa. 2021).

Neither party contests the elements of the crimes at issue. More specifically, the Commonwealth must prove that Defendant possessed the controlled substances with the intent to deliver them, that he possessed the controlled substances and that he possessed paraphernalia, namely a plastic bag used to contain numerous controlled substances. At this stage, neither party contests the identity of the substances as being illegal controlled substances. 35 P.S. § 780-113 (a) (30); 35 P.S. § 780-113 (a) (16); 35 P.S. § 780-113 (a) (32).

Possession of controlled substances can be proved by showing actual possession, that is, controlled substances found on the defendant's person, or by showing that the defendant constructively possessed the drugs. *Commonwealth v. Macolino*, 469 A.2d 132, 134 (Pa. Super. 1983).

In this particular case, the Commonwealth is proceeding on the theory of actual possession arguing that Defendant possessed the drugs, placed them in the cupcake area of the store and then left them there for another person to obtain them.

To prove possession, the Commonwealth must prove that Defendant had

knowing or intentional possession of the controlled substance. *Commonwealth v. Valette*, 613 A.2d 548, 549-50 (Pa. 1992).

The court holds that there is sufficient evidence to prove for prima facie purposes that Defendant possessed with intent to deliver the controlled substances, possessed the controlled substances and possessed the drug paraphernalia. As is indicated above, Defendant was seen going to and from the store on numerous occasions prior to the drugs being located. He was physically seen in the cupcake area of the store. Subsequently, individuals were seen going to that same exact area attempting to retrieve something. The timing is essential.

While clearly others had access to that particular aisle, it is the cupcake section that is at issue and the inferences to be drawn from the timing significantly favor the conclusion that a prima facie case has been proven.

Moreover, this type of scheme was known to the trained officers and the area where the incident allegedly occurred is a common area for these types of offenses. In other words, the area was known as a common area for drug transactions and the method used was a common “drop scheme.”

In sum, the evidence and the reasonable inferences to be drawn from the evidence demonstrate the following: Defendant had been to the Uni-Mart on more than one occasion prior to the controlled substances being located. Defendant was seen and surveillance video depicts Defendant going to the cupcake area, removing something from his front pocket and placing that “something” in the cupcake area. Subsequently, at least two

other individuals went to the same cupcake area and rummaged around trying to find something. Police eventually came to the store and located in the same cupcake area the bag containing the controlled substances. The place where the incident allegedly occurred is common for drug dealing and the type of method utilized is a common scheme for drug dealing.

ORDER

AND NOW, this ____ August 2021, following a hearing and argument, Defendant's Omnibus Pretrial Motion for Habeas Relief is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Kirsten Gardner, Esquire (ADA)
Jeffrey Weinberg, Esquire
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Judge Marc F. Lovecchio
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