

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
 :
 vs. : No. CP-41-CR-626-2021
 :
 RICHARD ROGERS, JR., :
 :
 Defendant : Petition for Writ of Habeas Corpus

OPINION AND ORDER

Defendant is charged with theft of services in violation of 18 Pa. C.S.A. § 3926(a)(1.1). Specifically, a person is guilty of theft if he intentionally obtains or attempts to obtain telecommunication service by the use of an unlawful telecommunications device or without the consent of the telecommunication service provider.

The Commonwealth alleges that Defendant between the dates of December 25, 2020 and December 26, 2020 illegally entered the property at 99 Bouganville Road in Jersey Shore, PA and without the consent of the owner or tenants purchased pay per view (PPV) movies for a total cost of \$257.30.

On July 7, 2021, Defendant filed a petition for writ of *habeas corpus* alleging that the Commonwealth's *prima facie* case is based on hearsay evidence alone and accordingly is legally insufficient to establish a *prima facie* case. *Commonwealth v. McClelland*, 233 A. 3d 717 (Pa. 2020)(fundamental due process requires that no adjudication be based solely on hearsay evidence).

A hearing and argument on Defendant's petition was held on September 15, 2021. Clearly, hearsay evidence alone is not enough to establish a *prima facie* case. The

proper means to attack the sufficiency of the Commonwealth's evidence pretrial is through the filing of a petition for writ of *habeas corpus*. *Commonwealth v. Marti*, 779 A.2d 1177, 1179 n.1 (Pa. Super. 2001). At a *habeas corpus* hearing, the issue is whether the Commonwealth has presented sufficient evidence to prove a *prima facie* case against the defendant. *Commonwealth v. Williams*, 911 A.2d 548, 550 (Pa. Super. 2006).

“A *prima facie* case exists when the Commonwealth produces evidence of each of the material evidence of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense.” *Commonwealth v. Munson*, 2021 PA Super 161, 2021 WL 3575350, *6 (Pa. Super. 2021) (citing *Commonwealth v. Karetny*, 880 A.2d 505, 513-514 (Pa. 2005)). 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. *Id.* Weight and credibility of evidence are not factors at the preliminary hearing stage. *Id.* at *7 (citing *Commonwealth v. Wojdak*, 466 A.2d 991, 997 (Pa. 1983)). All evidence must be read in the light most favorable to the Commonwealth, and inferences reasonably drawn therefrom which would support a verdict of guilty are to be given effect. *Id.* (citing *Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003)).

Courts must employ a more likely than not test to assess the reasonableness of inferences relied upon. *Id.* Anything less amounts only to suspicion or conjecture. *Id.* A *prima facie* showing is a low threshold for the Commonwealth to surpass. *Id.* (citing *Commonwealth v. Perez*, 249 A.3d 2049 (Pa. 2021)).

To meet its burden, the Commonwealth may utilize the evidence presented

at the preliminary hearing and may also submit additional proof. *Commonwealth v. Lambert*, 244 A.3d 38, 42 (Pa. Super. 2020). Depending on the particular circumstances of the case, the Commonwealth may introduce the preliminary hearing and/or present evidence. *Id.* The Commonwealth is required to establish a *prima facie* case by introducing some manner of evidentiary support. *Id.*

In this particular case, the Commonwealth did both. It presented the transcript of the preliminary hearing held before MDJ Jerry Lepley on May 12, 2021 as well as a document showing the PPV charges from December 25, 2020 through December 27, 2020.

At the preliminary hearing, Officer Justin Segura of the Tiadaghton Valley Regional Police Department testified that on or about December 27, 2020, he and another officer were dispatched for a “burglary in process” at the Bouganville Road residence. They determined through their investigation that on said property there is a small trailer in which the tenant had passed away in early December. During late December, the trailer was vacant.

Defendant was arrested and charged with burglary but subsequently, the landlord of the property notified Officer Segura that he received a bill from his cable provider regarding specific charges on the account from December 25, 2020 to December 27, 2020, which were not authorized. The bills were incurred during a timeframe in which no one was living at the property but during the time that Defendant was “in that home.”

According to the owner’s statements to Officer Segura, there were witnesses that observed Defendant in the home watching television during the relevant time period.

Previously, Defendant was found inside the trailer as well by the daughters of the deceased.

The court agrees with Defendant that the entirety of the case against him consists of hearsay evidence. Officer Segura testified about what he was told by the owner of the property regarding not only Defendant's presence on the property but also Defendant viewing the television. Moreover, the bill referenced at the preliminary hearing was a purported bill from Dish which was never authenticated.

The bill was purported to be admissible as an exception to the hearsay rule. The Commonwealth argued that it did not qualify as hearsay because it was made part of the officer's report through "a course of business." The bill, however, fails to comply with the business records exception set forth in Pa. R. Evid. 803(6). The prerequisites regarding such were not met. There also was no certification attached with respect to such. Furthermore, no police report was ever admitted into evidence nor asked to be admitted pursuant to 42 Pa. C.S. § 6104(b). Moreover, even if it was admitted into evidence, it does not make every statement contained therein admissible. Only those facts recorded pursuant to the official duty involved at the time and only those which indicate a trustworthy source of the facts are admissible. *Id.*; *see also D'Alssandro v. Pa. State Police*, 937 A.2d 404 (Pa. 2009).

The entirety of the case against Defendant rests on out-of-court statements presented as evidence of the truth of the matters asserted. The Commonwealth has relied exclusively and only on evidence that could not be presented at a trial. This not only violates due process but is clearly insufficient to establish a *prima facie* against Defendant.

Moreover, the Commonwealth presented absolutely no evidence whatsoever

that Defendant used *an unlawful communications device* or obtained the PPV materials *without the consent of the telecommunication service provider* as required by the statute with which Defendant was charged. 18 Pa. C.S.A. §3926(a)(1.1).

Instead, the Commonwealth presented hearsay testimony (at times double or triple hearsay) regarding Defendant's presence in the residence between December 25 and December 27 and the lack of consent of the property owner and/or tenants to his alleged PPV activities.¹ The Commonwealth also presented Commonwealth Exhibit 2 that purported to be a bill from service provider from February 7, 2021 through March 7, 2021, but which did not contain any certification nor any information regarding the provider or the subscriber and included charges for services after Defendant's arrest. This type of hearsay-filled record is precisely what the *McClelland* decision was intended to prevent.

ORDER

AND NOW, this ___ day of October 2021, following a hearing and argument and a review of the evidence presented at the preliminary hearing in this matter, Defendant's

¹ Despite the prosecutor's arguments at the preliminary hearing, the officer did **not** testify that Defendant was arrested in the home. To the contrary, he testified that Defendant was arrested down the road from the residence and that he did not personally see Defendant inside the trailer on December 25th, 26th or 27th. Preliminary Hearing Transcript (Commonwealth Exhibit 1), 05/12/2021, at 10, 11.

Petition for Writ of Habeas Corpus is **GRANTED**. The Information against Defendant is **DISMISSED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Ryan Gardner, Esquire (DA)
Taylor Beucler, Esquire (ADA)
Tyler Calkins, Esquire (APD)
Gary Weber, Esquire
Judge Marc F. Lovecchio