

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	: No. CR-848-2020
vs.	:
	:
DERON SHADD,	: Opinion and Order re
Defendant	: Motion for Writ of Habeas
	: Corpus contained in Defendant's
	: Omnibus Pretrial Motion

OPINION AND ORDER

Defendant is charged by Information filed on July 31, 2020 with four counts of a delivery of a controlled substance and two counts of a criminal use of a communications facility relating to the alleged sale of controlled substances on January 16, 2020, February 20, 2020, and February 26, 2020.

Defendant filed an Omnibus Motion on October 30, 2020, which included a motion for writ of habeas corpus with respect to all counts as well as a motion to suppress. A hearing and argument were held on January 25, 2021.

The court deferred holding a hearing on the motion to suppress giving counsel an opportunity to submit Briefs in Support and Opposition. The court is not aware of any legal authority that will permit it to grant the motion even if the allegations were accepted as true.

The court did, however, conduct a hearing on Defendant's Motion for Habeas Corpus. Following the hearing, the court denied the motion with respect to Counts 3, 4, 5 and 6 of the Information but reserved a decision on Counts 1 and 2. This Opinion will address the reasoning behind the court's decision with respect to Counts 3, 4, 5 and 6 and set forth the court's Opinion and Order with respect to Counts 1 and 2.

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. Lambert*, -- A.3d --, 2020 WL 7650278 at *2-3 (Pa. Super. 2020), citing *Commonwealth v. Dantzler*, 135 A.3d 1109, 1112 (Pa. Super. 2006) (en banc).

In establishing a *prima facie* case, the Commonwealth must produce evidence of every material element of the charged offenses as well as the defendant's complicity therein. *Dantzler, supra*. The evidence must 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. Karetny*, 880 A2d 505, 514 (Pa. 2005). 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 has committed the offense. *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2011). The evidence must be read in a light most favorable to the Commonwealth and inferences reasonably drawn from the evidence of record which would support a verdict of guilty, must be given effect. *Id.*

To meet the Commonwealth's burden, it may utilize the evidence presented at the preliminary hearing and may also submit additional proof. *Lambert, supra* at *3. Depending on the particular circumstances of the case, the Commonwealth may introduce the preliminary hearing record and/or present evidence. *Id.* The Commonwealth is required to establish a *prima facie* case by introducing some manner of evidentiary support. *Id.*

In support of its burden in this case, the Commonwealth introduced into evidence a copy of the preliminary hearing transcript before MDJ Frey on July 14, 2020 (C-1) and a copy of the Pennsylvania State Police lab report dated August 31, 2020 (C-2).

Furthermore, it presented the testimony of Detective Sara Edkin of the Lycoming County Narcotics Enforcement Unit (NEU).

For a defendant to be convicted of a delivery of a controlled substance, there must be evidence beyond a reasonable doubt that he knowingly made an actual or constructive transfer of a controlled substance to another person. *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (Pa. Super. 2004); 35 Pa. C.S.A. § 780-113 (a) (30).

Defendant contends that with respect to the January 16, 2020 incident there was no evidence that he transferred anything. With respect to the remaining two incidents, Defendant argues there was no reliable evidence that he transferred any controlled substance.

For a defendant to be convicted of criminal use of a communications facility, there must be evidence beyond a reasonable doubt that the defendant engaged in telephone and/or similar conversations (communication facility conversations) with another and that those conversations led to a controlled substance transaction or violation. *Commonwealth v. Moss*, 852 A.2d 374, 381-82 (Pa. Super. 2004); 18 Pa. C.S.A. §7512.

Defendant contends that with respect to all of the alleged incidents, there was no evidence that he was involved in any communications that led to the delivery of any controlled substances.

Counts 1 and 2 of the Information relate to the January 16, 2020 alleged incident. Counts 3 and 4 relate to the February 20, 2020 alleged incident and Counts 5 and 6 relate to the February 26, 2020 alleged incident.

The court can easily dispose of the motion with respect to Counts 3, 4, 5 and 6. Detective Edkin testified that on February 20, 2020 while working in an undercover

capacity, she and the Confidential Information (CI) messaged Defendant through Facebook and arranged to purchase cocaine from him. She and the CI met with Defendant at the CI's residence. She gave Defendant money and he gave her a substance, which eventually tested positive for cocaine and methamphetamine. On October 26, 2020 while working again in an undercover capacity, she and the CI contacted Defendant both through Defendant's Facebook and through a cell phone to arrange for the purchase of cocaine. She and the CI again met with Defendant at the CI's residence. She gave Defendant the money and he provided the controlled substance to her. The controlled substance eventually tested positive for cocaine and methamphetamine.

Accordingly and consistent with this court's Order of January 25, 2021, Defendant's habeas corpus petition with respect to Counts 3 through 6 shall be denied.

As for the January 16, 2020 transaction involving Counts 1 and 2, Detective Edkin did not view the actual transaction. She searched the CI before and after the transaction. Before the transaction, the CI did not have any controlled substances. Detective Edkin provided the buy money to the CI. After the CI returned, she had controlled substances but no money.

On January 16, 2020, Detective Curt Loudenslager was working with the NEU and met with the CI who advised that she could purchase controlled substances from a "Danielle." It was "arranged" that the CI would meet "Danielle" at the gas station at the corner of High Street and Wildwood Boulevard in Williamsport.

The CI was transported to an area near the gas station. She walked to the gas station and entered a white truck. "Danielle" was operating the truck. Defendant was

identified as being present in the truck.

According to hearsay testimony from the preliminary hearing, which was not objected to by Defendant, the CI gave the money to Danielle. Danielle then provided the CI with both cocaine and heroin. Defendant assured the CI that the cocaine was “good quality or good stuff.” Clearly, Defendant made this statement with the intent of promoting or facilitating the offense and had the effect of aiding Danielle in committing the offense.

Defendant’s role was described as being present, knowing what was occurring and assuring the CI that the quality of the drugs was a “high standard.” All of this information, however, was provided to the CI who was not present and to date has not testified. The Commonwealth did note that the CI was “still able” to testify at trial.

Hearsay is generally inadmissible in legal proceedings unless it falls under a recognized exception. *Commonwealth v. Ali*, 10 A.3d 282, 315 (Pa. 2010). A *prima facie* case may not be established solely on the basis of hearsay. *Commonwealth v. McClelland*, 233 A.3d 717, 721 (Pa. 2020).

All relevant evidence is admissible except otherwise provided by law. Pa. R.E. 402. The evidence of the CI although hearsay is clearly relevant. Of note is the fact that Defendant did not object to the evidence at the preliminary hearing nor did Defendant object to the Commonwealth introducing the transcript of the preliminary hearing during the hearing on the Motion for Habeas Corpus.

On the one hand, an argument can be made that by not objecting to the evidence, it is admissible. Being admissible, there is clearly enough admissible evidence to prove that Defendant aided or abetted the female named “Danielle” in connection with the

delivery of the controlled substances. There is clearly sufficient evidence to conclude for a *prima facie* purpose that Defendant is culpable under an accomplice theory.

On the other hand, however, the crux of Defendant's habeas corpus motion addresses *McClelland* and the hearsay issue. The court concludes that Defendant has preserved a technical hearsay objection through the filing of his motion. The court notes that Defendant's preliminary hearing occurred on July 14, 2020, and *McClelland* was decided on July 21, 2020. Prior to *McClelland*, appellate case law permitted the Commonwealth to establish a *prima facie* case through hearsay alone.¹ Therefore, Defendant's habeas corpus motion was Defendant's first opportunity to raise a hearsay objection based on *McClelland*.

Given the preservation of this issue, the court cannot conclude that a *prima facie* case has been satisfied. There is no competent evidence as to how the CI obtained the controlled substances, from whom the CI obtained the controlled substances, and what role, if any, Defendant played in said transaction. Defendant's mere presence is insufficient to establish principal, accomplice or co-conspirator liability. *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (Pa. 2004)(a defendant cannot be an accomplice simply based on evidence that he knew about the crime or was present at the crime scene); *Commonwealth v. Keblitis*, 456 A.2d 149, 151 (Pa. 1983); *Commonwealth v. Swerdlow*, 636 A.2d 1173, 1177 (Pa. Super. 1994)(mere association or mere presence at scene insufficient to prove conspiracy).

ORDER

AND NOW, this ___ day of February 2021, following a hearing and argument Defendant's Petition for Habeas Corpus with respect to Counts 1 and 2 is

¹ *Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. 2015).

GRANTED. Counts 1 and 2 of the Information are DISMISSED.

To reiterate the court's prior Order with respect to Counts 3 through 6, said Motion for Habeas Corpus is **DENIED.**

By The Court,

Marc F. Lovecchio, Judge

cc: Eric Williams, Esquire (ADA)
Andrea Pulizzi, Esquire
Eric Birth, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Judge Marc F. Lovecchio