

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. 00-11,275  
VS. :  
KYONG C. ROSS :

OPINION AND ORDER

Defendant has filed a timely Omnibus Pretrial Motion, which is now before this Court for consideration. Among the issues raised is a challenge to the sufficiency of the evidence presented at the preliminary hearing before District Justice C. Roger McRae. Counsel believes that the Court should rule on the sufficiency question before any other issues are reviewed. Counsel has agreed to submit the case on the preliminary hearing transcript, along with brief argument presented by counsel. After review of the testimony presented at the preliminary hearing along with applicable case law, the Court makes the following findings.

On July 21, 2000, Kyong Ross (Defendant) was charged with the offenses of Corrupt Organizations and Promoting Prostitution, violation of Sections 911 and 5902 of the Crimes Code. The Commonwealth alleges that the Defendant, then an employee of an establishment known as the Tokyo Spa (Spa), located in Muncy Township, was involved in performing acts of prostitution at the location. In addition, the Pennsylvania State Police allege that the Defendant was a supervisor or in some position of responsibility or authority with respect to the employees there.

At the hearing in front of District Justice McRae, the Commonwealth presented the testimony of four undercover troopers. The affiant, Trooper Hutson testified that he visited Tokyo Spa on May 27<sup>th</sup>, 1999. When he went there, he was offered a treatment for \$60.00. The treatment consisted of a sauna, body shampoo and massage. He believed that the person was an employee of the business by virtue of the fact that he obtained the services at the Tokyo Spa. He did not however, have any documentation to show that she was in fact employed by the Spa itself. (N.T. 8/3/00 p.20) Hutson returned to the Spa on May 18, 2000. He again paid \$60.00 for a body shampoo, sauna and massage. The woman who performed the services

was Jang Jung. This time, once the massage was completed, Hutson was offered sex, a hand release, for which he paid an additional \$60.00. However, when the masseuse returned to perform the act, he declined. As Trooper Hutson left the premises, he saw the Defendant. As he left, Ms. Jung said to the Defendant "the next time he comes in he wants a massage only". (Id. at p.18) Defendant put her arm around Hutson, wished him a nice night and walked him to the exit door. (Id.) Hutson gave the money knowing that he would not accept the additional services because he knew they were coming in the next day with a search warrant. He wanted to see where the money would end up after the search. (Id.) Hutson testified that he returned the next day to execute a search warrant on the building. During the course of the search, the Defendant gave consent for a search of her car. In the car was a purse, which held \$10.00 of the money that was used by Hutson from the day before. (Id. at p. 19)

Corporal David Young then testified that he visited the Spa on the 18<sup>th</sup> with Trooper Hutson. He also paid \$60.00 for the treatment (sauna, body shampoo and massage). At the end of the treatment performed by an unknown individual, he testified that he was offered the opportunity for a hand release for \$60.00, \$80.00 for oral sex and \$100.00 for sexual intercourse. Cpl. Young would have paid an additional \$60.00 but refused the additional services. (Id. at p. 27) Cpl. Young went back to the Spa on the 19<sup>th</sup> and requested the same \$60.00 treatment. When offered the additional services, he paid \$100.00 for sexual intercourse and before the unknown woman would have attempted to have intercourse with him, he declined her services. (Id. at p.28) Cpl. Young assisted Trooper Hutson on the execution of the search warrant. He ultimately found \$10.00 of the money he had given the masseuse the previous day in the Defendant's purse. The rest of the \$100.00 was found on the masseuse that Cpl. Young had paid. Other than contact on the day that the search warrant was executed, Young testified he may have seen the Defendant one time before, as a greeter, but she never had him as a client. (Id.)

The Commonwealth next called Trooper Lancer Thomas. He testified that he and Trooper Burcher both traveled to the Spa on July 12, 2000. They first made contact with a person by the name of In Sun Shim. (Id. at p.35) She would have advised the men that she could not help them at that time, and they would need to come back in about 45 minutes. However, another female later identified as the Defendant joined the conversation, and she indicated that they could both go inside. Thomas then haggled over the

price, but the treatment was offered for \$60.00. Thomas testified that he and Trooper Burcher were taken to different rooms, and after an initial bath, met again in the hot tub. (Id. at p. 36) The Defendant then took Thomas to another room where she proceeded to perform a massage. At one point, Thomas asked if she could be naked while working. Defendant stated that “ The boss...I could get fired for this,” but ultimately exposed her breasts to the trooper as she was working. (Id. at p. 37) Once the massage was complete, Defendant then asked Thomas if “anything else hurt” and without discussion of money or even a request, began to stroke his genitals. About that time, the other employee abruptly entered, saw the Defendant, and spoke something in another language and the Defendant’s demeanor changed. The Defendant told Thomas was a “bad boy” and in fact said it to the tune of what the Thomas believed to be the theme song from the TV show “Cops”. She stated that he was done, slapped him on the rear end, and once he was dressed, met him by the exit door and told him to “come back again”. (Id. at p. 39) Thomas was certain that while the Defendant worked on him she never said anything that could be construed as offering sex for money. (Id. at p. 40)

Trooper Burcher also testified about his experiences at the Spa on July 12th. He initially was taken to a room, paid his \$60.00 to, and was bathed by the Defendant. He was then taken to a massage room, where he was attended to by another worker there named In Sun Shim. (Id. at p. 43) She would have performed the massage and then requested if there was anything else he wanted. She indicated she could perform a hand release, but that it would cost an additional \$60.00. Burcher stated that he wasn’t interested. (Id. at p. 46) Burcher returned the next day for the same treatment, and again paid the Defendant the \$60.00. The massage was performed by Shim. Burcher also paid to Shim an additional \$60.00 for a hand release. (Id. at p. 47-48)

To successfully establish a prima facie case, the Commonwealth must present sufficient evidence that a crime was committed and the probability that the Defendant could be connected with that crime. Commonwealth v. Wodjak, 502 Pa. 359, 466 A2d 991 (1983). In order to establish a prima facie case on the violation of 18 Pa. C.S.A. § 5902 (b) (1), the Commonwealth must present evidence that the Defendant promoted prostitution by owning, controlling, managing, supervising or otherwise keeping, alone or in association with others a house of prostitution or a prostitution business. Defense Counsel argues that the

Commonwealth showed no evidence that the Defendant was anything more than a worker at the Spa, not necessarily an employee but one who performs her massage service at that location. In addition, at all of the times that the sex acts were paid for there was no evidence that the Defendant supervised, managed or profited from any of the additional monies received. The Commonwealth asserts that although circumstantial, there is evidence-- specifically the \$10.00 paid to the masseuse the previous day-- which suggests that the Defendant was more than a worker and that she profited directly from the additional sexual acts.

In order for a conviction of promoting prostitution to be sustained, the court must be assured that (1) there was a prostitution business; and (2) that the accused had a connection with the "running, control, supervision or keeping of the prostitution business." Therefore this Court must decide first if the activities, which occurred at the Spa, would rise to the level of a prostitution business. It is clear that the Pennsylvania legislature, in its prostitution statute, has outlawed the commercial exploitation of sexual gratification. The appellate courts have clarified the offending behaviors further to include "homosexual and other deviate relations." Commonwealth v. Potts, 314 Pa. Super. 256, 460 A2d 1127 (1983). The prohibited activity includes the masturbation of a male by a female for money. Commonwealth v. De Stefanis, 442 Pa. Super 54, 658 A2d 416, 419, citing Commonwealth v. Robbins, 358 Pa. Super. 225, 516 A2d 1266 (1986). ("Hand releases" were considered to be prohibited acts under the prostitution statute.) Therefore, it is clear from the testimony presented by the troopers that "services" prohibited under the prostitution statute were being performed for money at the Spa.

This Court is not satisfied, however, that sufficient evidence was presented to support, even prima facie, that there was a prostitution business and that the Defendant was promoting that business.

Trooper Hutson, although it is not clear from his testimony how the subject of the sex act came up, was very certain that as he exited the Spa his masseuse indicated to the Defendant that the next time he came in it would be for a massage only. Cpl. Young indicated that he was offered the opportunity to have a sexual act performed after the completion of a massage, without his suggestion or promoting. Trooper Thomas, when dealing with the Defendant directly, candidly testified that the Defendant, who was performing a traditional massage attempted to perform a sexual act with him without the mention of a fee. Trooper

Burcher testified that some prompting of the masseuse was required to determine “what else” there may be for an additional charge. Therefore, it is not entirely clear that a “business” of providing sexual gratification was prima facie established by the testimony. In addition, the fact that Trooper Thomas testified the Defendant was worried about what her boss might say about Thomas’ request to perform the massage partially unclothed, and that she could be fired because of it, seems to refute the Commonwealth’ s belief that the Defendant was in some position of authority with respect to the other employees of the Spa. Finally, although \$10.00 of the money paid by the trooper for a sex act was found in Defendant’s purse after the search, there is nothing to indicate that she received that money as her share of payment for managing the other workers at the Spa.

ORDER

AND NOW, this 2nd day of January, 2001, after review of the testimony of the preliminary hearing and argument by counsel, the Defendant’s Motion for Habeas Corpus is GRANTED. It is ORDERED AND DIRECTED that Count 2 shall be dismissed from the criminal information. As it appears that the remaining Count 1 was dismissed by the District Justice and inadvertently added to the criminal information, that count shall also be DISMISSED.

BY THE COURT,

\_\_\_\_\_J.

xc: District Attorney(RF)  
Peter T. Campana, Esquire  
Court Administrator  
Judges  
Law Clerk  
Gary Weber, Esquire  
Honorable Nancy L. Butts