

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
 :  
 vs. : No. CR-1431-2014  
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 DARRYL HARRIS, :  
 Defendant : Omnibus Pretrial Motion  
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 COMMONWEALTH :  
 : No. CR-1432-2013  
 vs. :  
 :  
 MARKEESE ASKEW :

**OPINION AND ORDER**

Before the Court are several outstanding motions. The Commonwealth filed a motion to amend the two Informations to add counts for each defendant for conspiracy to deliver cocaine, conspiracy to possess with intent to deliver cocaine and conspiracy to criminal use of a communications facility. The Commonwealth also filed a motion to consolidate the cases for trial. Defendant Harris filed an omnibus pretrial motion seeking a dismissal of the controlled substance offenses and a motion to preclude any in-court identification of him. Harris also filed a motion for permission to file additional pretrial motions upon completion of discovery.

Arguments on the various motions were held before the Court on December 16, 2014 and December 22, 2014. At the December 16, 2014 hearing, the Commonwealth introduced as Exhibit 1 the transcript from the preliminary hearing, while Harris introduced a Pennsylvania State Police report and a copy of a photographic line-up as Defendant's

Exhibits 1 and 2, respectively.

With respect to Defendant Askew, he is charged by Information filed on September 19, 2014 with two counts of possession with intent to deliver controlled substances, one count of delivery of a controlled substance, one count of criminal use of a communications facility and one count of possession of a controlled substance. By Information filed as well on September 19, 2014, Harris is charged with the same criminal offenses. The charges against both defendants arise out of an alleged controlled buy of crack cocaine by a confidential informant (CI) on August 14, 2014. The CI is alleged to have purchased the crack cocaine from the defendants.

According to the preliminary hearing testimony, Allison Sander met with Trooper Whipple on August 14, 2014 to arrange for a purchase of controlled substances. Trooper Whipple provided a telephone number to Ms. Sander so that she could arrange for a purchase. After obtaining the telephone number from Trooper Whipple, Ms. Sander engaged in a series of text messages with the recipient which ultimately led to the parties agreeing on a “meeting place” for the sale of the controlled substances. Ms. Sander did not know who she was texting or who was texting back to her.

The initial meeting place was set to be near the ABC Bowling Lanes. The prospective sellers initially drove past the vehicle Ms. Sander was driving. The passenger waved out the window, “flagging” Ms. Sander to follow them.

Ms. Sander followed the vehicle to “around Louisa Street.” The actors pulled their vehicle over at which time Ms. Sander pulled up behind them, got out of her vehicle

and got into the back of the driver's side of the other vehicle. Once inside the vehicle, Ms. Sander gave \$300.00 to the driver through a space between the front driver's seat and passenger seat. The passenger gave her the drugs. They were placed in her hand. She glanced at the drugs and stuck them in her pocket. She believed that she had received three packets based on the amount of money that she paid. However, she only ended up with two in her pocket when she got back.

She had no prior contact with either of the two individuals. While in the vehicle, she could see a profile of the driver. She described him as light-skinned with a goatee. Ms. Sander saw the whole face of the passenger who gave her the drugs, because he turned around and faced her. At the preliminary hearing, Ms. Sander identified Harris as the driver and Askew as the passenger.

Corporal Jeff Paulhamus of the Williamsport Bureau of Police was working on August 14, 2014 assisting in a narcotic enforcement detail. He became aware that a narcotics purchase was being conducted in the area of ABC Lanes and positioned his vehicle accordingly.

He subsequently was advised that the drug transaction occurred in front of Stevens School on Louisa Street. He moved to that location and spotted the suspect vehicle. As the vehicle passed him, he identified the driver as Harris and the passenger as Askew. He immediately activated his emergency lights in an attempt to stop the vehicle. However, it took off at a high rate of speed, traveling through several stop signs. Harris eventually lost control of the vehicle. It skidded across the oncoming lane on Fourth Avenue and collided

with the curb disabling the vehicle.

Askew immediately jumped out of the passenger side and ran. Harris opened the driver door and immediately ran in the other direction. Officer Paulhamus followed Harris, eventually caught up with him and took him into custody. Askew was apprehended a short distance later by other officers.

According to Corporal Paulhamus, once he “took down” Harris, the narcotics officers had arrived immediately. Corporal Paulhamus saw that Harris had keys in his right hand and he also “had a huge wad of money in his pocket.”

Trooper John Whipple has been employed by the Pennsylvania State Police almost 23 years. He recalled Ms. Sander coming to the barracks around 4:00 on August 14, 2014. After she arrived, she texted a phone number that was provided to her to “see if they were good, if they had drugs.”

Through text messages going back and forth, an agreement was reached. Ms. Sander was to get “three hard” and they were going to meet in the area of the ABC Bowling Lanes. The phone number that was provided by Trooper Whipple to Ms. Sander, 267-243-8253, was for an individual by the name of Basile Hall, who was known by Trooper Whipple to deal drugs in the city of Williamsport.

Three phones were subsequently obtained as a result of the investigation. Two phones were found in the vehicle and one phone was found on Askew. None of those phones matched the telephone number believed to be Mr. Hall’s; however, the search warrant revealed that all three of those phones had received messages and/or phone calls from Mr.

Hall's number.

No phone was ever taken from Harris, and the \$300.00 buy money was not recovered from any of the defendants or the vehicle.

The Court will first address the motion to dismiss filed by Harris, in which he contends that the Commonwealth failed to produce any evidence to establish that he possessed or possessed with intent to deliver any controlled substance and that the evidence fails to establish that he engaged in the criminal use of a communications facility.

The proper means to attack the sufficiency of the Commonwealth's evidence pretrial is through the filing of a Writ of Habeas Corpus. Commonwealth v. Marti, 779 A.2d 1177, 1178 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 (Pa. Super. 2006).

“A prima facie case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime.”

Commonwealth v. Packard, 767 A.2d 1068, 1070 (Pa. Super. 2001).

“Stated another way, a prima facie case in support of an accused's guilt consists of evidence that, if accepted as true, would warrant submission of the case to a jury.”

Id. at 1071.

When reviewing a petition for habeas corpus, the Court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. Commonwealth v. Santos, 583 Pa. 96, 101, 876 A.2d 360,

363 (2005). A prima facie case merely requires evidence of each of the elements of the offense charged; not evidence beyond a reasonable doubt. Marti, 779 A.2d at 1180 (citations omitted).

With respect to Harris' petition for habeas corpus (motion to dismiss), Harris argues that the evidence fails to prove possession of any controlled substances. Possession may be established by showing either an actual or constructive possession. Actual possession is established by showing that the defendant had the controlled substance on his person, while constructive possession can be proven through showing that the defendant exercised dominion over the substance. See Commonwealth v. Ocasio, 619 A.2d 352, 354 (Pa. Super. 1993). In a case such as this where neither controlled substances nor contraband are found on the defendant, the Commonwealth must establish constructive possession. Commonwealth v. Haskins, 677 A.2d 328, 330 (Pa. Super. 1996), appeal denied, 692 A.2d 563 (Pa. 1997).

Constructive possession is defined as "the ability to exercise a conscious dominion over the illegal substance: the power to control the contraband and the intent to exercise that control." Commonwealth v. Macolino, 469 A.2d 132, 134 (Pa. 1983)(citations omitted). The Pennsylvania Supreme Court, in Commonwealth v. Mudrick, 507 A.2d 1212 (1986), described the concept as follows: "Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of contraband was more likely than not." Id. at 1213. "An intent to maintain a conscious dominion may be inferred

from the totality of the circumstances...[and] circumstantial evidence may be used to establish the Defendant's possession of drugs or contraband." Commonwealth v. Valette, 613 A.2d 548, 550 (1992), quoting Macolino, supra. Additionally, multiple people may be found to constructively possess contraband in situations where the contraband is found in an area of joint control and equal access. Haskins, supra.

Considering all of the circumstances, the Court concludes that Harris constructively possessed the controlled substances with the intent to deliver them. For at least prima facie purposes, Harris was identified as the driver of a vehicle that was involved in a drug transaction. Under controlled circumstances, a CI entered the vehicle, gave money to Harris and then received controlled substances from the passenger. The timing of the exchange of drugs and money, one after another, evidences that Harris was aware of what occurred. Furthermore, the CI had numerous text messages with another phone essentially setting up the deal. The "other phone" had contacted the phones located in Harris' vehicle. Harris followed the directions as set forth in the phone messages. Finally, following the transaction and upon being confronted by police, Harris led them on a high speed chase until his car crashed. Following the crash, Harris ran until he was captured. Harris' flight certainly is circumstantial evidence of guilt.

While the Court recognizes Harris' arguments with respect to identification of him by the CI, the telephone numbers, the fact that the buy money was not recovered and the fact that the CI may have testified somewhat inconsistently, these arguments go to the weight

of the testimony and not the sufficiency for prima facie purposes. The weight and the credibility of the evidence are not factors at this stage of the proceedings. Marti, 779 A.2d at 1180.

Moreover, and as argued by the Commonwealth, Harris is also liable under prima facie standards on the theory of accomplice liability. For prima facie purposes and based upon the above testimony, the Commonwealth has proven that, with the intent of promoting or facilitating the commission of the controlled substance offenses, Harris aided or agreed or attempted to aid another in planning or committing these offenses. 18 Pa. C.S.A. § 306.

The Court will now address Harris' prima facie challenge to Count 3, criminal use of a communications facility. The Commonwealth concedes that there is no evidence that Harris spoke with or had any contact with the CI via text messages. Moreover, there was no communications device located on Harris or in his vehicle that matched the phone number of the cell phone called by the CI to arrange the drug transaction. Nevertheless, the Commonwealth argues that the evidence shows for prima facie purposes that the CI arranged the sale through a third party, who then had contact with Harris or his accomplice; therefore, Harris is culpable under the theory of accomplice liability.

As the Supreme Court of Pennsylvania recently noted in Commonwealth v. Knox, No. 13 WAP 2013 (Pa., December 15, 2014), the general rule is that a person is an accomplice of another in the commission of an offense if, acting with the intent to promote or



facilitate the commission of the offense, he solicits the other person to commit it or aids, agrees or attempts to aid the other person in planning or committing it. Knox, supra at 3. As the Court further noted, it previously rejected any expansive “common design and natural and probable consequences doctrines, re-focusing liability for complicity squarely upon intent and conduct, not merely results.” Id. Accordingly, the issue is whether the evidence and reasonable inferences, taken in the light most favorable to the Commonwealth, support a prima facie conclusion that Harris, acting with the intent to promote or facilitate the criminal use of a communications facility, solicited Askew or another to commit such offense or aided, agreed, or attempted to aid Askew or another in doing so.

Upon review of the evidence, the Court finds that it does support such a prima facie conclusion. At the very least, a drug transaction was arranged via telephone contact through texts. The information set forth in the texts between the CI and the unknown third party was relayed to Harris and Askew. Harris and Askew acted in accordance with the information set forth on the texts by consummating the deal as agreed. The crime of arranging a drug deal through a communications device was certainly promoted and facilitated by Harris’ conduct. As well, for prima facie purposes it can be concluded that the Harris aided the third party in the third party’s commission of that offense by carrying out the terms of the agreed upon transaction.

Harris next argues that because the CI could not identify him from the photo array, she should be precluded from identifying him in court at the trial in this matter.

According to the documents presented at the hearing in this matter, Trooper Whipple met with the CI on August 19, 2014. She was shown a photo array which contained a photograph of Askew. She positively identified him as the person she received the crack cocaine from on August 14, 2014. She was then shown a photo array which included a photograph of Harris. She was unable to positively identify anyone in that array as the person she handed the pre-recorded U.S. currency to during the controlled drug purchase.

During the preliminary hearing in this matter, the CI positively identified Harris as the individual who drove the vehicle involved in the drug transaction and to whom she handed the money.

Harris argues that the identification at the preliminary hearing was unduly suggestive in light of the fact that he was located behind defense counsel in a prison jumpsuit and restrained in handcuffs and leg shackles. He further argues that this suggestiveness was exacerbated by the fact that the CI was not able to identify him via the photo array.

“Following a suggestive pre-trial identification procedure, a witness should not be permitted to make in court identification unless the prosecution establishes by clear and convincing evidence that the totality of the circumstances affecting the witness’s identification did not involve the substantial likelihood of misidentification. Commonwealth v. Bradford, 451 A.2d 1035, 1037 (Pa. Super. 1982), quoting Commonwealth v. Fowler, 466 Pa. 198, 352 A.2d 17, 19 (1976) (citations omitted).

The Court must determine whether, under the totality of the circumstances, the identification at the preliminary hearing was reliable. McElrath v. Commonwealth, 592 A.2d 740, 742 (Pa. Super. 1991). “Absent some special element of unfairness, [an in-court identification] is not so suggestive as to give rise to an irreparable likelihood of misidentification.” Commonwealth v. Brown, 611 A.2d 1318, 1321 (Pa. Super. 1992). The fact that an identification occurred with the defendant in handcuffs does not render the identification improper. Id. Factors to determine whether the victim had an independent basis for an in-court identification include: “(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Commonwealth v. Fisher, 769 A.2d 1116, 1127 (Pa. 2001); Commonwealth v. Kearney, 92 A.3d 51, 65 (Pa. Super. 2014). In reviewing these factors, the Court cannot conclude that the identification of Harris at the preliminary hearing was so suggestive as to give rise to an irreparable likelihood of misidentification. When the incident occurred, the CI viewed Harris from a profile position. She did not have an opportunity to view his whole face. She had not previously met Harris. The full face photograph of Harris set forth in the array did not produce an identification. At the preliminary hearing, however, and as explained by the Commonwealth without objection by the Defendant, the CI had an opportunity to view Harris in person from a profile position, as well as a full frontal position.

Certainly, the CI had an opportunity to view Harris at the time of the crime.

While she was paying some attention, she was certainly not paying entire attention in light of the fact that it was a quick transaction and she was dealing with two individuals. Further, Harris was in front of her while she was in the back seat. She did describe Harris as being a light-skinned black male with possible a goatee. There is nothing in the record to lead the Court to conclude that there was any level of uncertainty by the CI when she identified Harris at the preliminary hearing. While some time passed between the incident and the preliminary hearing and while there is some level of suggestiveness, the Court cannot conclude that under all of the circumstances the identification was so suggestive as to give rise to an irreparable likelihood of misidentification. This conclusion is bolstered by the fact that the witness was not willing to simply identify anyone at the array. The integrity of the identification process is evident.

Accordingly, Harris' omnibus pretrial motion in the nature of a motion to dismiss and motion to suppress will be denied. The Court, however, will grant Defendant's Motion to file additional pretrial motions upon completion of discovery.

The Court will next address the Commonwealth's motion to amend the Information and the Commonwealth's motion to consolidate.

In connection with the Commonwealth's Motion to Amend, it seeks to amend both Informations to add counts of Conspiracy to Deliver Cocaine, Conspiracy to Possess with Intent to Deliver Cocaine and Conspiracy for Criminal Use of a Communications Facility.

Rule 564 of the Pennsylvania Rules of Criminal Procedure governs amendments to Information. Rule 564 provides that a court may allow the amendment of an Information where, among other things, there is a defect in the description of the offense, provided the amendment does not charge an additional or different offense.

The purpose of Rule 564 is to “ensure that a defendant is fully apprised of the charges, and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed.” Commonwealth v. Duda, 831 A.2d 728, 732 (Pa. Super. 2003), quoting Commonwealth v. J.F., 800 A.2d 942, 945 (Pa. Super. 2002).

In determining prejudice, lower courts are directed to consider several factors including the following:

(1) whether the amendment changes the factual scenario supporting the charges; (2) whether the amendment adds new facts previously unknown to the defendant; (3) whether the entire factual scenario was developed during the preliminary hearing; (4) whether the description of the charges changed with the amendment; (5) whether a change in defense strategy was necessitated by the amendment; and (6) whether the timing of the Commonwealth’s request for amendment allowed for ample notice and preparation.

Commonwealth v. Sinclair, 897 A.2d 1218, 1223 (Pa. Super. 2006), citing Commonwealth v. Grekis, 601 A. 2d 1284, 1292 (Pa. Super. 1992).

Furthermore, since the purpose of an Information is to apprise the defendant of the charges against him so that he may have a fair opportunity to prepare a defense, relief is awarded only when the variance between the original and the new charges prejudices the

defendant by, for example, rendering defenses which might have been raised against the original charges ineffective with respect to the substituted charges. Sinclair, supra. As well, “the mere possibility that the amendment of the Information may result in a more severe penalty due to the additional charges is not, of itself, prejudice.” Sinclair, 897 A.2d at 1224 citing Commonwealth v. Picchianti, 600 A.2d 597, 599 (Pa. Super. 1991) appeal denied, 609 A.2d 168 (Pa. 1992).

The proposed amendments neither change the factual scenario in this case nor add new facts previously unknown to the defendants. The crimes revolved out of the same factual scenario as the crimes specified in the original Information. The proposed amendment also does not deprive the defendants of a fair opportunity to prepare their defenses or render any of their defenses ineffective. The timing of the Commonwealth’s request allows for ample notice and preparation.

Harris and Askew argue that they would be prejudiced because each of them may not be responsible for the other’s conduct and that there might be insufficient evidence to sustain a conspiracy conviction. Pennsylvania case law holds, however, that “[o]nce there is evidence of a conspiracy, all conspirators are equally criminally responsible for the acts of their co-conspirators committed in furtherance of the conspiracy regardless of their individual knowledge of such actions and regardless of which member of the conspiracy undertook the action.” Commonwealth v. Figueroa, 859 A.2d 793, 798 (Pa. Super. 2004). In other words, if through the direct and circumstantial evidence it is concluded that one of the

defendants committed certain conduct in furtherance of the conspiracy, the remaining defendant would be equally criminally responsible. As well, the Court finds that there is ample evidence to support a prima facie case of conspiracy by both of the defendants. Accordingly, the Court will grant the Commonwealth's motion to amend the Information.

Finally, the Court will address the Commonwealth's motion to consolidate. Harris and Askew do not "strenuously" object to the motion, noting only that they believe they would be prejudiced if the cases were tried together. Specifically, they argue that their alleged differing roles in the transaction might cause one of them to be convicted simply because the other was more culpable.

Defendants charged in separate Informations may be tried together if they are alleged to have participated in the same series of acts or transactions constituting an offense or offenses. Pa. R. Crim. P. 582 (A) (2). The Court, however, may order separate trials if it appears that any party may be prejudiced by the defendants being tried together. Pa. R. Crim. P. 583.

"As a general policy, joint trials are encouraged when the judicial economy will be promoted by avoiding the expense and time-consuming duplication of evidence." Commonwealth v. Jones, 542 Pa. 462, 668 A.2d 491, 501 (1998)(citation omitted). In this particular case, the defendants are alleged to have participated in the same acts involving the alleged drug delivery. As well, they are both charged under accomplice liability and with conspiracy. When defendants have been charged with a conspiracy, a joint trial is preferable.

Id.

Harris and Askew assert that they may be prejudiced by consolidation due to perhaps inconsistent defenses or inconsistent roles in the alleged offense, however, “the fact that defendants have conflicting versions of what took place, or the extents to which they participated in it, is a reason for rather than against a joint trial because the truth may be more easily determined if all are tried together.” Commonwealth v. Martinelli, 690 A.2d 203, 213 (Pa. 1997), quoting Commonwealth v. Chester, 587 A.2d 1367, 1373 (Pa. 1991). Moreover, the fact that one defendant may try to save himself at the expense of the other constitutes insufficient grounds to require a severance. Martinelli, supra.

The Court fails to see how consolidation of the cases would cause Harris and Askew to suffer a specific prejudice greater than the general prejudice any defendant suffers when the Commonwealth’s evidence links them to a crime. Commonwealth v. Dozzo, 991 A.2d 898, 902 (Pa. Super. 2010). Accordingly, the Court finds that consolidation is appropriate and will grant the Commonwealth’s motion to consolidate.

**ORDER**

**AND NOW**, this \_\_\_\_ day of January 2015, following a hearing and argument, the Court **DENIES** Harris’ motion to dismiss and motion to preclude in-court identification. The Court **GRANTS** Harris’ motion for permission to file additional pretrial motions upon completion of discovery. Such a motion, if any, must be filed within thirty (30) days of receipt of said discovery and shall be limited to that discovery produced following



the hearing in this matter.

The Court **GRANTS** the Commonwealth's motion to consolidate. These cases shall be consolidated for trial purposes. The Court also **GRANTS** the Commonwealth's motion to amend the Information. The clerk of courts is directed to add count 6, conspiracy to deliver cocaine, an ungraded felony; count 7, conspiracy to possess with intent to deliver cocaine, an ungraded felony; and count 8, conspiracy to criminal use of a communication facility, a felony of the third degree, to the charges filed against the defendants in these cases.

The Court,

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Marc F. Lovecchio, Judge

cc: Anthony Ciuca, Esquire (ADA)  
Nicole Spring, Esquire (counsel for Defendant Askew)  
Robert Hoffa, Esquire (counsel for Defendant Harris)  
File 1431-2014  
Work file  
Gary Weber, Lycoming Reporter