

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1481-2023  
:   
vs. : Opinion and Order re  
: Petition for Writ of Habeas Corpus  
: Contained in Count 1 of Defendant's  
ANDREA SHEARER, : Omnibus Pre-Trial Motion  
Defendant :

**OPINION AND ORDER**

On June 13, 2024, the court held a hearing and argument on Andrea Shearer's (Defendant) Omnibus Pre-trial Motion (OPTM) filed. Count 1 of the OPTM was a Petition for Writ of Habeas Corpus<sup>1</sup>. Defendant contends that the Commonwealth failed to present a *prima facie* case for Criminal Attempt or Criminal Conspiracy<sup>2</sup> to Deliver a Controlled Substance, Delivery of a Controlled Substance (cocaine), and Criminal Use of a Communication Facility. More specifically, the defense asserts that the Commonwealth failed to present evidence that Defendant took a substantial step to deliver a controlled substance or that there was agreement between Defendant and Noah Moore to deliver a controlled substance; there was no evidence that Defendant possessed or possessed with the intent to deliver a controlled substance; and/or the Commonwealth failed to present *prima facie* evidence that Defendant used a communication device to facilitate the commission or attempt to commit a felony under the Controlled Substance Act.

At the hearing, the Commonwealth presented a transcript of the preliminary hearing

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<sup>1</sup> Defendant's OPTM raised several other issues which included a Motion to Compel Discovery, Motion to Disclose information about the CI or witnesses and a Motion to reserve the right to file additional motions when the missing discovery was provided. These issues were resolved by the order issued by the Court on June 14, 2024.

<sup>2</sup> A subsequent order was entered by the Court amending count 1 to Conspiracy to Deliver a Controlled Substance on June 13, 2024. There appears to be some kind of "glitch" that even though

as Commonwealth's Exhibit #1. Defense counsel relied on the arguments contained in the motion, and the Commonwealth did not wish to make any argument.

The Commonwealth called two witnesses at the preliminary hearing: Jasmine Aurand and Detective Sarah Edkin.

Jasmine Aurand testified that she was with Detective Edkin on September 27, 2023 in South Williamsport, Lycoming County, Pennsylvania. In the presence of Detective Edkin, Ms. Aurand called Andy's (Defendant's boyfriend's) phone. Andy and Defendant resided at 355 Fisher Street in South Williamsport. Andy and Defendant shared a phone. Ms. Aurand called and Andy answered the phone. Ms. Aurand testified that she was calling to purchase cocaine and she was told to call "her" so she could meet "them" over at the house. Andy told Ms. Aurand to call back because "they" weren't ready yet. Ms. Aurand called back a little later, and Defendant and Scott Paulhamus were on speaker phone. "They" had her wait over at the dollar store. Defendant told Ms. Aurand to come over, but "they" asked her if she had a couple ones to get some birthday balloons. Ms. Aurand recognized Scott Paulhamus on the phone; she knew his voice from speaking to him before. Ms. Aurand didn't have any ones, so "they" asked her to use money out of the \$100.

Ms. Aurand purchased the balloons and then went to Defendant and Andy's home on Fisher Street. Ms. Aurand went inside and was met by 'Tex' (Noah Moore). Ms. Aurand asked where Scott and Defendant were. He said they were upstairs. 'Tex'/Noah handed her powder cocaine in a plastic baggie and she handed him the \$100. Ms. Aurand left the residence, met with Detective Edkin, and handed her the cocaine.

On cross-examination, Ms. Aurand testified that she was talking to Scott Paulhamus;

he was on the speaker phone when she called Defendant's boyfriend's phone. Defendant asked her to get birthday balloons. Ms. Aurand also indicated that she had purchased drugs from 'Tex' a couple of times at another address, but not as a confidential informant. She was also surprised that 'Tex' answered the door.

Detective Sarah Edkin testified that she was conducting a controlled buy on September 27, 2023 utilizing a confidential informant (CI). The goal was to purchase cocaine from Defendant. Detective Edkin met the CI, strip-searched her and nothing was located, and provided the CI with pre-recorded police funds. Detective Edkin placed an audio-video recorder on the CI's person and the CI was wearing it the entire time during the buy. After Detective Edkin started the equipment the CI, Ms. Aurand, placed the phone call on speaker and dialed a phone number with a 570-area code. A male answered the phone and Ms. Aurand asked if Defendant was there. The male responded "yeah but you are going to have to hold on" and instructed Ms. Aurand to call back. After some time had passed, Ms. Aurand called back and a female answered the phone. The female asked Ms. Aurand if she had any ones on her. Ms. Aurand said no that she only had \$100 in 20s and she was instructed to use that money to go to the dollar store and buy some birthday balloons. Detective Edkin went with Ms. Aurand into the dollar store and Detective Edkin used the money to purchase the balloons. Detective Edkin then recorded the police funds again. Then there was a conversation that said to come over to the house at 355 Fisher Street. Detective Edkin transported Ms. Aurand to that residence. Ms. Aurand entered the residence, came out after a short time and returned to Detective Edkin. Ms. Aurand handed Detective Edkin the cocaine and Detective Edkin searched Ms. Aurand again. Detective Edkin took the

substance back to the Narcotics Enforcement Unit (NEU) headquarters and field-tested it; the result was positive for cocaine. It was also sent to Wyoming Regional Lab for further testing.

While Ms. Aurand was inside the residence, Detective Edkin was able to view the live feed from the audio-video recorder the entire time. Ms. Aurand only had contact with Noah Moore. Detective Edkin also overheard Ms. Aurand ask “where is (sic) Andrea and Scott?” Noah said “they are upstairs, they told me to bring this to you.” Detective Edkin also testified that Ms. Aurand came to her and said she could buy cocaine from Defendant and Detective Edkin replied, “let’s do it.”

Detective Edkin did not know who the voices were on the phone. She did not have contact with Defendant, Andy, Scott or Noah previously and did not recognize their voices. Ms. Aurand told Detective Edkin who was on the phone.

## **Discussion**

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove a defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused likely committed the offense. *Id.* Furthermore, 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. *Commonwealth v. Marti*, 779

A.2d 1177, 1180 (Pa. Super. 2001). To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and may also submit additional proof. *Commonwealth v. Dantzler*, 135 A.3d 1109, 1112 (Pa. Super. 2016). “The Commonwealth may sustain its burden of proving every element of the crime...by means of wholly circumstantial evidence.” *Commonwealth v. DiStefano*, 782 A.2d 574, 582 (Pa. Super. 2001); *see also Commonwealth v. Jones*, 874 A.2d 108, 120 (Pa. Super. 2016). The weight and credibility of the evidence may not be determined and are not at issue in a pretrial habeas proceeding. *Commonwealth v. Wojdak*, 466 A.2d 991, 997 (Pa. 1983); *see also Commonwealth v. Kohlie*, 811 A.2d 1010, 1014 (Pa. Super. 2002). Moreover, “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 the light most favorable to the Commonwealth's case.” *Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003).

***Did the Commonwealth present prima facie evidence of a conspiracy to deliver cocaine?***

Defendant alleges that the Commonwealth has failed to establish that the Defendant has taken a substantial step toward the delivery of a controlled substance. In fact, Defendant alleges that the Commonwealth presented no evidence that she was involved in any way in a criminal act.

According to Pennsylvania statute, the crime of conspiracy is defined as follows:

- (a) Definition of conspiracy.**--A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
- (1) agrees with such other person or persons that they or one or more of them

will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

**(b) Scope of conspiratorial relationship.**--If a person guilty of conspiracy, as defined by subsection (a) of this section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, to commit such crime whether or not he knows their identity.

18 Pa. C.S.A. § 903.

“The essence of a criminal conspiracy is the agreement to perform an unlawful act.”

*Commonwealth v. Eddowes*, 397 Pa.Super. 551, 558, 580 A.2d 769, 773 (1990) (citations omitted), *allocatur denied*, 529 Pa. 631, 600 A.2d 951 (1991). Here, other than the testimony provided by the CI that the phone number the CI used to arrange was shared by Defendant and her boyfriend and made general statements that “they” were the ones she communicated with to arrange the deal, there is no evidence to indicate the Defendant specifically knew what was happening. Under such circumstances, it is not reasonable to infer that a conspiracy had been committed. *Commonwealth v. Azim*, 313 Pa. Super. 310, 459 A.2d 1244 (1983).

“By its very nature, the crime of conspiracy is frequently not susceptible to proof except by circumstantial evidence.” *Id.* at 314, 459 A.2d at 1246 (quoting *Commonwealth v. Volk*, 298 Pa. Super. 294, 300, 444 A.2d 1182, 1185 (1982) (citations omitted)). *Commonwealth v. Herrick*, 442 Pa. Super. 412, 417, 660 A.2d 51, 53–54 (1995).

To convict a defendant of conspiracy at trial, the trier of fact must find that: (1) the defendant intended to commit or aid in the commission of the criminal act; (2) the defendant entered into an agreement with another (a “co-conspirator”) to engage in the crime; and (3) the defendant or one or more of the other co-conspirators committed an overt act in

furtherance of the agreed upon crime. *Commonwealth v. Spatz*, 716 A.2d 580, 592 (1998); *Commonwealth v. Murphy*, 292, 844 A.2d 1228, 1238 (Pa. 2004). “[M]ere association with the perpetrators, mere presence at the scene, or mere knowledge of the crime is insufficient” to establish that a defendant was part of a conspiratorial agreement to commit the crime. *Commonwealth v. Lambert*, 795 A.2d at 1016. There needs to be some additional proof that the defendant intended to commit the crime along with his co-conspirator. *Murphy*, 844 A.2d at 1238 (2004).

When the CI testified at the preliminary hearing she said that she spoke with someone who said “they” or referred to Scott Paulhamus or “Tex”, neither of whom are the Defendant. The only testimony connecting the Defendant to the crime is that she answered the phone she shared with Andy, asked the CI if she had any ones and when she did not, she asked the CI to pick up some balloons on her way to the house. Once the CI was at the Fisher Street residence, she never saw Defendant. She told Edkin that “Tex” (Noah Moore) told her “they were upstairs.” Something more than “mere presence” at the scene of the crime must be shown to convict one of the participants in the commission of the crime. *Commonwealth v. La*, 433 Pa. Super. 432, 448, 640 A.2d 1336, 1344 (1994). Although she was told that Defendant was there, the CI never saw her or spoke with her about the transaction. Since the Commonwealth has not shown anything more than the Defendant may have been present when there was a discussion about the delivery, that is not sufficient to establish that the Defendant was acting in concert with others to facilitate the crime.

Furthermore, in *Commonwealth v. Harris*, the Pennsylvania Supreme Court held that the Commonwealth cannot establish the identity of the perpetrator solely through hearsay

evidence. The non-hearsay testimony of the CI and Detective Edkin did not connect the Defendant to the transaction. With the exception of observing the CI place phone calls and receiving the controlled substance from the CI after the transaction occurred, Detective Edkin's testimony was based solely on what she heard or saw through the recording device. In other words, Detective Edkin's testimony was based on conversations she heard the CI have with others. Detective Edkin was not a party to those conversations.

Defendant did not deliver the drugs to the CI; Noah Moore ("Tex") did. The CI spoke with "Andy" who told her to call back later. While "Andy" may have told the CI that she would have to talk to "her", who was presumably the Defendant, "Andy" did not testify. Similarly, when the CI called back, she primarily spoke with Scott Paulhamus. It appears that the only conversation the CI had with the Defendant was one about picking up balloons at the Dollar General store. When the CI arrived to purchase drugs, the only person she had contact with was Noah Moore ("Tex"). The CI provided the money to Noah Moore and he provided the drugs to the CI. The CI testified that she asked him where Scott and Andrea (Defendant) were and he said they were upstairs. Detective Edkin testified that Noah Moore said "they were upstairs and they told me to give this to you." Noah Moore did not testify. All of the statements about the Defendant and the drug transaction, except the conversation about picking up balloons at the Dollar General store came from "Andy", Noah Moore ("Tex") and Scott Paulhamus but none of those individuals testified at the preliminary hearing or at the hearing on the Defendant's habeas motion.

***Did the Commonwealth present prima facie evidence that Defendant delivered cocaine to a confidential informant?***



The Commonwealth has charged Defendant with one count of Delivery a Controlled Substance.

To establish the crime of delivery, the Commonwealth must show

...(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 Pa. C.S. §780-113(a)30.

The term “deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship. 35 P.S. §780-102. A defendant actually transfers drugs whenever he or she physically conveys drugs to another person. *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (Pa. 2004). A defendant constructively transfers drugs when he or she directs another person to convey drugs under his or her possession and control to a third person. *Id.*

While the Commonwealth acknowledges that the Defendant did not participate in the actual transfer of the controlled substances, it has charged the Defendant in Count 2 under the theory of accomplice or co-conspirator liability. A person is an accomplice of another person in the commission of an offense if, with the intent of promoting or facilitating the commission of the offense he (1) solicits such other person to commit it; or (2) aids or agrees or attempts to aid such other person in planning or committing it. 18 Pa.C.S.A. § 306.

Therefore, two prongs must be satisfied for a defendant to be found guilty as an “accomplice.” *See Commonwealth v. Woodward*, 418 Pa.Super. 218, 614 A.2d 239, 242 (1992). First, there must be evidence that the defendant intended to aid or promote the

underlying offense. *See id.* Second, there must be evidence that the defendant actively participated in the crime by soliciting, aiding, or agreeing to aid the principal. *See id.* While these two requirements may be established by circumstantial evidence, a defendant cannot be an accomplice simply based on evidence that he knew about the crime or was present at the crime scene. *See Commonwealth v. Wagaman*, 426 Pa.Super. 396, 627 A.2d 735, 740 (1993). There must be some additional evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so. *See id.* With regard to the amount of aid, it need not be substantial so long as it was offered to the principal to assist him in committing or attempting to commit the crime. *See Commonwealth v. Cox*, 546 Pa. 515, 686 A.2d 1279, 1286 (1997), *Murphy*, 844 A.2d at 1234 (2004). The Commonwealth has not shown where the Defendant provided aid or assisted anyone in the commission of the crime.

***Did the Commonwealth present prima facie evidence that Defendant utilized a communications device to facilitate the delivery of cocaine to a confidential informant?***

The Commonwealth is required to prove that Defendant used “a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or . . . The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.” 18 Pa. C.S. § 7512(a).

The CI did not testify that the Defendant used the phone for anything other than asking if the CI “had ones” and asking the CI purchase balloons for a party happening after

she arrives at the house. Since the Commonwealth has not shown that the Defendant aided or assisted the drug transaction by the use of the cellular phone, this charge should be dismissed.

**ORDER**

**AND NOW**, this 25<sup>th</sup> day of September 2024, the Court GRANTS Defendant's petition for writ of habeas corpus with respect to all of the charges. This ruling is without prejudice to the Commonwealth to re-file the charges.

By the Court,

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Nancy L. Butts, President Judge

cc: Eric Birth, Esquire (ADA)  
Robert Hoffa, Esquire  
Gary Weber, Esquire  
Jerri Rook