

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	CR-1511-2023
	:	
	:	
KAYLA BAUSINGER,	:	
Defendant	:	

OPINION

This matter is before the Court after a hearing on July 22, 2024, on the Defendant’s Petition for Writ of Habeas Corpus filed on April 1, 2024, by and through the Defendant’s attorney of record at the time, Peter Lovecchio, Esquire. Attorney Lovecchio withdrew his appearance on behalf of the Defendant on July 16, 2024, and Attorney Jeana Longo simultaneously entered her appearance and presented for the hearing on the Petition for Writ of Habeas Corpus. Attorney Eric Birth appeared on behalf of the Commonwealth.

The Defendant is charged with one count of Theft by Deception-False Impression, a Felony of the third degree under 18 Pa.C.S.A. Section 3922(a)(1), for a series of thefts from McDonald’s restaurants in two Williamsport locations. The Defendant does not contest that the theft occurred, rather the Defendant asserts that the amount alleged to have been stolen does not reach the level claimed by the Commonwealth. In her Petition for Writ of Habeas Corpus, the Defendant asserts that to establish the grading for this charge, the Commonwealth must establish that the Defendant unlawfully obtained monies from the Restaurant in excess of \$2,000.00. The Defendant requests as relief that the sole charge of Theft by Deception be either dismissed or amended from a Felony of the Third Degree to a Misdemeanor of the Second Degree.

At the hearing on July 22, 2024, The Commonwealth called Jennifer Newcomer, Director of Operations for seven (7) McDonald’s restaurants in the Williamsport and

Bloomsburg areas, Andrew Kelley, owner of seven (7) McDonald's restaurants and employer of the Defendant at the time of the alleged incident, and Garrett Shnyder, a Pennsylvania State Police Officer for six (6) years. During the hearing, the Commonwealth submitted a hand-written list totaling the refund amounts provided to law enforcement as Commonwealth Exhibit 1, a register report as Commonwealth Exhibit 2, a video of the Defendant pocketing cash taken at the window as Commonwealth Exhibit 3, and a video of the Defendant giving a former employee two refunds as Commonwealth Exhibit 4. Without objection from the Defendant, all exhibits were admitted to the record.

Background

Jennifer Newcomer ("Newcomer"), Director of Operations for McDonald's in the Williamsport and Bloomsburg areas, testified at the hearing that accountants reported two McDonald's locations in the Williamsport, Pennsylvania area showing significantly higher refunds than other stores. The accountants notified Newcomer of the unusual activity on September 5, 2023, whereupon she launched her own investigation into the security footage from the preceding three months of the two stores cited. On the videos, Newcomer observed the Defendant conducting refunds and pocketing the money or giving the money to a customer. Newcomer testified that the footage also depicted the Defendant pocketing money while working at the first drive-through window. Newcomer testified to reviewing the refund amounts, compiling a hand-written list of the totals, and submitting the document to law enforcement. Newcomer testified that the two stores affected were the Lycoming Creek Road and East Third Street locations in Williamsport, Pennsylvania. Moreover, Newcomer stated that the two stores typically have a three-to-four-hundred-dollar standard refund amount each month. At that time, the Defendant was a supervisor with the authority to conduct refunds for three locations for about one year. Newcomer testified that in the Defendant's capacity as a

supervisor, she used multiple registers and transitioned between registers to supervise the employees. The Defendant also had keys to the cash drawers, supply closets, etc. However, the activity only occurred during regular business hours. Moreover, the Defendant's scope of employment required her to oversee the overall functioning of the restaurant, ensure crewmembers followed procedures and met service expectations and goals, and adhered to food safety compliance regulations. In Commonwealth Exhibit 2, the Register Report, Newcomer testified that the report details the refunds and she highlighted the refunds she knew the Defendant to have performed based on the video footage from each store. Newcomer testified that the Defendant did not have permission to take the money, Newcomer did not have any knowledge related to whether money was returned, and the Defendant did not provide any explanation as to why the theft occurred. Newcomer testified she calculated that approximately \$30,000.00¹ was taken from the McDonald's store by the Defendant.

On cross-examination the Defendant provided the exact dollar amount that Newcomer reported to law enforcement and inquired how the number was calculated. Newcomer testified that she calculated the number, not the accountants, by reviewing the refund reports and correlating the times and amounts to the video footage. Newcomer also explained that the calculations preceding the available video footage were estimated based on the average monthly standard refund amounts from before the investigation ensued. Newcomer testified that the amount \$89.50 was observed on the transaction report approximately twenty (20) to thirty (30) times, which was unusual because most refunds from the store are not such a significant amount. Newcomer testified that the Defendant utilized another manager's access code at the East Third Street location which was evidenced

¹ The exact dollar amount reported to law enforcement is \$30,718.50. see Criminal Information, 11/20/2023.

by when the number was keyed in and the time-stamped video footage that showed the Defendant as the one accessing the register. Newcomer further explained that that manager was not charged or alleged to have stolen because she was out on leave for a large portion of the East Third Street thefts. Newcomer testified that the Defendant used her own access code at the Lycoming Creek Road location because that is where she was promoted.

Andrew Kelley (“Kelley”), owner of seven (7) McDonald’s restaurants also testified at the hearing on the Defendant’s Petition for Writ of Habeas Corpus. Kelley testified that he has known and employed the Defendant for several years. Kelley testified that he discovered an employee was stealing from the East Third Street location and initiated an investigation into the thefts. Kelley explained that when he contacted the accountants they informed him of a separate theft issue, whereupon Newcomer called to inform Kelley of her investigation. Kelley testified that the corroboration of the reported refunded amounts and videos can only go back three months because the security footage only archives the most recent three months. Kelley also testified that the Defendant did not have permission to take the money or a legitimate reason to hold the money.

Finally, the Commonwealth called Trooper Garrett Shnyder with the Pennsylvania State Police. Trooper Shnyder has been a Pennsylvania State Trooper for six years, currently with the LaPorte area, but he was previously in Troop F out of Montoursville. Trooper Shnyder, Newcomer, and Kelley conducted an interview with the Defendant at the “corporate office” regarding the “alleged activities.” Trooper Shnyder testified that he read the Defendant her *Miranda* Rights and advised her she did not have to answer any questions. Trooper Shnyder testified to having a private conversation with the Defendant in early September of 2023. The Defendant admitted to the allegations without providing an explanation as to why she stole from the restaurants. Trooper Shnyder testified that he

believes neither he nor Newcomer provided a numerical value of the estimated theft during the interview for the Defendant to verify. At the time of the interview, Trooper Shnyder informed Newcomer that the evidence to date and the admission would not support an arrest and requested a more detailed and accurate accounting of the alleged activity and the amount reportedly missing.

The Defendant argued that the act of theft is undisputed. However, the Defendant asserts that the way in which the total amount missing was calculated is disputable. The Defendant furthers her argument by alleging that the list provided is of all of the refunds for the months investigated from all of the employees. Moreover, the evidence does not support that every suspicious refund was conducted by the Defendant because the register does not provide who gives which refund or the amount of the refund. The Defendant seeks the Commonwealth provide an amount that is based on the available evidence and not a speculative amount that cannot be corroborated. In her Petition, Defendant alleges that the evidence, even in a light viewed most favorable to the Commonwealth, does not support a finding that the Defendant unlawfully obtained more than \$2,000.00, the required amount to satisfy a grading of a felony of the third degree. Accordingly, the Defendant seeks the charge be dismissed or amended to reflect a more appropriate and evidence-based grading.

The Commonwealth asserts that the evidence presented establishes a *prima facie* case against the Defendant for the charge of Theft by Deception, a Felony of the Third Degree. Specifically, the Defendant's admission that she conducted theft, the circumstantial evidence, and the testimony from various parties support a finding that the Commonwealth's burden has been met and the charges should be bound for Court.

Analysis

A defendant appropriately files a motion for writ of habeas corpus during the pre-trial stages to test whether the Commonwealth has met its burden for a *prima facie* case.

Commonwealth v. Dantzler, 135 A.3d at 1112, citing *Carroll*, 936 A.2d at 1152. The Commonwealth meets its burden that a *prima facie* case exists when the evidence produced meets every material element of the charged offenses and the defendant's complicity therein. *Id.* Parties may meet this burden by utilizing the evidence available at a preliminary hearing and producing additional evidence. *Id.*

It is well settled that the preliminary hearing is not a trial and the Commonwealth need not establish Defendant's guilt beyond a reasonable doubt at that stage. *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991). Rather, the Commonwealth bears the burden of establishing a *prima facie* case "that a crime has been committed and that the accused is probably the one who committed it." *Id.*; Pa.R.Crim.P. 141(d). In its consideration, a court does not factor in the weight and credibility of the evidence. *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001); *see also Commonwealth v. Huggins*, 836 A.2d 862, 866 (Pa. 2003) (holding that "[t]he evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury"). "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. Owen*, 580 A.2d 412, 414 (Pa. Super. 1990).

Under 18 Pa.C.S.A. Section 3922(a)(1), "a person is guilty of theft if [she] intentionally obtains or withholds property of another by deception. A person deceives if [she] intentionally: (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to

perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise....” Moreover, theft constitutes a felony of the third degree if the amount involved exceeds \$2,000.00....” *18 Pa.C.S.A. §3903 §§ (a.1)*. Here, the Commonwealth has established that the Defendant committed theft by proffering testimony from three witness, two of which were aware of the actual theft and investigated the history of suspicious refunds; and, the third of which lawfully obtained the Defendant’s admission to committing the theft. Moreover, the Commonwealth submitted four (4) exhibits detailing the accounting of suspicious refunds and video footage depicting the Defendant physically pocketing money from the cash register. Thus, the Commonwealth’s burden of establishing whether a crime was committed, and that the Defendant was likely the one who committed the crime is met. The determination of the amount that was stolen and whether it meets the level necessary to grade the charge as a felony of the third degree is a question of fact reserved for a jury. The Commonwealth has submitted sufficient evidence and testimony to allow a jury to make a decision on the issue.

Accordingly, the Court enters the following Order:

ORDER

AND NOW, this 10th day of **January, 2025**, upon consideration of the evidence presented, the testimony from witness, the argument of counsel, the Defendant’s Petition for Writ of Habeas Corpus, and for the aforementioned reasons, the Petition for Writ of Habeas Corpus is **DENIED**.

By the Court,

Ryan M. Tira, Judge

CC: DA
PD (JL)
Gary Weber, Esquire-Lycoming Reporter