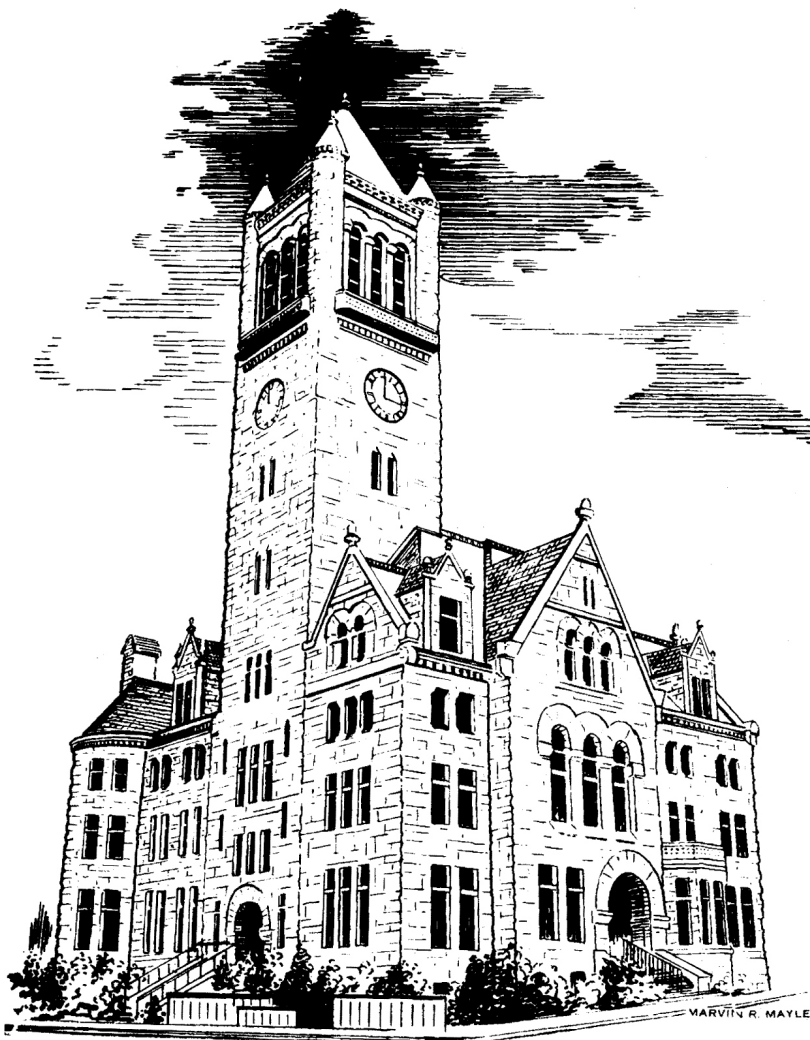


FAYETTE LEGAL JOURNAL

VOL. 80

MAY 27, 2017

NO. 21



FAYETTE LEGAL JOURNAL

The FAYETTE LEGAL JOURNAL is published weekly by the Fayette County Bar Association, 2 West Main Street, Suite 711, Uniontown, Pennsylvania 15401, 724-437-7994. Legal advertisements should be submitted online at www.fcbar.org no later than 12:00 noon on Friday for publication the following Saturday. No date of publication is promised, however. Legal notices are published exactly as submitted by the advertiser. Copyright 2001 Fayette County Bar Association. All rights reserved.

Co-Editors: Garnet L. Crossland and Melinda Deal Dellarose

Cover Design by Marvin R. Mayle, 207 Lick Hollow Road, Hopwood, PA

FAYETTE COUNTY BAR ASSOCIATION Board of Directors

President: John M. Purcell

President Elect: Gary N. Altman

Vice-President: James Higinbotham, Jr.

Secretary: Bernard C. John

Treasurer: Vincent J. Roskovensky, II

Past President: Anne N. John

Executive Director: Garnet L. Crossland

Directors

Davina D. Burd

Carolyn W. Maricondi

William M. Martin

Wendy L. O'Brien

Robert A. Gordon

Douglas S. Sholtis

Sheryl R. Heid

ETHICS HOTLINE

The Ethics Hotline provides free advisory opinions to PBA members based upon review of a member's prospective conduct by members of the PBA Committee on Legal Ethics and Professional Responsibility. The committee responds to requests regarding, the impact of the provisions of the Rules of Professional Conduct or the Code of Judicial Conduct upon the inquiring member's proposed activity. All inquiries are confidential.

LAWYERS CONCERNED FOR LAWYERS

Our assistance is confidential,
non-judgmental, safe, and effective

To talk to a lawyer today, call:

1-888-999-1941

717-541-4360

Call (800) 932-0311, ext. 2214.

ESTATE NOTICES

Notice is hereby given that letters testamentary or of administration have been granted to the following estates. All persons indebted to said estates are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

Third Publication

PAULINE A. DYNES, late of South Connellsville, Fayette County, PA (3)

Executor: Charlene Ringer
1917 First Street
South Connellsville, PA 15425

DOROTHY H. GRISHKAT, late of Dunbar Township, Fayette County, PA (3)

Personal Representative: Frank J. Grishkat
c/o Watson Mundorff Brooks & Sepic, LLP
720 Vanderbilt Road
Connellsville, PA 15425
Attorney: Charles W. Watson

CANDACE LEHMAN, A/K/A CANDACE S. LEHMAN, A/K/A CANDACE SHAW LEHMAN, late of South Union Township, Fayette County, PA (3)

Administrator: Donald E. Lehman, Jr.
c/o John & John
96 East Main Street
Uniontown, PA 15401
Attorney: Simon B. John

FRANCES L. NICHOLSON, late of Connellsville Township, Fayette County, PA (3)

Executrix: Christine A. Scott
2414 Springfield Pike
Connellsville, PA 15425
c/o Stewart, McArdle, Sorice, Whalen, Farrell, Finoli Cavanaugh, LLC
229 South Maple Avenue
Greensburg, PA 15601
Attorney: Vincent J. Finoli

KAREN D. SAMPEY, A/K/A KAREN DAWN SAMPEY, late of Dunbar Township, Fayette County, PA (3)

Personal Representative: Kevin R. Sampey
c/o Watson Mundorff Brooks & Sepic, LLP
720 Vanderbilt Road
Connellsville, PA
Attorney: Charles W. Watson

BEATRICE YOUNG, late of South Union Township, Fayette County, PA (3)

Executrix: Irene Hegyes Campagna
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: James T. Davis

Second Publication

DANIEL CASINI, A/K/A DANTE N. CASINI, late of Connellsville, Fayette County, PA (2)

Executor: Daniel Casini
c/o Casini & Geibig, LLC
615 West Crawford Avenue
Connellsville, PA 15425
Attorney: Jennifer M. Casini

CAROLYN A. HART, late of Everson Borough, Fayette County, PA (2)

Personal Representative: Dean A. Hart
329 Brown Street
Everson, PA 15631
c/o 815A Memorial Boulevard
Connellsville, PA 15425
Attorney: Margaret Zylka House

MARY KUZAR, late of Everson Borough, Fayette County, PA (2)

Personal Representative: Joan Orlando
c/o P.O. Box 760
Connellsville, PA 15425
Attorney: Carolyn W. Maricondi

ROBERT EUGENE LILLEY, late of
Uniontown, Fayette County, PA (2)
Personal Representative: Dorothy Dale
c/o Zerega Law Office
212 North Gallatin Avenue
Uniontown, PA 15401
Attorney: Dianne H. Zerega

**DONALD ROBERT PRITTS, A/K/A
DONALD R. PRITTS**, late of Saltlick
Township, Fayette County, PA (2)
Personal Representative:
Allison Deanne Pritts
c/o 111 East Main Street
Uniontown, PA 15401
Attorney: Melinda Deal Dellarose

WILLIAM SNYDER, late of Bullskin
Township, Fayette County, PA (2)
Executor: Mark Snyder
c/o 382 West Chestnut Street, Suite 102
Washington, PA 15301-4642
Attorney: Frank C. Roney, Jr.

First Publication

MARY M. ALLOWATT, late of Franklin
Township, Fayette County, PA (1)
Co-Executor: Betty J. Carpeal
805 First Street
Keisterville, PA 15449
Co-Executor: Patty A. Martini
228 Elm Lane
Duncansville, PA 16635

**JOHN C. BOONE, A/K/A JOHN
CLARENCE BOONE**, late of Perryopolis,
Fayette County, PA (1)
Executrix: Margaret Ann Clay
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: Gary J. Frankhouser

HELEN M. GUEST, late of Lower Tyrone
Township, Fayette County, PA (1)
Personal Representative: Terry L. Kupets
c/o Riverfront Professional Center
208 South Arch Street, Suite 2
Connellsville, PA 15425
Attorney: Richard A. Husband

THOMAS MATTISH, late of Luzerne
Township, Fayette County, PA (1)
Executor: Joseph A. Bochna
c/o 51 East South Street
Uniontown, PA 15401
Attorney: Anthony S. Dedola

**JESSIE EILEEN POSTLETHWALT, A/K/A
JESSIE EILEEN ADAMS**, late of
Connellsville, Fayette County, PA (1)
Executrix: Deborah Lynn Adams, a/k/a
Deborah Lynn King
c/o Casini & Geibig, LLC
615 West Crawford Avenue
Connellsville, PA 15425
Attorney: Jennifer M. Casini

EVELYN STAUFFER, late of Perry Township,
Fayette County, PA (1)
Executrix: Yvonne K. Stauffer
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: Gary J. Frankhouser

ERMA T. ZEMA, late of Belle Vernon Boro,
Fayette County, PA (1)
Executor: Gary G. Zema
57 Park Terrace East, Apt. B89
New York, NY 10034
c/o PO Box 384
Shaner Road
Rillton, PA 15678
Attorney: Kimberly J. Gallagher

LEGAL NOTICES

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

**IN RE: Derrick Anthony Kuhns and
Staci Ann Kuhns
Bankruptcy Case No. 16-21971-GLT**

NOTICE OF SALE

Notice is hereby given that Matthew R. Schimizzi, Esquire, attorney for Debtors, has filed a motion to sell, free and clear of liens and encumbrances, the real property located at 102 Campbell Avenue, Connellsville, PA 15425 (Tax ID # 05-10-0014). Debtors have received an offer of \$14,000.00. Higher and better offers will be considered at hearing.

Notice has been issued setting a hearing for June 14, 2017, at 10:30 a.m. before Judge Gregory L. Taddonio, Courtroom A, 54th Floor, U.S. Steel Tower, 600 Grant Street, Pittsburgh, PA 15219, when and where all objection will be heard, when and where the public is invited and when and where higher and better offers will be accepted. Additional information regarding the sale and property can be found on the Bankruptcy Court's EASI website at www.pawb.uscourts.gov. At hearing, successful bidder must deposit hand money of \$1,000.00 and provide proof of financing or available funds.

For additional information, contact Barbara Fichtner, Northwood Realty Services, 801 N. Greengate Road, Greensburg, PA 15601, (724) 216-1905.

IN THE COURT OF COMMON PLEAS OF
FAYETTE COUNTY, PENNSYLVANIA,
ORPHANS' COURT DIVISION
NO. 30 ADOPT 2017
Judge Linda R. Cordaro

IN RE: ADOPTION OF
SOPHIA DUNSEATH

NOTICE

TO: Unknown Father of Sophia Dunseath

A petition has been filed asking the Court to put an end to all rights you have to your child, Sophia Dunseath. The Court has set a hearing to consider ending your rights to your child. That hearing will be held in Courtroom No. 3 of the Fayette County Courthouse, Uniontown, Fayette County, Pennsylvania, on Wednesday, May 31, 2017 at 1:30 P.M. You are warned that even if you fail to appear at the scheduled hearing, the hearing will go on without you and your rights to your child may be ended by the court without your being there.

YOU HAVE A RIGHT TO BE REPRESENTED AT THE HEARING BY A LAWYER. YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

PENNSYLVANIA BAR ASSOCIATION
100 SOUTH STREET
PO BOX 186
HARRISBURG, PA 17108
(800) 932-0311 or (800) 692-7375

IN THE COURT OF COMMON PLEAS OF
 FAYETTE COUNTY, PENNSYLVANIA
 CIVIL ACTION - LAW
 ACTION TO QUIET TITLE
 JUDGE CORDARO
 No. 366 of 2017 G.D.

JOSEPH A. CHOLOCK,
Plaintiff,
 v.
DENNIS P. FRESH, his successors, heirs,
personal representatives, and assigns,
generally,
Defendant.

TO: DENNIS P. FRESH
his heirs, successors and assigns, generally,

You are hereby notified that Joseph A. Cholock, has filed a complaint at the above number and term in the above-mentioned court in an action to quiet title wherein it is alleged that he is the owner in possession of that certain lot of land situate in North Union Township, Fayette County, Pennsylvania having a mailing address of 58 Braddock Street, Uniontown, Pennsylvania.

Title to the above described property was conveyed to Dennis P. Fresh by a deed from U.S. Department of HUD being recorded at the Recorder of Deeds Office at Record Book 3246, Page 1226.

Said complaint sets forth that the plaintiff is the owner in fee simple of the above-described premises. The complaint was filed for the purpose of barring all of your right, title, and interest, or claim in and to all or a portion of said premises.

NOTICE

You are hereby notified that you have been sued in court. If you wish to defend against the claim set forth in the complaint and in the within advertisement, you must take action within twenty (20) days after the last advertisement of this notice by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claim set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may entered against you by the court without further notice or any money claimed in the complaint, or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights

important to you.

YOU SHOULD TAKE THIS NOTICE TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GOT TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

PENNSYLVANIA BAR ASSOCIATION
 PENNSYLVANIA LAWYER REFERRAL
 100 SOUTH STREET
 P.O. BOX 186
 HARRISBURG, PA 17108
 1-800-932-0311

By Jason F. Adams, Esq.
 Adams & Adams
 55 E. Church Street
 Uniontown, PA 15401
 (724) 437-2711

Registers' Notice

Notice by JEFFREY L. REDMAN, Register of Wills and
Ex-Officio Clerk of the Orphans' Court Division of the Court of Common Pleas

Notice is hereby given to heirs, legatees, creditors, and all parties in interest that accounts in the following estates have been filed in the Office of the Clerk of the Orphans' Court Division of the Court of Common Pleas as the case may be, on the dates stated and that the same will be presented for confirmation to the Orphans' Court Division of Fayette County on

Monday, June 5, 2017
at 9:30 A.M.

<u>Estate Number</u>	<u>Estate Name</u>	<u>Accountant</u>
2616-0106	ANNA J. BASINGER	Marlene Basinger, Executrix

Notice is also hereby given that all of the foregoing Accounts will be called for Audit on
Monday, June 19, 2017 at 9:30 A.M.

in Court Room No. 1 of the Honorable STEVE P. LESKINEN, or his chambers, 2nd Floor, Courthouse, Uniontown, Fayette County, Pennsylvania, at which time the Court will examine and audit said accounts, hear exceptions to same or fix a time therefore, and make distribution of the balance ascertained to be in the hands of the Accountants.

JEFFREY L. REDMAN
Register of Wills and Ex-Officio Clerk of the Orphans' Court Division (2 of 2)

JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY,
 PENNSYLVANIA
 CRIMINAL DIVISION

COMMONWEALTH OF :
 PENNSYLVANIA, :
 v. :
 RYAN THOMAS REESE, : NO. 711 OF 2016
 Defendant. : JUDGE STEVE P. LESKINEN

Patrick J. Schulte, Deputy Attorney General, for the Commonwealth
 Charity Grimm Krupa, Esq., for the Defendant

OPINION AND ORDER

LESKINEN, J.

May 12, 2017

Before the Court is an Amended Omnibus Pretrial Motion in the nature of a Petition for Writ of Habeas Corpus, Motion for Change of Venue, and Motion for Additional Discovery. The Court held a hearing on February 28, 2017; however, no evidence was presented. Instead, the parties submitted briefs at a later date, which included the transcript of Defendant’s April 11, 2016 preliminary hearing.

Since the Commonwealth has agreed to provide the alleged victim’s cell phone to the Defense pending the decision of the Omnibus Pretrial Motion, there is no need to further address the Motion for Additional Discovery, as it will be granted in the Court’s Order. With regard to the remaining Motions, they are denied for the reasons set forth below.

BACKGROUND

Defendant is charged with Rape by Forcible Compulsion {1}; three counts each of Involuntary Deviate Sexual Intercourse (“IDSI”) by Forcible Compulsion {2}, Sexual Assault {3}, and Indecent Assault by Forcible Compulsion {4}; and, Official Oppression {5}. The incidents giving rise to these charges commenced on or about January 7, 2012 through April 2013. The testimony at the preliminary hearing can be summarized as follows: During that time, Defendant worked as a police officer for the Connellsville Police Department and as a detective for the Fayette County Drug Task Force, an agency operated under the supervision of the Fayette County District Attorney’s Office. {6} R.S., the alleged victim in this matter, was illegally obtaining Oxycodone pills from a coworker, Stacy Monchak. Notes of Testimony (N.T.), 4/11/16, at 5-7. R.S. claimed that she obtained those pills for her own personal use. *Id.*

{1} 18 Pa.C.S. § 3121(a)(1).
 {2} 18 Pa.C.S. § 3123(a)(1).
 {3} 18 Pa.C.S. § 3124.1.
 {4} 18 Pa.C.S. § 3126(a)(2).
 {5} 18 Pa.C.S. § 5301(1).
 {6} The Fayette County Drug Task Force was disbanded in 2016.

In early January 2012, Ms. Monchak repeatedly contacted R.S. and asked if R.S. could obtain morphine pills for her. N.T., at 8-10. After much deliberation, R.S. agreed and set up a meeting with Ms. Monchak to deliver the pills outside of R.S.'s place of employment in Uniontown. N.T., at 10-14. As soon as the exchange was made in R.S.'s vehicle, Defendant Reese, working in his capacity as a detective, appeared and placed R.S. under arrest for the drug delivery. She was escorted to Defendant's vehicle in handcuffs while another officer and Ms. Monchak took R.S.'s vehicle to be impounded. N.T., at 17-18.

According to R.S., Defendant took her to the Drug Task Force office and continuously questioned her while she was still inside his vehicle. N.T. at 18-19. Defendant threatened to take R.S., who was emotionally distraught, to jail if she refused to write a statement. N.T. at 19-20. R.S. complied and wrote what she purported to be a full confession. *Id.* Defendant then drove her home and instructed her to call him the next day, which she did. N.T., at 21-22. The phone conversation consisted of Defendant informing R.S. of her charges and the procedure that would follow. N.T., at 22-23. R.S. also retained counsel. N.T., at 57.

Approximately two weeks later, Defendant contacted R.S. on the phone, and she further questioned him about the status of the charges and her impounded vehicle which contained several personal items. N.T., at 25. Shortly thereafter, R.S., along with her counsel and mother, met with Defendant to discuss possible resolutions of her case. N.T., at 57-58. Defendant told her that the felony delivery charge could be lowered to a misdemeanor simple possession if she participated in three controlled buys or posed as a prostitute. N.T., at 58-59. R.S. indicated that she was unable and/or unwilling to do that. N.T., at 30-31.

Approximately two weeks week after the meeting, Defendant arranged for R.S. to retrieve her personal belongings from her vehicle, and they met at the Drug Task Force office. N.T., at 26. At this point, she had not received a summons or any other court documents regarding her case, so she asked Defendant if there was "any [other] way [she] could get out of it." N.T., at 29. This was after she and her attorney were made aware of the aforementioned options. N.T., at 60. Defendant responded, "You can suck my cock," and proceeded to expose himself to her. N.T., at 29-30. She agreed to perform oral sex on Defendant, and did so. N.T., at 32-33. After that, she went into the bathroom and rinsed her mouth. N.T., at 33. She then asked him if that was all she had to do to resolve her case, to which Defendant responded, "We should hook up a few more times." N.T., at 35. The two remained in contact via phone and text message. N.T., at 34.

Approximately one week later, Defendant and R.S. arranged to meet at the same place, and per his request, she started to perform oral sex on him. N.T., at 36. At some point during the encounter, Defendant was being "aggressive" by "pushing [her] head down a lot," so she asked if she could take a break. *Id.* Defendant told her to bend over the desk, and R.S., knowing that Defendant wanted sex, pulled down her pants and underwear. N.T., at 37. She asked him if he had a condom, to which Defendant stated that he had a vasectomy, and she would not need to worry about pregnancy. N.T., at 38.

According to R.S., “So I trusted him and went ahead with [sexual intercourse].” Id. Defendant ejaculated into her vagina, and she went into the bathroom to clean herself before leaving. N.T., at 39.

Approximately three weeks later, they agreed to meet at Sheetz in Connellsville where Defendant was in a marked police vehicle in full uniform. N.T., at 41-42. R.S. got into the vehicle, and they drove to a secluded parking lot where she performed oral sex on him while still inside the vehicle. N.T., at 42-43. That was the last time the two saw each other, and R.S. was never charged in connection with the drug delivery. N.T., at 44. R.S. maintained that but for the fact that Defendant had pending criminal charges against her and was threatening to prosecute her to the fullest extent of the law, she never would have engaged in any sexual activity with Defendant. N.T., at 32, 37, 43.

She never reported the alleged sexual assaults to her attorney or her mother. N.T., at 67. These allegations did not come to light until September 2015 when Pennsylvania State Police Corporal James Aughinbaugh came to her home to interview her. N.T., at 68-69. Corporal Aughinbaugh viewed text messages between R.S. and Defendant that corroborated the aforementioned incidents. N.T., at 73-74.

A statewide grand jury was impaneled with regard to this and two other matters involving Defendant, and an indictment was returned on all three matters. Defendant’s preliminary hearing was held on April 11, 2016. {7} The Court granted several uncontested extensions for Defendant to file an Omnibus Pretrial Motion. He retained new counsel in the interim, who filed the Motion presently before the Court. The Court held a hearing on February 28, 2017; however, neither party presented any evidence. Instead, the Commonwealth submitted the preliminary hearing transcript, and both parties submitted briefs outlining their respective positions.

DISCUSSION

Defendant’s Omnibus Pretrial Motion is in the nature of a Petition for Writ of Habeas Corpus and a Motion for Change of Venue. The Court will individually address each Motion.

Petition for Writ of Habeas Corpus

Defendant argues that the Commonwealth has not established a prima facie case on the charges of Rape by Forcible Compulsion, IDSI by Forcible Compulsion, Indecent Assault by Forcible Compulsion, and Sexual Assault. For the reasons set forth herein, the Court finds that the Commonwealth met its burden, and a reasonable fact finder could render a guilty verdict based on the evidence presented.

A prima facie case requires that:

The Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to the jury.

{7} Defendant was represented by different counsel at his preliminary hearing, formal arraignment, and when the original Omnibus Pretrial Motion was filed.

When deciding whether a prima facie case was established, we must view the evidence in the light most favorable to the Commonwealth, and we are to consider all reasonable inferences based on that evidence which could support a guilty verdict. The standard ... does not require that the Commonwealth prove the [defendant's] guilt beyond a reasonable doubt at this stage.

Commonwealth v. Patrick, 933 A.2d 1043, 1045 (Pa.Super.2007) (citing Commonwealth v. James, 863 A.2d 1179, 1182 (Pa.Super.2004)).

With regard to Rape by Forcible Compulsion, the Commonwealth must establish beyond a reasonable doubt that: “A person ... engage[d] in sexual intercourse with a complainant by forcible compulsion.” 18 Pa.C.S. § 3121(a)(1). It is well established under Pennsylvania law that “forcible compulsion” can include “physical force as well as moral, psychological, or intellectual force, used to compel a person to engage in sexual intercourse against that person's will.” Commonwealth v. Riley, 643 A.2d 1090 (Pa.Super.1994).

In Commonwealth v. Rhodes, 510 A.2d 1217 (Pa.1986), the Pennsylvania Supreme Court further interpreted “forcible compulsion” as follows:

The determination of whether there is sufficient evidence to demonstrate beyond a reasonable doubt that an accused engaged in sexual intercourse by forcible compulsion ... is, of course, a determination that will be made in each case based upon the totality of circumstances that have been presented to the fact finder. Significant factors to be weighed in that determination would include the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress. This list of factors is by no means exclusive.

Id. at 1226.

In his Brief, Defendant heavily relies on the Pennsylvania Supreme Court's opinion in support of affirming the Superior Court's holding in Commonwealth v. Mlinarich, 542 A.2d 1335 (Pa.1988). In that case, appellant, aged sixty-three, was convicted of rape, attempted rape, IDSI, corruption of minors, indecent exposure, and endangering the welfare of a child stemming from a continuous course of sexual assaults against a fourteen-year-old girl with whom he was living. Id. at 1337. The girl had previously been adjudicated delinquent for theft and served time in a detention center. Id. at 1336. Appellant threatened to send the girl back to the detention center if she did not comply with his sexual advances, which included oral and vaginal sex. Id. at 1337.

In an evenly divided decision, the Court affirmed the prior holding of the Superior Court, which “reversed the rape and attempted rape convictions, affirmed the [IDSI] and corrupting the morals of a minor convictions, and vacated the sentences imposed on the indecent exposure convictions.” Id. at 1337-38. The Court meticulously analyzed the legislative history and intent of the rape statute, and stated:

[T]here is a clear legislative expression that the offense requires not only some degree of compulsion but that the compulsion must reach a prescribed level of intensity designed to have an effect upon the will of the victim. An “objective” test has been established to determine whether the pressure generated upon the victim by the threat would be such as to overcome the resolve and prevent further resistance of a person of reasonable resolution. Thus any uniqueness in the emotional makeup of the victim is irrelevant in determining whether the threat possessed the requisite force to satisfy this element of the offense. What is germane is its impact on a person of reasonable resolve.

Id. at 1340.

The Court went on to state:

The critical distinction is where the compulsion overwhelms the will of the victim in contrast to a situation where the victim can make a deliberate choice to avoid the encounter even though the alternative may be an undesirable one. Indeed, the victim in this instance apparently found the prospect of being returned to the detention home a repugnant one. Notwithstanding, she was left with a choice and therefore the submission was a result of a deliberate choice and was not an involuntary act. This is not in any way to deny the despicable nature of appellee's conduct or even to suggest that it was not criminal. We are merely constrained to recognize that it does not meet the test of “forcible compulsion” set forth in subsections (1) and (2) of sections 3121 and 3123.

Id. at 1341-42.

In the case sub judice, this Court is more persuaded by the non-exclusive list of factors listed by the Rhodes Court than by the Superior Court's decision in Mlinarich. Mlinarich is distinguishable in that the alleged perpetrator was a police officer with the authority to charge and jail the victim, and he directly used that authority to overpower the victim's will. It is undisputed that R.S. chose to do these acts and that no physical force was used by Defendant; however, her testimony was that but for the fact Defendant had pending criminal charges against her and was threatening to prosecute her to the fullest extent of the law, she would never have engaged in any sexual activity with Defendant. Based on that statement, there is evidence to suggest that Defendant used his position of authority to overpower her will.

With regard to the remaining Rhodes factors, these incidents took place at either the Fayette County Drug Task Force Office or in Defendant's marked police cruiser while he was in full uniform. Essentially, Defendant was on his “home turf,” which is inherently intimidating. Further, Defendant knew that R.S. did not want to go to jail, so he used that to his advantage in forcing her to engage in sexual intercourse with him.

For these reasons, the Commonwealth has established a prima facie case for Rape by Forcible Compulsion.

With regard to IDSI by Forcible Compulsion, the Commonwealth must prove beyond a reasonable doubt that: “A person ... engage[d] in deviate sexual inter-

course with a complainant ... by forcible compulsion.” 18 Pa.C.S. § 3123(a)(1). Pursuant to Pennsylvania precedent, “In order to sustain a conviction for [IDSI], the Commonwealth must establish the perpetrator engaged in acts of oral or anal intercourse, which involved penetration, however slight In order to establish penetration, some oral contact is required Moreover, a person can penetrate by use of the mouth or the tongue.” *Commonwealth v. Wilson*, 825 A.2d 710, 714 (Pa.Super.2003) (citations omitted).

In the instant case, R.S. testified that she engaged in oral sex with Defendant. With regard to the “forcible compulsion” component, the Court applies the same reasoning used above in finding that the Commonwealth has established a prima facie case for IDSI by Forcible Compulsion.

With regard to Indecent Assault by Forcible Compulsion, the Commonwealth must prove beyond a reasonable doubt that: “[A] person ha[d] indecent contact with the complainant, cause[d] the complainant to have indecent contact with the person or intentionally cause[d] the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant ... by forcible compulsion.” 18 Pa.C.S. § 3126(a)(2). Indecent contact is defined as: “[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person.” 18 Pa.C.S.A. § 3101.

Instantly, Defendant is alleged to have had indecent contact with R.S. by way of sexual intercourse and caused R.S. to have indecent contact with him by way of oral sex, both for the purpose of sexual gratification. Again, with regard to the “forcible compulsion” component, the Court applies the same reasoning used above in finding that the Commonwealth has established a prima facie case for Indecent Assault by Forcible Compulsion.

With regard to Sexual Assault, the Commonwealth must prove beyond a reasonable doubt that “a person engage[d] in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent.” 18 Pa.C.S. § 3124.1. The Pennsylvania Suggested Standard Jury Criminal Instructions adds a third element that the defendant “acted knowingly or at least recklessly regarding [the victim's] nonconsent.” PA-JICRIM 15.3124.1, Pa. SSJI (Crim), §15.3124.1 (2016). The jury instructions also state that consent is a legally effective defense, unless the consent was induced by “force, duress, or deception.” PA-JICRIM 8.311B, Pa. SSJI (Crim), §8.311B (2016). Furthermore, the burden is on the Commonwealth to establish said inducement. *Id.*

Instantly, the Commonwealth has already established a prima facie case for Rape by Forcible Compulsion and IDSI by Forcible Compulsion, so the same can be said for Sexual Assault. At trial, Defendant will be entitled to a consent instruction, and the Commonwealth will have the burden of establishing that R.S.'s consent was not legally effective.

For the aforementioned reasons, the Court finds that the Commonwealth has established a prima facie case on all of the above charges, and it is appropriate for a jury to make the ultimate determination as to the guilt or innocence of Defendant.

Motion for Change of Venue

Next, Defendant argues that due to the amount of pretrial publicity he has received as a result of this and the other two cases, Fayette County is not the proper venue for this matter to be heard.

Pursuant to well established Pennsylvania precedent:

A change in venue becomes necessary when the trial court concludes that a fair and impartial jury cannot be selected in the county in which the crime occurred Normally, one who claims that he has been denied a fair trial because of pretrial publicity must show actual prejudice in the empanelling of the jury. In certain cases, however, pretrial publicity can be so pervasive or inflammatory that the defendant need not prove actual juror prejudice Pretrial prejudice is presumed if: (1) the publicity is sensational, inflammatory, and slanted toward conviction rather than actual and objective; (2) the publicity reveals the defendant's prior criminal record, or if it refers to confessions, admissions or reenactments of the crime by the accused; and (3) the publicity is derived from police and prosecuting officer reports

Commonwealth v. Drumheller, 808 A.2d 893, 902 (Pa.2002) (citations omitted).

The Court further held:

Even where pre-trial prejudice is presumed, a change of venue or venire is not warranted unless [the defendant] also shows that the pre-trial publicity was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it, and that there was insufficient time between the publicity and the trial for any prejudice to have dissipated

In testing whether there has been a sufficient cooling period, a court must investigate what a panel of prospective jurors has said about its exposure to the publicity in question. This is one indication of whether the cooling period has been sufficient. Thus, in determining the efficacy of the cooling period, a court will consider the direct effects of publicity, something a defendant need not allege or prove. Although it is conceivable that pre-trial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias, that would be a most unusual case. Normally, what prospective jurors tell us about their ability to be impartial will be a reliable guide to whether the publicity is still so fresh in their minds that it has removed their ability to be objective. The discretion of the trial judge is given wide latitude in this area.

Id. at 902-03 (citations omitted).

In the instant case, Defendant submitted a total of thirty-five (35) newspaper articles from two different newspapers. The articles date back to 2014 when Defendant resigned from the Connellsville Police Department, amid reports of the grand jury investigation. The most recent article was from February 16, 2017 where it was reported that Defendant filed an appeal from his November 2016 conviction. There is

no doubt that there will be additional publicity regarding the Court's decision on this Motion and the upcoming jury trial, should there be one. However, as stated in the case law, pretrial publicity is not sufficient to warrant a change of venue.

The Commonwealth accurately stated that no difficulties arose when selecting jurors in November 2016. There were forty (40) prospective jurors considered, and a panel was selected with room to spare. Since Fayette County's criminal trials all occur in the same week, the quantity of jurors summoned is typically more than adequate to fill four to five courtrooms.

Based on the previous trial and the lack of difficulty selecting a panel of Defendant's peers, the Court cannot grant Defendant's Motion at this time. Should an issue arise at the time of jury selection, Defendant can renew this Motion, and the trial judge will rule on it based on the circumstances then existing.

WHEREFORE, the Court enters the following Order:

ORDER

AND NOW, this 12th day of May, 2017, upon consideration of Defendant's Omnibus Pretrial Motion, it is hereby ORDERED and DECREED that the Motion is GRANTED IN PART and DENIED IN PART.

With regard to the Petition for Writ of Habeas Corpus Relief as to Counts 1-7 and 9-11, it is hereby DENIED.

With regard to the Motion for Change of Venue, it is hereby DENIED WITHOUT PREJUDICE.

Lastly, with regard to the Motion for Additional Discovery, it is hereby GRANTED based on the agreement by the parties.

The Commonwealth is hereby ORDERED to list this matter for trial.

BY THE COURT:
STEVE P. LESKINEN, J.

ATTEST:
CLERK OF COURTS

ATTORNEY APPOINTMENT**NOTICE**

Any Fayette County lawyer interested in an appointment to any of the following lists should contact the District Court Administrator at (724) 430-1230 by June 30, 2017:

Criminal Conflicts Counsel

Death Penalty Certified

Counsel for children and indigent parents in involuntary termination and adoption proceedings

Master in Partition

Receivers

Trustees

John F. Wagner, Jr.
President Judge

*Quality... Experience... Results...
It's what your clients deserve.*

Medical Malpractice • Auto Accidents • Personal Injury



GISMONDI

& ASSOCIATES

412-281-2200

www.gislaw.com

700 Grant Bldg., 310 Grant St., Pgh., PA 15219