

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

vs.

Case No. 2009-4960-PH


Defendant.

OPINION AND ORDER

Defendant has filed a motion to quash. Plaintiff has filed a response seeking denial of the motion. In addition, the Court has received and reviewed amicus curiae briefs in support of defendant's motion to quash from the American Civil Liberties Union Fund of Michigan ("ACLU") and LAMBDA Legal Defense and Education Fund, Inc., Community Aids Resource and Education Services, Michigan Positive Action Coalition, and Michigan Protection and Advocacy Service, Inc.

I

Following a preliminary examination held on November 2, 2009 in the 41B District Court, the lower court bound defendant over to this Court to stand trial on count I, assault with intent to maim, MCL 750.86; count II, assault with intent to do great bodily harm less than murder, MCL 750.84; and count III, harmful device - unlawful possession or use, MCL 750.200(1)(a). Defendant now moves to quash the bindover of count III.

To bind a defendant over for trial there must be probable cause to believe a crime was committed and defendant committed it. MCL 766.13; MCR 6.110(E). The decision to bind a



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defendant over is reviewed for abuse of discretion. *People v Beasley*, 239 Mich App 548, 552; 609 NW2d 581 (2000). In reviewing a district court's decision to bind a defendant over for trial, a circuit court must consider the entire record of the preliminary examination, and it may not substitute its judgment for that of the magistrate. *Id.* Probable cause requires a reasonable belief that the evidence presented during a preliminary examination is consistent with defendant's guilt. *People v Northey*, 231 Mich App 568, 575; 591 NW2d 227 (1998). Although proof beyond a reasonable doubt is not required at a preliminary examination, the prosecution must present evidence on each element of the crime charged or evidence from which these elements may be inferred. *People v Giddings*, 169 Mich App 631, 633; 426 NW2d 732 (1988). Circumstantial evidence, coupled with those inferences arising therefrom, is sufficient to establish probable cause to believe that the defendant committed a felony. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997).

II

Following the preliminary examination on November 2, 2009, the district court bound defendant over on count III, harmful devices --unlawful possession or use, based on evidence that defendant was HIV positive and bit the complaining witness during an altercation between the men. *Preliminary Hearing Transcript*, dated November 2, 2009, p 95-96. The charge alleges defendant did possess HIV, a harmful biological substance, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person in violation of MCL 750.200i(1)(a).

Defendant contends the lower court erred because there was no evidence or stipulation regarding defendant being infected with the human immunodeficiency virus ("HIV positive") presented at the preliminary examination and, therefore, count III must be quashed. Defendant also maintains the charge must be dismissed where it is medically impossible to transmit HIV

through biting when blood is not present in the mouth or saliva. According to defendant, no evidence has been presented that defendant had blood in his mouth or saliva at the time of the alleged bite. Defendant asserts the legislative intent behind the statute was not to punish a person for biting another under the circumstances presented in this matter.

In response, plaintiff claims there was sufficient probable cause to bind defendant over on count III. Plaintiff maintains a stipulation was placed on the record which provided that defendant was HIV positive on the day of the incident. According to plaintiff, there was sufficient circumstantial evidence and reasonable inferences to support the district court's decision that HIV is a harmful biological substance and defendant intended to injure the complaining witness by biting him on the lips.

The ACLU, in its amicus curiae brief, asserts MCL 750.200i(1)(a) was not intended to punish a person with HIV/AIDS who is alleged to have bitten an individual in a physical altercation. Additionally, the ACLU concurs with defendant's assertion that since there is no evidence that defendant was bleeding when the alleged bite occurred, defendant could not have delivered a "harmful biological substance" to the complaining witness. The amicus curiae brief of the Lambda Legal, with other organizations, further concurs with the ACLU and defendant's arguments.

III

When interpreting a statute, the primary goal is to ascertain and give effect to the intent of the legislature. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). The first criterion in determining intent is the specific language of the statute. *Ryant v Cleveland Twp*, 239 Mich App 430, 433; 608 NW2d 101 (2000). The fair and natural import of the terms employed, in view of the subject matter of the law, should govern. *Id.* If the specific

language of the statute is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 392; 594 NW2d 81 (1999). The Court must give effect to all words in a statute and may not interpret a statute so as to render some of the terms nugatory. *Talcott v City of Midland*, 150 Mich App 143, 148; 387 NW2d 845 (1985). Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. *Ryant v Cleveland Twp*, 239 Mich App 430, 433; 608 NW2d 101 (2000). If the statute provides its own glossary, the terms must be applied as expressly defined. *Id.* at 434. Otherwise, the Court may consult dictionary definitions. *Id.*

In this matter, MCL 750.200i, the contested statute, provides in pertinent part:

(1) A person shall not manufacture, deliver, possess, transport, place, use, or release any of the following for an unlawful purpose:

(a) A harmful biological substance or a harmful biological device.

Additionally, MCL 750.200h provides the following applicable definitions:

(d) "Deliver" means that actual or constructive transfer of a substance or device from 1 person to another regardless of any agency relationship.

(e) "For an unlawful purpose" includes, but is not limited to, having the intent to do any of the following:

(i) Frighten, terrorize, intimidate, threaten, harass, injure, or kill any person.

(g) "Harmful biological substance" means a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.

First, the Court must determine whether a "harmful biological substance" was present in this matter. The Court of Appeals in *People v Odom*, 276 Mich App 407; 740 NW2d 557 (2007) discussed the definition provided at MCL 750.200h(g). In *Odom, supra*, the defendant spit HIV infected blood at a corrections officer and these facts were used to score 20 points for OV 1

because the victim was exposed to a harmful biological substance. The Court stated:

We take judicial notice of the fact that blood is commonly known to be a means of spreading HIV.^{FN10} We therefore conclude that HIV-infected blood is a "harmful biological substance," as defined by Michigan statute, because it is a substance produced by a human organism that contains a virus that can spread or cause disease in humans.

FN10. The Centers for Disease Control and Prevention of the United States Department of Health and Human Resources states that "HIV transmission can occur when blood ... from an infected person enters the body of an uninfected person." *How is HIV passed from one person to another?* <http://www.cdc.gov/hiv/resources/qa/qa_16.htm>(accessed September 27, 2007).

Id. at 413. Accordingly, HIV infected blood is a "harmful biological substance" as defined by MCL 750.200h(g).

Conversely, in the current case, there is no evidence that defendant's blood was present at the time of the alleged bite.¹ There was no testimony that defendant was bleeding from the mouth, or from any part of his body, when he allegedly bit the complaining witness. Defendant was solely bound over on this charge based on the stipulated fact that he was HIV positive and testimony that defendant bit the complaining witness. *Preliminary Hearing Transcript*, dated November 2, 2009, p 95-96. Although in *Odom, supra* the Court took judicial notice of the fact that blood is commonly known to be a means of spreading HIV, there is no evidence of the presence of blood in this matter. Based on the medical evidence presented, the Court cannot conclude that saliva presents the same risk of spreading HIV as blood presents. The Centers for Disease Control and Prevention of the United States Department of Health and Human Resources ("CDC") stated that "[c]ontact with saliva, tears, or sweat has never been shown to result in transmission of HIV." *See* Exhibit I of Defendant's motion to quash. Additionally, the

¹ The Court notes that defendant claims a proper stipulation was not placed on the record regarding whether defendant was HIV positive at the time of the alleged incident; however, for purposes of this motion, the Court

CDC has only documented the transmission of HIV through biting when there is the presence of blood. *Id.* Upon review of the evidence, the Court cannot conclude that saliva or biting, without the presence of blood, presents a means of spreading HIV. The Court finds there is no evidence to support the conclusion that saliva of a person infected with HIV is a "harmful biological substance" under the definition in the statute.

As a result, the record demonstrates the only possible "harmful biological substance" present in this matter was defendant's HIV infected blood contained in his bloodstream. However, the mere fact that defendant was HIV positive when he allegedly bit the complaining witness is insufficient to meet the elements of MCL 750.200i(1)(a). There is no evidence that demonstrates defendant manufactured or possessed a harmful biological substance, i.e. HIV infected blood, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, i.e. for an unlawful purpose. MCL 750.200i; MCL 750.200h(e) and (g). The fact that defendant is HIV positive, alone, cannot demonstrate he manufactured or possessed his HIV infected blood for an unlawful purpose. In addition, defendant's alleged action of biting the complaining witness, without the presence of blood, is not a documented manner in which HIV can be transmitted. Therefore, the Court is unable to conclude, under these circumstances, that there was sufficient circumstantial evidence that defendant possessed the harmful biological substance for an unlawful purpose.

Furthermore, there is no evidence that defendant placed, used, or released a harmful biological substance, i.e. his HIV positive blood, for an unlawful purpose, since there is no evidence of the presence of defendant's blood at the time of the alleged bite. Additionally, the record does not contain evidence to establish defendant delivered or transported a harmful

assumes the parties stipulated to this fact, but concludes the merits of the motion are both worthy of review and dispositive. Therefore, the Court will not address this argument.

biological substance for an unlawful purpose. "Deliver" requires the actual or constructive transfer of a substance. MCL 750.200h(d). However, the Court has already determined that there is no evidence to demonstrate that saliva or biting, without the presence of blood, transmits HIV. Accordingly, it cannot be said that defendant delivered or transported the harmful biological substance contrary to MCL 750.200i(1)(a).

Even when the evidence is viewed in the light most favorable to the prosecution, it is not sufficient to demonstrate a reasonable belief as to the required elements to establish a violation under MCL 750.200i(1)(a). Consequently, there was insufficient evidence to support the charge and defendant's motion to quash is properly granted.²

IV

Based on the foregoing, it is hereby

ORDERED defendant's motion to quash is GRANTED. Count III, harmful device – unlawful possession or use is DISMISSED. This Opinion and Order neither resolves the last claim nor closes the case. See MCR 2.602(A)(3).

SO ORDERED

DATED:

cc: James Galen
J.P. Hunt

PETER J. MACERONI
Peter J. Maceroni,
Circuit Judge

JUN - 2 2010

A TRUE COPY
BARMELLA SABAGH, COUNTY CLERK
BY: [Signature] Court Clerk

² Although the parties raise the issue of whether the legislature intended this statute to apply to a person infected with HIV who is involved in a physical altercation, the Court does not reach this issue, as defendant's motion is granted on other grounds.