COMMONWEALTH v. THOMAS, C.P. Franklin County Branch, No. 390 of 1981

Criminal Law - Hindering Apprehension - Evidence - Past Recollection Recorded

1. A defendant can be convicted of hindering apprehension of law enforcement officers attempting to execute arrest warrants when the warrants were issued for traffic violations rather than grounds identified as misdemeanors or felonies.

2. There is no evidence that the Legislature in passing Section 650 (c) of the Vehicle Code intended to make summary offenses under the Vehicle Code something other than a crime.

3. Where a police officer on cross-examination is unable to recall various specific details, it is proper to admit into evidence, under the past recollection recorded rule, an affidavit of probable cause where the affidavit was prepared within two hours of the event.

John F. Nelson, Assistant District Attorney, Counsel for the Commonwealth

John McCrea, III, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., March 11, 1982:

At approximately 9:25 p.m. on August 13, 1981, two officers of the Borough of Shippensburg Police Department were directed to proceed to the home of the defendant and her family as a result of an "active domestic complaint." The officers talked to the defendant and her husband, and warned them of the excessive noise. The officers observed Timothy Thomas, son of the defendant and her husband, inside the house and being aware of two warrants for his arrest issued by Justice of the Peace Cassner for motor vehicle violations, directed him to go with him to headquarters. Timothy said, "No way!" There was a struggle between Timothy Thomas and Officer Kennedy inside the home. Officer Kennedy was pushed and either fell onto a sofa or onto the floor while Timothy made his escape out the back door of the house.

According to the officers' testimony the defendant said he was not going to take Timmy, and she then attempted to hold him down and restrain him from pursuit of her son. Officer Kennedy managed to get away from the defendant, and in the

Sale of Real Estate - 10:00 A.M. Unused and unnecessary land and building:

Tract 1. A plot of ground containing 5.9 acres more or less, having erected thereon a brick building, one story, 12,600 sq. ft. size, with basement, formerly used as a school. Has 6 rooms on first floor, including one large room used as auditorium and stage.

Basement has 5 rooms, including large room used as gymnasium and several storage rooms.

It is heated with a York oil fired broiler in repairable condition. There is a 3,000 gallon oil storage tank. Water is supplied by a drilled well and submersible pump in working condition. Sewerage is an underground septic system.

Tract 2. An unimproved lot located to the south of tract 1, the size of 2/3 acre more or less.

Tract 3. An unimproved lot to the south of tract 2, the size of 1/2 acre more or less.

Terms of real estate, 10% down, balance on or before July 9, 1982. Possession time of settlement. Detailed terms sale day. For inspection phone 328-3127 or 369-4169.

Rudolf M. Wertime, Solicitor
173 Lincoln Way East
Chambersburg, Pa. 17201

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118 East Seminary Street
Mercersburg, Pa. 17236

4-16, 4-23, 4-30

process accidentally hit her on the head with his flashlight. He then renewed his pursuit of Timothy. Officer Worthington observed Officer Kennedy grab Timothy Thomas and Timothy pull away and run toward the rear of the house. Officer Worthington went back outside to radio for assistance and to go to the rear of the house to catch Timothy as he exited the rear door.

The defendant and her husband testified to the attempt made by Officer Kennedy to arrest her son; the scuffle; Timothy pushing Officer Kennedy down and running out of the room. They both testified that the defendant did not in any way interfere with, hold down or otherwise obstruct Officer Kennedy from getting up and continuing her pursuit. Both testified that the officer struck the defendant on the head with his flashlight before continuing his pursuit of Timothy.

Officer Kennedy testified that within several hours after the incident, he prepared his probable cause affidavit at Police Headquarters and executed and swore to it before the Justice of the Peace on August 14, 1981. Initially, the defendant was charged with hindering apprehension or prosecution and aggravated assault. At the preliminary hearing the aggravated assault charge was dismissed.

The matter was tried before a jury on November 17 and 18, 1981. At trial on cross-examination Officer Kennedy testified that he did not recall many of the facts he was questioned about, and could not therefore answer the question. He explained that his recollection was very hazy as to many of the incidents which occurred in the Thomas home. On redirect examination, he was given an opportunity to review his affidavit of probable cause and testified that he prepared the affidavit and that he knew that it correctly stated the facts as they occurred, but the reading of the affidavit did not refresh his recollection. Over objection the affidavit of probable cause was admitted in evidence. Counsel for the defense offered the criminal complaint as originally issued in evidence for the purpose of showing that Officer Kennedy charged the defendant with causing or attempting to cause bodily injury or serious bodily injury when on cross-examination he had testified (according to the Court's notes) that he could not testify that defendant caused him any injury. The Commonwealth objected to the admissibility of the exhibit on the grounds that the aggravated assault charge had been dismissed by the Justice of the Peace, and no portion of that charge had been brought before the jury so the evidence was irrelevant. The objection was sustained.

At the conclusion of the trial, and following the return of the jury's guilty verdict, counsel for the defense orally moved for a new trial or arrest of judgment and assigned seven specific reasons for the same. On February 4, 1982, briefs were submitted and arguments heard on defendant's post trial motions. Defendant's post trial motions were limited to:

1. Whether the defendant was as a matter of law properly convicted of hindering apprehension or prosecution?

2. Whether the Court erred in admitting the affidavit of probable cause prepared, sworn to and executed by Officer Kennedy in evidence as the officer's past recollection recorded?

3. Whether the Court erred in refusing to admit into evidence the criminal complaint which included the dismissed charge of aggravated assault?

Crimes Code Section 5105. HINDERING APPREHENSION OR PROSECUTION provides inter alia:

> (a) Offense defined. - A person commits an offense if, with intent to hinder the apprehension, prosecution, conviction or punishment of another for a crime, he:
>
> (2) provides or aids in providing a weapon, transportation, disguise or other means of avoiding apprehension or effecting escape;

Section 106 of the Crimes Code provides inter alia:

> (a) General Rule. - An offense defined by this title for which a sentence of death or of imprisonment is authorized constitutes a crime. The classes of crimes are:
>
> (1) murder of the first degree.
>
> (2) felony of the first degree.
>
> (3) felony of the second degree.
>
> (4) felony of the third degree.
>
> (5) misdemeanor of the first degree.
>
> (6) misdemeanor of the second degree.
>
> (7) misdemeanor of the third degree.

LEGAL NOTICES, cont.

and addresses of all persons owning or interested in said business are Stephen J. Lee, 8329 Newburg Road, Newburg, PA 17240, and Charles H. Pyne, 6 West Main Street, P. O. Box 147, Newburg, PA, 17240.

Hamilton C. Davis
P. O. Box 6
Newville, PA 17241

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NOTICE IS HEREBY GIVEN pursuant to the provisions of the Act of Assembly of May 24, 1945, P. L. 967, and its amendments and supplements of intention to file with the Secretary of the Commonwealth of Pennsylvania at Harrisburg and with the Prothonotary of the Court of Common Pleas of Franklin County, Pennsylvania, on May 10, 1982, an application for a certificate for the conducting of a business under the assumed or fictitious name of SOLAR USAGE NOW OF PENNSYLVANIA with its principal place of business at 125 Garman Dr., Chambersburg, PA, 17201. The names and addresses of all persons owning or interested in said business are J. Earl Dibert, 135 Echo Dr., Chambersburg, PA, 17201, Mary C. Dibert, 135 Echo Drive, Chambersburg, PA, 17201, David L. Dibert, 135 Echo Dr., Chambersburg, PA, 17201, Steven W. Dibert, 135 Echo Dr., Chambersburg. PA, 17201, and Kevin A. Dibert, 135 Echo Drive, Chambersburg, PA, 17201.
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The Mayor and Town Council of the Borough of Chambersburg vs. Thomas Tarlton	) In the Court) of Common Pleas) of the 39th Judicial) District, Penna.) Franklin County) Branch) Sewer Lien Docket) Volume 1, Page 102	

The Borough of Chambersburg to Thomas Tarlton, Registered Owner, Greeting:

WHEREAS, the Borough of Chambersburg filed its claim on September 20, 1978, in the Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, to Sewer Lien Docket Volume 1, Page 102, for the sum of $104.94, with interest from the 20th day of September, 1978, for electric and refuse service, against the property known as 238 Mt. Moriah Street, Chambersburg, Franklin County, Pennsylvania, owned or reputed to be owned by you.

AND WHEREAS, we have been given to understand that said claim is still due and unpaid, and remains a lien against the said property. Now you are hereby notified to file your affidavit of defense to said claim, if defense you have thereto, in the office of the Prothonotary of our said Court, within 15 days after the service of this writ upon you. If no affidavit of defense be filed within said time, judgment may be entered against you for the whole claim, and the property described in the claim be sold to recover the amount thereof.

WITNESS, the Honorable George C. Eppinger, President Judge of our said Court, this 20th day of April, 1982.

John F. George, Prothonotary
Raymond Z. Hussack, Sheriff
4-30-82, 5-7-82, 5-14-82

(c) Summary offenses. - An offense defined by this title constitutes a summary offense if:

(1) it is so designated in this title, or in a statute other than this title; or

(2) if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than 90 days.

The position of the Commonwealth in this prosecution has been that the defendant with intent to hinder the apprehension of another (her son Timothy Thomas) for a crime aided him in avoiding apprehension and effecting his escape. To the contrary the defendant contends that she cannot be convicted of hindering apprehension or prosecution under Section 5105 because the warrants for her son were for failure to pay fines and costs imposed for various traffic violations. In other words, the defense is that defendant cannot be convicted of hindering apprehension of law-enforcement officers attempting to execute arrest warrants when the arrests were issued for traffic violations rather than grounds identified as misdemeanors or felonies.

In support of her position the defendant cites *In the Interest of Golden*, 243 Pa. Super. 267, 365 A. 2d 157 (1976) and Section 6502(c) of the Vehicle Code which provides:

"Title 18 inapplicable. - Title 18 (relating to crimes and offenses), in so far as it relates to fines and imprisonment for conviction of summary offenses, is not applicable to this title."

Contrary to the contention of the defendant, we find the majority opinion in Golden far from supporting the contention of the defendant affirms the trial court's adjudication that juveniles who had entered a building intending to commit criminal mischief, a summary offense, and underage drinking, also a summary offense, had committed acts in the nature of the crime of burglary.

We also find no merit in the defenses reliance upon Section 6502(c), for a review of the entire section will disclose the section is entitled "summary offenses," and provides in the preceding subsection:

"(a) Designation. - It is a summary offense for any person to violate any of the provisions of this title unless the violation is by this title or other statute of this Commonwealth declared to be a misdemeanor or felony."

"(b) Penalty. - Every person convicted of a summary offense for a violation of any of the provisions of this title for which another penalty is not provided shall be sentenced to pay a fine of $25.00."

In our judgment the sole purpose of Subsection (c) is to establish that the provision of the Crimes Code which permits the imposition of a sentence of imprisonment of up to ninety days and/or a fine of $300.00 in all summary offenses is not applicable to the Vehicle Code. We find no evidence of any legislative intent to make summary offenses under the Vehicle Code something other than a crime.

In *Commonwealth v. Shields*, 50 Pa. Super. 194 (1912), the Sheriff of Westmoreland County was convicted of voluntarily permitting persons in his custody "to escape and go at large" where he apprently released individuals committed to the county jail for five days for failure to pay $5.00 fines for violation of the School Law, which was a summary offense. On appeal, contending that the convicted offender had not violated a criminal law justifying imprisonment, the Superior Court affirmed the conviction and inter alia held:

"It is not for the courts, much less is it for jailors having in custody convicted offenders against this statute, to minimize its provisions upon any theory of the unwisdom of the legislature in making this a penal offense; nor can the power of the legislature to do this and to subject the offender to summary conviction be questioned. . . . The triviality of the offenses for which such prisoners have been convicted is not to be taken as the measure of the offense of the officer in permitting them to go at large." (Pages 200, 201)

We find no merit in the contention and it is dismissed.

The defendant contends for her second issue that the Court erred in admitting into evidence Officer Kennedy's probable cause affidavit on the duel grounds that the Commonwealth should not have been permitted on redirect examination to "rehabilitate" the officer's testimony by the use of the affidavit, and the appearance on the affidavit of the jurat established a "double layer of credibility" for the Commonwealth's witness. The defendant contends that if the officer

Police Commissions,	
certified copy	12.00
originals	18.50
Power of Attorney	13.50
Notation	2.00
Release of Lien	13.50
Notation	2.00
Release	13.50
Revocation	13.50
Right-of-Way	13.50
Satisfaction Piece	13.50
Notation	2.00
Seal and Certification	1.50
Termination of Federal Tax Lien	10.00
Filing fee for Act No. 287 of 1974	5.00
copy - each township	2.00
Preferential assessments under Act. No. 319 of 1974	12.00
each page over four (4)	2.00
each name over four (4)	.50
Copies - Searches:	
Per Page	.50
Certification	1.50
Affidavit of Value	1.00

All fees include the State writ tax and all fees shall be payable in advance.

was going to plead loss of memory, the burden was upon the Commonwealth to have developed that fact on direct examination rather than on redirect.

We have no difficulty in agreeing with the defendant that had Officer Kennedy's inability to remember details of the incident become evidence during direct examination, it would have been incumbent upon the Commonwealth to at that time seek to refresh the recollection of the witness by exhibiting the probable cause affidavit to him; and if that did not produce the desired effect, to then clearly indicate its intention to seek the affidavit's admission as a past recollection recorded. Our recollection of Officer Kennedy's testimony on direct examination is that it was responsive to the Assistant District Attorney's questions; was relatively general in nature; and did establish the Commonwealth's prima facie case. It was only with defense counsel's piercing and strenuous cross-exmination that the witness evidenced an inability to recall various specific details, thus it was only at this stage of the trial that the Commonwealth became aware of the fact that it had a problem with the testimony of the prosecuting officer which the Assistant District Attorney concluded needed to be corrected. It should also be noted that it was counsel for the defense who first exhibited the probable cause affidavit to Officer Kennedy, and elicited the testimony that it was the witness' affidavit and that he had completed it on August 13, 1981.

In *Pennsylvania Trial Evidence Handbook*, Section 8.15 appears:

> Pennsylvania recognizes the recorded recollection exception to the hearsay rule: *Com. v. Kendig*, 215 Pa. Super. 139. Under this exception, the writing is admitted as a recording of past events where the witness has no recollection of these events and he knows the writing to be accurate: *Com. v. Kendig*, supra. The memorandum must have been made at or about the time of the occurrence; the facts must be within the personal knowledge of the witness-author and the written memorandum must have been made by him or approved by him.
>
> Where the witness does not have a clear recollection of the matters contained in the memorandum, he may read it to himself. If the memorandum serves to refresh his recollection, he must testify as to what he recalls independent of the memorandum: *McNair v. Com.*, 26 Pa. 388. Where the witness has an independent recollection after refreshing his

memory by the writing, it is error to order a witness to read the memorandum to the jury: *Com. v. Kendig*, supra. When thus employed for the purpose of refreshing recollection, the memorandum is not an exception to the hearsay rule.

If the memory of the witness is not refreshed and he testifies that the memorandum was prepared by him or by another and adopted by him as being true when he had a clear recollection of the event, the memorandum itself is admissible into evidence: *Christian Moerlein Brewing Co. v. Rusch*, 272 Pa. 181. Where a witness had no personal knowledge of the facts he cannot be permitted to refresh his recollection from a memorandum since he never had any knowledge of the event: *Gordon v. Blizard*, 106 Pa. Super. 112.

In the case at bar, Officer Kennedy did testify that he had prepared the affidavit of probable cause at Police Headquarters on August 13, 1981 within two hours of the occurrence of the incident; that it correctly states the facts; that he swore to it on August 14, 1981 at the District Justice's Office, and that he did not now have a recollection of the events. Under those circumstances, it is, in our judgment, evident that the affidavit was admissible as an exhibit under the past recollection recorded rule.

With regard to the defendant's contention that the appearance of the jurat on the exhibit created some additional credibility for the officer in the eyes of the jury, we find no merit for it is entirely supposition. In addition, had counsel for the defendant requested the Court to specifically charge the jury that the jurat appearing on the exhibit merely represented the necessary form required and was to be disregarded as having no effect in the trial of the matter such instructions would have been given.

For the foregoing reasons the second post trial motion will be dismissed.

The defendant's third motion for post trial relief is predicated upon the contention that the Court erred in refusing to admit the segment of the criminal complaint which charged the defendant with aggravated assault. The defendant correctly contends that on cross-exmination Officer Kennedy stated that he could not testify that the defendant caused him any bodily injury, and count 2 of the criminal complaint executed and sworn to by Officer Kennedy alleges the defendant "did cause or did attempt to cause bodily injury to a police officer while attempting to make or making a lawful arrest. TO WIT: Defendant did jump onto Affiant and did grab his hands trying

to hold such to prevent him from making a lawful arrest. Officer Kennedy did receive injuries to his arm and left hand and arm area around the elbow." Therefore, the defendant urges the criminal complaint or that portion of it setting forth the aggravated assault count was admissible in evidence as a prior inconsistent statement to impeach the testimony of Officer Kennedy.

The testimony in this case was not transcribed and, therefore, we must rely upon our notes and recollection of what occurred during the trial and at side bar conferences. As we recall the events:

1. During the cross-examination of Officer Kennedy, counsel for the defendant, after extracting the officer's testimony that he could not testify the defendant caused him any injury, showed the officer his affidavit of probable cause and criminal complaint, marked defendant's exhibits 1 and 2 respectively; had him identify them and questioned him about them.

2. Immediately prior to closing argument, and at an on the record side bar conference, counsel for the defendant indicated that he desired to have the criminal complaint be made a part of the record to show that Officer Kennedy had brought a charge of aggravated assault against the defendant on August 14, 1981 alleging bodily injury while attempting to make an arrest. The request was denied.

While we have no recollection of counsel for the defendant making a formal offer of defendant's exhibit 2, we consider the side bar request as being the equivalent of an offer, and our refusal as an effective denial thereof. From defendant's brief and argument we understand this offer and denial to be the basis of the third post trial motion.

Preliminarily, we should observe that during the trial of the case, it had been brought to our attention that the aggravated assault count had been dismissed by the Justice of the Peace at the preliminary hearing for insufficient evidence. We were also aware of the fact that the defendant's husband, Harry Robert Thomas, had been charged with various offenses, including recklessly endangering, arising out of another incident which also occurred on the same evening in the area of the Thomas home.

In our judgment the fact that the defendant was charged with aggravated assault, and that the officer alleged that she did cause and did attempt to cause bodily injury is totally irrelevant

in the case at bar because that charge had been dismissed and was not a matter for the proper consideration of the jury. An examination of the officer's affidavit of probable cause discloses nothing which would indicate that the defendant caused or attempted to cause any bodily injury to the officer, which might well have led the jury, as it did the court, to wonder whether the alleged aggravated assault occurred outside the time frame of the alleged hindering apprehension incidents. To include the criminal complaint or that portion of it containing the aggravated assault count without background evidence would have been more likely to confuse than to clarify the issues for the trier of fact. Further, in the light of the prohibitation of Pa. R. Crim. P. 1114 against permitting the jury to have "a copy of the information or indictment," we have serious doubts whether under any circumstances it would be appropriate to admit a criminal complaint in evidence.

We, therefore, conclude the third post trial motion must be dismissed.

ORDER OF COURT

NOW, this 11th day of March, 1982, the three post trial motions in arrest of judgment and for new trial, briefed and argued by the defendant are dismissed.

The Probation Department of Franklin County shall prepare a PreSentence Investigation Report and file the same. Upon the filing of the PreSentence Investigation Report the defendant shall appear on the call of the District Attorney for sentencing.

Exceptions are granted the defendant.

COMMONWEALTH V. SCHWARTZ, C. P. Franklin County Branch - No. 425 of 1980 and No. 426 of 1980

Criminal Law - Assault - Resisting Arrest - Hypothetical Questions

1. Generally, hypothetical questions must be based on matters which appear in the record and on facts warranted by the evidence.