

COMMONWEALTH OF PENNSYLVANIA
v. KEITH MICHAEL RUMMEL, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
No. 88-2004

Motion to suppress; Right to confrontation; Availability of a witness; Witness's partial lack of memory

1. When a witness testifies to remembering only some of the events in question, rendering her recollection of the alleged incident and her interactions with police officers who responded incomplete, the witness is unavailable under Pennsylvania Rule of Evidence 804(a)(1) due to her partial lack of memory.
2. Where an oral statement and a written statement, both given to police on the night of the alleged incident, comprise the evidence the Commonwealth wishes to use at trial and the witness never swore an oath to either statement and neither statement was subjected to cross-examination, the statements lack indicia of reliability and the circumstances of their making provide no basis for evaluating the truth of their contents. Admitting such statements as substantive evidence would violate Defendant's constitutionally guaranteed right to confrontation.

Appearances:

Dwight C. Harvey, Esq., *District Attorney*

Tamela Mellott Bard, Esq., *Counsel for Defendant*

OPINION

Walsh, J., October 19, 2004

Introduction

We have before us for decision an Omnibus Pre-Trial Motion - Motion to Suppress Witness Statement filed by Defendant. The Criminal Complaint alleges one count each of Terroristic Threats, Simple Assault, and Harassment. On or about April 25, 2004, the night of the incident, the alleged victim provided an oral and a written statement to the police. Based upon the information in these statements, as well as physical evidence, the police filed a Criminal Complaint against Defendant.

On or about September 2, 2004, Defendant filed this motion to suppress the witness's statements. Defendant argues that the witness's condition on the night of the alleged incident "made her 'crazy'" and that she has little to no recollection of the evening. Further, Defendant argues that the witness's statements are hearsay and wholly unreliable and that their admission would violate Defendant's right to Due Process and Defendant's right to confrontation. The Court issued a Rule to Show Cause on September 13, 2004, scheduling a hearing on the suppression issue. The Commonwealth filed an Answer on or about September 16, 2004. The Court heard argument and accepted evidence at a hearing on October 12, 2004. At the conclusion of the hearing, the Court requested that the Commonwealth and Defendant each file memos expounding upon and further clarifying issues raised at the hearing. The Court is in receipt of both parties' memos.

Based upon the Defendant's Motion, the Commonwealth's Answer, the arguments made and evidence offered at the hearing, the supplemental memoranda of the parties, and the law, the Court makes the following:

Findings of Fact

1. On or about April 25, 2004, the night of the incident, the alleged victim provided an oral statement to the police.
2. Based upon the circumstances described, the police asked the alleged victim to give a written statement of the events of that evening.
3. On or about April 25, 2004, the night of the incident, the alleged victim provided a written statement to the police.
4. The alleged victim wrote the statement herself.
5. The alleged victim signed her name to the statement, attesting to the truth of the contents therein.
6. Based upon the information in these statements, as well as physical evidence, the police filed a Criminal Complaint against Defendant.
7. The Criminal Complaint alleges one count each of Terroristic Threats, Simple Assault, and Harassment.
8. At a hearing on October 12, 2004, the witness testified, though not credibly, as to her memory loss of events on the night in question.

Discussion

A witness is unavailable when he/she testifies to a lack of memory of the subject matter of the declarant's statement or when he/she persists in refusing to testify concerning the subject matter of the declarant's statement despite a court order to do so.[1] Pa. R. Evid. 804(a)(3). A witness who claims no memory of prior testimony is unavailable. Commonwealth v. Jones, 496 A.2d 1177 (Pa.Super. 1985). Likewise, a partial lack of memory of events surrounding the offenses underlying the defendant's charges renders a witness unavailable. Commonwealth v. Graves, 398 A.2d 644 (Pa. 1979). Here, when on the stand, the witness testified to remembering only some of the events of the evening of April 25, 2004.[2] Her recollection of the alleged incident and her interactions with police officers who responded is incomplete. Due to this partial lack of memory, we find the witness unavailable under Pennsylvania Rule of Evidence 804(a)(1).

Under certain circumstances, the previous testimony of an unavailable witness may be presented at trial as substantive evidence. Previous testimony given under oath and subject to cross-examination is admissible. Commonwealth v. Stasko, 370 A.2d 350 (Pa. 1977) and Commonwealth v. Jones, 496 A.2d 1177 (Pa.Super. 1985). Here, an oral statement and a written statement, both given to police on the night of the alleged incident, comprise the evidence the Commonwealth wishes to use at trial. The witness never swore an oath to either statement; neither statement was subjected to cross-examination. Therefore, the statements lack indicia of reliability and the circumstances of their making provide no basis for evaluating the truth of their contents. Mancusi v. Stubbs, 408 U.S. 204, 216 (1972). Admitting such statements as substantive evidence would violate Defendant's constitutionally guaranteed right to confrontation. U.S.C.A. Const. Amends. 14 and P.S. Const. art. 1, § 9.

In its October 15, 2004 facsimile to the Court, the Commonwealth raised concerns that the issues briefed by Defendant do not fairly arise from Defendant's Motion. In light of this concern, the Court considered ordering a new hearing to ensure the Commonwealth ample opportunity to present evidence and make argument based on what it argues are newly raised issues. However, the Court is unable to determine any changes such a hearing, if warranted, would make in the outcome of this matter. Any potential factual variation within the imagination of the Court leads to the same legal conclusions. Therefore, the Court finds the Commonwealth suffered no harm by the infusion of new issues or sub-issues by Defendant in his brief.

Conclusion

Due to her partial lack of memory, the witness is unavailable. However, since her statements, both oral and written, lack sufficient indicia of reliability, they are inadmissible as substantive evidence. To admit either statement as substantive evidence would violate Defendant's right of confrontation. This Opinion and Order are not intended to tie the hands of the trial judge who may be in a circumstance to permit use of the witness's written statement under appropriate circumstances for impeachment, along with a limiting instruction.

Now this 19th day of October 2004, the Court having reviewed Defendant's Motion, the Commonwealth's Answer, the arguments made and evidence offered at the hearing, the supplemental memoranda of the parties, and the law, it is hereby ordered that Defendant's Motion to Suppress the Witness's Written and Oral Statements is granted such that neither the witness's oral nor written statement may be used by the Commonwealth as substantive evidence.

[1] Pennsylvania Rule Evidence 804(a) defines other situations in which a declarant is unavailable. However, the Court finds the other definitions inapplicable to the instant case. Definition (2) is arguably on point here, but neither side presented any evidence, nor made any arguments regarding its applicability. Therefore, we will proceed under Rule 804(a)(3).

[2] The Court found the witness's testimony regarding her lack of memory incredible and we believe it to be merely convenient. Had evidence been presented or arguments made, the Court may have been inclined to find that the witness refused to testify, not that she had a loss of memory. No such evidence was presented, nor arguments made. In any case, the result would remain unchanged. See Commonwealth v. Rizzo, 726 A.2d 378 (Pa. 1999) and Commonwealth v. Nelson, 652 A.2d 396 (Pa.Super. 1995).