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Commonwealth v. Norah

COMMONWEALTH OF PENNSYLVANIA
v. MARTIN NORAH, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 2166 of 2010

Criminal Law: Presumptions, Burden of Proof, and Weight and Sufficiency of Evidence

1. Although hearsay is admissible at a preliminary hearing, the Commonwealth may not meet its burden with hearsay alone. Commonwealth v. Buchanan ex rel. v. Verbonitz, 525 Pa. 413, 581 A.2d 172 (1990).

2. A habeas corpus hearing (a) is the proper method to challenge a magisterial district judge's return, (b) is similar to a preliminary hearing except the Commonwealth may supplement its case with additional evidence, and (c) the Commonwealth has a prima facie burden of proving that a crime was probably committed by the defendant. Commonwealth v. Fountain, 811 A.2d 24, 25 (Pa. Super. 2002).

3. Commonwealth sustained its burden at a habeas corpus hearing where only the defendant's identity was established by hearsay, but the Commonwealth presented additional non-hearsay evidence that a crime had occurred.

Criminal Law: Right of Accused to Confront Witnesses

1. The federal and state Confrontation Clauses are identical, and each grants a defendant the right to be confronted with the witnesses against him. U.S. Const. amend. VI; Pa. Const. art I §9.

2. The Confrontation Clause attaches at trial, and the Supreme Court has never held that there is a constitutional right to confront witnesses pretrial.

3. Even in light of Crawford v. Washington, 541 U.S. 36 (2004), and its progeny, there is no federal or state right to confront witnesses at a preliminary hearing.

4. Defendant's right to confront witnesses against him was not violated when the Commonwealth presented the hearsay statements of an unavailable witness at a pretrial hearing.

Criminal Law: Right of Accused to Examination

1. A defendant has no constitutional right, state or federal, to a preliminary hearing. Commonwealth v. Ruza, 511 Pa. 59, 511 A.2d 808 (1986).

2. The Commonwealth may forego filing a criminal complaint and holding preliminary hearing where the defendant has had an opportunity to rebut the Commonwealth's prima facie case, and no prejudice results to defendant by the absence of a criminal complaint or preliminary hearing.

3. Defendant's right to a criminal complaint and a preliminary hearing were not violated, because defendant had opportunity to challenge Commonwealth's prima facie case at a pretrial hearing.

Appearances:

Zachary Mills, Esq., *Assistant District Attorney*

Anthony Miley, Esq., *Assistant Public Defender*

OPINION

Walsh, J., June 9, 2011

Martin Norah has petitioned this Court for a writ of habeas corpus. Norah claims that the magisterial district judge improperly held for court the charges in the underlying criminal action. The Commonwealth also seeks to add a charge against Norah for intimidation of witnesses or victims. For the reasons that follow, we will deny Norah's petition. We will further allow the Commonwealth to proceed on the witness intimidation charge.

Factual Background

Because a habeas hearing is similar to a preliminary hearing, we read the following facts "in the light most favorable to the Commonwealth." Commonwealth v. Fountain, 811 A.2d 24, 25 (Pa. Super. 2002) (quoting Commonwealth v. Packer, 767 A.2d 1068, 1070 (Pa. Super. 2001)). Unfortunately, there is no record of the preliminary hearing, so we must rely on the averments of counsel, as well as the evidence adduced at the hearings before this Court.

Because a habeas hearing is similar to a preliminary hearing, we read the following facts "in the light most favorable to the Commonwealth." Commonwealth v. Fountain, 811 A.2d 24, 25 (Pa. Super. 2002) (quoting Commonwealth v. Packer, 767 A.2d 1068, 1070 (Pa. Super. 2001)). Unfortunately, there is no record of the preliminary hearing, so we must rely on the averments of counsel, as well as the evidence adduced at the hearings before this Court.

After he called the police, he saw Norah drive away and nearly hit one of the responding state police officers. (Id. at 18.) Trooper Ryan Remington, who arrived on the scene with lights flashing, testified that he saw Norah speed out of the parking lot towards the patrol car. The Jeep nearly struck Remington's partner, Trooper Kemerer, who had gotten out of the car. (N.T. 11/30/10, at 9.) Trooper Remington gave chase and was able to stop the vehicle, but not Norah, who got out and fled on foot. The other occupants of the vehicle identified Norah, as did Hann, whom the Trooper interviewed when he returned to the scene. (Id. at 10-11.)

Norah was apprehended later and charged with two counts of aggravated assault, see 18 Pa. C.S. §2702(a)(1), and one count each of fleeing or eluding, see 75 Pa. C.S. §3733(a), simple assault, see 18 Pa. C.S. §2701, disorderly conduct, see Id. §5503(a)(1), harassment, see Id. §2709 and public drunkenness, see Id. §5505. Norah posted $150,000 bail on September 26. As a condition of bail, Norah was prohibited from contacting the victim.

A preliminary hearing was scheduled, but in the meantime, Norah called Mower numerous times and begged him not to testify against him in other hearings in his case. (N.T. Tr. of Testimony of Eric Mower, 12/23/10, at 4.) Norah offered to pay Mower's medical bills, but he did not threaten Mower. (Id. at 10-11, 13-14.) Mower did appear for Norah's preliminary hearing on October 26, but the hearing was continued, on motion of Petitioner. Afterwards, Norah called him and begged him not to show up for Norah's rescheduled preliminary hearing. (Id. at 5.) He even promised to sign a notarized agreement to pay Mower's medical bills. (Id.) Norah told Mower not to tell anyone else about the phone calls.

Norah's preliminary hearing was held before Magisterial District Judge Dave Plum on November 9, 2010. Norah did not appear for the hearing. Neither did Eric Mower. (Id. at 15-16.) As a result, the Commonwealth produced only Brian Hann (N.T. 11/30/10, at 3-4), who testified as to his observations, and how he learned Norah's identity through the statements of non-witnesses. Judge Plum found that the Commonwealth met its burden and held the charges for court.[1]

Norah filed a petition for a writ of habeas corpus on November 19, 2010. The Court held a hearing on November 30, at which Trooper Remington testified. On December 23, 2010, the Court held a second hearing regarding the Commonwealth's motion to revoke bail because Norah had contacted Mower. Norah's counsel aggressively cross-examined Mower and disputed whether a the Commonwealth proved prima facie witness intimidation. (See N.T. Tr. of Proceedings, 12/23/10, at 10-13.) Nevertheless, the Court found that Norah violated the conditions of his bail, revoked his bail, and reset it at $250,000. Because of time constraints, Brian Hann was not able to testify at the second hearing. The Court held a third hearing to supplement the record with his testimony on February 10, 2011.

Discussion

First, Norah argues that Judge Plum's return should be quashed because the Commonwealth did not meet its burden at the November 9 preliminary hearing. He claims that Brian Hann's hearsay identification of him violated the rules of evidence and his constitutional right to confront the witnesses against him.

The second issue is whether the Commonwealth may add a charge of intimidation of witnesses or victims, see 18 Pa. C.S.

§4952, based on Norah's urging Mower not to testify. The Commonwealth has not filed a criminal complaint on that charge, nor has it held a preliminary hearing.

A. Hearsay at Preliminary Hearings

At a preliminary hearing, the Commonwealth must prove prima facie that a crime occurred, and that the defendant is probably the perpetrator. Fountain, 811 A.2d at 25. A petition for a writ of habeas corpus is the proper method to challenge a magisterial district judge's return. Id. A habeas hearing is similar to a preliminary hearing; however, at the habeas hearing, the Commonwealth may introduce additional evidence to meet its burden. Id.; see Commonwealth v. Carbo, 822 A.2d 60, 75-76 (Pa. Super. 2003); Commonwealth v. Lawson, 650 A.2d 876, 879 (Pa. Super. 1994).

Norah claims that preliminary hearing was defective because the Commonwealth established Norah's identity through hearsay. Norah also claims that the hearsay testimony violated his constitutional right to confront witnesses against him. The Commonwealth concedes that it used hearsay to establish identity, but it contends that that hearsay may be used at preliminary hearings to establish a prima facie case.[2] The Commonwealth further claims that confrontation rights do not attach at a preliminary hearing.

Hearsay is admissible at preliminary hearings. Commonwealth v. Tyler, 587 A.2d 326, 328 (Pa. Super. 1992) (citing Commonwealth v. Troop, 571 A.2d 1084 (Pa. Super. 1990)). This view of the law is longstanding. See Commonwealth v. Rick, 366 A.2d 302, 303-04 (Pa. Super. 1974). A plurality of the Pennsylvania Supreme Court has stated that the Commonwealth cannot meet its burden at a preliminary hearing by relying on mere hearsay evidence. Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172, 174 (Pa. 1990) (plurality opinion).[3] Subsequent Superior Court opinions, however, have adhered to the narrower view of the two concurring justices in Buchanan: that hearsay alone is insufficient to establish a prima facie case. See Id. at 176 (Flaherty, J., concurring) ("It is sufficient to hold that a prima facie case cannot be established at a preliminary hearing solely on the basis of hearsay testimony."); see, e.g., Commonwealth v. Carmody, 799 A.2d 143, 146 n.2 (Pa. Super. 2002); Commonwealth v. Fox, 619 A.2d 327, 332 (Pa. Super. 1993); Tyler, 587 A.2d at 328. Thus, the Commonwealth may sustain its burden at a preliminary hearing when it presents more than solely hearsay evidence.

B. Confrontation Rights

Crawford v. Washington, 541 U.S. 36 (2004), and its progeny add a layer to our analysis, because the Crawford Court held that using certain types of hearsay testimony at trial violates the Confrontation Clause of the Sixth Amendment. Crawford applies only when the Confrontation Clause is implicated, but the Buchanan plurality mentioned that a defendant has confrontation rights at a preliminary hearing. Most other cases construe the Confrontation Clause as a trial right - meaning that it does not attach at pretrial proceedings.

Initially, we note that our analysis is the same under both the Sixth Amendment and under Article I §9 of the Pennsylvania Constitution, because Pennsylvania's confrontation clause is now identical to the federal one. Commonwealth v. Mollett, 5 A.3d 291, 308 n.5 (Pa. Super. 2010), alloc. denied, 14 A.3d 826 (Pa. 2011); Commonwealth v. Geiger, 944 A.2d 85, 97 n.6 (Pa. Super. 2008), alloc. denied, 964 A.2d 1 (Pa. 2009).

The Buchanan plurality stated that a defendant has a constitutional right to confront and cross-examine witnesses at a preliminary hearing. Buchanan, 581 A.2d at 174 (plurality opinion). The plurality cited in support Coleman v. Alabama, 399 U.S. 1 (1970), a U.S. Supreme Court case holding that the Sixth Amendment guarantees the right to counsel at a preliminary hearing. The Coleman Court noted that a preliminary hearing is a critical stage of the prosecution of a defendant. Id. at 9 (plurality opinion). The Court stated four reasons why counsel is necessary at a preliminary hearing: (1) a lawyer's cross-examination may reveal weaknesses that cause the magistrate to dismiss the case; (2) the lawyer can lay grounds for later impeachment of witnesses at trial; (3) the lawyer can more effectively discover the case against his client[4]; and (4) the lawyer can make arguments for psychiatric examinations or bail. Id. But Coleman is a plurality opinion, too, and it concerned the right to counsel, not the right of confrontation.

The Buchanan plurality also relied on Gerstein v. Pugh, where the U.S. Supreme Court stated, in dicta,[5] that the importance of a preliminary hearing justifies allowing cross-examination of witnesses. 420 U.S. 103, 119 (1975). Notably, the Buchanan plurality conceded that the U.S. Supreme Court has never held that the Confrontation Clause applies at preliminary hearings. Buchanan, 581 A.2d at 174-75.

Finally, the plurality stated that Article I §9 of the Pennsylvania Constitution mandates the right of the defendant to confront and cross-examine witnesses at a preliminary hearing. Buchanan, 581 A.2d at 175.

The Supreme Court has never held that the Confrontation Clause includes the right to cross-examine witnesses before trial. See Pennsylvania v. Ritchie, 480 U.S. 39 (1987). In Ritchie, the respondent, who was accused of raping his daughter, claimed that Child Youth Services violated his confrontation rights when it refused to turn over his daughter's file, and that a statute making such documents privileged should yield to his confrontation rights. Id. at 45. The Court rejected his argument, because to hold otherwise would "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery." Id. at 52 (plurality opinion). That part of Ritchie has subsequently been adopted by the Superior Court. See Commonwealth v. Kyle, 533 A.2d 120, 124 (Pa. Super. 1987).

Even in light of Crawford, no court has held that the Sixth Amendment confers confrontation rights upon a defendant at a preliminary hearing. See, e.g., Peterson v. California, 604 F.3d 1166 (9th Cir. 2010); State v. Timmerman, 218 P.3d 590 (Utah 2009); State v. Harris, 998 So. 2d 55 (La. 2008); Godwin v. Johnson, 957 So. 2d 39 (Fla. Dist. App. 2007); Gresham v. Edwards, 644 S.E.2d 122 (Ga. 2007); Sheriff v. Witzenburg, 145 P.3d 1002 (Nev. 2006); People v. Felder, 129 P.3d 1072 (Colo. App. 2005); Vanmeter v. State, 165 S.W.3d 68 (Tex. App. 2005). But c.f. Curry v. State, 228 S.W.3d 292, 298 (Tex. App. 2007) (holding that the Confrontation Clause's protections extend to a pretrial suppression hearing). "The Pennsylvania cases that have analyzed the Crawford decision have consistently held that the Sixth Amendment right to confrontation is a trial right distinct from pretrial proceedings." Commonwealth v. O'Shea-Womer, 8 Pa. D. & C. 5th 178, 186 (C.P. Lancaster 2009).

In Peterson, the Ninth Circuit rejected a challenge to a California constitutional provision that explicitly allows hearsay at preliminary hearings. The court based its holding on two factors. First, a preliminary hearing is not constitutionally required. It makes little sense to grant a Constitutional right at such a hearing, and in the federal system, grand juries may return indictments based on hearsay.[6] Peterson, 604 F.3d at 1169. Second, the Supreme Court has repeatedly stated that the right to confront witnesses is a trial right. Id. (quoting Barber v. Page, 390 U.S. 719, 725 (1968)). Finally, the Peterson court held that Crawford does not affect prior case law, because Crawford held that the Confrontation Clause is violated when hearsay is introduced at trial. Id.

Upon review of the case law, this Court believes that the Confrontation Clause does not extend to preliminary hearings. It makes little sense to require a ***constitutional*** right to confront witnesses at a hearing that is not required by the Constitution. See Commonwealth v. Ruza, 511 A.2d 808, 810 (Pa. 1986) ("There is no constitutional right, federal or state, to a preliminary hearing."). Second, allowing full confrontation rights would turn preliminary hearings into "cracker barrel justice," or mini-trials on the merits. Buchanan, 581 A.2d at 424 (McDermott, J., dissenting). Our appellate courts have repeatedly stated that preliminary hearings are for the limited purpose of establishing a prima facie case against the accused, such that the case may proceed and that the accused may be held to bail or incarcerated before trial. E.g., Commonwealth v. Smith, 647 A.2d 907, 913 (Pa. Super 1994).

C. Application to this Case

In this case, the Commonwealth has met its prima facie burden. Although Norah was identified only through hearsay statements, the Commonwealth produced an eyewitness to the assault. Furthermore, any defect in the proceedings has been cured through subsequent hearings. The Commonwealth has supported its case with more than mere hearsay. Eyewitness Brian Hann testified about his view of the assault and its aftermath, and Trooper Remington testified about how he saw Norah nearly hit his partner while Norah was driving away. That evidence establishes that Eric Mower and Trooper Kemerer were probably assaulted and that Norah is probably the perpetrator.

There are no grounds to quash the return of transcript. The introduction of hearsay at the preliminary hearing and before this Court was neither improper[7] nor unconstitutional. The record is sufficient to hold this case for court. The petition for a writ of habeas corpus is therefore denied.

Attaching the witness intimidation charge

The Commonwealth is attempting to add a new charge against Norah for intimidation of witnesses or victims under 18 Pa. C.S. §4952. Norah claims that attaching the witness tampering charge violates his rights because the Commonwealth did not file a criminal complaint, and it did not conduct a preliminary hearing. Intimidation includes "offer[ing] any pecuniary or other benefit to the witness or victim." Id. §4952(b)(1)(ii).

We do not think that the absence of a complaint or a preliminary hearing violates Norah's constitutional rights. Those proceedings are not constitutionally required. Ruza, 511 A.2d at 810. Nor do we think Norah is prejudiced by their absence. At the December 23 hearing, Norah's counsel disputed our determination that prima facie Norah violated conditions of his bail, namely by attempting to induce Mower not to testify at the preliminary hearing. The evidence shows that Norah repeatedly called Mower and offered to pay his medical bills if Mower did not show for Norah's preliminary

hearing. Norah did not threaten Mower, but threats are not required. There is enough evidence to hold Norah for court on for intimidation of witnesses or victims. The Commonwealth shall proceed by filing an information with the Court.

ORDER OF COURT

June 9, 2011, upon consideration of the Defendant's Petition for Writ of Habeas Corpus, and the Commonwealth's application to add a charge of witness intimidation under 18 Pa. C.S. §4952, the briefs, the arguments of counsel, the record, and the law, it is ordered that the Defendant's Petition for Writ of Habeas Corpus be denied. It is further ordered that the Commonwealth's application to add a charge of intimidation of witnesses or victims be granted. The Commonwealth shall file an information with the Court.

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[1]Petitioner's counsel and the Commonwealth maintain that the public drunkenness charge was not held for court, but according to the docket sheet retrieved by the Court from the Common Pleas Case Management System, all charged were held over.

[2]We are aware that the Commonwealth argues the Court should not have required the Commonwealth to prove its case over *de novo* at the habeas hearing. Com.'s Br. at 5-6. This argument appears to be correct, but our task is somewhat frustrated by the absence of a record of the preliminary hearing.

[3]Buchanan is not binding precedent. Commonwealth v. Hanawalt, 615 A.2d 432, 437 (Pa. Super. 1992) ("[Buchanan] was a plurality opinion, which is not binding authority on [the Superior] Court.").

[4]Our rules do not permit a defendant to call witnesses at a preliminary hearing for the purposes of discovery. See Pa. R. Crim. P. 542 Comment.

[5]The Gerstein Court held that the Fourth Amendment requires a timely post-arrest determination by a neutral magistrate to incarcerate a person pretrial. Florida had allowed pretrial incarceration based solely on the filing of a prosecutor's information. Gerstein, 420 U.S. at 126.

[6]In the unusual situation in the federal system where a defendant is detained before indictment or information, hearsay is allowed at federal preliminary hearings, see Fed. R. EvId. 1101(d)(2) (stating that the rules of evidence do not apply at preliminary hearings), and the defendant is not allowed to object to evidence, even if it is illegally obtained, see Fed. R. Crim. P. 5.1(e).

[7]Ironically, it was Petitioner's own alleged wrongdoing that forced the Commonwealth to rely on hearsay evidence to establish identity. If Norah had adhered to the conditions of his bail, the Commonwealth might have been able to produce Mower to identify Petitioner, and would not have had to rely on Hann's hearsay testimony. See Pa. R. EvId. 804(b)(6).