IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 98-12,155

VS :

DENNIS LARUE SHIRES :

OPINION IN SUPPORT OF ORDER
IN COMPLIANCE WITH RULE 1925(A)
OF THE RULES OF APPELLATE PROCEDURE

Defendant appeals this Court's Order dated September 27, 1999, wherein the Defendant was sentenced to undergo incarceration for a minimum of sixty-six (66) months and a maximum of one-hundred thirty-two (132) months on the charge of rape, a minimum of sixty-six (66) months and a maximum of one-hundred thirty-two (132) months on the charge of involuntary deviate sexual intercourse, a minimum of forty-eight (48) months and a maximum of ninety-six (96) months on the charge of aggravated indecent assault, a minimum of two (2) years and a maximum of four (4) years on the charge of sexual assault, a minimum of one (1) year and a maximum of two (2) years on the charge of indecent assault, and a minimum of one (1) year and a maximum of two (2) years on the charge of simple assault. This sentence was entered after the Defendant was found guilty of the charges following the non-jury, case-stated trial held on July 12 and 13, 1999. The facts relevant to the appeal are as follows:

On November 21, 1998 at approximately 10:00 p.m., Defendant entered Fox Video on Route 405 in Muncy, Pennsylvania. EH, age 17, was working at Fox Video that evening, and recognized the Defendant as a regular customer. The Defendant came in alone, looked around, and left. At approximately 10:45 p.m. the Defendant returned, wearing a red ski mask, blue shirt, blue pants, and brandishing a

buck knife. (N.T. 7/12, 7/13, 1999, p. 87). EH recognized the Defendant's clothing, and could also see enough facial features through the holes in his ski mask to identify him. She also recognized his voice. (Ibid.) He directed her to the adult video room where he told her to undress (Ibid.) He directed her to perform oral sex on him, and he engaged in oral and vaginal sex with her. After the vaginal sex, the Defendant ejaculated upon her abdomen.

Corporal Miller and Troopers Sneath, Whipple and Kirkendall of the Pennsylvania State Police, Montoursville barracks, responded to and processed the crime scene. EH was transported to the Williamsport Hospital for a rape kit exam. A perpetrator exam was conducted on the Defendant. Samples taken from the scene and from EH were sent to the Pennsylvania State Police Regional Laboratory where they were tested by Forensic Scientists Bruce Tackett and Barbara Flowers. Among other findings, the testing revealed that the semen specimens from the victim's vagina, abdomen, and panties contained no spermatoza.

The testimony of Dr. Naresh Nagpal, a urologist, revealed that he performed a vasectomy upon the Defendant on January 27, 1995. A sperm count test performed on the Defendant on July 5, 1995 indicated that there were no sperm seen within his seminal fluid, and that the vasectomy had been successfully performed.

Michelle Frantz, Esquire, a cousin of the Defendant, received a phone call from the Defendant in December, 1998. During their conversation, the Defendant made various statements to her concerning his activities on the evening of November 21, 1998. He told her that he went to the video store that evening with a ski mask and a

knife, and that he did engage in oral sex with the victim. He told her that he tried to have vaginal intercourse with the victim, but that he was unable to obtain an erection.

On appeal, Defendant first alleges that the Court erred in allowing the testimony of his cousin, Michelle Frantz, Esquire. Defendant argues that he gave a statement to her believing the conversation was privileged and should be excluded pursuant to 42 Pa.C.S.A. § 5916, as a confidential communication to an attorney. Defendant raised this issue in a motion in limine immediately prior to the commencement of the trial. The following testimony was presented relevant to the conversation at issue.

Michelle Frantz, Esquire is a first cousin of the Defendant. She is a resident of Texas where she works as a tax compliance person for an accounting firm. She is licensed to practice law in both Pennsylvania and in Texas, but is currently on inactive status in both states. (N.T. 7/13/99, p.30). She testified that she spoke with the Defendant on December 2, 1998. She testified that at the beginning of the conversation, the Defendant "said something about the fact that he was talking with other inmates saying that he was having a large defense team because the PD had been sent to speak with him, and his parents had retained Mr. Lepley to represent him now I was calling him or speaking with him." (Id., p. 32) In response, Ms. Frantz immediately told the Defendant that she was not eligible to practice in Pennsylvania, and that it would be against the law for her to do so. She additionally told the Defendant that she did not practice criminal law, and that if she did, she would be prosecuting and not defending. She testified that she told the Defendant two or three times that she could not represent him. (Id., p.33). She stated that they then went on to speak about other matters.

The Defendant testified that he called his cousin in hopes of getting some legal advice. The Defendant testified that he recalled Ms. Frantz stating "something about not defending that she would be prosecuting." (Id., p. 44). He testified that he knew that she was licensed to practice in Pennsylvania, but did not recall her stating that she was inactive in Pennsylvania. He also did not recall her stating that she would not represent him. He stated that he did ask her questions related to his charges, and asked about the amount of time that he would be looking at, but that she told him that she did not know. (Id., p.47). On cross-examination, the Defendant admitted that he knew that Ms. Frantz was not practicing law. He stated that the last he had heard, she had been working in a movie theater.

Under 42 Pa. C.S.A. § 5916, counsel in a criminal proceeding shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client. In order for the privilege to apply the following requirements must be met: 1) The asserted holder of the privilege is or sought to become a client. 2) The person to whom the communication was made is a member of the bar of a court, or his subordinate. 3) The communication related to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort. 4) The privilege has been claimed and is not waived by the client. Commonwealth v. Mrozek, 441 Pa.Super. 425, 657 A.2d 997 (1995), *citing* United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358-59, (D.C.Mass. 1950).

In the instant case, the Court finds that the communication between the Defendant and Ms. Frantz was not privileged. Initially, the Court is not satisfied that the Defendant was, or sought to become a client. Ms. Frantz had not agreed to represent the Defendant, nor had she represented him in the past for other matters. Additionally, the Court found Ms. Frantz's testimony credible that she made it clear in the beginning of the conversation that she could not represent the Defendant since she was no longer practicing in the Commonwealth of Pennsylvania. Furthermore, there was no testimony that the Defendant had any intentions of retaining Ms. Frantz. The relationship was more familial that that of an attorney-client. The Court therefore rejects the Defendant's argument.

The Defendant next alleges that the Court erred in allowing the testimony of Doctor Naresh Nagpal concerning a procedure performed on the Defendant. 42 Pa.C.S.A. § 5929 provides :

> No physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without consent of said patient, except in civil matters brought by such patient, for damages on account of personal injuries.

Instantly, the Court finds that the statute does not prohibit the disclosure of information in criminal matters. The statute specifies that it applies only to civil matters.

Additionally, even if the Court were to find that the statute applied to criminal matters, the Court finds that the information revealed by the testimony of Dr. Nagpal is not among the communication protected by the statute. The "information" protected in the statute has been interpreted to include only communications made to the physician

by the patient. Information obtained from an examination is not communication made to the doctor by the patient and is not privileged. *See* In re Phillips' Estate, 295 Pa 349, 145 A. 437 (1929). In the instant case, the testimony of Dr. Nagpal included the results of testing performed after the Defendant had a vasectomy that revealed the absence of sperm in the seminal fluid. Even if the testimony concerning the fact that the vasectomy had been performed could be considered protected information, the Court finds that this is not information that would "tend to blacken the character of the patient." The Court therefore finds the Defendant's argument without merit.

The Defendant last argues that the Court erred in not granting a continuance when the Defendant informed the Court that he had not received all available discovery until the eve of trial. The discovery at issue was the results of the DNA testing performed by Forensic Scientist Flowers. At the hearing on Defendant's request for continuance, Defense counsel indicated that the report of Ms. Flowers had been received a week prior to the scheduled trial. Defense counsel indicated that they had tried to contact Ms. Flowers to question some of the reported findings, but that she was unavailable until the day before the trial. (N.T. 7/12/99, p. 2). Initially, Defense counsel indicated that he needed more time to converse with Ms. Flowers, as the results of the testing indicated that some of the specimens from the victim's underwear indicated that the Defendant could be excluded as a source for DNA. Defense counsel eventually agreed, however, that the Defendant was excluded only because the victim in the case was the source of the DNA. (Id., p.6). Ms. Flowers was made available to the Defense for the remainder of the day, as the trial was not scheduled to commence until the

following morning. As the Court did not find that the Defense had been prejudiced, the request for a continuance on that basis was denied.

Defense counsel then argued that he had thought that hair had been sent away for testing. He testified that he had thought that testing was being conducted on the hair, and he had only recently found out that the tests had not been done. The Commonwealth argued that Defense counsel had the opportunity to request that the hair testing be done while the hair samples were in the custody of the Pennsylvania State Police, but they had not. The Court agreed that prejudice had not been shown where Defense counsel could have requested that the tests be performed. The request for a continuance was therefore denied.

On the morning of the trial, Defense counsel renewed his continuance request, this time citing the fact that the first lab had identified three seminal stains. The first was from the abdomen of the victim, the second from the crotch of the underwear of the victim, and the third from the carpet of the room where the assault occurred. (N.T. 7/13/99, p. 11). Defense counsel indicated that because of time constraints, only the second and third stains had been sent for the DNA testing. The abdominal stain had not been sent. Defense counsel indicated that the lab performing the initial testing was limited to sending only two samples for DNA testing.

Defense counsel indicated that the scientist explained to him that it was "important to have one very personal to the victim, which he felt the panties' specimen was, and also he knew that there was sperm on the samples from the floor and he knew that there was not sperm, . . . from the sample from the crotch of the panties, therefore, he decided that those were the two that were most important to send out." (Id., p. 13-

14). Defense counsel argued that a continuance was requested to have the abdominal stain DNA tested. After argument, the Court denied the Defendant's request for a continuance based on the chance that DNA could be found. The Court was satisfied from the explanation given from the laboratory that the two samples chosen had been selected rationally. Additionally, the Court failed to see how the Defendant was prejudiced from lack of testing of the abdominal stain where the preliminary test results revealed that there was no sperm in seminal stains from either the abdomen or from the underwear of the victim. The lack of sperm in the stains would have made it unlikely that a DNA analysis could have been obtained. The Court therefore denied the Defendant's request for continuance.

Dated:

By The Court,

Nancy L. Butts, Judge

xc: George Lepley, Esquire
Kenneth Osokow, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges