IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. 03-10,050**
	:	
	:	
vs.	**:**	**CRIMINAL**
	:	
RICHARD WAYNE ILLES, SR., Defendant	**:**	**Order re former testimony of Robert Greenleaf**

O R D E R

AND NOW, this ___ day of February 2004, the Court GRANTS the Commonwealth's request to enter into evidence the preliminary hearing testimony of Robert A. Greenleaf, Sr.

Prior sworn testimony is admissible in a later proceeding where the witness is unavailable and the defense has been provided a full opportunity for cross examination. Commonwealth v. Wayne, 533 Pa. 614, 634, 720 A.2d 456, 465-66 (1998); see also Pa.R.E. 804(b)(1); Commonwealth v. Bazemore, 531 Pa. 582, 588, 614 A.2d 684, 687 (1992); Commonwealth v. Smith, 436 Pa.Super. 277, 286, 647 A.2d 907, 911 (1994). The Commonwealth subpoenaed Mr. Greenleaf for trial.[1] During trial, Mr. Greenleaf called the District Attorney's Office to inform them he was physically unable to travel to

1 The defense introduced the subpoena as Defendant's In Camera Exhibit 1 and argued that since the Commonwealth merely mailed a Pennsylvania subpoena to Mr. Greenleaf, who is a resident of Massachusetts, instead of utilizing the procedures for issuance of a Massachusetts subpoena, the Commonwealth was not entitled to the relief requested. The Court cannot agree. Mr. Greenleaf is not refusing to testify on the basis of an argument that he was improperly subpoenaed. He is willing to testify for the Commonwealth, but he is unable to travel to Pennsylvania due to his current medical condition.

Pennsylvania. The Commonwealth brought this information to the Court's attention and made a request to introduce Mr. Greenleaf's preliminary hearing testimony at trial. The Court held in camera hearings on February 5, 2004, at which Mr. Greenleaf and his primary care physician, Dr. Gartman, testified. After Dr. Gartman's testimony, the Court ruled on the record that Mr. Greenleaf was unavailable to testify at trial.

The next day the Court held oral argument to determine whether the defense had a full and fair opportunity to cross examine Mr. Greenleaf at the preliminary hearing. Defense counsel argued that it did not have a full opportunity for cross examination because: (1) they did not have Mr. Greenleaf's report at the time of the preliminary hearing; (2) they did not have FBI agent Musheno's report;[2] and (3) they were precluded from asking Mr. Greenleaf about the differences between a Savage and a Winchester .22 Hornet caliber rifle, the total number of Savage Model 23D .22 Hornet rifles produced and whether Mr. Greenleaf was getting paid for his testimony. The defense relied on two cases: Commonwealth v. Bazemore, 531 Pa. 582, 614 A.2d 684 (1992); and Commonwealth v. Smith, 436 Pa. Super. 277, 647 A.2d 907 (1994). The Commonwealth referred the Court to Commonwealth v. Elliott, 549 Pa. 132, 700 A.2d 1243 (1997) and Commonwealth v. Nelson, 652 A.2d 396 (Pa.Super. 1995).

2 Mr. Musheno could not determine with the requisite degree of certainty whether the rifle in the photograph of Joe Kowalski was a Savage Model 23D

The Court examined the allegations made by the defense and reviewed the cases cited by both sides. The Court finds that the defense had a full and fair opportunity to cross examine Mr. Greenleaf for several reasons. First, although the defense did not have Mr. Greenleaf's report at the time of the preliminary hearing, the report is not inconsistent with his preliminary hearing testimony.[3] Second, the Musheno report is indirect impeachment. Thus, on this topic the defense can adequately impeach Mr. Greenleaf through the testimony of Mr. Musheno, which is already before the jury. See Commonwealth v. Nelson, 652 A.2d 396, 399 (Pa.Super. 1995). Third, although the District Justice sustained the Commonwealth's objection to a defense question regarding the differences between the front sight of a Winchester and a Savage rifle, see N.T. at pp. 277-78, the defense subsequently elicited testimony from Mr. Greenleaf on this topic, see N.T. at pp. 279-80. Fourth, the defense never attempted to ask Mr. Greenleaf about compensation for his testimony. Therefore, the Court cannot find that the defense did not have the

.22 Hornet.

3 The Court also notes that the Commonwealth stated at oral argument that the defense expert was present at the preliminary hearing and was giving counsel advice on the questions to ask Mr. Greenleaf. The defense merely indicated that information was not in the record of the preliminary hearing; it did not say the Commonwealth's statement was untrue or inaccurate.

opportunity to inquire into this area. Similarly, the defense did not attempt to ask any questions regarding the witness' age or eyesight.

The only area that the defense was precluded from inquiry was the total number of Savage Model 23D .22 Hornet caliber rifles sold by Savage Arms. On direct examination of Mr. Greenleaf at the preliminary hearing, the Commonwealth elicited testimony that 16,018 Model 23Ds sold between 1932 and 1947. N.T. 274. The Commonwealth restricted its question to 1947 because that was the number (arguably the year) written on the back of the photograph of Joe Kowalski. On cross examination, the defense sought to elicit the total number of Model 23Ds produced and the total number sold. Mr. Greenleaf didn't know how many were produced. He went on to testify that the Model 23D was sold until 1948 or 1949, but he believed they were only made in Utica plant, which shut down in 1946. It was not unusual for some guns to linger in the warehouse for several years after the last one was made, though. N.T. at pp. 282-83. When the defense asked the total amount of sales, the District Justice sustained an objection by the Commonwealth. Despite the fact that the defense was precluded from eliciting the total number of Savage Model 23Ds sold, the Court does not believe this renders Mr. Greenleaf's prior testimony inadmissible. In light of Mr. Greenleaf's testimony that he believed production of the Model 23D ceased in 1946, it is unlikely that the total number of sales will be significantly higher than the number sold between 1932 and

1947.[4] Furthermore, the Commonwealth has offered to stipulate at trial to the total number of Model 23Ds sold.[5]

Based on the foregoing discussion, the Court finds that this case is more akin to Elliott and Wayne, cases that permitted the use of preliminary hearing testimony, than the Bazemore and Smith decisions cited by the defense. Therefore, the Court finds that the defense had a full and fair opportunity to cross examine Mr. Greenleaf at the preliminary hearing, rendering this former testimony admissible at trial.

By The Court,

_____
Kenneth D. Brown, Judge

cc: Michael Dinges, Esquire (DA)
Kenneth Osokow, Esquire (ADA)
George Lepley, Esquire
Craig Miller, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)

4 Mr. Greenleaf testified that the Model 23D was introduced in 1932. N.T. at p.274.
5 The Court would encourage the Commonwealth to stipulate to the compensation paid to Mr. Greenleaf for his testimony and his age, which is 81 years old.