

**IN THE COURT OF COMMON PLEAS
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH	:	
	:	
v.	:	No.: 03-11,060
	:	
BENTON COLVIN,	:	
Defendant	:	

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

Defendant appeals from this Court's Judgment of Sentence entered July 21, 2004 sentencing him to one to five years state incarceration for the offense of Harassment and five years supervised probation for the offense of Terroristic Threats, among other offenses not presently at issue. Specifically, Defendant alleges that this Court during trial on April 22 and 23, 2004; (a) deprived Defendant of his right to face his accuser; (b) illegitimately switched documents and substituted an unsubstantiated victim of the harassment [Defendant's concise statements nos. 2, 3 and 4]; (c) deprived Defendant of his right to fully cross examine witnesses [Defendant's concise statements nos. 5, 12 and 16]; (d) failed to enforce subpoenas on and otherwise allow for testimony by Defendant's witnesses [Defendant's concise statements nos. 6, 7, and 15]; (e) refused to allow Defendant to present an alibi defense; (f) failed to appoint stand-by counsel; (g) improperly ordered Defendant to

take a breathalyzer test; (h) conspired with police and prosecutors against Defendant by allowing perjurious testimony and illegitimate complicity between police officers and witnesses. A summary of facts follows.

On April 24, 2003, police responded to a complaint at 230 Campbell Street in Williamsport. Ila Newton advised officers that Defendant had confronted her and asked the whereabouts of Stephanie Hartsock who resided at the address. When Newton refused, she alleged that the Defendant made threatening remarks towards her and in reference to Stephanie Hartsock. On April 26, 2004, police responded twice to complaints at 230 Campbell Street. Ila Newton reported to officers that Defendant again stopped his car in front of the residence and pointed a shiny object at her and in Stephanie Hartsock's direction. Police then went to Defendant's residence to investigate and were advised by Defendant's live-in companion that Defendant had not been at home for the past few hours, contrary to Defendant's own report to the officers. On the basis of these facts, Defendant was ultimately convicted in a non-jury trial of Harassment and Terroristic Threats.

A. The Court did not violate Defendant's right of confrontation under the U.S. Const. amend. VI, and Pa. Const. art. I, § 9.

Defendant first alleges this Court improperly denied him the right to face his accusers. Stephanie Hartsock was not present at trial and Defendant asserts his rights were violated due to his inability to question her. (N.T., April 22, 2004, p. 54)

The Sixth Amendment as applied to the States through the Fourteenth Amendment provides in part that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." The accused's right of confrontation, which has been held to include the right to cross-examine accusing witnesses,

is violated when an out-of-court statement of a third person implicating the accused is introduced at trial. *Commonwealth v. Sampson*, 454 Pa. 215, 219, 311 A.2d 624, 626 (1973).

The convictions in this case were supported by the testimony of Ila Newton. For purposes of this proceeding, Ila Newton was the Defendant's accuser, and her testimony combined with all other evidence presented at trial was sufficient to sustain a finding of guilty. Because Stephanie Hartsock was implicated as an additional victim does not render her the Defendant's accuser for purposes of the Sixth Amendment. Her out of court accusations were present in the affidavit of probable cause used by police officers, but not considered in determining the guilt of the Defendant at trial. (N.T. April 22, 2004, p. 54)

B. The Trial Court properly handled and considered evidence.

The Defendant next contends that this Court illegitimately handled evidence by considering Ila Newton as a victim of Defendant's crimes. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Pa.R.E. § 401. Ila Newton's testimony regarding the Defendant's actions was in no way irrelevant or improperly produced. Ila Newton testified to first-hand experience with the Defendant's conduct and the Commonwealth was not restricted in its use of said testimony.

C. The Court allowed Defendant to cross-examine witnesses.

Defendant next alleges that the Court did not allow him to fully cross-examine the Commonwealth's witnesses. However, Defendant was in fact given the opportunity to

cross-examine witnesses within the parameters of the Rules of Evidence. (N.T. April 22, 2004 p. 11-16, 22-31, 35-38, April 23, 2004 126-130).

D. The Court properly allowed for the introduction of witness testimony by Defendant

The Defendant also asserts that the Court illegitimately failed to issue subpoenas for witnesses upon Defendant's request. The Defendant asserted at trial that he had served subpoenas on witnesses who in turn did not appear at the trial. Defendant then asked the Court to issue subpoenas to compel their testimony and asserted that in any case their testimony was required to ensure a fair trial.

"It is clear that under both our state and federal constitutions, a criminal defendant has a right of compulsory process to obtain witnesses in his favor. Pa. Const. art. I § 9. See *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920 (1967); *Commonwealth v. Allen*, 501 Pa. 525, 531, 462 A.2d 624, 627 (1983). "The right to compulsory process encompasses the right to meet the prosecution's case with the aid of witnesses, and the right to elicit the aid of the Commonwealth in securing those witnesses at trial, both of which are fundamental to a fair trial. This constitutional right, though fundamental, is not, however, absolute." *Commonwealth v. Jackson*, 457 Pa. 237, 243, 324 A.2d 350, 354-355 (1974). The constitutional right of compulsory process is not violated merely because a witness in a criminal case leaves the jurisdiction or is otherwise unavailable. The Constitution does not require that a defendant be given the right to secure the attendance of witnesses which he has no right to use. *Id.* The constitutional right to compulsory process does not grant to a defendant "the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process for obtaining witnesses in his favor.'" *United States v. Valenzuela-Bernal*, 458 U.S. at 858, 102 S.Ct. 3440 (1982). The law both in Pennsylvania

and most other jurisdictions, therefore, is that "[t]he trial court has discretion on motions to secure witnesses." *Commonwealth v. Sullivan*, 484 Pa. 130, 135, 398 A.2d 978, 980 (1979); *Commonwealth v. Lahoud*, 339 Pa.Super. 59, 488 A.2d 307 (1985).

The Defendant indicated to the Court at trial that witnesses important to his defense had failed to appear. The Court initially allowed the Defendant from 10:56 a.m. to 1:19 p.m. to try to locate and remind his witnesses of the need for their appearance. After that time period the Defendant was still unable to locate all but one witness. The Court inquired into the substance of the witness testimony to determine if they might qualify as material witnesses or were necessary to Defendant's case. The Defendant initially indicated they might provide an alibi. (N.T. April 22, 2004 p. 63). The Court reminded the Defendant that an alibi defense required notice and that no indication of alibi had been presented thus far by defendant. Pa.R.Crim.P. 573(c)(1)(a). Defendant then asserted that at least two essential witnesses would not be called to further an alibi defense. (N.T. April 22, 2004 p. 71). The Defendant also indicated an incarcerated witness who he expected to call. The Court noted that the Defendant failed to make the appropriate request to ensure that witness's availability, but offered Defendant more time to attempt to secure that testimony as well as any others. Defendant was given ample notice of the trial date to secure witnesses and to give notice of alibi or other sufficient offer of proof, however he failed to do so. The Court offered Defendant relative leeway in attempting to procure these witnesses up to and during the trial stage. Defendant was given the opportunity for compulsory process over all material witnesses; the unavailability of these witnesses is not grounds to assert lack of a fair trial.

E. The Court properly disallowed evidence of alibi at the time of trial pursuant to Pa.R.Crim.P 573(C)(1)(a)

The Defendant failed to provide notice of an alibi defense pursuant to Pa.R.Crim.P. 573(C)(1)(a). The rule clearly contemplates pro se litigants; “The notice and certificate shall be signed by the attorney for the defendant, or the defendant if unrepresented.”

F. The Court allowed Defendant ample opportunity to procure the assistance of counsel and was not required to provide stand-by counsel.

Defendant made a knowing and voluntary waiver of the assistance of counsel. Pa.R.Crim.P. 121(D) makes the appointment of standby counsel discretionary. The notes following Rule 121 favor appointment of standby counsel for cases expected to be long or complicated and those involving multiple defendants. Defendant’s case did not fall within these categories and it was not an abuse of discretion to forego standby counsel.

G. The Court legitimately requested Defendant to undergo a breathalyzer test.

Defendant asserts that the Court-ordered breathalyzer test was outside of the Court’s authority. The Court instructed Defendant to undergo a breathalyzer test to insure his competency to stand trial as well as to represent himself. The Court may order an examination of the Defendant’s competency on its own motion. 50 P.S. § 7402; *Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326 (1995). The question to be asked for both the ability of a criminal defendant to stand trial and the competency standard for waiving the right to counsel and proceeding pro se is “whether he has the *ability* to understand the proceedings.” *Id.* at 589. Further, “A competency determination is necessary

when a trial court has reason to doubt the defendant's ability to understand the proceedings.”
Id. at 589-90.

The Court ordered the examination of Defendant in order to ascertain his ability to understand the proceedings. There was no prejudice to Defendant in the non-jury trial as a result of the examination.

H. The Court did not conspire with police and prosecutors against Defendant's interest.

As reflected in the record, at all points during the proceedings, the Court presented Defendant a fair and impartial trial. At no time did the Court show bias toward the prosecution or engage in improper trial procedures.

By the Court,

Nancy L. Butts, Judge J.

xc: Benton Colvin
DA (WS)
Hon. Nancy L. Butts
Gary Weber, Esquire
Judges
Law Clerk