

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 vs. : NO. 610-2010
 :
 ELIZABETH CHAYKA, : 1925(a) Opinon
 :
 Defendant :
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OPINION IN SUPPORT OF THE ORDER OF NOVEMBER 18, 2010 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

The Commonwealth appeals this Court’s order of November 18, 2010 denying the Commonwealth’s Motion in Limine to Allow the Preservation of Testimony of Witness after Institution of Criminal Proceedings Pursuant to Pa. Rule of Criminal Procedure 500(A).

The Commonwealth’s Statement of Matters Complained of on Appeal Nunc Pro Tunc does not specifically state that this Court erred in making its decision on November 18, 2010. In reading the Commonwealth’s statement, in which it concludes “that Ms. Miles’ testimony under oath was credible enough to substantiate her incapacity and unavailability and should have been sufficient for the Court to allow her testimony to be taken by deposition,” this Court will imply that the Commonwealth feels that the Court erred as to its determination that Ms. Miles’s testimony was not credible and so was not sufficient to grant the Commonwealth’s motion in limine. The Court disagrees. The appeal should be dismissed.

The Court initially notes that credibility determinations are for the trial court as fact-finder, which is free to believe all, some or none of the evidence, to make, and to resolve conflicts in the evidence. *Gemini Equipment Co. v. Pennsy Supply, Inc.*, 595 A.2d 1211,

1214 (Pa. Super. Ct. 1991). There is adequate support in the record for this Court to find that Ms. Miles was not credible as to her testimony as to her own incapacity. In addition, as this Court explained in its order of November 18, 2010, there is currently a bench warrant for Ms. Miles issued by Magistrate Schriener on April 19, 2010, for her failure to appear at a preliminary hearing, and Ms. Miles clearly has motivation not to return to Lycoming County.

Perhaps the credibility determination that this Court did make with regard to Ms. Miles could have been cured with corroborative evidence. Corroborative evidence was not offered. The Commonwealth offered no evidence from medical professionals or other third parties as to Ms. Miles' medical condition that would prohibit her travel to Pennsylvania for the trial. In fact, if the Court had not take a thirty minute break during the hearing and instructed the Assistant District Attorney Paul Petcavage, Esquire, that when court resumed it would be of benefit to hear from Ms. Miles and receive any additional evidence that the Commonwealth would like to add, the Commonwealth would not have introduced any testimony or evidence in support of its motion at all. Notes of Testimony, November 18, 2010, pg. 7. The Court did not find that Ms. Miles' testimony alone was sufficient as it did not find that Ms. Miles' testimony was credible.

Even if the Court would have found Ms. Miles' testimony credible, it may not have granted the Commonwealth's motion. In this case, the Court agrees with the statement of defense counsel, Trisha Hoover, Esquire of the Public Defenders Office, that the Commonwealth did not undertake good faith efforts to discover Ms. Miles even though there was a bench warrant out for her arrest. Had the Commonwealth undertaken good faith efforts to discover her, they would have looked for

her at her grandmother's residence, where Ms. Miles lived prior to going into a nursing home, and asked her grandmother of her whereabouts.

Pennsylvania Rule of Criminal Procedure 500(a) allows for the taking and preserving of testimony of any witness who may be unavailable for trial or when due to exceptional circumstances, in the interest of justice that the witness testimony be preserved, and the Court does not believe that there are exceptional circumstances and that the interests of justice would be served by granting the Commonwealth's motion.

BY THE COURT,

Joy Reynolds McCoy, Judge

cc: Superior Court (original +1)
Gary Weber, esquire
Trisha Hoover, Esquire
Paul Petcavage, Esquire