

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-375-2010  
vs. :  
JHALIL MOORE, : Opinion and Order re Commonwealth's  
Defendant : Motion to Reconsider  
:

**OPINION AND ORDER**

This matter came before the Court on the Commonwealth's Motion to Reconsider the Court's Order granting Defendant's motion for a new trial based on after-discovered evidence. The relevant facts follow.

On January 15, 2010, D.W. was visiting her friend and her friend's residence in Williamsport. While there, she was drinking alcohol and became intoxicated. Several other individuals also were at the residence, including Defendant, who also had been drinking that night.

According to D.W., she remembered being in the bedroom, but she did not remember how she got there. She denied being passed out, but she was in and out of awareness. She realized that Defendant was on top of her having sex with her. She could not breathe, could not push him off of her and was getting scared. She started calling for her friend, apparently "passed out again" and then woke up when the light went on in the room. She could not remember if she gave permission to Defendant or anyone else to have sex with her that night.

D.W. was upset and crying. Defendant and several other boys quickly left the residence.

The police charged Defendant with rape by forcible compulsion, rape of an

unconscious or unaware person, and sexual assault.

On January 28, 2011, following a jury trial, Defendant was found guilty of rape of an unconscious or unaware person.<sup>1</sup>

Subsequent to the jury's verdict, but prior to sentencing, Defendant filed a motion for a new trial based on after-discovered evidence, which consisted of a letter written by D.W. The letter was addressed to the Court and defense counsel and indicated, among other things: (1) D.W. and Defendant were intoxicated; (2) the sexual contact between them was with consent; and (3) D.W. did not want Defendant to go to jail for something he didn't do.

A hearing was held on Defendant's motion for new trial on July 1, 2011. The letter was marked as Defendant's Exhibit 1 and admitted into evidence.

D.W. also was called to testify as a witness. She admitted that she wrote the letter, as well as a similar previous letter that she threw away. She also admitted that she and Shaelynn Stewart visited the courthouse on April 8, 2011 for the purpose of speaking with the Court and/or Defendant's attorney in order to drop the charges. Despite the letter, which D.W. acknowledged writing and signing, she testified the letter was a lie and nothing in the letter was true.

Shaelynn Stewart also testified. She confirmed that D.W. wrote the letter and came to the courthouse to speak with the Court and/or defense counsel about dropping the charges. Ms. Stewart also indicated she did not tell D.W. what to put in the letters, D.W. voluntarily wrote the letters, and D.W. was afraid that her mom and grandma would be mad

that the sex was consensual.

Detective William Weber of the Lycoming County District Attorney's office testified on behalf of the Commonwealth. On April 30, 2011, he and the assistant district attorney assigned to the case went to D.W.'s residence to talk to her about the letter. D.W.'s grandmother also was present. Detective Weber showed D.W. a copy of the letter and asked her if she wrote it and if it was true. D.W. responded that she wrote the letter, but that it was not true and essentially she was pressured into writing and signing it.

After reviewing the evidence and the standard for granting a new trial based on after-discovered evidence, the Court issued a written opinion on August 8, 2011,<sup>2</sup> granting Defendant's motion for a new trial finding that: the letter was not available prior to trial, it was not merely cumulative or corroborative; it would be admissible as substantive evidence, so it would not be used solely to impeach the credibility of D.W., and it would likely result in a different verdict if a new trial was granted.

On August 12, 2011, the Commonwealth filed its motion to reconsider, in which it asserted that the Court needed to make a finding that the evidence offered by Defendant in support of his motion was credible.

The Court held an argument on the Commonwealth's motion on August 19, 2011. At the argument, the Commonwealth argued that the Court must judge the credibility of the recantation testimony and deny the request for a new trial unless it is satisfied that the recantation testimony is true. The Commonwealth relied on the following cases:

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1 The jury found Defendant not guilty of rape by forcible compulsion and sexual assault.

2 The Opinion and Order was dated August 5, 2011, but it was docketed on August 8, 2011.

Commonwealth v. Lee, 478 Pa. 70, 385 A.3d 1317 (1978); Commonwealth v. Fernandez, 232 Pa. Super. 19, 332 A.2d 819 (1974) and Commonwealth v. Scull, 200 Pa. Super. 122, 186 A.2d 854 (1962).

Defense counsel argued that the Court correctly granted the motion utilizing the standard for after-discovered evidence and cited Commonwealth v. Mosteller, 446 Pa. 83, 284 A.2d 786 (1971) for the proposition that the trial court need not find the recantation testimony credible when the only evidence against a defendant is the alleged victim's testimony.

Although all the cases cited by counsel are arguably distinguishable from the case at bar, all four indicate that in order to grant a new trial, the court must find the recantation evidence credible.<sup>3</sup>

In Lee, supra, the appellant argued he was entitled to a new trial on the basis that either the prosecutor knowingly used perjured testimony or the co-defendants' recantation constituted after-discovered evidence. In denying the appellant's claims, the Pennsylvania Supreme Court stated: "As a prerequisite to relief under either theory, however, the evidence upon which relief is sought must be credible to the trial court." 478 Pa. at 74, 385 A.2d at 1319.

In Fernandez, the Superior Court noted, "Credibility is the key when a new trial is sought on the basis of recanted testimony...." 232 Pa. Super. at 21, 332 A.2d at 821.

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<sup>3</sup> For example, all of the cases cited by the Commonwealth involve recantation evidence provided by co-defendants where the after-discovered evidence claim was raised in a post conviction proceeding. While Mosteller involved recantation testimony from the victim, the victim testified under oath that she lied at trial and her recantation was supported by the testimony of a disinterested medical witness.

In Scull, the Superior Court stated: “Recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true....” 200 Pa. Super. at 130, 186 A.2d at 858.

In Mosteller, the Pennsylvania Supreme Court quoted the above statement from Scull and also noted: “There is no less reliable form of proof, especially when it involves an admission of perjury.” 446 Pa. at 89, 284 A.2d at 787. In overturning the trial court and granting a new trial, it appears the Supreme Court found the trial court erred in rejecting the credibility of the recantation testimony in light of the following: the defendant’s conviction was based completely on the testimony of the child prosecutrix, the child persisted in her retraction of her trial testimony despite having been informed that she could be subject to criminal charges for perjury and a substantial prison term, and the truth of the child’s trial testimony was open to serious question because of the testimony of a disinterested medical witness.

During the argument in this matter, the Court noted D.W. arguably represented three different versions through her trial testimony, the letter, and her testimony on Defendant’s motion for a new trial, respectively, and quite candidly, the Court did not know which statement was true. Unlike Mosteller, D.W. did not retract her trial testimony under oath at the hearing and there is no disinterested medical testimony to indicate that the retraction in the letter was true. While the Court believes the letter satisfies the general elements for after-discovered evidence, the Court cannot find that the additional element imposed by the case law for recantation evidence, i.e., that the Court must find the

recantation evidence credible, because in all candor the Court has no idea which statement or version is true. Therefore, the Court grants the Commonwealth's Motion to Reconsider.

**ORDER**

**AND NOW**, this 8<sup>th</sup> day of September 2011, the Court GRANTS the Commonwealth's Motion to Reconsider and schedules the case for sentencing on **October 18, 2011 at 1:30 p.m. in Courtroom No. 4 of the Lycoming County Courthouse.**

By The Court,

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Marc F. Lovecchio, Judge

cc: A. Melissa Kalas, Esquire (ADA)  
Donald Martino, Esquire  
Work file  
Gary Weber, Esquire (Lycoming Reporter)