IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-113-2010**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
ANTWONE CORMIER,	**:**	
Appellant	**:**	**1925(a) Opinion**

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

This opinion is written in support of this Court's judgment of sentence dated July 27, 2011 and docketed on August 4, 2011.[1]

By way of background, this case involves a charge of perjury arising out of testimony Appellant provided during a trial in another case.

In case number 722-2009, Appellant was arrested and charged with various drug offenses, arising out of alleged transactions with a confidential informant on July 24, 2008 and July 28, 2008.

During a trial held on November 5, 2009, Appellant took the stand in his own defense and testified that in July 2008 he was working for his girlfriend's father about four or five days a week. When asked specifically if he was working on July 24, 2008, Appellant replied, "More than likely I was. It was summertime so more than likely I was working." When asked the same question about July 28, 2008, Appellant answered, "I recall it, yes." Despite providing testimony in the nature of an alibi, Appellant never filed an alibi notice.

[1] The Court notes that the sentencing order incorrectly listed the date it was entered as June 27, 2011. The

The jury could not reach a unanimous verdict, and a mistrial was declared.

After trial, the Commonwealth began investigating Appellant's assertion that he was working on the dates in question. Police officers spoke to Clyde Allen, Appellant's girlfriend's father, who stated Appellant was never employed by him. Armed with this information as well as the evidence related to the alleged drug transactions, the police filed a criminal complaint against Appellant, charging him with perjury, on December 15, 2009.

A second trial was held on the drug offenses on February 1- 2, 2010. Appellant did not testify at this trial, and the jury acquitted him.

The acquittal, however, resulted in a variety of pre-trial motions being filed by the parties in this case.

Appellant filed a petition for habeas corpus in which he asserted that his allegedly false testimony in the first drug trial was not "material" in light of the fact that he did not testify in the second trial and was acquitted. The Court rejected this assertion and denied the petition, finding that materiality is determined at the time the statement is made based on whether it could affect the course or outcome of the proceeding; not whether it actually does.

Appellant also filed a motion in limine seeking to preclude testimony or evidence from law enforcement officers to show that Appellant was not working because they observed him engage in illegal drug activities, based on the doctrine of collateral estoppel since Defendant was acquitted of the drug charges. The Court precluded the officers from testifying that Appellant engaged in illegal drug transactions, but permitted any testimony that did not specifically refer to the alleged drug transactions.

Court issued an amended order correcting the date to July 27, 2011.

The Commonwealth also filed a motion in limine which sought to preclude Appellant from introducing evidence that he was acquitted of the drug charges, as this evidence was irrelevant to the issue of whether Appellant committed perjury in the first trial. The Court granted this motion in limine.

A jury convicted Appellant of perjury on June 7, 2011.

Appellant filed a timely notice of appeal.

Appellant's first issue on appeal is that the Court erred in denying his petition for writ of habeas corpus in light of the fact that he was ultimately acquitted of the drug charges at a subsequent trial at which he did not testify. The Court cannot agree.

The Court fully addressed this issue in its Opinion and Order entered on April 13, 2010, wherein the Court stated:

> [Appellant] alleges that his testimony on November 5, 2009 was not material to the outcome of his trial; therefore, his statements do not meet the elements of Perjury as defined by 18 Pa.C.S. §4902. A false statement, made under oath, is material 'if it could have affected the course or outcome of the proceeding.' 18 Pa.C.S.A. 4902(b). 'Materiality is to be determined as of the time that the false statement was made.' Commonwealth v. Lafferty, 419 A.2d 518 (Pa. Super. 1980)(see U.S. v. Stone, 429 F.2d 138 (2d Cir. 1970); U.S. Larocca, 245 F.2d 196 (3rd Cir. 1957); 70 C.J.S. Perjury §11, pp. 466-467.) 'Furthermore, the test of the materiality of a false statement is whether it **can** influence a fact-finder, not whether it **does**. The fact that the false testimony was unnecessary to accomplish the end in view will not render it immaterial.' Lafferty at 55, (see 70 C.J.S. Perjury §11, pp. 466-467). [Appellant] argues that his testimony was not material to the outcome of the case because he did not testify in his second trial in which he was acquitted of the drug offenses. At the time [Appellant] testified on November 5, 2009, he was accused of taking part in a drug transaction on July 24 and 28[,] 2008. Given the context in which [Appellant] gave the testimony, it appears that the statements regarding his work schedule in July of 2008 supported the defense conjecture that because [Appellant] was working, he could not have been part of a drug transaction on July 24 and 28, 2008. This being so, the Court believes that the false statements made by [Appellant] were material to the outcome of the case at the time said statements were made.

Opinion and Order entered April 13, 2010, at p. 5.

Appellant next asserts that the omnibus motion court erred by limiting its ruling on Appellant's motion in limine regarding collateral estoppel, thus allowing the District Attorney to: (a) present testimony from two of the investigating officers regarding their observations of Appellant on the dates in question; and (b) present highly prejudicial testimony regarding the procedures utilized in the initial investigation of Appellant (including the use of a body wire, a confidential informant, and multiple surveillance officers) in such a manner that even a lay person would conclude that drug activity was the focus of the officers' activity.

"Collateral estoppel is 'issue preclusion' which does not automatically bar subsequent prosecution but does bar redetermination in a second prosecution of those issues *necessarily* determined between the parties in a first proceeding which has become a final judgment." Commonwealth v. Smith, 518 Pa. 15, 540 A.2d 246, 251(1988) citing Commonwealth v. Hude, 492 Pa. 600, 425 A.2d 313, 319 (1980). In determining the applicability of the principle of collateral estoppel where a previous judgment of acquittal was based upon a general verdict, the court must "examine the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matters, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Hude, supra at 319-20, quoting Ashe v. Swenson, 397 U.S. 436, 444, 90 S.Ct. 1189, 1194 (1970). "Collateral estoppel simply does not apply to all evidence a jury may have utilized in reaching its decision. Thus, where one or several other rational explanations for the jury's actions exist,

admission of evidence in a subsequent prosecution will not be excluded on collateral estoppels grounds. Only if it is 'clear that the jury has spoken with respect to a particular fact [will] the Commonwealth no longer [be] permitted to request that another jury consider the same.'" Commonwealth v. Teagarden, 696 A.2d 169, 171-173 (Pa. Super. 1997), citing Commonwealth v. Tolbert, 448 Pa. Super. 189, 670 A.2d 1172, 1181 (1995).

Appellant provided evidence in the nature of an alibi at the first trial, where the jury did not reach a unanimous verdict. At the second trial, Appellant did not testify and the jury acquitted him. Since Appellant did not present alibi testimony or evidence at the second trial, the jury's acquittal could not possibly have spoken on the falsity or the materiality of the alibi testimony presented by Appellant on November 5, 2009, which were the issues in this perjury trial.

The acquittal also did not necessarily mean the jury found the officers' testimony lacked credibility. The officers observed Appellant meet with Mr. Wyland and take a ride in his vehicle on July 24 but the police did not actually observe the alleged drug transactions take place. Similarly, on July 28, the police observed Appellant on Fourth Street walking toward the Dollar General store. Although Mr. Wyland told the police the alleged drug transaction took place in the store, again the police did not actually observe the alleged drug transactions. There were also brief occasions on both dates where the police lost sight of either Mr. Wyland or his vehicle.

Collateral estoppel is not evidence preclusion. The issue in the second trial that resulted in Appellant's acquittal was whether he delivered drugs to Mr. Wyland. Appellant did not introduce any evidence in the second trial, let alone any evidence in the nature of an alibi. The issues in this perjury trial were whether Appellant lied in his first trial when he testified that

he was working on July 24 and July 28, 2008, and whether that testimony could have affected the outcome of the first trial. Since the issues were different and the jury's acquittal in the second trial could not, under any circumstances, be considered a finding that Appellant was working on the dates in question, this case is distinguishable from Hude and the principles of collateral estoppel would not preclude testimony or evidence from the officers regarding Appellant's whereabouts on July 24 and 28, 2008.

Appellant's third issue is that the trial court erred in granting the District Attorney's motion in limine to exclude evidence that Appellant had been acquitted following a re-trial at which Appellant did not testify. The Court cannot agree.

Appellant argued that his acquittal was relevant to the issue of materiality. The Court rejected this argument, because materiality is determined at the time the false statement is made and is based on the potential for the evidence to influence the jury, not its actual influence. The Court based this ruling on the perjury statute, 18 Pa.C.S.A. §4902(b); the standard criminal jury instructions, Pa.SSJI 15.4902A; and Commonwealth v. Lafferty, 276 Pa. Super. 400, 419 A.2d 518, 521-522 (1980). See Opinion and Order entered May 25, 2011.

Appellant next claims the trial court erred in denying his oral motion in limine seeking to question the investigating officers for any potential bias resulting from Appellant's ultimate acquittal of the charges at issue when the perjury was alleged to have occurred.

"The admissibility of evidence is within the sound discretion of the trial court, wherein lies the duty to balance the evidentiary value of each piece of evidence against the dangers of unfair prejudice, inflaming the passions of the jury, or confusing the jury."

Commonwealth v. Chamberlain, 30 A.3d 381, 419 (Pa. 2011)(citations omitted).

Although the Court could not locate the place in the record where Appellant's counsel made his oral motion, the Court believes Appellant's bias argument was that the police officers were "out to get him" because they did not get a conviction on the underlying drug charges. The Court ruled that Appellant could not introduce his acquittal on the underlying drug charges, because Appellant was charged with perjury before he was acquitted at the second trial and the officers' testimony was consistent throughout the proceedings. N.T., June 7, 2011, at pp. 15-16. The police filed the perjury charge against Appellant on December 15, 2009. Appellant was acquitted of the underlying drug charges in early February 2010. Clearly, the police filed the perjury charge against Appellant over a month before he was acquitted at the second trial.

The Court also believed evidence of the acquittal of the underlying drug charges would be unduly prejudicial and misleading or confusing to the jury. The Court was concerned that the jury would speculate as to why Appellant was acquitted and improperly factor such speculation into its decision in this case, as well as place undue weight on the acquittal. See N.T., May 24, 2011, pp. 6-7.

Finally, the Court was concerned that Appellant's counsel was merely trying to do an "end run" around the Court's ruling on the Commonwealth's motion in limine, which excluded any reference to Appellant's acquittal. N.T., June 7, 2011, at p. 15. When the parties argued this motion in limine, the Commonwealth contended the acquittal was irrelevant and unduly prejudicial. At that time Appellant's counsel did not argue that evidence of the acquittal was admissible to show bias on the part of the police officers; he only argued that it was relevant to the element of materiality. See, N.T., May 24, 2011.

The Court, however, did allow Appellant to explore any potential bias that may have resulted from the hung jury at the first trial. N.T., June 7, 2011, at p. 23. Appellant's counsel took advantage of this opportunity when he questioned Trooper Herbst. Id. at pp. 41-42.

In his fifth issue, Appellant asserts the trial court erred in permitting the District Attorney to introduce testimony from Megan Allen wherein Ms. Allen identified Appellant's voice without the tape having been played for the jury. This issue was discussed in the trial transcript at pages 10-12, 114-16, 187, and 191-193. The tape was a recording from a body wire that Joseph Wyland, wore during the alleged drug transactions. The content of the tape was not relevant to these proceedings. The fact that Appellant's voice was on the tape recording, however, was relevant to show that Appellant was not working on the date in question but was meeting and having conversations with Mr. Wyland. The reason the tape was not played for the jury was because Appellant's attorney objected to the tape being played. Appellant cannot now complain that the tape should have been played for the jury.

It appears that Appellant's real issue is that Ms. Allen should not have been permitted to testify regarding her recognition of Appellant's voice.

The admission of evidence is within the discretion of the trial court, and will not be overturned on appeal unless the appellant shows the trial court abused its discretion. Commonwealth v. Montalvo, 604 Pa. 386, 986 A.2d 84, 94 (2009). "Not merely an error in judgment, an abuse of discretion occurs when 'the law is overridden or misapplied or the judgment exercised is manifestly unreasonable or the product of partiality, prejudice, bias or ill-will, as shown by the evidence on record." Id.

The Court does not believe it abused its discretion. The Court tried to strike a balance between admitting relevant evidence, while doing so under circumstances that would not be unduly prejudicial to either party or in violation of the collateral estoppel ruling. There is no requirement in the law that a person is only permitted to identify another individual's voice if there is a recording of that conversation that can be played for the jury. For example, courts in this Commonwealth routinely admit testimony from witnesses who identify the caller on a phone conversation because they are familiar with the caller's voice even though there is no recording of the phone call to play for the jury. If the Court had permitted the Commonwealth to play the tape recordings, the jury would have heard Appellant and Mr. Wyland discussing alleged drug transactions.

The Court does not recall being informed that the tapes were of a poor quality at any time before the Court made its ruling; it was only informed that there was no way for the tapes to be redacted or edited so the jury would not realize that the recordings were about alleged drug transactions. Ms. Allen, however, readily admitted that she could not tell who was on the July 28th tape recording because the quality of that tape was too poor. She also testified that the voice on the July 24th tape "sounded like" Appellant, but acknowledged that she couldn't really hear it well due to static. N.T., June 7, 2011, at pp. 115-116. Given these acknowledgements and Ms. Allen's equivocal answer, the Court does not believe this evidence contributed to the verdict.

Appellant next alleges the trial court erred in denying his request for a missing witness jury instruction regarding confidential informant Joseph Wyland, who was referenced numerous time throughout the trial. Again, the Court cannot agree.

To be entitled to a missing witness instruction, the litigant seeking the

instruction must show: (1) the witness was available to one party and not the other; (2) it appears that the witness has special information material to the issue; and (3) the person's testimony would not merely be cumulative. Pa.SSJI 3.21A; see also Commonwealth v. Pursell, 555 Pa. 233, 724 A.2d 293, 308 (1999). Appellant did not satisfy these factors. Although Mr. Wyland may have had special information material to the drug trials since he was the only other person actually involved in the alleged drug transactions, Mr. Wyland's testimony about Appellant's whereabouts on the dates in question would have been cumulative to the testimony of the police officers.

The Court also notes that it ruled that the parties could not refer to Mr. Wyland as a confidential informant. N.T., June 7, 2011, at p. 9.

Appellant's seventh issue on appeal is that the trial court erred in granting the District Attorney's request to instruct the jury regarding a defendant's alibi notice obligations when the District Attorney failed to introduce such evidence in his case in chief. The way this issue is phrased is somewhat misleading. The prosecutor introduced evidence in his case in chief that Appellant did not file an alibi notice before he gave his testimony on November 5, 2009. N.T., June 7, 2011, at p. 36. The prosecutor asked the Court to instruct the jury on the law regarding alibi notices. The Court indicated it would instruct the jury that pursuant to the Pennsylvania Rules of Criminal Procedure if a party intends to defend against charges by claiming he was not present during the crime, but rather was somewhere else, he must file a written notice of alibi prior to trial but, despite the lack of an alibi notice, the defendant still had a constitutional right to testify. N.T., June 7, 2011, at 190. The Court does not know the exact language it used in its instructions to the jury, because it appears that the jury instructions were not transcribed.

The Court does not believe it erred when it explained the law regarding alibi notices to the jury, because the role of the judge and the purpose of jury instructions is to furnish guidance to the jurors by explaining the legal principles relevant to the case. See Commonwealth v. Bricker, 525 Pa. 362, 581 A.2d 147, 153 (1990)("It is an axiomatic principle of our jurisprudence that the trial judge has the sole responsibility for instructing the jury on the law as it pertains to the case before them. The function of elucidating the relevant principles belongs to the judge…."); Butler v. De Luca, 329 Pa. Super. 383, 478 A.2d 840, 843 (1984)("The purpose of jury instructions 'is to furnish guidance to the jurors, by stating and explaining the law of the case, clarifying the issues of fact and pointing out the essential facts which must be established….").

Appellant's eighth issue on appeal is that the trial court erred in allowing the admission of evidence, including testimony, pertaining to Appellant's adult probation supervision records that Appellant did not receive until the day prior to trial. The Court questions whether this issue has been properly preserved for several reasons.

First, the discussion of this issue apparently occurred during a conference that was not conducted on the record. The Court issued a ruling and Appellant's counsel indicated he was not going to repeat his argument (N.T., June 7, 2011 at pp. 12-14), but the Court has been unable to locate the actual arguments in the record. Quite candidly, the Court does not recall whether Appellant's counsel did not have any records and was completely unaware that Mr. Metzger was going to testify about dates and times that he met with Appellant; whether Appellant's counsel was aware Mr. Metzger was going to testify and had some computer records, but he did not have any of the records from the hard copy of the adult probation office file on Appellant; or whether Appellant's counsel's only objection

related to the fact that Mr. Metzger was an adult probation officer and allowing him to testify would reveal to the jury the fact that Appellant had a prior criminal history.

Second, Appellant's counsel did not object to the Commonwealth's introduction of the records into evidence. Commonwealth's exhibits 9 and 10 consisted of log-in sheets and case notes from Mr. Metzger's contacts with Appellant. N.T., June 7, 2011, at pp. 132, 134. When the Commonwealth moved for the admission of its exhibits, including exhibits 9 and 10, Appellant's counsel had no objection. N.T., at 143.

Even if this issue has been properly preserved, it is clear from the record that at least some of the records could not be provided to Appellant's counsel any earlier, because they were not located until the day before trial. N.T., at 142-143. Thus, it appears that the Commonwealth provided those records to Appellant's counsel as soon as it became aware of them. Since there was no violation of the discovery rules, Appellant was not entitled to exclusion of these records from evidence. See Commonwealth v. Collins, 598 Pa. 397, 857 A.2d 237, 253 (2008)("The Commonwealth does not violate Rule 573 when it fails to disclose to the defense evidence that it does not possess and of which it is unaware."). Moreover, Appellant has not shown that he suffered any prejudice from the timing of the disclosure. Commonwealth v. Jones, 542 Pa. 464, 668 A.2d 491, 512 (1995); Commonwealth v. Boring, 453 Pa. Super. 600, 684 A.2d 561, 567 (Pa. Super. 1996).

Appellant's final contention is that the trial court erred in ordering Appellant's trial counsel to produce the file for witness Aaron Biichle's review, considering that Mr. Biichle – who had been Appellant's former defense counsel in the case at trial – was at the time of his testimony an assistant district attorney and subordinate of the prosecutor in this case.

Appellant called Mr. Biichle as a witness for the defense to testify regarding the source of the letter that purported to show that Appellant worked for Clyde Allen in July 2008. Mr. Biichle initially testified that he was about 90% sure that he received the letter from Appellant. N.T., June 7, 2011, at p. 149. Appellant's counsel then showed Mr. Biichle a letter Mr. Biichle had written wherein he indicated he received the letter concerning Appellant's alleged employment from Miss Allen and asked Mr. Biichle if his letter refreshed his recollection. Id. Mr. Biichle then stated that, based on the letter he wrote, he had received the letter from Miss Allen. He also stated he spoke to Miss Allen on the phone and she stated she had handwritten the letter and then she had her father sign it. Id. at p. 150.

On cross-examination, the prosecutor asked Mr. Biichle if he would have made notes in his file regarding contacts he had with people in this case. Id. at p. 154. Mr. Biichle indicated that was standard procedure. The prosecutor then asked if Mr. Biichle had the opportunity to review the case file to see who and when he met with various people. When Mr. Biichle answered that he did not have the opportunity to review his case notes in the file, the prosecutor asked Appellant's counsel to present any of Mr. Biichle's case notes to him so he could see if there were any on the issue regarding who wrote the letter. The Court inquired whether the case notes would refresh Mr. Biichle's recollection of who provided the letter to him. Mr. Biichle indicated that if he made a notation in the file, it would be a definitive answer to whether Appellant or Miss Allen provided the letter to him. The Court then took a recess so Mr. Biichle could look at the case notes he made in the file.

During the recess, Appellant's counsel argued he should not be forced to turn over such information on the basis of privilege or work product. The Court initially

indicated it thought counsel waived this issue by showing Mr. Biichle the letter he wrote stating Ms. Allen gave him the letter. Counsel countered that Mr. Biichle's letter was not a communication between Mr. Biichle and Appellant. The Court indicated it did not think the case notes were privileged and permitted Mr. Biichle to review the notes he made in the file to see if there was any notation about who provided the letter to him.

The notes in the file were not communications between Mr. Biichle and Appellant; instead, it appears the notations were simply a way for Mr. Biichle to document, for his own benefit, people he had contacted or met or actions he had taken.

Mr. Biichle's review of his notations also did not reveal 'work product' to the prosecutor handling this case. Rule 573 (G) states: "**Work Product.** Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs." Pa.R.Cr.P. 573. There is nothing in the record to indicate that Mr. Biichle's opinions, theories, or conclusions regarding Appellant's case were in any way revealed to the prosecuting attorney. Mr. Biichle reviewed only his notations; he did not review any notes made by Appellant's trial counsel. See N.T., June 7, 2011, at p. 158. Furthermore, Mr. Biichle did not disclose the content of his notations to anyone; he simply stated there were no notations on this subject. Id. at pp. 158-159.

Even if the notations were privileged or work product, Appellant has not shown any prejudice. Although Mr. Biichle examined the file, no content was revealed. If anything, the fact there was no notation on this subject helped the defense, because the only documentation on this subject was Mr. Biichle's letter that stated he received the letter about

Appellant's alleged employment from Miss Allen.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Kirsten Gardner, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)