

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA--**

**COMMONWEALTH OF PENNSYLVANIA,**

**v.**

**QU MAR MOORE,  
RAYMARR ALFORD,  
Defendant**

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**CR: 1971-2012; 1969-2012**

**CRIMINAL DIVISION**

**OPINION AND ORDER**

On December 3, 2013, this Court issued an Order precluding the testimony of Darryl Franklin (Franklin) based upon what the Court found to be a series of discovery violations. The Commonwealth filed a Motion for Reconsideration of Order on December 5, 2013. Following argument on December 17, 2013, this Court issued an Opinion and Order on December 19, 2013, denying the Commonwealth's Motion for Reconsideration. This Court detailed a series of discovery violations which included failing to provide witness statements from Franklin and Tyuana Wheeler (Wheeler).

On December 20, 2013, at the time of a court conference, the parties requested the Court to make a decision regarding the admissibility of Franklin's statement as rebuttal evidence. Specifically, the Commonwealth indicated that Franklin could be used to rebut the testimony of Wheeler. Counsel for Moore stated that if rebuttal evidence was allowed that they would have to request a continuance.

The issue raised by allowing rebuttal is that its admissibility could be used to rebut testimony that was part of the justification of this Court precluding Franklin. This Court detailed many discovery violations; two of them dealt with the Commonwealth failing to provide the statements of Wheeler and Franklin. This Court could not preclude Wheeler's testimony because her testimony was beneficial to one of the Defendants. By allowing Franklin's testimony on

rebuttal, either defense counsel would have a strategic choice to make: not present the potentially beneficial testimony of Wheeler at trial to preclude any rebuttal by Franklin or to have the benefit of Wheeler's testimony which would enable the harmful testimony of Franklin to then be presented. Most likely, defense counsel would call Wheeler and Franklin would be called on rebuttal, resulting in essentially no sanction to the Commonwealth for its discovery violation.

In Moose, the district attorney obtained a statement on April 5, 1988 and only gave the statement to defense counsel on the day of trial on April 17, 1988. Commonwealth v. Moose, 602 A.2d 1265 (Pa. 1992). The Supreme Court of Pennsylvania noted that the district attorney appeared twice in court on discovery matters during this time and "gave repeated assurances that all available evidence had been provided." The Supreme Court found that the trial court abused its discretion in permitting the rebuttal testimony:

In essence, what the district attorney appears to have attempted to do was to try his case with last minute disclosures. Such a plan was fundamentally unfair and violated the discovery rules. The purpose of the discovery rules is to permit the parties in a criminal matter to be prepared for trial. Trial by ambush is contrary to the spirit and letter of those rules and cannot be condoned. We agree with the statement of the Superior Court in a similar instance, remarking that "[o]ur court has condemned such gamesmanship in criminal prosecutions."

Id. at 1274 (citing Commonwealth v. Thiel, 470 A.2d 145, 149 (Pa. Super. 1983)).

Similarly in Wade, the Superior Court of Pennsylvania found that allowing rebuttal evidence would remove sanctions imposed against the Commonwealth for violating the rules of discovery. Commonwealth v. Wade, 867 A.2d 547 (Pa. Super. 2005).

Indeed, by allowing the precluded testimony to be introduced on rebuttal, the purpose of imposing a sanction is, for the most part, eliminated. That is, the purpose of precluding the testimony is to create incentive to comply with the rules of discovery. As the Appellant correctly points out, if a discovery sanction against the Commonwealth is reversed anytime the defendant takes the stand and provides exculpatory testimony, it could reduce the disincentive for failing to comply with discovery rules. Stated in

positive terms, reversal of a discovery sanction would tend to make it more advantageous for the Commonwealth to withhold information, particularly where the need for the defendant to testify is perceived to be high. Thus, it would encourage trial by ambush.

Id. at 553. The Superior Court found that the trial erred in allowing the precluded testimony to be introduced in rebuttal.

Here, the cases cited above are distinguishable from this case; however, the policy concerns remain relevant. It is this Court's belief that the Defendants' defenses are to point the finger at each other as the shooter, which directly conflicts with Franklin's testimony.<sup>1</sup> Allowing rebuttal evidence would eliminate any sanction given to the Commonwealth, whether to rebut Wheeler or other defense witnesses. As detailed on the December 19, 2013 Opinion and Order, the Commonwealth has engaged in numerous discovery violations and to fail to sanction the Commonwealth would be an incentive for such practices to continue.

In addition, the preclusion of Franklin's testimony as rebuttal is not prejudicial to the Commonwealth. While this Court does not possess discovery in this case, Franklin's testimony appears to be cumulative to other witnesses that will be testifying at trial. The Commonwealth will have an opportunity to use any of these other witnesses as rebuttal, at the discretion of this Court.

Finally, it is within this Court's sound discretion to make decisions involving discovery matters. Based upon the reasoning in the Opinion and Order dated December 19, 2013, this Court still finds that preclusion of Franklin's testimony from the Commonwealth's case in chief and as rebuttal is a just remedy. However, in accordance with Harris, the Commonwealth would still be permitted to introduce suppressed statements for the purpose of contradicting alleged false statements made by the defendant while testifying. Harris v. New York, 401 U.S. 222 (1971); Commonwealth v. Woods, 312 A.2d 357 (Pa. 1973).

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<sup>1</sup> Franklin's testimony would be cumulative evidence in accordance with other witnesses.

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of December, 2013, based upon the foregoing Opinion, the Court finds that allowing the testimony of Darryl Franklin as rebuttal would result in no sanction to the Commonwealth for their discovery violations. Therefore, it is ORDERED and DIRECTED that the testimony of Darryl Franklin shall not be used as rebuttal evidence by the Commonwealth.

By the Court,

Nancy L. Butts, President Judge

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