IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-1046-2015**
v.	:	
	:	
TERRANCE XAVIER PEREZ,	:	**PRE TRIAL MOTIONS**
Defendant	:	

OPINION AND ORDER

In anticipation of trial, the Court held a number of hearings regarding Motions in Limine and Motions to Suppress on February 2, April 11, and October 4, 18, 20 and 21, 2016. Having provided counsel with the Court's rulings either during the hearing or by subsequent order filed on October 24, 2016, the Court issues this Opinion in support of its October 24, 2016 order.

Background

Defendant, Terrance Perez is charged with criminal homicide and other related offenses for the death of Jameel Bryant on May 11, 2015. Defendant's co-conspirator Cosme Berrones pled guilty to 3rd degree murder[1], Conspiracy[2], Tampering with Physical Evidence[3] and Obstruction of the Administration of Law[4] on Tuesday, October 18, 2016. Defendant's additional codefendant Brandon Love requested that his case be both severed for trial and continued to a future court date. The Commonwealth had no objection to either of these requests and the defense motion was granted with the Love matter being severed for trial.

[1] 18 Pa.C.S. § 2601(a).
[2] 18 Pa.C.S. § 903.
[3] 18 Pa.C.S. § 4910(1).
[4] 18 Pa.C.S. § 6101.

Motion to suppress the gun in the duffle bag

On February 2, 2016, the Court initially took testimony on the Defense Motion to exclude evidence specifically raising an objection to the Commonwealth's intent to introduce into evidence testimony of Sabina Kent (Defendant's mother) regarding a duffel bag which contained among other things bullets, white hand towel and "ugly" gun (a revolver). The Commonwealth's rationale for the use of the some of the contents of the bag would be to establish the Defendant's possession of the bag just prior to the shooting of Bryant. Ultimately, the duffle bag was also found to have contained the murder weapon.

After the first hearing on February 2, 2016, on the admissibility of the revolver, the Court believed that it needed the opportunity to review the testimony of the witness Kent which had not yet been prepared in transcript form in order to determine what relevance if any of the information regarding the gun would have at trial. At the subsequent hearing on April 11th, the Court was convinced by the parties that in order to make a decision on the admissibility of the gun it would require Kent to have already testified at trial to determine the relevance and or admissibility of the information.

As a result of the additional hearings this Court has held with regard to telephone calls, visitation calls and written correspondence from the Defendant to other individuals the Court believed that it did not need to wait for Kent to testify at trial to determine if that information should be admitted into evidence. After review of Kent's testimony and argument the Court granted the defense motion to preclude the testimony of Kent about the gun. The Court believed that the Commonwealth is not precluded from having Kent testify about the other contents of the bag to place it in the

possession of the Defendant without mentioning the other gun. The Court believes that the prejudicial effect of the Defendant being in possession of another gun outweighs the probative value it might possess. [5]

Commonwealth's Motion in Limine to Preclude portions of the Defense expert report

On September 30, 2016**,** the Commonwealth filed a Motion in Limine requesting the Court preclude Defense Counsel from presenting specific portions of the Defendant's expert report. A preliminary report was provided to the Commonwealth by the Defense on September 13, 2016, with the complete expert report forwarded on September 21, 2016. The expert report in question used the notes from the Pennsylvania State Police (PSP) examination of the murder weapon, along with an independent review of the evidence. The Commonwealth challenges the Defense expert in the following sections of the report. In paragraph b, the Commonwealth takes issue with the language of the opinion, arguing that the word "suggest" does not rise to the required degree of certainty required for an expert opinion. In paragraphs c, d, and e provided no information to advance the inquiry as to whether the defendant's DNA could be found merely a comment on the difficulty of making any determination from the quality and quantity of sample provided. And finally paragraph h wherein the expert opines a "possibility" of a method to have caused the transfer of DNA on the item

[5] At trial on October 27, 2016, on cross examination of witness Kent, Defense counsel questioned Kent on exactly what the contents of duffle bag were. As such, at side bar, the Commonwealth renewed its request to question its witness regarding the ''ugly'' gun contained in the duffle bag. The Court allowed the questioning in as Defense Counsel had ''opened the door'' and thus nullified its previously sustained objection to any mention of the ''ugly'' gun.

tested. Although the Court did rule in open court on October 20, 2016, on this motion, for ease of tracking the Court will restate its position on the issues.

Despite the Commonwealth's assertion that the opinion expressed in paragraph b is with less than a degree of reasonable certainty the Court does not agree. Paragraph b of the defendant's expert report makes a determination that the examiner believes that at least four individuals could have contributed to the DNA sample. The manner in which this opinion is expressed is admissible. Paragraphs c, d, and e of the expert report expressed an opinion as to the interpretation of the results performed by the PSP. The Court finds that the information contained in these paragraphs of the expert report provides relevant information to assist the jury in the weight that it could give to the Commonwealth's expert report.

The defense expert report paragraph h in pertinent part states:

> Overall, the presence of profiles from trace DNA on items of evidence in the current case of speaks to the possibility but not the probability of a hypothesized DNA transfer scenario.

Commonwealth objects to the language in the opinion as not meeting the standard for expert opinion. Defense argues that the entire paragraph should be considered as it speaks to the true DNA theory of the Defense case.

While nothing precludes Defense from questioning both Commonwealth's DNA expert and its own regarding the possibility of DNA being transferred onto the item in question, the opinion does appear to be speculative. Since the Court finds the opinion to be speculative, it does not meet the standard for admissibility. Therefore, defense will be precluded from admitting paragraph h.

Motion to renew request for Brady Colloquy

Defense Counsel was concerned about the possibility of Defendant Perez's codefendants testifying at trial and that information was not being provided to Counsel that could be used for impeachment purposes. Defense Counsel filed a Motion for a Brady Colloquy initially for this Court to place the District Attorney and/or his representative to testify under oath about their understanding of their obligations under ***Brady***[6] to provide any and all exculpatory information to defense counsel. As the initial request did not allege any specific information but reflected the deteriorating relationship between the attorneys, this Court declined to place the District Attorney under oath. The Court did however issue a practice order setting for the parties' responsibility to share information about the codefendant's plea offers within days of jury selection.

On October 14, 2016, Defense Counsel renewed its objection and refiled a motion as jury selection was scheduled for Tuesday, October 18, 2016, and no plea agreement information had been shared. On the day of jury selection, codefendant Berrones entered a plea of guilty in open court and codefendant Love requested a continuance of trial. The Commonwealth gave defense a copy of the written plea agreement for Berrones; Defense was able to observe this Court's guilty plea colloquy as well as was provided with a copy of the guilty plea hearing for his cross examination during trial. Defense counsel withdrew its request for the hearing as there was no indication they were not provided with the information they sought.

[6] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963).

Motion to suppress recordings of prison visitations

Findings of Fact and Procedural History

Defense counsel filed a Motion in Limine regarding a number of CDs that were provided to defense counsel which appear to be the substance of telephone calls and visitations recorded while the Defendant was housed in either Columbia, Tioga, and or Lycoming County Prison. Because of the sheer volume of the recordings and their late receipt, Defense Counsel believed they did not have sufficient resources to review all of the materials before trial. The Court requested the Commonwealth to identify which portions of the recordings would be used. In addition, the Fant[7] case, recently decided by the Supreme Court of Pennsylvania concerning prison visitation calls, required this Court to hold an evidentiary hearing to determine if any of the visitation calls the Commonwealth intended to use would need to be precluded as a violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act (Wiretap Act)[8]. The Commonwealth indicated the only visitation phone calls it would use were those made while the Defendant was housed at the Lycoming County Prison (LCP). During the trial on October 25, 2016, Defense Counsel sought to cross examine the Commonwealth's witness, and codefendant in the alleged crime, with recordings of visit conversations codefendant had while an inmate at Clinton County Correctional Facility (CCCF) on May 15, 2015.[9] The Court held a second Fant hearing on October 26, 2016. The initial Fant hearing on October 18, 2016, regarding LCP visit conversations is **Fant I**; and the latter hearing, addressing CCCF visit conversations, is **Fant II**.

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[7] Commonwealth v. Fant, 66 MAP 2015, decided September 28, 2016.
[8] See 18 Pa. C.S. Sections 5701-82.
[9] CCCF is the same correctional facility at issue in Fant *supra*.

At **Fant I**, Deputy Warden Brad Shoemaker (Shoemaker) of the LCP was the only witness called by the Commonwealth to distinguish the recordings from the holding in Fant.[10] Shoemaker established that any phone called made by inmates (either at visitation or collect outside the facility) required an inmate Telephone ID Number (TID) and each inmate would sign a release form with the number and the agreement to access the Inmate Telephone System. Commonwealth exhibit #1. The release form indicates just above the Defendant's signature, that

> "I understand and agree that telephone calls and visitation calls are subject to monitoring, recording and may be intercepted or divulged."

Shoemaker also stated that at the beginning of every communication using a phone at the LCP (outgoing or visitation), the inmate hears a prerecorded message advising the parties that the calls may be recorded or monitored. In addition, Shoemaker testified to the location of the different signs that alert all incoming visitors that all visits are subject to monitoring, recording and may be divulged. Once inside the visitation booth above each phone has a similar notification. Depending upon the visitation booth to which an inmate and their visitors maybe assigned, there may be four or six open seating areas affording the defendants and/or their visitors no private conversation area. Commonwealth's exhibits #6-7. Finally, the Commonwealth

[10] The Commonwealth also introduced the following exhibits: (1) Defendant's Inmate Telephone ID Number Release Form; (2) Visitation area lobby; (3) Close up photo of lobby sign which reads in part "All visits are subject to monitoring, recording and may be divulged"; (4) Photo of Visit Room 2 Door with sign that reads "Effective Monday, September 11, 2006, All visits are subject to monitoring, recording, and may be divulged"; (5) Close up Photo of sign in Ex. #4; (6) Picture of inmate of visitation area; (7) Picture of visitor side of visiting area; (8) Close up of visitation handset signage; (9) Audio recording that plays at beginning of visit conversation.

presented a portion of a telephone call between the Defendant and a female in which he clearly makes reference to the fact that he knows that his conversations are being monitored.

In **Fant II**, the Defense presented Tammy Russell (Russell), CCCF Executive Assistant and Fiscal Agent.[11] Russell is responsible for the budget, correspondence for the Warden, and records. Part of her records duty is responding to subpoenas for visit conversations and telephone calls. The prison assigns a unique five digit TID to inmates that they must use in operating the visit handsets. Defendant's exhibit #1 was Berrones's CCCF Inmate TID Number Release Form. In contrast to the LCP Form, no reference is made to the recording of visit conversations in addition to recording telephone calls. Russell did testify that there is a recorded message that plays when the visitation handset is activated regarding the conversations being recorded but she was uncertain whether both inmate and visitor heard the message.

Visitors to inmates at CCCF go through a metal detector in the lobby and meet with their inmate in a noncontact visitation room. Inmates communicate with their visitors through a glass window that is barred. Inmates pick up the visitation handset and use their TID to activate communication with their visitor who must use an identical handset on the other side of the glass in order to communicate verbally. Inmates and

[11] The Defense also introduced the following exhibits: (1) Co-Defendant's Inmate Telephone ID Number Release Form; (2) Visitation area lobby; (3) Photo of Noncontact visitation room 1 doorway; (4) Picture of inmate side of visitation area; (5) Close up Photo of sign above each inmate side visitation stall "Calls may be monitored and recorded"; (6) Photo of public side of visitation area; (7) Photo of public side of visitation side with sign that reads "Please be advised that visitation calla are recorded. By signing in on our [illegible], you are acknowledging your phone call is recorded; (8) Close up Photo of sign above each visitor side visitation stall "Calls may be monitored and recorded"; (9) Close up of visitation handset signage.

visitors cannot have a conversation without the use of the TID code. Neither handset contains a written warning that conversations will be recorded; however, above each glass window on inmate side and visitor side is a strip that reads “CALLS MAY BE MONITORED AND RECORDED”. Defendant’s exhibits #8-9.

Susan Watt (Watt), Deputy Warden of Custody at CCCF, explained the process of visitation at her facility. Though the signage in the visitation room at CCCF is less visible than that in LCP, Watt did testify that at her height of 5’4” she would be able to touch the sign above the visitation stall warning that “calls may be monitored and recorded”. Inmates request that a visitor be added to their visitation list. If the requested visitor is not on probation or parole, he/she will be added to the list. Visitors are not allowed to bring in cell phones or tobacco. Inmates may not bring anything to their visits. An officer lets the inmate into the visit room but inmates can open the door to leave the visitation room. There may be times when only one visitor and one inmate are visiting; however, the inmate side has capacity to accommodate five inmates, with five visitors plus children on the visitor side of the glass. There are security cameras, which do not record audio, on both sides of the visitation room. There is writing on the handsets on either side but it does not warn that CCCF records all visit conversations. Defense exhibit #9. Inmates have limited access to the visitation room and visitation area is only available to them at certain times and dates. The Visitor side does have a sign printed on an 8 ½” x 11” standard piece of copier paper that says “Please be advised all visitations calls are recorded. By signing in on our [illegible], you are acknowledging your phone call is recorded.” Defense exhibit #7.

At **Fant I**, the Commonwealth agreed that the LCP visitation system is essentially identical to the CCCF system in that they do not access individuals outside the correctional facility or involve the traditional telephone system. At the **Fant II**, the Commonwealth objected to the playing of the visit conversations farther than the message "This conversation may be monitored" as any further listening to the recording might be a violation of the Wiretap Act. The Court sustained the Commonwealth's objection.

Discussion

In the original Fant case decided by the Clinton County Court of Common Pleas, the Commonwealth sought to introduce visit conversation recordings into evidence. The Defense objected arguing that recording visit conversations violated the Wiretap Act. The Commonwealth countered that the recordings were made pursuant to exception 14 of the Act that permits the recording of prison phone calls provided certain requirements are met. In Fant, the trial court found the phone call exception inapplicable to the factual situation as visit handsets were not telephones and suppressed the visit conversations. On appeal, the Commonwealth presented three issues to the Superior Court for review:

(1) whether the trial court erred in determining that correctional facility visitation calls were not telephone calls, which fell within the exception to the Wiretap Act;

(2) whether the trial court erred in suppressing evidence without finding that [defendant] had a reasonable expectation of privacy in the correctional facility visitation calls; and

(3) whether the trial court erred in suppressing the personal belongings of [defendant] seized as the seizure was based upon lawfully obtained information.

The Superior Court never addressed assignment of errors (2) and (3) because it issued its decision solely based on its analysis of assignment of error (1). The Superior

Court found that visit conversations were indeed telephone calls and thus amenable to the Wiretap exception. The Supreme Court reversed the Superior Court finding. As the trial court's findings of fact and application of the law to the facts was without error, its suppression order would stand. Justice Todd, in her Concurring and Dissenting Opinion, did agree with reversing the decision of the Superior Court; however, rather than reinstating the trial court's grant of suppression, she would have remanded the case to the Superior Court to decide the other two assignments of error raised by the Commonwealth.

As the Supreme Court of Pennsylvania held in Fant "the term "telephone call" in Section 5704(14) does not include visit conversations and concluded that the suppression court's decision to suppress the recordings of those conversations was proper. This Court is bound by the Fant decision[12] and as such determines that the communications recorded between Defendant and his visitor was not telephone calls. The Court does believe, however, that the visit conversations are oral communications not protected by the Act:

"*Oral Communication*" is defined in section 5702 of the Act as

Any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation. The term does not include any electronic communication.

18 Pa.C.S. § 5702.

By the plain reading of the statute, the Wiretap Act prohibits interception of oral communication when the person making the utterance possessed an expectation that

[12] Other than its mandate (reversing the order of the Superior Court) and Footnote 13. Commonwealth v. Fant, No. 66 MAP 2015, 2016 Pa. LEXIS 2187 (Pa. Sept. 28, 2016).

such communication is not subject to interception under circumstances justifying such expectation. In **Fant I**, by Defendant's own admission, he had no expectation of privacy in his visit conversations. The evidence presented by the Commonwealth at **Fant I**, described *supra*, shows that Defendant had no expectation that his communication was not subject to interception and thus is not the type of communication protected by the Act.

Footnote 13 of Fant called Commonwealth v. Prisk, 13 A.3d 526 (Pa. Super. 2011) inapposite to the issue at the heart of Fant and in the present matter: the expectation of privacy while incarcerated. Footnote 13 is not binding upon this Court but the Court finds guidance in its decision.

In Prisk, a jury in Centre County convicted defendant for three hundred and fourteen (314) offenses, including multiple counts of rape, involuntary deviate sexual intercourse and indecent assault. As part of the investigation into the victim's allegations, the police convinced the victim to visit defendant in the county prison and to wear a recording device, capturing her conversation with her abuser. The Commonwealth did not obtain an order from the Court of Common Pleas prior to intercepting this conversation. Prisk moved to suppress the recording of his jailhouse conversation with the victim, claiming a Wiretap Act violation. The Defense argued that a court order was required before intercepting this conversation as the jailhouse was defendant's home and Section 5704(2)(iv) requires a court order to conduct a police interception of communication conducted in the non-consenting party's home. The trial court denied the suppression motion and the defendant appealed to the Superior Court asking it to review the issue of whether the trial court erred in failing to suppress an

intercepted conversation within the walls of the prison in which appellant resided. Prisk at 530. The Superior Court determined that the trial court appropriately applied the law to the factual circumstance and thus properly denied the suppression motion. The Superior Court stated:

> To determine whether one's activities fall within the right of privacy, we must examine: first, whether [the defendant] has exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable.
>
> To satisfy the first requirement, the individual must demonstrate that he sought to preserve something as private. To satisfy the second, the individual's expectation of privacy must be justifiable under the circumstances.
>
> In determining whether a person's expectation of privacy is legitimate or reasonable, the totality of the circumstances must be considered and the determination will ultimately rest upon a balancing of the societal interests involved. The constitutional legitimacy of an expectation of privacy is not dependent on the subjective intent of the individual asserting the right but on whether the expectation is reasonable in light of all the surrounding circumstances.

Commonwealth v. Prisk, 13 A.3d 526, 531 (Pa. Super. Ct. 2011).

Ultimately, Prisk held that "it is unreasonable for an inmate to expect privacy in his conversations that take place in the prison visitation room as such an expectation of privacy is not one that society is prepared to recognize." Fant Dissenting Op. at 6, n.3.

In Commonwealth v. Henlen, 522 Pa. 514, 564 A.2d 905 (1989), at issue was whether a prison guard's secret tape recording of a conversation he had with a state trooper within the prison was a protected oral communication. The prison guard did not have the approval of a governmental agency and there was no prior finding of probable cause by a neutral judicial authority before the recording took place. The defendant, a prison guard at Mercer County Jail, was suspected of stealing the personal belongings of an inmate at the jail and was interrogated at the jail by a state trooper. During the

trooper's interrogation of the defendant at his work site, the defendant secretly tape-recorded their conversation. After the Commonwealth's concluded its investigation, the guard/defendant filed a complaint against the trooper alleging harassment, at which time the defendant turned over the recording to the Internal Affairs Division of the Pennsylvania State Police in order to support his complaint. The defendant was later convicted of violating the Wiretap Act as a result of the tape recording and appealed his conviction. Similar to Fant, the Superior Court reversed the decision of the trial court to dismiss the charges, and was subsequently reversed by the Supreme Court of Pennsylvania. The prison guard/defendant was successful on appeal because the Superior Court determined that the trooper possessed no reasonable expectation of privacy while interrogating the suspect in his official capacity and as such the interception of the oral communication was not the type of oral communication protected by the Wiretap Act. The Court considered factors such as the fact that normally police questioning of suspects is recorded and the fact that the trooper took notes during the interview in concluding that trooper did not have a justifiable expectation that his words would not be subject to interception.

This Court treats the defendant's privacy interest as a "threshold" or "preliminary" matter. That is to say, if the evidence shows there was no privacy interest, the Commonwealth need prove no more; in terms of the court's review, it need go no further if it finds the defendant has not proven a reasonable expectation of privacy. Commonwealth v. Enimpah, 106 A.3d 695, 701-702 (Pa. 2014). In LCP, the Court finds that inmates and their visitors have no reasonable expectation of privacy in their communications. Between the signs posted upon entry to the jail, visitation rooms

and above each telephone device, along with the recording played before the inmate and visitor can speak to each other, anyone coming into visit is inundated with the notice that their conversations are monitored. Also while sitting and speaking to their inmate, visitors are in an area so close that it is unreasonable to believe that conversations would not be overheard by other visitors thus eliminating the expectation of privacy.

In Fant, the Supreme Court determined that face to face conversations such as these would not ordinarily be considered telephone calls despite using a telephone handset. The Court also found that absent any evidence to the contrary, there was a reasonable expectation of privacy in the communications between visitors and inmates. Both the trial court and the Supreme Court found no testimony presented that any written notice was given to inmates or visitors that conversations while visiting would be recorded or monitored. While the outgoing telephone system has a recording notifying the parties that their conversations are being recorded, monitored and may be divulged there was no testimony that a similar warning in the visitation phone system. Fant, FN 12.

In **Fant I** the Commonwealth agreed that the Lycoming County visitation phone system at issue was identical to the one in Clinton County. It argued the recorded conversations would fall under exception (4); that the communications that the Defendant engaged in using the visitation system would be admissible under the consent exception of the Wiretap Act.

The Wiretap Act generally prohibits intercepting, using, or disclosing communications except under certain circumstances. The Act is designed to safeguard

individual privacy while also giving law enforcement authorities a tool to combat crime. See Karoli v. Mancuso, 65 A.3d 301 (Pa. 2013) § 5704 of the Wiretap Act provides

> It shall not be unlawful and no prior court approval shall be required under this chapter for:
>
> (4) A person, to intercept a wire, electronic or oral communication, where all parties to the communication have given prior consent to such interception.

Concerning the consensual interception of **communications** under the Wiretapping and Electronic Surveillance Act, the Supreme Court has said:

> This Court has emphatically stated that for the purposes of 18 Pa.C.S. § 5704(2)(ii), one's **consent** must be given voluntarily in order for the governmental actions to be lawful. Commonwealth v. Clark, 516 Pa. 599, 605, 533 A.2d 1376, 1379 (1987), citing Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977); Commonwealth v. Mamon, 449 Pa. 249, 297 A.2d 471 (1972). The voluntariness of one's **consent** must be the "product of an essentially free and unconstrained choice by its maker . . . . His will [must not have] been overborne and his capacity for self-determination critically impaired." Commonwealth v. Clark, supra, 516 Pa. at 605, 533 A.2d at 1379. See also Commonwealth v. Smith, 470 Pa. 220, 368 A.2d 272 (1977); Commonwealth v. Alston, 456 Pa. 128, 317 A.2d 241 (1974). Each case must be determined "from the totality of the circumstances." Clark, supra, 516 Pa. at 605, 533 A.2d at 1379. Furthermore, **consent** is not voluntary where it is the product of coercion or duress either express or implied. However, "[a] decision to **consent** is not rendered involuntary merely because it is induced by a desire to avoid the possibility of a well-founded prosecution." Id.cited by Commonwealth v. Rodriguez, 519 Pa. 415, 419, 548 A.2d 1211, 1213 (1988) (emphasis added).
>
> Surveillance conducted with the **consent** of a party to the conversation is not subject to the exacting standards of authorization required for non-consensual surveillance under the Wiretap Act." Commonwealth v. Checca, 341 Pa.Super. 480, 492, 491 A.2d 1358, 1364 (1985).

The Court does not allow the visit conversation recordings into evidence because it finds that the parties consented to having their conversations recorded. In fact, the choice inmates are given: to either have visit conversations recorded or not

have visits at all is not truly a consensual situation as the inmates are constrained to consent if they would like any visits.

The Court does not find an exception to the Wiretap Act must exist to allow prison visit conversations into evidence. By the very nature of their incarceration, prisoners have no expectation of privacy in what they do. Prisk did not have it, and the state trooper in Henlen did not have it when conducting interrogations in the prison. A penal institution, by its creation a public institution, does not have many private spaces, and the visitation rooms cannot be included in a list of them. Though the signage in CCCF is somewhat less clear than that in LCP, the difference is not great enough to determine that inmates in one facility had a reasonable expectation of privacy and the inmates in others do not. The oral communication between inmates and visitors is not the type of communication protected by the Wiretap Act. In **Fant I**, the Defendant admitted he had no expectation of privacy in his conversations. In **Fant II**, it is unknown whether co-defendant had expected his conversations to be private but even if he had, it was not under circumstances justifying such expectation and thus is not an oral communication protected by the Wiretap Act.

Motion to suppress letters and recordings of prison visitations or telephone calls

The Commonwealth provided defense with a number (9) of letters written by the Defendant to his friend, Kirsten Sedlock (Sedlock) along with visitation recordings (2) between the Defendant and Sedlock, along with two (2) phone call recordings between the Defendant and his stepmother and cousin, while he was housed at Columbia or Tioga County Prison. Defense Counsel filed a motion to suppress the contents of the recordings/writings. The hearing was held on October 20-21, 2016.

To the parties' credit, the Commonwealth provided to Defense counsel all materials allowing them to have the opportunity to prepare their objections. At the time of the hearing, Defense Counsel acknowledged that they had no objection to the exhibits labeled Letter 1, 2, 3A and 9A and Call 1, Call 2 snippet 1, and Call 3 snippet 1. Generally, all of the statements, if relevant, were admissible under Pa.R.E. 803 Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness. Exception (25) allows opposing party's statements to be offered against an opposing party.

The governing rules of evidence which the Court applied to its admissibility decisions fell under 2 categories; relevance generally and character evidence. It is well established that to be admissible, evidence must be relevant and its prejudicial impact must not outweigh its probative value. Commonwealth v. Clark, 280 Pa.Super. 1, 421 A.2d 374 (1980). The Clark court opined*:*

"Relevant evidence then, is evidence that in some degree advances the inquiry, and thus has probative value, and is prima facie admissible." Commonwealth v. Shoatz, 469 Pa. 545, 564, 366 A.2d 1216, 1225 (1976); Commonwealth v. Walzack, 468 Pa. 210, 218, 360 A.2d 914, 918 (1976) (both quoting C. McCormick, Evidence § 185 at 437-38 (2d ed. 1972)) . . . . Of course, the prejudicial impact of the evidence may outweigh its probative value, and the court may be moved to exclude the evidence on this basis. Commonwealth v. Hickman, 453 Pa. 427, 309 A.2d 564 (1973); Commonwealth v. Quarles, 230 Pa.Super. 231, 326 A.2d 640 (1974). In determining whether evidence is so remote that the prejudicial effect outweighs the probative value, the court has no fixed standard on which to rely, but must instead consider the nature of the crime, the evidence being offered and all attendant circumstances. Commonwealth v. Kinnard, 230 Pa.Super. 134, 326 A.2d 541 (1974). The trial judge's determination that evidence is not too remote to be admissible is within his sound discretion and will not be overturned absent an abuse. Id., 280 Pa.Super. at 6-7, 421 A.2d at 376.cited by Commonwealth v. Ross, 375 Pa. Super. 176, 543 A.2d 1235 (1988).

Defense counsel failed to see the relevance of Letter 4, and saw mention of the ankle monitor as an evil afterthought, not a prior bad act. The Commonwealth did withdraw its request to introduce this portion of Letter 4:

> People are going to talk because the news already painted the picture of me being a cold-blooded murderer and people are going to speak off of emotion until the truth is revealed but until then we just go to wait it out and continue to let them throw dirt on my name.

The Court allowed the next line of the letter "Yeah, I thought about me cutting my ankle monitor off and how that was my best alibi, but what's done is done." The statement can be interpreted in a variety of ways. As above, the Defense interprets it as an evil afterthought. The Commonwealth interprets it as evidence of trying to produce a false alibi, which Defense objected to its admission on the basis that the Defense had filed no alibi notice. Ultimately, the court found the reference to the ankle monitor to be evidence of premeditation and thus admissible on the intent of Defendant at issue as the Commonwealth charged murder of the first degree and of the third degree. Generally, evidence of prior bad acts unrelated to the offenses for which a defendant is being tried, is inadmissible unless it comes under a recognized exception and the need for the evidence outweighs the potential prejudice. Commonwealth v. Elliot, 549 Pa. 132, 700 A.2d 1243 (1997). There are several recognized exceptions justifying admission of such evidence "such as when the evidence of the prior bad act tends to prove malice, motive or intent for the offense charged." Commonwealth v. Griffin, 453 Pa. Super. 657, 684 A.2d 589, 594 (Pa.Super. 1996). Cited by Commonwealth v. Baez, 2000 PA Super 263, P13 (Pa. Super. Ct. 2000).

Letter 5 was broken into two sections. The Defense objected to 5A based on double hearsay (the Defendant is writing to his girlfriend about something someone told

him that someone else said) and for relevance. The Court admitted 5A as an opposing party's statement; however, it did preclude the admission of 5B as it found that its prejudicial affect outweighed any probative value it could have.

The Defense objected to the admission of Letter 6 because Defendant describes conversations he is allegedly having with Counsel. Defense Counsel objected to its admission based on (1) it is untrue (Defense Counsel did not tell Defendant he had to testify on his own behalf) and (2) it is cumulative of other evidence. The Court recognized that any attorney client privilege Defendant had in his conversation with Counsel was waived when he shared the contents of those conversations with others. Additionally, Pa.R.E. 803 (25) enumerates an exception to the hearsay rule where an opposing party's statement can be offered against the opposing party, regardless of whether that party testifies. Lastly, a determination of whether evidence is cumulative is a determination that the Supreme Court of Pennsylvania has held better made during trial rather than through pre-trial motions. Commonwealth v. Hicks, 625 Pa. 90; 91 A.3d 47 (Pa. 2013).

Defense Counsel objected to the admission of Letter 7 as it felt that it was not relevant i.e. did not make any fact of consequence in determining the matter any more or less probable. The Commonwealth argued that Defendant's statement in his letter, discussing the trial strategy of choosing a jury, is not consistent with innocence i.e. "gaming the system." Ultimately, the Court allowed the Commonwealth to admit the letter into evidence as Defendant's statements in the letter were inconsistent with the statements he made to police.

Defense Counsel objected to Letter 8 on the basis of relevance as Defendant withdrew his request to file an alibi. The Commonwealth countered that Defendant's letter is discussing a defense to the charged crimes i.e. renunciation. Ultimately, the Court precluded the letter in its entirety as it found that its admission would unfairly prejudice the Jury against Defendant.

Letter 9A was admitted with no objection by Defense Counsel. Defense did object to 9B on the basis of relevance and 9C as it appeared that Defendant was describing prior bad acts. The Commonwealth countered that 9B should be admitted for motive and 9C because it shows that Defendant loves the feeling of killing and demonstrates Defendant's coldness and hardness of heart. The Court found 9B to be irrelevant, as it spoke in too general of terms to go to motive. Defendant wrote in 9B "You say you don't have the heart to pull a trigger, when in fact, you do. Everybody does. If you had any type of firearm and someone was to break into your house with intentions of hurting my young I bet any amount of money you'll do it." The Court agreed with Defense Counsel that 9C described prior bad acts and did not see any permissible uses. Though the prior bad acts Defendant described in his letter, if true would be similar to the crime charged, there is nothing in the statement that links the prior bad acts to the current matter and thus would make them admissible for motive. In order for evidence of prior bad acts to be admissible as evidence of motive, the prior bad acts must give sufficient ground to believe that the crime currently being considered grew out of or was in any way caused by the prior set of facts and circumstances. Commonwealth v. Jackson, 900 A.2d 936, 2006 PA Super 128 (Pa. Super. Ct. 2006) (superseded on other grounds). Showing coldness and hardness i.e.

Defendant's state of mind in prior bad acts cannot be used to show his intent, state of mind in current crime unless it was part of the history of the case and forms part of the natural development of the facts. Commonwealth v. Watkins, 577 Pa. 194, 843 A.2d 1203 (Pa. 2003).

Regarding the telephone calls and visitation recordings Call 1, Call 2 snippet 1, and Call 3 snippet 1, the Defense had no objection. Call 2 snippet 2 was admitted over the Defense's objection as an opposing party statement; however, Call 2 snippet 3 was precluded by the Court as a comment on post arrest silence. Call 2 snippet 4 was admitted as an opposing party's statement, as was snippet 5. The Defense objected to the admission of Call 2 snippet 6 on the basis of prior bad acts, hearsay and relevance. The Court found the snippet to be relevant as it showed his reactions to what he knew his mother told police, i.e. consciousness of guilt.

The Court admitted Call 3 snippet 1 with no objection by Defense as long as Defendant's mother indeed testified at trial. Defense did object to the admission of Call 3 snippet 2 as it felt that it prejudice the jury against Defendant (the visit conversation alludes to Defendant's step-father who is also charged with homicide in an unrelated matter). The Court was unaware of Defendant's step-father and admitted the statement as it showed Defendant's reactions to the planned testimony of his mother, i.e. consciousness of guilt.

Defense Counsel objected to the admission of Call 4. Defense objected to the 3:34 mark's relevance and that it were cumulative of other evidence to be admitted at trial. The Commonwealth countered that the discussion would be put into context of a longer story at trial. The Court recognized that whether Sabina Kent testified would be

determinative in whether these calls were admitted, more specifically, if she testified the Commonwealth could use the calls to bolster their theme. The Defense objected to the Call 4 5:49 mark as not relevant, prior bad act evidence. The Court ultimately admitted marks 3:34, 5:49, and 12:23 as statements of the opposing party. As with the other admitted telephone and visit conversation, Defendant's reactions to his knowledge that his mother will be testifying against him evidence his consciousness of guilt. The Court did preclude the 15:20 mark because though it does show his reactions, its likeliness to prejudice the jury against Defendant outweighed any probative value it might have.

Conclusion

The reasoning above is in support of the Court's Order filed October 24, 2016.

DATE: _____ BY THE COURT,

_____
Nancy L. Butts, President Judge

cc: DA
PD
Gary Weber, Esq. Lycoming Law Reporter
Susan Roinick, Law Clerk