

FILED
LYCOMING COUNTY

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

: CR-1041-2018

vs.

: CRIMINAL ACTION - LAW

LEON A. HALL,
Defendant.

: *Post-Sentence Motion*

OPINION AND ORDER

On January 16, 2020, Defendant filed a Post-Sentence Motion, which was followed by a supportive brief filed on February 9, 2020. The Commonwealth filed a responsive brief on March 2, 2020. The Court held argument on the Post-Sentence Motion on March 10, 2020.

Background

On July 18 2018, Defendant Leon A. Hall was charged by Criminal Complaint with the following three counts: 1. Driving under the Influence of Alcohol – General Impairment, 75 Pa.C.S. § 3802(a)(1); 2. Driving under the Influence – Highest Tier, 75 Pa.C.S. § 3802(c); and 3. Driving Under Suspension (non-DUI related), 75 Pa.C.S. § 1543(a). This information was amended on October 1, 2019, to reflect that Defendant had been convicted of a prior DUI within the past ten years. A criminal jury trial was held November 1, 2019.

Steven Wicks was called as the first witness. Mr. Wicks testified that on the night of December 17, 2017, he heard a loud crash outside his residence and went outside to investigate. There, Mr. Wicks saw that a vehicle had crashed into one of his cars, which was parked by the curb in front of Mr. Wicks' house. The force of the collision rammed the car forward, causing it to crash into the back of Mr. Wicks' other parked car. Mr. Wicks then called 911.¹ Mr. Wicks testified that he did not see any individuals exit the vehicle that caused the collision. However, he testified that after arriving at the scene of the accident he saw Defendant and another individual standing in the driveway of a

¹ *Com. v. Hall*, CP-41-CR-0001041-2018, Transcript of Proceedings – Testimony Only 16-17 (Jan. 22, 2020) ("Transcript").

house further down the street, whispering to each other.² He testified that this other individual, whom he could not clearly see but identified as male, left the scene of the accident before police arrived.³ Mr. Wicks testified that while he was waiting outside for police to arrive he spoke to Defendant, who admitted the he was the driver of the vehicle that caused the crash. Defendant told Mr. Wicks that he had been going Christmas shopping and was driving his daughter's car. However, Mr. Wicks testified that he did not live near any shopping areas.⁴

Officer Salisbury, the Officer who was dispatched to the scene of the accident, next testified. Officer Salisbury stated that once he arrived at the scene, he spoke with Defendant, who admitted that he was the driver of the vehicle that caused the crash. Defendant told Officer Salisbury that he had caused the accident when he swerved to miss a parked van at the other side of the street.⁵ Defendant later elaborated that he was taking the corner too fast and was distracted while talking on the phone when he realized that he was about to hit the parked van and swerved.⁶ Officer Salisbury had Defendant perform a field sobriety test, which indicated that Defendant was intoxicated.⁷ Officer Salisbury then transported Defendant to Williamsport Hospital after he consented to a chemical blood test. The blood test demonstrated that Defendant had a blood alcohol level of .231%, well above the .08% legal limit for driving.⁸

When asked whether Mr. Wicks had informed him that another individual had fled the scene of the accident, Officer Salisbury stated that he was not sure. The Court permitted entry of a short video. In the video, Mr. Wicks informed Officer Salisbury of the individual who had left the scene of the accident, although Mr. Wicks told Officer Salisbury that he did not know whether that individual was associated with Defendant or was involved in the accident.⁹ Officer Salisbury testified that he did not follow-up on this information by questioning the Defendant about the other individual because Defendant

² Transcript at 18.

³ Transcript at 19.

⁴ Transcript at 19-20.

⁵ Transcript at 26.

⁶ Transcript at 42-43.

⁷ Transcript at 32-35.

⁸ Transcript at 36-37.

⁹ Transcript at 52.

admitted to being the driver and he believed Defendant would have independently provided that he was not the driver if that were true.¹⁰

Tonisha Grimes, Defendant's friend, was next called as a witness. Ms. Grimes testified that she and Defendant were at a party thrown by a mutual friend on the night of December 17, 2017.¹¹ She testified that because Defendant appeared too intoxicated to walk home, she lent the keys to her car to a mutual friend of theirs named Mike, who was not drinking, so he could drive Defendant home.¹² She testified that she saw Mike get into the driver's seat of her car and Defendant in the passenger's seat as they left the party.¹³ Ms. Grimes testified that she did not accompany the two after they left, instead returning to the party.¹⁴

Defendant appeared as a witness on his own behalf. He testified that on the night of December 17, 2017, he was at a party thrown by his friend Sharif. He stated that about thirty people attended the party, including his friends Nate and Ms. Grimes. He stated Mike was also at the party. He described Mike as an acquaintance, someone he played basketball with, and stated that he and Mike were mutual friends with the group throwing the party. He testified that he did not know Mike's last name.¹⁵ Defendant testified that Mike was driving at the time of the accident and then fled the scene.¹⁶ Defendant testified that he did not specifically remember if he told Mr. Wicks and Officer Salisbury that he was driving the vehicle, due to his high level of intoxication at the time of the accident.¹⁷

Prior to the close of trial, the Commonwealth moved for the inclusion of the Failure to Call Potential Witness jury instruction (Pennsylvania Standard Criminal Jury Instruction 3.21.A) over the objection of defense counsel. The Court issued this instruction, and defense counsel repeated her objection in Court following the charging of the jury.¹⁸ Defendant was found guilty of all three counts. He was subsequently

¹⁰ Transcript at 55-56.

¹¹ Transcript at 65.

¹² Transcript at 67-68.

¹³ Transcript at 69.

¹⁴ Transcript at 71-72.

¹⁵ Transcript at 79.

¹⁶ Transcript at 74.

¹⁷ Transcript at 79-80.

¹⁸ The Court issued the following instruction:

sentenced to sixteen months to five years of incarceration in a State Correctional Institution, plus costs. Defendant filed a Post-Sentence Motion on January 16, 2020, asserting that the Court abused its discretion in including the Failure to Call Potential Witness Instruction and requesting a new trial on amended counts 1 and 2.

Analysis

The Failure to Call Potential Witness Instruction is commonly known as the “missing witness” rule. Pursuant to the missing witness rule:

[W]hen a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not be merely cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference that it would have been unfavorable.¹⁹

“Such an instruction is not necessary if the witness is available to both parties, i.e., the witness is not peculiarly within the control of one party.”²⁰

Defendant asserts in his Post-Sentence Motion and accompanying Brief in Support that because Officer Salisbury had notice of a man seen fleeing the scene of the accident, Mike was not uniquely available to Defendant. Defendant emphasizes that Officer Salisbury did not take any efforts to locate the individual. Further, Defendant argues that the Commonwealth did not present any evidence that Defendant would have had the ability to locate Mike, who may have intentionally made himself scarce. In support of the last contention, Defendant cites *Com. v. Taylor*, in which the

There is a question about what weight, if any, you should give to the failure of the Defendant to call Mike as a witness. If three factors are present and there is no satisfactory explanation for a party's failure to call a potential witness, the jury is allowed to draw a common sense inference that his testimony would have been unfavorable to that party.

The three necessary factors are, first, that the party is available to the party only and not to the other party. Second, it appears the person has special information material to the issue. And, third, that the person's testimony would not be merely cumulative.

Therefore, if you find these three factors present and there is no satisfactory explanation for the Defendant's failure to call Mike to testify, you may infer, if you choose to do so, that his testimony would have been unfavorable to the Defendant.

Transcript at 106-107.

¹⁹ *Com v. Nesbitt*, 419 A.2d 64, 68 (Pa. Super. 1980) (quoting *Com. v. Moore*, 309 A.2d 569, 570 (Pa. 1973)).

²⁰ *Com. v. Taylor*, 393 A.2d 929, 934 (Pa. Super. 1978).

Pennsylvania Superior Court ruled that the Commonwealth did not have unique control of a confidential informant that the Commonwealth lost contact with several weeks prior to trial.²¹

The Court finds that Mike would have been uniquely available to Defendant because he was not a witness known to the Commonwealth prior to trial. Defendant told Officer Salisbury multiple times following the accident that he was the driver of the vehicle. He did not mention that another individual was in the car at the time of the accident. While Mr. Wicks told Officer Salisbury that he saw a man talking with Defendant who left the scene of the accident prior to the arrival of police, he also informed Officer Salisbury that he was uncertain whether that man had even been involved in the accident and did not provide any identifying information.

Further, Defendant testified that Mike was an acquaintance with whom he played basketball. Defendant and Mike had both attended a party with thirty other individuals, some of whom were mutual friends. Defendant would have been best situated to locate Mike, or to at least obtain basic information such as his last name and home address. Defendant did not produce any evidence that he made efforts to locate Mike prior to trial, and therefore did not demonstrate a lack of availability.²²

Defendant next asserts that Mike's testimony would have been cumulative because Defendant and Ms. Grimes both provided testimony that Mike was the driver. However, the Court finds this evidence is not cumulative. While Ms. Grimes testified that she gave her keys to Mike and saw him get in the driver's seat when leaving the party, she was not at the scene of the accident and so could not testify as to whether Mike was still driving at that time. Only Defendant offered testimony that Mike was the driver at the time of the accident. The Superior Court has previously held "that when a defendant raises the existence of alibi witnesses who would be known to him personally, but does not call those witnesses, the jury may infer that the absent testimony would be adverse to the defendant, and the trial court may so instruct."²³

²¹ See *id.*

²² *Com. v. Ferguson*, 432 A.2d 1103, 1106 (Pa. Super. 1981) (citing *Com. v. Stasko*, 370 A.2d 350 (Pa. 1977)) ("A witness cannot be deemed unavailable unless the party has exerted a good faith effort to produce him or her.").

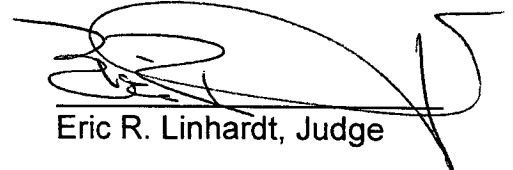
²³ *Com. v. Bright*, 522 A.2d 573, 576-77 (Pa. Super. 1987).

Defense counsel asserts that *Bright* and its related line of cases is limited solely to cases involving alibi witnesses. However, the Superior Court has applied this alibi witness rule to other witnesses whose testimony might exonerate the defendant, including those witnesses who defendant alleges were participants in the crime.²⁴ Therefore, Defendant's own testimony that Mike caused the accident did not preclude the Court from providing a missing witness instruction when Defendant failed to call him.

Based on the foregoing, the Post-Sentence Motion is hereby DENIED.

IT IS SO ORDERED this 25th day of March 2020.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/cp

cc: Jessica M. Feese, Esq., 48 West Third St., Williamsport, PA 17701
Devin Walker, Esq., 48 West Third St., Williamsport, PA 17701

²⁴ See *Com. v. Womack*, 453 A.2d 642, 647 (Pa. Super. 1982) (applying missing witness rule to individual who defendant alleged was a participant in the charged rape).