

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-1369-2020
	:	
vs.	:	
	:	
LAMONT CRADLE,	:	CRIMINAL DIVISION
Defendant	:	

ORDER

AND NOW, this 14th day of February, 2022, a hearing and argument on the Commonwealth’s Motion for Preservation of Testimony was held February 10, 2022, at which time the Commonwealth was represented by Matthew Welickovitch, Esquire, and the Defendant appeared personally and was represented by Michael Morrone, Esquire.

The Defendant is charged with two deliveries of fentanyl and related offenses. His jury was selected on January 13, 2022, and his case is scheduled to be tried on February 24, 2022. In support of its Motion, the Commonwealth contends that it learned the name of the confidential informant just prior to the jury selection, and it is common practice for an affiant to not release the name of the confidential informant until the time of the jury selection. After the Commonwealth sent its critical witness a subpoena via regular mail, the witness notified the Commonwealth of a prepaid vacation that was booked on December 28, 2021, and will place him out of the country on the date of the trial. The Defendant’s counsel refused the Commonwealth’s request to have the witness testify via Zoom on the date of the trial. The Commonwealth then contended that the witness is unavailable, and filed the Motion to preserve the witness’s testimony in the form of a deposition.

“At any time after the institution of criminal proceedings, upon motion of any party, and after notice and hearing, the court may order the taking and preserving of the testimony of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness’ testimony be preserved.” Pa.R.Crim.P Rule 500(A)(1)B. The comment to the rule states “‘May be unavailable’ used in paragraph (A), is intended to include situations in which the court has

reason to believe that the witness will be unable to be present or to testify at trial or other proceedings, such as when the witness is dying, or will be out of the jurisdiction and therefore cannot be effectively served with a subpoena, or is elderly, frail, or demonstrates the symptoms of mental infirmity or dementia, or may become incompetent to testify for any other legally sufficient reason.”

An unavailable witness is “a witness who is not capable of appearing in court and giving testimony directly, for reasons such as illness or incapacitation.” *Commonwealth v. Einhorn*, 911 A.2d 960, 972 (Pa. Super. 2006). *See Commonwealth v. Rizzo*, 726 A.2d 378, 381 (Pa. 1999) (finding the language “may be unavailable” not applicable to situations where a witness could feasibly be present at trial). In the instant case, the Commonwealth’s crucial witness is not alleged to be suffering from a terminal illness or dementia, and there are no concerns that he may become incompetent to testify between now and the February 24, 2022, trial date. The witness’s willingness to testify via Zoom on the date of the trial evidences that he/she is not “unavailable” as contemplated by Pa.R.Crim.P Rule 500B. The witness merely has somewhere he would rather be than where he is required to be pursuant to the subpoena he acknowledged receiving. This is not an exceptional circumstance that would require the pre-trial taking of the witness’s testimony. In this case, “inconvenienced” does not equate to “unavailable.”

The Commonwealth avers that allowing the witness to be deposed will save the Court from having to reschedule this matter for another jury selection and trial date. The Court is of the opinion that this situation could have been avoided with some advanced preparation, notwithstanding the Commonwealth’s contention that they only learned the identity of the confidential informant at the time of jury selection on January 13, 2022. Counsel for the Commonwealth and the Defendant were notified via email from the Deputy Court Administrator on January 5, 2022, that this case would be scheduled for jury selection on January 13, 2022, and if a jury was picked, the trial would be on February 24, 2022. These dates were selected based upon the Commonwealth and the Defendant’s stated availability. The Court believes that although the Commonwealth may not have been aware of the confidential informant’s identity, the Commonwealth was under a duty of due diligence to communicate with the affiant prior to the jury selection to ensure that his

confidential informant would be available for the trial; or to address any potential scheduling issues in advance of the jury selection.

The Court is not unsympathetic to the witness's predicament. However, he is not "unavailable" within with meaning of Pa.R.Crim. P. 500. Accordingly, the Commonwealth's Motion to Preserve Testimony is **DENIED**.

By the Court,

Ryan M. Tira, Judge

RMT/jel

CC: DA (MW)
Mike Morrone, Esquire
Gary Weber, Esquire
Jennifer Linn, Esquire