

THE CENTRE COUNTY COURT OF COMMON PLEAS, PENNSYLVANIA

COMMONWEALTH : Criminal Division
v :
: CP-14-CR-2421-2011 &
: CP-14-CR-2422-2011
GERALD A. SANDUSKY :

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DEBRA C. IMEL
PROTHONOTARY
CENTRE COUNTY, PA

MOTION IN LIMINE TO ADMIT THE OUT OF COURT STATEMENTS
OF UNAVAILABLE WITNESSES SPANIER, CURLEY, & SHULTZ

Defendant seeks to admit statements of Curley, Shultz, and Spanier, players in this case known to the Court from previous filings and materials. Curley and Shultz are known, and Spanier is believed to be likely to, invoke their right against self incrimination and be unavailable.

This Court's discretion with respect to evidentiary rulings is well-settled and illustrated by the applicable standard of review: "[q]uestions concerning the admissibility of evidence lie within the sound discretion of the trial court, and a reviewing court will not reverse the trial court's decision absent a clear abuse of discretion." Commonwealth v. Bishop, 936 A.2d 1136, 1143 (Pa.Super. 2007) (citation omitted). Thus this Court has broad discretion in this matter, but nonetheless is bound to honor precedent.

Pennsylvania Rule of Evidence 804(b)(3) states:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Further there is a "due process exception" to the hearsay rule found in Commonwealth v. Hackett, 307 A.2d 334 (Pa.Super. 1973). It is mandatory for courts to admit exculpatory hearsay statements in order to observe the basic tenets of fairness and due process. *Id.*

Public policy, the fundamental principles of fairness and due process of law require the admission of declarations against penal interest where it can be determined that those statements: (1) exculpate the defendant from the crime for which he is charged; (2) are inherently trustworthy in that they are written or orally made to reliable persons of authority or those having adverse interests to the declarant; and [3] that they are made

pre-trial or during the trial itself. Under these circumstances, an exception to the hearsay rule, in our view, is mandatory. Hackett, 307 A.2d at 338.

The United States Supreme Court and Pennsylvania courts have consistently held that a statement is not admissible under this exception simply because it may exculpate the defendant and are against the declarant's interest, but "statements must be made under circumstances that provide considerable assurances of their reliability." Com. v. Tielsch, 934 A.2d 81, 90 (Pa.Super. 2007) (citing Chambers v. Mississippi, 410 U.S. 284, 300 (1973)) (quotation marks and citations omitted)

In Chambers, the defendant attempted to admit testimony of three separate individuals who heard another individual confess to the murder for which the defendant was on trial. This confessor had also submitted sworn testimony to the defendant's attorneys, but consequently repudiated his confession when he realized the certainty and severity of penal liability. Chambers, 401 A.2d at 288. The trial court excluded these statements as inadmissible and prohibited the defense from cross-examining the confessor, citing a "voucher rule" which subsequently prohibited the defense from questioning the confessor about his repudiated statement. *Id.* at 296-297.

Accordingly, the United States Supreme Court held that the trial court erred in excluding these statements as there was assurance of the statements reliability in that the three confessions were made spontaneously to close friends near the time of the murder, other evidence pointed to the confessor's involvement, the statements were undoubtably against the confessor's self interest as he would gain nothing from confessing, and the confessor was present at trial and under oath. *Id.* at 300-301.

In Commonwealth v. Tielsch, the Superior Court excluded the confession of a third party exculpating the defendant as "there were no assurances of reliability to buttress the out of court statements." Tielsch, 934 A.2d at 91 (emphasis in original) (upholding trial court's decision to exclude statements of confessor who claimed to be the murderer to impress his girlfriend). See also Commonwealth v. Hall, 867 A.2d 619, 631-632 (Pa.Super. 2005) (finding confession of a third party exculpating defendant to be untrustworthy when the defendant's cellmate revoked his confession when he realized he would be subject to penal liability and the evidence against defendant was overwhelming).

Commonwealth v. Bracero, 515 Pa. 355, 528 A.2d 936 (1987 t), a Pennsylvania Supreme Court case followed the Hackett test for admitting exculpatory statements against interest.

We believe that a rule requiring assurance of the trustworthiness and reliability of an out of court statement, such as that announced in Hackett and Chambers, and as mandated by the Federal Rules of Evidence (Rule 804(b)(3)), is the better view.

Experience teaches us that it is not rare for friends, peers, and family members to go to extraordinary lengths to help an accused win an acquittal or avoid a jail sentence.

Bracero, 515 Pa. 355, 366, 528 A.2d 936, 941 (1987) (Larsen, J., plurality)

Here there is a high index of reliability of the out of court statements of Curley and Shultz and Spanier, as they were under oath, before a Grand Jury, and each were subject to examination by the

Commonwealth, aided by the Commonwealth's previous investigation. Thus this court should admit them. To restate the holding in Hackett:

Public policy, the fundamental principles of fairness and due process of law require the admission of declarations against penal interest where it can be determined that those statements: (1) exculpate the defendant from the crime for which he is charged; (2) are inherently trustworthy in that they are written or orally made to reliable persons of authority or those having adverse interests to the declarant; and, that they are made pre-trial or during the trial itself. Under these circumstances, an exception to the hearsay rule, in our view, is mandatory. The protection of innocent defendants must override any technical adherence to a policy that excludes evidence on the grounds of hearsay. Commonwealth v. Hackett, 225 Pa. Super. 22, 29-30 (Pa. Super. Ct. 1973)

Respectfully submitted,
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