

[J-59-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 66 MAP 2005
	:	
Appellant	:	Appeal from the Order of Superior Court
	:	entered October 29, 2004 at No. 912 MDA
	:	2002 which reversed the Order of Court of
v.	:	Common Pleas of Dauphin County,
	:	Criminal Division, entered May 29, 2002,
	:	(exited May 30, 2002) at No. 1683 CD
ALFONSO F. CARTER,	:	1998.
	:	
Appellee	:	861 A.2d 957 (Pa. Super. 2004)
	:	
	:	ARGUED: May 8, 2006

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY

DECIDED: October 17, 2007

I respectfully dissent from the majority opinion because I do not believe that a state police lab report falls within the business records exception to the hearsay rule.

As noted by the majority opinion, Pennsylvania Rule of Evidence 803(6) provides an exception to the hearsay rule that permits admission of certain types of regularly kept business records. The exception is “justified by the high degree of accuracy imputed to business records because of the regularity with which they are kept and the high degree of reliance placed upon them by the entities that keep such records.” LEONARD PACKEL AND ANNE BOWEN POULIN, PENNSYLVANIA EVIDENCE, §803(6)-1 at 757-58 (2d ed. 1999). As one commentator has noted:

The business records exception grew out of considerations of necessity and trustworthiness -- the necessity for alternatives in permitting large and small business to prove debts by their records of account, and the unusual degree of trustworthiness and reliability of such records owing to the fact that they were kept regularly, systematically, routinely, and contemporaneously. The element of unusual reliability is supplied by habit or precision, by actual experience of business in relying upon these records or by a duty to make an accurate record as a part of a continuing job or occupation. The essence of the business records exception to the hearsay rule is that records systematically made for the conduct of a business as a business are inherently highly trustworthy. These records are routine reflections of day-to-day operations, and because of their entrant's obligations to have them truthful and accurate for the purpose of the conduct of the enterprise, their reliability is without question.

ROBERT BERKLEY HARPER, HANDBOOK OF PENNSYLVANIA EVIDENCE, §803[E] at 434 (2001).

The United States Supreme Court, in Palmer v. Hoffman, 318 U.S. 109, 113-14 (1943), employed a similar understanding of what constitutes a business record as a “record made for the systemic conduct of the business as a business.” Palmer, 318 U.S. at 113. As the Court further explained, such records would be those “typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls.” Id.

Using this understanding of business records as contemplated by Rule 803(6), my query would be whether a state police lab report was a record made for the systematic conduct of the business as a business, or, using the words of Robert Harper, whether the records are routine reflections of day-to-day operations of the business. Viewed in this light, a state police lab report is not a record that reflects the day-to-day operations of the business of the state police lab. Instead, it is a product of the business itself and unlike a record that has been kept to reflect the day-to-day operations of the business. See, e.g. Commonwealth v. Graver, 334 A.2d 667 (Pa. 1975) (holding that a police log reflecting course of business from the day's police reports was admissible). It certainly does not reflect routine events or occurrences, transactions with others, or provide a mechanism for

internal controls. Palmer, supra. Accordingly, I would not find the lab report at issue to be a “business record” within the definition of Rule 803(6).

Moreover, even if I were persuaded that a state police lab report was the type of record contemplated by Rule 803(6), I would find that it does not fall within the exception, since it is a record prepared in anticipation of litigation. Business records prepared for the purposes of pending litigation can never be “in the regular course of business” for purposes of Rule 803(6). Pompa v. Hojanicki, 281 A.2d 886 (Pa. 1971); see State of Wisconsin v. Williams, 644 N.W.2d 919 (Wisc. 2002) (holding that state crime lab report was not admissible under the business records exception to the hearsay rule). Turning again to the United States Supreme Court’s decision in Palmer, the Court explained that the basis for the exception was “to facilitate the admission of records which experience has shown to be quite trustworthy.” 318 U.S. at 113. Documents prepared in anticipation of litigation do not share this same trustworthiness. Id. at 114. Therefore, as the state police lab report in question was prepared for the sole purpose of prosecution, I cannot conclude it falls within the ambit of Rule 803(6).

I also cannot join the majority’s alternative analysis, since I disagree that the report falls within Section 6104 of the Judicial Code. That section provides that “official records” shall be admissible ... “unless the sources of information or other circumstances indicate lack of trustworthiness.” 42 Pa.C.S. § 6104. Records prepared in anticipation of litigation are excluded from the business records exception because of their lack of trustworthiness. Palmer, supra. Accordingly, I do not see how the result can be any different under § 6104, which similarly requires that the documents reach a certain level of trustworthiness in order to be admissible.

For these reasons, I respectfully dissent.