

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TION TERRELL,

Defendant-Appellee.

FOR PUBLICATION

August 26, 2010

No. 286834

Wayne Circuit Court

LC No. 08-001533-02

Before: METER, P.J., and BORRELLO and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I concur in the result in this case, as I do not believe that defendant provided an adequate basis for the trial court to grant his motion for new trial pursuant to MCR 6.431(B), whether we apply the test employed by the majority of federal circuits, or that employed under the test enunciated by the Court of Appeals for the First Circuit. Therefore, I do not believe we need to reach the question of which test to apply. However, the majority having reached it, I respectfully suggest that the more appropriate test is that enunciated by the First Circuit.

In *United States v Montilla-Rivera*, 115 F3d 1060, 1066 (1997), the First Circuit held that “the better rule is not to categorically exclude the testimony of a codefendant who asserted his Fifth Amendment privilege at trial under the first prong but to consider it, albeit with great skepticism” The Court recognized that “[i]t is true that there is greater need for caution in considering [such] motions where the new evidence comes from a codefendant who was ‘unavailable’ at trial because he chose to exercise his privilege.” *Id.* Indeed, the First Circuit did not order a new trial, but merely directed that the trial court hold a hearing to hear the “new” evidence, and further noted that even having such a hearing is “[not] required in the usual course.”¹ *Id.* at 1067. The First Circuit’s approach does not open the floodgates for new trials

¹ In *Montilla-Rivera*, the Court reversed the lower court’s denial of a motion for new trial, but only after careful review of the facts and circumstances of the case. *Id.* at 1067-1068. First, the Court noted that although the evidence against the defendant was sufficient, “the evidence was thin.” *Id.* at 1064. Second, the Court noted that the defendant had “diligently attempted to secure [the co-defendants’] testimony.” *Id.* at 1065. The defendant’s attorney tried on two separate occasions to interview the codefendants, but they refused to speak with him. *Id.* at 1065 n 3. He also moved to have the two codefendants subpoenaed to testify and his client had

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based on “newly available” codefendant testimony. Rather, it takes the prudent and limited step of not foreclosing the possibility that justice may require the granting of a new trial in a particular case involving “newly available” evidence.

In this case, defendant is not entitled to a new trial under the First Circuit test. First, there was other evidence admitted that the victim was armed. Thus, defendant was able to present evidence in support of his self-defense claim. Second, defense counsel did not interview or attempt to interview the codefendant, thus undercutting the likelihood that there was a good faith belief that he could offer exculpatory testimony. Third, there was no request for severance or for the codefendant’s trial to occur first, a mechanism that may have avoided the Fifth Amendment problem. Fourth, there was no attempt to call the codefendant at trial and to require him to assert his Fifth Amendment privilege outside the presence of the jury. Fifth, there was no offer of proof at trial as to what defendant believed his codefendant could testify to if he did not assert his Fifth Amendment privilege. These failures strongly suggest that the issue in this case related more to the desirability of an appellate parachute rather than to the existence of known exculpatory testimony that was genuinely unavailable prior to conviction.

I agree with the majority that post-conviction claims of exculpatory testimony from a codefendant should be viewed with a high index of suspicion. However, that is a matter best addressed on a case-by-case basis and not with a bright line rule. I also recognize that the majority does not view the rule it adopts today as foreclosing such a case-by-case approach. Indeed, the majority made this clear by positing that “there may be cases where [a codefendant’s post-trial or post-conviction exculpatory statements] does indeed constitute newly discovered evidence.” I believe the majority and I are in agreement that a trial court should not be precluded from granting a new trial where the defendant made appropriate efforts to obtain the testimony at trial and where the trial court, in an exercise of sound discretion after hearing all the evidence, concludes that a miscarriage of justice may have occurred. I am concerned, however, that this critical caveat to the rule otherwise excluding “newly available evidence” may be lost in subsequent cases. I believe that in order to assure that it is not, the more prudent course is to adopt the First Circuit standard, which more explicitly provides for it.

/s/ Douglas B. Shapiro

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“insisted that the testimony would exculpate him rather than hurt him.” *Id.* At trial, the codefendants informed the court that they would not testify despite defendant’s request and the court made a determination that the codefendants’ attorneys each advised his client not to testify while awaiting sentencing because the testimony might incriminate them with regard to other transactions and because they were still awaiting sentencing. *Id.* at 1065. Finally, the Court noted that the new testimony was neither cumulative nor implausible. *Id.* at 1066.