

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMES DEON MEREDITH, ANGELA LEE
BARNES, and CECIL DASTER PEOPLES,

Defendants-Appellees.

UNPUBLISHED

March 27, 1998

No. 201370

Oakland Circuit Court

LC Nos. 96-146088-FC;

96-146089-FC;

96-146092-FC

Before: Gage, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

The prosecution appeals by leave granted from December 1996 orders of the Oakland Circuit Court denying the prosecution's motion to admit the preliminary examination testimony of a prosecution witness who would be otherwise unavailable to testify at trial and denying the prosecution's motion for reconsideration. We affirm.

The defendants in this case were indicted by an Oakland County grand jury for conspiracy to deliver 650 grams or more of a mixture containing cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i) and MCL 750.157a; MSA 28.354(1). A preliminary examination for defendants Meredith and Barnes was held in the district court.¹ Lavinia Peoples testified at the preliminary examination on behalf of the prosecution.² The essence of her testimony was that she was stopped by an Auburn Hills police officer on August 23, 1991, for speeding as she was traveling northbound on I-75. When she was unable to produce any identification, she was arrested and the vehicle was searched incident to that arrest. The officer discovered a brown paper bag in the vehicle containing a white powdery substance in brick form that was later identified as cocaine. Ms. Peoples testified that she had obtained the cocaine in Detroit from Walter Moore and another person referred to as "Smoot." She testified that she regularly traveled from Saginaw to Detroit to purchase cocaine for her cousin, defendant Peoples, who would give her the money to purchase the cocaine. Ms. Peoples would purchase the cocaine in Detroit, return to Saginaw, and deliver the cocaine to defendant Peoples.

At the conclusion of the proofs, the district court ruled that venue was improper in Oakland County. In orders entered on May 12, 1992, the district court dismissed the charges against defendants Meredith and Barnes on the basis of improper venue.

A preliminary examination regarding defendant Peoples was held on January 12, 1993. At that time, defendant Peoples stipulated to the use of the transcript from the earlier preliminary examination involving defendants Meredith and Barnes. Defendant Peoples waived his right to cross-examine the witnesses. The district court again found that venue was improper in Oakland County, and, in an order entered on January 12, 1993, dismissed the charge against defendant Peoples. The circuit court affirmed the ruling of the district court that venue was improper in Oakland County.

The prosecution appealed the dismissal of the charges against the defendants to this Court. This Court reversed the rulings of the district court and circuit court and held that venue was proper in Oakland County. The matter was remanded to the Oakland Circuit Court for arraignment. *People v Meredith (On Remand)*, 209 Mich App 403; 531 NW2d 749 (1995). Defendants were subsequently bound over to the circuit court as charged.

Before trial, on November 19, 1996, the prosecution moved to admit Ms. Peoples' preliminary examination transcript. A hearing was held on December 2 and 3, 1996. The prosecution sought to introduce Ms. Peoples' preliminary examination testimony because her attorney stated that Ms. Peoples intended to invoke her Fifth Amendment privilege to not incriminate herself at trial. Although the record is not entirely clear, Ms. Peoples wished to assert her Fifth Amendment privilege to not testify at trial because of the possibility of subjecting herself to other criminal charges, specifically perjury.

The trial court ruled that Ms. Peoples, because of the assertion of her Fifth Amendment privilege to not testify at trial, was unavailable as a witness under MRE 804(a)(1). The trial court further ruled that although the preliminary examination testimony would be admissible under MRE 804(b)(1) (former testimony), Ms. Peoples' preliminary examination testimony could not be admitted at trial because there was no "indicia of reliability" as required under the Confrontation Clause. US Const, Am VI; Const 1963, art 1, § 20. Specifically, the trial court ruled that because of Ms. Peoples' claim that she would possibly subject herself to perjury at trial if she testified, then the testimony given at the preliminary examination was unreliable.

A trial court's determination of an evidentiary issue is generally reviewed for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). Constitutional issues, however, are not accorded such deference. Constitutional issues are reviewed de novo on appeal. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). In order for a hearsay statement (here, Ms. Peoples' preliminary examination testimony) to be admissible as substantive evidence against the defendants in this case, the statement must be admissible under the Michigan Rules of Evidence and cannot violate the defendants' rights under the Confrontation Clause. *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993); *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994); *People v Petros*, 198 Mich App 401, 409; 499 NW2d 784 (1993).

MRE 804(b)(1) - FORMER TESTIMONY

MRE 804(b)(1) provides:

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

In this case, the trial court declared that Ms. Peoples was unavailable as a witness because of her assertion of her Fifth Amendment privilege to not testify at trial.³ The trial court's ruling in this regard was not erroneous. MRE 804(a)(1); *People v Richardson*, 204 Mich App 71, 74; 514 NW2d 503 (1994); *Petros, supra*, p 414.

Having found that the witness was unavailable at trial, the trial court was then required to determine whether the defendants had the opportunity and similar motive to develop the former testimony at the preliminary examination by direct, cross, or redirect examination. MRE 804(b)(1). The trial court found that defendants Meredith and Barnes not only had the opportunity to cross-examine Ms. Peoples at their preliminary examination conducted in 1992, but that they did in fact cross-examine her. Defendant Peoples also had the opportunity to cross-examine Ms. Peoples, but waived the right to do so. MRE 804(b)(1) only requires that the party against whom the testimony is being offered *had an opportunity and similar motive* to develop the former testimony. Defendants Meredith and Barnes clearly had the opportunity and similar motive to do so, and did, in fact, cross-examine Ms. Peoples. Similarly, with respect to defendant Peoples, he waived his right to cross-examine the witnesses at the preliminary examination and stipulated to the use of the transcript of Ms. Peoples' testimony, but also had the opportunity and similar motive to cross-examine Ms. Peoples.

Accordingly, the trial court did not err in ruling that Ms. Peoples' preliminary examination testimony was admissible under MRE 804(b)(1) as former testimony.

THE CONFRONTATION CLAUSE

In order for the preliminary examination testimony to be admissible as substantive evidence against the defendants, however, it must not violate the defendants' rights under the Confrontation Clause. *Poole, supra*, pp 157, 162. In order to be admissible under the Confrontation Clause, there must be a showing that the declarant is unavailable and that the statement bears an adequate indicia of reliability. *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980); *Poole, supra*, p 162. Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. *Roberts, supra*, p 66. We need not decide whether MRE 804(b)(1) constitutes a firmly rooted hearsay exception because we agree with the trial court that the preliminary examination testimony does not bear an adequate indicia of reliability where Ms. Peoples has asserted her Fifth

Amendment privilege against self-incrimination on the ground that she may face perjury charges if she testifies at trial.

Our Supreme Court has explained that the “indicia of reliability necessary to establish that a hearsay statement has particularized guarantees of trustworthiness sufficient to satisfy Confrontation Clause concerns must exist by virtue of the inherent trustworthiness of the statement and may not be established by extrinsic, corroborative evidence.” *Poole, supra*, p 164. “Courts should also consider any other circumstance bearing on the reliability of the statement.” *Id.*, p 165. The totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is not able to cross-examine the declarant. *Id.*

The trial court did not err in ruling that Ms. Peoples’ preliminary examination testimony was unreliable such that it could not be admitted as substantive evidence at trial. Ms. Peoples specifically stated at the hearing that she would assert her Fifth Amendment privilege against self-incrimination because she would possibly subject herself to perjury charges if she testified at trial. Ms. Peoples’ assertion of her Fifth Amendment privilege on this ground must mean that she committed perjury at the preliminary examination and that such false testimony would be revealed at trial. On this basis, her preliminary examination testimony must be considered to be inherently unreliable. Therefore, the totality of the circumstances indicates that Ms. Peoples’ preliminary examination testimony is not sufficiently reliable to allow its admission as substantive evidence against defendants, especially where the defendants would be unable to cross-examine Ms. Peoples at trial.

Accordingly, we conclude that the trial court did not abuse its discretion in denying the prosecution’s motion to admit Ms. Peoples’ preliminary examination testimony at trial where she would be unavailable as a witness. Admission of the testimony would violate the Confrontation Clause because the testimony is inherently unreliable.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Kathleen Jansen

Gage, J., did not participate.

¹ This Court has not been furnished with copies of the preliminary examination transcripts. Although it is unclear, it appears that the preliminary examination was held on March 13 and 14, 1992. The actual date of the preliminary examination is not dispositive of the issue raised on appeal.

² Because this Court has not been provided with copies of the preliminary examination transcripts, Ms. Peoples’ testimony is taken from this Court’s opinion in *People v Meredith (On Remand)*, 209 Mich App 403, 406; 531 NW2d 749 (1995).

³ We note that the prosecutor, in footnote three of its appellate brief, contends that Ms. Peoples could not validly assert her privilege against self-incrimination because she appeared to be concerned that if

she testified at trial, then she would commit perjury, but her concern did not appear to be that she had already committed perjury in the past. We do not agree with the prosecutor's interpretation of the hearing transcript in this regard, and further note that the prosecutor did not argue before the trial court that Ms. Peoples could not validly assert her Fifth Amendment privilege to not incriminate herself. At the hearing on December 2, 1996, Ms. Peoples' attorney stated that Ms. Peoples was not *admitting* to have committed perjury (presumably so that such an admission could not be used against Ms. Peoples), however, Ms. Peoples did state that she was asserting her Fifth Amendment right to not testify at trial because she believed if she did testify, then she would possibly subject herself to perjury charges. We understand this to mean that Ms. Peoples was asserting that she perjured herself at the preliminary examination and that such would be revealed by her testimony at trial. Further, this question of whether Ms. Peoples was validly asserting her Fifth Amendment privilege to not incriminate herself at trial was not raised by the parties below. Therefore, we decline to remand this matter to the circuit court for it to reconsider the validity of the assertion of the Fifth Amendment privilege against self-incrimination as requested by the prosecutor in the appellate brief. Moreover, we note that the prosecutor could grant immunity to Ms. Peoples on this issue, thereby precluding her assertion of her privilege to not incriminate herself at trial. See *In re Watson*, 293 Mich 263, 274; 291 NW 652 (1940); *In re Cohen*, 295 Mich 748, 751; 295 NW 851 (1940).