**[Cite as *State v. Carter*, 2017-Ohio-8220.]**

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO, | ) | CASE NO. 15 MA 0225 |
| | ) | |
| PLAINTIFF-APPELLEE, | ) | |
| | ) | |
| VS. | ) | OPINION AND |
| | ) | JUDGMENT ENTRY |
| KALONTAE CARTER, | ) | |
| | ) | |
| DEFENDANT-APPELLANT. | ) | |

CHARACTER OF PROCEEDINGS: Motion for Reconsideration; Motion to Certify a Conflict

JUDGMENT: Denied.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
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For Defendant-Appellant:

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JUDGES:
Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Date: September 28, 2017

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PER CURIAM.

**{¶1}** On August 30, 2017, this court affirmed the aggravated murder conviction of Defendant-Appellant Kalontae Carter. On September 7, 2017, Appellant filed a timely pro se application for reconsideration under App.R. 26(A)(1). Within his application, he also asks this court to certify a conflict. For the following reasons, Appellant's application for reconsideration is denied, and the request to certify a conflict contained therein is also denied.

**{¶2}** The standard for reviewing an application for reconsideration is whether the application calls to the attention of the court a legally unsupportable holding or an obvious error in its decision, or whether it points to an issue that should have been but was not fully considered. *Cosgrove v. Omni Manor*, 7th Dist. No. 15 MA 0207, 2017-Ohio-646, ¶ 8, citing *Niki D'Atri Ents. v. Hines*, 7th Dist. No. 13 MA 0057, 2014-Ohio-803, ¶ 3. An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusion reached and the logic used by an appellate court. *Id.*

**{¶3}** A party seeking to have a conflict certified has a duty to file a "motion" to certify a conflict which "shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed." App.R. 25(A). "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." Article IV, Section 3(B)(4), Ohio Constitution. "[T]he alleged conflict must be on a rule of law—not facts." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993). Furthermore, the rule of law set forth in the case of another appellate district must be upon "the same question" ruled upon by the court in the case wherein certification is sought. *Id.* It is improper to certify a conflict unless there is "a true and actual conflict on a rule of law" *Id.* at 599.

**{¶4}** Initially, Appellant asks this court to reconsider the decision on his first assignment of error where he argued: "The Trial Court erred in permitting a jailhouse

snitch to testify to an alleged out-of-court statement made by a co-defendant in the trial of Defendant-Appellant as it both constituted inadmissible hearsay and violated his confrontation rights." Appellant's application for reconsideration generally argues he had the right to confront his accusers. He then claims our decision conflicts with *State v. Weimer*, 2016-Ohio-3116, 66 N.E.3d 50 (11th Dist.). Besides seeking reconsideration, he asks that we certify a conflict with the *Weimer* case.

**{¶5}** In ruling on Appellant's first assignment of error, this court found the statement of his co-defendant (who died before trial) to an old friend while they were incarcerated in the county jail was non-testimonial for confrontation clause purposes. *State v. Carter*, 7th Dist. No. 15 MA 0225, 2017-Ohio-7501, ¶ 28-36, citing, e.g., *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (describing certain "statements from one prisoner to another" as "clearly nontestimonial" for the purposes of the confrontation clause), and *Ohio v. Clark*, ––– U.S. ––––, 135 S.Ct. 2173, 2180-2181, 192 L.Ed.2d 306 (2015) (a statement cannot fall within the confrontation clause unless its primary purpose was testimonial). We fully explained the evolution of the confrontation clause law. *Carter*, 7th Dist. No. 15 MA 0225, 2017-Ohio-7501 at ¶ 28-42. Appellant fails to elucidate any cause for reconsideration of our decision finding the pertinent statement was not testimonial.

**{¶6}** At most, he simply disagrees with our conclusion on the non-testimonial nature of the declaration and/or our refusal to adopt his argument that the statement against interest hearsay exception in Evid.R. 804(B)(3) was inapplicable because the declarant, who incriminated both himself and Appellant, was a participant in the offense. Appellant's argument on reconsideration is very general, and in seeking certification of a conflict, he fails to "specify the issue proposed for certification" as required by App.R. 25(A). Appellant's citation to *Weimer* suggests he believes the existence of Evid.R. 801(D)(2)(e) (which excepts certain co-conspirator statements from the definition of hearsay) eliminates the ability to use hearsay exceptions if the declarant could be considered a co-conspirator. However, this argument would be incorrect.

**{¶7}** Evid.R. 801(D) sets forth certain statements that are not considered to be hearsay, i.e., they are excluded from the definition of hearsay. For instance, a statement is not hearsay if: "The statement is offered against a party and is * * * a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." Evid.R. 801(D)(2)(e).[1] Distinct from the statement against interest *exception* outlined further infra, a statement which qualifies for the Evid.R. 801(D)(2)(e) exclusion need not be against the co-conspirator's interest, the co-conspirator need not be unavailable, and only the state can use this rule in a criminal case. If a co-conspirator's statement was made during the course of and in furtherance of the conspiracy and there is independent proof of the conspiracy, then the statement can be admitted *under* Evid.R. 801 as it is *excluded* from the definition of hearsay set forth in that rule. If a co-conspirator's statement was not made during the course of and in further of the conspiracy or if there is no independent proof of the conspiracy, then the statement is *not excluded* from the definition of hearsay contained in Evid.R. 801.

**{¶8}** However, the inapplicability of Evid.R. 801(D)(2)(e) does not address the question of whether a hearsay exception set forth in Evid.R. 803 or 804 applies. If no exclusion within Evid.R. 801 applies to remove a statement from the definition of hearsay, then the analysis moves to Evid.R 802 which provides hearsay is not admissible unless an exception applies. Notably, there are *exclusions* from the definition of hearsay, and then there are *exceptions* to the rule stating hearsay is inadmissible. For instance, Evid.R. 803 contains exceptions to the rule against the

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[1] In whole, Evid.R. 801(D)(2) states the following type of statements are not hearsay: "*Admission by Party-Opponent*. The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." In other words, a co-conspirator's statement meeting the elements in Evid.R. 801(D)(2)(e) is akin to a statement of the party-opponent himself. Yet, if the co-conspirator's statement does not meet those elements, it is not akin to a statement of the party-opponent.

admission of hearsay which apply whether or not the declarant is available, such as the excited utterance exception. *See* Evid.R. 803(2). The excited utterance exception does not become inapplicable merely because the declarant could be considered a co-conspirator. *See, e.g., State v. Smith*, 87 Ohio St.3d 424, 433, 721 N.E.2d 93 (2000). Likewise, the exceptions in Evid.R. 804, which only apply if the declarant is unavailable (such as here where the declarant was dead), do not become inapplicable where the declarant could be considered a co-conspirator.

**{¶9}** Pertinent to this case, Evid.R. 804 provides a hearsay exception where the declarant is unavailable and where the statement "so far tended to subject the declarant to * * * criminal liability * * * that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true." Evid.R. 804(B)(3). The rule further provides: "A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement." *Id.*

**{¶10}** In addressing Appellant's arguments on appeal, we cited Supreme Court cases applying the statement against interest exception to declarations by accomplices. *Carter*, 7th Dist. No. 15 MA 0225, 2017-Ohio-7501 at ¶ 23, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 41-57 (where the Court found admissible statements by the mastermind which incriminated himself and the defendant), and *State v. Issa*, 93 Ohio St.3d 49, 58-59, 752 N.E.2d 904 (2001) (where a subpoenaed co-defendant who refused to testify after pleading his rights under the Fifth Amendment was considered unavailable, his confession was admissible as a statement against interest). The exclusion from the definition of hearsay under Evid.R. 801(D)(2)(e) is one vehicle the state can use to admit a co-conspirator's statement where it was made during and in furtherance of the conspiracy (and there is independent proof of the conspiracy).

**{¶11}** The failure of a statement to meet the elements of this exclusion does not preclude the application of an exception contained in subsequent rules. *See, e.g., State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 95-97

(alternatively discussing under multiple rules, including Evid.R. 801(D)(2)(e) and Evid.R. 804(B)(3), the admissibility of an accomplice's statements implicating the defendant); *State v. Toney*, 7th Dist. No. 14 MA 0083, 2016-Ohio-3296, ¶ 61-62 ("even if the testimony was not sufficient to establish an independent proof of conspiracy, the statements were admissible as a statement against interest. * * * If the statements do not qualify as statements of co-conspirators, then the statements would be hearsay [which] is not admissible unless subject to a relevant exception."); *State v. Newsome*, 3d Dist. No. 12-12-03, 2012-Ohio-6119, ¶ 39, fn. 3 (refusing to address an inadmissibility argument under Evid.R. 801(D)(2)(e) where the court determined the declaration was admissible under the statement against interest exception).

**{¶12}** Accordingly, Appellant incorrectly suggests the statement against interest exception in Evid.R. 804(B)(3) is inapplicable merely because the declarant could be considered a co-conspirator (whose statement was not made during or in furtherance of the conspiracy). The Eleventh District's *Weimer* case did not express a position to the contrary. Although *Weimer* found error in admitting a co-conspirator's statement under Evid.R. 801(D)(2)(e) because the elements of that exclusion were not met, the court did not discuss the statement against interest exception to the hearsay rule. In addressing Appellant's appeal, we found the deceased co-defendant's testimony admissible under the statement against interest exception to the hearsay rule and did not discuss the alternative exclusion from the hearsay definition contained in Evid.R. 801(D)(2)(e) (as there was no argument the jailhouse statement to another inmate was made during and in the furtherance of the conspiracy). As aforementioned, an appellate court cannot certify a conflict unless there is "a true and actual conflict on a rule of law" meaning "the alleged conflict must be on a rule of law—not facts" and the rulings made in the two cases must be upon "the same question." *Whitelock*, 66 Ohio St.3d at 596, 599. As the *Weimer* case did not rule on or consider Evid.R. 804(B)(3) and this is the hearsay exception we found applicable in Appellant's case, we cannot certify a conflict.

**{¶13}** Appellant also asks this court to reconsider our decision on his third assignment of error wherein he claimed he was denied the effective assistance of trial counsel. Under this assignment of error, Appellant set forth the following assertions: trial counsel's arguments in objecting to the admission of his co-defendant's statement were not thorough; a motion to suppress Appellant's statements to police should have been filed; counsel's request to re-watch a video of Appellant's statement suggested he was unprepared to formulate objections to any irrelevant portions; counsel should have objected to a detective's testimony as to what a street term meant; and counsel should have cross-examined a ballistics expert on an alternative explanation for the presence of ammunition produced by a "third" weapon. We fully addressed these claims. *Carter*, 7th Dist. No. 15 MA 0225, 2017-Ohio-7501 at ¶ 70-92. Appellant has not called to our attention a legally unsupportable holding or an obvious error in our decision. He is simply disagreeing with the conclusion reached on his ineffective assistance of trial counsel arguments.

**{¶14}** Finally, Appellant alludes to his fifth assignment of error and argues we should have concluded his trial counsel rendered ineffective assistance of counsel by failing to argue Appellant was denied an amenability hearing. We addressed this concern but then explained how a superseding Ohio Supreme Court case eliminated the issue. On this topic, Appellant's fifth assignment of error argued: "The mandatory transfer of Kalontae, an alleged juvenile offender, to the adult court system violated his rights to due process and equal protection, pursuant to *State v. Aalim* * * *." We pointed out an attorney's failure to raise the constitutionality of mandatory bindover did not waive the issue recognized in *State v. Aalim*, __ Ohio St.3d __, 2016-Ohio-8278, __ N.E.3d __ (*"Aalim I"*). *Carter*, 7th Dist. No. 15 MA 0225, 2017-Ohio-7501 at ¶ 111 (citing Supreme Court cases applying *Aalim I* even where there had been no objection below). However, as we explained, the Supreme Court reconsidered its *Aalim I* decision and declared the mandatory transfer of juveniles was not unconstitutional. *State v. Aalim*, __ Ohio St.3d __, 2017–Ohio–2956, __ N.E.3d __ ("*Aalim II*"). Either way, trial counsel's failure to raise the issue

below was not ineffective assistance of counsel. Appellant's reconsideration argument on this topic lacks any foundation.

**{¶15}** For the reasons expressed above, Appellant's application for reconsideration is denied, and the request to certify a conflict contained with the application is denied as well.

Robb, P.J., concurs.

Donofrio, J., concurs.

Waite, J., concurs.