NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. BOYD C. DAVIS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 117 EDA 2013

Appeal from the Judgment of Sentence December 18, 2012
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0004014-2011

BEFORE: BOWES, DONOHUE, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.: **FILED DECEMBER 04, 2013**

Boyd C. Davis appeals from the judgment of sentence of eighteen to thirty-six months imprisonment followed by seven years of probation. We affirm.

On September 21, 2012, a jury convicted Appellant of numerous property crimes. The offenses included nineteen counts each of theft by unlawful taking, theft by failure to make required disposition of funds received, and receiving stolen property, thirteen counts of theft by deception, ten counts of forgery, and five counts of dealing in the proceeds of unlawful activity. The convictions arose due to actions with respect to his parents' assets.

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* Former Justice specially assigned to the Superior Court.

Specifically, in 2005, Appellant's parents, Boyd Davis Sr. and Nelda Wynn Davis, began to decline mentally, and, by the time of Appellant's criminal activities, his parents were mentally incapacitated. From January 2005 through August 2007, Appellant took advantage of his parents' mental infirmities by stealing their assets. Appellant depleted a Morgan Stanley investment account of over $1.2 million by forging his mother's name on checks, which he deposited either into accounts in his sole name or into accounts held by Appellant and his parents jointly. When the money was deposited in a joint account, Appellant would then transfer the assets from the joint account into an individual account in his name alone. Appellant also mortgaged his parents' home to secure a loan for $500,000 and personally retained the loan proceeds.

On August 29, 2007, an orphans' court determined that Mrs. Davis was partially incapacitated and appointed a guardian, Steven Lagoy, Esquire, over her estate. Mr. Lagoy uncovered Appellant's activities with respect to his parents' money. At the criminal trial at issue herein, the Commonwealth was permitted to introduce into evidence the orphans' court order that adjudicated Mrs. Davis partially incapacitated. The Commonwealth also produced numerous witnesses who confirmed the mental state of the victims during the pertinent time frame. In this appeal that followed imposition of judgment of sentence, Appellant raises these contentions:

> I. Whether the trial court abused its discretion in admitting a 2007 orphan's court order finding the defendant's mother, an alleged victim, to be partially incapacitated on the

> grounds that the order constitutes inadmissible hearsay, a violation of defendant's right to confrontation, confuses and misleads the jury, and precluded the defense from calling its own witnesses[?].

Appellant's brief at 8.

The following procedural events are pertinent. Appellant filed a motion *in limine* prior to trial seeking to prevent introduction by the Commonwealth of an order entered by the Orphans' Court Division of the Chester County Court of Common Pleas on August 29, 2007. The order in question provided in material part:

> AND NOW, this 29th day of August, 2007, based upon evidence received and the record and upon agreement of counsel for the parties, the Court finds by clear and convincing evidence that Nelda Wynn Davis is a partially incapacitated person and she is hereby adjudicated as such. The Court finds that Nelda Wynn Davis suffers from an age-related cognitive decline, a condition which partially impairs her capacity to receive and evaluate information effectively and to make and communicate decisions concerning her management of financial affairs.

Commonwealth's Exhibit 1. The order thereafter contained routine directives requiring Appellant to submit materials for Mr. Lagoy's review, authorizing Mr. Lagoy to assume control of Mrs. Davis's assets and to pay her debts, allowing Mrs. Davis's children and grandchildren to visit her without impediment from Appellant, and revoking a power of attorney that Mrs. Davis had executed.

The trial court denied the motion *in limine* and permitted the Commonwealth to introduce the document in question. Appellant raises various challenges to that decision. Initially, we note that when we review

> the denial of a motion *in limine,* we apply an evidentiary abuse of discretion standard. ***Commonwealth v. Rivera****,* 603 Pa. 340, 983 A.2d 1211 (2009). "[A] motion *in limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to trial, which is similar to a ruling on a motion to suppress evidence, [therefore] our standard of review is the same as that of a motion to suppress." ***Commonwealth v. Mitchell****,* 588 Pa. 19, 902 A.2d 430, 455 (2006). The admission of evidence is committed to the sound discretion of the trial court, and our review is for an abuse of discretion. ***Commonwealth v. Baumhammers****,* 599 Pa. 1, 960 A.2d 59 (2008).

Commonwealth v. Rosen, 42 A.3d 988, 993 (Pa. 2012).

Appellant's first contention is that the order was hearsay introduced for the truth of the matter asserted. The trial court concluded that the public records exception to the hearsay rule applied to the document in question. "Public records have long constituted an exception to the hearsay evidence rule and are admissible in judicial proceedings. While the Pennsylvania Supreme Court declined to adopt the 'public records exception' in its Rules of Evidence, that exception is currently embodied in Section 6104 of the Judicial Code[.]" 10 Pa. Practice § 20:5 (footnotes omitted); ***see Commonwealth v. Stallworth***, 781 A.2d 110, 128 n.2 (Pa. 2001) (noting that public records exception is not adopted in Pennsylvania Rules of Evidence but that the exception is outlined in 42 Pa.C.S. § 6104); ***Commonwealth v. Little***, 512 A.2d 674 (Pa.Super. 1986) (applying public records hearsay exception to certificate of accuracy issued for a breathalyzer testing machine). Section 6104 of Title 42, which has prior versions dating back to 1823, provides:

> **(a) General rule.--**A copy of a record of governmental action or inaction authenticated as provided in section 6103 (relating to proof of official records) shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.
>
> **(b) Existence of facts.--**A copy of a record authenticated as provided in section 6103 disclosing the existence or nonexistence of facts which have been recorded pursuant to an official duty or would have been so recorded had the facts existed shall be admissible as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

In the present case, Appellant defended this criminal case on the basis that his parents approved of his gifting of their assets to himself. The Commonwealth countered with proof that the victims were incapacitated. It presented various witnesses who attested to Appellant's parents' mental state as well as the order in question. The order was introduced to establish that a court had taken the action of declaring Mrs. Davis partially incapacitated and falls within the public records exception to the hearsay rule. Herein, Appellant simply fails to cite to a single case suggesting that the order in question did not qualify under the outlined exception. Hence, we reject his first claim on appeal.

Appellant also maintains that his Confrontation Clause rights were violated by introduction of the order. The issue of whether the defendant's Confrontation Clause rights have been violated "is a question of law, for which our standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Yohe***, 2013 WL 5826045, 8 (Pa. 2013). Under the

Confrontation Clause, a defendant has the right to confront any witnesses against him. ***Id***. Prior to the decision in ***Crawford v. Washington,*** 541 U.S. 36 (2004), the United States Supreme Court took the view that "the Confrontation Clause did not bar the admission of out-of-court statements that fell within a firmly rooted exception to the hearsay rule." ***Williams v. Illinois***, 132 S.Ct. 2221, 2223 (2012); ***see Ohio v. Roberts***, 448 U.S. 56 (1980) (no longer valid under ***Crawford***). The public records exception to the hearsay rule is rooted in the common law. Hence: "At the time the Constitution was adopted, common law recognized the admissibility of an official record as an exception to the Confrontation Clause." ***Commonwealth v. Carter***, 932 A.2d 1261, 1269 n.7 (Pa. 2007).

However, in ***Crawford***, the Court indicated that a statement can be inadmissible under the Confrontation Clause even if it is subject to an exception to the hearsay rule if the statement in question is testimonial in nature. It ruled that testimonial statements of a non-testifying witness can be introduced into evidence only when both the declarant is unavailable and the defendant had a previous opportunity to cross-examine the witness. ***Crawford***, ***supra*** at 59. Thus, after dissemination of the ***Crawford*** decision, the key question arising was what type of statement qualifies as testimonial in nature and is thus subject to ***Crawford***. ***See Williams***, ***supra*** at 2223 (collecting cases). The seminal definition of testimonial statements was outlined in ***Davis v. Washington,*** 547 U.S. 813 (2006),

where the Court held that whether a statement is testimonial depends on its primary purpose. Specifically, if the driving reason for procurement of the statement is "to establish or prove past events potentially relevant to later criminal prosecution," then the statement becomes testimonial and subject to ***Crawford***. ***Id***. at 822. Under ***Crawford***, scientific reports prepared by a non-testifying witness and which establish an element of the crime, such as a chemical analysis of a drug for purposes of a narcotics conviction and blood analysis prepared for a driving under the influence conviction, cannot be introduced without offending the Confrontation Clause. ***Bullcoming v. New Mexico***, 131 S.Ct. 2705 (2011); ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009). ***But see Williams***, ***supra***. ***Bullcoming*** and ***Melendez-Diaz*** indicate that such reports are testimonial since they establish a fact necessary to convict and are prepared solely for the purposes of a criminal prosecution.

In the present case, the orphans' court order in question was not prepared, to any extent, in anticipation of a criminal prosecution. Additionally, the order did not establish or prove past events potentially relevant to later criminal prosecution. It solely was a determination relating to Mrs. Davis's mental state for purposes of determining the necessity for the appointment of a guardian of the estate. Hence, we conclude that the order was not testimonial as envisioned by ***Crawford*** and its progeny.

Appellant additionally avers that the order was confusing and misleading since it "determined Mrs. Davis' capacity based on the civil standard for capacity and not the criminal standard." Appellant's brief at 22. Under 18 Pa.C.S. § 311(a),

> The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the arm or evil sought to be prevented by the law defining the offense.

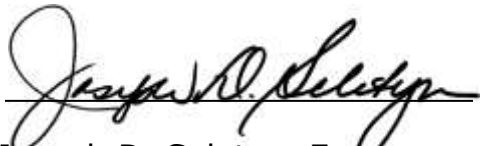
However, § 311(c)(1) indicates that "assent does not constitute consent if it is given by a person **who is legally incapacitated** to authorize the conduct charged to constitute the offense[.]" (emphasis added). The flaw in Appellant's position is that there is no "criminal standard" for legal incapacity, and there is no portion of the Crimes Code containing a definition of legal incapacity. Appellant certainly fails to refer us to either a statute or a case that provides a "criminal" definition for legal incapacity. The procedures for determining that state of mind are contained in the Probate Estates and Fiduciaries Code and are relegated to the jurisdiction of the orphans' court. Mrs. Davis's capacity to consent to Appellant's actions had to be determined by the only standard available for legal incapacity, which is that outlined in the civil setting. We therefore reject his contention.

Appellant's final complaint is that the order prevented him from calling witnesses to rebut the Commonwealth's proof regarding Mrs. Davis's mental capacity. We disagree. Appellant was free to present any witness whom

Appellant wished to present regarding Mrs. Davis's mental state. The Commonwealth was permitted to use the court order to impeach the witnesses' perception of the victim's mental acuity because the document was subject to a hearsay exception and its admission was permitted under the Confrontation Clause. Appellant provides no legal authority that would prevent the Commonwealth from using an admissible document for impeachment purposes merely because it was detrimental to the position of his witnesses that Mrs. Davis was mentally sound and capable of consenting to Appellant's transfer of nearly all of her assets into his name.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013