NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellant v. DAVID BECHTOLD, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2056 EDA 2013

Appeal from the Order Entered June 19, 2013
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0002627-2012

BEFORE: BENDER, P.J.E., PANELLA, J., and LAZARUS, J.

MEMORANDUM BY BENDER, P.J.E. **FILED MAY 02, 2014**

The Commonwealth appeals from the trial court's order granting David Bechtold's (Appellee's) motion *in limine*. The Commonwealth granted Appellee immunity, pursuant to 42 Pa.C.S. § 5947, for the testimony he provided against a co-conspirator at a preliminary hearing. Subsequently, Appellee filed a motion *in limine* to preclude the admission at his own trial of any and all unimmunized statements that he made prior to his immunized testimony. After careful review, we reverse.

> On or about January 15, 2012, two assailants, armed with a handgun, forcibly entered the home of Carrie Smith, an elderly female, who resided at 2466 Hillside Avenue, Wilson Borough, Pennsylvania. The assailants, apparently aware that Ms. Smith had money, jewelry and other valuables within her home, placed the handgun to Ms. Smith's head and demanded that she either turn over her valuables to them or disclose their location within her house. Eventually, the assailants took approximately $50,000 in cash, jewelry and other valuables from the victim's

> home. The two assailants then left Ms. Smith's home, allegedly got into a vehicle driven by a third male, and fled the scene.
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> The Commonwealth alleged that Ms. Smith suffered a heart attack, was hospitalized, and eventually died as a result of the trauma suffered during the January 15, 2012, burglary/robbery.

Trial Court Opinion (TCO), 9/13/13, at 1-2.

In the course of their investigation, police spoke with Appellee who, at the time, was seventeen years old. Police first questioned him on January 27, 2012, regarding the January 15, 2012 home invasion. Appellee denied any involvement at that time. Upon further questioning on April 30, 2012, however, Appellee admitted to conspiring with his cousin, Rebecca Johnson, and her boyfriend, Rogel Suero, to burglarize Johnson's grandmother's house. Initially, the plan was to commit the burglary when Smith's home was unoccupied. After an attempt to burglarize the home was thwarted by Smith's unanticipated presence, however, Johnson suggested robbing Smith at gunpoint. A plan was then adopted for Suero and another male to conduct the home invasion while Appellee acted as a getaway driver. Appellee waited outside while Suero and his cohort entered Smith's home. He recalled seeing them exit the house with a bag which they placed in the trunk. Appellee was paid $500 by Johnson for his participation.

Johnson, Suero and Appellee were each charged with robbery, burglary, aggravated assault, reckless endangerment, conspiracy and other

offenses related to the January 15, 2012 home invasion. Johnson and Suero were also charged with second degree murder.[1]

Appellee testified at Johnson's preliminary hearing. However, prior to Suero's preliminary hearing, which was scheduled for May 1, 2013, Appellee indicated his intent to invoke his Fifth Amendment right against self-incrimination if called to testify. In response, the Commonwealth granted Appellee immunity for his testimony pursuant to 42 Pa.C.S. § 5947. The order granting Appellee immunity was drafted by the Commonwealth and signed by the motions judge. The order read as follows:

> AND NOW, this 30th day of April, 2013, the undersigned Motions' Judge, in the absence of the assigned Judge, and further in accordance with the provisions of 42 Pa.C.S.A. §[ ]5947 and upon application of the District Attorney, it is hereby ORDERED, ADJUDGED, and DECREED:
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> 1. The Defendant, David Bechtold, shall not be excused from testifying at a preliminary hearing in the matter of Commonwealth v. Rogel Suero, OTN T-255758-6 on the grounds that the testimony or evidence required of the Defendant may tend to incriminate the Defendant or otherwise be subject to a penalty or forfeiture.
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> 2. No testimony, information or other evidence, directly or indirectly derived from the testimony of the Defendant at the preliminary hearing presently scheduled for May 1, 2013 may be used against the Defendant, except in the prosecution against the Defendant for perjury, false swearing, or … contempt of Court for failing to comply with this Order.

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[1] Although the victim died two months after the home invasion, the coroner ruled her death a homicide.

Order (hereinafter "immunity order"), 4/30/13, at 1-2. In accordance with the immunity order, Appellee testified against Suero at Suero's May 1, 2013 preliminary hearing.

On May 28, 2013, Appellee filed a motion *in limine* to prohibit the admission of any and all unimmunized statements and testimony he gave prior to Suero's preliminary hearing. Motion *in Limine*, 5/28/13, ¶ 11. By opinion and order dated June 19, 2013, the trial court granted the motion. The Commonwealth then filed a motion for reconsideration on June 24, 2013. As the trial court did not act on the motion for reconsideration within the 30 day time period for the filing of a notice of appeal from the trial court's order granting Appellee's motion *in limine*, the Commonwealth filed a timely notice of appeal on July 18, 2013. The Commonwealth now presents the following question for our review:

> Whether a grant of use immunity pursuant to 42 Pa.C.S.A. [§] 5947 for the specific testimony of a witness retroactively immunizes all previous unimmunized statements given by the witness[,] thereby making all the previous unimmunized statements inadmissible[?]

Commonwealth's Brief at 7.

A trial court's decision to grant or deny a motion *in limine* is subject to abuse of discretion review. ***Commonwealth v. Reese***, 31 A.3d 708, 715 (Pa. Super. 2011).

> The term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice,

> personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Id. at 716 (quoting ***Commonwealth v. Widmer***, 744 A.2d 745, 753 (Pa. 2000)).

The statutory immunity granted in this case is governed by 42 Pa.C.S. § 5947. The statute provides, in pertinent part, as follows:

> **(a) General rule.--**Immunity orders shall be available under this section in all proceedings before:
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> (1) Courts.
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> ***
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> **(b) Request and issuance.--**The Attorney General or a district attorney may request an immunity order from any judge of a designated court, and that judge shall issue such an order, when in the judgment of the Attorney General or district attorney:
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> ***
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> (2) a witness has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.
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> **(c) Order to testify.--**Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding specified in subsection (a), and the person presiding at such proceeding communicates to the witness an immunity order, that witness may not refuse to testify based on his privilege against self-incrimination.
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> **(d) Limitation on use.--**No testimony or other information compelled under an immunity order, or any information directly or indirectly derived from such testimony or other information, may be used against a witness in any criminal case, except that such information may be used:

> (1) in a prosecution under 18 Pa.C.S. § 4902 (relating to perjury) or under 18 Pa.C.S. § 4903 (relating to false swearing);
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> (2) in a contempt proceeding for failure to comply with an immunity order; or
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> (3) as evidence, where otherwise admissible, in any proceeding where the witness is not a criminal defendant.

42 Pa.C.S. § 5947(a)-(d).

> In general, there are three types of immunity. ***Commonwealth v. Swinehart***, 541 Pa. 500, 664 A.2d 957, 960 n.5 (1995).
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> > "Use" immunity provides immunity only for the testimony actually given pursuant to the order compelling said testimony. "Use and derivative use" immunity enlarges the scope of the grant to cover any information or leads that were derived from the actual testimony given under compulsion.... "Transactional" immunity is the most expansive, as it in essence provides complete amnesty to the witness for any transactions which are revealed in the course of the compelled testimony.
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> ***Id.***

Commonwealth v. Brown, 26 A.3d 485, 499-500 (Pa. Super. 2011).

In ***Kastigar v. United States***, 406 U.S. 441 (1972), the United States Supreme Court held that use and derivative use immunity adequately protected the privilege against compulsory self-incrimination contained within the Fifth Amendment. It remained undetermined until ***Swinehart*** whether use and derivative use immunity adequately protected a defendant compelled to forsake the right against self-incrimination contained in Article 1, § 9 of the Pennsylvania Constitution. In ***Swinehart***, our Supreme Court recognized that section 5947 provides "use and derivative use" immunity. ***Swinehart***, 664 A.2d at 960. The Court also recognized that "Article I,

Section 9 is, in fact, more expansive than the Fifth Amendment[.]" ***Id.*** at 969. Nonetheless, our Supreme Court held "it is not … so expansive that the privilege against self-incrimination would require greater protection than that provided within [section 5947]." ***Id.*** To effectuate the greater protections provided by Article I, Section 9, our Supreme Court set a high burden on the Commonwealth when it seeks to prosecute a witness after granting that witness use and derivative use immunity under section 5947:

> [I]n the later prosecution, the evidence offered by the Commonwealth shall be reviewed with the most careful scrutiny. That is, the Commonwealth must prove, of record, by the heightened standard of clear and convincing evidence, that the evidence upon which a subsequent prosecution is brought arose *wholly* from independent sources.

Id. (emphasis in original).

In the instant case, the trial court determined that the Commonwealth had not met this high standard because it "'opted not to produce evidence' in support of meeting its burden of proof." TCO at 12 (quoting Order and Opinion, 6/19/13, at 12). The trial court also found that the immunity order protected not just the testimony given by Appellee at Suero's preliminary hearing, but the content of that testimony as well. TCO at 14. The trial court reasoned as follows:

> With this skeleton record, we know the following: (1) the Commonwealth needed [Appellee]'s testimony in order to convict his Co-Defendants and (2) the Commonwealth therefore subpoenaed the source of that information, [Appellee], and required him to repeat the statements he made to the police under a grant of immunity. Now, the Commonwealth argues that the grant of immunity is worthless to [Appellee] because it

> applies only to the spoken words at [Suero's] preliminary hearing and does not immunize the content, the evidence sought and/or the person who was … compelled to give the evidence.
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> When we look at this case in the face of § 5947(d), the testimony or evidence compelled under the Immunity Order consists of the statements made to the police by [Appellee] in the spring of 2013. It is indisputable. It is also indisputable that the Commonwealth gave [Appellee] immunity to compel him to provide the information/evidence given during his police interviews in 2013.

TCO at 14.

The trial court's legal analysis is incorrect. The immunity order itself specifically limited the grant of immunity to "testimony, information or other evidence, directly or indirectly ***derived from the testimony of the Defendant at the preliminary hearing***[.]" Immunity Order, ¶ 2. Appellant's prior statements and testimony were not "derived" from his subsequent testimony at Suero's preliminary hearing. That the content of his immunized testimony is identical to his prior statements and testimony is of no moment. Statements and testimony cannot possibly be said to have 'derived from' testimony that is given later in time.

Furthermore, the "derived from" language used in the immunity order is nearly identical to that of the governing statute, which states that no "testimony or other information compelled under an immunity order, or any information directly or indirectly derived from such testimony or other information, may be used against a witness in any criminal case…." 42 Pa.C.S. § 5947(d). The statute speaks of 'testimony,' not the 'content of testimony.' The trial court's interpretation, however, significantly broadens

the meaning of the statute to encompass the latter. Yet, the trial court does not cite, and our own research fails to uncover, any legal authority that supports an interpretation of section 5947(d) that would permit its application to retroactively immunize prior statements and testimony, even when the content of the prior statements and testimony was identical to the subsequently immunized testimony.

Such a reading is not just inconsistent with the text of the statute, but also with governing principles recognized in ***Swinehart***. In ***Swinehart***, our Supreme Court stated:

> The very nature of criminal conspiracies is what forces the Commonwealth into the Hobson's choice of having to grant one of the parties implicated in the criminal scheme immunity in order to uncover the entire criminal enterprise. Thus, in order to serve justice an accommodation must be made, however, that arrangement should not place the "witness" in a better position as to possible criminal prosecution than he had previously enjoyed. A grant of immunity should protect the witness from prosecution through his own words, yet it should not be so broad that the witness is forever free from suffering the just consequences of his actions, if his actions can be proven by means other than his own words.

Swinehart, 664 A.2d at 968.

There can be no doubt that by retroactively immunizing Appellee's prior unimmunized statements and testimony, he is placed "in a better position as to possible criminal prosecution than he had previously enjoyed." ***Id.*** Given the text of the immunity order in this case, the text of section 5947(d), and the governing principles set forth in ***Swinehart***, we conclude

that the immunity order should not have been read to have effectively and retroactively immunized Appellee's prior statements and testimony.

The trial court also determined, however, that the Commonwealth failed to meet the high burden of proof set forth in ***Swinehart***. We disagree. First, Appellant was already charged with numerous offenses arising out of the home invasion at the time the immunized testimony was given, with the notable exception that he was not charged with a homicide offense. Thus, his prosecution was already ongoing without the benefit of the immunized testimony or anything derived therefrom, alleviating the primary concern which prompted the establishment of the heightened burden in ***Swinehart***.[2]

It is for this reason that we agree with the Commonwealth that the trial court's reliance on ***Commonwealth v. Handfield***, 34 A.3d 187 (Pa. Super. 2011), is misplaced. In ***Handfield***, the defendant was not arrested or charged with any offense until a year after he was compelled to testify before a grand jury in a homicide case. ***Id.*** at 189. Handfield implicated himself as the shooter during his testimony. ***Id.*** When Handfield filed a motion to dismiss the subsequently filed first degree murder charge, the Commonwealth was justifiably beset with the burden of demonstrating, by

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[2] To be clear, the heightened burden would certainly apply to any charges not already before the court at the time Appellee gave the immunized testimony.

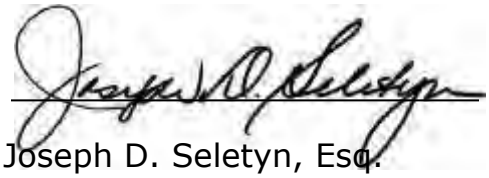
clear and convincing evidence, that "the evidence [the Commonwealth] proposed to use was derived from a legitimate source wholly independent of Appellant's compelled, immunized grand jury testimony." ***Id.*** at 204.

Second, even if the heightened burden applied in this case, we would conclude that it was satisfied. The trial court indicates that "[o]n May 29, 2013, the parties agreed that the [m]otion in [l]imine could be decided without additional testimony, relying upon the Preliminary Hearing transcripts and the official record, as well as allegations set forth by [Appellee] and his [m]otion in [l]imine." TCO at 5. In Appellee's motion *in limine*, he alleged as fact that he had spoken to police about the home invasion on May 1, 2012, and that he had testified against Johnson on August 22, 2012. Motion *in Limine*, 5/28/13, at 2. Because it was undisputed that Appellee spoke with police and testified against Johnson *before* the immunized testimony was given, we know, *a priori*, that those statements were not "directly or indirectly derived from" the immunized testimony. 42 Pa.C.S. § 5947(d). For the same reason, we know, *a priori*, that such evidence was obtained "wholly … independent" of the immunized testimony. ***Swinehart***, 664 A.2d 969. Thus, based upon Appellee's own allegations of fact, the Commonwealth satisfied its burden of demonstrating by clear and convincing evidence that the evidence in question (Appellee's prior statements and testimony) was not derived from and, similarly, was obtained independently of the immunized testimony.

Accordingly, we conclude that the trial court abused its discretion when it granted Appellee's motion *in limine* to prohibit the admission of any and all of Appellee's unimmunized statements and testimony made prior to his immunized testimony.

Order ***reversed***.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/2/2014