[J-58-98]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 60 W.D. Appeal Dkt. 1997
	:	
	:	Appeal from the Order of Superior Court
v.	:	at No. 1183PGH95 entered December 16,
	:	1996 affirming the Orders of the Court of
	:	Common Pleas of Somerset County,
DOMINICK "BUTCH" RIZZO	:	Criminal Division, at Nos. 58 Criminal
	:	1995/38 Special 1994 entered May 30,
	:	1995.
APPEAL OF: MARK BRADLEY	:	
REIGHARD,	:	688 A.2d 185 (Pa. Super. 1996)
	:	
	:	ARGUED: March 9, 1998
COMMONWEALTH OF PENNSYLVANIA,	:	
	:	No. 61 W.D. Appeal Docket 1997
	:	
v.	:	Appeal from the Order of Superior Court
	:	at No. 1184PGH95 entered December 16,
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DOMINICK "BUTCH" RIZZO	:	Common Pleas of Somerset County,
	:	Criminal Division, at Nos. 58 Criminal
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APPEAL OF: JAMES HYLAND	:	1995.
	:	
	:	688 A.2d 185 (PA.Super.1966)
	:	
	:	ARGUED: March 9, 1998

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: MARCH 25, 1999**

The majority holds that the contempt findings against appellants cannot stand because the hearing at which the court made the findings of contempt was improperly

convened pursuant to Pa.R.Crim.P. 9015. Specifically, the majority reasons that: (1) the witnesses were not "unavailable" for purposes of Rule 9015 simply because they were unwilling to testify; and (2) there were no exceptional circumstances which compelled the preservation of appellants' testimony in the interests of justice. I respectfully dissent because I believe that the trial court properly acted within the purview of Rule 9015. The rule provides:

> BY COURT ORDER.
>
> (a) At any time after the institution of a criminal proceeding, upon motion of any party, and after notice and hearing, the court may order the taking and preserving of the testimony of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness' testimony be preserved.
> (b) The court shall state on the record the grounds on which the order is based.
> (c) The court's order shall specify the time and place for the taking of the testimony, the manner in which the testimony shall be recorded and preserved, and the procedures for custody of the recorded testimony.
> (d) The testimony shall be taken in the presence of the court, the attorney for the Commonwealth, the defendant(s), and defense counsel, unless otherwise ordered.
> (e) The preserved testimony shall not be filed of record until it is offered into evidence at trial or other judicial proceeding.

Contrary to the majority's reasoning, the trial court's decision to hold a hearing pursuant to Rule 9015 is not conditioned upon a finding of unavailability or exceptional circumstances. It is only the preservation of testimony that is subject to such limitations. Rather, the language of the rule **requires** a court to conduct a hearing upon the motion of any party prior to ordering the taking and preserving of pre-trial testimony. It is only after such a hearing that the court may exercise its discretion and determine if the

preservation of the testimony is proper.[1] Here, the trial court properly held a hearing pursuant to Rule 9015 as it was **required** to do in order to determine whether to preserve appellants' testimony, either because they would be unavailable, or because preservation would be in the interests of justice.[2]

Once the trial court ascertained that appellants would refuse to testify at trial, despite being granted immunity, the trial court properly attempted to compel appellants' testimony in order to preserve their testimony for trial pursuant to Rule 9015. The rule allows for the taking and preservation of testimony in two circumstances: (1) when the witness may be unavailable for trial; and (2) when, due to exceptional circumstances, it is in the interests of justice to preserve the witness' testimony. Here, the trial courts actions were justified under both circumstances.

First, despite the majority's conclusion to the contrary, when appellants refused to testify despite being granted immunity, they became "unavailable." [3] The majority

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[1] Specifically, the first sentence of the rule provides that a court may order the taking and preserving of the testimony **"**at any time after the institution of a criminal proceeding, upon motion of any party, and after notice **and hearing**." Pa.R.Crim.P. 9015 (a) (emphasis added).

[2] In the order convening the hearing, the Court provided:

> We will hear report on the intention of the witnesses Reighard and Hyland, the two witnesses identified by the Commonwealth's counsel, as to whether they intend to testify or refuse to testify. We will conduct hearing to determine whether or not those witnesses will testify or refuse to testify. We will receive the testimony of the witnesses Reighard and Hyland. If deemed appropriate, after hearing further argument and testimony, if need be, the testimony of the witnesses Reighard and Hyland will be preserved under the applicable rules of criminal procedure, including rule of criminal procedure 9015. . . . Trial Ct. Order, May 22, 1995.

Thus, the trial court was very clear that the purpose of the hearing was twofold: First, to determine appellants' willingness to testify, and second, if necessary, to preserve their testimony. Pursuant to Rule 9015, the trial court was correct in realizing that a hearing was first necessary to make the preliminary determination concerning the availability of the witnesses. The fact that the court opted to try to preserve appellant's testimony at the same proceeding in which it found the witnesses unavailable for trial is inconsequential, as nothing in the rule mandates that the court preserve the testimony in a separate proceeding. Thus, despite the majority's conclusion to the contrary, the trial court had the authority to conduct the May 30, 1995 hearing.

[3] Reighard refused to testify because he allegedly feared for his life. Hyland refused to testify based on his Fifth Amendment and Article 1, Section 9 rights against self-incrimination, and because it was his belief that the order granting him immunity had not been properly granted.

concludes that, for purposes of the rule, a witness is “unavailable” only when it is anticipated that the witness will be unable to be physically present at the trial. In support of this narrow definition, the majority relies upon the comment to Rule 9015 which provides:

> "May be unavailable," as used in paragraph 1, is intended to include situations in which the court has reason to believe that the witness will be unable to be present **or to** testify at trial or other proceeding, such as when the witness is dying, or will be out of the jurisdiction and therefore cannot be effectively served with a subpoena, or may become incompetent to testify for any legally sufficient reason. (emphasis added).

The majority misconstrues the comment. The comment provides two situations where a witness is unavailable: When he is unable to be present **or** when he is unable to testify at trial. By giving the second part of the comment the exact same meaning as the first, the majority imputes a superfluous use of language in the comment. Nothing in the comment provides that a witness is unavailable only if he cannot be physically present at trial.

In addition, the majority has overlooked this Court’s pronouncements on the meaning of witness unavailability in other contexts. This Court has not equated witness availability only with physical presence for purposes of the common law exception to hearsay for prior testimony. See Commonwealth v. Graves, 484 Pa. 29, 38, 398 A.2d 644, 649 (1979)(exception permits prior testimony to be admitted when a witness who is physically available and competent becomes legally unavailable due to partial or full memory loss); Commonwealth v. Thompson, 538 Pa. 297, 311, 648 A.2d 315, 322 (1994)(relating to witness unavailability for purposes of admitting preliminary hearing testimony at trial). In addition, for purposes of the hearsay exception relating to an

unavailable declarant in the newly adopted Pennsylvania Rules of Evidence, a witness is unavailable if he:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

Pa.R.E. 804(a)(emphasis added)(adopted May 8, 1998, effective October 1, 1998). Thus, under the rules of evidence, appellants' refusals to testify would bring them within the definition of unavailable witnesses. I see no reason to employ one definition, of unavailability for purposes of the Pennsylvania Rules of Evidence and another, more restrictive definition for purposes of the Pennsylvania Rules of Criminal Procedure. Therefore, the trial court in the instant matter properly convened the hearing and sought to preserve appellants' testimony under Rule 9015 on the ground that appellants would be unavailable for trial.

Finally, the trial court's decision to convene the hearing was proper under the provision of the rule that allows for such a hearing to effectuate the interests of justice. The trial court found that a hearing was necessary because of appellants' repeated declarations to refuse to testify despite the grants of immunity. If pre-trial testimony had not been scheduled and the court had waited until a jury in Rizzo's case was seated before ascertaining with certainty that appellants would refuse to testify, double jeopardy would most likely have attached and the case against Rizzo may have

been forever lost. Thus, the trial court properly found that a hearing was necessary in order to avoid a miscarriage of justice.

Accordingly, I would hold that the trial court properly convened the hearing pursuant to Rule 9015 and that the findings of contempt against appellants should stand.

Madame Justice Newman joins this dissenting opinion.