

[J-77-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 320 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence
	:	entered on September 22, 2000 in the
v.	:	Court of Common Pleas of Berks County,
	:	Criminal Division at 3849-99.
	:	
	:	
RAYMOND JOHNSON,	:	
	:	SUBMITTED: October 21, 2002
Appellant	:	
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CONCURRING OPINION

MR. CHIEF JUSTICE CAPPY

DECIDED: December 18, 2003

I join the majority opinion and expressly join the majority’s discussion of the co-conspirator exception to the hearsay rule. I write separately, however, to emphasize the standard of proof and the limited nature of the co-conspirator exception to the hearsay rule.

Pennsylvania Rule of Evidence 803(25)(E), entitled “Admission by Party-Opponent,” provides for admission of a statement if “[t]he statement is offered against a party and is ... (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement may be considered but are not alone sufficient to establish ... the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).” The

Pennsylvania Rule's federal counterpart is found at Fed.R.Evid. 801(d)(2)(E).¹ The Pennsylvania rule and the federal rule are virtually identical.²

To admit a co-conspirator's statement into evidence under this exception, the Commonwealth bears a heavy burden. The Commonwealth must establish by the preponderance of the evidence that: (i) a conspiracy existed; (ii) the defendant and the declarant were involved in the conspiracy; (iii) the statement was made during the course of the conspiracy; and (iv) the statement was made in furtherance of the conspiracy. See Bourjaily v. United States, 483 U.S. 171, 175 (1987); United States v. Ellis, 156 F.3d 493, 496 (3rd Cir. 1998); Federal Criminal Conspiracy, 40 Am. Crim. L. Rev. 577, 599 (2003).

As noted by the majority, it is widely accepted that out-of-court statements by co-conspirators may be admissible even if the defendant is not formally charged with conspiracy in the indictment. See, e.g., United States v. Skidmore, 254 F.3d 635, 638 (7th Cir. 2001); United States v. Lara, 181 F.3d 183, 196 (1st Cir. 1999); United States v. Asibor, 109 F.3d 1023, 1034 (5th Cir. 1997). When conspiracy is not charged, however, I strongly believe that judges should only admit a co-conspirator's statement if the conspiracy is closely related or "factually intertwined" with the crime for which the defendant is charged. See Ellis, 156 F.3d at 497; United States v. Grossman, 843 F.2d 78, 83 (2nd Cir. 1988); United States v. Kendall, 665 F.2d 126, 132 (7th Cir. 1981).

This additional requirement is in essence a restatement of ordinary relevancy principles. Ellis, 156 F.3d at 497. It is axiomatic that simply because a statement falls

¹ Under Rule 801(d)(2)(E) of the Federal Rules of Evidence ("Rule 801"), "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."

² As noted in the comments to the Pennsylvania Rule, the difference between the federal and Pennsylvania formulations is organizational. It has no substantive effect. Moreover, the admissibility of a statement by a co-conspirator as provided by this rule is consistent with Pennsylvania law. Pa.R.E. 803(25), comment.

within an exception to the hearsay rule does not make this statement per se admissible; only statements which are relevant are admissible in court. In this vein, the introduction of statements from an uncharged conspiracy, thus, might be precluded by application of general rules of the admissibility of evidence. See id.; Pa.R.E. 402.

Here while the Commonwealth has not charged Johnson with conspiracy, I am satisfied that the conspiracy that serves as the basis for the admission of the co-conspirator's statement is sufficiently related to the crime for which Johnson was charged, and thus, the statement is admissible under the co-conspirator exception to the hearsay rule.

With these principles in mind, I join the majority opinion.

Mr. Justice Nigro joins this concurring opinion.