[J-99-1999]
THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 120 Capital Appeal Docket
	:	
Appellee,	:	Appeal from the Judgment of Sentence
	:	entered September 6, 1995 in the Court of
	:	Common Pleas of Lackawanna County at
v.	:	No. 92 CT 397
	:	
	:	
RICHARD YOUNG,	:	
	:	SUBMITTED: May 19, 1999
Appellant.	:	
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DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: March 24, 2000**

I respectfully dissent because even if the trial court incorrectly allowed the introduction of these statements, I am convinced beyond a reasonable doubt that the error was harmless.[1] A full review of the record clearly shows that the tainted evidence was merely cumulative of the untainted evidence,[2] and that the erroneously admitted evidence

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[1] I note that defense counsel for Richard Young (as well as the prosecution) used (and read into the record) the statements of George Cornell (Cornell) on the basis that the statements were admissible as statements of a co-conspirator (E.g., N.T. August 24, 1995, at 37, 38-60, 65-66).

[2] William Slick (Slick) and Cornell in their statements admitted participating in an illegal conspiracy with Richard Young and acknowledged conversations with him about killing
(continued…)

did not contribute to the verdict against Young. Commonwealth v. Lopez, 739 A.2d 485, 503 (Pa. 1999); Commonwealth v. Romero, 722 A.2d 1014, 1019 (Pa. 1999). In Lopez and Romero, we held that the admission of the custodial confession of Barbosa (a co-conspirator with Lopez and Romero in the murder of Mr. Bolasky), which primarily implicated Romero in the killing, was harmless error. Lopez, 739 A.2d at 503; Romero, 722 A.2d at 1019 (citing Commonwealth v. Bond, 652 A.2d 308 (Pa. 1997)). We determined that the error was harmless because the statements of Barbosa were cumulative of other substantially similar and properly admitted evidence indicating the defendants' guilt. Id. I find no significant difference between this present matter and that of Lopez and Romero because here, like in Lopez and Romero, the primary evidence for the Commonwealth was not the erroneously admitted statements, but was the testimony of a co-conspirator in the murder, which was corroborated by other untainted evidence.

In this case, the prosecution presented Ronald Hull (Hull), a participant with Young in the slaying of Russell Loomis (Loomis), who testified that he and Loomis and others were involved with Young in an illegal conspiracy, which consisted mainly of a "bust out scheme." (N.T. August 21, 1995 at 18-22).[3] Most of this illegal activity occurred in 1978 through 1980 (before and after the murder of Loomis) and centered around buying merchandise, primarily automotive parts, on phony credit to be filtered to a number of store fronts called "liquidation" stores owned by Young, and also to be sold to a "fence" named Lou Masgay. (Id.). Hull testified that he was aware, before the murder of Loomis, that the

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(…continued)
Russell Loomis. (E.g., N.T. August 22, 1995 at 142-43). This information was cumulative of the testimony provided by Hull and Halupke, and others as set forth infra.

[3] Hull admitted at trial that in previous statements to the police he lied and gave varying accounts of the crime in order to cover up his involvement in the crime.

FBI was investigating this illegal activity because he was subpoenaed to appear in front of the grand jury sometime before April of 1979. (Id. at 25). Moreover, Young was aware that the FBI was investigating these activities because Hull told Young about his subpoena to testify. (Id. at 26).

Hull then testified in intimate detail regarding the circumstances of the murder of Loomis. He recounted a conversation that occurred a few weeks before Loomis was murdered in which Cornell and Young were discussing that, "we have to do something about Russell (Loomis)." (Id. at 26-27). He was also present when Young asked Paul Nenish (Nenish), whether Nenish could obtain a gun that could not be traced. (Id. at 29).[4] In addition, Hull testified that before the Loomis murder, he, Young and Halupke drove around in the woods looking for a spot to "blow away" Loomis and that they came upon the spot where the murder was actually committed. (Id. at 30).[5] Loomis testified that on April 10, 1979, Slick and Young asked Hull for some tools and Young told Hull that "it was done," meaning that the grave for Loomis was "dug and done." (Id. at 32).

On the following day, April 11, 1979, Cornell told Hull, in the presence of Young, that "everything was all arranged and ready," meaning that this was the day to kill Loomis. (Id. at 33). At about 6:00 that evening, Young, Cornell, Nenish, Slick, Loomis and Hull were

[4] Nenish testified that he sold a .357 Magnum to Cornell in January of 1979. (N.T. August 16, 1995 at 65).

[5] In a statement that was read to the jury while Halupke was present, Halupke confirmed that he and Young were looking for a place to dispose of the body. (N.T. August 14, 1995 at 133-34). Further, Roberta Young, Young's ex-wife, testified that the location where the body of Loomis was found was an area where Young took her while they were dating, and he was very familiar with all of the woods in that area and the surrounding secluded area. (N.T. August 15, 1995 at 128-29).

present at the store.[6] Hull saw and heard Loomis call his girlfriend, Theresa Slick. (Id. at 35-36).[7] Hull, Loomis, Cornell and Young left the store in Loomis's car, with Cornell driving, for the stated purpose of retrieving a jeep that was stuck in the mud. (Id. at 36-38). Nenish was scheduled to close the store and Slick had left about an hour before this group. (Id. at 37). Cornell drove to the designated location and parked alongside a stream and the group walked about a half a mile up to where the jeep was supposedly stuck in the mud. (Id. at 42-43). Loomis was first, and was carrying a "come along," a tool needed to retrieve the jeep. (Id. 42-43, 56). Young was behind Loomis, then Cornell and last Hull, who was carrying a chain. (Id.) Cornell and Hull were about eight feet behind Loomis when Cornell said to Hull, out of earshot of the others, "that's the spot right there" and indicated to a location to the right of them where a grave had been dug near an old stone foundation. (Id. at 44, 45-46).

As the group approached, there was a jeep on the opposite bank of the stream, which Slick had driven to the scene. (Id. at 48-49). At that point, Young, Cornell, and Hull were on one side and Loomis started to cross a log that bridged the creek. Just before he got to the end, Young "pulled out a gun" and shot at Loomis two to three times. (Id. at 50). Loomis turned around, started taking a few steps towards the group and was stumbling a bit and "yelling and cursing." (Id. at 50-51). At that point, Cornell took the gun from Young and shot at Loomis three times. (Id. at 52).[8] Hull then stated that he, Young and Slick tried

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[6] Nenish confirmed that he was working that evening and was present at the store. (N.T. August 16, 1995 at 63).

[7] Ms. Slick corroborated that Loomis called her and that she heard "Ronnie" laughing in the background (she knew him well and recognized his voice.) (N.T. August 15, 1995 at 167).

[8] The medical evidence was consistent with Hull's testimony. Both the Commonwealth and defense experts agreed that Loomis was shot first in the back, and then put his hands defensively to his head and a shot went through his hand into his skull. He was then shot (continued…)

to remove Loomis's body from the stream, but he was "stuck in there." (Id. at 56). After the group determined they could not move the body (he was a large man -- six foot five and about 250 pounds), Hull walked back to the car of Loomis, a green Ford LTD, and drove to the main road, Route 502. (Id. at 59). Then "the muffler or something came apart" and Hull stopped the car. (Id. at 59-60).

The jeep pulled up behind Hull and all three in the jeep got out and attempted to put the muffler back on the car. (Id. at 60-61). When the problem was repaired, Hull got in the car, "made a U-turn" and headed down the road towards a shopping mall in Wilkes Barre, where Young had told Hull to leave the car. (Id.). As directed, Hull left it at the mall and then called Young's brother-in-law, who came to pick up Hull and brought him to the home of the parents of Young. (Id. at 61). Hull, Cornell, Young and Young's parents then discussed how to dispose of the gun. (Id. at 63-67). Hull said that after several attempts to destroy the gun, Young disposed of it in the river, which ran behind his house. (Id.).

The remainder of the Commonwealth's evidence corroborated the testimony of Hull. The location and position of the body were confirmed by a number of witnesses. Mr. Shorten, who discovered the body of Loomis while fishing on April 14, 1979 testified that the body was wedged between some cement and a log in a trout stream. (N.T., August 8, 1995 at 92- 140, N.T. August 22, 1995 at 115). The location was as described by Hull, which was a very secluded wooded area. The investigating officers noted the prominence of a large hole that appeared to be a grave. (N.T., August 9, 1995 at 11- 140.) All confirmed the position and location of the body in the stream and indicated that the body was wedged so tightly that it took four officers to remove it from the creek. (August 22, 1995 N.T. at 116).

(…continued)
through the jaw. It was possible for him to talk, although the bullet perforated the trachea, and although the bullet injured his spine, there was agreement that it could be possible for him to take a few steps.

They further testified that the come along was underneath the body. (N.T. August 9, 1995 at 60).[9] Officers in Wilkes Barre confirmed that Loomis' car was discovered in the shopping mall on the evening of April 13, 1979, in the spot described by Hull. (N.T. August 16, 1995 at 12-13). Another witness who worked with Loomis confirmed that he saw Loomis's car parked at the liquidation store at about 6:30 p.m. on Wednesday April 11, 1979, but his car was not there later in the evening nor the following day. (N.T. August 14, 1995 at 73-80).

Contrary to the view expressed in the Majority Opinion, Hull's testimony regarding the involvement of Young with Loomis and others in illegal activity, and thus a motive for the murder, was not credibly refuted. Testimony from numerous witnesses indisputably indicated that Young was involved in an illegal conspiracy. In fact, all of the conspirators pled guilty to federal charges related to activity involving Young and that arose from the FBI's investigation. (Joe Brizinski, Hull and Bill Nolan all testified that they pled guilty to charges that arose from these activities.) Indeed, Nolan, the accountant for Young, testified that he had been incarcerated in federal prison for four and half years because of his involvement with Young, specifically that he notarized a document to be used by Young as evidence in his defense during a preliminary hearing concerning these conspiracy charges. (N.T. August 24, 1995 at 178, 184, N.T. August 25, 1995 at 8). Moreover, the jury heard that Young himself pled guilty to charges arising from the FBI investigation with which Loomis had agreed to cooperate. (N.T., August 17, 1995 at 34-35).

Further, Hull's testimony regarding the motive for the murder was supported by several witnesses. Brizinski, a co-conspirator in many of the illegal activities at the

[9] Note that Curacello said that he and Loomis were using the come along on Wednesday, April 11, 1979 but it was not there on the following Thursday or Friday, his last two days of work at the store. (N.T., August 14, 1995 at 68, 77).

liquidation stores,[10] testified that in about February of 1979, Young asked him whether Loomis could be trusted and that Brizinski had told Young that Loomis was a snitch. (N.T. August 15, 1995 at 62-63). Theresa Slick, the live-in girlfriend of Loomis, testified that Loomis told her that Young faked a burglary and confirmed that Loomis was talking to the police about Young. (Id. at 160, 162). She indicated that in February of 1979 Loomis was very nervous because of the situation with Young and that he was talking to the police. She testified that Loomis told her that if "Rick found out, something would happen" and that he was afraid of all the "shady things going on." (Id. at 163, 195).

The Commonwealth also called an Officer Golden, who was a neighbor of Loomis (Id. at 23). He testified that two to three weeks before the murder, Loomis called him and said he had to speak to him the night of his call. (Id. at 26). After meeting with him, Loomis told Golden that "he was afraid of Richard Young" and that, because of his "association" with Young, he was "afraid for [his] mother and [his] father and anyone else with whom he was connected." (Id. at 26-27). He further told Golden that "I (Loomis) am in his Mafia" and that "Richard Young's Mafia is worse than any Mafia I ever heard about." (Id.). He further stated that if "we just tried to get away from him, or you know quit, he said that he would kill our mothers, our fathers, our children, or whatever it took." (Id. at 28.). Golden, on this information, told Loomis to talk to the FBI, and he referred him to an agent that Golden felt that Loomis could trust. (Id. at 29).

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[10] Brizinski, one of the co-conspirators who was a subject of the FBI's investigation, testified that he worked in a store that was owned by Young and that he was involved with Young in the "bust out" scam, and described what that was. (N.T. August 15, 1995 at 51). He testified about false claims that he participated in with Young where he burned a U-haul to collect insurance for the merchandise inside. (Id. at 56). He testified about two additional schemes where Young and he would stage a burglary and than claim insurance for the stolen goods, and he testified that one of these schemes occurred before the murder of Loomis and one afterwards in 1980. (Id. at 58).

Agent Glasgow, an FBI agent in the Scranton area, confirmed that Loomis had spoken to him following his talk with Golden. Agent Glasgow testified that Loomis gave him a statement that indicated that he was involved in an illegal conspiracy with Young, Cornell and others. (N.T. August 17, 1995 at 15 - 26). He said that he spoke to Loomis in March of 1979. Through Glasgow, the Commonwealth introduced the statements by Loomis, given on March 21, 1979 to the FBI. (Id. at 17). Glasgow indicated that a federal grand jury had been empanelled and that he (Glasgow) had intended that Loomis appear, which would be at the next session in April. (Id. at 19). In his statement to Glasgow, Loomis indicated that he worked for Young running an operation known as Brown's Sale Company, which was a drop point for stolen goods and that it was to be "torched" to get insurance money. Loomis also outlined the "bust out" scheme that Young and Cornell orchestrated. (Id. at 20-24). Loomis specifically named Young and Cornell as direct participants in the scheme and illegal activity. (Id. at 25).

Hull's statements concerning the course of events on the night of the murder were confirmed by the testimony of Harold Litts and his brother Gary, who lived near where the victim was found. Harold Litts testified that on April 11, 1979, his brother called him outside because he heard screams and sounds like firecrackers coming from the woods. (His brother was outside gathering "nightwalkers" in preparation for trout season)(N.T. August 17, 1995 at 90-91). Harold Litts went outside and heard the screams, which were "sharp" and "shrilly." (Id.). About a half an hour after going back indoors, Harold's brother called him outside again, indicating that there was "someone parked down the road from the house." (Id. at 91). He went outside again and saw a car parked about a hundred yards from his house. "There was movement, silhouettes from the headlights and stuff of cars coming up the road and stuff." (Id. at 91). Harold Litts said that a pick up truck with "cab

lights on it" pulled up behind the car. The cab lights were "little lights over the windshield."[11] Litts and his brother were concerned that someone might be tampering with their fuel trucks and they drove down to where the vehicle was parked. (Id. at 92). When they drove past the car that was parked, a man stepped "about three foot into the road looking at us." (Id. at 94). He also saw two men standing behind the car that he could identify because the trunk light on the car worked and because the headlights from his own car illuminated the men. Litts went back to his house and continued to watch the car. Awhile after "the car with the loud muffler went up the road, it went up the road a ways, turned around, and went back down the road." (Id. at 95). A few days later, both Gary and Harold Litts identified the car that they saw as the green Ford LTD owned by Loomis, and which the police had found in the shopping mall. (Id. at 96, N.T. August 16, 1995 at 169, 173,175). Some years later, Harold Litts also identified Young from a photo array as one of the men standing behind the car. (Id. at 101-02).

Because of the detail of Hull's account and the numerous witnesses who corroborated the intricacies of his testimony, the Commonwealth overwhelmingly showed Young's guilt and the statements of Slick and Cornell played no significant role in that verdict. It seems particularly telling that the smallest parts of Hull's story were confirmed, such as Harold Litt's identification of Young with Loomis's car on April 11, 1979, Litt's description of Loomis's car as the one with the loud muffler, the statements of Loomis that he was afraid of Young, the vast number of people who confirmed that on April 11, 1979,

[11] Paul Nenish testified that he sold to Young a green pick-up jeep, with lights on the cab, on March 30, 1979. (N.T. August 16, 1995 at 55-56). Halupke testified that Nenish drove a green jeep, but after Loomis was killed, he never saw it again. (N.T. August 14, 1995 at 168).

Loomis was planning to pull a jeep out of the mud,[12] and the medical evidence confirming the sequence of the shots.

In conjunction with this clear case, Young's own behavior following the murder, including fleeing the jurisdiction in 1980 when it was clear that the State Police had a warrant for his arrest, enlisting Nolan to fabricate documents, his continual lies about his identity when he was apprehended in Idaho, going so far as to try to obliterate his prints, speak loudly to his guilt. Moreover, his repeated attempts to fabricate an alibi show a clear consciousness of his guilt that remove any doubt that the jury convicted Young of this murder for reasons completely unrelated to the tainted evidence. See, e.g., Commonwealth v. Carbone, 574 A.2d 584, 589 (Pa. 1990) (fabrication of false and

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[12] For example, as set forth supra, Theresa Slick said that Loomis told her at about 6:30 p.m. that he was going to pull a jeep out of the mud. Also, Beth Ann Fashauser, who in 1979 was the girlfriend of one of Loomis' co-workers, Jerry Curacello, testified that Loomis usually gave Curacello a ride to work, but on Wednesday, April 11, 1979, she had to give Curacello a ride to work because Loomis did not show up. (N.T. August 10, 1995 at 112-115). Later that day, about noon, she brought Curacello his lunch at work and brought it to him in the basement of the automotive store where Curacello and Loomis were working. (Id. at 115). She then overheard Loomis tell Curacello that Curacello would not be helping to pull the jeep out of the mud tonight because Young had said that Curacello could not leave. (Id. at 115-116). Curacello also confirmed this conversation. (N.T. August 14, 1995 at 69, 70).

A number of other witnesses who were patrons at the bar where Loomis frequented testified that Loomis told them that he was going to retrieve a jeep that was stuck in the mud and if he could get it out, he could have it. (N.T. August 14, 1995 at 38, 46-47). They confirmed that this conversation occurred on Wednesday, April 11, 1979. (Id.). Another witness, Mr. Bartosh, who owned the bar, indicated that Loomis used to be in that bar almost every day and that he told Bartosh on April 10, possibly April 11, that he was "going to get a four wheel drive vehicle that he could have if he could get it out of the mud." (N.T. August 15, 1995 at 17).

Further, Nenish testified that on April 11, 1979, Loomis and Young came into the store looking for a chain and a jack to get something "unstuck." (N.T. August 16, 1995 at 63).

contradictory statements by accused are evidence which jury may infer were made with intent to mislead police or other authorities, or establish an alibi or innocence, and hence indicatory of guilt).[13] In addition, the jury heard that soon after the murder, Young overtly tried to get at least one witness to change his story about the last time that he saw Loomis. (N.T. at 78-80). The jury also heard Young admit that he gave false statements in interviews with police in Idaho where he continued to insist that he was Todd Devine and he acknowledged that he fabricated and submitted to the United States Marshals a false social security number and false tax records in the name of Todd Devine. (N.T. August 31, 1995 at 153-60).

Most tellingly to a jury must have been Young's own behavior to concoct an alibi while he acted as pro se counsel. The Majority notes that Young presented an alibi defense, but the record shows that this defense was so seriously undermined that there is no doubt that the jury rejected it for reasons completely unrelated to the statements of Slick and Cornell. First, the jury heard that Appellant had acted as counsel on his own behalf for most of the pre-trial in this matter. At that time, Appellant had listed three witnesses who could supposedly provide Appellant with an alibi for April 11, 1979. The first of these, John Hope (Hope) had provided an affidavit in 1993 while Young was pro se counsel. Hope swore that he was with Loomis on April 13, 1979 and Loomis was driving a green jeep. (Thus, Young could not have killed Loomis on April 11, 1979 because Loomis was still alive). (N.T. August 23, 1995 at 43). The problem with this "alibi" is that on April 11, 1979 Hope was in jail, so Hope was clearly lying. (Id. at 52). Further, at the time that Hope

[13] The Commonwealth called Officer Zanin to testify that he took fingerprints of Young in November of 1990 and compared these to fingerprints taken in 1988 when Young was going under the alias of Todd Devine. (N.T. August 23, 1995 at 70). The fingerprints show that each finger had some point of scarring from a searing type of burn, "mechanically induced by the person himself in order to distinguish and try to hide some of the comparison points in the prints themselves." (Id. at 74).

provided the false affidavit he was in a cellblock with Young. (Id. at 51). While Hope claimed that he provided the affidavit at the behest of the district attorney's office in order to "get" Young, the claim was utterly fantastic because of Hope's implausible accusations and rambling justifications. (Id. at 44-50, 56).[14] The false affidavit acted as a defense for Young, was written while Hope and Young were jail mates and while Young was his own counsel. Thus, the jury was left with the clear impression that Young had fabricated evidence of an alibi, not the Commonwealth. (Id.).

Further, and most damning to Young's alibi defense was Patrick Tigue, who was also presented as an alibi witness while Young acted as his own counsel. Like Hope, Tigue was an inmate who had extensive contact with Young in the jail system. Tigue stated that in 1979 he had been at Young's store and had a signed receipt that showed that at 8:57 p.m. on April 11, 1979 Young was at the store, consequently providing Young with an alibi for the night of the Loomis murder. (N.T. August 24, 1995 at 16). Young and Tigue both signed the receipt at issue. (Id. at 18-19). However, the problem with this witness was the same as with Hope -- he was in jail on April 11, 1979 so it would have been impossible for him to have been in the store with Young at that time. (Id.)[15] Worse than that the alibi testimony fell apart was the proof that Young directly participated in this fabrication because Young's signature was on the phony receipt and Young, as his own counsel, had called Tigue as a witness in pre-trial proceedings. Moreover, during Young's testimony at trial, he created an incredible story that the Tigue who he had listed as an alibi witness when he acted as pro se counsel, was not the person who signed the receipt because

[14] Moreover, the affidavit's substance -- that Loomis was alive on April 11-- undermined the focus of the Commonwealth's case that Loomis was killed on April 11, 1979.

[15] In addition, the witness indicated that he remembered the date of the April 11, 1979 because of his son's baptism, however, the district attorney presented the son's baptismal certificate, which indicated that the baptism was in March, not April.

there were a lot of people by the name of Tigue in the phone book. (N.T. August 31, 1995 at 122-23, 152). In light of the testimony of Tigue and Young, it was quite clear that Tigue was not a credible witness. Worse for Young, the clear impression was that Young had created this witness in order to fabricate an alibi, certainly evidence of consciousness of guilt.

The Majority finds significant that a third witness, Anthony Rish, "provided an alibi" for Young on April 11, 1979, the date the Commonwealth contended that Loomis was murdered. However, as holds true with Young's other two alibi witnesses, Rish was a fellow prison mate of Young's, and his story lacked any credibility. Rish only came forward with this alibi in 1992 when he first sent a letter to the State Police (and when he and Young were in prison). On the stand, Rish claimed that he remembered the date of April 11, 1979, because he had a birthday party for his daughter the day before that, however, his wife told police that there was no birthday party for their daughter. (N.T. August 30, 1995 at 153-55). Further, his statement given to the police in 1993 indicated that he did not "know the month or year" of this alleged visit with Young but remembered the day only because Young had told him the day was April 11, 1979. (Id. at 145-46). Moreover, Rish claimed that he was with Young from 3:30 p.m. until at least 8:00 p.m., almost without interruption, but Young testified that he had a "meeting" with Hull, Slick and Cornell at 4:30 p.m. that day regarding air fresheners. (Id. at 140, 144, N.T. August 31, 1995 at 146-48). Further other witnesses, including Nenish who closed the store the night of April 11, 1979, testified that Young was not there when he closed the store at 8:00 p.m. (N.T. August 16, 1995 at 63). Further, because of the track record with the other two "alibi" witnesses, and the numerous other events in which Young was shown to have fabricated evidence, it seems clear to me that in rendering its verdict against Young, the jury accepted the testimony of other witness that indicated that Young was not at the store on Wednesday evening, the time the murder occurred.

For the reasons stated above, I have no doubt that the erroneous admission of the statements of Slick and Cornell were cumulative of other properly admitted evidence, had no impact on the jury's verdict in this matter and that the error in admitting them was harmless beyond a reasonable doubt. Accordingly, I dissent.