

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 99-11,044

VS :

FRANK ANTONIO McGUIRE :

OPINION AND ORDER

Before the Court is the Defendant's Omnibus Pre-Trial Motion filed September 16, 1999. A hearing on the Motion was held March 10, 2000.

MOTION FOR DISCOVERY

Defendant first requests any new statements made by the Commonwealth's witnesses. The Defendant argues that the discovery of witness statements, whether inculpatory or exculpatory, are critical to his defense. The discovery of the names and addresses of eyewitnesses, and written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial is discretionary with the Court under Pa.R.Crim.P.305(2)(i)(ii). The Court may order the Commonwealth to allow the Defendant's attorney to inspect the statements upon a showing that they are material to the preparation of the defense, and that the request is reasonable. Instantly, the Court is satisfied that the statements sought are material to the preparation of the Defense and that the request is reasonable. Additionally, the Commonwealth is under a continuing duty to disclose and shall promptly notify the opposing party or the Court of any additional statements received pursuant to Rule 305(D).

MOTION TO OBTAIN TRANSCRIPTS

The Defense next requests the transcription of all proceedings in this matter. The Defendant argues that if the Defendant is found guilty and a life sentence is imposed, a complete record will be required for the appeal. Although the Court does not disagree that the complete record would be required for the appeal, the Court finds that an Order for them prematurely could possibly result in a waste of resources. The Court therefore denies this Motion at this time.

MOTION TO EXCLUDE PHOTOGRAPHS

The Defendant next argues that the photographs of the victim in this case be excluded at trial. Defendant argues that the submission of the photographs would serve no other purpose but to inflame and prejudice the jury. Photographs of a murder victim are not per se inadmissible, Commonwealth v. Chambers, 546 Pa. 370, 685 A.2d 96, (1996), certiorari denied 118 S.Ct. 90, 522 U.S. 827, 139 L.Ed.2d 46. In determining admissibility of a photograph of a corpse in a homicide trial, the court must determine whether the photograph is inflammatory and, if not, the photograph may be admitted if it has relevance and can assist the jury's understanding of the facts. If the photograph is inflammatory, the court must decide whether the photograph is of such essential evidentiary value that its need clearly outweighs likelihood of inflaming minds and passions of jurors, Commonwealth v. Rompilla, 539 Pa. 499, 653 A.2d 626, (1995), denial of post-conviction relief affirmed 554 Pa. 378, 721 A.2d 786, reargument denied. Instantly, the Court finds that an in camera inspection of any photographs of the victim that the Commonwealth intends to introduce at trial should be performed before the trial

to determine whether they are of such essential evidentiary value that their need outweighs the likelihood of inflaming the jurors.

MOTION TO SUPPLEMENT OMNIBUS MOTION

The Defendant next requests that he be permitted to supplement his Omnibus Pre-Trial Motion as additional discovery and reports are received. Pa.R.Crim.P. 307 provides that pretrial motions shall be filed within 30 days following the arraignment, unless opportunity therefore did not exist, or the defendant, defense attorney, or attorney for the Commonwealth was not aware of the grounds for the motion. If the additional discovery reveals grounds for a new motion, the Defense will be permitted to raise it at that time.

MOTION TO SUPPRESS

The Defendant last argues that the statements made to Agent Weber and Assistant District Attorney Henry Mitchell on August 4, 1999, should be suppressed. The Defense argues that the representatives of the Commonwealth should not have been permitted to interview the Defendant without notifying his attorney of record, and only in the presence of his attorney. The Court finds the following facts with regard to the motion:

Agent William Weber of the Williamsport Bureau of Police testified that he became involved in the investigation of the homicide shortly after it was reported. He testified that he interviewed the Defendant and took a statement from the Defendant that evening. Upon committing him to the prison, Agent Weber gave the Defendant his

card, and told him to call if he had any other questions. Agent Weber received a letter from the Defendant on August 4, 1999. In Defendant's letter, he states that he "would greatly appreciate being able to talk with you" about the death of his son. He states that he "is very hopeful that [Agent Weber is] still willing to meet" with him. Agent Weber called the District Attorney's Office to inquire whether he would be permitted to talk to the Defendant.

District Attorney Marino testified that he told Agent Weber that he could visit with the Defendant since he had made the request. He then asked Agent Weber if he would like someone from his office to go with him to ensure that the Defendant was informed of and understood his rights. Agent Weber agreed. District Attorney Marino found the only available Assistant, Henry Mitchell, and requested that he accompany Agent Weber.

Agent Weber and Attorney Mitchell went to the Lycoming County Prison to meet with the Defendant. Agent Weber testified that upon entering the room, he introduced Attorney Mitchell. Agent Weber testified that the Defendant immediately stated that he was very upset about his son, that he didn't know what had happened, and that he was trying to put it all together. Mr. Mitchell stopped the Defendant before he went any further, and read the Defendant the Miranda warnings. After having heard the warnings, the Defendant stated that he still wanted to talk to them. Agent Weber testified that at some point the Defendant had said that someone had been there and answered his questions. Attorney Mitchell had then asked whether he still wanted to talk to them, and the Defendant had answered "yes". Agent Weber testified that when

he returned to his office after talking to the Defendant, there was a message from Defendant's attorney requesting that he not converse with Defendant.

Defendant asserts that his statements during the interview, although voluntary, should be suppressed, as the Defendant was interviewed without notifying his attorney of record, and without his attorney being present. The Court does not agree. The Pennsylvania Supreme Court has held "that a person accused of crime who has already engaged counsel may, with full knowledge of his rights but in the absence of counsel, effectively waive his right to have counsel present while he is questioned by the police. Commonwealth v. Lark, 505 Pa. 126, 477 A.2d 857, (1984), *citing* Commonwealth v. Hawkins, 448 Pa. 206, 209-11, 292 A.2d 302, 304-305 (1972). In this case, the Court finds that the Defendant was fully informed of his rights. Mr. Mitchell interrupted the Defendant as he started speaking to Agent Weber, and he explained his Miranda rights. The Defendant stated that someone had been there to answer questions, but that he still wished to speak with them. The Court finds that the Defendant effectively waived his right to have his counsel present for the interview.

The Defense attorney additionally argues that it was inappropriate for Agent Weber to have approached the Defendant when his office had called Weber notifying him that he did not want him talking to the Defendant. The Court disagrees. Agent Weber testified that he did not receive the message left on his answering machine until after he returned from the interview. The Court is satisfied that Agent Weber had not received the message. Even if Agent Weber had been notified about the Defense counsel's wishes before the interview, there may be some support in the case law that the subsequent interview would not violate the Defendant's right to remain silent,

because the Defendant waived that right before the interview took place, see Lark, supra. The Court in Lark reasoned that “although a defendant may authorize his attorney to exercise his rights on his behalf, a defendant’s right to remain silent is his own; the decision whether or not to waive that right can only be made by him.” Lark, 477 A.2d at 861, *citing* Malloy v. Hogan, 378 U.S. 1,8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964). The Defendant’s Motion to Suppress is therefore Denied.

ORDER

AND NOW, this ____ day of March, 2000, based on the foregoing Opinion, it is ORDERED and DIRECTED as follows:

The Defendant’s Motion for Discovery is GRANTED. The Commonwealth shall promptly notify Defense counsel of any additional statements received from the eyewitnesses they intend to call at trial.

The Defendant’s Motion to Obtain all transcripts from this matter is DENIED at this time.

The Defendant’s Motion to Exclude Photographs is DEFERRED until the time of trial. The Commonwealth shall provide copies of the photographs (similar size and manner of presentation) that they intend to introduce at trial to the Defense counsel for review on the date of jury selection for this case.

The Defendant’s Motion to Supplement the Omnibus Motion is GRANTED upon a further showing that as a result of receiving additional discovery they have been made aware of the grounds for the supplemental motion.

The Defendant's Motion to Suppress statements made during the interview with Agent Weber and Attorney Mitchell is DENIED.

By The Court,

Nancy L. Butts, Judge

cc: William Miele, Esquire, Public Defender's Office
DA
CA
Honorable Nancy L. Butts
Judges
Law Clerk
Gary Weber, Esquire