

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: No. 99-10,887
	:
vs.	: CRIMINAL DIVISION
	:
TIMOTHY JORDAN,	: Motion in Limine to Continue
Defendant	: or Preclude Testimony

OPINION AND ORDER

This matter came before the Court on the defendant's Motion in Limine wherein the defendant seeks a continuance of the trial in this matter scheduled for April 10-11, 2000 and/or preclusion of the testimony of Commonwealth witnesses John Biser and Richard Fleeger because the defense was not aware of these witnesses until April 4, 2000.

The relevant facts are as follows: On or about March 27 or 28, 2000, a jury was selected in this case. After selection was completed, Assistant District Attorney Daniel Holmes telephoned the victim of the alleged arson. The victim advised Mr. Holmes that his mother was part of the jury pool on another case when she came in contact with Mr. John Biser. During their conversation, Mr. Biser informed the victim's mother that the defendant made an oral statement before the alleged arson to him and Mr. Richard Fleeger that the barn or building in question was going to come down one way or another. Subsequently, Mr. Holmes was able to reach Mr. Biser by telephone and he confirmed the statement. Mr. Holmes has not yet spoken to Mr. Fleeger. The Commonwealth has subpoenaed both individuals as witnesses for trial.

On or about April 4, 2000 at approximately 11:30 a.m., Mr. Holmes gave a brief written memo to defense attorney William Miele to inform him the defendant made an

oral statement prior to the date of the alleged arson to Mr. John Biser and Mr. Richard Fleeger that the barn or building in question was going to come down one way or another. The memo did not provide an address or telephone number for these individuals.

On April 6, 2000, at 8:30 a.m, the time scheduled for argument on the Commonwealth's Motion in Limine regarding the introduction of certain crimen falsi convictions of the defendant, Mr. Miele provided the Court with his Motion in Limine. Both motions were argued before the Court. Immediately following the argument, the Commonwealth gave the defense a written memo explaining how they acquired the information regarding the defendant's statement to Mr. Biser and Mr. Fleeger and providing the addresses and telephone numbers for these individuals for the first time.

First, the Court believes this information is clearly discoverable, and in fact, would constitute mandatory discovery because the statement is being offered as an inculpatory statement, although it is arguably ambiguous.¹ See Pa.R.Cr.P. 305(b)(1). Therefore, the defense must have fair notice and an opportunity to investigate. Perhaps if the Commonwealth's initial written notice to the defense on Tuesday, April 4, 2000, which was four work days before the start of the trial, contained the address and phone number of the witnesses, there would have been sufficient time to investigate the matter. The Court is not confident, however, that the defense has sufficient time to investigate the matter when it received the addresses and telephone numbers one and one-half work days

¹The Commonwealth, at argument, submits that despite the fact they want to offer the statement in evidence against the defendant that is not truly significant because of its ambiguous nature. While the statement may be ambiguous, the Court, based on its understanding of the other evidence in this case feels it could have significant impact on a jury.

before the trial.

The Court acknowledges that the statements in question do not seem to require extensive investigation. An interview with the witnesses may suffice. However, there is always some probability that something said by the witness may lead to the need for some follow up effort. For instance, was anyone else present who may have overheard the conversation? Do work records support the location of the witness(es)?² Is there other impeaching information available? But for the eve of trial aspect of the situation, this would not be problematic.

The Court is satisfied that Attorney Holmes came upon the information by happenstance and did not withhold the information. Thus, preclusion of the statements would not be a proper remedy. However, as previously stated, the Court believes the addresses and telephone numbers should have been supplied with the first memo.

In conclusion, the Court grants the defense request for a continuance, but with some reluctance. If this kind of scenario occurs often in our new date certain trial system, the system which offers many advantages to both the Commonwealth and defense, will not last and we will need to go back to the trailing list system which would give us more flexibility in a case like this.

Accordingly, the following Order is entered:

²The witnesses were allegedly digging or otherwise working on a ditch near the subject property when the defendant made the statement to them.

ORDER

AND NOW, this 6th day of April 2000, the Court GRANTS the defense request for continuance³ to the May trial term. The case shall be listed for pre-trial conference on April 24, to determine witness availability for that term which will take place on the weeks of May 15 and May 22, 2000.

By The Court,

Kenneth D. Brown, J.

cc: District Attorney
William Miele, Esq. (PD)
Work File
Gary Weber, Esquire (Lycoming Reporter)
Eileen Grimes, CST

³A secondary basis for the continuance request was that an alibi witness cannot be found by the defense. However, the defense does not seem to have any confidence that they will be able to find this witness even if the case is continued. Therefore, the Court would not have continued this case on that basis.