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Pennsylvania's Preliminary Hearing Makes a Comeback

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The Preliminary Hearing in Pennsylvania

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In 1968 the Pennsylvania Constitution created a unified judicial system which organized all of the courts of the Commonwealth under one Supreme Court.

The criminal/civil minor judicial system included 550 district justice courts statewide presided over by a single district justice (now magistrate district judge). One function of the courts of the minor judiciary is to conduct preliminary arraignments and preliminary hearings for those cases which are beyond their final jurisdiction.

When the preliminary hearing was established the purpose was to give a defendant an opportunity to confront the accusations made against him or her and to cross-examine witnesses or present witnesses on their own behalf.

If, after hearing the evidence presented at the preliminary hearing, the district justice is satisfied that there is probable cause to believe that an offense occurred and the defendant probably committed the offense, the defendant is bound over for trial in to the Court of Common Pleas. Otherwise, the defendant is discharged.

In Pennsylvania, prior to 1990, prosecutors could establish a prima facie case at a preliminary hearing by presenting only hearsay evidence. In 1990, the

Pennsylvania Supreme Court changed that when it decided Ex. Rel. Buchanan v. Verbonitz, 525 Pa. 413 (1990).

Today, a prima facie case of criminal conduct exists where the Commonwealth produces evidence of each material element of the crime charged and establishes probable cause to believe that it was the defendant who committed the offense. Commonwealth v. Perez, 249 A.3d 1092 (Pa. 2021). Probable cause to maintain criminal proceedings is "a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent man in the same situation in believing that the party is guilty of the offense," Miller v. Pa.R.R. Co., 89 A.2d 809 (Pa. 1952).

A court determining whether there is probable cause must make every reasonable inference in the Commonwealth's favor, Perez.

Ex. Rel. Buchanan v. Verbonitz, 525 Pa. 413 (1990)

In Buchanan, the only evidence offered by the Commonwealth at the preliminary hearing was the testimony of a police officer testifying about a statement made by a witness. The Pennsylvania Supreme Court held that the Commonwealth failed to establish a prima facie case. Justice Rolf Larsen wrote in a plurality opinion, “Fundamental due process requires that no adjudication be based solely on hearsay evidence.”

Russell Buchanan was arrested and charged with statutory rape, corruption of a minor and endangering the welfare of a 7-year-old child. At the preliminary hearing, the district attorney presented as the sole witness the testimony of a police officer. The victim did not testify at the preliminary hearing.

DJ Edward Verbonitz found that the Commonwealth had established a prima facie case solely based upon the hearsay testimony of the police officer who interviewed the child.

The case made its way to the Pennsylvania Supreme Court and Justice Larsen wrote:

As Justice Flaherty stated in his concurring opinion in Commonwealth, Unemployment Board of Review v. Ceja, 427 A.2d 631 (1981), "[f]undamental due process requires that no adjudication be based solely on hearsay evidence". If more than "rank hearsay" is required in an administrative context, the standard must be higher in a criminal proceeding where a person may be deprived of his liberty. (See, Commonwealth v. Aumick, 2022 Pa.Super 33).

The preliminary hearing, although not constitutionally required, is nonetheless a critical stage of a defendant's prosecution, Coleman v. Alabama, 399 U.S. 1, (1970).

The sole purpose of a preliminary hearing is to determine whether there is sufficient evidence to send the case to the Court of Common Pleas.

The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. Accordingly, the procedures challenged here whereby a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination, are unconstitutional, Gerstein v. Pugh, 420 U.S. 103 (1975).

In Commonwealth v. Carmody, 799 A.2d 143 (Pa. Super. Ct. 2002) the Superior Court ruled that the use of only hearsay testimony fails to meet the threshold for evidence upon which the preliminary hearing judge may rely. In Commonwealth v. Nieves, 876 A.2d 423, 427 (Pa. Super. Ct. 2005) the court found that a prima facia case can be established by hearsay only when the prosecution provides other evidence in addition to hearsay.

In Verbonitz, the Pennsylvania Supreme Court found that a preliminary hearing warrants "the presentation of witnesses and full exploration of their testimony on cross-examination."

The Pennsylvania Constitution provides that "in all criminal prosecutions" the accused has a right to meet the witnesses against him, Pa. Const.Art. 1 Section

9. The state constitution provides for the right to confront witnesses and examine their testimony through cross-examination. A preliminary hearing is an adversarial proceeding wherein a defendant has the right to test the evidence submitted by the commonwealth.

Justice Larson, Papadakos and Zappala joined in the majority opinion in Verbonitz. Justice Flaherty wrote an opinion concurring in the judgment in which Justice Cappy joined. Justices Nix and McDermott each dissented.

Verbonitz is a plurality opinion. According to Steven F. Lachman, Ph.D., *Hearsay Evidence at Preliminary Hearings: Verbonitz, Ricker, McClelland and Beyond*, 93 Pa Bar Assn. Quarterly 1, Larsen's and Justice Flaherty's opinions both hinged on one common principle: "[f]undamental due process requires that no adjudication be based solely on hearsay evidence." The differences between their opinions seem to be limited to:

1. whether the U.S. Supreme Court actually declared confronting witnesses a constitutional right in Gerstein (Larsen's view) or merely implied it (Flaherty's view); and
2. whether any hearsay is admissible at the preliminary hearing. Pa.R.Crim.P. 141 governed conduct at preliminary hearings at the time, and unlike current Rule 542(E), did not mention hearsay.

Pa.R.Crim.P. 542

Twenty years after Verbonitz, Pa.R.Crim.P. 542 was established and preliminary hearings got a bit twisted. Subsection (E) provides as follows:

Hearsay as provided by law shall be considered by the issuing authority in determining whether a prima facie case has been established. Hearsay evidence shall be sufficient to establish any element of an offense requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

Rule 542 was established in 2011. It appeared that the new rule was intended to lessen the burden on prosecutors to call witnesses to prove "ownership of, non-permitted use of, damage to, or value of property."

However, the new rule's comments appeared to imply that hearsay could be used to establish any element of a prima facie case. Prosecutors ran with that interpretation.

In 2013, the comment to Rule 542 was amended. The comment, as it reads today, provides "[H]earsay, whether written or oral, may establish the elements of any offense. The presence of witnesses to establish these elements in not required at the preliminary hearing."

Currently, Rule 542(C), (D), and (E) provides:

(C) The defendant shall be present at any preliminary hearing except as provided in these rules, and may:

(1) be represented by counsel;

(2) cross-examine witnesses and inspect physical evidence offered against the defendant;

(3) call witnesses on the defendant's behalf, other than witnesses to the defendant's good reputation only;

(4) offer evidence on the defendant's own behalf, and testify; and

(5) make written notes of the proceedings, or have counsel do so, or make a stenographic, mechanical, or electronic record of the proceedings.

(D) At the preliminary hearing, the issuing authority shall determine from the evidence presented whether there is a prima facie case that (1) an offense has been committed and (2) the defendant has committed it.

(E) Hearsay as provided by law shall be considered by the issuing authority in determining whether a prima facie case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

Commonwealth V. Ricker

In June 2014, Edward Ricker shot Pennsylvania State Trooper Michael Trotta. Ricker was arrested and charged with attempted murder, assault of a law enforcement officer and aggravated assault, Commonwealth v. Ricker, 120 A.3d 349 (Pa.Super. 2015).

At the preliminary hearing before a magisterial district judge, the Commonwealth presented testimony from a state trooper, who testified that he observed Trotta's gunshot wounds and participated in a search of Ricker's residence.

The trooper spoke to Ricker telling him he had an AK-47 rifle when he shot Trotta and that he did not understand why Trotta did not have a search warrant.

At the preliminary hearing the prosecution played a recording of an interview with Trooper Trotta. Ricker's lawyer demanded to cross-examine Trotta, and argued that Ricker's case is being improperly evaluated on hearsay testimony alone. The Commonwealth argued that they presented more than just hearsay evidence—they also presented Ricker's statement.

Ricker objected to the use of hearsay and asked for a continuance to call Troopers Trotta to testify. The District Judge overruled the objection and bound the case over for trial. Ricker filed a writ of habeas corpus, asking the court of

common pleas to review the testimony presented at the preliminary hearing. The petition was denied. He appealed to the Superior Court.

Ricker objected to the preliminary hearing result based upon the confrontation clause of the Pennsylvania Constitution. Prosecutors suggested only the three members of the Verbonitz plurality who joined in Justice Larsen's opinion decided the case based on the confrontation clause, therefore that aspect of the opinion is not binding precedent.

Prosecutor's argued that preliminary hearings are not constitutionally mandated. There were no preliminary hearings when the Confrontation Clause of the Pennsylvania Constitution was adopted. The Confrontation Clause was adopted with trials in mind not preliminary hearings.

The language of Rule 542(E) saying "[h]earsay evidence shall be sufficient to establish any element of an offense," implies that hearsay evidence alone can support a prima facie case. The Superior Court affirmed.

Pursuant to Commonwealth v. Ricker, a prosecutor can call a police officer as its sole witness at a preliminary hearing, have her read her affidavit of probable cause into the record, and meet its burden of proof.

The Pennsylvania Superior Court held in Ricker that it does not violate the Confrontation Clause of Article I, Section 9 of the Pennsylvania Constitution, or

the Sixth Amendment to the United States Constitution for a defendant to be held for court and ordered to stand trial as a result of a preliminary hearing based on hearsay alone.

Rule 542 (E), amended in 2013, provides: “Hearsay as provided by law shall be considered by the issuing authority in determining whether a prima facie case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, nonpermitted use of, damage to, or value of property.”

The Superior Court found that Rule 542 (E), permitting hearsay to be considered in assessing whether the Commonwealth has met its burden, authorizes the use of hearsay alone at a preliminary hearing to satisfy the Commonwealth's entire burden of proof.

Why should an accused be afforded the right of confrontation at a preliminary hearing. The reasons are obvious. Effective cross-examination of material witnesses could reveal flaws in the Commonwealth’s case.

Counsel for the defendant can seal the testimony of a prosecution witnesses for trial, and reveal defenses that might be available at trial.

The preliminary should be more than just a formality wherein a mouth-piece for an alleged victim appears under oath to tell the court what was told to them

along the side of road, in the victim's home or at the police station days after the event occurred.

Ricker's appeal to the Pennsylvania Supreme Court was granted on April 18, 2016, with oral argument on December 6, 2016. But on September 28, 2017, the Court dismissed the appeal as "having been improvidently granted."

The dismissal of the appeal, Commonwealth v. Ricker, 642 Pa. 367 (2017), included a dissenting statement and concurring statement clearly signaling that this issue is far from resolved.

Chief Justice Thomas G. Saylor, in a concurring statement in Ricker, acknowledged, "I recognize that the applicable rules are not models of clarity, as, for example, the directive to accept hearsay evidence in Rule 542 (E) appears to clash with the rule-based right to cross-examine witnesses against the defendant conferred under Rule 542 (C)."

"From my perspective, the 2013 amendment to the rule was not intended to convey that the Commonwealth could meet its burden at a preliminary hearing entirely through hearsay evidence," wrote Saylor.

"I personally operated on the belief that the Court was not rejecting Commonwealth ex rel. Buchanan v. Verbonitz, but rather, was simply putting the attendant controversy aside for future consideration in the case law," said Saylor.

Justice David Wecht, in a dissenting statement, wrote, “when the law affords a hearing to a person involved in our judicial system, particularly a hearing in which that person's liberty is at stake, the hearing must be more than a mere formality.” He then borrowed from U.S. Supreme Court Justice Benjamin Cardoza in Palko v. State of Connecticut, 302 U.S. 319, 327 (1937), “[t]he hearing, moreover, must be a real one, not a sham or a pretense.”

According to Lachman, Justice Wecht argued that hearsay constituted all the meaningful evidence presented at Ricker's preliminary hearing. By waiting for a "best case" to decide the issue of the admissibility of hearsay alone, the Court was depriving defendants of their right to conduct meaningful cross-examination and depriving magisterial district judges of their "essential role of determining whether the Commonwealth has presented enough evidence to detain the accused."

The Court issued no opinion, but Chief Justice Saylor's concurring opinion offered some explanation for the dismissal. The issue of whether hearsay alone established a prima facie case was not before the Court, because the commonwealth offered the statement of Trooper Trotta not just hearsay evidence.

At that point, the criminal preliminary hearing in Pennsylvania was of no practical use nor does it provide any meaningful protection to a defendant.

Commonwealth v. McClelland I

In McClelland I, Commonwealth v. McClelland, 165 A.3d 19(Pa. Super. Ct. 2017), the Superior Court held that the Fourteenth Amendment Due Process Clause is not violated when a defendant is held for court at a preliminary hearing based on only hearsay testimony.

Although in McClelland I, the Superior Court acknowledged that the Due Process Clause requires adequate notice, the opportunity to be heard, and the chance to defend oneself—it does not require the opportunity to confront witnesses against a defendant. However, Justice Bowes writing for the three-judge panel in McClelland did suggest some limitations on hearsay. She wrote, "This decision does not suggest that the Commonwealth may satisfy it burden by presenting the testimony of a mouthpiece parroting multiple levels of rank hearsay."

The use of rank hearsay is exactly what Ricker and McCelland have permitted. Although the Rules of Evidence have traditionally been relaxed at a preliminary hearing, permitting the prosecution to offer only hearsay evidence at such a hearing is a "sham," and a violation of the 14th Amendment due process and the Sixth Amendment right to confrontation.

McClelland was charged by the Pennsylvania State Police with sexually assaulting an eight-year-old girl. The charges included indecent assault, indecent

exposure, and corruption of a minor. The child was interviewed on video-tape by a child advocate in the presence of a state trooper.

At the preliminary hearing, the prosecution did not call the eight-year-old alleged victim to testify or play the video-tape interview. The prosecution called only the trooper. The trooper testified entirely from his observations of the interview. The only evidence presented was hearsay.

McClelland filed a Petition for Writ of Habeas Corpus asking the Court of Common Pleas to review the preliminary hearing and dismiss the charges. Attorneys for McClelland argued that holding the charges for court based only on hearsay violated both their client's right of confrontation and right to due process under both the Pennsylvania and United States Constitutions.

The trial court denied the petition, and McClelland filed an interlocutory appeal to the Superior Court.

The Superior Court found that there is no constitutional right to a preliminary hearing, and therefore the prosecution cannot violate the defendant's right to due process by asking a police office to simply read into the record the statement of a witness.

The Pennsylvania Supreme Court granted allowance to appeal to McClelland in January, refining the issue to "Whether the Superior Court panel

failed to properly apply and follow the legal precedent set forth in Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172 (Pa. 1990) in which five (5) Justices held that 'fundamental due process requires that no adjudication be based solely on hearsay evidence.'"

McClelland's filed a petition for a writ of habeas corpus, and then appealed the trial court's denial of that petition. McClelland sole argument was that the denial of his right to cross-examine the witnesses to the alleged offense violated due process.

According to Lachman, the Superior Court held that due process protections apply to preliminary hearings because once a state chooses to act in a field where its regulation is discretionary the procedures governing that field are subject to due process strictures. There was no legitimate claim that McClelland's substantive due process rights were violated because "there is no substantive due process right to be free from criminal prosecution except upon probable cause."

The court further ruled that the primary purpose of McClelland's cross-examination was not to obtain a dismissal at the preliminary hearing, but rather to prepare for trial.

The McClelland I court declared that the Supreme Court's Verbonitz decision was a plurality decision, and was decided before the adoption of Pa.R.Crim.P. 542(E).

Commonwealth v. McClelland II

In McClelland II, Commonwealth v. McClelland, 233 A.3d 717 (Pa. 2020), Donald McClelland appealed to the Pennsylvania Supreme Court. The high court framed the issue as "Whether the Superior Court panel failed to properly apply and follow the legal precedent set for in Commonwealth ex re. Buchanan v. Verbonitz, 581 A.2d 1972 (Pa. 1990) in which five (5) justices held the 'fundamental due process requires that no adjudication be based solely on hearsay evidence.'"

The Supreme Court issued its opinion on July 21, 2020, more than three years after the Superior Court's ruling. Justices Todd, Donohue, and Wecht joined in Justice Dougherty's majority opinion. Chief Justice Saylor concurred and dissented. Justice Mundy joined in a dissenting opinion written by Justice Baer.

The majority began by expressly disapproving of the Superior Court's decision in Ricker and unequivocally stated that a majority of five justices in Verbonitz agreed that fundamental due process requires more than hearsay to sustain a prima facie case.

In Marks v. United States, 430 U.S. 188 (1977), the United States Supreme Court said, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]"

Justice Dougherty examined Rule 542(E), and found the rule, "though not the model of clarity, does not permit hearsay evidence alone to establish all elements of all crimes for purposes of establishing a prima facie case at a defendant's preliminary hearing."

As preliminary hearings are a critical stage of criminal proceedings, due process attaches, and the hearings must be more than a mere formality.

Concurring, Justice Wecht, who dissented in Ricker, emphasized the precedential value of Verbonitz. He then stressed the importance of the liberty interests protected by preliminary hearings. Those protections, he observed would be "illusory" if hearsay alone served as the basis to detain a defendant or bring a defendant to trial.

In McClelland II, the Supreme Court had “little difficulty in stating with certainty that five Justices in Verbonitz agreed a prima facia case cannot be established by hearsay evidence alone, and the common rationale among those

Justices involved due process considerations." The Court held that hearsay evidence alone cannot establish a prima facie case at a preliminary hearing.

The Pennsylvania Supreme Court reversed the Superior Court in McClelland II, state unequivocally that hearsay alone cannot support a prima facie case at a preliminary hearing .

Commonwealth v. Harris

A recent Pennsylvania Superior Court panel has weighed in on the ongoing evolution of what evidence prosecutors need to sustain a prima facie case at a preliminary hearing.

In January 2022, the Superior Court further interpreted Rule 542. On January 3, 2022, the Superior Court decided Commonwealth v. Harris, 2022 Pa. Super. 1 (Pa. Super. Ct. 2022). Ronald Harris was accused of shooting a man over drugs. The victim failed to show up for two preliminary hearings. When the victim failed to show for a third hearing the district attorney's office called the police officer who took a statement of the victim. The officer testified over the objection of Harris' counsel. The case was bound to trial.

Although Harris filed a motion to quash the information, he remained incarcerated for nearly 18 months, despite the fact that the Commonwealth had a witness unwilling to cooperate.

The court in Harris found that "[N]othing in Rule 542 (E) prevents the application of Verbonitz requiring that all material elements of the criminal offense need to be proved at a preliminary hearing by non-hearsay evidence."

The court went on to say, "[W]hile a preliminary hearing is not a trial and due process is a flexible concept, the hearing is still a critical stage in the proceedings that is intended under Rule 542 to be more than a mere formality."

The court continued, "We conclude that the Supreme Court's holdings in Verbonitz and McClelland precludes the Commonwealth from relying on hearsay alone at a preliminary hearing to establish a prima facie case that the defendant committed a crime."

Fundamental due process limits the applicability of Pa. R. Crim. P. 542(E) to the use of other inadmissible hearsay evidence to matters that are not core elements of the crime charged, or matters that are tangential to whether the defendant was the one who committed the crime.

The Supreme Court's holdings in Verbonitz and McClelland precluded the Commonwealth from relying on hearsay alone at a preliminary hearing to establish a prima facie case that the defendant committed a crime. By failing to do that in this case, the Commonwealth violated defendant's fundamental due process right.

The Superior Court recently decided an interesting case extending the protections of Verbonitz and McClelland to a collateral consequence of a criminal conviction. On February 23, 2022, in Commonwealth v. Aumick, 2022 Pa.Super 33, the Superior Court reversed a trial courts collateral civil finding that the defendant was a sexually violent predator (SVP) under the Sex Offender Registration and Notification Act (SORNA), 42 Pa.C.S. 9799.12.

At the SVP hearing the SOAB member testified that she did not interview the defendant and conceded under cross-examination that her "opinion [was] based solely on allegation to which Aumick did not plead guilty."

Aumick argued that the SOAB member's expert opinion was based on unproven hearsay. The court citing Verbonitz and McClelland found , "If hearsay alone is insufficient to make out a *prime facie* case at a preliminary hearing, then the use of unproven allegations alone to designate a person as a SVP is also improper." The Commonwealth failed to meet its burden of clear and convincing evidence.

Burdens of Proof, Prosecution

The Supreme Court of Pennsylvania has previously observed the question of the evidentiary sufficiency of the Commonwealth's prima facie case is one of law. The

court's standard of review over such questions is de novo and its scope of review is plenary.

Preliminary Hearings, Entitlement

The preliminary hearing is not a trial. The principal function of a preliminary hearing is to protect an individual's right against an unlawful arrest and detention. At this hearing the Commonwealth bears the burden of establishing at least a prima facie case that a crime has been committed and that the accused is probably the one who committed it.

Preliminary Hearings, Appellate Review

A prima facie case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense.

Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. A judge at a preliminary hearing is not required, nor is he authorized to determine the guilt or innocence of an accused; his sole function is to determine whether probable cause exists to require an accused to stand trial on the charges contained in the complaint.

An offense on which the Commonwealth has met its burden will be held over for trial, at the trial, of course, the Commonwealth's burden is to establish guilt beyond a reasonable doubt. The weight and credibility of the evidence are not factors at the preliminary hearing stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense.

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Mangino's book The Executioner's Toll, 2010 was published by McFarland & Company. His weekly column on crime and punishment was syndicated nationwide by GateHouse Media and Gannett. He is an adjunct professor at Thiel College.

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