

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. CR 1282-2019
	:	
DANIEL KLEINTOP,	:	
Defendant	:	

Angela L. Raver, Esq.	Counsel for Commonwealth Deputy Attorney General
Joseph R. D'Andrea, Jr., Esq.	Counsel for Defendant

MEMORANDUM OPINION AND ORDER

Matika, J. - December 29, 2020

I. INTRODUCTION.

This Memorandum Opinion addresses the August 4, 2020 "Motion to Remand for a Preliminary Hearing" ("Defendant's Motion to Remand") filed by Defendant Daniel Kleintop ("Mr. Kleintop" or "Defendant").

In accordance with the Order of Court that follows this Memorandum Opinion, Defendant's Motion to Remand is denied, however, consistent with the holding of *Commonwealth v. McClelland*, 233 A.3d 717 (2020), Count 12 and Count 13 are dismissed without prejudice as the Preliminary Hearing held as to those counts was conducted in violation of the Defendant's due

process rights.

II. FACTUAL AND PRELIMINARY PROCEDURAL BACKGROUND.

A. The Underlying Charges.

Defendant has been charged with:

- Sexual Abuse of Children [Counts 1-5] (F2)
(18 Pa.C.S.A. §6312(b)(2));
- Sexual Abuse of Children [Counts 6-11] (F3)
(18 Pa.C.S.A. §6312(d));
- Indecent Assault [Count 12] (M1)
(18 Pa.C.S.A. §3126(a)(7));
- Corruption of Minors [Count 13] (M1)
(18 Pa.C.S.A. §3126(a)(7));
- Criminal Use of a Communication Facility [Count
14] (F3)
(18 Pa.C.S.A. §7512(a));

See generally, Information.

B. Factual and Procedural Background.

1. The Arrest.

On October 9, 2019, the Commonwealth arrested Defendant and charged him with five counts of Sexual Abuse of Children (Manufacturing Child Pornography), six counts of Sexual Abuse of Children (Possession of Child Pornography), and one count each of Indecent Assault, Corruption of Minors, and Criminal Use of a Communication Facility.

2. The October 25, 2019 Preliminary Hearing.

On October 25, 2019, District Court #56-3-02, per Magisterial District Judge William J. Kissner ("Judge Kissner"), conducted a preliminary hearing (the "October 25, 2019 Preliminary Hearing") as to all fourteen (14) counts at which Special Agent Daniel Block ("Agent Block") and Special Agent Kathryn Murray ("Agent Murray") testified on behalf of the Commonwealth.

Particularly and as to Count 12 and Count 13, Agent Murray testified that she had been present during an earlier forensic interview of the alleged victim in this matter. Agent Murray testified as to the contents of this forensic interview. Agent Murray detailed allegations made by the alleged victim during said forensic interview that resulted in the Commonwealth charging Defendant with Indecent Assault and Corruption of Minor. The Commonwealth and Defendant agreed at the October 25, 2019 Preliminary Hearing that Agent Murray accurately described the forensic interview of the alleged victim. Accordingly, the Commonwealth and Defendant further agreed that the Commonwealth did not need to introduce and play the recorded forensic interview of the alleged victim.

The Commonwealth did not present any testimony of the alleged victim during the October 25, 2019 Preliminary Hearing. The

Commonwealth relied instead solely on hearsay evidence with respect to Count 12 and Count 13 as permitted by *Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. 2015), discussed *infra*.

Counsel for Defendant objected to the use of hearsay evidence. Judge Kissner overruled this objection based upon *Commonwealth v. Ricker* and its permission of the sole use of hearsay evidence at preliminary hearings, heard testimony and argument from both the Commonwealth and Defendant, and bound all charges over to this Court.

Defendant conceded at the August 31, 2020 argument with respect to Defendant's Motion to Remand that the Commonwealth presented non-hearsay evidence to support all counts other than Count 12 and Count 13.

C. The Charges Filed.

Based upon the foregoing, on August 29, 2019, the Commonwealth charged Defendant with the above-delineated charges by Information filed on November 6, 2019.

II. THE PENNSYLVANIA SUPREME COURT'S DECISION IN COMMONWEALTH v. McCLELLAND.

Rule 542(E) of the Pennsylvania Rules of Criminal Procedure ("Rule 542(E)") states:

Rule 542. Preliminary Hearing; Continuances

(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.

See Pa.R.Crim.P. 542(E).

As of the October 25, 2019 Preliminary Hearing, the Pennsylvania Superior Court's opinion in *Commonwealth v. Ricker* provided Pennsylvania's prevailing interpretive judicial pronouncement with respect to Rule 542(E). In *Commonwealth v. Ricker*, the Pennsylvania Superior Court held that a plain reading of Rule 542(E) indicates that it permits hearsay evidence to be considered at a preliminary hearing in determining any material element of a crime when the Commonwealth seeks to establish a *prima facie* case and that an accused does not have a state or federal constitutional right to confront the witnesses against him or her at the preliminary hearing. See generally, *Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. 2015).

On July 21, 2020, the Pennsylvania Supreme Court, in *Commonwealth v. McClelland*, 233 A.3d 717, 734 (Pa. 2020) (sometimes hereafter "*Commonwealth v. McClelland*") held that Rule 542(E) does

not permit the Commonwealth to rely exclusively on hearsay evidence to establish all elements of all crimes for purposes of establishing a *prima facie* case at a preliminary hearing. See *Commonwealth v. McClelland*, 233 A.3d 717, 734 (Pa. 2020) ("We determine Rule 542(E), 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.").

III. DISCUSSION.

A. Defendant's Motion to Remand.

Defendant's Motion to Remand "[r]equests that this matter, based on *Commonwealth vs. McClelland* be remanded for a new Preliminary Hearing." See Defendant's Motion to Remand at 2. "Defendant maintains that the Court should grant the Motion to Remand to the magisterial district judge level to ensure that his due process rights will not be violated." See Defendant's Brief in Support of Motion to Remand for a Preliminary Hearing at 5.

Because Defendant conceded at the August 31, 2020 argument with respect to Defendant's Motion to Remand that the Commonwealth presented non-hearsay evidence to support all counts other than Count 12 and Count 13, only Count 12 and Count 13 warrant this

Court's consideration herein.

B. Retroactive Application of *Commonwealth v. McClelland*

"Unless they fall within an exception to the general rule [inapplicable to this matter], new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." See *Teague v. Lane*, 489 U.S. 288, 310 (1989).

The instant matter - obviously still ongoing - had not become final as of the Pennsylvania Supreme Court's July 21, 2020 issuance of the *Commonwealth v. McClelland* opinion. Accordingly, this Court shall consider retroactive application of *Commonwealth v. McClelland*.

C. Application of *Commonwealth v. McClelland* to this Matter.

The Pennsylvania Supreme Court in *Commonwealth v. McClelland* held that "[w]e determine Rule 542(E), 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."). See *Commonwealth v. McClelland*, 233 A.3d at 734.

How does this impact the case sub judice? In any criminal case, it is the responsibility of the Commonwealth to establish a *prima facie* case against a defendant on each count lodged against him or her. In the instant matter, neither the Commonwealth nor Defendant dispute that the Commonwealth presented non-hearsay evidence in support of all counts other than Count 12 and Count 13. The Commonwealth and Defendant likewise do not dispute that the Commonwealth relied solely on hearsay evidence with respect to Count 12 and Count 13. Notwithstanding, the characterization of the evidence, all charges were separately, yet collectively, bound over on the basis that the Commonwealth met the burden of establishing a *prima facie* case as to each count. As the Magisterial District Judge is tasked with the responsibility of determining whether a *prima facie* case has been established on each individual count, we do not believe our Supreme Court intended the *McClelland* holding to apply in any other way than through a charge-by-charge determination of a *prima facie* case.

By relying exclusively upon hearsay evidence to establish all elements of both Count 12 and of Count 13 for purposes of establishing a *prima facie* case at the October 25, 2019 Preliminary Hearing, the Commonwealth violated the due process rights of the defendant.

Accordingly, and notwithstanding the nature of the Motion to Remand seeking to remedy this wrong, we will deny this motion believing that the appropriate relief, consistent with *Commonwealth v. McClelland*, is to dismiss Count 12 and Count 13 without prejudice to the Commonwealth.

IV. CONCLUSION.

For the foregoing reasons, this Court enters the following Order:

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 v. : No. CR 1282-2019
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 DANIEL KLEINTOP, :
 Defendant :
 :

Angela L. Raver, Esq. Counsel for Commonwealth
Deputy Attorney General
Joseph R. D'Andrea, Jr., Esq. Counsel for Defendant

ORDER OF COURT

AND NOW, this 29th day of December, 2020, upon consideration
of

- the August 4, 2020 "Motion to Remand for a Preliminary Hearing" filed by Defendant Daniel Kleintop,
- the October 21, 2020 "Defendant's Brief in Support of Motion to Remand for a Preliminary Hearing,"
- the August 25, 2020 "Response [to] Motion to Remand for a Preliminary Hearing" filed by the Commonwealth,
- the October 20, 2020 "Commonwealth's Brief in Support of Response to Motion to Remand for a Preliminary Hearing,"

after the August 31, 2020 argument thereon, and upon comprehensive
review of this matter, it is hereby **ORDERED and DECREED** that the:

- August 4, 2020 "Motion to Remand for a Preliminary Hearing"

filed by Defendant Daniel Kleintop is DENIED, however, consistent with *Commonwealth v. McClelland*, and the Memorandum Opinion of even date herewith, Count 12 and Count 13 are DISMISSED without prejudice to the Commonwealth.

BY THE COURT:



Joseph J. Matika, J.