COMMONWEALTH OF PENNSYLVANIA v. MAURICE RUCKER
NO. CP-67-CR-4814-2019

Petition for a Writ of Habeas Corpus – Hearsay Testimony – Right to Confrontation

1. In his Petition for a Writ of Habeas Corpus, Defendant raised two issues: whether he could be bound over for trial at a preliminary hearing based solely on the hearsay testimony of one Commonwealth witness, and whether the Defendant has a right to confrontation pursuant to the U.S. Constitution and the Pennsylvania Constitution at the preliminary hearing level.

2. The Court concluded the Defendant's constitutional rights were violated when the Magisterial District Judge bound his case over for trial based solely on the inadmissible hearsay of the testifying Officer. Therefore, a *prima facie* case was not established against the Defendant at the preliminary hearing, and the charges against him were dismissed without prejudice.

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

COMMONWEALTH OF PENNSYLVANIA	:	NO. CP-67-CR-4814-2019
	:	
v.	:	
	:	
	:	
MAURICE RUCKER	:	
Defendant	:	

APPEARANCES:

Jennifer Tobias, Esquire
For the Commonwealth

Ronald Jackson, Esquire
For the Defendant

ORDER AND OPINION REGARDING DEFENDANT'S PETITION FOR HABEAS CORPUS RELIEF

AND NOW, this 24th day of February, 2020, the Court orders the charges in the above mentioned caption to be dismissed against the Defendant without prejudice for the reasons stated

in this opinion.

Procedural History

On June 6, 2019, Defendant was charged by Officer Adam Nothstein of the York City Police Department with Person not to Possess Firearms, Carrying Firearms without a License; Simple Assault; and Recklessly Endangering another Person. The Defendant's preliminary hearing was held on July 30, 2019, before Magisterial District Judge Linda Williams. She held the case over to the Court of Common Pleas. On October 1, 2019, the Defendant filed a Petition for Writ of Habeas Corpus. On December 5, 2019, this Court held a hearing on the matter. This Court ordered both parties to brief the matter no later than January 16, 2020.

Facts

The facts presented are solely based on the testimony of Officer Adam Nothstein. Officer Nothstein testified that he was dispatched to the area of 615 East Market Street, York, Pa. on June 6, 2019, at approximately 10:47 p.m. *See* Adam Nothstein, Police Criminal Complaint at 11; *see also* Brief In Support of Defendant's Petition for Habeas Corpus Relief at 2. Upon arrival at the scene of the alleged crime he was advised by employees of a pizzeria that a shooting had taken place across the street near 615 East Market Street. *See* Criminal Complaint at 11. When he inspected the scene he found blood splatter and four spent shell casings. *Id.*

Next, Officer Nothstein went to the York Hospital and spoke with Page Cameron Sykes, who had just been admitted with a gunshot wound to his left thigh. After some hesitation, Sykes named Maurice Rucker as his assailant. Sykes said, according to Officer Nothstein, that Maurice Rucker came out of a club, located at 615 East Market Street, and stated, "I'm sick of this shit" as well as he was "tired of people's shit." *Id.* At this moment Sykes started walking west, away

from the scene, when he heard gunshots and felt something strike his leg. Sykes claimed he knew it was the Defendant who shot him because they "used to be cool." *Id.*

The Officer then returned to York City Police Headquarters to put together a photo lineup to establish Sykes' identification of the Defendant. When the Officer returned to York Hospital to administer the lineup, Sykes refused to participate and stated that he "already did more than he should have." *Id.* According to Officer Nothstein another officer, PO Swartz, said a confidential informant was also at the location at the time of the shooting and corroborated Maurice Rucker's identity. *Id.*

Sykes did not show up to the preliminary hearing despite being subpoenaed to appear. The CI did not testify. The case was bound over to the Court of Common Pleas based on the testimony of Officer Nothstein alone. *See* Brief in Support of Defendant's Petition for Habeas Corpus Relief at 3. Sykes also did not show up to the habeas hearing on December 5, 2019. At the habeas hearing Officer Nothstein testified consistently with his preliminary hearing testimony and his affidavit of probable cause, but he indicated that he has not spoken with Sykes since the incident occurred. *Id.*

Discussion

Two issues are presented. First, whether the defendant can be bound over for trial at a preliminary hearing based solely on the hearsay testimony of one Commonwealth witness. Second, whether the Defendant has a right to confrontation pursuant to the U.S. Constitution and the Pennsylvania Constitution at the preliminary hearing level.

I.

In his Petition for a Writ of Habeas Corpus, the Defendant argues that the use of hearsay alone as the basis for holding his case over to the Court of Common Pleas violated his constitutional rights. He argues that both his right to confrontation under the Federal and Pennsylvania Constitutions and his right to due process were violated at the preliminary hearing. *See* Brief in Support of Defendant's Petition for Habeas Corpus Relief at 4-6. To support his claim he cites *Commonwealth v. Verbonitz*, a case in which the Pennsylvania Supreme Court, in a plurality opinion, held that a *prima facie* case cannot be made out against a defendant at a preliminary hearing based solely on hearsay. *See Commonwealth v. Verbonitz*, 525 Pa. 413, 419 (Pa. 1990). While it was a plurality opinion, a majority of the Justices agreed with the outcome, but differed on whether the rationale should be based on the right of confrontation or the right to due process. *Id.* at 420-21.

The Commonwealth does not dispute that the Defendant's preliminary hearing was conducted solely on the basis of inadmissible hearsay from the arresting officer. The Commonwealth's argument is that without binding precedent from either the federal or state Supreme Courts, the primary guidance on these matters should come from the Superior Court's decision in *Commonwealth v. Ricker* and Pennsylvania Rule of Criminal Procedure 542(E). *See* Commonwealth's Motion for Denial of Defendant's Petition for Writ of Habeas Corpus at 3. In *Ricker*, the Superior Court held that *Verbonitz* is a merely persuasive plurality opinion and that in light of the more recently enacted Rule 542(E), a *prima facie* case of probable cause should be able to be made out based purely on hearsay alone. *See Commonwealth v. Ricker*, 120 A.3d 349, 361 (Pa. Super. 2015). Rule 542(E) states that "any" element of an offense may be established by hearsay alone at a preliminary hearing. Pa.R.Crim.P. 542(E). The Superior Court took this to mean that "every" and "all" elements of an offense could be established at a preliminary hearing.

See 120 A.3d at 357. The Commonwealth argues that this Court should adopt this line of reasoning and find that the Defendant's constitutional rights were not violated at the preliminary hearing.

Another basis for the Commonwealth's argument is that a preliminary hearing is not a constitutionally mandated proceeding and, lacking any clear constitutional guidance on the scope of constitutional rights at a preliminary hearing, the rights mandated are those outlined in the Pennsylvania Rules of Criminal Procedure, specifically Rule 542. *See* Commonwealth's Motion for Denial of Defendant's Petition for Writ of Habeas Corpus at 2. These limited rights, according to the Commonwealth, do not include the right to have a *prima facie* case established by more than hearsay, under the Rule of Criminal Procedure 542 as amended in 2013. *Id.* at 5-6.

II. A.

Pa.R.Crim.P. 542 dictates the scope and procedures required at a properly conducted preliminary hearing. The rule states that the purpose of the preliminary hearing is to allow the issuing authority to "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*." Pa.R.Crim.P. 542(D)(italics added). While the burden is lower than that of a trial, this proceeding is still an adversarial adjudication which requires certain constitutional safeguards when it comes to identifying an alleged perpetrator. Rule 542(C) reflects this by giving the Defendant a limited, but vital, set of rights at the preliminary hearing. This includes the right to confront the witnesses the Commonwealth must use to establish a *prima facie* case against the Defendant. While this does not include all the witnesses the Commonwealth may use to establish guilt beyond a reasonable doubt at trial, it does, at a bare minimum, include the witnesses necessary to establish

the threshold *prima facie* case that the offense was committed and that it was committed by the defendant charged with the crime. *See Verbonitz*, 525 Pa. at 419.

In 2013, Section 542(E) was amended to allow the Commonwealth to establish "any" element of the offense by hearsay evidence alone.[1] Read too broadly this addition to Rule 542 would negate Rule 542(C)(2) and eviscerate two of the most important constitutional protections a Defendant has prior to trial: the right to confront the witnesses the Commonwealth needs to use to establish its *prima facie* case against a defendant, and the due process right not to have an adversarial adjudication determined solely on impermissible hearsay. Further, the Superior Court noted this danger in *Commonwealth v. McClelland* stating, "An extremely permissive reading of Rule 542(E) would mean that a prima facie case is always satisfied through the presentation of hearsay." *Commonwealth v. McClelland*, 165 A.3d 19, 26 (Pa. Super. 2017).[2] To read the rule otherwise would make 542(C)(2) a pointless addition to the rule.[3]

II. B.

[1] The rule makers could have chosen to state "all" elements, but significantly did not.
[2] The precedent set by *McClelland* would weigh in favor of allowing pure hearsay to establish a *prima facie* against a defendant at a preliminary hearing. This matter is dealt with below.
[3] Justice Wecht offers a salient analysis of the use of the word "any" in Rule 542(E) as interpreted by the Superior Court in *Ricker*: "On the other hand, it would be reasonable as well to interpret 'any' in a more restrictive, singular sense. A simple hypothetical will illustrate the point. The setting is a law firm. In an effort to ingratiate himself with his older colleagues, one young associate shows up for work on a Friday with a dozen doughnuts, and sends out an email reading 'I brought doughnuts today. Please help yourself to any that you like.' Inside the box are three different kinds of doughnuts: glazed, chocolate-sprinkled, and cream-filled. Lawyer A walks up and selects one glazed doughnut, reasonably believing that 'any' meant 'any one' particular doughnut. However, imagine that Lawyer B was the first to the box, and he decided to take two glazed doughnuts and two chocolate-sprinkled doughnuts. Lawyer B, also reasonably, interpreted 'any' to mean 'some' or 'as many as,' because each doughnut fairly can be considered 'any' doughnut. The first glazed is 'any', as is the second glazed, and as is each of the two chocolate-sprinkled doughnuts. Now, suppose instead that Lawyer C is the first to the box, and that he takes all of the doughnuts. Every one of them is a doughnut that he likes, and there was no limit suggested on the amount of doughnuts that he could take. In fact, he was told that he could take 'any' of them. In his view, 'any' meant 'all,' which he happens to know is also the precise meaning ascribed to the term by the Superior Court of Pennsylvania." *Commonwealth v. Ricker*, 642 Pa. 367, 394-95 (Pa. 2017). As this illustration reflects, the word "any" is imprecise and subject to differing interpretations by reasonable persons. "All" is clear and encompasses the entire set of items or issues under discussion. The rule makers in constructing Rule 543(E) consciously chose not to use the word "all," so to interpret the word "any" to mean "all" for this Rule would appear inconsistent.

The Commonwealth argues that *Commonwealth v. Ricker* constrains this Court to allow a case to proceed to trial based on a preliminary hearing in which the Commonwealth presented only hearsay evidence to establish all the elements of the charged offense. However, our Supreme Court, in rejecting the defendant's appeal in *Ricker* as improvident, made it clear that the case was not actually based on hearsay alone at the preliminary hearing. Justice Wecht stated, "The Court dismisses this appeal as improvidently granted, because a majority of Justices now have concluded that the case presents a poor vehicle by which to review the use of hearsay evidence at preliminary hearings. The Court has determined that, because the Commonwealth introduced some non-hearsay evidence at David Ricker's preliminary hearing, we should await a case in which the issue is more suitably presented." *See Commonwealth v. Ricker,* 642 Pa. 367, 388-89 (Pa. 2017). Because the Superior Court's opinion in *Ricker* does not address a preliminary hearing based on hearsay alone, it does not bind the case at hand, which is based solely on hearsay.

In *Ricker*, the Superior Court made its determination based on the Confrontation Clauses of the Federal and Pennsylvania Constitutions. Additionally, in *McClelland*, the Superior Court affirmed holding the case over for trial even though it was based on pure hearsay on due process grounds. However, the Superior Court cautioned that,

> An extremely permissive reading of Rule 542(E) would mean that a prima facie case is always satisfied through the presentation of hearsay. As an extreme application, the Commonwealth could sustain its burden by presenting the testimony of a fellow prosecutor who spoke to a police officer, who had read a report, which stated that an anonymous citizen called to report that a defendant committed a series of acts that met the material elements of some charged crime.

> This decision does not suggest that the Commonwealth may satisfy its burden by presenting the testimony of a mouthpiece parroting multiple levels of rank hearsay.

McClelland, 165 A.3d. at 26-27. The strength of these precedents remains unclear for two reasons: (1) our Supreme Court granted *allocatur* in *McClelland* and two justices, in *Ricker*, have indicated they do not agree with allowing pure hearsay in this context (and that *Ricker* did not address a pure, inadmissible hearsay case), and (2) in *McClelland*, it is unclear why multiple levels of rank hearsay would be qualitatively worse than one level of rank hearsay. In absence of a clear rule, this Court will follow the established precedent set by our Supreme Court in *Verbonitz*, which is consistent with the Constitutional right to confrontation.

Given the guidance by our Supreme Court in *Verbonitz* and in the two opinions issued by Chief Justice Saylor and Justice Wecht in *Ricker*, this Court is disinclined to condone the practice of allowing hearsay alone in a preliminary hearing. The message from these sources is clear: hearsay alone should not be the basis for establishing a *prima facie* case against the defendant. Chief Justice Saylor, in his opinion concurring with the rejection of *allocatur* in *Ricker*, stated that he did not want to hint at a bright-line rule either way on this issue, but that it was his personal opinion that,

> the 2013 amendment to the rule [Rule 542(E)] (which expanded the range of express permission for the use of hearsay evidence beyond establishing elements requiring proof of ownership of, non-permitted use of, damage to, or value of property) was not intended to convey that the Commonwealth could meet its burden at a preliminary hearing entirely through hearsay evidence. Rather, I believe the revision served only as an attempt to clarify that the 2011 amendment

> to the rule had not restricted the Commonwealth's ability to adduce hearsay evidence at preliminary hearings solely to offense elements requiring proof of ownership, non-permitted use, damage, or value of property.

Ricker, 642 Pa. at 387-88.

The Chief Justice also made it clear that the precedents used by the Court in *Verbonitz* should still guide decisions in this matter today. Specifically, he said "The opinions in *Ceja*, arising out of the use of hearsay in administrative proceedings, provide salient expositions of relevant considerations." *Id.* at 386 (citations omitted). Our Supreme Court, in *Verbonitz*, used the United States Supreme Court opinions in *Ceja* to analogize administrative adjudications to criminal proceedings. The plurality in *Verbonitz*, quoting *Ceja*, stated, "'[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." *Verbonitz*, 525 Pa. at 417(citations omitted). A fuller discussion of *Verbonitz* will be found *infra*, but this Court finds the Chief Justice's endorsement of the *Verbonitz/Ceja* line of reasoning persuasive.

Another justice, dissenting in the dismissal of the *Ricker allocatur*, opined that when the right case came before our Supreme Court, he would be inclined to reaffirm the Court's opinion in *Verbonitz*. Justice Wecht stated that the importance of a preliminary hearing lies in its status as the first adversarial adjudication between a defendant and the Commonwealth in which the latter has the burden, however slight, of proving its charges against the defendant. *See Ricker*, 642 Pa. at 391. The Commonwealth is not allowed to relax its vigilant protection of a defendant's constitutional rights merely because the possibility of a final determination of guilt has not yet attached to the proceeding. The Commonwealth must protect the defendant's constitutional

rights at every critical stage of the criminal prosecution. *See Id.*; *see also Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *See also* U.S. CONST. Amends. VI, XIV; *See also* Pa. CONST. art. I, § 9. A preliminary hearing is one of those stages. *Id.* Justice Wecht made it clear that an interpretation of Rule 542(E) that allowed for the establishment of a *prima facie* case at a preliminary based purely on hearsay would violate the constitutional principles that protect a defendant from the perils of a government that does not have to abide by its own standards. *See Ricker*, 642 Pa. at 405. Justice Wecht stated that an overly broad interpretation of Rule 542(E), "runs afoul of our constitutional requirements of due process and fundamental fairness. It is unsustainable, as a matter of law." *Id.* at 392. To bolster his opinion, Justice Wecht offers an analysis of the use of the term "any" in Rule 542(E) under the Statutory Construction Act.

This Court agrees with Justice Wecht that the Statutory Construction Act provides a useful lens through which to ascertain the true meaning of this rule. While the Act is generally applied to discover the legislative intent of a statute, its provisions can usefully be applied to Rule 542(E) as well. The Justice first notes that the term "any" has multiple interpretations and the rule provides no guidance as to which should apply. *Id.* at 394. Applying the rationale behind the Statutory Construction Act, Justice Wecht reasons that "any" has to be read in a way that does not interfere with the mechanics of the rest of the rule. *Id.* at 386. Specifically, he settles on the canon of constitutional avoidance to help understand this term.[4] Under this canon of construction, Justice Wecht examines the use of the word "any" to mean "every", as the Superior

[4] Our Supreme Court has recognized this canon and stated, "The 'canon of constitutional avoidance' provides that when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. See Harris v. United States, 536 U.S. 545, 555, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002). . . . Pennsylvania explicitly recognizes this canon by statute in instances where construction of a Pennsylvania statute is at issue. See 1 Pa.C.S. § 1922; see also Commonwealth v. Bavusa, 574 Pa. 620, 832 A.2d 1042, 1050-51 (Pa. 2003)." *MCI WorldCom, Inc. v. Pa. Pub. Utility Comm'n,* 844 A.2d 1239, 1249-50 (Pa. 2004)

Court used it in *Ricker*, and states that such an interpretation "raises grave due process concerns that render it unsustainable, requiring it to give way to a construction that does not raise the same concerns." *Id.* at 397-98.

Justice Wecht's *Ricker* opinion also states at length how the overly broad interpretation of Rule 542(E) acts to deprive a defendant of his due process rights. Fundamentally, his argument boils down to the fact that due process guarantees that states will be prevented from depriving "any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend XIV, § 1. Procedural due process has many roles in protecting citizens from the unfair deprivation of their liberty, including in the pretrial phase of a criminal proceeding. While a preliminary hearing is not a product of either the Federal or Pennsylvania Constitution, that does not mean that constitutional protections do not attach to such a proceeding. *Id.* at 403. A preliminary hearing serves a fundament purpose in our system of government: "Although not constitutionally mandated, a preliminary hearing, once established, plays a vital role in our criminal justice system. For all parties involved, it serves a core function, and it protects against unwarranted governmental intrusions upon a citizen's liberty." *Id.* at 405. An overly broad reading of Rule 542(E) would turn this core function into a mere formality and reduce the government's role in a preliminary hearing to that of a trivial rubber stamp for the prosecution. Our Supreme Court, in *Verbonitz*, handed down an opinion that would ensure that this would not be the case.

The Superior Court in *Ricker* rightly noted that *Verbonitz* is a plurality opinion and is, therefore, merely persuasive. However, on a constitutional issue of core importance to protect Pennsylvania citizens from a denial of liberty without a right of confrontation or due process, this

Court is persuaded.[5] *Verbonitz* stands for the position that once a defendant has been granted constitutional rights, they cannot be nullified by taking away other rights that are necessary to the function of the constitutional right. *Verbonitz,* 525 Pa. at 417-18. Our Supreme Court in *Verbonitz,* incorporated *Coleman,* and stated that one of that one of the primary purposes for providing counsel at a preliminary hearing was because "the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over." *Id.* (quoting *Coleman v. Alabama,* 399 U.S. 1, 9 (1970)). The recognized right to counsel must include the right to cross examine the witnesses necessary to possibly expose real, truthful weaknesses in the Commonwealth's *prima facie* case against the Defendant.

The Commonwealth is correct, however, that the trial courts and counsel have languished for too long without a definitive appellate ruling from the Supreme Court on this issue. As this is a clean record, where only hearsay was relied upon as a basis to link the Defendant to the alleged crime, this case provides that vehicle to clean up the uneven application of the law as to the scope and extent to which a defendant may have charges forwarded based solely on hearsay. The instant case could indeed be the last safety stop at the top of a slippery slope before the preliminary hearing is relegated to a mere bureaucratic formality, rather than an essential step in the criminal justice process that preserves citizens' rights. This case reveals the dangers of hearsay evidence alone. After identifying the Defendant as his assailant, the alleged victim in this

[5] Justice Wecht counseled as much in his opinion in *Ricker*: "In the case *sub judice*, the Superior Court effectively buried *Verbonitz* as a valueless plurality. This was a parched interpretation. In *Verbonitz*, five Justices of this Court agreed that, to some degree, constitutional due process attaches at a preliminary hearing and prohibits cases from being bound over for trial based solely upon hearsay. Far from lacking persuasive value, the *Verbonitz* opinions should together be recognized as a holding that due process prohibits the Commonwealth from depriving a person of liberty upon nothing more than inadmissible hearsay. A hearing premised only on hearsay cannot comport with any reasonable understanding of 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.'" *See Ricker,* 642 Pa. at 404 (citations omitted).

case refused to cooperate further or testify at the preliminary hearing. Is that because his initial allegation was untrue, speculative, contrived, or some other reason? The right to confrontation being denied in this case precludes the Defendant from developing any of those possibilities, and thereby demonstrating the absence of a *prima facie* case.

The Court in *Verbonitz* noted, as did Chief Justice Saylor in *Ricker*, that if "rank hearsay" does not suffice to meet the state's burden in an administrative adjudication, then it cannot be the basis of an adversarial criminal adjudication between a defendant and the Commonwealth. *Id.* at 417; *see also Ricker*, 642 Pa. at 386. In *Verbonitz* our Supreme Court clearly articulated the standard for preliminary hearings,

> The Pennsylvania Constitution provides that "in all criminal prosecutions" the accused has a right to meet the witnesses against him -- "face to face". Pa. Const. Art. 1 § 9. This right necessarily includes the right to confront witnesses and explore fully their testimony through cross-examination. A preliminary hearing is an adversarial proceeding which is a critical stage in a criminal prosecution. It is not a sidebar conference at which offers of proof are made. Thus, the Pennsylvania Constitution mandates a criminal defendant's right to confrontation and cross-examination at the preliminary hearing.

Id. at 419. The right to confront the Commonwealth's witnesses against the defendant, at least the witnesses required to establish probable cause under Pennsylvania Rule of Criminal Procedure 542, cannot be abridged in the name of expediency.[6]

[6] The *Verbonitz* Court also addressed the lack of U.S. Supreme Court precedent on this matter and stated, "While the United States Supreme Court has not specifically held that the full panoply of constitutional safeguards (ie., confrontation, cross-examination, and compulsory process) must attend a preliminary hearing, it has inferred as much in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). In Pugh, the court held that the right to

III.

The preliminary hearing is a vital stage in a criminal proceeding. It can result in the dismissal of charges. Conversely, as in murder cases, it can result in a defendant being denied access to bail, and being incarcerated for lengthy periods, if the court finds a *prima facie* case exists in a first degree murder trial. *See* 42 Pa.C.S. § 5701("All prisoners shall be bailable by sufficient sureties, unless: (1) for capital offenses or for offenses for which the maximum sentence is life imprisonment; or (2) no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great."). Thus, the very issues of freedom and imprisonment are a direct outcome of preliminary hearing proceedings. It is disingenuous for the Commonwealth to argue that because the preliminary hearing is not a constitutionally mandated proceeding that constitutional protections do not apply. The Commonwealth employs the preliminary hearing as a tool to decide issues of liberty and imprisonment, and thus its procedures must withstand constitutional scrutiny under the Sixth and Fourteenth Amendments to the U.S. Constitution, as well as Article 1 § 9 of the Pennsylvania Constitution. The government could, in theory, elect to do away with the preliminary hearing process and to initiate and forward charges by other means, such as a grand jury. However, where the government elects to employ the preliminary hearing process, it must provide due process of law and the right of confrontation.

Under the Sixth Amendment right to confront the witnesses against him, the Defendant has a right to cross-examine the witness against him, if that witness is necessary to establish a

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counsel, confrontation, cross-examination and compulsory process are not essential for a pre-trial detention hearing held pursuant to the Fourth Amendment because such a hearing is not adversarial in nature. The court stated, however, that when a pretrial hearing takes the form of a preliminary hearing and thus, adversary procedures are used, '[t]he importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination'. Id. at 120, 95 S.Ct. at 866, 43 L.Ed.2d at 69." *Verbonitz*, 525 Pa. at 418-19.

prima facie case that can be held over to trial. Under his Fourteenth Amendment right to procedural due process, the Defendant has a right to have his case bound over for trial based on more than inadmissible hearsay. Under Article 1 § 9 of the Pennsylvania Constitution, the Defendant has a right in all criminal prosecutions "to be confronted with the witnesses against him." Anything less would turn the preliminary hearing into a check-the-box administrative procedure by the prosecution. This is not to say the Commonwealth must hold a full trial at a preliminary hearing or prove the Defendant's guilt beyond a reasonable doubt. Nor does this mean the Commonwealth must hold the preliminary hearing merely to give the Defendant the opportunity to build a case for his defense. The precedent on this matter is clear, "The preliminary hearing was not created for the purpose of serving as a trial preparation tool for the defense." *Ricker*, 642 Pa. at 406 (citing *Commonwealth v. Sanchez*, 82 A.3d 943, 984 (Pa. 2013)).

However, if some benefits naturally accrue to the Defendant as the Commonwealth protects his constitutionally mandated rights, then so be it. The Commonwealth does not have to present legally admissible evidence that establishes the Defendant's guilt beyond a reasonable doubt, they merely must meet the low burden of presenting some legally admissible non-hearsay or recognized hearsay exception evidence that establishes the *prima* facie case against the Defendant, while allowing him to confront the witness who alleges that he was the one who committed the charged crime. This means more than mere hearsay from one officer who interviewed an alleged victim, who has since declined to cooperate or corroborate their initial accusation.

In this case, the Commonwealth offered only a single inadmissible hearsay statement against the Defendant from the mouth of one police officer. Such a proceeding is mere theatre in

service to our Constitutions, unless the defendant's underlying rights to confrontation and due process are preserved. This Court concludes the Defendant's constitutional rights were violated when the Magisterial District Judge bound his case over for trial based solely on the inadmissible hearsay of Officer Adam Nothstein.

Conclusion

A *prima facie* case was not established against the Defendant at the preliminary hearing. Therefore, the charges against him are dismissed without prejudice.

BY THE COURT:

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CRAIG T. TREBILCOCK, JUDGE