

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE: :
: Ernest L. Marraccini :
Magisterial District Judge In and For : No. 2 JD 05
Magisterial District 05-2-26 :
Allegheny County :

BEFORE: Honorable Richard A. Sprague, P.J.
Honorable Joseph A. Halsey
Honorable Robert L. Capoferri
Honorable Paul P. Panepinto
Honorable Lawrence J. O'Toole
Honorable Marc Sandler
Honorable William H. Lamb

CONCURRING OPINION BY JUDGE SANDLER FILED: July 20, 2006

I concur with the holding of the majority that Respondent did not violate the Pennsylvania Constitution nor any of the Rules promulgated by our Supreme Court Governing the Standards of Conduct of Magisterial District Judges when he refused to permit the violation of the Sixth Amendment of the United States Constitution and of Article 1, §9 of the Pennsylvania Constitution, and refused to permit the introduction of hearsay testimony to convict citizens of this Commonwealth in his courtroom.¹

As the majority has pointed out:

The root of the controversy in this case is Pennsylvania Rule of Criminal Procedure 454(B) and the way it has been interpreted and implemented by Magisterial District Judge Evashavik and Chief Wood of the Edgewood Borough Police Department. The portion of Rule 454(B) pertinent here provides:

¹ I also concur with the holding of the majority that Respondent's actions in the waiting area outside the courtroom where he announced the dismissal of all the cases and responded rudely to questions from the defendants were such that subject him to discipline.

If the defendant pleads not guilty, the issuing authority shall try the case in the same manner as trials in criminal cases are conducted in the courts of common pleas when jury trial has been waived; however, in all summary cases arising under the Vehicle Code or local traffic ordinances, the law enforcement officer observing the defendant's alleged offense may, but shall not be required to, appear and testify against the defendant. In no event shall the failure of the law enforcement officer to appear, by itself, be a basis for dismissal of the charges against the defendant.

According to the testimony of Chief Wood, Officer Quinn and Respondent, Judge Evashavik had interpreted this rule to permit – even require – a finding of guilty in the absence of any evidence of guilt and, by way of implementing this interpretation, had established a protocol whereunder “the law enforcement officer observing the defendant's alleged offense,” commonly did not attend the hearings and the testimony which he or she would [supposedly] give was given, as if by proxy, by the Chief who appeared as “reader.”

The Respondent, a judge of thirteen years experience, did not subscribe to the legitimacy of this interpretation of the rule, would not permit its implementation, and clashed with Chief Wood who repeatedly demanded that he do so.²

The majority holds that it was “reasonable” for Respondent to rule that Rule 454(B) of the Criminal Rules of Procedure did not require him to admit testimony offered by a “reader.”³ I certainly agree with that holding. However, the majority opinion does not say it would have been “wrong” or “unreasonable” for Respondent to have ruled the other way and admitted the testimony of a “reader.” The inescapable implication of that omission is that it would have been just as “reasonable” for Respondent to have ruled the other way and admitted the testimony of a “reader.”

² Majority Opinion pp. 11-12.

³ Id. at 12.

I proceed to this opinion because I believe it would have been unquestionably wrong for Respondent to have admitted the testimony of Chief Wood as “reader.”

Review of the constitutional authorities demonstrates that Respondent was right to exclude Chief Wood’s “testimony,” and that the procedure established by Judge Evashavik and urged on Respondent by Chief Wood is unconstitutional and offends basic rules of evidence. To follow that procedure would have been unlawful – and far from “reasonable.”

Heed must be taken of the Sixth Amendment to the United States Constitution and to Article 1, §9 of the Pennsylvania Constitution both of which provide that a defendant in a criminal case has the right “to be confronted with the witnesses against him.” In Barber v. Page, 390 U.S. 719, 721, 88 S.Ct. 1318, 1320, 20 L.Ed. 2d 255, 258 (1968), the United States Supreme Court said:

Many years ago this Court stated that “the primary object of the [Confrontation Clause of the Sixth Amendment] . . . was to prevent depositions or *ex parte* affidavits⁴ . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.” Mattox v. United States, 156 U.S. 237, 242-243 (1895). More recently, in holding the Sixth Amendment right of confrontation applicable to the States through the Fourteenth Amendment, this Court said, “There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.” Pointer v. Texas, 380 U.S. 400, 405 (1965). See also Douglas v. Alabama, 380 U.S. 415 (1965).

⁴ Such as the affidavits of the officers who issued the citations which Chief Wood was proposing to read into evidence.

Under the procedure established by Judge Evashavik and pressed on Respondent by Chief Wood it was a given that defendants would not be confronted by the witnesses against them, i.e., by the law enforcement officers observing the defendants' alleged offense – a patent violation of the above stated constitutional principles.

In addition, the proposed “testimony” of Chief Wood, i.e., his “reading” of what the absent law enforcement officer had written on the citations, was hearsay and inadmissible under Pennsylvania Rules of Evidence 801 and 802:

Those rules provide:

Rule 801. Definitions

The following definitions apply under this article:

- (a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant. A “declarant” is a person who makes a statement.
- (c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.

In the proceedings taking place before Respondent on the day in question, Chief Wood was attempting to place in evidence written assertions by absent declarants to prove the truth of the matters asserted – which in every case perfectly fit the definition of hearsay. Rule 802 provides that such testimony is not admissible.

It is commonly noted that the hearsay rule is as well known for its exceptions as for the rule itself. Rule 802 provides for three categories of exceptions:

- (1) “except as provided by these rules,”
- (2) “[except as provided] by other rules prescribed by the Supreme Court,” and
- (3) “[except as provided] by statute.”

The only exception here applicable is the second, because the testimony of Chief Wood proffered here is not the subject of any exception contained in the Rules of Evidence, nor is it the subject of any statutory exception. It might, however, be asserted to be an exception by virtue of Rule of Criminal Procedure 454(B), which is a rule “prescribed by the Pennsylvania Supreme Court.” It is apparent that Rule 454(B) does not, and was not intended to, create an exception to the hearsay rule. Review of the language of Rule 454(B) itself reveals that no exception is intended or provided and this conclusion is confirmed when the language of that rule is compared with other Supreme Court rules and with statutes which clearly do provide exceptions to the hearsay rule.

Rule 454(B) does not even purport to establish an exception to the hearsay rule: it nowhere provides for the admissibility of testimony which would meet the definition of “hearsay.” Indeed, it does not even address or approach the hearsay rule. What it says is:

- the officer who witnessed the alleged offense and wrote the citation may but shall not be required to, appear and testify, and
- the failure of that officer to appear and testify shall not, by itself, be a basis for dismissal of the charges.

It is to state the obvious to say that Rule 454(B) does not provide that somebody else may provide the testimony which the officer issuing the citation [supposedly/presumably/probably/most likely] would have given. The rule nowhere provides for the admissibility of any testimony, let alone hearsay.

In contrast, other rules prescribed by the Supreme Court which do provide for the admissibility of hearsay do so specifically. See, e.g., Pa.R.C.P. No. 4017.1 – relating to videotape depositions, which specifically provides that they are admissible:

- (g) In addition to the uses permitted by Rule 4020 a videotape deposition of a medical witness or any witness called as an expert, other than a party, may be used at trial for any purpose whether or not the witness is available to testify (emphasis added).

Pa.R.C.P. No. 4017.1(g). See, also, Pa.R.C.P. No. 4020 which specifies the various circumstances when depositions “may be used” at a trial.

Likewise, exceptions to the hearsay rule provided by statute, specifically provide that particular types of hearsay are admissible. For example:

- 42 Pa.C.S.A. §6104 provides:

A copy of a record of governmental action or inaction . . . shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.

- 35 Pa.C.S.A. §450.810 provides:

Any record or duly certified copy of a record . . . [which qualifies as a vital statistic] shall constitute prima facie evidence

- 13 Pa.C.S.A. §1202 provides:

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher’s or inspector’s certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of

its own authenticity and genuineness and of the facts stated in the document by the third party.

- 42 Pa.C.S.A. §5936 provides:

A deposition taken under subsection (a) shall be admissible in a civil matter.

- 42 Pa.C.S.A. §5919 provides:

The testimony of witnesses taken in accordance with section 5325 (relating to when and how a deposition may be taken outside this Commonwealth) may be read in evidence

- 42 Pa.C.S.A. §5985.1 provides:

An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing physical abuse, indecent contact or any of the offenses enumerated in 18 Pa.C.S. Ch. 31 (relating to sexual offenses) performed with or on the child by another, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal proceeding

- 42 Pa.C.S.A. §5986 provides:

A statement made by a child describing acts and attempted acts of indecent contact, sexual intercourse or deviate sexual intercourse performed with or on the child by another, not otherwise admissible by statute or court ruling, is admissible in evidence in a dependency proceeding

- 75 Pa.C.S.A. §3368(d) provides:

A certificate from the station showing that the calibration and test [of a mechanical, electrical and electronic device used to measure speed of a motor vehicle] were made within the required period, and that the device was accurate, shall be competent and prima facie evidence of those facts in every proceeding in which a violation of this title is charged.

(Emphasis in all cases added.)

It is obvious, then, that Rule 454(B) neither does, nor intends to, create such an exception to the hearsay rule as to require the admissibility of the “readings” of Chief

Wood – or any other “reader” – of the out-of-court statements of absent declarants. The common sense – and only constitutional – meaning of Rule 454(B) is that if the issuing officer, i.e., “the law enforcement officer who witnessed the alleged offense” does not appear, that, “by itself” shall not be a basis for dismissal of the charges, where there is other evidence to establish the alleged offense. Such other evidence could include, for example, another witness, film properly authenticated, or a statement by the defendant. This is a reasonable interpretation of the rule, and the only one which would permit its implementation without colliding with basic constitutional principles.

I point out, in addition, that even if Rule 454(B) were to be construed as creating an exception to the hearsay rule, i.e., as permitting the admission of the readings of Chief Wood or some other reader, then implementation of the exception would still have to pass constitutional examination. I believe that implementation which would permit conviction without the opportunity for defendants to confront and cross-examine the witnesses against them would violate the constitutional rights of defendants. The Supreme Court of the United States has so held.

In California v. Green, 399 U.S. 149, 155-56, 90 S.Ct. 1930, 1933-34, 26 L.Ed. 2d. 489, 495-96 (1970) that Court stated:

While it may readily be conceded that hearsay rules and the Confrontation Clause [of the Sixth Amendment] are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

Given the similarity of the values protected, however, the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation.

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d. 177 (2004), an out-of-court statement of defendant's wife was admitted at defendant's trial for assault and attempted murder because, since the wife had admitted that she had led defendant to the victim's apartment and thus had facilitated the crime, her statement was against penal interest and admissible under that exception to the hearsay rule in the State of Washington, Washington Rule of Evidence 804(b)(3) (2003). The Supreme Court of the United States overruled the Supreme Court of Washington, as well as its own earlier ruling in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980), and held that the Confrontation Clause prohibits the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case regardless of whether the out-of-court statement would qualify for admission under some exception from the hearsay rule and regardless of whether some judge considers the out-of-court statement to bear adequate "indicia of reliability." Id. at 66, 100 S.Ct. 2539, 65 L.Ed. 2d 608 (1980). The latter concept had been adopted by the Court in the Roberts case which it overruled in Crawford.

It is clear that the Confrontation Clause applies to the testimony which Chief Wood sought to introduce in the Edgewood Borough cases. As Justice Scalia, writing for the Court in Crawford explained:

[T]he Confrontation Clause applies to "witnesses" against the accused - in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration

or affirmation made for the purpose of establishing or proving some fact.” Ibid. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of “testimonial” statements exist: [1] “ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” . . . [2] “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” (citation omitted) [3] “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,”

Id. at 51-52, 124 S.Ct. 1364, 158 L.Ed. 2d 192-93 (2004).

The Court thus enumerated “three formulations” of what it considered to be the “core class” of testimonial hearsay. The Court observed that “[t]hese formulations all share a common nucleus” and that “some statements qualify under any definition.” Id. The affidavits on the citations written by the absent police officers offered in this case qualify under all three formulations and the hearsay proffered here is prototypical “testimonial” hearsay.⁵

Underscoring its determination to permit no judicial nibbling at the core elements of the Confrontation Clause, the Crawford Court observed:

The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial

⁵ I think Justice Scalia aptly focuses upon the heart of the matter and upon the issue here prominent when he notes that “involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.” Crawford v. Washington at 56, 245 S.Ct. 1367, 158 L.Ed. 2d 196, n.7 (2004).

statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.

Id. at 53-54, 124 S.Ct. 1365, 158 L.Ed. 2d 194 (2004). And, again:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge [as had been approved in Roberts] is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

The Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.

Id. at 61-62, 124 S.Ct. 1370, 158 L.Ed. 2d 199 (2004).

Reversing the judgment of the Supreme Court of Washington, the Court concluded:

In this case, the State admitted Sylvia's [the wife's] testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. Roberts notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of

reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

Id. at 68-69, 124 S.Ct. 1374, 158 L.Ed. 2d 203 (2004).

Thus, as stated earlier, even if Rule 454(B) were to be construed as creating an exception to the hearsay rule in Pennsylvania, and, even if the testimony proffered by Chief Wood would qualify as admissible under the rule, to admit it would be to deprive defendants of their Sixth Amendment right to confrontation as explicitly explained and laid down in Crawford.⁶

I mention two additional points.

First, the only exceptions to the hearsay rule which have been held, pre-Crawford, not to conflict with the Confrontation Clause, were those which were considered to fall within a “firmly rooted” hearsay exception. See, Ohio v. Roberts, supra, at 66, 100 S.Ct. 2531, 2539, 65 L.Ed. 2d 597, 607-08 (1980); Mattox v. United States, 156 U.S. 237, 244, 15 S.Ct. 337, 340, 39 L.Ed. 409, 411 (1895) (dying declarations); Pointer v. Texas, 380 U.S. 400, 407, 85 S.Ct. 1065, 1069-70, 13 L.Ed. 2d 923, 928 (1965) (dying declarations); Mancusi v. Stubbs, 408 U.S. 204, 213-14, 92 S.Ct. 2308, 2313-14, 33 L.Ed. 2d 293, 301-02 (1972) (cross-examined prior testimony). By no stretch can a “Rule 454(B) exception” be considered to be “firmly rooted.” For an exception to be a “firmly rooted exception” it must first be an “exception”: it has never been held that Rule 454(B) created an exception to the hearsay rule. Nor, as pointed out above, does it, supra, 13-17.

⁶ In the following cases the Supreme Court granted certiorari, vacated judgment and remanded for proceedings in accordance with Crawford: Wedgworth v. Kansas, 543 U.S. 801, 125 S.Ct. 214, 160 L.Ed. 2d 1 (2004); Calcano v. United States, 543 U.S. 801, 125 S.Ct. 135, 160 L.Ed. 2d 2 (2004); LaFontaine v. United States, 543 U.S. 801, 125 S.Ct. 46, 160 L.Ed. 2d 1 (2004); Varacalli v. United States, 543 U.S. 801, 125 S.Ct. 36, 160 L.Ed. 2d 1 (2004); Shields v. California, 541 U.S. 930, 124 S.Ct. 1653, 158 L.Ed. 2d 352 (2004); and Corona v. Florida, 541 U.S. 930, 124 S.Ct. 1658, 158 L.Ed. 2d 352 (2004).

Second, it is important to remember that, in order for an out-of-court statement to be admitted without offending a defendant's rights under the Sixth Amendment, two elements must be present: (1) the absent witness must be unavailable and (2) the defendant must have had a prior opportunity for cross-examination, Crawford, supra, at 53-54, 124 S.Ct. at 1365-66, 158 L.Ed. 2d at 194 (2004). In the Edgewood Borough cases before Respondent on the day in question both elements were absent. The absence of any opportunity for the defendants to cross-examine the issuing officers is obvious; but it must not be overlooked that the issuing officers also were not unavailable – they were “unavailable” only because they chose to be. In order to comply with the Sixth Amendment, the government must affirmatively establish that the witness is unavailable. See, Crawford, supra, at 57, 124 S.Ct. at 1367-68, 158 L.Ed. 2d at 196 (2004), where the Court made the point that it had excluded testimony for violation of the Confrontation Clause “even where the defendant had ... an opportunity [to cross-examine] ... where the government had not established unavailability of the witness,” citing Barber v. Page, 390 U.S. 719, 722-25, 88 S. Ct. 1318, 1320-22, 20 L.Ed. 2d 255, 258-60 (1968).

It is worthwhile to examine the facts in the Barber case.

There the State of Oklahoma argued that it was not error for the lower court to have permitted the introduction of the transcript of a witness's testimony at the preliminary hearing because the witness was outside the jurisdiction and therefore “unavailable” at the time of trial and that the defendant had had the opportunity to cross-examine the witness at the preliminary hearing. The United States Supreme Court reversed the Court of Appeals, holding that it had not been established that the witness was “unavailable,” and, consequently, the demands of the Confrontation Clause had not

been satisfied even though there had been an opportunity to cross-examine at the preliminary hearing.⁷

In the course of its opinion, the Supreme Court said:

We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma.

Id. at 723, 88 S.Ct. at 1321, 20 L.Ed. 2d at 259 (1968). The Court then pointed out the several processes available to the State of Oklahoma to obtain the presence of a witness in federal custody and observed:

In short, a witness is not “unavailable” for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly.

Id. at 724-25, 88 S.Ct. at 1322, 20 L.Ed. 2d at 260 (1968). Then, underscoring the importance of “unavailability,” the Supreme Court held:

Moreover, we would reach the same result on the facts of this case had petitioner’s counsel actually cross-examined Woods at the preliminary hearing. See Motes v. United States, 178 U.S. 458 (1900). The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness

⁷ The defendant’s attorney declined to cross-examine the witness at the preliminary hearing and the State argued that this constituted a waiver of his right to confront the witness at trial. The Supreme Court held no waiver took place because, not only was the defendant unaware that the witness would be in a federal prison at the time of his trial and not only was he unaware that the State would make no effort to produce him, but the nature and function of a preliminary hearing may well have played a determinative role in the decision to cross-examine or not.

at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.

Id. at 725-26, 88 S.Ct. at 1322, 20 L.Ed. 2d at 260 (1968).

In the Edgewood Borough cases at issue here the “prosecutorial authorities have made [no] good-faith effort to obtain ... [the] presence [of the issuing officers] at trial” – on the contrary, the prosecutorial authorities deliberately and overtly planned their absence. So, in these cases, since the witnesses were not unavailable and there was no opportunity for prior cross-examination, the defendants’ right to confront them could not be dispensed with.

Finally, I think that any discussion of this subject would be incomplete without consideration of the idea that the defendants’ right to a trial de novo on appeal from a summary conviction of a violation of the Motor Vehicle Code in Judge Evashavik’s court “cures” the violation of the Confrontation Clauses of the United States and Pennsylvania Constitutions. The short – and easy – answer is: it does not.

In Commonwealth v. Cronin, 336 Pa. 469, 9 A.2d 408 (1939), the Supreme Court of Pennsylvania held that a hearing de novo in the court of common pleas on appeal from an order of the Secretary of Revenue suspending his driver’s license “protected” defendant against an arbitrary exercise of power by the Secretary. That Court held:

Regardless of whether he was accorded a proper hearing before the Secretary, it is certain that the hearing de novo remedied the infringement of any constitutional right of which defendant may have been deprived. Therefore it is immaterial that he was not afforded an opportunity to confront his accuser and to cross-examine him. This right is one guaranteed under the Constitution to a defendant in a criminal proceeding; Gaines v. Washington, 277 U.S. 81; Snyder v. Massachusetts, 291 U.S. 97; Howser v. Com., 51 Pa. 332, and it is not necessary for the purposes of this

case to decide whether such guarantee extends to a party in an administrative proceeding.

Id. at 474, 9 A.2d at 411 (emphasis added).

It would be sufficient to conclude this discussion with the observation that in Cronin the Court was dealing with an administrative hearing – not a criminal case, as we are – and that the Court explicitly called attention to that critical difference and unconditionally recognized that the right of confrontation is “guaranteed ... in a criminal proceeding.” It is helpful, nevertheless, to refer to a more recent case where the availability of a de novo hearing was held insufficient to save even a constitutionally deficient administrative hearing.

In Kilfoyle v. Heyison, 417 F. Supp. 239 (D.C. W.D. Pa. 1976) a statutory three-judge court held that the availability of a de novo hearing on appeal did not “save” a Pennsylvania statute which authorized the Secretary of Revenue to suspend the motor vehicle operating privileges of an uninsured motorist who was involved in an accident resulting in bodily injury or property damage exceeding \$200 and who failed to deposit security sufficient to satisfy any judgment which may be recovered against him. In that case the court held that it was bound by the holding of the Supreme Court in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 (1971) where that Court held that procedural due process⁸ in a license suspension under a similar Georgia statute will be satisfied by an administrative hearing which includes an inquiry limited to a determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee. The Pennsylvania statute made no

⁸ Of course, procedural due process is not a Sixth Amendment right, however it is a constitutional right, as is the right of confrontation.

provision for such an inquiry; but the Secretary argued that Bell v. Burson was satisfied by a combination of the availability of a de novo judicial proceeding and the supersedeas effect of a timely appeal. The three-judge court first called attention to the difference between an administrative hearing and a criminal case:

There is no doubt that Bell v. Burson, *supra*, does not demand the full panoply of a due process hearing such as is required for entry of a formal judgment in court or a conviction in a criminal case

Id. at 245 (emphasis added). The court then held that even with respect to administrative hearings:

The record in this case together with the holdings of the United States Supreme Court in recent years shows that an appeal to the common pleas court with a de novo trial is not a satisfactory method of according operators due process of law.

* * * * *

For our present purposes it is sufficient to say that Pennsylvania at the present time has adopted no statute or rules and regulations to comply with Bell v. Burson. It relies almost entirely upon administrative procedures which are inadequate and the right of trial de novo when as a practical matter, most of these decisions are made at the administrative level.⁹ This is not a satisfactory procedure for affording due process.

Id. at 247-48.

The bottom line is that, whatever the requirements of Bell v. Burson might – or might not – be, they apply to administrative hearings and not to criminal cases such as those being heard by Respondent on the day in question. It is clear, then, that provision

⁹ Here the court is referring to its findings, noted earlier in the opinion, that: “The brute fact is that suspensions under Section 1404 are determined administratively: of approximately 56,000 Section 1404 suspensions in an eight-month period, 179 persons petitioned for trial de novo in court.” Id. at 245. While no statistics on the incidence of appeals to common pleas court from convictions in traffic cases are part of this record, experience tells us that the incidence would relate closely to the experience in the license suspensions referred to in Kilfoyle. It is also certain that the necessity to pay a filing fee as well as the necessity (or at least the strong advisability) of having legal representation in any appeal from conviction of a violation of the Motor Vehicle Code provide the same disincentive to appeal as those considerations do, as mentioned in Kilfoyle, in the case of appeals from license suspensions.

for a trial de novo in the event an appeal is taken from a conviction in Judge Evashavik's court does not cleanse or cure that procedure of its inherent unconstitutionality.

As I have said earlier, I agree with the majority's evaluation of Judge Marraccini's rulings on the admissibility of Chief Wood's readings as constituting no violation of the Pennsylvania Constitution or the Rules Governing Standards of Conduct of Magisterial District Judges.

However, this Court's omission to make it known that Judge Evashavik and Chief Wood were wrong to think that Rule 454(B) authorized the use of a "reader" when it clearly does not, unfortunately leads to the conclusion that they weren't wrong – it's just that Judge Marraccini wasn't wrong either. And if they were wrong – so obviously wrong – I believe the magisterial district judges who hear these cases daily are better served if this Court makes that clear¹⁰ – rather than leaving the point susceptible of a contrary interpretation, i.e., that it is perfectly acceptable for convictions in traffic cases to be had simply by having some third party "reader" reciting the affidavits of absent witnesses.

Finally, I must say that, as I listened to the testimony in this case, it took awhile for it to sink in that what the police were proposing – demanding – here was a system of justice which would permit citizens to be convicted without any witness being presented to establish the case against them. I was struck by the unfairness of it all – by the

¹⁰ It is suggested, see Concurring and Dissenting Opinion, Panepinto, J., p.1, that the canons of adjudicative methodology discountenance the questioning of the constitutionality of a rule or statute and require that the rule or statute be interpreted so as to preserve its constitutionality if at all possible. 1 Pa.C.S.A. §1922(3). Nowhere in this concurring opinion are these principles disserved. On the contrary, as is specifically noted supra, pp. 7-8, Rule 454(B) is interpreted in this opinion so as to preserve its constitutionality. It is the uncalled for and unwarranted misinterpretation of the rule by Judge Evashavik, as sought to be implemented by Chief Wood, which raises the constitutional issues which confronted Judge Marraccini and which are discussed herein.

unfairness of a system which would require citizens to show up for trial (no matter how meritless the charge might be) under pain of automatic conviction, while at the same time attaching no consequences to the absence of the police who can obtain convictions whether they show up or not. I wondered how the police (and the judges who hold traffic court) would react to a proposal that the citizen-defendants need not appear if they didn't want to and have some stand-in "testify" for them. After all, there's no reason to think that it is any less inconvenient for the citizen to take a day off from work (or a half day) than it is for a policeman. Actually, as we know, many traffic tickets are issued to citizens who live at a distance from the courthouse¹¹ for whom of course, it is a much greater hardship to attend than it is for the local police officer.

I did not want to believe that a rule of our Supreme Court could permit such a system of justice as the Judicial Conduct Board and Chief Wood were insisting it did. I hope that what I have written reveals that it does not. Besides being unfair, it also happens to be unconstitutional. If Judge Marraccini had acceded to Chief Wood's demands he would have been violating the rights of the defendants; as it was, his actions that morning were singularly directed at protecting those rights.

It is for these reasons that, while I join in the rulings of the majority, I have proceeded to this concurring opinion.

¹¹ It has even been suggested that some police departments have been known to "target" out-of-towners.