FINAL REPORT[1]

Amendments to Pa.Rs.Crim.P. 542 and 1003

HEARSAY AT PRELIMINARY HEARINGS

On April 25, 2013, effective June 1, 2013, upon the recommendation of the Criminal Procedural Rules Committee, the Court adopted the amendment of Rules 542 (Preliminary Hearing; Continuances) and 1003 (Procedure in Non-Summary Municipal Court Cases) to (1) clarify that the use of hearsay at preliminary hearings is not limited to proof of the elements of property offenses; and (2) to remove language from the Rule 542 *Comment* that suggests the issuing authority may never take evidence of summary offenses during a preliminary hearing.

On January 27, 2011, the Court amended Rules of Criminal Procedure 542 and 1003 to provide that "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." The *Comments* to both rules explain that the use of hearsay is not limited to these elements and offenses.

Since the adoption of these amendments, the Committee has received reports that the amendments to Rule 542 are being interpreted by some issuing authorities as limiting the use of hearsay in preliminary hearings to property offenses, despite the language in the *Comment* indicating that the rule was not intended to be thus limited. When the *Comment* language is raised to support the use of hearsay, these issuing authorities decline to be guided by the *Comment* noting that the clarifying language is not officially adopted as part of the rule.

This narrow interpretation is not consistent with the state of the law in Pennsylvania regarding the use of hearsay in preliminary hearings. *See, e.g., Commonwealth v. Nieves*, 876 A.2d 423 (Pa. Super. 2005) (an officer could testify both to his own knowledge of a drug sale and also to the hearsay statement of the buyer/informant about the delivery), *Commonwealth v. Kohlie*, 811 A.2d 1010 (Pa.Super. 2002) (use of a report of blood serum level at the preliminary hearing to show BAC level at the time of the accident was acceptable since it was to be

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[1] The Committee's *Final Reports* should not be confused with the official Committee *Comments* to the rules. Also note that the Supreme Court does not adopt the Committee's *Comments* or the contents of the Committee's explanatory *Final Reports*.

supplemented by expert testimony at trial), *Commonwealth v. Branch,* 292 Pa.Super 425, 437 A.2d 748 (1981) (police officer's testimony regarding a witness' statement was admissible at the preliminary hearing when the witness would be available at trial and other non-hearsay evidence was presented at the hearing), and *Commonwealth v. Rick*, 366 A.2d 302 (Pa. Super. 1976) (along with evidence that the defendant drove his car into a tree, a hearsay lab report could be admitted to show the defendant's blood alcohol level). *See also* Pa.R.E. 101 *Comment* ("Traditionally, our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, parole and probation hearings, extradition or rendition hearings and others…").

The Committee concluded that a clarification in the rules regarding the use of hearsay evidence at preliminary hearings would be beneficial. The intent of these amendments are not to modify the procedures resulting from the amendments that were adopted in January, 2011, but to clarify the language of the rules to address reported problems arising from the misinterpretation of these changes.

Therefore, the phrase "including, but not limited to" has been added to the statement in Rule 542(E) that provides that hearsay evidence may be used to "establish any element of an offense requiring proof of the ownership of, non-permitted use of, damage to, or value of property." A similar amendment has been added to Rule 1003(E)(1)(b) describing the use of hearsay evidence in felony preliminary hearings in the Philadelphia Municipal Court. Revisions also have been made to the *Comments* of both of these rules elaborating on these principles.

An additional revision is being made to the *Comment* to Rule 542 to remove the phrase "the taking of evidence on the summary offenses" from the penultimate paragraph of the *Comment*:

> In cases in which summary offenses are joined with misdemeanor, felony, or murder charges, pursuant to paragraph (F), during the preliminary hearing, the issuing authority is prohibited from proceeding on the summary offenses, **[including the taking of evidence on the summary offenses,]** or adjudicating or disposing of the summary offenses except as provided in Rule 543(F).

This change is in response to a complaint that the prohibition described above would prevent the taking of evidence of summary offenses even when necessary to the proof of a joined misdemeanor or felony, for example, when a charge of homicide by vehicle requires the proof of any underlying traffic offense.