1972

Evidence (B) (January 13, 1972)

William & Mary Law School

Evidence B (L29)
Mr. Phelps
Jan. 13, 1972 (Thursday)

I

D, a defendant in a criminal trial, took the witness stand and testified in his own behalf. On cross-examination he was asked if he had refused to testify before the grand jury. The court required him to answer and he stated he had testified to certain questions but refused to answer others for the grand jury. The prosecution was also permitted to question the defendant as to statements he had made to the grand jury which were at variance with his testimony in the trail on direct examination. The defendant argued his Miranda rights would be violated by the use of his statements before the grand jury. M, who was an unindicted co-conspirator, was put on the stand as a defense witness and testified for D. The government, to meet M's testimony offered Y as a witness to testify to statements of M prior to the trial which were contrary to M's testimony. The statements were made by M to Y and M's deceased brother. It was objected the statements were hearsay and they were not made in the furtherance of the conspiracy, therefore no exception applied under the hearsay rule. The court permitted Y to testify. Discuss the rulings of the court and indicate whether or not you agree with them.

II

D was indicted for causing a company to sell oil and gas properties to corporations controlled by conspirators at prices greater than their fair market value. A duly qualified expert testified he estimated the value of one property to be slightly less than $500,000 and the other approximately $44,000. He reached these estimates from personal inspection of the properties and from consulting the following sources of information: (1) the past production performance of the leases which was obtained from reports filed with the State by operators of the leases, (2) core analyses data and wells records obtained from the two companies, (3) data as to the price of oil and gas obtained from pipeline run statements in the records of the companies, and (4) data as to operating costs from the billing records from the operators of the leases. D objected to the testimony on the ground the records of the companies were not themselves offered in evidence, therefore there was a violation of D's right of confrontation and of the hearsay rule. Further D argues in determining for this case what the hearsay rule requires civil cases on expert testimony cannot be applied. The further objection was made that since the witness was basically summarizing the records, the records had to be first introduced before the witness could testify. The expert witness had also prepared two appraisal reports. D objected that the exhibits were hearsay. Discuss carefully the problems of evidence raised and state how you think they should be resolved.

III

While M was in a hospital his apartment was burglarized and a pistol and the key to his safe deposit box was taken. It was discovered a certificate of deposit issued to M had been cashed at the bank about the same time. An arrest warrant was issued for D, a woman who had been in his apartment a short time before he went to the hospital and who knew he was going there, in connection with the forged certificate of deposit. The warrant was served at the apartment of D and her husband H who were both in the living room when the warrant was served. H was searched for weapons but none was found. D was standing in the doorway between the kitchen-dining room area and the living room where she was four to six feet from a cabinet. The officer entered the kitchen and noted a partially hidden envelope on a shelf of the cabinet, the cabinet being partially open. Against D's protests the detective removed the envelope and found a check and checkbook bearing M's name and a safe deposit key. The detective testified he was searching for a pistol since he knew D was a suspect in the burglary and this was one item taken. Fourteen days after the arrest of D, police officers contacted employees of the bank showing a series of ten or twelve pictures with two pictures of H included. The employees identified H as the man who cashed the certificate of deposit, and on the basis of this he was arrested. At the trial the bank employees positively identified H.

H made a motion to suppress the evidence claiming an illegal search and seizure, and a violation of due process by prejudicial identification procedures. The government contends that H has no standing to challenge the validity of the search and seizure. Should the evidence be suppressed? Were H's constitutional rights violated by permitting the identification testimony? Explain.

IV.

In a criminal trial in a Federal District Court where the defense was insanity, the government on the issue of insanity offered a coherent letter written by the defendant to a priest shortly after the robbery requesting the priest to get in touch with an agent of the FBI and have him come to see defendant. The letter was turned over to the FBI by the priest. It was argued by defendant's counsel that the letter was irrelevant, privileged and hearsay. What is your opinion? Explain.

V.

A wrongful death action was brought by the parents of a child against D a landowner, based on the attractive nuisance theory. The original complaint alleged the deceased and another boy B were walking along the edge of an open trench which suddenly gave way causing the deceased to be buried alive. At the trial plaintiffs were granted leave to amend to allege instead that the boys were walking inside the open trench when it suddenly gave way. No objection was made to the amendment. A certificate of death signed by a doctor who did not testify and some of whose information was obtained from investigating officers was offered by D and admitted, except the words "Victim fell in open ditch" were deleted therefrom. A statute provided the certificate was prima facie evidence of the facts therein stated. D contended the parents were contributorily negligent since the mother had given the child permission to play in the field knowing of the construction project. The father testified he had instructed the boy not to play in the field, and his mother had not given him permission, in fact she was away from home at the time. B testified the mother was at home and deceased had told B she had given deceased permission to play in the field. Plaintiffs moved to strike the testimony in so far as it created an issue of contributory negligence on the part of the parents on the ground that it constituted double hearsay. D's counsel also requested the court to instruct the jury that they could draw an unfavorable inference from the mother's failure to testify.

(1) D requests the appellate court to take judicial notice of the original complaint and to deny any relief to the plaintiffs by treating the complaint as an admission. How should the court rule? Explain.

(2) D contends there was error on the part of the court in deleting the words "Victim fell in open ditch" from the certificate of death. How should the court rule? Explain.

(3) How should the court rule on B's testimony that he had been told by the deceased that deceased's mother had told him he could play in the field? Explain.

(4) How should the court rule on the request of D's counsel that the jury be instructed they could draw an unfavorable inference from the mother's failure to testify? Explain.

EVIDENCE Phelps

Answers to exam

I

The Gruenwald case says there cannot be cross-examination as to refusal to testify before the grand jury.

The Harris case might be a basis for saying the defendant cannot take the stand with impunity under the circumstances outlined in the question.

Inconsistent statements are admissible for impeachment purposes and the rule of "furtherance of conspiracy" relates to substantive evidence.

331 F.S. 1201

II

The expert was available for cross-examination, therefore confrontation as determined in Cal. v. Green was satisfied.

Had the government attempted to introduce the appraisal reports in evidence without calling the expert who had prepared them and offering an opportunity for cross-examination, then D's confrontation rights would have been infringed.

An expert's opinion may be based in part or solely on hearsay sources. Because of his professional knowledge and ability the expert is competent to judge the reliability of the records and statements on which he bases his expert opinion.

Hearsay rules should apply equally to both civil and criminal cases.

447 F 2d 1285

III

H has standing. He had possession of the seized property and a substantial interest in the premises searched.

The Chimel case deals in terms of safety and does not flatly prohibit search of another room. The precautionary measure of entering the room was justified under the circumstances. The area by reasonable interpretation was within the immediate control of D.

Since a pistol might have been concealed in the partially open cabinet, the search was warranted for safety and anything in that immediate area could be seized.

Showing two photos of H would not constitute an impermissible suggestion of guilt and the likelihood of irreparable misidentification. Further there were eyewitnesses here who made an independent in court identification.

447 F 2d 424

(While you might disagree with the above answer this case suggests what you are going to find many courts doing and I gave illustrative cases suggesting what the courts are doing.)

IV

The privilege exists in the Federal courts. In criminal cases the federal courts follow the common law as they see it in accordance with present day standards of wisdom and justice.

IV (continued)

Rule 506 of the proposed rules recognizes the privilege based on federal decisions.

Here apparently it was not intended the communication be kept in confidence. Here there was not a penitent seeking spiritual rehabilitation.

The letter was not offered for the truth of the statements contained therein. (Answer based on recent case.

V

1. A complaint can constitute an admission against interest, however it is doubtful it should be judically noticed under the circumstances stated. An admission of a party contained in a pleading, however, under normal circumstances may be sufficient to carry a case.

2. The words should not be excluded from the death certificate. By the more modern rule the fact that some of the facts were obtained by the doctor from officers goes to the weight of the evidence not the admissibility of the certificate.

3. The words "Victim fell in ditch"is a statement of fact.

4. Each separate hearsay component conforms to an exception to the hearsay rule.

   Deceased is unavailable to testify. If he is not considered a party to the suit and the statement an admission, it is a declaration against interest.

5 As to the mother, she is a party and any statement made by her is admissible as an admission against interest. If the mother's admission is unexplained it could carry the case against her. (i.e. prevent recovery.)

6. The instruction should have been given.

448 F. 2d 528