

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CRIMINAL ACTION NO.
BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION IN
LIMINE TO EXCLUDE EVIDENCE OF JAIL TELEPHONE CONVERSATIONS
RECORDED BY THE COMMONWEALTH**

After review and hearing, the defendant's motion in limine to exclude evidence of jail telephone conversations recorded by the Commonwealth is allowed in part and denied in part. The Commonwealth identified excerpts of conversations that it intended to seek to use in the case. Following the filing of the defendant's motion in limine, the Commonwealth advised that it had decided not to seek to introduce the excerpts of nineteen such conversations. No action is therefore taken by the court on those recordings.

With respect to statements made by the defendant, assuming that the recordings are authenticated, such statements are admissible to the extent that they are both relevant to an issue, such as consciousness of guilt, and they are not more prejudicial than probative. In admitting or excluding jail calls, the court has broad discretion in balancing the probative value of the statements versus unfair prejudice. Commonwealth v. Spencer, 465 Mass. 32, 48, 52-53 (2013). The court may consider, for example, whether the proffered evidence would lead to jury confusion even if the inferences the Commonwealth suggests can be drawn from the defendant's statements are plausible. Id. at 53. The court has highlighted on the transcripts attached to this Memorandum those statements

of the defendant, which the Commonwealth seeks to introduce,¹ that the court has found meet that standard. The inferences the Commonwealth seeks to have the jury draw are reasonable and plausible, in view of all the evidence, and they are not more prejudicial than probative.

With respect to statements made to the defendant, assuming that the recordings are authenticated, those statements are admissible to the extent that they are relevant to the defendant's state of knowledge or make the defendant's responses comprehensible. The court has highlighted on the transcripts attached to this Memorandum those statements made to the defendant, which the Commonwealth seeks to introduce, that the Court has found meets that standard. The court does not find that the Commonwealth has proven, by a preponderance of the evidence, the prerequisites to admitting statements made to Mr. Hernandez by Ms. Jenkins or by Ms. Singleton for their truth. Accordingly, the Court will give the jury a limiting instruction if such a recording is introduced. Under Massachusetts law, a statement of a co-conspirator or joint venturer made during the pendency of the cooperative effort and in furtherance of its goal, when the existence of the conspiracy or joint venture is shown by evidence independent of the statement, is not hearsay. See Mass. Guide to Evidence 801(d)(2)(E). Conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose. Commonwealth v. Nee, 458 Mass. 174, 180 (2010). The heart of a conspiracy is the formation of an unlawful agreement or combination. Commonwealth v. Pero, 402 Mass. 476, 478 (1988). See also Commonwealth v. Caramanica, 49 Mass. App. Ct. 376, 381 (2000) (conspiracy differs from joint venture because it requires affirmative

¹ In its Opposition to the Defendant's Motion in Limine, the Commonwealth indicated that it was not seeking to introduce the entirety of the portions of the transcripts it had provided to the defendant.

proof of prior agreement, separate and distinct from shared intent at time of substantive offense).²

To the extent that the court has denied the defendant's motion, the defendant, under the doctrine of verbal completeness, may request the Commonwealth to include additional portions of the same conversation on the same subject as the admitted statement that are necessary to the understanding of the admitted statement. Commonwealth v. Eugene, 438 Mass. 343, 351 (2003). Should the Commonwealth dispute the defendant's entitlement to have particular additional portions of the recordings introduced into evidence, the parties should bring their differences to the court's attention.

With respect to statements by Mr. Wallace,³ the Commonwealth has not shown, by a preponderance of the admissible evidence, that the criminal enterprise was continuing. Both the defendant and the declarant were in jail awaiting trial when the statements were made. As the Reporter's Notes to Section 801(d)(2)(E) state, the hearsay exception for joint venturer's statements applies to situations where the joint venturers are acting to conceal the crime that formed the basis of the criminal enterprise, but it does not apply after the criminal enterprise has ended, as where a joint venturer has been apprehended and imprisoned. See, e.g., Commonwealth v. Bright, 463 Mass. 421, 437, n. 22 (2012) (citing Commonwealth v. Drew, 397 Mass. 65 (1986)); Commonwealth v. Colon-Cruz, 408 Mass. 533, 543 (1990) (citing Drew); Commonwealth v. Santos, 463 Mass. 273 (2012).

² There is no claim by the Commonwealth that either Ms. Singleton or Ms. Jenkins were co-venturers with Mr. Hernandez in the killing of Mr. Lloyd as opposed to post-killing co-conspirators.

³ With respect to statements to Mr. Wallace by Ms. Singleton, they are inadmissible substantively for the same reason that her statements to Mr. Hernandez are inadmissible substantively.

The co-defendants in Drew had been indicted for murder and were awaiting trial at the Bristol County House of Correction when one made the statement at issue, approximately six months after the murder occurred. Id. at 69. The Supreme Judicial Court held that “[b]ecause [the co-defendant’s] statement was made long after the crime while he and the defendant were imprisoned, the statement was not admissible.” Id. at 71. The Court found that the trial judge thus correctly rejected the argument that the statement fell under the co-conspirator hearsay exception. Drew was not a case in which either of the co-defendants were imprisoned following conviction at the time the statements at issue were made.

Commonwealth v. Anguilo, 415 Mass. 502 (1993), relied on by the Commonwealth, does not support admission of Wallace’s jail conversations. In that case, the Court, as the Commonwealth represented in its Opposition, did state that “[e]fforts on the part of a joint venturer to conceal the occurrence of the enterprise’s unlawful purpose or to effect an escape warrant the inference that the joint venture continued through the time the statements were made.” Id. at 519. This court has admitted such evidence, such as Mr. Wallace’s travels to Georgia. What the Commonwealth fails to quote in its Opposition is the very next sentence in the decision, namely: “Absent a circumstance such as where the declarant had been incarcerated at the time the statement was made, as was the case in Commonwealth v. Drew, or where the declarant has been apprehended before the statement had been made, as was the case in Commonwealth v. Dahlstrom, we cannot say that the joint venture had terminated at the time the statements were made.” Id. at 519-520 (citations omitted).

In Commonwealth v. White, 370 Mass. 703 (1976), also cited by the Commonwealth, the Court sets forth the general proposition that out-of-court statements by joint criminal venturers are admissible against the others if the statements are made both during the pendency of the cooperative

effort and in furtherance of its goal. But what the Court actually concluded in that case was that the trial court had erred in admitting the statement of one arrested co-defendant against another co-defendant. The Supreme Judicial Court reasoned as follows: "We need not go beyond the many cases holding that declarations of the usual sort by a coventurer after he has been apprehended or arrested, admitting the crime or implicating another, while they may be admissible against himself, do not fall within the hearsay exception and cannot be offered against another coventurer to prove the matters asserted." Id. at 710.

Commonwealth v. Colon-Cruz, 408 Mass. at 533, another case relied upon by the Commonwealth, similarly contains relevant language omitted from the Commonwealth's Opposition. The Court in Colon-Cruz stated: "It is well settled that out-of-court statements by joint criminal venturers are admissible against the others if the statements are made 'both during the pendency of the cooperative effort and in furtherance of its goal.'" Id. at 543. That is the language quoted by the Commonwealth. In language not quoted by the Commonwealth, the Court went on to state: "This exception to the hearsay rule does not apply after the criminal enterprise has ended, as where a joint venturer has been apprehended and imprisoned. See Commonwealth v. Drew" Id.(citation omitted). The timing of the calls at issue, as is set forth in the Commonwealth's Opposition, demonstrate that the statements at issue were not made immediately after arrest while, for example, the declarant was in a police station holding cell. Cf. Commonwealth v. Leach, 73 Mass. App. Ct. 758, 764, rev. den., 453 Mass. 1110 (2009).

ORDER

For the reasons set forth above, it is hereby **ORDERED** that the defendant's Motion in Limine to Exclude Evidence of Jail Telephone Conversations Recorded by the Commonwealth is **DENIED** with respect to the highlighted portions of the transcripts attached hereto and otherwise is **ALLOWED**.



E. Susan Garsh
Justice of the Superior Court

DATED: March 25, 2015

P R O C E E D I N G S

AARON HERNANDEZ: You got my letter?

TANYA SINGLETON: Yeah, I did. I -- of course I did. I got you one. I got you a card and a letter. (Inaudible) letter (inaudible) --

AARON HERNANDEZ: Watch what you write. They read the shit.

TANYA SINGLETON: I -- no, no, like I don't know that.

(End of file)

P R O C E E D I N G S

AARON HERNANDEZ: Well, I got to get going.

I will probably call you, um, probably like once a week or something like that. Like --

TANYA SINGLETON: Yeah, that's perfect.

AARON HERNANDEZ: Yeah, and -- and I'll also help you out with that, too. Obviously don't say nothing, but I love you --

TANYA SINGLETON: I know. I'm not saying nothing. I love you so much.

AARON HERNANDEZ: I love you. I miss you and uh --

TANYA SINGLETON: (Inaudible).

AARON HERNANDEZ: Well, I'll talk to you and I'll write to you almost every day.

TANYA SINGLETON: Okay. I love you.

AARON HERNANDEZ: I love you. Muah.

(End of file)

P R O C E E D I N G S

AARON HERNANDEZ: I set up account, don't tell nobody, a trust fund for Jarrod (phonetic) and Dudley (phonetic).

WOMAN VOICE: You did?

AARON HERNANDEZ: Yeah, so maybe like 18, 21 they gonna have a chunk of money.

WOMAN VOICE: I didn't know you did that.

AARON HERNANDEZ: Yo, yo, so at least if they struggle now, if they can mature enough, they may have like \$250,000 just to have (inaudible).

WOMAN VOICE: Yeah.

AARON HERNANDEZ: And the longer they wait the longer it grows. So they can take out a little bit when they're, like, 18. They can take out a little bit when they're 21. And then if they wait until, like, they're 30 years old, it will be like, could be like \$400,000 or something like that, do you know what I mean?

WOMAN VOICE: Yeah, I was going to say if they don't have to, they can just leave it in there until they're ready to settle down and get married.

AARON HERNANDEZ: Yeah, it depends on,

1 obviously (inaudible). It depends on -- I think it
2 depends on me (inaudible).

3 WOMAN VOICE: Yes.

4 AARON HERNANDEZ: 'Cause that's going to
5 be -- the reason I did that is that's my way to have
6 some control so I can be like, hey, you guys want to
7 do this, then once they're old enough (inaudible).
8 But once they mature, (inaudible) do you know what I
9 mean, and you did that. Do you know what I'm
10 saying.

11 WOMAN VOICE: Yeah.

12 AARON HERNANDEZ: So don't tell nobody. I
13 don't want nobody to know about it. And I ain't
14 even telling my girl, nobody. And -- but what you
15 call it, 'cause it already started off at \$100,000
16 for them, do you know what I'm saying, I think about
17 \$75 a piece or something like that and every 7 years
18 it doubles. So it would be \$100,000, \$200,000. I
19 put in \$250 in for Avielle (phonetic) (inaudible)
20 it will be a million by the time she's 18, 6 million
21 by the time she's, like, 30, so --

22 WOMAN VOICE: Oh, my God.

23 (End of file)

24 C E R T I F I C A T E

P R O C E E D I N G S

SHAYANNA JENKINS: Um, Tanya's in jail.

AARON HERNANDEZ: Tanya?

SHAYANNA JENKINS: Yeah.

AARON HERNANDEZ: For what?

SHAYANNA JENKINS: I don't know.

AARON HERNANDEZ: What they arrest her

for?

SHAYANNA JENKINS: I don't know, Yup.

So she's in jail. She got arrested today.

AARON HERNANDEZ: They picked her up by
her house?

SHAYANNA JENKINS: No, she went for --
she was -- I don't know. You probably should talk
to your lawyers more about it.

AARON HERNANDEZ: Oh.

SHAYANNA JENKINS: But she told me to
tell you that she's gonna be just fine and to keep
your head up and to know that she loves you.

AARON HERNANDEZ: Oh, my God. Let me
call you right back.

SHAYANNA JENKINS: All right.

AARON HERNANDEZ: All right. I love you,

1 bye.

2 SHAYANNA JENKINS: I love you, bye.

3 (End of file)

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P R O C E E D I N G S

AARON HERNANDEZ: Yeah, and I want you to
do me a favor.

SHAYANNA JENKINS: All right.

AARON HERNANDEZ: Can you, um, give, uh,
somehow stop by Tanya's house and give them a little
bit of money to put on her canteen.

SHAYANNA JENKINS: Babe, I'm not going
over there. I'm not going over there.

AARON HERNANDEZ: Oh, well, send her
money or something.

SHAYANNA JENKINS: I don't know why you
keep --

AARON HERNANDEZ: She's got no money in
jail.

SHAYANNA JENKINS: I under -- Aaron, I
understand that, but why do I have to keep being the
one to do that? That's what you're not
understanding.

AARON HERNANDEZ: All right. Well, can
you give it to, um, I don't know who to tell you to
give it to.

SHAYANNA JENKINS: Okay. Well, neither

1 do I.

2 AARON HERNANDEZ: All right. Well --

3 SHAYANNA JENKINS: I'm trying -- well,
4 I'm trying to follow what my lawyers are telling me
5 to follow, and then you keep trying to have me do
6 other things.

7 AARON HERNANDEZ: Not really but I'm
8 saying whatever works for you. I'm just trying to
9 have my aunt be able to eat but, um --

10 SHAYANNA JENKINS: Aaron, I understand
11 that. Don't make it so depressing. She's going to
12 eat either way. Are you kidding me right now?

13 AARON HERNANDEZ: Yeah, whatever,
14 whatever, whatever you want to do.

15 (End of file)

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P R O C E E D I N G S

AARON HERNANDEZ: Keep letting me know, write me letters, like, when she runs out or something or something like that, so I could get her canteen and stuff like that.

JENNIFER MERCADO: Yeah, I just -- I just sent you another letter, um, because she had called me to see if I could send her some because she didn't have any.

AARON HERNANDEZ: Yeah, um, you got that money from, um, my agent; right?

JENNIFER MERCADO: Yeah.

AARON HERNANDEZ: I told him -- I had him send \$500 for her canteen and stuff and for the boys for stuff like that for school and everything.

(End of file)