

Superior Ct.: Defense Should Get Phila. Arrest Reports Sooner

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Of the Legal Staff

A state Superior Court panel has weighed in on an ongoing and long-running dispute between Philadelphia prosecutors and criminal defense lawyers over how soon to provide arrest reports, writing in dicta in an unpublished opinion that the best policy may be for the district attorney to allow defendants to obtain copies before preliminary arraignment.

The Philadelphia Police Department's arrest reports under the city of Philadelphia's Preliminary Arraignment Reporting System were available for about a decade in criminal court files. But the practice was stopped in 2007 at the request of the Philadelphia District Attorney's Office and with the approval of the Philadelphia Municipal Court president judge because of the office's perspective that PARS reports are internal police documents.

Philadelphia defendant Jamel Bailey argued that not providing the police arrest report to him and his counsel at the time of his first arraignment violated his constitutional rights.

Criminal defense attorneys also argue that less information is provided to Philadelphia defendants and their counsel at the time of preliminary arraignments than in the rest of the state. And they object to the provision of the reports to bail commissioners to set bail without the defendants being able to access the reports.

The court panel of Judges John L. Musmanno, Jack A. Panella and Christine L. Donohue said in a footnote in an unpublished decision Jan. 21 that "in light of the critical nature of the preliminary hearing in assuring that the commonwealth has a legal basis for prosecuting a person, the better course



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may be for the commonwealth to allow the defense to obtain a copy of the PARS reports. Because the relevant parts utilized by the bail authority in setting bail are read at the hearing pursuant to the internal operating procedure in the Municipal Court, it appears that the reports could be provided to the defense."

The court also said in *Commonwealth v. Bailey* that Bailey is not entitled to any change in his conviction because of alleged defects in his preliminary hearing. Once a defendant has gone to trial and been found guilty of crimes beyond a reasonable doubt, Pennsylvania case law makes any deficiencies in the preliminary hearing moot, the panel said.

Edward McCann, the deputy in charge in the Philadelphia District Attorney's trial division, said that, while PARS reports are being provided within 24 hours of defendants' arrests in a pilot program diverting misdemeanor cases earlier on, and that program is going to be expanded, "there is nothing in the case that is going to change current practice."

Bailey's attorney, Michael J. Diamondstein, however, said the decision's dicta about PARS reports is "a victory for every Philadelphia defense attorney who practices in the city."

Diamondstein has filed a motion asking for the decision to be published.

He said not broadly changing the office's policy on releasing PARS reports is in contradiction to the Superior Court's directions.

He argues that anything that prosecutors

Reports continues on 9

INSIDE THE LEGAL

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11 Experts & Services

12 Classified

13 Public Notices

22 Legal Listings

Postal ID on Page 8

Reports

continued from 1

provide to judges must be given to opposing counsel, and that in the suburban counties near Philadelphia a factual recitation of the basis of a defendant's charges is provided in every single case.

"If the Philadelphia District Attorney's Office is truly serious about streamlining the system, there's no reason not to give us a factual recitation at the first listing so we can look at our client and say, 'They said you did X, Y and Z, and maybe we should talk about a plea,'" Diamondstein said.

Without such information, attorneys can't have intelligent discussions about the value of cases, Diamondstein said.

McCann said that it is a tactical advantage for defense attorneys to have the PARS reports as early as preliminary arraignments, and the District Attorney's Office believes that providing PARS reports earlier on results in protracted

preliminary hearings going beyond the purpose of the hearings.

"I understand defense counsel's desire to have particular information at an earlier time. We just have different interests," McCann said. "Our interests are to make sure that the cases, in terms of preliminary hearings, don't degenerate into mini-trials."

The office is still committed to providing discovery earlier and making offers earlier in the hopes that more defendants will plead guilty to charges prior to preliminary hearings in Philadelphia Municipal Court, McCann said.

Electronic discovery will not be operational in the near future because of technology issues, but the office is keeping criminal e-discovery on the horizon, McCann said.

Discovery is also being completed in the vast majority of cases by the time of common pleas court arraignments, he added.

But even if e-discovery were provided by the time of common pleas court arraignments, the office still does not want

to release PARS reports at the time of Municipal Court arraignments, McCann said.

Michael J. Engle, president of the Pennsylvania Association of Criminal Defense Lawyers, said that while the court's opinion did not grant any relief to the defendant, "the decision of the court in terms of the dicta about the production of the PARS reports seems pretty clear that... this is information that should be provided to the defense, particularly at a bail hearing where a document is provided to someone sitting in the position of the judge."

When the state Supreme Court authorized last year pushing out Municipal Court preliminary hearings to 14 to 21 days after arraignment in order to provide more time for Philadelphia prosecutors to work up their cases, the defense bar said that providing the PARS reports would make the process more effective, Engle said. PARS reports are not being provided prior to preliminary hearings, he said.

Engle said not only are bail commissioners using PARS reports to make bail

decisions, but PARS reports are also often used during preliminary hearings for witnesses to refresh their recollection.

Attorney Brad Shuttleworth, of Alva & Associates was the primary author of an amicus brief filed by PACDL on the PARS issue in *Bailey*, Engle said.

Bailey was charged in 2008 with possession with the intent to deliver a controlled substance, violation of the Uniform Firearms Act, possession of an instrument of crime, knowing and intentional possession of a controlled substance and possession of paraphernalia. After his conviction on all charges during a bench trial, Bailey was sentenced by Philadelphia Common Pleas Judge Genece E. Brinkley on May 20, 2009, to five to 10 years in state prison, as well as 10 years of probation.

(Copies of the 12-page opinion in Commonwealth v. Bailey, PICS No. 11-0270, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.)