

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KERRICK FARQUHARSON,

Defendant-Appellee.

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FOR PUBLICATION

February 13, 2007

9:10 a.m.

No. 271783

Genesee Circuit Court

LC No. 05-016672-FC

Official Reported Version

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

TALBOT, J. (*concurring in part and dissenting in part*).

While I concur, in general, with the majority's reasoning and analysis regarding the admissibility of investigative-subpoena testimony under MRE 804(b)(1), I respectfully dissent and write separately because I believe that this Court is able to determine whether the prosecution in this matter had a similar motive in developing the disputed testimony, and I would reverse the trial court's ruling regarding admissibility of the investigative-subpoena testimony.

As recognized by both the majority and caselaw, for testimony secured through an investigative subpoena to qualify as a hearsay exception when the declarant is subsequently unavailable for trial, MCR 804(b)(1) requires "the party against whom the testimony is now offered" to demonstrate that the party had "an opportunity and similar motive to develop the testimony . . . ." The inquiry to determine the existence of a "similar motive must be fact specific . . . ." *United States v DiNapoli*, 8 F3d 909, 914 (CA 2, 1993) (en banc).

In accordance with this Court's ruling in *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986), in ascertaining the similarity of motive, "the issue for which the former testimony was elicited and the issue for which the party wishes the former testimony admitted must be substantially similar . . . ." In addition,

[t]he test must turn not only on whether the questioner is on the same side of the same issue at both proceedings, but also on whether the questioner had a substantially similar interest in asserting that side of the issue. If a fact is critical to a cause of action at a second proceeding but the same fact was only peripherally related to a different cause of action at the first proceeding, no one would claim that the questioner had a similar motive at both proceedings to show that the fact had been established (or disproved). [*DiNapoli, supra* at 912.]

Hence, situations are not necessarily equivalent or "the same where the two proceedings are different in significant respects, such as their purposes or the applicable burden of proof." *Id.* at 913.

The stated purpose of an investigative subpoena is simply to provide a mechanism to assist a prosecutor in gathering facts and information "to investigate the commission of a felony . . ." MCL 767A.2(1). In contrast, at trial a prosecutor's role is to seek justice, and not merely to obtain a conviction. *People v Pfaffle*, 246 Mich App 282, 291; 632 NW2d 162 (2001). The motive for development of testimony in these two types of proceedings is inherently different, making it "quite unrealistic to characterize the prosecutor as the 'opponent' of a witness's version" of events when examined pursuant to an investigative subpoena. *DiNapoli, supra* at 913. Hence, in conducting an investigative-subpoena hearing, a prosecutor is motivated more by an interest in discovery than a desire to evaluate or test the reliability of a particular witness's testimony. Specifically:

At a preliminary stage of an investigation, the prosecutor is not trying to prove any side of any issue, but only to develop the facts to determine if an indictment is warranted. Even if the prosecutor displays some skepticism about particular testimony . . . , that does not mean the prosecutor has a motive to show the falsity of the testimony, similar to the motive that would exist at trial if an indictment is returned and the witness's testimony is presented by a defendant to rebut the prosecutor's evidence of guilt. [*Id.*]

I do not purport to suggest that a bright-line rule can be established regarding the admissibility of investigative-subpoena testimony under MRE 804(1)(b). However, the facts of this case permit this Court to determine that the trial court erred in ruling the testimony admissible without the trial court having evaluated whether the prosecutor had a "similar motive" sufficient to meet the requirements of MRE 804(1)(b). Although, in certain circumstances it would be both necessary and appropriate to remand to the trial court for a determination regarding the existence of a "similar motive," to avoid further delay in these proceedings, I would assert that it is unnecessary in this instance because, when conducting the investigative-subpoena hearing, the prosecutor's concern and motivation were simply to gather information, and not to prove either the truth or falsity of the testimony provided. Given the absence of any similarity in motive, as required by MRE 804(1)(b), I would reverse the trial court's ruling regarding the admissibility of the investigative-subpoena testimony.

/s/ Michael J. Talbot