IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Plaintiff-Petitioner,

v.

JOHN M. NAMAULEG,

Defendant-Respondent.

SUPREME COURT NO. 2009-SCC-0038-PET
SUPERIOR COURT NO. 08-0033A

Cite as: 2009 MP 13

Decided September 8, 2009

Matthew Meyer, Assistant Attorney General, Saipan, Northern Mariana Islands, for Plaintiff-Petitioner
Richard Miller, Assistant Public Defender, Saipan, Northern Mariana Islands, for Defendant Respondent
BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice

DEMAPAN, C.J.:

¶ 1 The Commonwealth filed a petition for a writ of mandamus, requesting full review of the trial court's decision to exclude a videotape deposition from evidence in an ongoing jury trial. A writ of mandamus is an extraordinary writ, only to be used in dire circumstances to avoid the irreversible consequences of a clearly erroneous trial court decision. Because the Commonwealth did not make a good-faith effort to procure the declarant and because it is not clear whether she is presently physically unable to testify in court, the trial court did not err in deciding to exclude the videotape. Accordingly, the Commonwealth's petition is DENIED.

I

¶ 2 On September 1, 2009, the Commonwealth began presenting its case against the respondent in a jury trial for second degree attempted murder. The following day the Commonwealth moved to admit into evidence for the first time a videotape deposition of the victim, who is now in China. The defense objected to this evidence on the ground that it was hearsay. In response, the Commonwealth claimed that, although hearsay, the victim's deposition should nevertheless be admitted because the witness was physically unavailable. As authority, the Commonwealth relied on Commonwealth Rules of Evidence 804(a)(4) and 804(a)(5), allowing certain hearsay into evidence if the declarant is either physically unable to appear in court, or is absent and the proponent of the statement has been unable to procure the declarant's attendance. The respondent countered by citing *Barber v. Page*, 390 U.S. 719, 725 (1968), which states that the proponent of the testimony must make a good-faith effort to obtain the declarant's testimony at trial before the court can consider the above hearsay exceptions. The respondent argued that the Commonwealth has made no effort to secure the declarant's presence, and accordingly, that the videotape deposition was inadmissible hearsay.

¶ 3 The trial court agreed with the respondent, and found that no effort had been made on the part of the Commonwealth to procure the victim's attendance, and that the victim was still an available witness for evidentiary purposes. In rebuttal, the Commonwealth submitted a letter from a doctor familiar with the victim's condition outlining her poor physical health. However, the trial court found that the Commonwealth still had not made an effort to make the declarant available at trial as required by established case law. Consequently, the trial court excluded the victim's videotaped deposition.

¶ 4 On September 3, 2009, the Commonwealth filed a petition for a writ of mandamus requesting review of the evidentiary issue. It claimed that we have jurisdiction to review the issue pursuant to 6 CMC § 8101(b), which states that an appeal "shall lie with the Supreme Court from a decision or order of the Superior Court suppressing or excluding evidence . . . in a

criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an information . . . ." 6 CMC § 8101(b). In *Commonwealth v. Pua*, 2006 MP 19 ¶ 10, we held that this section of 6 CMC § 8101(b) is not applicable once the jury has been sworn, as jeopardy has already attached. Because the jury in the present case was sworn on September 1, 2009, the statute is likewise inapplicable here. However, we also held in *Pua* that this Court may exercise its mandamus power where jurisdiction under 6 CMC § 8101(b) is lacking. *Id.* ¶ 11.

II

¶ 5 In *Commonwealth v. Superior Court*, we emphasized that "'[a] writ of mandamus is an extraordinary writ reserved for the most dire of instances when no other relief is available.'" 2008 MP 11 ¶ 9 (quoting *Bank of Saipan v. Martens*, 2007 MP 5 ¶ 16). "'It is by no means a procedural right, and shall not be used to second guess the trial court every step of the way.'" *Id.* (quoting *NMI Scholarship Bd. v. Superior Court*, 2007 MP 10 ¶ 4). "'There are dangers to an unprincipled use of peremptory writs, as for example, the possibility that its use would be an impermissible alternative to the normal appellate process.'" *Id.* (quoting *Tenorio v. Superior Court*, 1 NMI 1, 8 (1989)). We therefore carefully analyze whether a petition for a writ for mandamus should be granted by examining the five factors laid out in *Tenorio*. *Id.* ¶ 10. Those factors are:

1. The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;
2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;
3. The lower court's order is clearly erroneous as a matter of law;
4. The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and
5. The lower court's order raises new and important problems, or issues of law of first impression.

Tenorio, 1 NMI at 9-10. "These factors are not set against any objective standard, but are balanced and weighed against the costs of issuing a writ, such as interfering with trial court proceedings prior to final adjudication. "'The considerations are cumulative, and proper disposition will often require a balancing of conflicting indicators.'" *Pua*, ¶ 19 (quoting *Commonwealth v. Superior Court*, 2004 MP 14 ¶ 8).

¶ 6 In the case at hand, the first factor clearly favors a full review of the Commonwealth's evidentiary claims. Because the underlying action is a criminal trial, and the Commonwealth may not seek an interlocutory review of the trial court's suppression decision, it has no other option but to petition for a writ of mandamus. In regard to the second factor, suppression of the victim's

video deposition will be unreviewable as soon as the jury returns a verdict. "If the jury convicts, the issue would be moot since it would not have prejudiced the prosecution's case. If the jury acquits, the issue would be moot because acquittals are not appealable." *Pua*, ¶ 20. Thus, it is possible that denial of the Commonwealth's petition will prejudice it in a way that is not correctable on appeal. Conversely, the forth and fifth factors of the *Tenorio* test are both inapplicable to this case. The evidentiary rules at issue are not ones which the Superior Court often misapplies, and jurisprudence surrounding hearsay rules is generally well-established.

¶ 7 In *Pua*, factors four and five were similarly inapplicable, and factors one and two similarly favored granting the petition. However, the Court in that case allowed a full review on the issues pursuant to its mandamus powers based on the third factor, for it is "where the crux of [that] case lies." *Id.* ¶ 23. There, it was readily apparent that the trial court had erroneously excluded evidence, and the Court found it necessary to conduct an immediate full review of the issue to avoid injustice. Here, however, no such circumstance exists, as it appears that the trial court made a proper evidentiary ruling. Our reasons for finding as much are set forth below.

¶ 8 In order to use deposition testimony in the place of live testimony at trial, courts require the proponent to firmly establish actual unavailability of the declarant. "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Barber*, 390 U.S. at 721 (citing *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965)). Further, the ability to cross-examine a witness in a deposition does not satisfy the requirements of the Confrontation Clause. *Id.* at 725. "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Id.* For this reason, there is a stringent requirement to establish actual unavailability before depositions are admitted in lieu of live testimony.

¶ 9 The case before us potentially implicates two hearsay exceptions - Commonwealth Rules of Evidence 804(a)(4) and 804(a)(5). In order for either of these exceptions to apply, the Commonwealth must make a preliminary showing that the declarant is unavailable to testify in trial. *See United States v. Sines*, 761 F.2d 1434, 1439 (9th Cir. 1985). For cases of unavailability due to physical impairment under Rule 804(a)(4), "[t]here must be 'the requisite finding of necessity' which is 'case specific' in order to dispense with confrontation in open court." *Stoner v. Sowders*, 997 F.2d 209, 212 (6th Cir. 1993) (quoting *Maryland v. Craig*, 497 U.S. 836, 855 (1990)). Additionally, general evidence that the declarant is in poor health, or that he or she may not have been able to testify at one time does not establish unavailability. "[I]t must appear that

the witness is in such a state, either mentally or physically, that in reasonable probability he will never be able to attend trial." *Peterson v. United States*, 344 F.2d 419, 425 (5th Cir. 1965).

¶ 10 Here, the Commonwealth provided a letter from a neurologist discussing the declarant's physical condition, past medical history, and recommendations for future treatment. The letter is dated April 5, 2008, and is the most recent account on record of the patient's condition.[1] Several months after this report was compiled, the declarant returned to China to continue treatment for her injuries. The Commonwealth has not provided evidence that the declarant's condition has worsened in the seventeen months since the medical report was compiled. She was able travel to China approximately one year ago, and the Commonwealth has not shown that she would be unable to travel back to Saipan today. As such, the Commonwealth has not met its burden of establishing unavailability due to physical impairment under Commonwealth Rule of Evidence 804(a)(4).

¶ 11 Similarly, the Commonwealth has provided no evidence suggesting that it has made a good faith effort to obtain the declarant's presence, thereby establishing unavailability under Commonwealth Rule of Evidence 804(a)(5). For purposes of Rule 804(a)(5), a witness is not unavailable unless the prosecution "ha[s] made a good-faith effort to obtain his presence at trial." *Barber* 390 U.S. at 725. The Commonwealth asserts that it is unreasonable to expect the declarant, who is paraplegic and generally in poor health, to return to Saipan to testify in this trial. It draws the court's attention to three unsubstantiated facts in support of that assertion: that she needs constant medical attention, that she lives a far distance from the nearest major airport, and that she cannot afford the travel expenses required to return to Saipan. While we recognize that these factors make her procurement difficult, they do not answer the question of whether the Commonwealth has made a good-faith effort to obtain her presence.[2] "'The ultimate question is

---

[1] In addition to the neurologist's report, the Commonwealth submitted the declaration of Eric S. Smith, who is the declarant's attorney in civil matters related to this case, and a memorandum from the Attorney General, Edward T. Buckingham. In the declaration, Smith discusses the process used to transport the declarant to her ultimate destination in China, as well as his current efforts to keep in touch for purposes of the civil matter. The memorandum from Buckingham notifies the trial judge that the Office of the Attorney General does not have sufficient funding to finance the declarant's trip back to Saipan for trial. Like the neurologist's report, neither of these documents address whether the Commonwealth has made a good faith effort to secure the declarant's presence, thereby establishing unavailability under Commonwealth Rule of Evidence 804(a)(5), or the that the declarant's current state of health prevents her from traveling to Saipan, thereby establishing unavailability under Commonwealth Rule of Evidence 804(a)(4).

[2] Following review of the record, we note the strong possibility that the declarant is actually unavailable to testify at trial. However, the protections of the Confrontation Clause require the Commonwealth to establish that this is presently the case, and it has failed to do so. The Commonwealth could have, for example, provided more current medical information or an affidavit from the declarant herself testifying that she is currently not physically able to travel. The declaration from Eric Smith, who is

whether the witness is unavailable despite good faith efforts undertaken prior to trial to . . . present the witness.'" *United States v. Yida*, 498 F.3d 945, 956 (9th Cir. 2007) (quoting *Ohio v. Roberts*, 448 U.S. 56, 74 (1980). Without establishing that an effort has been made, the declarant is not an unavailable witness under Commonwealth Rule of Evidence 804(a)(5).

III

¶ 12 For the foregoing reasons, we find that the Commonwealth has not satisfied the factors under *Tenorio* which would prompt this Court to grant a petition for a writ of mandamus. The Commonwealth has not presented sufficient evidence that the declarant is currently physically impaired, such that she is unavailable under Commonwealth Rule of Evidence 804(a)(4). Furthermore, the Commonwealth has not made a good faith effort prior to trial to procure the declarant's presence, potentially making her unavailable under Commonwealth Rule of Evidence 804(a)(5). Accordingly, the Commonwealth's petition for a writ of mandamus is DENIED.

SO ORDERED this 8th day of September 2009.

/s/
MIGUEL S. DEMAPAN
Chief Justice

/s/
ALEXANDRO C. CASTRO
Associate Justice

/s/
JOHN A. MANGLONA
Associate Justice

---

not a doctor, and the neurologist report from seventeen months ago are too remote to establish that the requisite finding of unavailability.