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NoraV Borja

IN THE

Supreme Court

OF THE

Commonwealth of the Northern Mariana Islands

IN RE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Petitioner,

v.

SUPERIOR COURT OF THE NORTHERN MARIANA ISLANDS,
Respondent,

and

RUDOLPH RUDOLPH,
Respondent-Real Party in Interest.

Supreme Court No. 2020-SCC-0013-PET

ORDER GRANTING WRIT OF MANDAMUS

Cite as: 2020 MP 22

Decided November 17, 2020

CHIEF JUSTICE ALEXANDRO C. CASTRO

ASSOCIATE JUSTICE JOHN A. MANGLONA

ASSOCIATE JUSTICE PERRY B. INOS

Superior Court Criminal Action No. 20-0132
Associate Judge Joseph N. Camacho, Presiding

PER CURIAM:

¶ 1 The Commonwealth of the Northern Mariana Islands ("Commonwealth") petitions for a writ of mandamus to vacate the trial court's order compelling production of documents at the preliminary hearing. The court ordered the Commonwealth to produce all tangible materials used by law enforcement to establish probable cause in connection with the cross-examination of its witness. The Commonwealth contends that discovery is beyond the scope of a preliminary hearing. It asserts that the order is clearly erroneous as a matter of law and manifests a persistent disregard of applicable rules. Further, it argues the court's delay of the hearing violates NMI Rule of Criminal Procedure 5.1 ("Rule 5.1"). For the following reasons, we GRANT the petition.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 The Department of Public Safety investigated a report of sexual abuse of an eleven-year-old victim by defendant Rudolph Rudolph ("Rudolph"). Detective Dela Cruz made an affidavit in support of an arrest warrant. The affidavit cited interviews with the victim, several family members, Division of Youth Services ("DYS") personnel, and medical staff who conducted a sexual assault examination. The witnesses all conveyed the victim's account of sexual assault. Rudolph was arrested and made his initial appearance with a bail hearing on July 29, 2020. An Information was filed on August 5 containing three counts of Sexual Abuse of a Minor in the First Degree and four counts of Sexual Abuse of a Minor in the Second Degree. The preliminary hearing was initially set for the same date, but the Office of the Public Defender withdrew from representation of the defendant due to a conflict and the hearing was moved to August 12.[1]

¶ 3 At the preliminary hearing, the Commonwealth called one witness—Detective Dela Cruz—to establish probable cause. After direct examination, the defense orally moved for the production of tangible materials used by law enforcement to establish probable cause in order to effectively cross-examine Detective Dela Cruz. The Commonwealth objected and the court continued the hearing to September 2 at the defendant's request. The hearing was continued again to September 23 because the preliminary hearing judge was unavailable due to medical reasons. The Commonwealth then moved for re-assignment of the case to a different judge, but this motion was not ruled upon. On September 28, the court issued an order requiring the Commonwealth to produce "all notes, statements, police reports, videos, etc. relevant to the determination of probable cause at the preliminary hearing," specifically including reports of interviews of the victim and several family members, notes and records from the medical examination of the victim, and access to a recording of the interview of the victim. *Commonwealth v. Rudolph*, Crim. No. 20-0132 (NMI Super. Ct. Sept. 28, 2020) (Order at 13) ("Order"). On September 30, the Commonwealth filed two motions for reconsideration, which were denied, and the parties agreed to a

[1] The Office of the Public Defender sought leave of court to submit an amicus brief which we denied because it had previously withdrawn from representation due to a conflict.

two-week continuance.

¶ 4 The Commonwealth filed this petition on October 13. At the continuance of the hearing on October 14, the court denied the Commonwealth's oral motion to stay the case and threatened sanctions if the Commonwealth did not comply with the Order. The parties agreed to continuance of the hearing pending resolution of this petition.

II. JURISDICTION

¶ 5 The Supreme Court has jurisdiction to issue writs of mandamus under Article IV, Section 3 of the NMI Constitution. *Tudela v. Superior Court*, 2007 MP 18 ¶ 4.

III. DISCUSSION

¶ 6 The Commonwealth asserts the court: 1) lost its jurisdiction by delaying the hearing beyond the ten days specified in Rule 5.1; 2) lacked jurisdiction to issue a discovery order at a preliminary hearing; and 3) created its own procedural rules, usurping the Constitutional functions of the Chief Justice and the legislature. We find the court retains jurisdiction over the preliminary hearing because the defendant has consented to several continuances, but remind the court to expedite preliminary hearings consistent with Rule 5.1. We hold that some disclosure is permissible at the preliminary hearing but that it must be narrowly tailored to the probable cause inquiry and not exceed the scope of direct examination. We find the order exceeded this narrow scope and therefore grant the petition.

A. Preliminary Hearings

¶ 7 "The purpose of a preliminary hearing is to determine whether there is probable cause to believe that a crime has been committed and that the accused committed it." *Babauta v. Superior Court*, 4 NMI 309, 310 (1995). Preliminary hearings are often viewed as a screening device that determines whether the facts alleged justify detaining a defendant as he awaits trial. *Moana v. Wong*, 405 P.3d 536, 542–43 (Haw. 2017). "A preliminary hearing is a procedural safeguard that seeks to 'protect[] the accused' by ensuring 'that the prosecution can at least sustain the burden of proving probable cause.'" *People v. Vanness*, 458 P.3d 901, 904 (Colo. 2020) (quoting *In re People v. Rowell*, 453 P.3d 1156, 1159 (Colo. 2019)).

¶ 8 The preliminary hearing is therefore, first and foremost, a determination of probable cause. "The mission of the hearing is an investigation into probable cause for further proceedings against the accused." *Coleman v. Burnett*, 477 F.2d 1187, 1200 (D.C. Cir. 1973) (emphasis added). The scope of the proceeding is narrow. Thus, courts have recognized that the rights to cross-examine witnesses and to introduce evidence are limited to the probable cause determination. *People v. Fry*, 92 P.3d 970, 977 (Colo. 2004) ("A preliminary hearing is limited to matters necessary to a determination of probable cause. The rights of the defendant are therefore curtailed: evidentiary and procedural rules are relaxed,

and the rights to cross-examine witnesses and to introduce evidence are limited to the question of probable cause.").

¶ 9 This Court has similarly emphasized that the probable cause determination is the core purpose of the preliminary hearing. "It has long been recognized: the critical importance of the preliminary hearing as a mechanism to weed out groundless claims and thereby avoid for both defendants and the People the imposition and expense of an unnecessary criminal trial." *Commonwealth v. Crisostimo*, 2005 MP 18 ¶ 14 (quoting *Mills v. Superior Court*, 728 P.2d 211, 214 (Cal. 1986)).

¶ 10 With this background in mind, we consider whether to grant the petition for writ of mandamus based on the five factors laid out in *Tenorio v. Superior Court*. 1 NMI 1, 9–10 (1989). These include:

> (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."

Id. We examine each factor in turn.

B. No other adequate means

¶ 11 The Commonwealth argues that it has no other available avenue to relief because an order compelling discovery at a preliminary hearing is not a final order and therefore not directly appealable. Further, it notes that 6 CMC § 8101 limits the Commonwealth's right to appeal in criminal cases. The Commonwealth has already filed two motions for reconsideration and obtained no recourse. We held in *Commonwealth v. Crisostimo* that a determination of no probable cause is not a final judgment and therefore not an appealable decision. 2005 MP 18 ¶ 17. Refiling the case against the defendant does not resolve the issue because the Commonwealth will suffer the same discovery dilemma every time.

C. Damaged in a way not correctable on appeal

¶ 12 The Commonwealth stresses that it suffers an injury because criminal cases are being delayed due to the practice of one judge at preliminary hearings.[2]

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[2] The petition characterizes the issue as a "split" between the judges of the Superior Court, as though they were sister circuit courts in the federal system. The CNMI Superior Court is one body.

It notes that the defendant remains in custody while the determination of probable cause is delayed. The delays prejudice the Commonwealth's ability to prosecute cases in a timely fashion under Rule 5.1. Delays also harm the defendants themselves if they are held in custody without probable cause while a hearing is pending. These delays at the preliminary hearing stage are not remediable through direct appeal since the disputed order is not final for purposes of appellate review. The defense argues there is no harm to the Commonwealth by ordering disclosure because the requested documents would eventually be disclosed prior to trial pursuant to discovery rules. But this misses the point; the issue is whether the requesting party is entitled to these materials at the preliminary hearing.

D. Clearly erroneous as a matter of law

¶ 13 This is the weightiest factor and a prerequisite to granting writ relief. *In re Commonwealth of the Northern Mariana Islands*, 2015 MP 7 ¶ 9; *In re Commonwealth of the Northern Mariana Islands*, 2018 MP 8 ¶ 32. The Commonwealth contends that the Order is clearly erroneous because: (1) the court had lost jurisdiction due to delay; and (2) there is no right to discovery at the preliminary hearing.

1. Jurisdiction

¶ 14 The Commonwealth argues that the court violated Rule 5.1 by repeatedly delaying the preliminary hearing and therefore lost jurisdiction over the hearing. Rule 5.1 provides that the preliminary hearing must be held within ten days of the initial appearance.[3] According to the defense, each of the continuances occurred with the defendant's consent and with good cause, effectively waiving any objection to being held in custody beyond the prescribed period.

¶ 15 The first delay occurred on August 5, the date originally set for the hearing, when the Office of the Public Defender withdrew due to a conflict. This was within ten days of the initial appearance and was good cause for delay. The second continuance occurred on August 12, delaying the hearing to September 2 for the parties to brief the discovery issue. This was with the defendant's consent and for good cause. The continuance for medical reasons owing to the judge's illness was a sua sponte order, but by the defense's own representation it was at

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[3] In pertinent part:

> [The preliminary] examination shall be held within a reasonable time but in any event not later than ten (10) days following the initial appearance. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits . . . may be extended one or more times by a judge. In the absence of such consent by the defendant, time limits may be extended by a judge only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

NMI R. CRIM. P. 5.1.

least impliedly consented to.[4] Subsequent continuances have been to litigate the instant discovery dispute. Since the defense consented, the continuances need meet only the "good cause" standard rather than the higher "extraordinary circumstances" standard. Substitution of counsel, medical emergency, and the need to litigate this discovery issue meet the relatively low bar of good cause with the defendant's consent.

¶ 16 Because the defense consented to the continuances, the court has not lost its jurisdiction. Still, it is concerning that the hearing remains pending nearly three months after the initial arrest. Fairness to the accused requires that the detention be no longer than necessary for a threshold probable cause determination.[5]

2. Production of Tangible Materials

¶ 17 The defense's motion requests "all tangible materials . . . that was reviewed by . . . Dela Cruz[] prior to the preliminary examination to refresh [her] recollection and to familiarize herself with the case pursuant to 6 CMC § 6303(c)." *Commonwealth v. Rudolph*, Crim. No. 20-0132 (NMI Super. Ct. Aug. 17, 2020) (Motion for All Tangible Materials Used by Law Enforcement to Establish Probable Cause to fully and Properly Cross Examine the Government's Witness at 1) ("Motion"). This statute provides that "[t]he arrested person may cross-examine adverse witnesses and may introduce evidence in his or her own behalf." 6 CMC § 6303(c).

¶ 18 The Commonwealth argues that the plain language of Section 6303 provides only that the defense can provide evidence, not that it can compel production of discovery. It cites several federal cases for the proposition that Federal Rule of Criminal Procedure 5.1 does not provide for discovery. *See, e.g.*, *Sciortino v. Zampano*, 385 F.2d 132, 133 (2d Cir. 1967) ("the purpose is not to give discovery, before trial, of the government's case.") The defense insists that the statutory right to cross-examination under Section 6303(c) encompasses a right to materials used by law enforcement, citing the same court's previous order in *Commonwealth v. Saimon*, Crim. No. 18-0020 (NMI Super. Ct. Sept. 13, 2019).

¶ 19 This brings us to the interpretation of Section 6303's right to cross-examination and presentation of evidence. We have held that the legislative intent of Section 6303 was not "to codify any procedural rules that might supersede the Commonwealth Rules of Criminal Procedure." *Babauta*, 4 NMI at 313. Section 6303 derived from 12 TTC § 204, which incorporated language from an earlier version of Federal Rule of Criminal Procedure 5.1. *See* Fed. R.

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[4] Under the circumstances, the court had good cause to reassign the case to a different judge as the delay was occasioned by the court's unavailability.

[5] This court has itself held that the Rule 5.1 ten-day limit is jurisdictional. *CNMI v. Philip Manuel Pangelinan Roberto*, No. 15-0084 (NMI Sup. Ct. Sept. 15, 2015) (Order at 6).

Crim. P. 5.1 advisory committee's note to 1972 amendment. Several adjoining Trust Territory Code sections dealing with the right to a preliminary hearing and the circumstances under which a defendant could request a preliminary hearing were transformed into criminal procedure rules. 12 TTC § 204, however, was re-enacted as a CNMI statute—Section 6303. *Babauta*, 4 NMI at 310–11. The language is largely the same, and says nothing about a right to discovery, only that a defendant may "cross-examine . . . witnesses and introduce evidence . . . ." 6 CMC § 6303(c). In the context of the legislative history, it is clear that the statute does not confer procedural rights on defendants beyond those embedded in the rules of criminal procedure.

¶ 20 But here, the court read into the statute an expansive right to discovery that is neither evident in the plain language, nor reflected in the legislative history. It envisions a right to compel documents flowing from Section 6303's cross-examination requirement that resembles full-blown discovery under Rule of Criminal Procedure 16.[6] This is far beyond the incidental byproduct described in federal cases interpreting Federal Rule 5.1. *See Coleman*, 477 F.2d at 1199 ("[T]he degree of discovery obtained in a preliminary hearing will vary depending upon how much evidence the presiding judicial officer thinks is necessary to establish probable cause in a particular case. This may be quite a bit, or it may be very little, but in either event it need not be all the evidence within the possession of the Government that should be subject to discovery.") (quoting S.Rep. No. 371, 90th Cong., 1st Sess. 34 (1967)).

¶ 21 The court relied on its earlier *Saimon* order, where it gave a fuller justification for its broad interpretation of 6 CMC § 6303(c) cross-examination. There, it held that "for cross examination at a preliminary hearing to be effective, it is necessary for the party conducting the cross-examination to be privy to the documents that formed the basis of the opposing party's testimony." *Commonwealth v. Saimon*, Crim. No. 18-0020 (NMI Super. Ct. Sept. 13, 2019) (Order at 8). The court quoted the United States Supreme Court to the effect that cross-examination is "the greatest legal engine ever invented for the discovery of truth." *Id.* (quoting *California v. Green*, 399 U.S. 149, 158 (1970)). But the quote from *California v. Green* refers to cross-examination *at trial*, where the factfinder weighs evidence in order to make factual findings. By contrast, the purpose of the preliminary hearing is merely to establish probable cause to bring charges, not to conduct "a mini-trial of the criminal charges prior to the . . . trial." *Commonwealth v. Eckerle*, 470 S.W.3d 712, 726 (Ky. 2015).

¶ 22 A determination of probable cause may require effective cross-examination but it does not require what amounts to discovery:

> [Cross-examination at the preliminary hearing] does not include discovery for the sake of discovery. To be sure, the evidence the

[6] The right to discovery under NMI Rule of Criminal Procedure 16 does not apply to preliminary hearings. *See United States v. Begaye*, 236 F.R.D. 448, 454 (D. Ariz. 2006).

> Government offers to establish probable cause is by nature also discovery for the accused. So also is information adduced on cross-examination of Government witnesses on the aspects of direct-examination testimony tending to build up probable cause. *In those senses, some discovery becomes a by-product of the process of demonstrating probable cause. But in no sense is discovery a legitimate end unto itself.*

Coleman, 477 F.2d at 1200 (emphasis added). The aim of the defense's right to cross-examination at the preliminary hearing stage is to rebut the government's assertion that it has probable cause to bring charges, not to compel discovery of elements of the prosecution's case on the merits. "The true dimension of that right is bound to depend in considerable measure upon the degree to which discovery by the defense may be a purpose the preliminary hearing is designed to serve." *Id.* at 1198.

¶ 23 Many state courts take a similar view. *See, e.g.*, *Madrid v. State*, 910 P.2d 1340, 1343 (Wyo. 1996) ("although some discovery is the inevitable by-product of a preliminary hearing, discovery is not the purpose of the hearing."). A certain amount of discovery is permissible in advance of preliminary hearings in a number of jurisdictions. *See, e.g.*, *People v. Laws*, 554 N.W.2d 586, 589 (Mich. Ct. App. 1996) ("The district court may order discovery in carrying out its duty to conduct preliminary examinations. Discovery may be ordered before the preliminary examination."); *Garcia v. Superior Court*, 47 Cal. App. 5th 631, 638 (Cal. Ct. App. 2020) (trial court sanctioned prosecution for failure to comply with discovery order for a preliminary hearing). But its scope extends only so far as necessary to make a determination of probable cause.

¶ 24 Law enforcement officers have probable cause to make an arrest if "at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense." *Beck v Ohio*, 379 U.S. 89, 91 (1964). To justify a finding of probable cause, the prosecution must simply produce "believable evidence of all the elements of the crime charged . . . ." *In re Commonwealth*, 2018 MP 8 ¶ 17 (quoting *State v. Virgin*, 137 P. 2d 787, 792 (Utah 2006). The judge at this stage does not make findings of fact regarding disputed evidence, merely whether the prosecution has met its burden to show evidence that, if believed, suffices as a matter of law to satisfy each element of the charged offense. *See id*. ¶ 18.

¶ 25 Here, the witness's testimony on direct examination meets that bar without reference to any tangible materials or documents. Detective Dela Cruz testified largely to interviews at which she was physically present. These included DYS's forensic interview of the victim and Detective Dela Cruz's interviews of the victim's family members. App. 1–3. We were not provided with a transcript of the hearing, and no showing was made that the documents enumerated in the court's order formed the basis of Detective Dela Cruz's testimony on direct examination. In the earlier *Saimon* case, the testifying officer relied on notes by

other officers not present.[7] But here, the detective's testimony based on interviews at which she was herself present would suffice to establish probable cause.

¶ 26 The court's order compelling production of tangible materials exceeds the scope of Section 6303 and Rule 5.1. Discovery requests should not be granted "in the absence of a showing that such discovery is reasonably necessary to prepare for the preliminary examination, and that discovery will not unduly delay or prolong that proceeding. Pretrial discovery is aimed at facilitating the swift administration of justice, not thwarting it." *Holman v. Superior Court of Monterey County*, 629 P.2d 14, 17 (Cal. 1981). Ordering production of "all notes, statements, police reports, videos, etc. relevant to the determination of probable cause at the preliminary hearing" exceeded the scope of facilitating cross-examination. For purposes of this writ petition, we need not draw a bright line on the permissible scope of discovery for a preliminary hearing; it suffices to determine that, on these facts, the order is overbroad. The discovery here exceeds reasonable preparation for cross-examination and appears targeted to discovering the case for trial. The court clearly erred in granting the discovery.

3. Creating rule

¶ 27 The Commonwealth alleges that the court's expansive reading of Section 6303(c) to permit discovery amounts to creating a procedural rule. Article IV, section 9(a) of the NMI Constitution provides that procedural rules are proposed by the chief justice and approved by the legislature. The Commonwealth overstates its case. While we find the order reflected a clearly erroneous interpretation of Rule 5.1 and Section 6303(c), the court understood its finding of a "right to the tangible materials prior to a preliminary examination hearing" to "flow[] from a defendant's right to cross-examine under 6 CMC § 6303(c)." Order at 8 n. 3. The court erred in interpreting the statute but did not usurp rulemaking authority.

E. Oft-repeated error and issue of first impression

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[7] Federal courts have held that Federal Rule of Criminal Procedure 26.2, which applies at the preliminary hearing per Federal Rule 5.1(h), compels disclosure of a report by Officer A that has been "expressly adopted" by Officer B by serving as the basis of Officer B's testimony under the "joint investigation" doctrine. *See United States v. Marschall*, 2020 U.S. Dist. Lexis 107045 *4 (W.D. Wash. 2020); *United States v. Valdez-Gutierrez*, 249 F.R.D. 368 (D.N.M. 2007) (holding that Rule 26.2 requires a witness to disclose the statements of another when the witness "either had some part in making the statement or report or . . . participated in conducting the underlying investigation and later approved the accuracy of the contents of the statement or report of the investigation."). In federal court, a "witness statement" discoverable at the preliminary hearing includes a statement that the witness "adopts or approves." FED. R. CRIM. P. 26.2(f)(1). Our rule 26.2 mirrors the language of an earlier version of this federal rule. It does not apply at the preliminary hearing and does not expressly provide for this expansive interpretation of "witness statement."

¶ 28 The Commonwealth cites two previous cases in which the court issued similar orders. *Commonwealth v. Saimon*, Crim. Case No. 18-0020 (Super. Ct. Sept. 13, 2019) (Order); *Commonwealth v. Basa*, Crim. Case No. 20-0126 (Super. Ct. Sept. 16, 2020) (Order). As a recurring issue, this weighs strongly in favor of appellate review. Whether there is a right to compel production of documents at preliminary hearings is an issue of first impression and is a new and important problem. This factor likewise weighs in favor of review.

V. CONCLUSION

¶ 29 Repeated continuances have not stripped the court of jurisdiction because the defendant has consented to delay. Still, our rules require a swift disposition of the preliminary hearing, the sole function of which is to establish probable cause. Though some disclosure is permissible in aid of the probable cause determination, the court's order exceeded this narrow scope. The petition for writ of mandamus is GRANTED. The court's overbroad order compelling production of "all notes, statements, police reports, videos, etc. relevant to the determination of probable cause at the preliminary hearing" is VACATED and the preliminary hearing should be conducted without further delay.

SO ORDERED this 17th day of November, 2020.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

COUNSEL

J. Robert Glass, Jr., Chief Solicitor, Office of the Attorney General, Saipan, MP, for Petitioner.
Anthony Aguon, Saipan, MP, for Respondent-Real Party in Interest.