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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

DANIEL GEORGE TALLEY,
Appellant.

BRIEF FOR *AMICUS CURIAE* PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF THE COMMONWEALTH OF PENNSYLVANIA

Appeal from the Order dated July 17, 2020, of the Superior Court, No. 2627 EDA 2018, affirming the order entered August 24, 2018, in the Court of Common Pleas, Montgomery County, at CP-46-CR-0005241-2017.

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STATEMENT OF *AMICUS CURIAE*

The Pennsylvania District Attorneys Association is the only organization representing the interests of its member District Attorneys and their assistants in the various counties in the Commonwealth of Pennsylvania. This Court's review of issues involving constitutional questions and/or the interpretation of evidentiary rules in criminal matters is of special interest to district attorneys throughout Pennsylvania.

CERTIFICATION PURSUANT TO Pa.R.A.P. 531(b)(2)

No other person or entity has authored any portion of the within brief, in whole or in part, nor have any funds been expended by any person or entity in the preparation and filing of this brief outside of the Association.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

(1) Is the Commonwealth required under Article I, Section 14 of the Pennsylvania Constitution to produce clear and convincing evidence at a hearing pursuant to Pa.R.Crim.P. 600(D)(2) for nominal bail in order to meet its burden of proof that there is "no condition or combination of conditions other than imprisonment that will reasonably assure the safety of any person and the community when the proof is evident or presumption great" when this Honorable Court has already determined that the standard is *prima facie*?[1]

(2) Is it a violation of the Best Evidence Rule to permit the introduction of screenshots of text messages, and supporting testimony thereto, when the content of the messages is not at issue and the challenge raised is related to authentication and does not contest that accuracy of the information written in the text messages?

[1] The question put forth by Appellant to this Honorable Court addressed the issue in the context of a bail revocation hearing but the issue in the instant matter arose in the context of a hearing for nominal bail pursuant to Pa.R.Crim.P. 600(D)(2).

COUNTERSTATEMENT OF THE CASE

The Commonwealth and Superior Court panel have set forth the facts and relevant procedural history and *Amicus* joins in those recitations.

SUMMARY OF ARGUMENT

Appellant is not entitled to relief and his judgment of sentence should be affirmed.

Article I, Section 14 of the Pennsylvania Constitution does not require a showing of "clear and convincing" evidence for bail to be denied. This Honorable Court has already determined that that standard required is one of *prima facie*. The standard has not changed since 1874. The amendment to Section 14 in 1998 did not alter the standard for denying bail. Rather, it added two categories of cases where a court could decide that defendant was not eligible for bail. The policy arguments related to the impact of pre-trial incarceration are appropriate for the Legislature to consider but are not, respectfully, a basis for this Honorable Court to abandon the *prima facie* standard.

The Best Evidence Rule did not prohibit the introduction of text messages via screenshot in the instant case. The purpose of the rule is to ensure that the trier of fact is viewing an accurate representation of the writing at issue. In the instant matter, that means the words written in the text messages. Appellant's complaint regarding the absence of metadata really addresses authentication and is not governed by the Best

Evidence Rule. The Commonwealth set forth sufficient circumstantial evidence at trial to authenticate the text messages.

ARGUMENT

I. This Honorable Court has addressed the standard of proof required under Article I, Section 14 of the Pennsylvania Constitution with relation to denial of bail and the 1998 amendment to said section did not alter that standard.

Appellant contends when considering the denial of a request for nominal bail pursuant to Pa.R.Crim.P. 600(D)(2), this Honorable Court should hold that the Commonwealth is required to show by "clear and convincing evidence" that "…no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community…." He further contends that bail should never be denied for misdemeanor cases and that he was unable to assist in his own defense, making his trial unfair. Appellant's claims are, respectfully, without merit. In support of said conclusion, and in support of the Commonwealth and their reasons advocating the same, *Amicus* offers the following argument.

Pa.R.Crim.P. 600(B)(1) provides that "[e]xcept in cases in which the defendant is not entitled to release on bail as provided by law, no defendant shall be held in pretrial incarceration in excess of…180 days from the date on which the complaint is filed…." If a defendant has been incarcerated for more than 180 days prior to trial, Pa.R.Crim.P. 600(D)(2) provides, in

relevant part, that:

> [e]xcept in cases in which the defendant is not entitled to release on bail as provided by law, when a defendant is held in pretrial incarceration beyond the time set forth in paragraph (B), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the defendant be released immediately on nominal bail subject to any nonmonetary conditions of bail imposed by the court as permitted by law.

Article I, Section 14 of the Pennsylvania Constitution addresses when a defendant is not entitled bail.

In 1998, Article I, Section 14 of the Pennsylvania Constitution was amended to set forth the following related to bail in criminal matters:

> All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

Prior to the 1998 amendment, the section read as follows:

> All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

Pa. Const. Art. I, § 14, 1968. The language of Article I, Section 14 in the 1968 Pennsylvania Constitution is identical to the language in the

preceding constitution, which was ratified in 1873 and became effective in 1874. *See* Pa. Const. Art. I, § 14, 1874. Thus, pursuant to the 1874 and 1968 constitutions, the only time bail could be denied was for a capital offense.

This Honorable Court addressed the standard of proof for determining whether a defendant was charged with a capital offense, and thus not entitled to bail pursuant to Article I, Section 14 of the 1874 Pennsylvania Constitution, in *Commonwealth ex.rel. Alberti v. Boyle*, 412 Pa. 398, 195 A.2d 97 (Pa. 1963). Regarding the standard, this Honorable Court stated:

> We are likewise convinced that the words in Section 14 'when the proof is evident or presumption great' mean that if the Commonwealth's evidence which is presented at the bail hearing, together with all reasonable inferences therefrom, is sufficient in law to sustain a verdict of murder in the first degree, bail should be refused.

Id. at 400-401.

Subsequent to the ratification of the 1968 Pennsylvania Constitution, in which Article I, Section 14 remained unchanged from the 1874 constitution, this Honorable Court found that the *prima facie* case for first-degree murder established at the preliminary hearing supported the lower court's determination that bail should be denied. *Commonwealth v.*

Farris, 443 Pa. 251, 278 A.2d 906 (Pa. 1971). The Pennsylvania Superior Court followed this *prima facie* standard in *Commonwealth v. Heiser*, 303 Pa. Super. 70, 478 A.2d 1355 (Pa. Super. 1984). This Honorable Court has explained *prima facie* as follows:

> A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense. The evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury. Moreover, [i]nferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.

Commonwealth v. Huggins, 575 Pa. 395, 402, 836 A.2d 862 (Pa. 2003)(internal citations and quotations omitted). When one compares the requirements for a finding of *prima facie* with the standard set forth in *Alberti*, it is evident that they are the same.

The 1998 amendment to Article I, Section 14 added two categories, in addition to capital offenses, wherein bail could be denied upon a finding that "the proof is evident or presumption great." The first is where the charge(s) at issue carry a sentence of life imprisonment. The second is when "…no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the

community…." *See* Pa. Const. Art. I, § 14, 1998. Notably, while the amendment added two categories where bail could be denied, it did not change or modify the standard that needed to be shown for bail to be denied, that "the proof is evident or presumption great." Thus, the standard that had been in place since 1874, and interpreted by this Honorable Court in *Alberti*, remained constant.

The "plain English" statement put forth by the Attorney General at the time the amendment was submitted to the electorate for consideration supports a finding that the amendment was solely adding categories to which the standard in Article I, Section 14 would be applied and would not change the standard that had been in place since 1874. The statement, in relevant part, read as follows:

> The ballot question would amend the Constitution to disallow bail also in cases in which the accused is charged with an offense punishable by life imprisonment or in which no condition or combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community. *The ballot question would extend to these two new categories of cases in which bail must be denied the same limitation that the Constitution currently applies to capital cases. It would require that the proof be evident or presumption great that the accused committed the crime or that imprisonment of the accused is necessary to assure the safety of any person and the community.*
>
> The proposed amendment would have two effects. First, it would require a court to deny bail when the proof is evident or presumption great that the accused committed a crime punishable

> by death or life imprisonment. Second, it would require a court deciding whether or not to allow bail in a case in which the accused is charged with a crime not punishable by death or life imprisonment to consider not only the risk that the accused will fail to appear for trial, but also the danger that release of the accused would pose to any person and the community.

Grimaud v. Commonwealth, 581 Pa. 398, 410-411, 865 A.2d 835 (Pa. 2005)(emphasis added).

At best, Appellant and his *Amici* have glossed over *Alberti* in an attempt to put forth the narrative that this Honorable Court has never interpreted the language "the proof is evident or presumption great" and should, therefore, find that "clear and convincing evidence" is the standard of proof required to deny bail under Article I, Section 14. Appellant's assertion that the standard somehow has a different meaning in the context of an allegation that a defendant "poses a danger" than it had when *Alberti* was decided is without support. *See* Appellant's Brief, pg. 25. The purpose of the 1998 amendment was not to change the standard of proof for denying bail. The purpose of the amendment was to include two new categories where a court could deny bail. In light of the clear intent of the amendment, as explained to the electorate, Appellant, and his *Amici*, have failed to offer valid reasons why *Alberti* should be abandoned in favor of a "clear and convincing" standard.

Further, Appellant's contention that this Honorable Court should simply hold that bail cannot be denied in misdemeanor cases is completely contrary to the plain language of Article I, Section 14. The 1998 amendment specifically allows for bail to be denied in any case where it can be demonstrated that "…no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great…." There is nothing in the amendment that excludes misdemeanor offenses. Appellant's suggestion is contrary to the will of the electorate, which voted to adopt an amendment which would allow for bail to denied based on upon the actions, or alleged actions, of a defendant and not solely on the grading of a particular offense.

Under Appellant's interpretation, a defendant who, for example, is charged with Driving Under the Influence[2] and Involuntary Manslaughter[3], both graded as misdemeanors, who continues to drink and drive prior to or after his/her arrest, could not be denied bail, have his/her bail revoked or be denied nominal bail. Likewise, a defendant who, like Appellant, is arrested for stalking/domestic violence crimes and makes bail

[2] 75 Pa.C.S. § 3802(a)-(d)
[3] 18 Pa.C.S. § 2504

(or is given nonmonetary bail) and then continues to engage in stalking/domestic violence behaviors resulting in another arrest for similar misdemeanor offenses, could not be denied bail, have his/her bail revoked or be denied nominal bail. The dangers posed by these, and other, scenarios are exactly what the 1998 amendment seeks to address.

The language of Article I, Section 14 is clear in that it allows for bail to be denied upon a showing that the danger posed by a defendant cannot be addressed in another manner. The arguments put forth by Appellant and his *Amici* related to the policy implications of pre-trial detention on defendants are best put forth to the Legislature, whose job it is to examine these policy arguments and determine whether any action should be taken to change the law, which is currently set forth in the Pennsylvania Constitution.

Finally, Appellant's assertion that he was unable to assist in his defense because of his pre-trial detention and as result his trial was "unfair" is not supported by the record in the instant matter. There is absolutely no evidence of record which would establish that Appellant was unable to assist in his defense. He merely offers his own, self-serving assertion that his ability to assist in his defense was hampered. His assertion appears to be an attempt to piggyback on the policy arguments

of his *Amici*, that pretrial detention can be detrimental to a defendant's overall case. However, Appellant's bald assertions, unsupported by evidence of record, are an insufficient vehicle for relief.

"Adherence to precedent is a foundation stone of the rule of law[.]" *Commonwealth v. Reid*, 235 A.3d 1124, 1168 (Pa. 2020)(internal citation and quotation omitted). The 1998 amendment to Article I, Section 14 did not change the standard to be used when evaluating whether a defendant is entitled to bail under the Pennsylvania Constitution. There is nothing in the amendment to suggest that the standard is somehow different by the addition of two categories where bail can be denied, than when Section 14 only allowed bail to be denied for capital offenses. This Honorable Court should uphold to the dictate of *Alberti*, that the language "the proof is evident or presumption great" encompasses a *prima facie* standard and deny Appellant's claims to the contrary.

II. The Best Evidence Rule does not prohibit the admission of text messages via screenshot.

Appellant also claims that it was error for the trial court to allow the Commonwealth to introduce text messages via screenshot. He asserts that this violated the Best Evidence Rule as the screenshots did not contain the attendant metadata and hyperlinks associated with the

text messages. The crux of Appellant's argument is that because the screenshots of the text messages did not contain the metadata – such as when the message was read, who sent it (or who purportedly sent it), or the source of the message – it was not the complete writing and as such violated the Best Evidence Rule. He is focused almost exclusively on the idea that a writing must contain information establishing the identity of the sender or it is not the "best evidence."

This is not, however, the purpose of the Best Evidence Rule. Pa.R.E. 1002, which is the codification of the Best Evidence Rule, provides that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise." The comment to the rule sets forth that:

> [t]his rule corresponds to the common law "best evidence rule." *See Hera v. McCormick*, 425 Pa. Super. 432, 625 A.2d 682 ([Pa. Super.]1993). The rationale for the rule was not expressed in Pennsylvania cases, but commentators have mentioned four reasons justifying the rule.
>
> (1) The exact words of many documents, especially operative or dispositive documents, such as deeds, wills or contracts, are so important in determining a party's rights accruing under those documents.
>
> (2) Secondary evidence of the contents of documents, whether copies or testimony, is susceptible to inaccuracy.

> (3) The rule inhibits fraud because it allows the parties to examine the original documents to detect alterations and erroneous testimony about the contents of the document.
>
> (4) The appearance of the original may furnish information as to its authenticity.

Pa.R.E. 1002, cmt., *quoting* 5 Weinstein & Berger, *Weinstein's Evidence* § 1002(2) (Sandra D. Katz rev. 1994).

If a party does not have an original, however, it does not mean that a copy/duplicate cannot be used. Pa.R.E. 1003 provides that "[a] duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." The comment to the rule makes clear that as copies have become more accurate, their admission in place of an original has become more common. Pa.R.E. 1003, cmt.

A "writing" for purposes Rules 1002 and 1003 is defined as "…letters, words, numbers, or their equivalent set down in any form." Pa.R.E. 1001. An original writing or electronically stored information is defined as "…[a] writing…itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, 'original' means any printout--or other output

readable by sight--if it accurately reflects the information." Id. A duplicate is "…produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." Id.

Thus, the purpose of the Best Evidence Rule in Pennsylvania is to ensure the content of writing (or photograph, recording, etc.) is accurately presented to the trier of fact. While an original writing may offer information as to authenticity, it is not a requirement under the Best Evidence Rule that the writing must provide conclusive proof of authenticity or of the actual author of the writing. The focus of the rule is to provide an accurate representation of the actual writing – as in the words written on the page, or in this case written in the text - in question to the trier of fact. If this were not the case, an anonymous note, for example, would never be admissible, regardless of the accuracy of the writing itself. The metadata, of which Appellant complains, is not the writing that was sent to the victim. The writing is the actual words written in the text message(s).

The issue presented in the instant matter is not the content of the messages received by the victim – i.e., the nature of the messages she received. Appellant has not contended that the victim did not receive the

messages that were in the screenshots or that the nature of the messages was inaccurate. Rather, his contention is that someone else sent the messages and the Commonwealth could not show that he was the person who sent the messages. Thus, he is really arguing authenticity.

Since authenticity, or authorship, is separate from the idea that the writing itself is accurate, the Best Evidence Rule would not prohibit the admission of the screenshots of the text messages for a failure to contain the metadata information. Assuming, *arguendo*, that the Best Evidence Rule required such information to be included for a text message to be admissible, the requirement would not just be applicable to the Commonwealth. It would mean that a defendant who sought to introduce text messages from his/her own phone at trial, would be required to engage in a forensic analysis of his/her own phone and, at some point, turn that information over to the Commonwealth so that his/her expert could testify about the text messages and ultimately admit them into evidence.

Given the almost universal use of cell phones by vast majority of people, such a requirement would, undoubtedly, also have a significant impact on civil litigation. For example, every time a party in a custody matter wanted to admit a text message in a modification or contempt

proceeding, they would need to have a forensic analysis of their phone absent an agreement by the other party that the message is admissible. The same would hold true for support matters or divorce proceedings.

In the instant matter, as has been thoroughly set forth by the Commonwealth, the circumstantial evidence was more than sufficient for the trial court to find that the Commonwealth properly authenticated the screenshots and they were, therefore, admissible. Indeed, subsequent to trial in this case, Pa.R.E. 901 – Authenticating or Identifying Evidence – was amended to include a section on authenticating digital evidence. Pa.R.E. 901(b)(11). It sets forth that authentication of digital evidence, such as text messages, can occur via circumstantial evidence, as was done in with the screenshots at issue. Id., cmt. Appellant has put forth no compelling argument as to why circumstantial evidence was not sufficient for authentication of the screenshots and the amendment to Rule 901 confirms that authentication of text messages in this manner is permissible.

Clearly, the Best Evidence Rule would not serve to prohibit the admission of the screenshots of the text messages at issue in the instant matter. Appellant's claim is without merit and should, respectfully, be denied.

CONCLUSION

WHEREFORE, the Pennsylvania District Attorneys Association, *amicus curiae*, respectfully requests that the Superior Court's Judgment and Order be affirmed.

Respectfully submitted,

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Certification

I hereby certify pursuant to Pa.R.A.P. 531 (b)(3) that this amicus brief does not exceed the 7,000-word count limit.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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Date: July 14, 2021

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I, Maureen Flannery Spang, hereby certifies that on July 14, 2021, the foregoing amicus brief was filed through this Court's PACFILE electronic filing system and thereby served the following parties:

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