

MASSACHUSETTS SUPREME JUDICIAL COURT

Commonwealth v. Rosado

480 Mass. 540 (2018) · No. SJC-12467 · Decided September 14, 2018

SUMMARY

The Massachusetts Supreme Judicial Court held that the Commonwealth had not established the elements required to invoke forfeiture by wrongdoing and admit an unavailable witness's out-of-court statements. The court concluded that the witness was not shown to be unavailable, that the defendant did not cause her unavailability in the witness-intimidation case, and that he lacked the requisite intent to prevent her from testifying against him. The court affirmed the denial of the Commonwealth's motion in limine.

CASE DETAILS

COURT	Massachusetts Supreme Judicial Court
WRITING FOR THE COURT	Gants, C.J.; Gaziano, J.; Lowy, J.; Budd, J.; Cypher, J.
JURISDICTION	Massachusetts
DECIDED	September 14, 2018
DOCKET	SJC-12467
DISPOSITION	affirmed
PROCEDURAL POSTURE	The Commonwealth petitioned for relief under G. L. c. 211, § 3, from a motion judge's order denying its motion in limine to admit an unavailable witness's grand jury testimony and recorded interview under the doctrine of forfeiture by wrongdoing. A single justice reserved and reported the matter to the full Supreme Judicial Court.
STANDARD OF REVIEW	The court reviewed the reported legal and evidentiary questions de novo, while recognizing that whether the Commonwealth proved the forfeiture-by-wrongdoing elements by a preponderance of the evidence was a preliminary factual question for the judge.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Commonwealth v. Joshua Rosado

TOPICS

- hearsay
- sixth amendment
- evidence
- criminal procedure

PRACTICE AREAS

criminal procedure

evidence

constitutional law

QUESTIONS PRESENTED

1. Whether the doctrine of forfeiture by wrongdoing permits admission of Ortiz's out-of-court statements when Rosado's alleged wrongdoing was intended to prevent her from testifying against a third party in an earlier proceeding, rather than against Rosado in the present case.
2. Whether Ortiz was unavailable within the meaning of the forfeiture-by-wrongdoing doctrine when she had been served with out-of-State process and ordered to appear but merely told the prosecutor that she did not want to testify.
3. Whether Rosado was involved in or responsible for procuring Ortiz's unavailability.
4. Whether Rosado acted with the intent to procure Ortiz's unavailability as a witness against him.

HOLDINGS

1. A defendant forfeits confrontation and hearsay objections only when the defendant's wrongdoing was intended to prevent the witness from testifying against the defendant in the proceeding at issue; an intent to prevent testimony against a third party in another proceeding is insufficient.
2. A witness who has been served with out-of-State process and ordered to appear at a Massachusetts trial is not shown to be unavailable merely because the witness tells the prosecutor that the witness does not want to testify.
3. Rosado was not involved in or responsible for procuring Ortiz's unavailability because the evidence showed that Ortiz feared retaliation from Mercado and his associates, not that Rosado had caused her refusal to return or testify in the present case.
4. The motion judge correctly denied the Commonwealth's motion in limine to admit Ortiz's grand jury testimony and recorded interview under the doctrine of forfeiture by wrongdoing.

KEY QUOTATIONS

“A defendant forfeits his right to object to otherwise inadmissible hearsay solely as a result of his own wrongdoing in seeking to prevent a witness from testifying against him, not against a third party in another proceeding.” (480 Mass. at 540-541)

“The equitable principle at the heart of the doctrine of forfeiture by wrongdoing is that a defendant should not be able to benefit from the unavailability of a witness at his own trial where the defendant caused the witness to be unavailable.” (480 Mass. at 549)

“For the foregoing reasons, we affirm the judge's order denying the Commonwealth's motion in limine to admit Ortiz's out-of-court statements in evidence, pursuant to the doctrine of forfeiture by wrongdoing.” (480 Mass. at 558)

FACTUAL BACKGROUND

Rosado was a friend of Jean C. Mercado, who was prosecuted for murder, and Ortiz was a key prosecution witness in Mercado's case. Shortly before Mercado's trial, Rosado posted threatening and derogatory Facebook messages about Ortiz, urged her not to testify against Mercado, and told her to lie to police. Ortiz nevertheless testified at Mercado's trial, but later told the prosecutor that she feared returning to Massachusetts because of possible retaliation from Mercado and his associates; there was no evidence that Rosado had contacted or threatened her after his arrest on the witness-intimidation charge.

PROCEDURAL HISTORY

The Commonwealth charged Rosado with intimidation of witness Shakira Ortiz. Before trial, the Commonwealth sought to introduce Ortiz's grand jury testimony and transcribed interview because Ortiz, who lived outside Massachusetts, told the prosecutor she did not want to return to testify. The motion judge denied the motion, concluding that the Commonwealth had not proved that Rosado intended to make Ortiz unavailable as a witness against him. The Commonwealth sought relief under G. L. c. 211, § 3, and the single justice reported the matter to the full court.

DISPOSITION

affirmed

CASES CITED

- Commonwealth v. Edwards, 444 Mass. 526, 536, 540-542 & n.21 (2005)
- Commonwealth v. Greineder, 464 Mass. 580, 589 (2013), cert. denied, 571 U.S. 865 (2013)
- Reynolds v. United States, 98 U.S. 145, 158-159 (1878)
- United States v. Houlihan, 92 F.3d 1271, 1280, 1282-1283 (1st Cir. 1996), cert. denied, 519 U.S. 1118 (1997)
- Crawford v. Washington, 541 U.S. 36, 42, 62 (2004)
- Szerlong, 457 Mass. 858, 864-866 (2010), cert. denied, 562 U.S. 1230 (2011)
- Giles v. California, 554 U.S. 353, 356-357, 361-362, 368, 377 (2008)
- United States v. Thompson, 286 F.3d 950, 962 (7th Cir. 2002), cert. denied, 537 U.S. 1134 (2003)
- United States v. Gray, 405 F.3d 227, 230-233, 241-242 & n.9 (4th Cir.), cert. denied, 546 U.S. 912 (2005)
- United States v. Burgos-Montos, 786 F.3d 92, 115 (1st Cir.), cert. denied, 136 S. Ct. 599 (2015)
- Charbonneau v. Presiding Justice of the Holyoke Div. of the Dist. Court Dep't, 473 Mass. 515, 518 (2016)
- Blaisdell v. Commonwealth, 372 Mass. 753, 755 (1977)
- Myers v. Commonwealth, 363 Mass. 843, 844 (1973)
- Commonwealth v. Fisher, 433 Mass. 340, 355 (2001)
- Opinion of the Justices, 406 Mass. 1201, 1211 (1989)
- Commonwealth v. Pittman, 60 Mass. App. Ct. 161, 170 (2003)
- Pointer v. Texas, 380 U.S. 400, 406 (1965)

