

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

STATE OF ARKANSAS, PLAINTIFF,
VS. NO. CR-90-36
ALAN GENE HUBBARD and
JAMES ROSS WEAVER, DEFENDANTS.

MOTION FOR CONTINUANCE

BE IT REMEMBERED, that on the 5th day of March, 1990, the same being a day of the regular March, 1990, Term of the Pulaski Circuit Court, Fourth Division, before the Honorable John Langston, Judge of said Court, this cause came on to be heard, the State being represented by the Honorable Kent G. Holt, Deputy Prosecuting Attorney, the Defendant, James Ross Weaver, being represented by the Honorable Bill Luppen. the Defendant, Alan Hubbard, being represented by the Honorable Thomas B. Devine, Deputy Public Defender. THEREUPON, the following proceedings were had and done, as follows:

THE CLERK: 90-36, ALAN GENE HUBBARD, JR. and JAMES WEAVER.

THE COURT: See if Mr. Luppen's back in the back, would you, sir? To begin with, counsel, do we have a report on Mr. Hubbard yet?

MR. DEVINE: No, Your Honor.

THE COURT: My file does not reflect. Give me another report date.

CASE COORDINATOR: April 27th at eight thirty.

THE COURT: Anything else on Mr. Hubbard?

MR. DEVINE: No, Your Honor.

THE COURT: Thank you, sir. Mr. Weaver's ready for trial tomorrow I take it?

(THEREUPON, the Court went off the record for a time, and then in Open Court, the proceedings continued, as follows:)

THE CLERK: 90-36, JAMES ROSS WEAVER, JR.

THE COURT: Counsel, what are we doing on this one?

MR. LUPPEN: Your Honor, I have a Motion to make. This case was severed. The co-Defendant, Alan Hubbard, has appeared today and said that he was-- They haven't given his mental exam to him yet. He's pled not guilty by reason of mental disease or defect. Your Honor, a major issue in this case for my client is that Mr. Hubbard committed the act, that my client was an accomplice. If he is found not guilty by-- If Mr. Hubbard is found not guilty by reason of mental disease or defect and I go to trial tomorrow, and he's subsequently found not guilty by reason of mental disease or defect, then I think I will be jeopardizing my client's defense if I don't wait or ask for this case to be continued until it is determined whether the actual perpetrator of this crime is not guilty by reason of

mental disease or defect.

THE COURT: Why?

MR. LUPPEN: Well, it's the -- I believe it'll come out in the trial that the perpetrator, Mr. Hubbard, admitted to doing the act. They're both charged with capital murder, saying that they premeditated and deliberately committed this act. If Mr. Hubbard is not guilty by reason of mental disease or defect, then he obviously could not form the intent under the statute. He could not have premeditated and deliberate. If my client is just an accomplice or knowingly went somehow with this person who was mentally diseased or defect at the time, I don't believe that they could then prove his intent to commit the crime. And also---

THE COURT: The problem with that is, counsel, is that it sounds strange how you could have two persons working together. The one who does the act is not capable of forming that intent, but yet his accomplice could have been capable of forming the intent and could be convicted of it.

MR. LUPPEN: That's correct. And some--

THE COURT: And so it wouldn't make any difference if the other one was convicted or not.

MR. LUPPEN: The only other thing-- I'm ready to go to trial, Your Honor. I'm just thinking about my

client.

THE COURT: I know you are, counsel. I understand why you're making this motion.

MR. LUPPEN: The only other argument I have on this, why it would jeopardize my client, would be he is unavailable now to testify. If he was found not guilty by reason of mental disease or defect, Mr. Hubbard, and then found competent to testify, or if it was just found that he did not -- He was incompetent at the time -- Then I could call him as a witness at my client's trial and impeach him with his statement that he's made. At this point I don't have that ability, because he's unavailable for me to call as a witness.

THE COURT: All right. Counsel, you've got a lot of ifs there.

MR. LUPPEN: I know.

THE COURT: Knowing the State Hospital, even though we've given a forthwith order on it, it could be eight or nine months before they examine him. And you're talking about putting this trial off possibly a year, and then you're talking about they may find him not knowing what he's doing at the time -- He may be found guilty, and he may become available as a witness. We don't know that.

MR. LUPPEN: I know, Your Honor. I know there are

all those ifs, but I just felt it was necessary for me to ask at this point for a continuance.

THE COURT: Is his statement admissible that he gave?

MR. LUPPEN: Your Honor, that's the other thing I wanted to bring up. I will attempt to introduce his statement under -- Mr. Hubbard's statement under 804 (b)(3), statement against interest. His statement that he made to the detectives that night.

MR. HOLT: Isn't it still subject to cross examination?

MR. LUPPEN: I believe that's an exception.

THE COURT: I don't understand what you--

MR. HOLT: I'm not sure how it's admissible, Judge.

MR. LUPPEN: Your Honor, he's definitely unavailable as a witness.

THE COURT: The witness is unavailable if he's in the State Hospital undergoing this Act. He most certainly would take the Fifth Amendment if he was called, if he were available to be called, and that's going to make him unavailable. And you have a statement that was given to police officers which has some guarantee of trustworthiness, because it's a declaration against interest and taken. So, it may very well be admissible.

MR. HOLT: Well, conceivably then it could be ad-

missible in this trial, but not admissible in the trial of him.

THE COURT: It wouldn't be admissible in the-- It could conceivably not be admissible in the trial of the other Defendant. You mean?

MR. HOLT: Hubbard. His statement may not be able to be used against him.

THE COURT: You may not be able to use it against Hubbard. I don't know about that. It depends on what kind of mental state he's in, but it could very well be admissible by Mr. Weaver, because the other one is, in fact, unavailable.

MR. HOLT: I really don't oppose---

THE COURT: And which shows if we wait until he becomes available, it probably wouldn't be admissible under your other statement.

MR. LUPPEN: Then he'd be available.

THE COURT: Yeah. If he were available, then you couldn't, probably couldn't get it in, so---

MR. HOLT: The other--

THE COURT: You sure you want to wait?

MR. LUPPEN: I just feel like I had to ask, Your Honor.

THE COURT: Because if he becomes available, gets in and says something else, and then you cross examine

him with the statement, then that's not--

MR. LUPPEN: It would just be for impeachment purposes.

THE COURT: Impeachment purposes only, and not as

MR. LUPPEN: It's more-- Your Honor, I'm just-- There's so many ifs. The big if to me is if he's found not guilty by reason of mental disease or defect, I hadn't looked at it long enough, but it's just this feeling that if he's found not guilty by reason of mental disease or defect, this definitely would help my case with Mr. Weaver.

THE COURT: How?

MR. WEAVER: Well, just by what I said before. I think I can make a better argument to the jury if there was some way where I could, you know, could get in that he was found not guilty by reason of mental disease or defect, or that I could put him on the stand, and he would get up and--

THE COURT: How would a finding of not guilty by reason of mental defect even be admissible in your trial, counsel?

MR. LUPPEN: Well, say that he-- The big if is if he's found not guilty by reason of mental disease or defect and then if he could testify, and then he

testified that my client said yeah, he didn't know anything about it, and I went crazy that night and beat this guy's brains out.

THE COURT: Is this not the statement I heard on behalf of your client the other day here in Court?

MR. LUPPEN: Yes, Your Honor. It's very similar to that.

THE COURT: Counsel, I presume there's been many accomplices convicted when the person who was charged as the main actor had beaten the charges for one reason or another.

MR. LUPPEN: I know it.

THE COURT: Because of statements given and so forth. One's not totally dependent on the other. We've had conspiracy charges where a person is charged with conspiring with someone else, and had that someone else get off, and one of the conspirators get convicted, and the other one not. It doesn't make any difference in the trial of the second conspirator whether the first one got off or not. Even though it-- You know, it kind of strikes you as funny that I'm supposed to have conspired with somebody who didn't do it, yet I'm guilty of it, and he's not.

MR. LUPPEN: That's correct.

THE COURT: But that happens all the time. I see

the purpose for your Motion, counsel, in saying you'd like to wait and know what happens to Mr. Hubbard, because he is, according to your client's statement and according to his statement, he was the principal actor in the matter. But, this could be an interminable delay. This delay could be for as much as a year or so. I do note that your client's in jail on the matter which goes both ways on him. It shows that this Motion' not made just to delay, because he's waiting in jail.

MR. LUPPEN: No, I'm not trying at all to delay, Your Honor. It's just--

THE COURT: What does the State say to the Motion?

MR. HOLT: Well, I don't guess it is proper at this time, but the State is -- I do need to state for the record that we are waiving the death penalty in this case. That I really -- I would oppose a continuance. At this point, correct me if I'm wrong, but the co-Defendant's statement would be admissible because he is unavailable, and it's against his interest. I assume it's admissible by State or by the Defense at this point. In addition to any statement that the co-Defendant may have made in furtherance of the conspiracy.

THE COURT: Now, wait a minute. Let's hear that last part again.

MR. HOLT: Well, wouldn't any statement that the

co-Defendant made in this case be admissible if it's a statement in furtherance of the conspiracy?

THE COURT: If it was made during the time--while the conspiracy existed.

MR. HOLT: Yeah. Not anything before. I mean, that's separate from the statement that was taken later, and the statement is admissible because it is against his interest and he's unavailable. Now, I have a question about whether or not we'd have to have a hearing as far as -- Would a Motion to Suppress that statement have any effect on going forward with this Defendant?

THE COURT: You mean a Motion to Suppress the other Defendant's statement?

MR. HOLT: Yes.

THE COURT: For what reason?

MR. HOLT: I---

THE COURT: It depends on the reason for it. If they claim that it was beaten out of him, it might make a difference. If it was claimed that his constitutional rights were violated and that he wasn't warned of something, wouldn't have anything to do with this Defendant.

MR. HOLT: Well, I think it's that the police officers didn't comply with Rule 2.3, the affirmative

duty to advise that he wasn't under any obligation to come down there to the police department.

THE COURT: I don't think that would make any difference as to whether or not it would be introducible for or against this Defendant. The State's made some indication that they'd like to have the co-Defendant's statement in. Are you--

MR. LUPPEN: I mean, it's not all good, Your Honor.

THE COURT: I understand that there doesn't seem to be much controversy over whether or not this statement comes in. So what you want to do is to pass this case until such time as the other co-Defendant becomes available to testify?

MR. LUPPEN: Or not testify. Again, he could be found incompetent and not be able to testify.

THE COURT: Why?

MR. LUPPEN: Because he'd be incompetent. He would not be able to --

THE COURT: Just because he didn't understand the meaning of his acts at the time doesn't mean he's incompetent to testify, counsel.

MR. LUPPEN: Well, then, yes, to see if he's able to testify.

MR. HOLT: Is the Court saying that he would be

able -- We would have to have a hearing to determine whether or not he could testify, but ---

THE COURT: Why?

MR. HOLT: I'm just -- It wouldn't matter if he's competent or incompetent as far as--

THE COURT: Knowing the gravity of his acts and able to cooperate with his attorney, he'd still be available to testify, would he not?

MR. LUPPEN: That's what--

THE COURT: Of course, if he gets to that point and he wants to take the Fifth Amendment, then--

MR. LUPPEN: Your Honor, I'm not doing it to--

THE COURT: He's unavailable.

MR. LUPPEN: I'm not doing this to delay at all. I'm just looking at if there is something and I miss it, and then we come back and he's found guilty, and we come back, and we -- Then it may be four or five years before this issue is ever-- this case is ever resolved.

THE COURT: Can you think of any situation under which he would become available to testify if, in fact he would take the Fifth Amendment? He'd never be available to testify.

MR. LUPPEN: No, he'd never be available.

THE COURT: And so your pass wouldn't do you any

good. It'd only be in the circumstances where he was found not guilty by a jury or not guilty by reason of mental defect, and still wanted to testify.

MR. LUPPEN: Well, Your Honor, couldn't -- What if he was found competent, and then he pled?

THE COURT: He could still take the Fifth Amendment if he wanted to.

MR. LUPPEN: Would he have grounds for that after he had already pled?

THE COURT: You can't go behind a Fifth Amendment.

MR. HOLT: Well, Your Honor.

THE COURT: They can be in the penitentiary awaiting the death penalty, and they can still take the Fifth Amendment, because you don't know what else is going to be in there. There could be crimes unknown to the State with their testimony if they testify. It seems to me that --

MR. HOLT: Your Honor, the State -- The position of the State is we would oppose any severance in this matter as well. The only reason that it was severed was that they did the Act III on the co-Defendant.

THE COURT: Are you going to let speedy trial run on this guy while we're waiting on the report from the State Hospital? Because that's what's going to happen if we don't have them severed.

MR. HOLT: Well---

MR. LUPPEN: Well, I'd waive the speedy trial, Your Honor, on my client.

MR. HOLT: I'm just trying to put it on the tape. The State does oppose a continuance.

THE COURT: All right. Now, Mr. Luppen, what you're telling me is the only way this Defendant would be prejudiced by this matter, and it's my understanding that both sides seem to generally agree that the co-Defendant's statement that he gave to the police department can come in. It also which, from what you're telling me, it's a mixed bag. Some of it's going to help this Defendant, and some of it's going to hurt him. Is that under the situation where he would want -- Only under the circumstances where the co-Defendant would become available to testify and would want to testify, would you get any help at all out of this matter. And if he became available to testify-- In other words, if he's found ready to proceed, these two would probably be tried together anyway. And in which case we don't know if he's going to testify in that matter or not until the time comes.

MR. LUPPEN: That's right. There is only one possibility that I see that it could benefit my client, and if that doesn't happen, it could be one in a mil-

lion shot, but I just feel like I had to at least make the Court aware that if that possibility did happen, I didn't want to go by and say that I never asked for a continuance until this person was found, whether he was competent or not competent to be a co-Defendant in this case.

THE COURT: So the only way that you can gain any benefit from this continuance, and that is in the situation that the co-Defendant's case is disposed of first?

MR. LUPPEN: Yes, sir.

THE COURT: What could keep the co-Defendant from making the same motion as to your client? That he wants you disposed of first so you can testify on his behalf.

MR. LUPPEN: I don't plan on doing that.

THE COURT: I understand, but I'm just thinking through the possibilities of it and trying to determine what possible prejudice, if any, is there for either side if this matter happens. Because if he were ready to proceed today, he would say that well, I want my case passed until after Mr. Luppen's client is disposed of, because he might decide that he wants to testify in my behalf. Counsel, it's just too far afield. Especially in light of that you could have the benefit

of his statement at the trial.

MR. LUPPEN: All right.

THE COURT: The only thing I could see that you're getting deprived of in any way is the right to cross examine him about that part of the statement that may hurt you.

MR. LUPPEN: That's correct.

THE COURT: Or may be injurious to you. But since I notice that you were the one asking to have it brought in, I assume that the major portion of it is helpful to you.

MR. LUPPEN: It's beneficial to us.

THE COURT: It's more beneficial to you than ---
Go ahead, sir. Excuse me.

MR. LUPPEN: Well, that-- Well, I think we've argued it enough.

THE COURT: Let me ask you another question or two. Is there anything that you expect to extract from the testimony of the co-Defendant that's not contained in this statement?

MR. LUPPEN: Your Honor, it would be that this crime was a completely senseless act, but it would come out that in his statement the co-Defendant doesn't go into very much at all about his relationship with the victim, and I would want to develop his relationship

with the victim to show that it was his anger and his motive to inflict the blows on the victim, and that my client really had nothing to do with it. It's really--

This case comes down to two people. There aren't really any other witnesses to it at all, and that it is such - almost looks motiveless crime that this co-Defendant committed. I would want to develop his relationship, and that it was his anger to show the jury that my guy was just a very minor player, if any, and really had no motive at all to commit this crime. I believe I could do that the best possible way through the co-Defendant if he were to ever testify. Because he is the one who had the anger against this victim.

THE COURT: Have you talked with his attorney to see if he would testify tomorrow?

MR. LUPPEN: I've talked to Mr. Sallings earlier, and he was talking to Mr. Hubbard's parents. We didn't have time to get into it, but I told him basically what we were doing. That would be the main thing.

THE COURT: Because what we're doing now, is we're assuming that he's not available.

MR. LUPPEN: That's right.

THE COURT: Because he's charged with the same offense, but I understand what you would like to do with the co-Defendant. But, if I passed your case, he became

available for trial and we set you down for trial at the same time, you would not have that testimony available to you at that time either.

MR. LUPPEN: That's right.

THE COURT: Unless the Defendant happened to take the stand. And so what you're giving me is a scenario, I believe, that's just got so many ifs that would have to come to fruition and with what you have available to you in any event, you just want to develop a relationship. I assume there would be other witnesses who could talk about that same relationship, wouldn't there?

MR. LUPPEN: There will be other witnesses that can testify to that.

THE COURT: All right. Your Motion for Continuance is going to be denied, counsel.

MR. LUPPEN: Right. And just wanted the State to have notice under 804(b)(3) we would be attempting to introduce his statement.

THE COURT: All right.

MR. HOLT: Is there anything else open on this?

THE COURT: I don't know of any other open motions.

MR. HOLT: Now, that we've waived, I assume we're not going to have sequestered voir dire.

THE COURT: Now the State has waived the death penalty, is there any reason to have individual se-

questered voir dire of the jury?

MR. LUPPEN: No, Your Honor.

THE COURT: All right. Then we'll go ahead with our normal procedure, but since it is still a capital case, the number of strikes in a capital case will still apply. Okay.

MR. LUPPEN: May I be excused, Your Honor?

THE COURT: So, can I put this down as Motion for Individual Sequestered Voir Dire is withdrawn?

MR. LUPPEN: Yes.

THE COURT: Okay. Anything further we need to take up?

MR. LUPPEN: No, Your Honor.

THE COURT: See you tomorrow, counsel. Thank you. Thank you, Mr. Luppen.

(THEREUPON, the case of the State of Arkansas versus Alan Gene Hubbard and James Ross Weaver, Jr., was concluded.)

STATE OF ARKANSAS)
)
COUNTY OF PULASKI)

REPORTER'S CERTIFICATE

I, Patricia S. Shinn, Official Court Reporter of the Pulaski Circuit Court, Fourth Division, hereby certify that the above and foregoing pages, constituting the Motion for Continuance, contain a true and correct transcript of all the proceedings taking place at said hearing, as taken down by me in Stenotype at the time and thereafter reduced to typewriting.

WITNESS my hand and seal this 28th day of October, 1990.

Pat Shinn

PATRICIA S. SHINN, CCR #149
OFFICIAL COURT REP

MY COMMISSION EXPIRES:

9-17-92

Pat Shinn

PATRICIA S. SHINN, Notary Public

Cost: \$ 62.00

JUDGE'S CERTIFICATE

AND NOW ON THIS _____ DAY OF _____,
AND WELL WITHIN THE TIME HERETOFORE BY THE COURT GRANTED HEREIN TO
FILE HIS BILL OF EXCEPTIONS, COMES THE DEFENDANT HEREIN AND PRESENTS
TO THE HONORABLE JOHN LANGSTON, THE REGULAR JUDGE OF THE PULASKI
CIRCUIT COURT, FOURTH DIVISION, WHO WAS PRESENT AND PRESIDING AT ALL
TIMES UPON THE TRIAL OF THIS CAUSE, THIS, HIS BILL OF EXCEPTIONS,
WHICH IS BY SAID JUDGE EXAMINED, FOUND TO BE A COMPLETE AND CORRECT
RECORD THEREOF, THE SAME HE NOW APPROVES AS SUCH AND ORDERS THAT
SAME BE FILED AS PART OF THE RECORD IN THIS CAUSE.

WITNESS MY HAND AS SUCH JUDGE OF THE PULASKI CIRCUIT COURT,
FOURTH DIVISION, ON THIS 12th DAY OF DECEMBER,
1990.



CIRCUIT JUDGE

APPROVED BY:

CLERK'S CERTIFICATE

STATE OF ARKANSAS)

)SS

COUNTY OF PULASKI)

I, JACQUETTA ALEXANDER, CLERK OF THE CIRCUIT COURT,
WITHIN AND FOR THE COUNTY AND STATE AFORESAID, HEREBY CERTIFY
THAT THE FOREGOING TRANSCRIPT CONTAINS A TRUE AND CORRECT COPY
OF ALL PLEADINGS AND RECORD ENTRIES IN THE CASE OF:

STATE OF ARKANSAS

VS: CR 90-36

JAMES ROSS WEAVER

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET MY HAND
AND AFFIXED THE SEAL OF SAID COURT, THIS 12TH DAY OF
DECEMBER, 1990.

JACQUETTA ALEXANDER, CIRCUIT CLERK

BY:

Leslie Cochran D.C.

