

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Robinson, :
Appellant :
v. : No. 2447 C.D. 2008
Montgomery County Court : Submitted: July 17, 2009
Reporter :

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM

FILED: October 1, 2009

Thomas Robinson appeals, pro se, the order of the Court of Common Pleas of Montgomery County (trial court) granting the preliminary objections of the Montgomery County Court Reporter, and dismissing his complaint with prejudice that was filed pursuant to the former provisions of the statute commonly referred to as the “Right to Know Law”.¹ We affirm.

In 1996, Robinson was adjudged guilty of the crime of first degree murder and related offenses following a jury trial in the trial court. Following a direct appeal and post-conviction proceedings and appeal, Robinson filed a request in the trial court under the former Right to Know Law seeking complete copies of the audio recordings of his homicide trial. On January 10, 2005, the trial court issued an order denying Robinson’s request.

¹ Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §§ 66.1 – 66.4, repealed by Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101 – 67.3104, effective January 1, 2009.

On September 4, 2007, Robinson submitted a request to the Montgomery County Court Reporter in which he again sought complete copies of the audio recordings of his homicide trial pursuant to the provisions of the former Right to Know Law. On September 17, 2007, the Montgomery County Solicitor notified Robinson that the Montgomery County Court Reporter would not comply with his request.

As a result, on March 7, 2008, Robinson filed a complaint in the trial court in which he sought complete copies of the audio recordings under the former Right to Know Law. On April 4, 2008, the Montgomery County Court Reporter filed preliminary objections to Robinson's complaint asking the trial court to dismiss the complaint because: (1) Robinson had not named a proper defendant; (2) Robinson had not made proper service of original process; (3) there is no provision in the former Right to Know Law for the filing of a civil complaint to obtain relief under the statute; (4) the former Right to Know Law does not compel the production of copies of the audio recordings of his homicide trial; and (5) the action was barred by the trial court's ruling in his prior request for copies of the audio recordings of his homicide trial under the provisions of the former Right to Know Law.

On March 13, 2009, the trial court issued an order granting the Montgomery County Court Reporter's preliminary objections, and dismissing Robinson's complaint with prejudice. Robinson filed the instant appeal from the trial court's order.²

² This Court's scope of review of a trial court's ruling on preliminary objections is limited to determining whether the trial court committed an error of law or abused its discretion. Delaware County v. City of Philadelphia, 620 A.2d 666 (Pa. Cmwlth. 1993).

In this appeal, Robinson claims³: (1) the trial court unlawfully and improperly denied his statutory and common law right of access to the audio recordings of his homicide trial; and (2) the trial court erred in concluding that the instant action was barred by its ruling in his prior request for copies of the audio recordings under the former Right to Know Law.

Robinson first claims that the trial court unlawfully and improperly denied his statutory and common law right of access to the audio recordings of his homicide trial. With respect to Robinson’s purported statutory right of access to the audio recordings under the former Right to Know Law, it is well settled that “[t]he [former] Right to Know [Law] has no application to the present case, however, because it pertains only to agencies rather than to the judiciary. 65 P.S. § 66.1(1).” Commonwealth v. Fenstermaker, 515 Pa. 501, 511-512, 530 A.2d 414, 420 (1987). As a result, the trial court did not err in granting the Montgomery County Court Reporter’s preliminary objections, and dismissing Robinson’s complaint seeking access to the audio recordings under the former Right to Know Law, as that statute does not apply to judicial proceedings.

However, with respect to Robinson’s purported common law right of access to the audio recordings, there is a well settled common law right of access to public judicial records. Indeed, as the Pennsylvania Supreme Court has noted:

The tradition of keeping proceedings and records of the criminal justice system open to public observation is founded in common law right, and, as stated in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 [(1978)] (footnotes omitted), “It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” There is a “presumption – however

³ In the interest of clarity, we reorder the claims raised by Robinson in this appeal.

gauged – in favor of public access to judicial records.” *Id.* at 602[.]. See also *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) (common law right of the public to inspect and copy judicial records antedates the Constitution and has been justified on grounds of the public’s right to know and the public’s right to open courts.).

The threshold inquiry in such a case such as this where a common law right of access is asserted is whether the documents sought to be disclosed constitute public judicial documents, for not all writings connected with judicial proceedings constitute public judicial documents. Certainly, transcripts of bench conferences held in camera, working notes maintained by the prosecutor and defense counsel at trial, and numerous other examples of non-public writings may be cited....

Fenstermaker, 515 Pa. at 508, 530 A.2d at 418. See also *Commonwealth v. Upshur*, 592 Pa. 273, 282, 924 A.2d 642, 647-648 (2007) (plurality opinion) (“However, not all documents and materials utilized during court proceedings are subject to the right of access. The threshold question in any case involving the common law right of access is ‘whether the documents sought to be disclosed constitute public judicial documents.’ *Fenstermaker*, 515 Pa. at 508, 530 A.2d at 418.... Certainly, ... any item that is filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making will be a public judicial document. See, e.g., *Fenstermaker*, 515 Pa. at 510, 530 A.2d at 419 (arrest warrant affidavits filed with a magistrate); *PG Publishing Co. v. Commonwealth*, 532 Pa. 1, 6, 614 A.2d 1106, 1108 (1992) (search warrants and supporting affidavits).”).

In general, regarding the recording of criminal proceedings, Rule 115 of the Pennsylvania Rules of Criminal Procedure provides that “[i]n court cases, after a defendant has been held for court, proceedings in open court shall be

recorded.” Pa.R.Crim.P. 115(A). Rule 115 also provides that “[u]pon the motion of any party, upon its own motion, or as required by law, the court shall determine and designate those portions of the record, if any, that are to be transcribed.” Pa.R.Crim.P. 115(B). The Comment to Rule 115 provides, in pertinent part, that “[s]ome form of record or transcript is necessary to permit meaningful consideration of claims of error and an adequate effective appellate review...”, and that “[this Rule] is intended to provide a mechanism to insure appropriate recording and transcribing of court proceedings....” Comment, Pa.R.Crim.P. 115 (1989) (citations omitted).

To this end, Rule 5000.4 of the Uniform Rules Governing Court Reporting and Transcripts of the Pennsylvania Rules of Judicial Administration provides, in pertinent part, that “[t]he president judge of each judicial district or his designee shall select and appoint court reporters for his or her district...”, and that “[t]he primary task of each court reporter shall be to record or reduce to notes the proceedings for the judges ... and promptly to transcribe or arrange for transcription of such record or notes upon request for a transcript.” Pa.R.J.A. No. 5000.4(a), (c). In addition, Rule 5000.13 provides, in pertinent part, that “[t]he stenographic notes, tapes, or other media used by a court reporter to record a proceeding in or for a court shall be public property, subject, however, to the vested property interest of the reporter described in these rules.” Pa.R.J.A. No. 5000.13(a).⁴

⁴ With respect to the fees that may be charged by a court reporter, Rule 5000.7(b) provides that “[a] reporter who uses an electronic audio recording device from which the transcript is made shall be paid at a rate of \$.25 per page of original transcript. If such reporter provides the typist or stenographer who does the typing, the cost of such service will be added to the fee....” Pa.R.J.A. No. 5000.7(b). In addition, Rule 5000.6 provides that “[t]he reporter may require a deposit of up to one-half of the estimated charge for the transcript as a condition

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Moreover, after a party to a proceeding has filed an appeal of a trial court order, Rule 1911 of the Pennsylvania Rules of Appellate Procedure provides that “[t]he appellant shall request any transcript required under this chapter in the manner and make any necessary payment or deposit therefore in the amount and within the time prescribed by ... the Pennsylvania Rules of Judicial Administration (court reporters).” Pa.R.A.P. 1911(a).^{5,6} In addition, once the stenographic notes, tapes or other recording media of the court reporter has been reduced to a transcript, Rule 1921 provides “[t]he original papers and exhibits filed in the lower court, hard copies of legal papers filed with the prothonotary by means of

precedent to starting transcription....” Pa.R.J.A. No. 5000.6. Further, Rule 5000.11(b) provides that “[i]f any balance is due for transcript as provided in Rule 5000.6, the reporter may refuse to deliver the transcript until such balance is fully paid or adequate security is posted for payment.” Pa.R.J.A. 5000.11(b).

⁵ Rule 1911 also provides that “[i]f an appellant fails to take the action required by these rules and the Pennsylvania Rules of Judicial Administration for the preparation of the transcript, the appellate court may take such action as it deems appropriate, which may include dismissal of the appeal.” Pa.R.A.P. 1911(d).

⁶ The Note to Rule 1911 provides, in pertinent part:

[I]t is the responsibility of the appellant to contact the court reporter to ascertain whether a deposit will be required and the amount thereof, and to make the deposit. The court reporter is under no obligation to proceed in the absence of a required deposit, and under Pa.R.J.A. 5000.11(b) is under no obligation to certify and file the transcript in the absence of full payment or adequate security therefore. While delay in payment, and any resulting delay in certification and filing of the transcript does not automatically affect the validity of the appeal, under Subdivision (d) the appellate court may impose other sanctions in an appropriate case.... This Rule and Rule 1922 are “another arrangement for delivery” under Pa.R.J.A. 5000.11(a), since it is undesirable for the official appellate transcript to pass outside of the control of court officials.

Note, Pa.R.A.P. 1911 (1997).

electronic filing, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases.” Pa.R.A.P. 1921.

Based on the foregoing, it is clear that the transcript of the proceedings before the trial court is used to reflect what transpired before that court as part of the official record, and it is what is relied upon by both the trial court and the appellate courts in judicial proceedings in this Commonwealth. Any stenographic notes, tapes, or other media used by a court reporter to record a proceeding in the trial court are merely used as an aid by that reporter in the composition of the official transcript to be used by the courts. Moreover, although Rule 5000.13(a) of the Uniform Rules Governing Court Reporting and Transcripts designates these media used by the court reporter as “public property”, it specifically recognizes “the vested property interest of the reporter” in these media.

In short, the stenographic notes, tapes, or other media used by a court reporter to compose the official transcript are neither filed with the trial court as part of the official record of a case, nor are they relied upon by the court in the course of judicial decision-making. As a result, the stenographic notes, tapes, or other media used by the Montgomery County Court Reporter in this case should not be considered to be a “public judicial document” subject to a common law right of access by Robinson. See, e.g., Commonwealth v. Long, 592 Pa. 42, 52, 922 A.2d 892, 898 (2007) (“As a general matter, a list containing the names and addresses of impaneled jurors is not entered into evidence and is not required to be kept by any rule of the Pennsylvania Rules of Criminal Procedure. The names do not otherwise become part of the record and are not made available to the public. Furthermore, such a list is not part of the certified record on appeal. More importantly, this information is not the type of information upon which a judge

bases his or her decision. Therefore, in Pennsylvania, there is no list of jurors' names and addresses that becomes part of the public judicial record and jurors' names and addresses are not subject to a common law right of access.”) (citation and footnotes omitted); Fenstermaker, 515 Pa. at 508, 530 A.2d at 418 (“[N]ot all writings connected with judicial proceedings constitute public judicial documents. Certainly, transcripts of bench conferences held in camera, working notes maintained by the prosecutor and defense counsel at trial, and numerous other examples of non-public writings may be cited....”). See also Smith v. United States District Court Officers, 203 F.3d 440, 442 (7th Cir. 2000) (“Regarding audiotapes that merely back up the court reporter’s stenographic record, the regulations we have just cited^[7] make these the personal property of the reporter except as to audiotapes of arraignments, changes of plea, and sentencing hearings. We do not think that these should be deemed judicial records, unless some reason is shown to distrust the accuracy of the stenographic transcript.^[8] This position is

⁷ As noted in In re Pratt, 511 F.3d 483, 485 n. 2 (5th Cir. 2007), the “[r]egulations issued by the Judicial Conference of the United States state that a reporter’s backup tapes are the personal property of the court reporter to which there is no public entitlement except for recordings of arraignments, changes of plea, and sentencing proceedings. See 6 *Guide to Judicial Policies and Procedures* § 16.5.4 (Court Reporters Manual) (Jan. 1998)....”

⁸ It should be noted that, in his appellate brief, Robinson asserts that the certified transcript of his jury trial is incorrect, and that the audio recordings are needed to correct that transcript. See Plaintiff’s Brief in Support of Public Access Request at 13. However, Robinson fails to indicate where this claim was raised before the trial court or in any of the prior court proceedings, see Pa.R.A.P. 2117(c), and our review of the record in this case demonstrates that Robinson did not raise such a claim in the instant proceedings. As a result, any claim in this regard will not be addressed for the first time by this Court in this appeal. Pa.R.A.P. 302(a) (“[I]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.”); Commonwealth v. Hawkins, 441 A.2d 1308, 1312 n.6 (Pa. Super. 1982) (“[B]ecause issues, even those of a constitutional dimension, cannot be raised for the first time on appeal, his contentions have been waived.”) (citations omitted).

Nevertheless, it is worth commenting that the purportedly incorrect transcript
(Continued....)

consistent not only with the regulations, and with [28 U.S.C. § 753⁹] (which requires only that the reporter's *original* records be filed with the court), but also with the case law, which defines the right of access as a right of access to those

could have been corrected in a variety of ways throughout the appellate process in Robinson's prior criminal proceedings. See 20A G. RONALD DARLINGTON ET AL., PENNSYLVANIA APPELLATE PRACTICE § 1926:1 n. 2 (2008-2009) ("Pursuant to Pa.R.A.P. 1922(a) parties have five days from the receipt of notice of the lodging of the transcript to make objections to the text of the transcript. If objections are made, they are resolved by the trial judge pursuant to Pa.R.A.P. 1922(c). Once the objections are resolved or the period for making objections expires, the court reporter is required to certify the transcript and cause it to be filed with the clerk of the trial court. The transcript then becomes part of the record in the case..."); *Id.* at 1926:1 ("Rule 1926 provides a mechanism whereby the parties to a proceeding, the lower court itself, or the appellate court may correct misstatements or cure omissions in the record on appeal. The Rule is not intended for use by the parties to correct transcript errors; that procedure is prescribed in Pa.R.A.P. 1922 (Transcription of Notes of Testimony). Rather, the Rule has two primary purposes. First, it affords the trial judge the opportunity to postpone review and correction of the transcript ... until the time of opinion writing. Upon review of the transcript at the time of opinion writing, the trial judge may decide that the transcript is incorrect, and, after notice to the parties and an opportunity for objection, the trial judge may correct the transcript to conform to the truth. Second, the Rule affords all participants in the appellate process, including the parties, the lower court, and the appellate court, the opportunity to review the record of proceedings that will be or has been transmitted to the appellate court and to cure misstatements or omissions that exist.") (footnotes omitted).

⁹ 28 U.S.C. § 753(b) provides, in pertinent part:

(b) Each session of the court and every other proceeding designated by rule or order of court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge....

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years....

records of a proceeding that are filed in court or that, while not filed, are relied upon by a judicial officer in making a ruling or decision....”) (citations omitted).

Thus, it is clear the trial court did not err in granting the Montgomery County Court Reporter’s preliminary objections, and in dismissing Robinson’s complaint seeking access to the audio recordings under the common law right of access to public judicial records. Long. Accordingly, the trial court’s order in this case is affirmed.^{10,11}

¹⁰ It is well settled that this Court may affirm the trial court’s order on any basis appearing in the record. See, e.g., Feldman v. Lafayette Green Condominium Association, 806 A.2d 497, 502 n. 3 (Pa. Cmwlth. 2002) (“[W]e may affirm an order for any reason, regardless of the trial court’s rationale, so long as the basis for our decision is clear on the record. *Pennsylvania State Police v. Paulshock*, 789 A.2d 309 (Pa. Cmwlth. 2001).”).

¹¹ Based upon our disposition of this claim, we will not consider the additional allegation of error raised in this appeal.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Robinson,	:	
	:	
Appellant	:	
	:	
v.	:	No. 2447 C.D. 2008
	:	
Montgomery County Court	:	
Reporter	:	

PER CURIAM

ORDER

AND NOW, this 1st day of October, 2009, the order of the Court of Common Pleas of Montgomery County, dated March 13, 2009, at No. 2008-06314, is AFFIRMED.