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SUPREME COURT
OF NEW JERSEY

A-32-24

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SUPREME COURT OF NEW JERSEY
DOCKET NO. 090121
APP. DIV. DOCKET NO. A-1592-23

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

TYRELL S. LANSING,
Defendant-Movant.

: CRIMINAL ACTION

: On Appeal from an Interlocutory Order of
the Superior Court of New Jersey, Law
Division, Morris County.

: Sat Below:

: Hon. Greta Gooden Brown, J.A.D.
: Hon. Patrick Dealmeida, J.A.D.
: Hon. Robert M. Vinci, J.A.D.

**SUPPLEMENTAL BRIEF IN SUPPORT OF
DEFENDANT-MOVANT'S MOTION FOR LEAVE TO APPEAL**

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PRELIMINARY STATEMENT

The unprecedented disruption of the courts caused by the COVID-19 pandemic led to a proliferation of virtual court proceedings that fundamentally altered the way in which courts operate. As the need for remote forms of communication resulted in the expanded use of technology, courts began adding virtual options to traditionally in-person proceedings. Almost overnight, videoconferencing became commonplace, and beginning in 2020, this Court issued a series of orders that allowed for virtual proceedings and virtual testimony under certain circumstances.

It is against this backdrop in September 2021 that New Jersey Court Rule 1:2-1 was modified to permit virtual testimony for “good cause” and with “appropriate safeguards.” Notably, New Jersey’s rule tracks the language of Federal Rule of Civil Procedure 43 with one significant exception: New Jersey’s rule omits language from the federal rule that requires not only good cause, but also “compelling circumstances.” Implicit in New Jersey’s rule is a recognition of the benefits of allowing a witness to testify virtually, which can include lower costs, increased accessibility, and improved efficiency.

In this case, the Appellate Division, in denying the defense motion to allow its expert witness to testify remotely, applied the wrong legal standard by relying on a seven-factor test articulated on Pathri v. Kakarlamath, 462 N.J.

Super. 208 (App. Div. 2020). The Pathri test was derived from the more stringent federal rule and from Aqua Marine Products, Inc. v. Pathe Computer Control Systems Corp., 229 N.J. Super. 264 (App. Div. 1988), a case about telephonic testimony that was decided 37 years ago and is wholly inconsistent with Rule 1:2-1's good cause standard as it imposes what is essentially a presumption against virtual testimony.

The Appellate Division's erroneous decision has wide-reaching implications, as it creates unnecessary barriers to utilizing virtual testimony. This is an issue that will continue to arise in cases throughout the state and is particularly critical in cases, like this one, that involve challenges to forensic evidence. Forensics are proliferating in criminal cases, exponentially increasing the need for qualified expert witnesses at pretrial hearings and at trial. Many of these forensic experts are very highly specialized, which often means that there will only be a few qualified experts within any one specialty available throughout the country or even the world. The scheduling issues and often prohibitive costs associated with expert travel are factors that will likely impede parties from retaining the most highly qualified experts unless the Appellate Division's published decision disfavoring virtual testimony is reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Tyrell S. Lansing was charged in Morris County Indictment Number 21-12-0895 with murder contrary to N.J.S.A. 2C:11-3A(1); second-degree possession of a firearm for an unlawful purpose contrary to N.J.S.A. 2C:39-4A(1); second-degree possession of a handgun without a permit contrary to N.J.S.A. 2C:39-5B(1); second-degree possession of a handgun by a convicted felon contrary to N.J.S.A. 2C:39-7B(1); and fourth degree possession of hollow nose bullets contrary to N.J.S.A. 2C:39-3F(1). This matter is currently pending trial before the Honorable Stephen J. Taylor, J.S.C.

The charges in the indictment stem from the shooting death of Raijah Scott on August 18, 2021 at 1:05 a.m. in the roadway in front of 28 Clyde Potts Drive in Morristown. Police officers retrieved surveillance video footage of the area surrounding the incident, and after reviewing the video, the State developed a theory that Lansing was the shooter, notwithstanding that the video does not depict the shooting. Indeed, at the time that the State infers that the victim was shot, neither the victim nor the perpetrator can be observed on the video at all. Rather, the entire event, which occurred at night on a narrow piece of pavement between a white Land Rover and a row of vehicles parked along the front of 28 Clyde Potts Avenue, is entirely obscured by parked vehicles and a very large leaf covered tree with a thick tree trunk.

As part of its case in chief, the State intends to introduce a reconstruction of the shooting and has therefore retained Angelo Leiloglou, an expert in photogrammetry, which is a field of science involving the use of photography in surveying and mapping to measure the distances between objects. In December 2022, the State submitted an expert report from Leiloglou for the purpose of reconstructing the shooting in order to determine who the shooter was. In May 2023, the defense retained its own expert, Robert Sanderson, who specializes in forensic video analysis, to review the report of the State's expert, issue his own findings, and testify at the hearing challenging the reliability of this evidence.

Before he was retained, Sanderson indicated that he would need to testify virtually at any hearing or trial due to both his significant health issues and his responsibilities caring for his seriously ill wife. Accordingly, in August 2023, Lansing filed a motion for Sanderson to be permitted to testify remotely.

Sanderson, who lives in Poughkeepsie, New York, had been receiving ongoing medical treatment for a heart condition, atrial fibrillation, and had also been recovering from three hernia surgeries. (Da 18) He is also the sole caregiver for his wife, who has undergone chemotherapy, multiple surgeries, and other treatments for esophageal cancer and is now significantly limited in performing daily life functions. Sanderson was assisting his wife with all of her

daily activities, preparing a six-meal per day regimen to meet her special dietary needs, ensuring her physical safety, and dispensing her medications. (Da 18) Due to his wife's immunocompromised state, Sanderson could not risk exposure to viruses, including COVID-19. (Da 18)

In moving to allow Sanderson to testify virtually, Lansing emphasized the need for Sanderson's testimony, arguing that allowing him to appear virtually would prevent the potential loss of his testimony and would also be in the interest of judicial economy. (Da 19-20) The State opposed Lansing's motion, and on September 18, 2023, Judge Taylor entered an order and written opinion denying Lansing's motion to permit his expert witness to testify remotely. (Da 1-16)

Lansing filed a motion for leave to appeal, which was denied by the Appellate Division on October 27, 2023. (Da 28) Lansing subsequently filed a motion for leave to appeal in the Supreme Court, and on January 29, 2024, this Court entered an order granting the motion for leave to appeal and remanding the matter to the Appellate Division for consideration on the merits. (Da 29) On remand, Lansing filed a motion to expand the record to include Sanderson's written report (Da 31-70), and the motion was granted on March 14, 2024. (Da 30) On October 3, 2024, the Appellate Division issued a published opinion, affirming the trial court's denial of Lansing's motion to permit his expert

witness to testify remotely. State v. Lansing, 479 N.J. Super. 565 (App. Div. 2024).

Following the Appellate Division's opinion, Sanderson, who until then had been unwavering about his inability to testify in person, indicated to trial counsel that due to improvements in both his and his wife's medical conditions, he would attempt to testify in person. Because of remaining uncertainty about Sanderson's ability to testify in person and because the published Appellate Division opinion in this case imposes undue restrictions on virtual testimony, Lansing filed a motion for leave to appeal with this Court, which was granted on January 31, 2025.

In February 2025, Judge Taylor scheduled the Olenowski¹ hearing in this matter, and Sanderson agreed to appear in person to testify on February 20, 2025. However, on February 16, 2025, Judge Taylor entered an order that the hearing "shall not proceed absent an Order from the New Jersey Supreme Court granting a limited remand or an indication that the pending appeal has been dismissed." (Da 71-72) On February 18, 2025, Lansing filed an emergent motion with this Court, seeking either (1) an order instructing the trial court that it had jurisdiction, pursuant to Rule 2:12-11, to proceed with the pretrial hearing while

¹ State v. Olenowski, 255 N.J. 529 (2023).

the appeal was pending, or (2) a temporary remand so that the pretrial hearing could proceed in the trial court before the appeal was heard in this Court.² On February 19, 2025, this Court granted Lansing's motion for emergent relief, instructing that "the trial court has jurisdiction to conduct the Olenowski hearing scheduled for February 20, 2025." The Olenowski hearing took place on February 20 and 25, 2025. Both Sanderson and the State's expert testified in person at the hearing.

² In the event the Court declined to grant either request for relief, Lansing moved in the alternative for dismissal of the appeal so that the Olenowski hearing could proceed in the trial court.

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION ERRED IN BARRING THE VIRTUAL TESTIMONY OF A DEFENSE EXPERT BY IMPORTING THE OVERLY RESTRICTIVE STANDARD FROM PATHRI V. KAKARLAMATH INTO RULE 1:2-1(B)'S GOOD CAUSE STANDARD.

In affirming the trial court's denial of Lansing's motion for his expert witness to testify virtually, the Appellate Division relied on an overly-restrictive analysis that is contrary to Rule 1:2-1(b)'s good cause standard. Incorporating the pre-pandemic test articulated in Pathri v. Kakarlamath, 462 N.J. Super. 208 (App. Div. 2020), into the good cause standard, the Appellate Division failed to sufficiently account for the advanced capabilities of technology as well as society's post-pandemic, widespread acceptance of remote testimony. This Court should reverse the Appellate Division's decision and clarify that consistent with the Rule's good cause standard, virtual testimony should be permitted when there is a substantial reason for the request.

A. Relevant Legal Authorities

The use of remote testimony in criminal proceedings is addressed by Rule 1:12(b) and the Supreme Court's October 27, 2022 Order, "The Future of Court Operations – Updates to In-Person and Virtual Court Events" (Da 21-27), both of which were promulgated by this Court, and by the Appellate Division's decision in Pathri. Each authority, as well as the Appellate Division's decision

in this case, will be discussed in more detail below.

1. Court Rule 1:2-1(b)

Effective September 1, 2021, Rule 1:2-1(b) was modified to add a subsection specifically permitting virtual testimony. Reflecting an increased comfort level with virtual testimony brought about by the COVID-19 pandemic, Rule 1:2-1(b) states:

Contemporaneous Transmission of Testimony. Upon application in advance of appearance, unless otherwise provided by statute, the court may permit testimony in open court by contemporaneous transmission from a different location for good cause and with appropriate safeguards.

As the comments to paragraph (b) of Rule 1:2-1 indicate, “[e]xperience with the various video conferencing and live streaming applications employed during [the COVID-19] emergency laid the groundwork for rule adoptions providing for the use of these technologies in appropriate circumstances.” Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:2-1 (2025). The comments further state that what constitutes good cause under Rule 1:2-1(b) “almost certainly will evolve with further experience with contemporaneous proceedings.” Id. at cmt. 2.6.

2. The Supreme Court’s October 2022 Order

Beginning in 2020, this Court, initially prompted by the exigencies of the COVID-19 pandemic, issued a number of orders regarding remote proceedings,

repeatedly authorizing novel uses of technology “to preserve, not to undermine, the constitutional right[s] of defendant[s]...”. State v. Vega-Larregui, 246 N.J. 94, 102 (2021) (upholding validity of virtual grand jury presentations where all testimony was given remotely). In its most recent order of October 27, 2022, the Court continued to authorize remote proceedings even as the pandemic was waning, explaining that:

This Order updates the framework for those court events that are to be conducted in person and those that in general will proceed in a virtual format. Informed by experience, it establishes a more sustainable approach to court operations in order to optimize access, participation, and the timely administration of justice.

(Da 22)

The October 2022 Order provides a general framework for how different categories of proceedings will generally take place, indicating that criminal jury trials and evidentiary hearings will take place in person unless both parties consent to a virtual hearing.³ Section seven of the October 2022 Order goes on to explain that “[c]ourt events will be scheduled and conducted consistent with

³ The Appellate Division in this case rejected the State’s argument that this language precludes a trial court from allowing a witness to testify remotely at an evidentiary hearing without the State’s consent. Lansing, 479 N.J. Super. at 574. As the Appellate Division correctly recognized in this regard, Lansing was not seeking to have the entire evidentiary hearing conducted remotely, but only the remote testimony of one witness, and the State’s consent was therefore not required. Id. at 574-75.

the principles of procedural fairness.” And, significantly, the Order specifies that “[i]n individual cases, all judges will continue to have discretion to grant an attorney or party's reasonable request to participate in person in a virtual proceeding or to participate virtually in a matter being conducted in person.” Issued after Rule 1:2-1(b) was adopted, the October 2022 Order does not explicitly mention the Rule, but it indirectly references a judge’s authority to allow virtual testimony, pointing out that “judges also routinely exercise discretion to permit individuals to participate virtually as necessary for health and other reasons.” (Da 22)

3. The Appellate Division’s Pathri Decision

In January 2020, two months before the pandemic forced all courts to switch to remote proceedings, the Appellate Division for the first time addressed the permissibility of remote testimony via contemporaneous video. Pathri v. Kakarlamath, 462 N.J. Super. 208 (App. Div. 2020). In Pathri, one of the parties to a divorce proceeding moved out of the country while the case was pending and was unable to obtain a visa to return. He therefore moved to testify remotely via contemporaneous video transmission, and the trial court denied his motion. In concluding that remote testimony was permissible under certain circumstances, the Appellate Division explained that “[o]ur court rules do not provide for testimony by way of contemporaneous video transmission, but they

don't prevent it either. In fact, trial testimony may be presented in a number of ways that do not require the witness' physical presence." Id. at 212; see also State v. Santos, 210 N.J. 129, 139 (2012) ("[a]s important as live witness testimony is, the New Jersey Court Rules do not expressly require it...").

In articulating a standard for permitting virtual testimony, the Appellate Division relied in part on a federal rule of criminal procedure that allows contemporaneous video transmission "[f]or good cause in compelling circumstances and with appropriate safeguards." Fed. R. Civ. P. 43(a). The court also was guided by its prior decision in Aqua Marine Products, Inc. v. Pathe Computer Control Systems Corp., 229 N.J. Super. 264 (App. Div. 1988), where the court constructed a two-part test that would allow telephonic testimony only in "special situations in which there is either exigency or consent and in which the witness' identity and credentials are known quantities." Pathri, 462 N.J. Super. at 215. Endorsing Aqua Marine's narrow exigency exception to in-person testimony, the Pathri court explained, "...we approach the issue presented here by assuming...that Aqua Marine still provides guidance in this century and that its two-part test requiring 'exigency' and certainty in the witness' identity must be satisfied." Id. at 214-15. The Pathri court further emphasized that "what was referred to in Aqua Marine as an 'exigency' and what the federal rule describes as 'good cause in compelling circumstances' are

two ways of expressing the same thing.” Ibid.

Consistent with this exigency standard, the Appellate Division established seven factors to be considered by a trial court when deciding whether to permit a witness to testify remotely:

- (1) the witness’ importance to the proceeding;
- (2) the severity of the factual dispute to which the witness will testify;
- (3) whether the factfinder is a judge or a jury;
- (4) the cost of requiring the witness’ physical appearance in court versus the cost of transmitting the witness’ testimony in some other form;
- (5) the delay caused by insisting on the witness’ physical appearance in court versus the speed and convenience of allowing the transmission in some other manner;
- (6) whether the witness’ inability to be present in court at the time of trial was foreseeable or preventable; and
- (7) the witness’ difficulty in appearing in person.

Id. at 216. Remanding for “a more fulsome presentation than previously provided” (id. at 221), the Pathri court instructed that the trial judge’s decision “should address all the factors we have identified.” Ibid.

4. The Appellate Division’s Lansing Decision

In affirming the trial court’s denial of the request to permit virtual

testimony in this case, the Appellate Division read the Pathri factors into Rule 1:2-1(b), assuming without analysis that good cause under the rule is synonymous with the Pathri standard. Strictly applying the Pathri factors to determine whether good cause existed in this case, the Appellate Division viewed every Pathri factor as weighing against virtual testimony. The court summarized:

We have carefully reviewed the record and conclude that the trial court properly considered each of the Pathri factors and made findings with respect to each factor that are supported by the record. The technical and complicated nature of the expert's expected testimony, the prevalent role video evidence will play when determining whether the State's expert's opinion is admissible and, if so, credible, the difficulty the State would have in cross-examining defendant's expert, the physical proximity of defendant's expert to the courthouse, defendant's knowledge of the expert's desire to testify remotely when he retained the expert, and the absence of medical evidence requiring remote testimony, all support the conclusion that the trial court did not mistakenly exercise its discretion when denying defendant's motion.

Lansing, 479 N.J. Super. at 578. In its analysis, the court made little or no mention of the fact that Sanderson is one of only several experts in the country who is qualified to challenge the reliability of the photogrammetry evidence that is the subject of an Olenowski challenge; that his wife's serious health issues prevented him from appearing in person; or that obtaining a new expert, if even possible, would cause undue delay and unnecessary expenditure of taxpayer

dollars.

B. Legal Analysis

In this case, the Appellate Division applied the wrong legal standard by incorporating Pathri's factors into Rule 1:2-1(b)'s good cause analysis. As discussed above, the Pathri court's factors were derived from an analysis of a federal rule, which unlike New Jersey's rule, requires compelling circumstances for remote testimony, and on 37-year-old caselaw, which required proof of exigency for telephonic testimony. This analysis is outdated and creates unnecessary obstacles to remote testimony. Instead, Rule 1:2-1(b)'s good cause standard should be applied to liberally allow virtual testimony in cases where the proponent of the virtual testimony proffers a substantial reason for allowing it.

1. The Decision Whether to Allow a Witness to Testify Remotely Should Be Governed by Rule 1:2-1(b)'s Good Cause Standard, not Pathri's Seven-Factor Test.

Here, the Appellate Division correctly recognized that Rule 1:2-1(b) and the October 2022 Order address the use of remote testimony in criminal proceedings and that Pathri predated the Rule. Lansing, 479 N.J. Super. at 575-76 ("We acknowledge that when we issued Pathri, we did not have the benefit of the experience that informed the Court when it adopted Rule 1:2-1(b)."). Nevertheless, the Appellate Division incorporated the Pathri factors into the

good cause standard, essentially creating a presumption against virtual testimony that is wholly inconsistent with Rule 1:2-1(b).

In finding the Pathri factors applicable, the Appellate Division in this case concluded that the factors “were based in part on a federal rule of civil procedure which mirrors Rule 1:2-1(b) and are useful guidelines for deciding “good cause” and “appropriate safeguards” under the Rule.” Id. at 576. However, while the Appellate Division correctly stated that Pathri was based on Federal Rule of Civil Procedure Rule 43, the Appellate Division incorrectly determined that the federal rule “mirrors” Rule 1:2-1(b). Significantly, the federal rule states:

At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Fed. R. Civ. P. 43(a). By contrast, New Jersey’s rule states:

Upon application in advance of appearance, unless otherwise provided by statute, the court may permit testimony in open court by contemporaneous transmission from a different location for good cause and with appropriate safeguards.

Rule 1:2-1(b).

The omission of the “in compelling circumstances” language in New Jersey’s rule is significant as it creates a much more permissive standard than

the federal rule. In this regard, the Advisory Committee Notes to the 1996 Amendments to the federal rule reflect the Committee's intent to create only a very narrow exception to the requirement of in-person testimony, stating that:

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. ... An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Fed. R. Civ. P. 43(a) advisory committee's note. Emphasizing the importance of exigency, the Advisory Committee explained:

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.

Id.

In contrast, New Jersey's rule specifically omits the compelling circumstances language, requiring only good cause. Accordingly, both the

federal rule and the Pathri standard, which is derived in part from the federal rule, are not applicable to an analysis of good cause under Rule 1:2-1(b). In other words, because New Jersey does not include an “in compelling circumstances” requirement in Rule 1:2-1(b), the Pathri factors are too restrictive for determining the permissibility of remote testimony under New Jersey’s rule.

In fact, implicit in most of the Pathri factors is that court’s presumption in favor of live testimony. For instance, with respect to the first factor (witness’ importance to the proceeding), the Pathri court explained that “[t]he greater the witness’ importance in the dispute, the heavier should be the burden of excusing in-person testimony.” Ibid. Similarly, regarding the second factor (severity of the factual dispute), the Pathri court advised that “the court should ascertain the significance of the witness’ credibility and demeanor and whether the factfinder is better served in its truth-finding function by having testimony in person rather than by contemporaneous video transmission.” Id. at 217-18. In discussing the third factor (whether the factfinder is a judge or a jury), the court remarked that “a judge would likely overcome whatever barrier to ascertaining the witness’ credibility and demeanor is created by contemporaneous video transmission than would a jury of laypersons not accustomed to weighing testimony in any form.” Id. at 218. And, perhaps most indicative of the court’s presumption against

virtual testimony is the sixth factor (whether the witness' inability to be present was foreseeable or preventable), which the court explains involves an analysis of "whether the witness was faced with the unavoidable consequence of being outside the jurisdiction at the time of trial." Id. at 219.

2. Good Cause Under Rule 1:2-1(b) Requires Only a Substantial Reason.

Recognizing that "it is impossible to lay down a universal definition of good cause ... or an all-inclusive and definitive catalogue of all of the circumstances to be considered by a court in determining whether there is good cause" (Ullmann v. Hartford Fire Ins. Co., 87 N.J. Super. 409, 414 (App. Div. 1965)), New Jersey courts have characterized good cause as an "amorphous term ... 'difficult of precise delineation.' " Ghandi v. Cespedes, 390 N.J. Super. 193, 196 (App. Div. 2007) (quoting Delaware Valley Wholesale Florist, Inc. v. Addalia, 349 N.J. Super. 228, 232 (App. Div. 2002)); see also Templeton Arms v. Feins, 220 N.J. Super. 1, 21 (App. Div. 1987) ("The good cause standard, then, is flexible, taking its shape from the particular facts to which it is applied."). Accordingly, what constitutes good cause "will depend upon the circumstances." State v. Del Fino, 100 N.J. 154, 160 (1985); see also Delaware Valley Wholesale Florist, Inc. v. Addalia, 349 N.J. Super. 228, 232 (App. Div. 2002) ("Its application requires the exercise of sound discretion in light of the facts and circumstances of the particular case considered in the context of the