[J-46-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 43 WAP 2011
	:	
Appellee	:	Appeal from the Order of the Superior Court entered November 8, 2010 at No. 1897 WDA 2008, affirming the Judgment of Sentence of the Court of Common Pleas of Allegheny County entered May 14, 2008 at No. CP-02-CR-0001671-2006.
v.	:	
JAMES MONROE BALDWIN,	:	
	:	
Appellant	:	ARGUED: April 11, 2012

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: DECEMBER 28, 2012**

I support the majority's decision to approve reference to the factors delineated in United States v. Peterson, 233 F.3d 101 (1st Cir. 2000), as a useful, non-exclusive guide in assessing whether to reopen an evidentiary record to permit a defendant, who has previously waived his right to testify, to do so nonetheless. I agree with Appellant, however, that the Superior Court -- and, by implication, the majority (which essentially adopts the Superior Court's analysis) -- digressed too far into an unnecessary and unwarranted fact-finding venture.

For example, in attributing to Appellant a motivation to engage in a "self-serving monologue[]" and "bend the rules," Majority Opinion, slip op. at 17, the majority relies primarily on a colloquy which occurred the day before the decision in question. It is

worth noting, however, that, in such colloquy and otherwise, Appellant was repeatedly admonished that he would not be permitted to engage in a self-serving monologue, avoid cross-examination, or otherwise bend the rules. See id. at 2-7. Since the record reveals nothing concerning how Appellant processed that information in the time between the colloquy and when he changed his mind, and the trial court made no pertinent findings, I do not support the majority's decision to supply its own inferential conclusions.

To the degree that the present case should be viewed as a totality-based, discretionary decision on the part of the trial court, I would also submit that Appellant's mental condition should also have been taken into account. The Commonwealth did not contest that Appellant suffered from serious mental-health conditions in the time period after the killing. For example, in her closing remarks, the prosecutor explained to the jury:

> I submit to you that . . . there isn't a serious mental illness going on [at the time of the killing]. Now, did he deteriorate later, yeah. We don't have any quarrel with that. People who are in jail, it's not a nice place. People who are facing serious charges and in the jail, if you've got a mental – some kind of a mental problem to begin with, it might well become worse and worse and worse while you're in the jail. And from the evidence, that's what happened.

N.T., Feb. 21, 2008, at 405-06. Other than that Appellant had been deemed to have progressed sufficiently that he was competent to be tried, the record says little about his mental condition at the time of the relevant decision-making.

In any event, I do not believe the trial court's decision was a totality-based one, nor was it required to be so. In this regard, Appellant's counsel presented his client's wish to testify after the close of the evidentiary record as an informational matter only. Counsel did not move to reopen the evidentiary record – indeed, when asked by the trial court to state his position on the matter, counsel declined, as follows:

> THE COURT: . . . And his request to testify, did you want to put it [in the record] if you were in agreement or disagreement with that at all? I don't know if you actually indicated your position or if you want to.
>
> [COUNSEL]: No, Your Honor.

Id. at 362. As there is no right to hybrid representation at trial, see, e.g., Commonwealth v. Ellis, 534 Pa. 176, 180, 626 A.2d 1137, 1139 (1993), the trial court was not duty-bound to explore Appellant's request, relayed without counsel's support. Moreover, in my view at least, a litigant who wishes to invoke some extraordinary procedure (such as reopening the record effectively to retract a previous waiver), should carry the burden of making an adequate, supportive proffer and, if factual matters are in controversy, to request an evidentiary determination or colloquy, as appropriate. Here, however, there was no proffer and no request for a hearing or colloquy.

In the absence of a motion, proffer, and request for a hearing or colloquy, I conclude that the trial court did not err in its response upon hearing of Appellant's wishes. I also believe that any fact-finding is best left to the post-conviction stage, at which Appellant may elect to challenge the manner in which his request was presented to the court.

Madame Justice Todd joins this Concurring Opinion.