**[J-107-2002]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

**CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, BAER, BALDWIN, JJ.**

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| COMMONWEALTH OF PENNSYLVANIA, | : | No. 338 CAP |
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| Appellee | : | Appeal from the Order entered on 4/5/01 |
| | : | at No. 269-1995 in the Court of Common |
| | : | Pleas, Criminal Division of Schuylkill |
| v. | : | County |
| | : | |
| | : | |
| MARK NEWTON SPOTZ, | : | |
| | : | |
| Appellant | : | SUBMITTED: May 20, 2002 |

## CONCURRING AND DISSENTING OPINION

**MR. JUSTICE SAYLOR** **DECIDED: May 2, 2006**

I join Parts A(1), (3) and (5), and B(1), (2) and (4), of the majority opinion, I concur in the holding affirming the denial of relief from the conviction, I would reverse with regard to the denial of a new penalty hearing, and I write to the following points.

With regard to Part A(2), pertaining to Appellant's claim of gender-based discrimination in jury selection, I would add to the majority's analysis that in Commonwealth v. Uderra, 580 Pa. 492, 862 A.2d 74 (2004), this Court adopted the approach of various federal courts to the effect that a post-conviction petitioner asserting an unpreserved claim of racial discrimination in jury selection may not rely on a prima facie case under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986), but must prove actual, purposeful discrimination by a preponderance of the evidence. See

Uderra, 580 Pa. at 513, 862 A.2d at 87 (citing McCory v. Henderson, 82 F.2d 1243, 1251 (2d Cir. 1996)). Since the rationale supporting the position adopted in Uderra was not dependent on the type of discrimination asserted, but rather, was premised on the absence of contemporaneous assessment by the trial court, see Uderra, 580 Pa. at 511-12, 862 A.2d at 85-86, I see no reason why it should not apply equally to claims of gender-based discrimination. Although the post-conviction hearing in this case preceded Uderra, I believe that the PCRA court afforded Appellant the opportunity to put forth his evidence concerning the asserted discrimination, and I join the portion of Part A(2) of the majority opinion that credits the PCRA court's salient factual findings and holds that Appellant has not satisfied his burden of proof.

Concerning the treatment of Appellant's claim of ineffective assistance of counsel for failing to present a diminished capacity defense in Part A(4) of the majority opinion, I have reservations about the general application of the precept foreclosing a diminished capacity defense to a charge of first-degree murder, where the Commonwealth asserts guilt under principal and accomplice liability theories in the alternative, but where the defendant has not conceded that he acted as a principal. See Majority Opinion, slip op. at 28 ("Absent an admission from Spotz that he had shot and killed [the victim], trial counsel could not have presented a diminished capacity defense."). I realize that this general prohibition is fairly well entrenched in our criminal law jurisprudence and previously has been referenced in association with the accomplice liability paradigm. See, e.g., Commonwealth v. Chester, 557 Pa. 358, 379, 733 A.2d 1242, 1252-53 (1999). It appears, however, that the rule derives from the Court's discussion of the theoretical basis for a diminished capacity defense in Commonwealth v. Walzack, 468 Pa. 210, 221, 360 A.2d 914, 919-20 (1976), see Commonwealth v. Weaver, 500 Pa. 439, 440, 457 A.2d 505, 506 (1983) (citing Walzack), rather than a developed

assessment concerning the possible assertion of defenses in the alternative; a defendant's entitlement to rebut essential elements of the Commonwealth's assertion of specific intent as an essential element of its case; or the nuances associated with the rule's application to one who, analogous to an actual perpetrator of a killing conceding liability to murder generally, contests liability as an accomplice to first-degree murder only in terms of the requisite mental state relative to the specific intent crime.[1] I would therefore be receptive to reconsidering the contours of the restrictions on the diminished capacity defense in an appropriate case.[2] I agree with the majority, however, that the rule is well established, and trial counsel cannot be deemed ineffective for acceding to its dictates.

With regard to Part B(3) of the majority opinion, concerning Appellant's challenge to the jury's finding of the (d)(6) aggravating circumstance, such aggravator applies, where "[t]he defendant committed a killing while in the perpetration of a felony," 42 Pa.C.S. §9711(d)(6) (emphasis added)). This Court has held that these plain words foreclose the application of the aggravating circumstance to persons who are liable for

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[1] Parenthetically, various Justices have, over the course of the Court's history, expressed the view that diminished capacity, short of insanity negating all criminal liability, simply should not be available as a defense, see, e.g., Commonwealth v. Weinstein, 499 Pa. 106, 119-21, 451 A.2d 1344, 1350-51 (1982) (McDermott, J., concurring without participation), and certainly Pennsylvania law is not unique in terms of the reluctance to implement an expansive approach to the defense.

[2] The restriction seems particularly questionable as applied to an accomplice, since its application will never allow a diminished capacity defense, despite that first-degree murder as established via accomplice liability theory remains a specific intent crime, see Commonwealth v. Huffman, 536 Pa. 196, 201, 638 A.2d 961, 964 (1994) ("Unless the appellant possessed a specific intent to kill, he could not be found guilty of murder in the first degree."). Cf. PAUL H. ROBINSON, CRIMINAL LAW DEFENSES §64, at 273 (1984 & Supp. 1993) (discussing the tension between requiring a particular state of mind to support liability for an offense but nevertheless excluding evidence relevant to it).

first-degree murder solely in the capacity of an accomplice. See Commonwealth v. Lassiter, 554 Pa. 586, 595-96, 722 A.2d 657, 662 (1998) (plurality).[3] In spite of the plain text of the statute, however, the trial court instructed the sentencing jury that the aggravator applied if "the killing was committed in the perpetration of a felony," N.T., March 6, 1996, at 292; see also id. at 296, thus, in effect, conveying that the defendant's actual perpetration of the killing was immaterial.[4]

The majority deems Lassiter inapplicable because it post-dates the trial in this case. As noted, however, Lassiter's holding merely enforces the plain meaning of the statute, and capital counsel are responsible to vindicate their clients' interests under existing statutory provisions. See Commonwealth v. Hughes, 581 Pa. 274, 331-32

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[3] Although Lassiter is a plurality opinion for other reasons, six Justices agreed that a prosecution for murder based on accomplice liability will not support the use of the aggravating circumstance under Section 9711(d)(6), and that counsel in the case lacked a reasonable strategy for failing to pursue this point at least in consultation with his client. See Commonwealth v. Williams, 581 Pa. 57, 93 n.4, 863 A.2d 505, 526-27 n.4 (2004) (Saylor, J., dissenting) (describing the various positions in Lassiter).

[4] The majority incorrectly indicates that the jury found that Appellant "committed a killing while in the perpetration of a felony." See Majority Opinion, slip op. at 63. In fact, in alignment with the trial court's instruction, the verdict slip reflects only the jury's finding that the "killing was committed in the perpetration of a felony." There simply is no special finding on the record to the effect that Appellant actually perpetrated the killing of the victim; Appellant adduced affirmative evidence tending to support his defense theory that his accomplice, Christina Nolan, was the actual killer, see e.g., Majority Opinion, slip op. at 30 n.31 (citing testimony of Darcy Smith and Lawrence Shugars); the primary direct evidence that Appellant was the actual shooter derived from Nolan, who, by virtue of applicable law, is to be regarded as a tainted source, see N.T., March 2, 1996, at 770 (reflecting the trial court's directive that the jurors "shall view [Nolan's] testimony with disfavor because it comes from a corrupt and polluted source"); the trial court affirmatively instructed the jury in the guilt phase of trial that Appellant could be held liable for first-degree murder as an accomplice, see id. at 788-90; and the jury returned a general verdict to first-degree murder.

n.36, 865 A.2d 761, 795 n.36 (2004); cf. Lassiter, 554 Pa. at 596, 722 A.2d at 662.[5] Moreover, in my view, none of the decisions referenced by the majority persuasively supports its position that the argument that prevailed in Lassiter had been otherwise rejected and/or diminished by the Court in a fashion that would relieve trial counsel of his obligation to pursue it. See Majority Opinion, slip op. at 65-66 nn. 38-39.[6] Indeed,

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[5] In light of the plain language of Section 9711(d)(6), it seems to me that, if the trial courts would simply use the words of the statute in their penalty-phase instructions and on verdict slips, this should be sufficient to convey the plain meaning (although I believe that it is preferable to advise the jury specifically that the aggravator cannot be applied if the defendant was found guilty of first-degree murder under accomplice liability theory). The most significant deficiency arises where, as here, a trial court paraphrases the aggravator using the passive voice, removing the defendant from the active position that is elemental in the statute.

[6] In this regard, many of the cases referenced by the majority post-date the 1996 trial of this case, and thus, these are of limited relevance in assessing trial counsel's calculus in 1996; the Lassiter issue was not raised and/or addressed in any of the decisions that are cited (in the only one of the cases that touches on the Lassiter question, the Court noted that it was unnecessary to address it, since the jury had found two other aggravators and no mitigators, see Commonwealth v. Rios, 554 Pa. 554 Pa. 419, 435-36 n.16, 721 A.2d 1049, 1057 (1998)); none of the decisions specifies the relevant penalty-phase instructions that were issued to the jury at trial concerning the Section 9711(d)(6) aggravator; indeed, in many of the cases the trial courts under review had actually quoted the (d)(6) aggravator directly from the statute in their penalty-phase charges, as opposed to displacing the required focus on the active role of the defendant as occurred in the present case, see, e.g., Commonwealth v. Chambers, No. 42 C.A. 1987, N.T. June 3, 1994 (V. VII), at 1524 (C.P. York) (reflecting the trial court's instruction "[i]n this case the Commonwealth has presented one aggravating circumstance which is, and I read it from the Act, that the Defendant committed a killing while in the perpetration of a felony"); Commonwealth v. Chester/Laird, Nos. 741-88, 746-88, N.T., May 20, 1988, at 797 (C.P. Bucks) (reflecting a similar instruction centered on the requirement that "the defendant committed a killing while in the perpetration of a felony"); Commonwealth v. Lambert, Nos. 343 et al. Aug. Term 1983, N.T., Apr. 25, 1984, at 67 (C.P. Phila.) (reflecting the trial judge's reading of the aggravating circumstances verbatim from the death penalty statute); and finally, the Court has continued after Lassiter to utilize the same shorthand phraseology that the majority references in merely setting out the procedural history of cases, see, e.g., (continued . . .)

the majority's position in this regard is contrary to the prevailing reasoning of Lassiter itself. See Lassiter, 554 Pa. at 596, 722 A.2d at 662 ("Clearly, trial counsel could have no reasonable basis for failing to explain to the appellant that a strong argument could be made that the death penalty could not be applied to her under Pennsylvania law[, because the (d)(6) aggravator does not apply to an accomplice who does not commit the killing]."); see also id. at 599, 722 A.2d at 664 (Saylor, J.) (agreeing with the lead opinion that counsel was ineffective in such regard).[7]

In the circumstances as previously described, see supra note 4, and in light of trial counsel's testimony on post-conviction review to an erroneous understanding of the (d)(6) aggravator akin to the trial court's misstatement, see N.T., September 28, 2000, at 152-53, I find the arguable merit and reasonable strategy prongs of the

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Commonwealth v. Singley, 582 Pa. 5, 13 868 A.2d 403, 408 (2005), and, at least in my view, it would be unreasonable to take the position that such mere imprecision (particularly in instances in which precision is not called for) displaces Lassiter.

Certainly the six Justices in Lassiter who agreed that the appellant's counsel lacked a reasonable strategy for failing to convey the focus of Section 9711(d)(6) on the defendant's active participation in the killing did not deem controlling some prior or future imprecise phrasing by this Court in decisions in which the particular focus of Section 9711(d)(6) simply was not in issue before it.

[7] In response to my position, the majority distinguishes Lassiter on the ground that the ineffectiveness claim in that case centered on the failure of a defense attorney to advise his client concerning the plain meaning of Section 9711(d)(6) for purposes of her decision whether to enter into a plea agreement, as contrasted with the situation in the present case, entailing trial counsel's failure to vindicate the plain meaning of the same statute at an actual death penalty hearing. See Majority Opinion, slip op. at 66-67 n.40. Respectfully, I fail to see the relevance of this distinction in terms of Appellant's entitlement to post-conviction relief, since the plain meaning of Section 9711(d)(6) is equally dispositive in either setting. Indeed, if there is any difference, it seems to me that the claim of deficient stewardship is stronger and more direct in the latter circumstance.

ineffectiveness test satisfied. Further, since the jurors found a mitigating circumstance, and therefore, the sentencing decision was committed to their weighing of the aggravating and mitigating circumstances, see 42 Pa.C.S. §9711(c)(1)(iv), I believe that counsel's deficient stewardship was sufficient to undermine confidence in the penalty verdict. Accordingly, I would award a new penalty hearing.

Finally, concerning the discussion of the range of evidence and argumentation that will implicate a capital defendant's future dangerousness for purposes of determining the availability of an instruction concerning the meaning of a life sentence under Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187 (1994), I respectfully differ with the majority's analysis. In Kelly v. South Carolina, 534 U.S. 246, 122 S. Ct. 726 (2002), the United States Supreme Court set forth the following, straightforward test to determine whether or not future dangerousness is implicated for such purposes:

> Evidence of future dangerousness under Simmons is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms.

Id. at 254, 122 S. Ct. at 732.

Rather than applying this test, the majority relies on prior decisions of this Court that are inconsistent with Kelly. Compare Majority Opinion, slip op. at 71-72 (cataloguing Pennsylvania precedent reflecting the proposition that "[t]he trial court is not required to issue the instruction based upon references to a defendant's past violent acts alone"), with Kelly, 534 U.S. at 253, 122 S. Ct. at 731 ("A jury hearing evidence of defendant's demonstrated propensity for violence reasonably will conclude that he

presents a risk of violent behavior[.]").[8] While the majority regards Kelly as a new rule of law subject only to prospective application, see Majority Opinion, slip op. at 74-77, I believe that the decision merely clarified a matter that previously was unsettled as a matter of United States Supreme Court jurisprudence, namely, the breadth of Simmons' holding requiring a special instruction in instances in which a defendant's future dangerousness is placed in issue by the prosecution in a capital case.[9] It seems to me

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[8] Notably, in response to a dissenting opinion asserting that under the Kelly standard the evidence in a substantial proportion of, if not all, capital cases will show a defendant likely to be dangerous in the future, the Kelly majority indicated, that this "may well be," see Kelly, 534 U.S. at 254 n.4, 122 S. Ct. at 732 n.4, albeit that it declined to respond definitively.

[9] As the foundation for its conclusion that Kelly presents a new rule of law, the majority relies on this Court's various holdings to the effect that references to future dangerousness must be express to implicate the requirement of a Simmons instruction. See Majority Opinion, slip op. at 76-77. The reasoning is that, since this Court's prior holdings are contrary to Kelly, then Kelly must represent a novel legal proposition. See id. Such logic, however, fails to account for the possibility that a state court might not correctly implement existing federal constitutional doctrine; thus, under the majority's rationale, it would appear that even a mere correction by the United States Supreme Court of a state court's misinterpretation of federal constitutional law should apply prospectively only. I therefore believe that a broader approach to the retroactivity question is warranted, which does not focus integrally on the Pennsylvania decisions.

In particular, in my view, whether Kelly represents a new rule of law should be determined with reference to the relevant decisions of the United States Supreme Court, including Kelly itself. In this regard, it seems apparent that the Kelly majority viewed its ruling as an application of Simmons, rather than as an alteration. For example, the Kelly majority specifically credited the state court decision under review for correctly framing the legal issue arising under Simmons by considering whether the defendant's future dangerousness was "a logical inference from the evidence," or was "injected into the case through the State's closing argument. Kelly, 534 U.S. at 252, 122 S. Ct. at 731. Moreover, the Kelly majority cited the Simmons lead and concurring opinions for the proposition that "'rais[ing] the specter of . . . future dangerousness generally' and 'advanc[ing] generalized arguments regarding [same]'" implicates future dangerousness under Simmons. Id. Indeed, the majority here correctly acknowledges that it was the minority perspective in Kelly that the holding represented a novel (continued . . .)

that competent capital counsel should be well aware of open controversies associated with Simmons, which is a highly prominent matter in capital litigation, and, as such, and where not otherwise inconsistent with trial strategy, do what is necessary to preserve the position favoring the instruction for both state and federal review.

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proposition of law. See Majority Opinion, slip op. at 74-75 (citing Kelly, 534 U.S. at 261, 122 S. Ct. at 735 (Rehnquist, C.J., dissenting); id. at 263-64, 122 S. Ct. at 736-37 (Thomas, J., dissenting)).