**[J-115-2007]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

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| COMMONWEALTH OF PENNSYLVANIA, | : | No. 44 EAP 2005 |
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| Appellant | : | Appeal from the Order of the Superior |
| | : | Court entered on March 8, 2005 at No. |
| | : | 525 EDA 2004 (reargument denied May |
| v. | : | 11, 2005) vacating the Judgment of |
| | : | Sentence in the Court of Common Pleas |
| | : | of Philadelphia County, Criminal Division, |
| DUANE KING, | : | entered January 28, 2004 at No. 0303- |
| | : | 1004. |
| Appellee | : | |
| | : | |
| | : | ARGUED: April 3, 2006 |
| | : | |
| | : | RESUBMITTED: September 25, 2007 |

## DISSENTING OPINION

**MR. JUSTICE CASTILLE** **DECIDED: December 28, 2007**

In this case we are asked to determine when an individual false statement satisfies the materiality element of the perjury statute, 18 Pa.C.S. § 4902, such that multiple false statements may serve as the basis for multiple counts of perjury. In my view, the Majority Opinion both usurps the jury function and rewrites the perjury statute in such a way as to invite a volume discount for multiple crimes. Therefore, I respectfully dissent.

The Majority, without explicitly acknowledging that it deems the statute to be ambiguous and therefore subject to construction, overlooks the plain language of the statute. There is no need to look beyond the text of a statute when its plain meaning is evident on its face. See, e.g., Commonwealth v. McClintic, 909 A.2d 1241, 1245-46 (Pa. 2006) (citing Sternlicht v. Sternlicht, 876 A.2d 904, 909 (Pa. 2005); Rarnich v. Workers' Comp. Appeal Bd. (Schatz Elec., Inc.), 770 A.2d 318, 322 (Pa. 2001)). A court should only

resort to other considerations as the primary basis for a decision when the words of a statute are ambiguous. 1 Pa.C.S. § 1921(c); see also Commonwealth v. Hagan, 654 A.2d 541, 544-45 (Pa. 1995).

Turning first to the question of how many "statements" are constituted by the falsehoods in appellee's testimony, the definition of a "statement" in 18 Pa.C.S. § 4901 is both patently clear and broad: "'statement' means any representation . . . ." Here, the Majority applies a test in which "the essential inquiry in determining whether each individual falsehood could be considered an individual 'statement' must be whether each lie related to 'different matters' or a single event or were so interrelated as to a single subject matter that they could not amount to individual statements." Majority Slip Op. at 7. Applying this test, the Majority determines that the six falsehoods in question constitute only three "statements" for the purposes of Section 4901.

Although appellee's statements each relate to his fundamental testimony that he lied when implicating Dickerson in the Crawford murder, "[s]tatements relating to different matters may be made the basis of separate counts of perjury, even though they all refer to the same general subject of inquiry and were made at the same hearing." 60A AM. JUR. 2D *Perjury* § 53 (2007).[1] In the present case, I would hold that each of the six falsehoods put forth by appellee represents a different statement for purposes of the perjury statute. First, appellee attempted to undermine the detectives' version of events and assert that his initial

[1] Federal courts have approved of the charging of multiple counts of perjury arising out of the same transaction or subject matter pursuant to 18 U.S.C. § 1623 (false declarations before grand jury or court). United States v. De La Torre, 634 F.2d 792, 795 (5th Cir. 1981) ("Separate and distinct false declarations in trial testimony, which require different factual proof of falsity, may properly be charged in separate counts, albeit they are all related and arise out of the same transaction or subject matter."); see also United States v. Scott, 682 F.2d 695, 698 (8th Cir. 1982); United States v. Doulin, 538 F.2d 466, 471 (2d Cir.), cert. denied, 429 U.S. 895 (1976).

confession was made under pressure (Count I -- relating that the detectives who investigated the Crawford murder arrested him before, not after, eliciting his confession in the homicide). Appellee next testified that the police told him to lie (Count II -- asserting that the detectives told him to falsely accuse a man named Ivan Bingham of the Crawford murder). He then explained why he was motivated to follow the detectives' instructions (Count III -- contending that the detectives promised not to proceed against him on a separate pending murder charge if he fabricated a case against Bingham). Appellee elaborated that it was the detectives' idea, not his own, to falsely implicate himself in the Crawford murder (Count IV -- relating to appellee's allegation that the detectives told him to falsely implicate himself in the Crawford murder to enhance his credibility). Finally, appellee explained why he was allegedly willing to lie about the Crawford murder, given that he had separate assurances from the police (Count V -- recounting that the detectives promised to limit appellee's minimum sentence to five years on the charges arising from the Crawford murder) and from the district attorney's office (Count VI -- asserting that an Assistant District Attorney told him that, in exchange for his cooperation, charges in the unrelated homicide would be dropped and his minimum sentence on his Crawford guilty plea would be five years) that his punishment for the Crawford murder would be limited. Clearly, each assertion is a distinct representation, and thus qualifies as a "statement."

Turning next to the materiality requirement, the analysis should begin and end with the plain language of the statute. The statute defines materiality as follows:

> Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

18 Pa.C.S. § 4902(b). Section 4902 is modeled after Section 421.1 of the MODEL PENAL CODE, which provides an identical definition of materiality. See 18 Pa.C.S. § 4902 cmt.

Contrary to the Majority's opinion, the proper inquiry to determine whether a statement is material comes from the plain language of Section 4902(b) itself. Section 4902(b) materiality is a fact-driven test, as it depends upon the "given situation"; thus, similar statements could be deemed material in one case and not in another. This alone, however, does not render the plain meaning of the statute's text ambiguous. Section 4902(b) asks solely whether false statements made by a perjury defendant "could have affected the course or outcome of the proceeding," 18 Pa.C.S. § 4902(b), not whether a statement could have done so **standing alone**. Answering the query posed by Section 4902(b) requires a case-specific inquiry, focusing on the effect that the statement may have had on the fact finder's decision-making at the prior proceeding.

In interpreting the "materiality" requirement, the Majority ignores the actual language of the statute and falls prey to the same instinct that led the Superior Court to conclude that a false statement could only be material under Section 4902(b) if that statement "could have, **standing alone**, affected the outcome of the Dickerson PCRA hearing." Super. Ct. Op. at 5 (emphasis added). Likewise, the Majority, despite the lack of ambiguity on the face of Section 4902(b), has chosen to import a materiality test from a legal treatise and a single divided opinion of the Superior Court. The Majority states that the Commonwealth must prove that each statement could have affected the course or outcome of the proceeding **by itself**. To bolster its rewriting of the statute, the Majority states that a false statement is material when "the misrepresentation or concealment was predictably capable of affecting . . . the official decision." Majority Slip Op. at 7 (quoting Kungys v. U.S., 485 U.S. 759, 771 (1988)). The Majority seems to assume that this means each statement must be considered completely divorced from the context in which it was made. The Majority's test thus requires the Commonwealth to establish that each statement, **by itself**, affected the course or outcome of the proceedings. But the Majority is not done. Having determined that no individual statement at issue meets its extra-statutory threshold, the

Majority reads yet another test into the statute and permits the materiality requirement to be met by the collective effect of the statements considered together.

I think it better to apply the plain text of Section 4902(b). Under that text, I would find that there was sufficient evidence to support a finding that appellee's six discrete statements each warranted a conviction for perjury. The central relevance and purpose of appellee's testimony at the Dickerson PCRA hearing was to convince the PCRA court that appellee had lied in incriminating Dickerson (and himself) at Dickerson's trial, and, as a result, the court should find that Dickerson was wrongly convicted of murder. Appellee could have just made the assertion, "I lied at Dickerson's trial," to make Dickerson's after-discovered evidence point in the barest sense. But appellee went further and sought to explain why he lied, and thereby give the PCRA court a reason to credit his PCRA account. As a practical matter, the credibility of an individual witness is largely judged by the story told: the more complete and plausible the story, the greater the probability it will be believed. The credibility of the recantation here was bolstered by appellee's explanation of why he testified differently at the earlier proceeding. Indeed, the primary reason a witness would seek to explain the motivation for what he now claims was prior false testimony would be to influence the present fact finder's decision concerning his present credibility.

When examining the practical effect of the statements separately, it is apparent how each statement was designed to affect the fact finder's judgment, either in an effort to enhance appellee's credibility or to explain the reasons motivating his alleged false confession. Appellee did not confine himself to some generalized notion of pressure, coercion, or official corruption. Instead, appellee testified to specific instances that suggested a logical, connected progression of governmental misconduct all designed to coerce him to implicate himself and to testify falsely against his co-defendant. The statements appellee made, listed above, provided the PCRA court with six separate, compelling reasons to believe that his original confession was false and, accordingly, that

there was sufficient evidence to support the fact finder's conclusion that the six statements underlying appellee's perjury charges "could have affected the course or outcome of the proceeding."[2]

Even aside from whether the plain language of the statute, or the Majority's rewritten statute, should apply, the Majority's "interpretation" leads to an absurd result: it provides an incentive for perjurers to increase the number of false statements in their testimony. See 1 Pa.C.S. § 1922(1) (noting presumption that General Assembly does not intend result that is absurd or unreasonable). This Court recognized in Commonwealth v. Hude, 425 A.2d 313, 323 (Pa. 1980), that in every criminal proceeding there are ultimate issues of fact to be resolved, *i.e.*, whether the defendant is guilty of the crimes for which he stands accused, as well as factual predicates on which a fact finder relies to decide those ultimate issues. Factual predicates, therefore, are essentially the evidence the fact finder believes to be true, which the fact finder considers when deciding the ultimate issue at trial. The extent to which a fact finder finds a party's presentation of the case compelling depends, at least in part, on the credibility of the witnesses the party presents. See Commonwealth v. Robinson, 491 A.2d 107, 110 (Pa. 1985). The more complete the story, the greater the probability that it will be considered true. The Majority's revision of Section 4902(b), however, ignores this reality and implicitly encourages a witness providing false testimony

[2] It is significant that the Superior Court failed to provide a rationale to explain why Count I had the ability to influence the outcome of the Dickerson PCRA court, but Counts II through VI did not. Clearly, if appellee's assertion that the detectives arrested him before his confession could have influenced the jury, it is illogical to believe that appellee's assertions that he was promised certain deals in exchange for his confession could have had no effect on the jury.

to create the most compelling story he or she may conceive without fear of reprisal for the additional false events he or she may relate in telling the fictional tale.[3]

Finally, I note that by concluding that the six falsehoods in question consist of three separate statements supporting a single perjury charge, the Majority avoids appellee's argument that the Commonwealth's multiple perjury charges offend double jeopardy principles. Because I would conclude that appellee's false statements are six separate material statements, and thus support six perjury charges, I will address the Commonwealth's argument.

Double jeopardy prohibits multiple punishments for the same offense. Abney v. United States, 431 U.S. 651, 660 (1977); Commonwealth v. Bostic, 456 A.2d 1320, 1322 & n.4 (Pa. 1983) ("At least in the 'multiple punishments' context, it seems clear that the double jeopardy proscription embodied by the Fifth Amendment of the United States Constitution is coextensive with that embodied by Article 1, Section 10 of the Pennsylvania Constitution."). The question of whether multiple punishments have been given for the same offense is a factual issue. See Commonwealth v. Andrews, 768 A.2d 309, 313 (Pa.

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[3] Any "construction" of Section 4902(b) that would encourage a perjurer to reinforce his or her testimony with additional false statements would frustrate an obvious purpose of criminalizing perjury, namely, to ensure that the fact finder at trial reaches an accurate result. Other jurisdictions have recognized that the materiality requirement of perjury helps to pinpoint exactly when that interest is in peril.

> The requirement that the statement be material to an official proceeding isolates those occasions where inaccuracy may significantly impair important governmental interests. False statements affecting the outcome of such proceedings can jeopardize essential functions of government: the determination of guilt in a criminal trial, the adjustment of interests in a civil trial, and the development of a legislative record, to name only a few.

People v. Chaussee, 880 P.2d 749, 763 (Colo. 1994) (interpreting perjury statute modeled after MODEL PENAL CODE Article 241.1).

2001) (citing Commonwealth v. Koehler, 737 A.2d 225, 245 (Pa. 1999)). In cases of perjury, double jeopardy precludes a court from imposing multiple punishments based on a repeated misrepresentation of the same fact. Here, as detailed above, appellee made six separate statements pertaining to events involving his alleged false confession to the Crawford murder, describing separate allegations of what actions the detectives took, what the detectives told him, and what both the district attorney's office and the police promised him. I would hold that each perjury count related to a separate allegation involving his supposed false confession and, therefore, his six convictions do not implicate double jeopardy concerns.

For the foregoing reasons, I respectfully dissent.

Mr. Justice Saylor joins this dissenting opinion.