[J-125- 2004]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

BRYAN P. HALL,	:	No. 40 EAP 2002
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court entered on
	:	November 21, 2002 dismissing Petition for
V.	:	Review at No. 458 MD 2002
	:	
	:	
PENNSYLVANIA BOARD OF	:	
PROBATION AND PAROLE,	:	SUBMITTED: July 9, 2003
	:	
Appellee	:	
	:	
	:	
	:	

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: June 22, 2004**

Like the majority, I agree that a decision of an inferior federal court should be treated by this court as persuasive, but not binding, authority, where that decision interprets federal law. I, however, recognize that the decisions of the United States Supreme Court on such matters are controlling. Unlike the majority, therefore, I would find that the decision of the Third Circuit Court of Appeals on the *ex post facto* question involved in this case, in adhering to recent pronouncements of the High Court, is persuasive in its interpretation of federal law. Accordingly, I am compelled to dissent.

At issue here is the retroactive application of the 1996 amendments to the Parole Act[1] and whether applying those provisions to a person sentenced prior to 1996 violates the *ex post facto* clause of the United States Constitution. Appellant has been in prison since 1991. The heart of Appellant's argument is that in all probability under the parole system as it existed at the time he committed his offense, was convicted, and sentenced, he would have been paroled, while under the current system he is ineligible for parole. Appellant points to the amendments to the 1996 Parole Act that he asserts altered the focus of the parole policy in Pennsylvania from one that centered on the rehabilitation of the offender to one that now emphasizes public safety, deterrence, and the incapacitation of criminals. Appellant asserts that the retroactive application of the policy created through the 1996 amendments to his application for parole causes him to suffer a longer period of incarceration than if his parole application were considered under the pre-1996 policy, thereby creating an *ex post facto* violation.

This exact argument was presented, and rejected by our court in two recent decisions, Winkelspecht v. Pa. Bd. Probation and Parole, 813 A.2d 688 (Pa. 2002) and Finnegan v. Pa. Bd. Probation and Parole, 838 A.2d 684 (Pa. 2003). Before discussing the specifics of those two cases, however, I believe a brief review of the United States Supreme Court decisions in California Department of Corrections v. Morales, 514 U.S. 499 (1995) and Garner v. Jones, 529 U.S. 244 (2000) is warranted. In each of those cases, the Court was faced with an argument that a decrease in the frequency of scheduled parole hearings constituted an *ex post facto* violation as to the prisoners sentenced under the prior scheme. In Morales, the changes occurred via statutory enactment; while in Garner, the change in frequency of parole hearings was accomplished through the exercise of the parole board's legitimate discretion. In each case, based on the specific facts presented,

[1] The specific provision at issue is found at 61 P.S. § 331.1.

the Court found no *ex post facto* violations. However, the critical points made in those cases are first, that retroactive changes in the laws governing parole **may** violate the *ex post facto* clause; and second, that the test for determining if such a violation has occurred is "whether retroactive application of the change in law created a significant risk of increased punishment." Garner, at 256. With these important points in mind, we return to a consideration of the case law as it developed in our court.

Winkelspecht was a plurality opinion. The Appellant had presented his *ex post facto* challenge to the denial of his parole application by bringing a petition for the writ of habeas corpus. The court was presented with two questions, whether a writ of habeas corpus was the correct means to challenge the denial of parole, and whether Appellant had suffered an *ex post facto* violation. Three of the justices agreed that the 1996 amendments to the Parole Act did not violate the *ex post facto* clause. The opinion announcing the judgment of the court (OAJC) reasoned that although the 1996 amendments added new language, the alteration in wording did not create a change in the concepts considered by the parole board when exercising its discretion over an application for parole. According to the OAJC, a reordering of the considerations necessary to resolve an application for parole could not result in an *ex post facto* violation. 813 A.2d at 691-92. Two justices concurred in the result without opinion. I authored a short opinion concurring in result only. I agreed with dismissing the writ of habeas corpus as I believed that a writ of mandamus was the correct method for challenging a denial of parole; and that resolution of the case should have ended short of a discussion on the merits of the *ex post facto* claim. Id. at 692. Justice Castille concurred in the OAJC, with the exception that he believed a habeas petition to the trial court would be the best means to adjudicate consitutional challenges to a denial of parole. Id. at 693. Justice Saylor authored a concurring and dissenting opinion. In sum, he agreed that there was no facial violation of the *ex post facto* clause and that Appellant could not establish a constitutional violation without pleading and proving that the new

guidelines effected a change in the rate at which prisoners were paroled. Id. at 700. However, in the portion of his opinion concurring in the result, Justice Saylor, viewing the *ex post facto* claim in light of the decisions in Morales and Garner, stated that he would not go as far as the OAJC, leaving open the possibility that a prisoner could meet the burden of demonstrating an *ex post facto* violation through the application of the 1996 amendments in a specific case. Id. at 697.

Following this court's decision in Winkelspecht, the Third Circuit Court of Appeals addressed the identical issue in Mickens-Thomas v. Vaughn, 321 F.3d 374 (3d Cir. 2003) and reached the opposite conclusion than did the plurality on the *ex post facto* question. The Mickens - Thomas court did not view the 1996 amendment to the Parole Act as simply reordering policy considerations that had always been reviewed by the parole board, but rather, found the change in language in the 1996 amendments to signal a change in the weight to be afforded those policy concerns within the deliberative process of considering an application for parole. Id. at 385. Although the Circuit Court did have the benefit of the recent pronouncement of this court in Winkelspecht, the court did not consider that case dispositive in its analysis of Mr. Mickens-Thomas' *ex post facto* claim. Focusing on the critical points established by the United States Supreme Court in the Morales and Garner decisions, the court concluded that the change in emphasis in the parole process could create a significant risk of prolonged incarceration. Accepting the premise that an *ex post facto* violation may occur through application of the amended parole policy guidelines to a prisoner sentenced before the adoption of the 1996 amendments, the court then turned to the specific circumstances in Mr. Mickens-Thomas' case. Specifically the court looked at the emphasis by the parole board on public safety as a paramount consideration in denying the application for parole. In the court's view, the concern for public safety eclipses other factors in weight after the 1996 amendment. Thus, if the application for parole had been reviewed prior to the amendment, when public safety was not so heavily emphasized, it

was more likely than not that parole would have been granted on the facts of this case. Accordingly, the court concluded that Mr. Mickens-Thomas had established a substantial likelihood of an increase in the period of his incarceration because of the policy changes. The case was then remanded to the parole board to reconsider the application for parole in light of the Circuit Court's observations regarding the *ex post facto* claim.[2]

A short time after the decision in Mickens-Thomas, this court again visited the question of *ex post facto* challenges to the denial of parole in the case of Finnegan. The appellant in that case presented his claim through a writ of mandamus. A majority of the court agreed that mandamus was the proper vehicle to bring a consitutional challenge to the denial of parole. Id. at 687. Then, reaching the merits of the consitutional *ex post facto* claim the majority found that the amendments did not alter the criteria the parole board used in exercising its discretion on parole applications. Id. at 688. The majority firmly stated that a change in policy guiding the discretion of the parole board can never support a claim of an *ex post facto* violation in the denial of parole. Id. at 690. As for the decision in Mickens-Thomas, the Finnegan court distinguished that case on the basis of the distinctive factual assertions made by the litigants to support their claims of an ex *post facto* violation in the two cases:

> *Mickens-Thomas* concerned the issue of greater emphasis being given to the public safety factor in the parole decision, whereas public safety was not even a factor mentioned as a basis for the denial of parole in appellant's case. Thus, we are not bound by the Third Circuit's decision.

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[2] On remand the board again denied the application for parole. The matter was again brought to the Third Circuit Court of Appeals where the petition for habeas relief was granted and the board was ordered to release Mr. Mickens-Thomas on parole, as the court found an *ex post facto* violation had occurred. Mickens-Thomas v. Vaughn, 355 F.3d 294 (2004). Although one could question the Third Circuit's conclusion that an ex *post facto* violation had been established on the facts presented, it cannot be contested that the Third Circuit applied the correct legal standard in reaching its conclusion.

Id., at 689.

Justice Saylor authored a dissent in Finnegan, joined by myself, and Justice Nigro. The primary point of dissonance between the dissent and majority was on the question of whether an *ex post facto* claim may arise from a change in parole guidelines. The majority definitively stated that "the *ex post facto* clause does not apply to the parole guidelines. . . " Id. at 690. The dissent disputed that holding, pointing out that the underlying issue was one controlled by federal law, and reminding the majority that in Garner, the United States Supreme Court unmistakably recognized that the *ex post facto* clause bars retroactive changes in parole policies that create a substantial risk of prolonging a prisoner's incarceration. The dissenting Justices favored a remand to allow for a hearing to consider Finnegan's statistical evidence that a systematic change in parole policies following implementation of the 1996 amendments created a significant risk of prolonged incarceration, in support of his *ex post facto* claim.

In the case at bar, the majority recognizes that tension exists between the decisions of this court in the recent opinions of Winkelspecht and Finnegan, and the concurrent pronouncement of the Third Circuit Court of Appeals in Mickens-Thomas. The majority summarily rejects the decision in Mickens-Thomas. It is the kernel of reasoning upon which the federal and state opinions on this question diverge that causes me to reject the analysis of the majority. The ultimate question of whether a change in parole policy that creates a substantial risk of prolonging incarceration may constitute an *ex post facto* violation has been answered in the affirmative by the United States Supreme Court. Garner; Morales.

What the majority herein is missing is that the decisions by this court in Winkelspecht and Finnegan fail to accept and comport with the holdings of the United States Supreme Court on the question of whether parole policy changes can provide a legitimate basis to assert an *ex post facto* violation. The majority now compounds that mistake by its blanket refusal to consider the reasoning employed by the Third Circuit in Mickens-Thomas. The

critical point is that a change in parole policy as applied to a person sentenced under the previous policy can in fact create an increase in that person's period of incarceration and that any individual prisoner has the right to mount such a challenge. Whether the prisoner can demonstrate that a violation has occurred, and that he in fact faces a significant risk of an increase in punishment by application of the new policy, is a question of proof.

By rejecting the Third Circuit's opinion in Mickens-Thomas, the majority in this instance repeats the original error committed by our court in Winkelspecht and Finnegan.[3]

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[3] I recognize that Finnegan is a recent majority decision of this court and under the doctrine of *stare decisis* it would ordinarily be entitled to adherence as precedential authority. However, this court has never uncritically employed the concept of *stare decisis* to perpetuate error, particularly in the constitutional arena, where the Legislature cannot correct any error we make. See generally Hohn v. United States, 524 U.S. 236, 251, 118 S. Ct. 1969, 1977 (1998) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress is free to alter what we have done.") (internal quotation marks omitted). As I firmly believe the opinion in Finnegan erroneously fails to follow binding federal authority, I do not believe we should continue to perpetuate that error by hiding behind a judicial doctrine. See, e.g., Hack v. Hack, 433 A.2d 859, 867-68 (Pa. 1981) (abolished doctrine of interspousal immunity and recognized that "[t]his court has full authority, and the corresponding duty to examine its precedents to assure that a rule previously developed is not perpetuated when the reason for the rule no longer exists and application of the rule would cause injustice"); Mayle v. Pennsylvania Department of Highways, 388 A.2d 709, 720 (Pa. 1978) (abolished doctrine of sovereign immunity and recognized that "*[s]tare decisis* should not be invoked to preserve a rule of law when [there is] no better reason for [it] than [that] is was laid down in the time of Henry IV"); Mayhugh v. Coon, 331 A.2d 452, 456 (Pa. 1975) ("the doctrine of stare decisis was never intended to be used as a principle to perpetuate erroneous principles of law"); Ayala v. Philadelphia Board of Public Education, 305 A.2d 877, 887-89 (Pa. 1973), ("the doctrine of *stare decisis* is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice, and thus, permits the orderly growth processes of law to flourish"); Olin Mathieson Chemical Corp. v. White Cross Stores, Inc., 199 A.2d 266, 268 (Pa. 1964), ("While it is true that great consideration should always be accorded precedent, especially one of long standing and general acceptance, it doesn't necessarily follow that a rule established by precedent is infallible. . . . If it is wrong[,] it should not be continued. Judicial honesty dictates corrective action"); Commonwealth v. Lawrence, 193 A.46 (Pa. 1937) ("[we are by] no means unmindful of the salutary tendency of the rule of [sic] *stare decisis*, but at the same time we cannot be unmindful of the lessons furnished by our own (continued…)

Further the majority reaches its conclusion by blindly applying the policy statement as to the impact of inferior federal case law on the decision-making of this tribunal. Although I agree with the majority that decisions of inferior federal courts are not binding on this court, and will merely be looked to as potentially persuasive authority on questions of federal law, my problem is that the majority fails to apply that principle in this case. The majority fails to consider the reasoning of the inferior federal court before summarily rejecting it.

I must dissent from the majority's refusal to consider the reasoning of an inferior federal court on a question of federal law. Furthermore, I dissent as I believe the decisions in Winkelspecht and Finnegan are in error as they ignore the holdings of the United States Supreme Court in Garner and Morales.

Messrs. Justice Nigro and Saylor join this dissenting opinion.

(…continued)
consciousness, as well as by judicial history, of the liability to error and the advantages of review"). Moreover, to the extent the majority would argue the doctrine of *stare decisis* required that the application of the 1996 parole guidelines can never result in an ex post facto violation, see Majority Opinion, slip op. at 11, it is mistaken. Further, it should be noted that Finnegan's determination was based upon a counting error because, as discussed above, Finnegan relied upon Winkelspecht in this regard, and Winkelspecht does not reflect majority support for such a position. See, e.g., Finnegan, 838 A.2d at 691 (Saylor, J., dissenting).