[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	:	
	:	
	:	
	:	

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MADAME JUSTICE NEWMAN **DECIDED: June 22, 2004**

Bryan P. Hall (Hall) appeals from an Order of the Commonwealth Court, which dismissed his *pro se* Petition for Review in the Nature of Mandamus, brought in the original jurisdiction of the Commonwealth Court. Hall contends that the Pennsylvania Board of Probation and Parole (Board) improperly denied his numerous requests for parole by judging his applications pursuant to standards enacted in 1996, five years after his date of sentence. For the reasons discussed herein, we affirm the Order of the Commonwealth Court.

FACTS AND PROCEDURAL HISTORY

Hall is currently serving a prison sentence of four to twenty years at the State Correctional Institution in Dallas, Pennsylvania, for convictions of aggravated assault,[1] aggravated indecent assault,[2] and related charges stemming from his arrest on June 26, 1991. Hall, who has been incarcerated since his arrest, had a minimum sentence date of June 28, 1995, and a maximum sentence date of June 28, 2011. He appeared before the Board on May 24, 1995, in anticipation of the expiry of his minimum sentence term. In a decision dated June 13, 1995, the Board denied parole based on the following factors: (1) substance abuse; (2) habitual offender; (3) assaultive instant offense; (4) very high assaultive behavior potential; (5) the need for treatment; (6) failure to benefit from treatment programs for sex offenders or substance abuse; and (7) an unfavorable recommendation from the Department of Corrections. Reproduced Record (R.R.) at A-1. The Board informed Hall that to improve his parole candidacy he: (1) must participate in prescriptive programs; (2) maintain a clear conduct record; and (3) earn an institutional recommendation from the Department of Corrections. Id.

From 1996 through 1998, on an annual basis, Hall appeared before the Board, which rejected his parole requests, citing itemized reasons and indicators that it would review at his next parole hearing. Id. at A-2, A-3, A-4. Hall again appeared before the Board on March 11, 1999. Again, the Board denied parole, this time explaining that "[f]ollowing an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in

[1] 18 Pa.C.S. § 2702.

[2] 18 Pa.C.S. § 3125.

the fair administration of justice cannot be achieved through your release on parole." Id. at A-5. The Board used the same language in a decision denying parole filed in 2000. Id. at A-6. The Board supported its parole denials on April 10, 2001, and June 13, 2002, with the following language: "[f]ollowing an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the fair administration of justice cannot be achieved through your release on parole." Id. at A-7, A-8.

On July 9, 2002, Hall filed a *pro se* Petition for Review in the nature of a request for *mandamus* in the original jurisdiction of the Commonwealth Court. Hall contended that the 1996 amendments to the Parole Act[3] materially changed the criteria for granting and denying parole, and that application of the amended Parole Act to his parole requests violated the constitutional prohibition against *ex post facto* laws. Specifically, Hall contended that the 1996 amendments shifted the policy statement of the Board from one that recognized the "value of parole as a disciplinary and corrective influence and process" to one that emphasizes the protection of public safety. 61 P.S. § 331.1 (1995 and 2003). The Board sought a stay of the matter pending the Commonwealth Court's disposition of Reynolds v. Pennsylvania Board of Probation and Parole, 809 A.2d 426 (Pa. Cmwlth. 2002). The Commonwealth Court decided Reynolds on October 21, 2002, rejecting similar arguments to those presented *sub judice*.

On October 28, 2002, while the Commonwealth Court proceedings were stayed, the Board modified its June 13, 2002 decision to deny parole to read as follows:

> Following an interview with you and a review of your file, and having considered all matters required pursuant to the Parole Act of 1941, as amended, 61 P.S. § 331.1 et seq., the Board of

[3] Act of August 6, 1941, P.L. 861, as amended, 61 P.S. §§ 331.1 - 331.34a.

> Probation and Parole, in the exercise of its discretion, has determined at this time that: your best interests do not justify or require you being paroled/reparoled; and, the interests of the Commonwealth will be injured if you were paroled/reparoled. Therefore, you are refused parole/reparole at this time. The reasons for the Board's decision include the following:
>
> The recommendation made by the prosecuting attorney.
>
> Reports, evaluations and assessments concerning your physical, mental and behavior condition and history.
>
> Other factors deemed pertinent in determining that you should not be paroled: your prior criminal history.

R.R. at A-9. On November 26, 2002, relying on Reynolds, the Commonwealth Court denied the Petition for Review filed by Hall. Hall now appeals to this Court, contending that application of the 1996 amendments to the Parole Act to his parole requests operated in contravention of the prohibition of the *ex post facto* clause contained in the United States Constitution. U.S. CONST. Art. I § 10 ("[n]o state shall . . . pass any . . . ex post facto law").

DISCUSSION

Though the claims herein presented by Hall concern application of the Parole Act, the resolution of this matter turns on the principles of separation of powers and *stare decisis*, rather than the substantive arguments raised by Hall.

Just last year, in Winklespecht v. Pennsylvania Board of Probation and Parole, 813 A.2d 688 (Pa. 2002), this Court was faced, *inter alia*, with the exact question Hall presents today: does application of the newly-amended Parole Act to an inmate sentenced prior to the promulgation of those amendments violate the *ex post facto* clause of the United States

Constitution?[4] Although we filed Winklespecht as a fractured Opinion Announcing the Judgment of the Court, at least three Justices agreed that there was no *ex post facto* violation. See id. at 691-692 ("[t]he rewording of 61 P.S. § 331.1 did not create a substantial risk that parole would be denied any more frequently than under the previous wording, nor did the addition of this language create a new offense or increase the penalty for an existing offense") (Opinion Announcing the Judgment of the Court per Eakin, J.); id. at 693 ("I fully agree . . . with the lead opinion's conclusion that the constitutional *ex post facto* claim raised here . . . is entirely meritless") (Castille, J., concurring, joined by Newman, J.); id. at 697.[5] However, subsequently, a clear majority of this Court explicitly held that application of the 1996 amendments to the Parole Act to individuals incarcerated prior to the effective date of those amendments did not violate the *ex post facto* clause. Finnegan v. Pennsylvania Board of Probation and Parole, 838 A.2d 684 (Pa. 2003).[6]

---

[4] Walter Winklespecht was convicted and sentenced in 1988 for rape, involuntary deviate sexual intercourse, and aggravated assault. The trial court sentenced him to seven to twenty years' imprisonment and a consecutive term of five years' probation.

[5] Mr. Chief Justice Emeritus Zappala, Mr. Chief Justice Cappy, and Mr. Justice Nigro did not express any opinion on whether application of the 1996 amendments to the parole request of Winklespecht violated the *ex post facto* clause. Mr. Justice Saylor, while not expressing a definitive view on the issue, stated: "[w]hile the statutory changes may have placed particular emphasis on . . . considerations [such as public safety and the fair administration of justice], any conclusion that there is a substantial risk of prolonging incarceration sufficient to offend *ex post facto* prohibitions would appear to be based on mere conjecture." Winklespecht , 813 A.2d at 697 (Saylor, J., concurring and dissenting).

[6] Mr. Justice Eakin authored the majority opinion in Finnegan, which Messrs. Justice Castille and Lamb, and myself, joined. The dissent makes it a point to de-emphasize the precedential value of Finnegan because of Finnegan's reliance on the plurality opinion in Winklespecht. Nevertheless, four justices in Finnegan agreed that application of the 1996 amendments to the Parole Act to persons sentenced prior to the amendments does not violate the *ex post facto* clause and, therefore, whether or not the Court erred in counting a majority in Winklespecht is of no moment because there is a clear majority in Finnegan. See Finnegan, 838 A.2d at 690 ("[w]e reiterate that the 1996 revision of . . . the Parole Act
(continued…)

Seven weeks after Winklespecht, on February 21, 2003, the United States Court of Appeals for the Third Circuit, faced with an identical substantive contention, decided Mickens-Thomas v. Vaughn, 321 F.3d 374 (3d Cir. 2003). The Third Circuit rejected the determination of this Court in Winklespecht, finding instead that applying the 1996 amendments to Mickens-Thomas, who had been sentenced in 1969, violated the *ex post facto* prohibition. The Third Circuit found that parole policy in the Commonwealth shifted after 1996, which calculably lessened the chances that an inmate would be paroled. The Third Circuit reasoned as follows:

> [P]rior to 1996, the Board's concern for potential risks to public safety could not be the sole or dominant basis for parole denial under the existing Guidelines. Considerations of public safety were already incorporated into its Guidelines analysis; the Board had to point to "unique" factors as a basis for its rejection of the Guidelines. Moreover, the Board had to weigh all factors, militating for and against parole, and make its decision on the totality of the factors pertinent to parole, and give appropriate weight to the interests of the inmate. Heavy foot application on one factor could not have been the basis of granting or rejecting parole. Policy declarations in and after 1996 demonstrate that Board stance shifted and that, indeed, post-1996 considerations of public safety became the dominant concern of the Board

---

(…continued)
does not violate the *ex post facto* clause when applied to a prisoner convicted prior to the revision").

All alleged counting errors aside, we have considered and flatly rejected the arguments raised by the dissent concerning application of Garner v. Jones, 529 U.S. 244 (2000), and California Department of Corrections v. Morales, 514 U.S. 499 (1995). See Finnegan, 838 A.2d at 688. In resurrecting these arguments, regrettably, the dissent attempts to revive the substantive dispute that has been settled definitively by a majority of this Court. In spite of these efforts, we refuse to alter the purely jurisprudential nature of this decision.

Id. at 386. The Third Circuit has reaffirmed its position on at least two subsequent occasions: Hollawell v. Gillis, 65 Fed. Appx. 809 (3d Cir. 2003) (memorandum), cert. denied, ___ U.S. ___, 124 S.Ct. 229 (October 6, 2003), and McLaurin v. Larkins, 76 Fed. Appx. 415 (3d Cir. 2003) (memorandum).[7] Hall recognized this divergence in legal authority when he asked us to consider his appeal in light of Mickens-Thomas. Accordingly, given our rejection of the *ex post facto* argument in Winklespecht, as clarified by Finnegan, at this juncture our concern is no longer a question of whether there is an *ex post facto* violation, but whether we are constrained by Mickens-Thomas.

It is beyond cavil that this Court is bound by the determinations of the United States Supreme Court on issues of federal law, including the construction and interpretation of the federal constitution. Purple Orchid, Inc. v. Pennsylvania State Police, 813 A.2d 801, 806 (Pa. 2002) (citing Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc., 689 A.2d 213, 216 (Pa. 1997)). However, whether or not this Court has a responsibility to adhere to the pronouncements of inferior federal courts on matters of federal law, where the United States Supreme Court has not spoken, is less certain. There appear to be four schools of thought on this question: (1) a decision of an inferior federal court should be treated as persuasive, but not binding, authority; (2) a decision of an inferior federal court should be followed, if reasonably possible, to avoid a conflict between state and federal resolutions of the same question; (3) a decision of an inferior federal court binds the state court; and (4) if the decisions of the inferior federal courts are "numerous and consistent," the state court must follow their dictates.

[7] In a footnote in McLaurin, the Third Circuit noted that *certiorari* is pending in Mickens-Thomas. McLaurin, 76 Fed. Appx. 415 at *2 n.3.

A vast majority of state supreme courts that have addressed this issue have adopted the first approach. See, e.g., Totemoff v. State, 905 P.2d 954 (Alaska 1995), cert. denied, 517 U.S. 1244 (1996); Custom Microsystems, Inc. v. Blake, 42 S.W.3d 453 (Ark. 2001); Hill v. Thomas, 973 P.2d 1246 (Colo. 1999), affirmed, 530 U.S. 703 (2000); Macon-Bibb County Hospital Authority v. National Treasury Employees Union, 458 S.E.2d 95 (Ga. 1995); Indiana Department of Public Welfare v. Payne, 622 N.E.2d 461 (Ind. 1993); Shell Oil Company v. Secretary, Revenue and Taxation, 683 So.2d 1204 (La. 1996); ACE Property Casualty and Insurance Co. v. Commissioner of Revenue, 770 N.E.2d 980 (Mass. 2002);[8] In Re 3628 V Street, 628 N.W.2d 272 (Neb. 2001); Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239 (N.J. 1990); Custom Cabinet Factory of New York, Inc. v. Eighth Judicial District Court ex rel. County of Clark, 62 P.3d 741 (Nev. 2003); Bogart v. CapRock Communications Corp., 69 P.3d 266 (Okla. 2003); State v. Austin, 685 A.2d 1076 (Vt. 1996); Election Board of State of Wisconsin v. Wisconsin Manufacturers & Commerce, 597 N.W.2d 721 (Wis. 1999), cert. denied, 528 U.S. 969 (1999).

At least two jurisdictions give slightly more deference to the federal appeals court of the circuit where the state is located. Red Maple Properties v. Zoning Commission, 610 A.2d 1238, 1242 n.7 (Conn. 1992) ("It would be a bizarre result if this court [adopted one analysis] when in another courthouse, a few blocks away, the federal court, being bound by

[8] But see Commonwealth v. Masskow, 290 N.E.2d 154 (Mass. 1972). In Masskow, the Supreme Judicial Court of Massachusetts noted the general rule that decisions of federal appeals courts are persuasive, but that "[i]t would be undesirable . . . to affirm the conviction of a defendant if the inevitable consequence were that he would be released on a writ of habeas corpus." Id. at 157. Accordingly, without deciding the issue, for purposes of the case, the Supreme Judicial Court of Massachusetts assumed that the federal appeals court "accurately state[d] the [f]ederal law." Id. Ultimately, however, the Masskow Court did not follow the federal precedent, finding the case distinguishable on its facts.

the Second Circuit rule, required [a different result]"); Littlefield v. State, Department of Human Services, 480 A.2d 731, 737 (Me. 1994) ("even though only a decision of the Supreme Court of the United States is the supreme law of the land on a federal issue . . . nevertheless, in the interests of existing harmonious federal-state relationships, it is a wise policy that a state court of last resort accept, so far as reasonably possible, a decision of its federal circuit court on such a federal question").

Mississippi and New Hampshire hold that they are constrained by the interpretations of federal law forwarded by the Fifth and First Circuits, respectively. Columbus Chemical and Paper, Inc. v. Chamberlin, 687 So.2d 1143 (Miss. 1996); Desmarais v. Joy Manufacturing Co., 538 A.2d 1218 (N.H. 1988). Finally, Alabama, California, and Illinois will consider themselves bound by interpretations of inferior federal courts, but only where the decisions of those courts are "numerous and consistent." Etcheverry v. Tri-Ag Service, Inc., 993 P.2d 366, 368 (Cal. 2000).[9] See also Ex Parte Bozeman, 781 So.2d 165 (Ala. 2000), affirmed, 533 U.S. 146 (2001), and Bishop v. Burgard, 764 N.E.2d 24 (Ill. 2002).

Almost forty years ago, we were faced with the same question of whether and how to consider the interpretations of inferior federal courts on matters of federal law when we decided Commonwealth v. Negri, 213 A.2d 670 (Pa. 1965). In Negri, the question we intended to answer was whether we should adhere to our interpretation of Escobedo v. Illinois, 378 U.S. 478 (1964) (predecessor to Miranda v. Arizona, 384 U.S. 436 (1966)), or the conflicting analysis followed by the Third Circuit Court of Appeals. We recognized the

[9] But see People v. Bradford, 939 P.2d 259 (Cal. 1997), cert. denied, 523 U.S. 1118 (1998) (viewing the decisions of federal courts of appeal as persuasive, but not binding authority).

problem inherent in interpreting federal law in a manner inconsistent with the reasoning advanced by the Third Circuit Court of Appeals, explaining that:

> If the Pennsylvania courts refuse to abide by [the Third Circuit's] conclusions, then the individual to whom we deny relief need only to "walk across the street" to gain a different result. Such an unfortunate situation would cause disrespect for the law. It would also result in adding to the already burdensome problems of the Commonwealth's trial courts, which look to us for guidance. Finality of judgments would become illusory, disposition of litigation prolonged for years, the business of the courts unnecessarily clogged, and justice intolerably delayed and frequently denied.

Negri, 213 A.2d at 672. Ultimately, however, this rationale for applying Third Circuit precedent was rendered mere *dictum* because we determined that Escobedo was not retroactive and, therefore, avoided choosing between the two alternatives. Id. at 676.[10]

More recently, in a number of decisions, this Court has clearly indicated that we are not obligated to follow the decisions of the Third Circuit on issues of federal law. See, e.g., Commonwealth v. Cross, 726 A.2d 333 (Pa. 1999) (this Court not bound by a Third Circuit decision interpreting United States Supreme Court jurisprudence); Commonwealth v. Ragan, 743 A.2d 390 (Pa. 1999) (this Court is not constrained by a Third Circuit decision interpreting federal law); Commonwealth v. Chester, 733 A.2d 1242 (Pa. 1999) (same); Commonwealth v. Laird, 726 A.2d 346 (Pa. 1999) (same). Similarly, as early as 1962, we held that we are not bound by the decisions of other federal Circuit Courts of Appeal. Breckline v. Metropolitan Life Insurance Co., 178 A.2d 748 (Pa. 1962) (Ninth Circuit ruling on federal question does not bind this Court).

---

[10] One year after Negri, the United States Supreme Court, in Johnson v. New Jersey, 384 U.S. 719 (1966), approved the Third Circuit's approach and, accordingly, we conceded to the federal interpretation in Commonwealth ex rel. Wilkes v. Maroney, 222 A.2d 856, 858-859 (Pa. 1966), and Commonwealth v. Senk, 223 A.2d 97, 99 (Pa. 1966).

While we recognize the concerns articulated in Negri regarding conflicting interpretations of federal law by this Court and the Third Circuit, we must reaffirm our Winklespecht/Finnegan analysis. As a foundational matter, the cited portion of Negri was dicta, and in the intervening period, this Court, as well as most other state courts, have determined that they are not bound by the decisions of inferior federal courts. Further, if we were to relent from our newly announced positions merely because the Third Circuit, or any other inferior federal court, has reached a conflicting resolution, we would breed the same disrespect for the law, the concern over which we articulated in Negri. To follow this path, would render illusory the finality of judgments within our Commonwealth. Therefore, rather than reversing the position we took one year ago; we believe that it is more jurisprudentially sound to confirm our prior decision.

Within our federal system of governance, there is only one judicial body vested with the authority to overrule a decision that this Court reaches on a matter of federal law: the United States Supreme Court. Absent a contrary ruling from that tribunal, it is the law of this Commonwealth that application of the 1996 amendments to the Parole Act to persons sentenced prior to their adoption does not violate the *ex post facto* clause of the United States Constitution.

CONCLUSION

For the reasons discussed above, we affirm the Order of the Commonwealth Court.

Mr. Justice Baer concurs in the result.

Mr. Chief Justice Cappy files a dissenting opinion in which Messrs. Justice Nigro and Saylor join.