[J-151-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	Nos. 9-10 EAP 2004
	:	
	:	Appeal from the Judgment of the Superior
Appellant	:	Court entered on 2/25/03 at 3282 EDA
v.	:	2002 quashing in part and reversing in
	:	part the Order of the Court of Common
	:	Pleas, Philadelphia County, Criminal
	:	Division entered on 11/17/00 at No. 9909-
MIRIAM T. WHITE,	:	0819 1/1
	:	
Appellee	:	ARGUED: October 18, 2004

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: November 22, 2006**

I join Parts II, III, and IV.B of the majority opinion, but I respectfully dissent relative to the affordance of as-of-right appellate review of a trial judge's decision on a Commonwealth motion to recuse. My reasoning follows.

As concerns the Commonwealth's ability to appeal as of right under Rule of Appellate Procedure 311(d) from a trial court's order denying a recusal request (Part I of the majority opinion), I would affirm the decision of the Superior Court majority based largely on the reasoning that it supplied. See Commonwealth v. White, 818 A.2d 555, 557-58 (Pa. Super. 2003). Consistent with this Court's recent decision in Commonwealth v. Shearer, 584 Pa. 134, 882 A.2d 462 (2005), the Superior Court recognized that, although Rule 311(d) extends outside the suppression context and

some deference should be accorded to the Commonwealth's good-faith certification, some subject-matter limitations on Rule 311(d)'s scope are appropriate, based on the interest in containing the exception's impingement on the general principle that interlocutory orders are not appealable as of right. See White, 818 A.2d at 559.[1] In my view, this reasoning is consistent with Commonwealth v. Cosnek, 575 Pa. 411, 836 A.2d 871 (2003), as clarified in Shearer, 584 Pa. at 141 & n.6, 882 A.2d at 466-67 & n.6, and I would not overrule Cosnek in any respect. Accord id. at 150-51, 882 A.2d at 472-73 (Saylor, J., concurring) (expressing an understanding of Rule 311(d) similar to that of the Superior Court majority in the present case).

Notably, here the Commonwealth also sought certification of the recusal issue for interlocutory appeal under Appellate Rules 312 and 1311, see also 42 Pa.C.S. §702(b), and then filed a Rule 1511 petition for review with the Superior Court when that request was denied. See White, 818 A.2d at 557 n.1; Pa.R.A.P. 1511. I find this to be the preferable avenue for obtaining review of an order denying recusal, as it permits the appellate court to determine whether it is likely that a sufficient showing of actual or apparent judicial bias appears as of record as a prerequisite to the allowance of an appeal in this setting. Indeed, had the Commonwealth filed an appeal in this Court relative to the Superior Court's decision to deny its petition for review, I would have been inclined to reverse. In this regard, I would apply the majority's reasoning in Part II

[1] My only significant difference with the Superior Court majority's reasoning is its approving reference to the decision on the merits in Commonwealth v. Shearer, 828 A.2d 383 (Pa. Super. 2002), which was recently reversed by this Court. See Shearer, 584 Pa. at 147, 882 A.2d at 470.

of its opinion that Judge Hughes' interactions with Appellee, although they appear to have been well intentioned, raise the potential appearance of impropriety.[2]

On the question of whether Rule 311(d) applies with regard to the Commonwealth's challenge to the trial court's decision to deny its request for a jury trial at the degree-of-guilt hearing, initially, I join the majority's holding, in Part III of its opinion, that the appeal was available as of right under the rule. In this regard, it seems reasonably clear to me that the trial court's refusal of its request for a jury trial substantially handicapped the prosecution, as such decision facially impinged on a constitutional right afforded to the Commonwealth. See PA. CONST. art I, §6.

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[2] It bears mention that Judge Hughes was not alone in her expressions of concern for Appellee and in her efforts to secure the most appropriate disposition. For example, in ruling on the defense request for decertification, a different judge expressed frustration at the defense's rejection of a treatment-oriented settlement proposal that had been advanced by the Commonwealth and indicated as follows:

> This Court expended great effort in trying to secure treatment for Miriam. I did this, in part, out of recognition of the importance to the community that Miriam receive treatment. I made special efforts because . . . my sense of social responsibility dictates to me that we try to help Miriam.
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> * * *
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> I know Miriam is tortured by many demons. I really want to help her.
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> * * *
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> Miriam White . . . is a sad, damaged, disturbed child who needed our help before she hurt somebody else.

N.T., Nov. 2, 2000, at 21-22, 35, 37. The record, however, reflects a qualitative difference between the two judges' treatment of the respective positions of the Commonwealth and the defense, as reflected in the majority opinion.

On the merits, however, I have difficulty with the premise that a degree-of-guilt hearing is appropriate to this case at all, since the Commonwealth, in light of Appellee's age and mental condition, limited the charges against her to third-degree murder and possession of an instrument of crime. See N.T., November 17, 2000, at 6. Rule of Criminal Procedure 590(C), however, provides for a degree-of-guilt hearing when the defendant enters a plea of guilty or nolo contenedre to a charge of murder generally. See Pa.R.Crim.P. 590(C). Here, as noted, there is no longer any such charge pending before the court. Thus, in my view, in the absence of another compromise agreed to by the Commonwealth, Appellee's choice was to plead guilty to the extant charge of third-degree murder or to stand trial.

I agree with the majority's conclusion, however, in Part IV.B of its opinion, that a plea to murder generally encompasses an affirmative waiver, by the defendant, of her right to have a jury determine her degree of guilt, as explained below. The salient point is that, in light of the amendment to Article I, Section 6, a defendant cannot, by means of such waiver, vitiate the corresponding jury-trial right possessed by the Commonwealth.

When a criminal defendant is initially hailed into court, the status quo is that she cannot alone obviate a jury proceeding while maintaining defenses to the charges. The manifest intent to place the Commonwealth on equal footing with a criminal defendant in this respect is made abundantly clear by the plain English statement that accompanied the ballot question proposing the amendment. This statement explains, in significant detail, that the motivation underlying the amendment was the desire to curtail this Court's ability to utilize its procedural rulemaking powers to thwart such equalization.

In line with the approach of the Superior Court, I believe that the analysis of this issue should be grounded on the understanding that the assignment by Rules 590(C)

(Pleas and Plea Agreements/Murder Cases), and 803(A) (Guilty Plea Procedure), of the fact-finding function to a judge, as opposed to a jury, depends integrally upon the defendant's waiver, associated with her invocation of those rules, of her right to a jury trial. See Commonwealth v. White, 818 A.2d 555, 562 (Pa. Super. 2003); see also Commonwealth v. Passmore, 857 A.2d 697, 710 (Pa. Super. 2004). See generally Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551, 560 (2004) ("By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to a trial by jury[.]").

As to the analysis in Part IV.A of the majority opinion, I do agree that, in the wake of the United States Supreme Court decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), it is now manifest that, in the absence of such waiver, a defendant would maintain the right to a jury trial in a degree-of-guilt proceeding. However, I would not proceed under Apprendi by reference to the possibility of a manslaughter verdict. The reason is that a plea to murder generally, and the associated waiver, raise a presumption of guilt of third-degree murder, thus encompassing a presumption of malice. See Commonwealth v. Shaver, 501 Pa. 167, 169, 460 A.2d 742, 743 (Pa. 1983); Commonwealth v. Geiger, 475 Pa. 249, 254, 380 A.2d 338, 340 (1977); Commonwealth ex rel. Kerekes v. Maroney, 423 Pa. 337, 340, 223 A.2d 699, 701 (1966) (noting that, to the extent the defendant may be found guilty of manslaughter after pleading to murder generally, "the burden is upon him to adduce evidence which will so mitigate the offense"). By contrast, the Apprendi rule pertains to facts of which the defendant is presumed innocent, and which the prosecution must prove to a jury beyond a reasonable doubt.

It is more relevant that, to obtain a second- or first-degree murder conviction at an ordinary degree-of-guilt hearing, the Commonwealth must prove facts that elevate the offense to that level. See Maroney, 423 Pa. at 340, 223 A.2d at 701; Commonwealth ex rel. Dandy v. Banmiller, 397 Pa. 312, 315, 155 A.2d 197, 199 (1959). Significantly, in this regard, the penalties for first-degree murder (life imprisonment or death, see 18 Pa.C.S. §1102(a)), and second-degree murder (life imprisonment, see 18 Pa.C.S. §1102(b)), exceed the maximum penalty for third-degree murder (40 years' imprisonment, see 18 Pa.C.S. §1102(d)). Therefore, any sentence for first- or second-degree murder exceeds the maximum sentence otherwise imposable solely on the basis of the general plea to murder. This, in turn, means that, absent an express waiver, a defendant who pleads guilty to murder generally has a federally-guaranteed right under the Sixth and Fourteenth Amendments -- as interpreted in Apprendi and its progeny -- to have a jury decide her degree of guilt. See generally Blakely, 542 U.S. at 313-14, 124 S. Ct. at 2543 (after pleading guilty, the defendant retained the right to have a jury find any fact that would elevate his sentence above the otherwise-imposable statutory maximum); Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362-63 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

Notably, as well, although Apprendi, Blakely, and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002) (invalidating a procedure whereby a sentencing judge, sitting without a jury, finds an aggravating factor necessary for imposition of the death penalty), all pertained to sentencing proceedings, the holdings in those cases derived from the Sixth Amendment's guarantee of a trial by jury. It is thus evident that the United States Supreme Court views the term "trial" in the Sixth Amendment as encompassing a broad

set of criminal proceedings in which fact finding occurs, particularly where the facts found may result in criminal punishment exceeding that which would otherwise be imposable. Given this broad view of the term "trial" under the Sixth Amendment, and that the 1998 amendment to Article I, Section 6 expressly equates the Commonwealth's rights in this setting with those of the defendant, it is appropriate not to apply an unduly narrow definition of the word "trial" to defeat the Commonwealth's jury rights as to degree-of-guilt hearings. In this light, Appellee's suggestion that Apprendi, Ring, and Blakely, having been decided relative to sentencing proceedings, lack relevance in the present, guilt-determining context, is perverse.

Rules 590(C) and 803(A) should obviously be amended in light of the amendment to Article I, Section 6 -- they were written at a time when the Commonwealth did not possess a right to a jury trial and have been grounded in explanations that are in tension with now-prevailing constitutional law. Thus, Appellee's attempt to carry them over in their present form into the post-amendment context is inconsistent with the intent of the revised Constitution and is not supportable. Pending necessary amendments to the rules, I can only envision that a defendant should be afforded their full benefit upon the Commonwealth's consent and waiver of its own jury trial right. Additionally, I note that a defendant has other means of accomplishing some of the effects of Rules 590(C) and 803(A); for example, she may stipulate to facts at trial, such as her involvement in the killing, thus perhaps taking some of the sting out of the Commonwealth's case and enhancing her credibility before the fact finder on the question of her degree of guilt. What she may not do, however, is retain a benefit of these rules (which may be one of the most significant ones) that has been expressly obviated by a constitutional amendment.