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

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

COMMONWEALTH OF PENNSYLVANIA,	:	No. 9 & 10 EAP 2004
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court dated February 23, 2003 at No.
	:	3282 EDA 2000 quashing in part and
v.	:	reversing in part the Order of the Court of
	:	Common Pleas of Philadelphia County,
	:	Trial Division, Criminal Section at No. 814
MIRIAM WHITE,	:	1/1 September Term, 1999
	:	
Appellee	:	818 A.2d 555 (Pa. Super. Ct. 2003)
	:	
	:	ARGUED: October 18, 2004
	:	
	:	

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: November 22, 2006**

I dissent.

Today, in short order, the majority ignores the principle of *stare decisis* by overruling a three-year-old decision of this court, eviscerates the final order rule, erroneously reverses a trial judge's determination that she can be a fair and impartial jurist, and undermines a defendant's right to plead guilty to murder. For these reasons, I can join no part of the majority opinion.

In Commonwealth v. Cosnek, 836 A.2d 871 (Pa. 2003), this court construed Rule 311(d) regarding interlocutory appeals of right. In that case, we explained that the "plain

language" of the rule limits its application to the "circumstances provided by law." Thus, in that case, we undertook an examination of what the phrase, "circumstances provided by law," meant. We conducted a lengthy analysis of the "legal underpinnings" of the Rule, explaining that the language of the Rule was derived from Commonwealth v. Bosurgi, 190 A.2d 304 (Pa. 1963), in which this court devised a strategy for evaluating cases after Mapp v. Ohio, 367 U.S. 643 (1961). In Mapp, the United States Supreme Court concluded that evidence seized in violation of the Fourth Amendment was inadmissible in state proceedings.[1] Thus, Bosurgi held that when a pretrial order of suppression will terminate or handicap the prosecution, the order has an "attribute of finality" so as to give the Commonwealth the right of immediate appeal. In Cosnek, we further explained that subsequent case law clarified Bosurgi, such that the Commonwealth merely needed to allege that an order suppressing, precluding, or excluding Commonwealth evidence terminated or substantially handicapped its case in order for a pretrial appeal under Rule 311(d). Cosnek, 836 A.2d at 874 (citing Commonwealth v. Dugger, 486 A.2d 382, 386 (Pa. 1985)). Ultimately, we set forth a clear understanding of what the phrase "circumstances provided by law" signified, concluding that the application of the rule should be limited "to those 'circumstances provided by law' in which a pretrial ruling results in the suppression, preclusion or exclusion of Commonwealth evidence." Cosnek, 836 A.2d at 877. Simply stated, in Cosnek, we held that Rule 311(d) applied only in those instances in which evidentiary rulings made by the trial court substantially interfered with the presentation of the Commonwealth's case.

[1] "In the wake of Mapp new impetus has been given to the practice of filing by defendants of motions to suppress evidence seized in allegedly illegal searches. In this Commonwealth, such motions, save in exceptional circumstances, are *now required* to be made *in advance of trial*." Bosurgi, 190 A.2d at 308 (emphasis in the original).

In the instant case, the majority first attempts to distance itself from the holding in Cosnek by explaining that the decision was limited to the narrow facts before it. Such an assertion is unconvincing, since the proper construction of Rule 311(d) was hotly debated at the time of Cosnek. Indeed, the majority's position today was one that was advocated in a dissent at the time of Cosnek, but plainly rejected in favor of a different standard. Yet, the same standard that was rejected a mere three years ago is resurrected and offered by the court as a majority viewpoint. Ultimately, even the majority recognizes that it may not be enough to simply "limit" our holding in Cosnek to the facts of that case, and overrules it to the extent it may be understood differently. See Majority Opinion at 8.

We should not simply overrule case law because the composition of the court has changed and a dissenting Justice can garner a majority of votes. The doctrine of *stare decisis* is not new nor should it be ignored. Rather, as this court stated over 100 years ago,

> [i]t is sometimes said that this adherence to precedent is slavish; that it fetters the mind of the judge, and compels him to decide without reference to principle. But let it be remembered that *stare decisis* is itself a principle of great magnitude and importance. It is absolutely necessary to the formation and permanence of any system of jurisprudence. Without it we may fairly be said to have no law; for law is a fixed and established *rule,* not depending in the slightest degree on the caprice of those who may happen to administer it. I take it that the adjudications of this Court, when they are free from absurdity, not mischievous in practice, and consistent with one another, are the law of the land.
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> The inferior tribunals follow our decisions, and the people conform to them because they take it for granted that what we have said once we will say again. There being no superior power to define the law for us as we define it for others, we ought to be a law unto ourselves. If we are not, we are without a standard altogether. The uncertainty of the law--an uncertainty inseparable from the nature of the science--is a great evil at best, and we would aggravate it terribly if we could be blown about by every wind of doctrine, holding for true to-day what we repudiate as false to-morrow.

McDowell v. Oyer, 21 Pa. 417, 423 (Pa. 1853) (emphasis in original). The sentiment expressed in McDowell remains as potent today as when it was written. There is no

question that *stare decisis* requires adherence to recent decisions as precedential authority. Grimaud v. Commonwealth, 865 A.2d 835, 849 n.2 (Pa. 2005) (Cappy, J. dissenting). As I explained in my dissenting opinion in Grimaud, the purpose of *stare decisis* is to ensure predictability and stability in the affairs of government and people and is essential to the rule of law. Id. Moreover, while the doctrine may be disregarded when faced with an unsupportable or erroneous holding, or when over the course of time the reason for a rule of law no longer exists and application would cause injustice, id., the majority fails to explain why the holding in Cosnek should cede for any of these reasons.

Indeed, there was good reason for the holding in Cosnek, which the majority today fails to address, namely, the final order doctrine. The general rule is that only final orders are appealable as of right. Pa.R.A.P. 341. The policy underlying this rule is "to prevent piecemeal litigation and the consequent protraction of litigation." Adcox v. Pennsylvania Mfrs. Ass'n Cas. Ins. Co., 213 A.2d 366, 368 (Pa. 1965). In keeping with this policy, any exceptions to the final order doctrine should be narrowly construed. See, e.g., Melvin v. Doe, 836 A.2d 42, 46-47 (Pa. 2003). As noted by the majority, Rule 311(d) provides one of those rare exceptions to the final judgment rule. The decision in Cosnek properly kept the scope of the exception narrow by focusing on the limited circumstances that the rule was created to protect. In interpreting Rule 311(d) to apply in any instance in which an "order terminates or has the practical effect of terminating some or all of the Commonwealth's case … and the Commonwealth has certified the same in good faith," the majority ignores that the exceptions to the final order rule must be narrowly construed. Rather, the majority chooses to continue the trend to emasculate the final order doctrine where the Commonwealth seeks to appeal an interlocutory order. See, e.g., Commonwealth v. Dennis, 859 A.2d 1270 (Pa. 2004).

The troubling posture taken by the majority opinion is compounded by the fact that it not only assumes jurisdiction over an interlocutory matter, but also reverses the trial judge's

determination that she could be a fair and impartial jurist. While I believed that the standards for recusal were well settled, the majority's application of those standards in this case brings them into doubt. As the author of the majority opinion set forth in Commonwealth v. Druce, 848 A.2d 104, 108 (Pa. 2004), this court presumes that judges of the Commonwealth are honorable, fair, and competent. Furthermore, decisions regarding recusal are, in the first instance, to be made by the trial judge as a matter of self-examination to determine whether she can be fair and impartial. "This assessment is a 'personal and unreviewable decision that only the jurist can make.'" Id. Following this self-examination, the judge is to determine whether her continued presence on the case "creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary." Id. Appellate review is limited to an abuse of discretion standard and a review of our case law makes clear how very deferential appellate courts are to a trial judge's determination regarding recusal.

In Druce, this court was faced with a trial judge who violated Canon 3(a)(6) of the Judicial Code by giving a statement to the press implicating the substantive question at issue in the case before him. This court denied an emergency petition filed by the defendant. Justices Castille and Newman dissented on the basis that the trial judge should remove himself to avoid the appearance of impropriety. Following this court's denial to exercise King's Bench jurisdiction, the case proceeded to sentencing.

This court reviewed the trial judge's recusal decision on direct appeal and the question before this court was whether a violation of the Judicial Code required recusal automatically. We rejected a *per se* standard in favor of the recusal standard set forth above. Furthermore, we concluded that the trial judge adequately addressed the concerns surrounding his comments to the press prior to sentencing, when he "openly acknowledged making the comments, then reiterated his ability to be fair and impartial. He clearly gave the matter considerable thought, and acknowledged the public interest on both sides of the

sentencing issue. We find his introspection and sincere public statements of impartiality sufficient to justify his decision not to recuse himself." Druce, 848 A.2d at 111.

Similarly, in Commonwealth v. Travaglia, 661 A.2d 352 (Pa. 1995), following the trial and first collateral review the trial judge expressed dismay in various statements to the press at the length of time it took to impose the death penalty and stated that "[i]f anyone deserves to die, these two individuals do for killing four people for fun." 661 A.2d at 370 n.37. Appellant filed a motion seeking to disqualify the judge from reviewing his collateral petition. We reviewed the trial judge's reasoning denying the disqualification motion, finding that his opinion was "thoughtful" and deferred to his determination that public confidence would not be affected by his continuing presence on the case. Id. at 370.

What these opinions make clear is that the trial judge's decision regarding recusal is given great deference. Moreover, they evince a trend to give a trial judge the opportunity to reflect on her decision in an opinion or on the record at a time following the initial denial. In this case, the trial judge has not had the opportunity to reflect on her decision and express her reasoning at this early point in the proceedings. This fact is yet another reason why I do not believe an order denying a request for recusal should be immediately appealable.

Nevertheless, I believe there is sufficient evidence on the existing record which supports Judge Hughes' decision. While I agree with the majority that "personal opinions concerning the adequacy or propriety of the law pertaining to a given suggestion have no place on the trial bench," I believe Judge Hughes acknowledged that some of her pretrial comments raised concern and expressed that she could follow the law similar to the trial judges in Druce and Travaglia. In this regard, the majority gives the trial judge's comments regarding her ability to apply the law short shrift by summarizing them into one-line: "although the trial judge stated that she would be able to apply the law…" Majority opinion at 12. In reality, however, her comments were far more substantial.

Specifically, during the discussion of the recusal motion, Judge Hughes stated that "I think any fair examination of my record reveals that I absolutely uphold the law in all instances." N.T., 11/17/2000, at 3. She then stated quite forcefully, "I have not prejudged this case. … The question is what is the degree that should be assigned to it, and the law is very clear. Either the evidence will make out the elements of first, third or whatever, period. There is nothing about the record before me that says I will do anything other than follow the law." Id. at 4. The Commonwealth then asked Judge Hughes whether she could find anything other than third degree murder in this case. She replied that she could not answer the question at this point in the proceedings because she did not know what evidence would be presented and that that question would be for the fact finder. She then explained, "I have read nothing with respect to this case. The Commonwealth will present that evidence as it is required to do. The defense will present whatever it chooses to present, and I will decide. So to have a position that's based on the effort that was made in this very jury room by the four of us to try to have this child evaluated [for mental health] has no bearing on what she is guilty of." Id. at 8-9.

The trial judge separately set forth her reasons for denying the recusal motion at a subsequent status hearing. At that time, Judge Hughes made it evident that pre-trial, her intention was to work with the attorneys to craft a nontrial disposition "that would address the equities and the unique needs of the citizen charged in this case." N.T., 11/20/2000, at 3-4. Recognizing that such a solution did not work, Judge Hughes then stated that she would treat the accused "as an adult." Id. at 4. She further explained her pre-trial conduct: "Prior to there being a ruling on decertification I implored these lawyers to do what I deem to be humane, appropriate, and the best interest of our community and the best interest of Mariam [sic] White." Id. at 5. Again, she recognized that her efforts were unsuccessful and reiterated that "She will be tried as an adult." Id.

Like the trial judges in Druce and Travaglia, Judge Hughes made clear that she had not prejudged this matter and that she could be a fair and impartial jurist. She acknowledged the comments that she had made, explained that she was only trying to do what was in the best interests of the accused and the community, and then further explicated that those comments related to the pre-trial stage and that nothing that she said or did during that stage would have any impact on the degree of guilt hearing.

Additionally, her statements at these hearings clarified that her pretrial comments and conduct were based on her belief that this case was out of the ordinary, since it involved a thirteen-year-old girl, with the mind of a seven-year-old, on trial for murder. In my opinion, commenting on the extraordinary nature of a case does not amount to an "appearance of impropriety." Nevertheless, even presuming Judge Hughes' comments created the appearance of impropriety, any appearance of impropriety was resolved by her subsequent statements that she would follow the law. Accordingly, even if I believed that a recusal motion was the proper subject of an immediate appeal, I could not join the majority's resolution of the substance of this issue.

Finally, I disagree with the majority's analysis and resolution of the question of whether the Commonwealth has a right to demand a jury trial for purposes of a degree of guilt hearing. The majority apparently believes that the only way to answer this question is to inquire into whether the defendant would have such a right in these circumstances. Accordingly, in answering this question, the majority turns to federal constitutional law.

This analysis overlooks that the Commonwealth's right to a jury trial is a unique animal under the Pennsylvania Constitution and does not implicate federal constitutional rights. The Pennsylvania Constitution provides that "in criminal cases the Commonwealth shall have the same right to trial by jury as does the accused." PA. CONST. art. I, § 6. By its

terms, Article I, Section 6 gives the parties the right to demand a jury if there is a trial.[2] When a defendant pleads guilty to murder generally, however, *there is no trial*. Commonwealth v. Petrillo, 16 A.2d 50, 56 (Pa. 1940) ("The proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial."); see also Commonwealth v. Kirkland, 195 A.2d 338, 340 (Pa. 1963) ("In indictments for murder, defendant, with the consent or approval of his attorney of record, may plead guilty, in which event the crime and the degree of the crime are determined and fixed by a Judge or a Court without a jury."); cf. Commonwealth v. Staush, 101 A. 72 (Pa. 1917); accord Hallinger v. Davis, 146 U.S. 314 (1892) (finding that due process allows a capital defendant to waive the right to jury and proceed before a judge alone for determining the degree of guilt). Indeed, this court has clearly stated on more than one occasion that "determining the degree of guilt is not a trial though facts from the evidence must be found." Commonwealth v. Shawell, 191 A. 17, 21 (Pa. 1937); see Petrillo, 16 A.2d at 56. There is no ambiguity in Pennsylvania jurisprudence: a degree of guilt hearing is not a trial.

The majority fails to confront this unmistakable and controlling case law in any meaningful fashion, choosing instead to focus its attention on federal constitutional law. Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and Blakely v. Washington, 542 U.S. 296 (2004). Whether Apprendi, Ring, and Blakely would guarantee a criminal defendant the right to a jury at a degree of guilt hearing has nothing to do with whether a degree of guilt hearing is a trial. Furthermore, those cases do not

[2] My research leads me to the inescapable conclusion that Article I, Section 6 prescribed the right to a mode or method of trial, i.e., a "jury trial." Accord Byers and Davis v. Commonwealth, 42 Pa. 89 (1862) (discussing that "mode of trial," i.e., the right to trial by jury "had long been considered the right of every Englishman"); Singer v. United States, 380 U.S. 24 (1965) (explaining that trial by jury was the one, regular common law mode of trial). Accordingly, I would conclude that Article I, Section 6 gives the parties the right to demand a jury if there is a trial; and in this case, the amendment to Article I, Section 6 gives the Commonwealth the reciprocal right to demand a jury when there is a trial.

compel us to revisit our case law holding that a degree of guilt hearing is not a trial, since they do not define what constitutes a trial. Rather, Apprendi, Ring and Blakely are concerned with when the right to a jury attaches under the Sixth and Fourteenth Amendments. Those amendments, taken together, entitle a defendant "to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Apprendi, 530 U.S. at 477. The United States Supreme case law has no effect on this court's construction of "trial" under Article 1, § Section 6.

Indeed, it strains credulity to base the Commonwealth's right to a jury trial *under the Pennsylvania Constitution* upon a defendant's right to a jury *under the United States Constitution*. To make our interpretation of the Pennsylvania Constitution dependent upon an analysis of the United States Constitution ignores that our Constitution is a separate and independent document containing distinct rights and remedies. This fact is never truer than in a situation when the right does not even exist under the United States Constitution.

Moreover, utilizing Apprendi, Ring, and Blakely to give the Commonwealth the right to demand a jury at a degree of guilt hearing turns those decisions on their heads by giving them a meaning that was never contemplated by the United States Supreme Court. In those cases, the High Court sought to "expand" an accused's right to have a jury at certain criminal proceedings. The majority takes the enhanced right of an accused and perverts it to thwart the accused's right to choose to proceed before a judge. Equating the Commonwealth's rights with the rights of the accused ignores that the Commonwealth can never be in the same position as the accused, since it is impossible for the Commonwealth to be in a position to plead guilty.[3] In fact, the majority's holding will have the practical

[3] Contrary to the Majority, I am not convinced that the Sixth Amendment of the United States Constitution plays a role in interpreting Article 1, Section 6 of the Pennsylvania Constitution. Consistent with this court's prior case law, Article 1, Section 6 was simply an attempt to preserve the parties' right to a jury as it existed at common law, and, thus, the amendment would merely give the Commonwealth the same right to a jury as the accused (continued…)

effect of undermining a defendant's decision to plead guilty in a criminal case and forcing the defendant to a trial.

For these reasons, I respectfully, but emphatically, dissent.

Mr. Justice Baer joins this dissenting opinion.

(…continued)
as it existed at common law. Indeed, I believe there is a question whether Article 1, Section 6 is an "analogous" provision to the Sixth Amendment, since the rights given by the Sixth Amendment mirror those contained in Article 1, Section 9 and not Article 1, Section 6. Accordingly, I doubt whether the Sixth Amendment case law is relevant in any fashion to a discussion of Article 1, Section 6.