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

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

COMMONWEALTH OF PENNSYLVANIA,	: No. 9 & 10 EAP 2004
	:
Appellant/Cross-Appellee	: 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/Cross-Appellant	: 818 A.2d 555 (Pa. Super. Ct. 2003)
	:
	: ARGUED: October 18, 2004

OPINION

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

Mr. Justice Eakin announces the Judgment of the Court. Mr. Justice Eakin delivers the Opinion of the Court with respect to parts II, III, and IV.B, in which Mr. Justice Castille, Madame Justice Newman and Mr. Justice Saylor join, and a plurality opinion with respect to parts I and IV.A, in which Mr. Justice Castille and Madame Justice Newman join.

This appeal presents two issues: (1) whether an interlocutory appeal as of right, pursuant to Pa.R.A.P. 311(d), lies from a trial court's denial of a motion for recusal; and (2) whether the Commonwealth has a right under the Pennsylvania Constitution to have a jury determine the degree of guilt after a defendant pleads guilty to murder generally. The Superior Court concluded it did not have jurisdiction under Pa.R.A.P. 311(d) to review the recusal motion, and that the Commonwealth has a right to a jury at a degree of guilt

hearing. Commonwealth v. White, 818 A.2d 555 (Pa. Super. 2003). We reverse in part and affirm in part.

The Philadelphia police arrested 11-year-old Mariam[1] White in conjunction with the stabbing death of Rose Marie Knight. By operation of law, White was charged as an adult for the crime of murder. See 42 Pa.C.S. § 6355(e). There were several failed attempts at negotiating a plea before the Honorable Renee Cardwell Hughes of the Philadelphia Court of Common Pleas. Subsequently, White's counsel moved to decertify the case to juvenile court. The decertification proceedings occurred before the Honorable Legrome D. Davis. Before the decertification motion was decided, several more attempts at negotiating a plea were made, but no agreement was reached. Ultimately, Judge Davis denied decertification, and the case returned to Judge Hughes. See N.T. Decertification Hearing, 11/2/00, at 38.

Defense counsel told Judge Hughes that White intended to plead guilty to murder generally and requested that the court schedule a degree of guilt hearing. N.T. Status Hearing, 11/8/00, at 4. The prosecutor inquired whether the judge believed a degree of guilt hearing could result in a verdict of less than third degree murder, i.e., voluntary manslaughter. Id., at 8-9. Judge Hughes responded in the affirmative. Id. at 9. One week later, the prosecutor appeared before Judge Hughes and asked that she recuse herself. N.T. Status Hearing, 11/17/00, at 2. The prosecutor asserted that while plea negotiations were ongoing prior to the decertification proceedings, Judge Hughes made statements which showed judicial bias. Id., at 4. Judge Hughes denied the request for recusal. The prosecutor also requested that the Commonwealth be afforded its right to a jury trial. Id., at 10. Judge Hughes denied the request. Finally, the prosecutor asked that the court certify

[1] White's first name appears in the record as both "Miriam" and "Mariam"; however, a document bearing White's signature reflects the spelling as "Mariam."

both questions for immediate appeal under 42 Pa.C.S. § 702(b).[2] Id., at 11-12. Again, the judge denied the request. The Commonwealth appealed the judge's rulings.

On appeal, the Superior Court quashed in part and reversed in part. White, at 563. The court first addressed the availability of an immediate appeal from an order denying a recusal motion under Pa.R.A.P. 311(d), which allows the Commonwealth to appeal, as of right, an interlocutory order that "terminates or substantially handicaps" the prosecution. White, at 558. The court reasoned it need not "accept blindly" the Commonwealth's certification of substantial handicap. Id. Rather, "when issues other than those evidentiary in nature are raised, we may pause to consider the propriety of the Commonwealth's certification." Id., at 559. The court considered the fact that the ruling did not interfere with the Commonwealth's ability to present its case, and ultimately declined to expand Rule 311(d) to include an appeal from an order denying recusal. White, at 559. The court also considered whether the jury trial issue was appealable under Rule 311(d), and concluded that precluding the Commonwealth from appellate review of this issue would allow a trial court to overrule a constitutional provision based on its own interpretation, which "no doubt" constituted a substantial handicap under Rule 311(d). White, at 560-61.

In considering whether the Commonwealth has a right to a jury at a degree of guilt hearing, the Superior Court first noted the procedural rule governing such hearings "affords a criminal defendant the option of having the trial judge, rather than a jury, determine her degree of guilt." Id., at 561. The court then noted that "implementation of the Rule is irrelevant in the event that the Commonwealth seeks to exercise its constitutional right to a

[2] This section governs interlocutory appeals by permission and allows the court to certify an issue for appeal when it is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." 42 Pa.C.S. § 702(b).

jury trial." Id. The Commonwealth's right to a jury trial is "the same as" the defendant's, as provided for by Article 1, § 6 of the Pennsylvania Constitution. "Its effect, simply, is to permit the Commonwealth to insist on a jury trial despite a criminal defendant's decision to waive that same right." White, at 561. The Superior Court concluded a guilty plea to murder generally is unique, and what follows is akin to a trial, since the proceedings still involve the presentation of evidence, the arguments of counsel, and the findings of fact in support of the verdict. Id., at 562. Accordingly, the court concluded a degree of guilt hearing was "a variation of a waiver trial and as such, it cannot trump the Commonwealth's constitutional right to demand a jury trial." Id.

This Court granted allowance of appeal on the question of "whether the Commonwealth is permitted to appeal an order denying recusal of a trial judge as an interlocutory order pursuant to Pa.R.A.P. 311(d), and if so, whether denial of the recusal motion was in error." Commonwealth v. White, 845 A.2d 199, 200 (Pa. 2004). We also granted allowance of appeal to address whether the Commonwealth has a right to a jury at a degree of guilt hearing when a defendant pleads guilty to murder generally.[3]

I. Commonwealth's Right to Appeal Denial of Recusal Under Pa.R.A.P. 311(d)

We turn first to the question of the Commonwealth's right to appeal under Rule 311(d) when a trial court denies a recusal motion. It is well settled that, as a general rule, appellate courts have jurisdiction only over final orders. See 42 Pa.C.S. § 742 (providing appellate jurisdiction to Superior Court over "final orders"); id., § 762 (same for Commonwealth Court); Commonwealth v. Wells, 719 A.2d 729 (Pa. 1998). That general rule, however, is subject to exceptions which give appellate courts jurisdiction to review

[3] The two issues presented for review are purely questions of law. Accordingly, our standard of review is de novo, and our scope of review is plenary. Buffalo Twp. v. Jones, 813 A.2d 659 (Pa. 2002).

interlocutory orders under limited circumstances. See 42 Pa.C.S. § 702 (governing appellate jurisdiction over interlocutory orders); see also Pa.R.A.P. 311 (interlocutory appeals as of right); Pa.R.A.P. 312 (interlocutory appeals by permission). Rule 311(d) provides such an exception in criminal cases when an order terminates or substantially handicaps the prosecutor's case:

> In a criminal case, under the circumstances provided by law, the Commonwealth may take an appeal as of right from an order that does not end the entire case where the Commonwealth certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution.

Pa.R.A.P. 311(d).

The Commonwealth asserts the text of Rule 311(d) does not bar review of recusal rulings. Further, a plain reading of the text, coupled with this Court's prior case law, leads to the conclusion that the Commonwealth must be allowed to appeal from pre-trial rulings that implicate "the particular burden which it bears to prove its case." Commonwealth's Brief, at 33 (quoting Commonwealth v. Cosnek, 836 A.2d 871, 877 (Pa. 2003)). According to the Commonwealth, an order denying recusal implicates this precise burden, because a biased court can hamper the presentation of the prosecutor's case.

White responds that the Commonwealth's contentions are at odds with Cosnek, which she argues specifically limited the scope of Rule 311(d) to appeals from "pretrial ruling[s] result[ing] in the suppression, preclusion or exclusion of Commonwealth evidence." White's Brief, at 15 (quoting Cosnek, at 877).

As both parties argue Cosnek controls the outcome of this issue, we begin our analysis with that case. In Cosnek, we considered whether the Commonwealth had the right to appeal an order which ruled on the admissibility of defense evidence. Cosnek, at 871. We first considered the "legal underpinnings" of Rule 311(d), noting the government may bring an interlocutory appeal in criminal cases only under express statutory authority. Cosnek, at 873. We then examined the origin of Rule 311(d), explaining 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). Cosnek, at 874. In Mapp, the United States Supreme Court concluded that evidence seized in violation of the Fourth Amendment was inadmissible in state proceedings.[4] Cosnek, at 874. Thus, Bosurgi held that when a pre-trial order of suppression will terminate or handicap the prosecution, the order has such an "attribute of finality" as to give the Commonwealth the right of immediate appeal. Cosnek, at 874. In Cosnek, we further explained that subsequent case law clarified Bosurgi, such that the Commonwealth merely needed to allege an order suppressing, precluding, or excluding evidence terminated or substantially handicapped its case to be entitled to a pre-trial appeal under Rule 311(d). Cosnek, at 874 (citing Commonwealth v. Dugger, 486 A.2d 382, 386 (Pa. 1985)).

Following this review of Rule 311(d), we concluded the Commonwealth did not have a right to an interlocutory appeal from an order admitting defense evidence under Rule 311(d). We noted the origin of the Rule was to ensure the Commonwealth could meet the specific burdens of proof of the case and the focus of the Rule was the suppression, preclusion, or exclusion of Commonwealth evidence. Cosnek, at 877. For these reasons, we held the application of Rule 311(d) was limited to a pre-trial ruling that results in the "suppression, preclusion or exclusion of Commonwealth evidence…." Cosnek, at 877.

The instant case, however, does not involve an order "suppressing, precluding, or excluding" Commonwealth evidence; thus, the parties dispute the relevance of Cosnek. White argues Cosnek expressly limited the application of Rule 311(d) to the Commonwealth's right to appeal an interlocutory order in the suppression of evidence

[4] "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, at 308 (emphasis in original).

context. The Commonwealth encourages a much broader reading of Cosnek, which would include all cases where the Commonwealth alleges the order "terminates" or "substantially handicaps" its case.

Rule 341 of the Rules of Appellate Procedure defines a "final order" as an order disposing of all claims and all parties, any order expressly defined as a final order by statute, or any order entered pursuant to subsection (c) of the Rule. Pa.R.A.P. 341(b). The Comment to Rule 341 explains that, following the 1992 amendments to the Rule, in the criminal context "[o]rders formerly appealable under Rule 341 by the Commonwealth in criminal cases as heretofore provided by law, but which do not dispose of the entire case, are now appealable as interlocutory appeals as of right under Subdivision (d) of Rule 311." Comment, Pa.R.A.P. 341. Thus, criminal orders which had been appealable under Rule 341 were to be encompassed within Rule 311(d).

Cosnek sought to apply Rule 311(d) to the Commonwealth's appeal of an in limine ruling which denied its motion to exclude defense evidence; it did not involve an order remotely similar to that at issue here. The limited question in Cosnek was the proper application of Rule 311(d) in light of the specific challenge forwarded; we were not asked to revisit and rewrite Rule 311(d), nor to deal with circumstances not there presented. Rules and cases serve differing functions and have differing effects. Rules certainly build upon and reflect experience, but they primarily seek to frame future expectations and attempt to provide general guidance. Cases, on the other hand, are narrow and necessarily fact-bound. Thus, Cosnek's language that "we limit the application of Rule 311(d) to those 'circumstances provided by law' in which a pretrial ruling results in the suppression, preclusion or exclusion of Commonwealth evidence," Cosnek, at 877, should not be read as undoing Rule 311(d), which simply provides the Commonwealth may appeal an order, not just certain types of orders, which terminates or substantially handicaps the prosecution. See Cosnek, at 882 (Eakin, J., dissenting); accord Commonwealth v.

Shearer, 882 A.2d 462, 471-72 (Pa. 2005) (Newman, J., concurring); id., at 472-74 (Saylor, J., concurring); id., at 474-75 (Eakin, J., concurring and dissenting). This is the plain language of the Rule, and to the extent Cosnek may be understood differently, it is hereby overruled. Accordingly, when an order terminates or has the practical effect of terminating some or all of the Commonwealth's case, or substantially handicaps the Commonwealth's case, and the Commonwealth has certified the same in good faith, the Commonwealth is entitled to an interlocutory appeal as of right under Rule 311(d).

Here, the Commonwealth has certified in good faith that denial of its recusal motion will substantially handicap its prosecution of this case. See Notice of Appeal, 11/21/00. Indeed, if the judge is unable to preside and serve as fact-finder impartially, and an unfair verdict is rendered, the Commonwealth, unlike a criminal defendant in a similar circumstance, has no appellate recourse. Thus, "if there is a good faith certificate that a pretrial ruling substantially hampers the case of the party whose one job is to seek justice, and the only possible time to appeal is before jeopardy attaches at trial, the appeal should be allowed." Cosnek, at 884 (Eakin, J., dissenting). Accordingly, we proceed to review the merits of the recusal issue under Rule 311(d).[5]

II. Merits of Recusal Issue

The Commonwealth sought recusal of Judge Hughes based on her interaction with White, expressions of her personal feelings about the accused and the case, and opinions

[5] Ordinarily, we would remand for the Superior Court to address the merits of this issue in the first instance, since quashal of an appeal does not involve ruling on the merits; however, in this instance, the Superior Court's majority opinion addressed the merits of the recusal issue in response to the dissent's consideration of the issue. The majority concluded the issue was meritless, whereas the dissent would have reversed, requiring that White's degree of guilt hearing be held before a different judge. Cf. White, at 559-60 and id., at 563-68 (Joyce, J., dissenting).

about the justice system's ability to handle the case. The judge believed White, a juvenile, was not suited for adult prison, and that the parties agreed that the matter should proceed with a nontraditional disposition, i.e., with White being evaluated by a mental health professional in order to determine a more appropriate facility in which to house her. However, when the parties were convened before the court at a status hearing, it came to the judge's attention that the Commonwealth drafted a letter to the mental health evaluator, which the judge believed resulted in White not being evaluated as originally discussed. See N.T. Status Hearing, 12/2/99, at 3-10. The judge stated:

> To say I am angry is just--doesn't even begin to equate to you the level of hostility that I feel right now; because number one, I thought it was clear to everyone in this room that I do not think the traditional judicial system is prepared to accommodate the case that is in front of us ….
>
> Our best effort, our best avenue of making something happen has been foreclosed and I am convinced is because of this letter….[S]o I don't know when I'm going to get her out of adult prison to get an assessment. I am angry.

Id., at 5-6.

Because White had been told she would meet the judge that day, she was brought before the court, even though there was to be no formal evaluation at that time. The judge engaged her in conversation, during which she told White she was "absolutely beautiful," had a "gorgeous smile," and that she wanted "to send [her] to someplace where [she] could grow up to be a beautiful young woman." Id., at 23. The judge inquired if White was eating, asked her about her favorite foods, admitted to liking some of the same foods and commented that her son also liked those foods, and said she would try to "see if they can get you a pizza every now and then." Id., at 24-26. Before White left the courtroom, the judge told her she was "glad to meet [her]" and that she was "going to work very hard on getting [her] into a good place," but White had to "be good." Id., at 27. The judge then shook White's hand and said, "Oh, wonderful. I am so pleased to meet you." Id., at 28.

When White responded affirmatively that she would "work with" the judge, the judge responded, "Excellent. Good girl." Id.

When it became evident there would be no expert evaluation of White at the status hearing as originally planned, thus leaving the trial court with nothing upon which to assess White and proceed with a non-trial disposition of the case, the judge stated:

> I have got to have something. Even if I subpoena the records and hold them in camera for me, and I am permitted to do that, but I have got to have--I need something now because … if we can't get past this hurdle and this is a significant hurdle in my mind, if we can't get past this hurdle, what you are leaving me with is to treat this case like any other case in the system. And I don't care who knows this from Justice Flaherty all the way down. This system is not equipped to deal with this case, and I don't want to treat it this way. And unless I am ordered to by higher-ups, I am not going to, and I am still not going to disadvantage either one of you. And so I may have to do some things that are unusual. I don't want to be boxed into treating this like a regular case. It's not appropriate. It's not appropriate. And at this point in time nobody can force me to do this unless y'all come in here with an order from Flaherty. You can't force me to treat this like a regular case. So I want the med[ical records] in camera.

Id., at 41-42.

At a subsequent status hearing held after a different trial judge refused to decertify White's case from criminal to juvenile court, the Commonwealth orally requested that Judge Hughes recuse herself because "there [was] the appearance of prejudgment by [the judge] in [the] matter." N.T. Status Hearing, 11/17/00, at 2. The judge responded:

> I don't think that there is any basis for your request for recusal. Let's be absolutely clear. I do not think that a seven year old should be tried as an adult, and that is what this child has the intellectual capacity of. She is biologically 13 years old. I make no bones about that. I have been very clear publicly and in private. I think this law is wrong.
>
> However, I think any fair examination of my record reveals that I absolutely uphold the law in all instances. Mariam White was tried as an adult. That decision has been made by a court over which I have no review authority. I have been advised by the defense that she seeks a degree of guilt, period. The protocol in this jurisdiction is that section leaders retain the degree of

> guilt, period. It stays in my room. … I will not recuse myself. There is no legal basis for recusal.

Id., at 2-3. The judge further emphasized that she had not prejudged the case, and there was nothing on the record that said she would do anything other than follow the law. Id., at 4. After refusing to certify the issue for appeal under 42 Pa.C.S. § 702(b) and accepting the Commonwealth's written recusal motion for review, the judge commented, "I know what was presented to me and what has not been presented to me, and the arrogance of you to come in here and presume that I would somehow not honor my obligations as a jurist is patently offensive." N.T. Status Hearing, 11/17/00, at 15-16. When the Commonwealth tried to make one more request, the judge replied, "I don't want any more requests from you because you have prejudged me and it is inappropriate. It is absolutely inappropriate and it is baseless." Id., at 17.

The standard for recusal is well-settled:

> It is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially. As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner …. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make. Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overturned on appeal but for an abuse of discretion.

Commonwealth v. Abu-Jamal, 720 A.2d 79, 89 (Pa. 1998) (citations omitted). Furthermore, "[a]ny tribunal permitted to try cases and controversies must not only be unbiased but must avoid even the appearance of bias." In the Interest of McFall, 617 A.2d 707, 713 (Pa. 1992). "There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings." Id., at 714.

The dissenting opinion filed in the Superior Court in this matter is well-reasoned and persuasive. In analyzing the exchange between the judge and White, the dissent noted:

> [T]his type of dialogue is rarely seen between a court and a defendant. It is unquestionable that the subject matter is peculiar in the courtroom setting, although it appears that the trial court was attempting to gauge [White's] mental stability and chose a level of conversation appropriate for a twelve-year-old in order to do so. … However, in doing so the trial court managed to share personal information about itself and its family. Worse yet, the trial court told [White] that it would attempt to get her pizza while she was incarcerated, which would certainly constitute special treatment as I doubt that the trial court often attempted to obtain pizza for other alleged murderers who await trial. Whether or not the trial court's conduct during the 12/02/99 status hearing amounts to an appearance of impropriety is a very close question.

White, at 565 (Joyce, J., dissenting). The dissent went on to examine the judge's statements that she could not be "forced to treat this like a normal case"; the dissent pointed out that, contrary to the judge's statements, "the law does provide for this type of situation." Id. Citing 42 Pa.C.S. §§ 6322, 6355(e), Judge Joyce noted:

> Contrary to the trial court's belief that "this system is not equipped to deal with this case" the legislature has already made a determination as to how this type of case is to be handled. The trial court's pronouncement that it was not going to be "boxed into treating this like a normal case" unless it was "ordered to by higher-ups" indicates that the trial court pre-judged the case and [was] unwilling to follow the law as set forth by the legislature, and as it was required to do.

Id., at 567.

We agree; although the judge stated that she would be able to apply the law, her oft-voiced opinion was about the short-comings of the legal system in this type of case and her refusal to treat the case "normally," short of "an order from [then Chief Justice] Flaherty." Such public denouncement of the very system in which an impartial jurist is one of the key components creates the appearance of impropriety. Telling the accused that she was going to work hard to do things for her was inappropriate for an impartial jurist. Had the

judge offered to work hard for the prosecution, White would certainly have grounds for recusal -- showing partiality is not excused merely because the parties are reversed.

Personal opinions concerning the adequacy or propriety of the law pertaining to a given situation have no place on the trial bench. While the underlying facts concerning White's background are indeed tragic, the law provides the procedure to be followed in White's case. As the judge who presided at the decertification hearing noted: "I cannot exonerate Mariam just because I feel sorry for her. I cannot return Mariam to juvenile court just because her life story and her life circumstances make my heart weep. I can't do it. My oath as a judge requires that I decide this case on the basis of the facts that I heard in court, and that's what I have done." N.T. Decertification Hearing, 11/2/00, at 38. Judge Hughes's comments created an appearance of impropriety which added to the already questionable conversation she engaged in with White.

Finally, the judge's reaction to the Commonwealth's recusal request cements the conclusion that recusal is appropriate in this case because of the appearance of impropriety. As the dissent noted:

> The vehement reaction of the trial court to a motion that is reasonably meritorious is the proverbial final nail in the coffin…. While the examples I have reviewed, standing alone, may not warrant the conclusion that there existed an appearance of impropriety, I would find that in the aggregate, such a determination is compelling. While I can appreciate the efforts of the trial court in attempting to reach a resolution favorable to all the parties involved, in doing so the overall effect was to create an appearance of impropriety.

White, at 568 (Joyce, J., dissenting).

Mindful of the high standard to which a trial judge is held, and of the ready availability of another trial jurist, we conclude the judge should have recused herself in this matter.

III. Commonwealth's Right to Appeal Denial of Request for Jury at Degree of Guilt Hearing Under Pa.R.A.P. 311(d)

The second question is whether the Commonwealth is entitled to demand a jury at a degree of guilt hearing when a defendant pleads guilty to murder generally. Before addressing the merits of this issue, we must determine whether we have jurisdiction over the issue, since it also comes before this Court under Rule 311(d).

The Superior Court concluded it had jurisdiction over this question under Rule 311(d), relying on Commonwealth v. Johnson, 669 A.2d 315 (Pa. 1995). See id. (assuming jurisdiction over interlocutory order transferring case from criminal to juvenile division). The court was persuaded that if jurisdiction were not present, this constitutional issue might never reach the appellate courts; in the event of an acquittal, the Commonwealth would have no right to appeal because it is precluded from challenging a not guilty verdict. White, at 561 n.6. Similarly, in the event of a conviction, the Commonwealth would have no right of appeal since it was not an aggrieved party. Id.

The Commonwealth certified that the denial of its request for a jury at the degree of guilt hearing would substantially handicap its case; this issue is intertwined with the recusal issue, as the Commonwealth is asserting it will be forced to proceed before a judicial fact-finder who is biased against it. There are two potential protections either party in a criminal proceeding may have in a circumstance where there is concern the presiding judge will be unfair or biased: a recusal request or a jury demand. Here, the Commonwealth was denied both, and, as the trial court inexplicably refused to certify the question for interlocutory appeal under 42 Pa.C.S. § 702(b), sought review under the only avenue available to it: Rule 311(d). Having complied with the requirements of that Rule by certifying in good faith that denial of a jury will hamper the presentation of its case, the Commonwealth is entitled to review under Rule 311(d), and we proceed to the merits of the jury trial issue.

IV. Commonwealth's Right to Jury at Degree of Guilt Hearing

White argues Pa.R.Crim.P. 803(A) and 590(C)[6] are clear: when a defendant pleads guilty to murder generally, only the trial judge has the authority to determine the degree of guilt. A guilty plea to murder generally is simply a guilty plea, she avers, and there is no right to a jury for a guilty plea; case law from this Court establishes a degree of guilt hearing is not a trial. White's Brief, at 50-51 (citing Commonwealth v. Petrillo, 16 A.2d 50 (Pa. 1940); Commonwealth v. Staush, 101 A. 72 (Pa. 1917)). Additionally, White asserts a defendant has no right to a jury at a degree of guilt hearing, and the Pennsylvania Constitution only gives the Commonwealth the same right to a jury as a defendant has. Consequently, the Commonwealth cannot have a right to a jury at a degree of guilt hearing.

White also rejects the Commonwealth's reliance on 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), for the proposition that a jury is required at a degree of guilt hearing. According to White, those cases merely demonstrate the Sixth Amendment bars a judge from imposing a sentence beyond the prescribed statutory maximum without having a jury determine the predicate facts for such a finding. Here, however, there is no sentencing

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[6] These Rules provide:

> When a defendant charged with murder enters a plea of guilty to a charge of murder generally, the judge before whom the plea is entered shall alone determine the degree of guilt.

Pa.R.Crim.P. 803(A).

> In cases in which the imposition of a sentence of death is not authorized, when a defendant enters a plea of guilty or nolo contendere to a charge of murder generally, the judge before whom the plea was entered shall alone determine the degree of guilt.

Id., 590(C).

issue, since there is nothing to suggest the judge might impose a sentence different from that provided by statute or engage in additional fact-finding during sentencing. Accordingly, White concludes that any reliance on those cases is inapt.[7]

The Commonwealth responds that in Apprendi, Ring, and Blakely, the United States Supreme Court declared a defendant has a Sixth Amendment right to have a jury decide any factual questions that can trigger an increased maximum sentence. Therefore, those cases require a jury determination of an essential element of a crime, i.e., mental state, which would be the issue at the degree of guilt hearing. Accordingly, a defendant has the right to have a jury make those determinations, and under Article I, § 6, the Commonwealth must have that same right.

Alternatively, the Commonwealth points out that in order to plead guilty generally and proceed to a degree of guilt hearing, a defendant must waive the right to a jury trial. Thus, under Article I, § 6, if the defendant has the right, as she does if it must be waived, then the Commonwealth also has the right to a jury. The Commonwealth points out that Pa.R.Crim.P. 620[8] demonstrates both the defendant and the Commonwealth must waive a jury trial "in all cases." Id. The Commonwealth argues that since it never waived such right, it was entitled to a jury at the degree of guilt hearing under Article I, § 6 of the Pennsylvania Constitution.

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[7] White also argues, for the first time, that the jury trial ballot question violated the "separate vote" requirement of Article 11, § 1 of the Pennsylvania Constitution. Pa. Const. art. XI, § 1. This issue is raised for the first time before this Court and as such, it is waived. Pa.R.A.P. 302(b).

[8] The Rule provides, in pertinent part: "In all cases, the defendant and the attorney for the Commonwealth may waive a jury trial with approval by a judge of the court in which the case is pending, and elect to have the judge try the case without a jury."

Pa.R.Crim.P. 620.

A. Analysis

Article I, § 6 was amended in 1998, to give the Commonwealth the same right to a jury trial as a defendant, and provides:

> Trial by jury shall be as heretofore, and the right thereof remain inviolate. The General Assembly may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. Furthermore, in criminal cases the Commonwealth shall have the same right to trial by jury as does the accused.

Pa. Const. art. I, § 6. As the Commonwealth is expressly afforded "the same right" that a defendant has, we must determine whether a defendant has the right to a jury at a degree of guilt hearing. If so, then the Commonwealth has the identical right.

Traditionally, our jurisprudence has held a degree of guilt hearing is not a trial. Petrillo, at 56. However, as the Superior Court noted in the present case:

> A plea of guilty to murder generally is a unique plea, unlike anything else provided in statute or decisional law…. In a guilty plea, no evidence is presented against the defendant…. A Rule 590(c) proceeding, on the other hand still requires the presentation of evidence, the arguments of counsel and the finding of facts in support of a verdict.
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> * * *
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> This option, created by rule and available only to murder defendants, is not a simple guilty plea. It is instead a variation of a waiver trial ….

White, at 562. This characterization is generally correct; a defendant's plea of guilty to murder generally bifurcates the fact-finding process which ordinarily occurs at trial--it dispenses with the need to determine whether the defendant committed murder, but leaves open for determination the question of the degree. A plea of guilty to murder generally "is simply an acknowledgement by a defendant that he participated in certain acts with a criminal intent." Commonwealth v. Mitchell, 599 A.2d 624, 626 (Pa. 1991) (citing Commonwealth v. Anthony, 475 A.2d 1303 (Pa. 1984)). The purpose of the degree of guilt

hearing is "to determine whether the homicide was murder of the first, second or third degree, or voluntary manslaughter." Commonwealth v. Myers, 392 A.2d 685, 687 (Pa. 1978). Thus, although the defendant has pled guilty to murder generally, an essential question remains: the defendant's state of mind at the time of the killing.

Recently, the United States Supreme Court has expanded a criminal defendant's right to have a jury, rather than a judge, make factual determinations which subject a defendant to an increased penalty. In Apprendi, supra, the Court held any factual determination increasing the penalty for a crime beyond the statutory maximum must be submitted to a jury. Id., at 490. In Ring, supra, the Court held the determination of the existence of aggravating factors in a death penalty case must be made by a jury. Id., at 588. Finally, in Blakely, supra, the Court held state sentencing guidelines were unconstitutional where they permitted a judge to sentence a defendant outside the guidelines, upon the judge's finding of additional facts such as deliberate cruelty. Id., at 303-04.

Here, as in Apprendi, Ring, and Blakely,[9] factual determinations that affect the maximum penalty will be made at the degree of guilt hearing. A plea to murder generally

[9] While these cases were decided under the Sixth and Fourteenth Amendments of the federal constitution, if a defendant has this right under the federal constitution, then the right also exists under the Pennsylvania Constitution. See Commonwealth v. Aponte, 855 A.2d 800, 806-07 (Pa. 2004) (in interpreting provision of Pennsylvania Constitution, Court is not bound by United States Supreme Court decisions interpreting similar, yet distinct, federal constitutional provisions; however, federal constitution establishes certain minimum levels which are "equally applicable to the [analogous] state constitutional provision.") (quoting Commonwealth v. Edmunds, 586 A.2d 887, 894 (Pa. 1991) (citations omitted)). If a defendant has such right under the Pennsylvania Constitution, then so does the Commonwealth. Pa. Const. art. I, § 6.

raises a presumption of malice, an essential element of third degree murder; the defendant may rebut the presumption of malice by introducing evidence negating this element, thereby reducing the degree of guilt to voluntary manslaughter. See Commonwealth v. Shaver, 460 A.2d 742, 743 (Pa. 1983); Commonwealth v. Geiger, 380 A.2d 338, 340 (Pa. 1977); Commonwealth ex rel. Kerekes v. Maroney, 223 A.2d 699, 701 (Pa. 1966) (noting that, to extent defendant may be found guilty of manslaughter after pleading guilty to murder generally, "the burden is upon him to adduce evidence which will so mitigate the offense"). If the element of malice is disproven by White, she will be guilty of voluntary manslaughter, which carries a maximum penalty of 20 years imprisonment. 18 Pa.C.S. § 2503(c); id., § 1103(1). If malice is not negated, White will be guilty of third degree murder, which carries a maximum penalty of 40 years imprisonment. Id., § 1102(d).[10] Although the court does not have the authority to sentence White beyond the statutory maximum for either degree of homicide, White will still face the possibility of receiving twice the sentence for manslaughter if third degree murder is proven. As the Blakely Court noted, "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, at 303 (citing Ring, at 602; emphasis in original). Therefore, the maximum sentence White may receive is dependent on the findings made at the hearing.

[10] First degree murder is not at issue, as the Commonwealth limited the charges to third degree murder and possession of an instrument of crime. See N.T. Status Hearing, 11/17/00, at 6.

B. Conclusion

By pleading guilty to murder generally, however, White waived her right to have a jury as fact-finder in her case. See Pa.R.Crim.P. 590(c); id., 803(A); 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 (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[.]"). Waiving one's right, however, does not constitute waiver of another's corresponding right; White cannot vitiate the Commonwealth's right by waving her own. Accordingly, we conclude the Commonwealth retains its right to a jury under Article I, § 6 of the Pennsylvania Constitution, Pa. Const. art. I, § 6 ("in criminal cases the Commonwealth shall have the same right to trial by jury as does the accused."); see also Commonwealth v. Tharp, 754 A.2d 1251 (Pa. 2000) (holding amendment to Article I, § 6, which affords Commonwealth same right to jury trial as accused, is constitutional), and it may request one at the degree of guilt hearing.

V. Disposition

Accordingly, we reverse the quashal of the Commonwealth's appeal from the denial of its recusal motion and remand for the appointment of another judge in this matter. We affirm the order reversing the denial of the Commonwealth's request for a jury at White's degree of guilt hearing.

Order reversed in part and affirmed in part. Case remanded. Jurisdiction relinquished.

Mr. Justice Eakin delivers the Opinion of the Court with respect to parts II, III and IV.B, in which Mr. Justice Castille, Madame Justice Newman and Mr. Justice Saylor join, and a plurality opinion with respect to parts I and IV.A, in which Mr. Justice Castille and Madame Justice Newman join.

Former Justice Nigro did not participate in the decision of this case.

Mr. Justice Saylor files a concurring and dissenting opinion.

Mr. Chief Justice Cappy files a dissenting opinion in which Mr. Justice Baer joins.