[J-159-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 286 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence
	:	entered by the Court of Common Pleas,
	:	Criminal Division, Philadelphia County at
v.	:	0467 July Term 1998 (Lineberger, J.)
	:	dated October 28, 1999
	:	
JOSE DEJESUS,	:	
	:	
Appellant	:	ARGUED: October 22, 2002

CONCURRING OPINION

MR. JUSTICE EAKIN **DECIDED: October 21, 2004**

I agree the prosecutor here crossed the line. Most "message sending" statements indicate the advocate lacks a better reason for the verdict sought; a solid case does not require a resort to such vagaries and extra-judicial social commentary. All verdicts send peripheral messages of one kind or another, but such collateral consequences are not a proper basis for a jury's decision and hence are not for counsel to argue.

However, I believe a per se rule is unwise and unnecessary. This may be similar in concept to invoking the deity, but it is not on a par with religious hyperbole, nor is the problem so pervasive as to be beyond the leash of existing jurisprudence. A per se rule will, of necessity, lead to more litigation, not less, for now any words by the prosecutor

that may somehow be interpreted as implying a request for a message will be challenged; indeed, must now be challenged on pain of ineffectiveness.

It is likewise improper for defense counsel to ask for a message to be sent, but there is no meaningful curative sanction in the immediate trial. The prosecution has the right of fair response - may that response include a request for a contrary message? Can a curative instruction be asked for by defense counsel who thinks the penalty phase has gone well; is a new penalty phase the only cure, or may the objection to a per se rule of this Court be waived? We will undoubtedly have to face these questions and a host of variations in the not too distant future.

Per se rules addressing the fluid and extemporaneous flow of trial advocacy are not the cure-all they may appear. Hence, the trend of the criminal law is away from fixed recipes for evaluating error and toward a totality of the circumstances perspective for review. See, e.g., Florida v. Bostick, 501 U.S. 429 (1991) (rejecting per se rule prohibiting police from randomly boarding buses as means of drug interdiction); Commonwealth v. Smith, 836 A.2d 5 (Pa. 2003) (applying Bostick's totality of circumstances test); Illinois v. Gates, 462 U.S. 213 (1983) (standard for evaluating whether probable cause exists is totality of circumstances); Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985) (totality of Gates' circumstances test for determing existence of probable cause meets requirements of Article I, § 8); Commonwealth v. Druce, 848 A.2d 104 (Pa. 2004) (declining to adopt per se rule requiring recusal of judge for violation of Judicial Code of Conduct); Commonwealth v. Perez, 845 A.2d 779 (Pa. 2004) (holding voluntary statements by accused, given more than six hours after arrest when accused has not been arraigned, no longer inadmissible per se; courts must

examine totality of circumstances surrounding confession); Commonwealth v. Mack, 796 A.2d 967 (Pa. 2002) (declining to adopt bright-line rule that consent to search is per se involuntary when police advise suspect they "would have to get a search warrant" if suspect refuses search); Commonwealth v. DeJesus, 787 A.2d 394 (Pa. 2001) (rejecting per se rule that declaratory statements by police concerning charges against suspect are functional equivalent of interrogation; rather, totality of circumstances test applies).

I believe this evolution is wise and appropriate; creating a new per se rule is neither. Our present tests allow courts to address each situation individually. Allowing flexibility is preferable to creating bright-line rules then creating exceptions when the inevitable variation on the facts arises; I suspect that in a very few years, we will have our share of exceptions to this per se rule as well.

Accordingly, I join in reversing the penalty imposed, but cannot agree with the creation of a per se rule as pronounced by my colleagues.

Madame Justice Newman joins.