[J-164-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 86 MAP 2005
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered January 19, 2005 at No.
	:	473 MDA 2004, that vacated and
v.	:	remanded the Order of Court of Common
	:	Pleas of Berks County, Criminal Division,
	:	entered February 25, 2004 at No.
LAWRENCE A. GAUL, JR.,	:	4696/03.
	:	
Appellant	:	867 A.2d 557 (Pa. Super. 2005)
	:	
	:	RESUBMITTED: August 22, 2006
	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: December 27, 2006**

I join Mr. Justice Eakin's Dissenting Opinion, but I write separately to address two overly broad assertions and determinations posited by the Majority Opinion in its discussion of whether Investigator Shenk "should have known" that his statements were reasonably likely to elicit an incriminating response from appellant. I believe that these broad assertions and determinations amount to classic "Monday morning quarterbacking."

In Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980), the United States Supreme Court addressed the issue of the meaning of "interrogation" under the system of prophylactic rules promulgated in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). The High Court concluded the following:

> [T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

Innis, 446 U.S. at 300-02, 100 S.Ct. at 1689-90 (emphasis in original) (footnotes omitted). Accordingly, the High Court announced a supposed objective test, rather than a subjective test, for the "functional equivalent" of express questioning -- *i.e.*, whether the police should have known that their conduct was reasonably likely to elicit an incriminating response. As noted by the Innis Court, this objective test focuses principally on the suspect's perceptions and not on the intent of the police. Id. at 301, 100 S.Ct. at 1690. Indeed, decisions from this Court since Innis have recognized and applied this objective test. See, e.g., Commonwealth v. DeJesus, 787 A.2d 394, 402-03 (Pa. 2001); Commonwealth v. Hughes, 639 A.2d 763, 771 (Pa. 1994).

In reaching the ultimate conclusion that Investigator Shenk breached appellant's constitutional rights by not providing him Miranda warnings prior to the imputed interrogation that produced the incriminating statement, the Majority relies on unsupported and irrelevant speculations. First, the Majority asserts that, because Investigator Shenk informed appellant on two occasions that he would have to give him Miranda warnings

because he was in custody, this is clear evidence that Investigator Shenk believed that he was interrogating appellant. Maj. slip op. at 5-6 ("Clearly, Investigator Shenk was aware that he needed to give Appellant Miranda warnings before Appellant said anything, indicating his belief that Appellant was subject to an interrogation."). The Majority's subjective determination that Investigator Shenk "clearly" believed that he was conducting an interrogation of appellant is not supported by any fact-finding below and, in any event, any would-be appellate "fact-finding" along these lines is irrelevant under Innis/DeJesus. Similarly, the Majority asserts that "the totality of the circumstances indicates that Investigator Shenk almost certainly knew that his conduct was likely to evoke a response from Appellant based upon his repeated acknowledgements that he would have to give Appellant Miranda warnings." Id. at 6 (emphasis added). Again, this is both pure speculation and irrelevant under Innis/DeJesus. We have no idea of just what the Investigator knew as there is no evidence of record pertinent thereto. What is at issue is what the Innis fiction requires us to attribute to the officer. And, on that question, I join Justice Eakin's dissent. As noted above, the definition of "the functional equivalent of express questioning" as announced by the Innis Court is whether the police should have known that their conduct was reasonably likely to elicit an incriminating response; "almost certainly knew" is not the proper standard.