[J-206-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 296 CAP
	:	
Appellee	:	Appeal from the Order of the Court of Common Pleas of Cambria County entered on January 30, 2000 at No. 1025-1988
v.	:	
	:	
STEPHEN REX EDMISTON,	:	
Appellant	:	SUBMITTED: December 14, 2000

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: June 22, 2004**

I agree with the result reached by the majority, but write separately because I am unable to join the majority's reasoning as to several of Appellant's claims. For example, while it is true that this Court has generally applied the previous litigation bar to post-conviction challenges to proportionality review, see, e.g., Commonwealth v. Albrecht, 554 Pa. 31, 61, 720 A.2d 693, 708 (1998); Commonwealth v. Jones, 571 Pa. 112, 123, 811 A.2d 994, 1000-01 (2002), the claim in those matters was deemed to fall outside of the ambit of the PCRA because the Court had already fulfilled its proportionality obligations on direct review. See Albrecht, 554 Pa. at 61, 720 A.2d at 708; Jones, 571 Pa. at 123, 811 A.2d at 1001. The situation is different where (as here) the post-conviction petitioner's allegation that the Court did not fulfill such obligations rests upon a mistake of fact patent from the face of the opinion itself. In this case, the claim could not logically have been raised or litigated prior to the issuance of the Court's opinion.

Therefore, I believe that Appellant's contention in this regard is cognizable under the PCRA. Moreover, it is not apparent, to me at least, that, simply because the mistake of fact appears in a different part of the paragraph, it could not have affected the proportionality analysis. We cannot know, at this juncture, that the three distinct statutory review functions set forth in that paragraph were undertaken with such clean boundaries that erroneous information reflected in one aspect of that function could not also have been relied upon for any other portion of it. Accordingly, I would find that Appellant is entitled to a new proportionality review by this Court.

That said, I reach the same ultimate result as the majority, namely, that this claim does not entitle Appellant to a new sentencing hearing. This was a particularly gruesome rape and murder of a two-year-old girl, whom Appellant had separated from her family and transported to a remote area where it was impossible for any help to come to her. In such circumstances -- and taking into account the relevant data from the Administrative Office of Pennsylvania Courts and other information pertaining to similar cases -- imposition of the death penalty here was neither disproportionate nor excessive.

As a separate matter, Appellant asserts that, at voir dire, it was apparent that some of the venirepersons selected to serve on his jury mistakenly believed that death was the presumptive sentence for first-degree murder, and that this error improperly imposed upon him the burden of persuading them to "reduce" his sentence to life. He contends that trial counsel was ineffective for failing to challenge such jurors for cause (Argument VII). The majority rejects this claim without reaching its merits on the basis that Appellant allegedly waived it by failing to raise it before the PCRA court. The record reveals, however, that, on December 16, 1998, Appellant filed a motion seeking to amend his petition, in which he raised the issue. The PCRA court never ruled on the

motion, and hence, we have no substantive basis to conclude that the court either allowed the amendment or disallowed it. See generally Pa.R.Crim.P. 905(A) (stating that amendments to PCRA petitions "shall be freely allowed to achieve substantial justice"). Under such circumstances, this Court should not summarily consider the issue waived. Rather, if there is any potential merit to the claim, the preferred course would be to remand the matter to the PCRA court for a ruling on the motion to amend.

Nevertheless, a remand is unnecessary here because the claim lacks arguable merit. Although Appellant identifies several jurors whom he argues should have been struck, he only supports his contentions by highlighting limited portions of the voir dire proceedings which are taken out of context. Appellant asserts, for example, that venireman Robert Santee was biased in favor of the death penalty. However, after the portion of the questioning that Appellant cites, defense counsel and the court both interviewed Mr. Santee, whose unequivocal responses reflected that he would follow the instructions of the court. See N.T. 9/26/89 at 239-41. Furthermore, earlier in the interview, the prosecutor asked Mr. Santee whether he would presume that death was the appropriate penalty, to which he responded that he would not. See id. at 235-36. Similarly, a full review of the questioning of the other jurors identified by Appellant gives little foundation to conclude that they would not be fair and impartial, or would have trouble following the judge's instructions.

Finally, while I agree that counsel's decision not to present evidence of Appellant's pedophilia had a reasonable basis, I note that Argument II contains additional subparts unrelated to the issue of pedophilia. See Brief for Appellant at 34-56. Although I believe that the Court should review these allegations -- which pertain primarily to counsel's failure to present certain lay testimony, as well as expert evidence

concerning Appellant’s prior history of alcohol abuse -- they are insufficient, in my view, to undermine confidence in the verdict.

Mr. Justice Nigro joins this concurring opinion.