[J-44-2009] [MO: Greenspan, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 81 MAP 2008
	:	
Appellant	:	Appeal from the Superior Court order
	:	dated March 10, 2008, No. 384 EDA 2007,
	:	vacating the judgment of sentence entered
v.	:	September 7, 2006 in the Court of
	:	Common Pleas of Pike County, Criminal
	:	Division, at No. CP-52-CR-0033-2005.
CARL NORTHRIP,	:	
	:	945 A.2d 198 (Pa. Super. 2008)
Appellee	:	
	:	ARGUED: May 12, 2009

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: December 28, 2009**

I join the Majority Opinion and write separately to emphasize the limited nature of today's holding. As the Majority notes, the parties *sub judice* agree that this Court is not today writing on a blank slate. In Commonwealth v. Shaw, 744 A.2d 739 (Pa. 2000), we were asked to provide the proper test for determining whether an offense committed in a foreign jurisdiction is equivalent to an offense committed in Pennsylvania. Although the need for the equivalence analysis in Shaw arose from the then-governing driving under the influence ("DUI") statute,[1] whereas here the question arises under the Three Strikes Law,[2]

[1] See 75 Pa.C.S. § 3731(e)(1)(iii) (requiring mandatory minimum sentence of 90 days "if the person has twice previously been convicted of . . . an offense under this section or of **an equivalent offense** in this or other jurisdictions within the previous seven years") (emphasis added) (repealed 2004).

the parties *sub judice* further agree that the Shaw test of equivalence governs the instant case.

Shaw was not this Court's first opportunity to consider the proper approach to determining equivalence of offenses. Indeed, the root of our jurisprudence in this area extends to the Superior Court's decision in Commonwealth v. Bolden, 532 A.2d 1172 (Pa. Super. 1987). In Bolden, the defendant had a prior conviction for attempted burglary in Colorado. After his convictions in Pennsylvania for burglary, attempted rape, indecent assault, and simple assault, the trial court determined, for purposes of calculating Bolden's prior record score under the Sentencing Guidelines, that the Colorado attempted burglary conviction was equivalent to Bolden's conviction for attempted burglary under 18 Pa.C.S. § 903 (criminal attempt). See 204 Pa. Code § 303.7(d) ("A prior out-of-state or Federal conviction . . . , or a prior conviction . . . under former Pennsylvania law, is scored as a conviction for **the current equivalent Pennsylvania offense.**") (emphasis added). On appeal to the Superior Court, Bolden argued that the trial court's equivalence determination was a misapplication of the Sentencing Guidelines. In upholding the trial court's equivalence determination, the Superior Court reasoned as follows:

> In assessing the quality of a prior conviction in a foreign jurisdiction, we discern from the purpose and language of the guidelines that it was the intent of the Sentencing Commission as well as the legislature that offense equivalency be considered in terms of the nature and definition of the offense in light of the record of the foreign conviction. This approach requires a sentencing court to carefully review the elements of the foreign offense in terms of the classification of the conduct proscribed, its definition of the offense, and the requirements for culpability. Accordingly, the court may

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(…continued)

[2] 42 Pa.C.S. § 9714(a)(1) (requiring mandatory minimum sentence of ten years if "the person had previously been convicted of a crime of violence" as defined in subsection (g) "or **an equivalent crime** under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction") (emphasis added).

> want to discern whether the crime is *malum in se* or *malum prohibitum*, or whether the crime is inchoate or specific. **If it is a specific crime, the court may look to the subject matter sought to be protected by the statute, *e.g.* protection of the person or protection of property.** It will also be necessary to examine the definition of the conduct or activity proscribed. In doing so, the court should identify the requisite elements of the crime -- the *actus reus* and *mens rea* -- which form the basis of liability.
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> Having identified these elements of the foreign offense, the court should next turn its attention to the Pennsylvania Crimes Code for the purpose of determining the equivalent Pennsylvania offense. An equivalent offense is that which is substantially identical in nature and definition as the out-of-state or federal offense when compared with [the] Pennsylvania offense. The record of the foreign conviction will be relevant also when it is necessary to grade the offense under Pennsylvania law or when there are aggravating circumstances. Where there is no equivalent offense, the prior foreign conviction is scored as a current Pennsylvania non-weapons misdemeanor in accordance with section 303.7(h). 204 Pa. Code § 303.7(h) (relating to incomplete prior records for Pennsylvania convictions).

Bolden, 532 A.2d at 1175-76 (emphasis added) (citation and footnote omitted).

In Commonwealth v. Robertson, 722 A.2d 1047 (Pa. 1999), this Court was asked to determine the equivalence of offenses for purposes of the DUI statute, as in Shaw. Specifically, the question before us in Robertson was whether the Maryland offense of "driving while intoxicated" ("DWI") was equivalent to Pennsylvania's DUI offense for purposes of the one-year mandatory minimum sentence applicable under our former DUI statute where the defendant "has three times previously been convicted of . . . an offense under this section or of **an equivalent offense** in this or other jurisdictions within the previous seven years." 75 Pa.C.S. § 3731(e)(iv) (emphasis added) (repealed 2004). On appeal from his mandatory minimum sentence, Robertson argued that the Maryland DWI conviction was not equivalent to his Pennsylvania DUI conviction.

The six-Justice Robertson Court was evenly divided on the proper test for determining equivalence. Three Justices expressly endorsed the Bolden approach to determining equivalence of offenses, which I quoted at length in my Opinion in Support of

Affirmance. In noting that we would uphold the sentence, we reasoned, in part, that to hold that Robertson was not subject to the mandatory minimum sentence "would be to ignore the underlying public policy behind the criminal statutes. Both the Maryland and Pennsylvania statutes sought to protect the public from individuals who drank to the point of substantial impairment and then operated a motor vehicle." Robertson, 722 A.2d at 1051. Our observation in Robertson that both the Maryland and Pennsylvania statutes were designed to protect the public was, of course, in perfect harmony with the Bolden court's observation of the relevance of "the subject matter sought to be protected by the statute, *e.g.* protection of the person or protection of property." Bolden, 532 A.2d at 1176. Then-Justice Cappy's Opinion in Support of Reversal criticized what he called our "policy driven approach," Robertson, 722 A.2d at 1051, but his view, like mine, did not garner a Court majority.

Shaw decided what Robertson had left open. In Shaw, in determining whether the New York offense of "driving while ability impaired" was equivalent to Pennsylvania's DUI offense, the 4-3 Majority "formally adopt[ed]" and applied the Bolden court's approach for determining equivalence of offenses. Shaw, 744 A.2d at 743. We described that approach as a comparison of "the elements of the crimes, the conduct prohibited by the offenses, and the underlying public policy behind the two criminal statutes." Id.

Instantly, the Majority "hold[s]" that a sentencing court must apply the test for determining equivalence of offenses that we set forth in Shaw. Majority Slip Op. at 9. Of course, such a "holding" is necessary only in the sense that we today decide that the Bolden/Shaw test applies for purposes of the Three Strikes Law; the general test for determining the equivalence of offenses was already articulated by a clear majority of this Court in Shaw. Recognizing the limited nature of today's holding, I join the Majority Opinion.

Madame Justice Todd joins this opinion.