

[J-60-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 2 WAP 2006
	:	
	:	Appeal from the Order of the Superior
	:	Court entered August 22, 2005 at No. 373
	:	WDA 2004, reversing the Order of the
v.	:	Court of Common Pleas of Allegheny
	:	County entered March 2, 2004 at No.
	:	MISC 410 March 2004.
JAMIE LYNN UPSHUR	:	
	:	
	:	ARGUED: September 11, 2006
	:	
APPEAL OF: WPXI, INC.	:	RESUBMITTED: April 13, 2007

CONCURRING OPINION

MR. JUSTICE CASTILLE

DECIDED: JUNE 20, 2007

I concur in the result, but not in the reasoning of the Opinion Announcing the Judgment of the Court.

My thoughts concerning access to a copy of the audio tape and the perceived benefits of that access are similar to those of Madame Justice Baldwin, and I join the sections of her responsive opinion regarding such.

I write to stress that appellant has no “right” of access to a copy of the actual audio tape recording, as opposed to the preliminary hearing transcript, which contains the verbatim substance of the recording. The courts are not obliged to provide the media with the form of information which is “most dramatic or sensational,” or which might be best for programming and ratings purposes. Thus, like Justice Baldwin, I see a fundamental distinction between a copy of the tape itself and a transcript.

With respect to balancing relevant policy factors, as outlined in this Court's opinion in Commonwealth v. Fenstermaker, 530 A.2d 414 (Pa. 1987), I see room for reasonable disagreement. Quite frankly, I do not believe the Opinion Announcing the Judgment of the Court's balancing analysis is more persuasive than the expression of view by the Honorable Justin M. Johnson, writing for the Superior Court majority below. I do not believe that disclosure of a copy of the recording, as opposed to the transcript equivalent, serves "as an important check on the criminal justice system, ensuring not only the fair execution of justice, but also increasing public confidence and understanding." OAJC Slip Op. at 6. In my judgment, the effect on the public's confidence and understanding has nothing to do with the tape vs. transcript issue, and everything to do with the context (or lack of context) in which the media ultimately elect to portray the matter. Further, I have difficulty believing that the tape does anything greater than the transcript to operate as a legitimate "check" on the criminal justice system, much less does it "ensure the fair execution of justice." These openness concerns are more than adequately met by substantive access.

Ultimately, I concur because, even though I do not believe that the media has a "right" of access to a copy of an audiotape which is read into evidence at a preliminary hearing, I believe that the decision to order release of a copy is a discretionary matter for the trial judge. Notwithstanding the persuasiveness of the expression by the Superior Court majority, I would not overturn the trial judge's decision in the case *sub judice* merely because he could, in my view, just as justifiably have denied release of a copy of the tape.

Mr. Justice Eakin joins this opinion.