[J-61-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 42 EAP 2005
	:	
Appellee	:	
	:	Appeal from the Judgment of Superior
	:	Court entered on 6/16/99 affirming the
v.	:	Judgment of Sentence of the Court of
	:	Common Pleas, Criminal Division of
	:	Philadelphia County on 6/5/98 at No.
	:	9709-1318
MARCUS ELLISON,	:	
	:	
Appellant	:	ARGUED: April 4, 2006

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: July 19, 2006**

In this case involving a sexually violent crime, the trial court expressly noted and refused a defense request to supplement the voir dire that was conducted exclusively by the court with a question to each juror pertaining to this potentially emotional aspect of the offense. The relevant exchange proceeded as follows:

> [DEFENSE COUNSEL]: Is there a question on the questionnaire about the nature of the offense?
>
> THE COURT: No. That is why I tell them what it is.
>
> [DEFENSE COUNSEL]: Was there a general first question, anything about the nature of the offense?

> THE COURT: No. There is not a question like that. Do you know the judge, the lawyers or the parties; have you heard of the incident; would it be an extraordinary hardship for you to serve; do you know any of the people's names who have been read; have you already made up your mind that the defendant is guilty or not guilty of the charge in this case.
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> [DEFENSE COUNSEL]: I would request that there be a general question about the nature of the offense, anything that would effect them.
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> THE COURT: That, I am not going to do. That is noted and overruled.
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> * * *
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> [DEFENSE COUNSEL]: Your Honor, the only other concern I have, and I understand the court's ruling, I am not comfortable with not being able to participate in the voir dire because I don't feel we get a sense of these people at all.
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> THE COURT: [F]rankly, I would take the first 14 people other than for cause and put them in the box and I think that you would get the same jury results. I understand your concerns, but that is just not what the Constitution requires.

N.T., April 15, 1998, at 40-41 (emphasis added).[1] Similar requests were made to supplement the voir dire with other more specific lines of inquiry, which were also refused. See id. at 42-43. Rather, the trial court appears to have chosen to conduct the voir dire based almost entirely on its own initiative and judgment. Further, the court reduced most inquiries to superficial questions concerning whether the potential juror

[1] Contrary to the Superior Court's opinion, in light of the above, I believe that the relevant request was reasonably preserved as a matter of record. Further, I disagree with the majority to the degree that it suggests that counsel was not constrained from posing questions concerning the nature of the offense on his own. See Majority Opinion, slip op. at 10. It seems clear from the record that the attorneys were simply not permitted to ask questions, and, even if this were not the case, I do not believe that counsel should be charged with an obligation subsequently to pursue lines of inquiry that a trial court has expressly foreclosed.

could be fair,[2] moving through the panel upon a very brief dialogue with most venirepersons that is reflected in less than two pages of transcript, on average.

Certainly, I am sympathetic to the trial courts in their efforts to exercise necessary and appropriate control over voir dire. Various courts have noted that efficiency in jury selection frequently and substantially is impeded by attorney tactics, including attempts to indoctrinate and persuade jurors at an early stage. See, e.g., United States v. Lawes, 292 F.3d 123 (2d Cir. 2002); State v. Manley, 255 A.2d 193, 275-77 (N.J. 1969). The response in our Criminal Procedural Rules of affording the trial courts substantial control to maintain the central focus upon the fair and expeditious selection of an impartial jury seems to me to be the appropriate one, and is consistent with that pertaining in the federal courts. Compare Pa.R.Crim.P. 631(D), with Fed.R.Crim.P. 24(a). The rules, however, contemplate some meaningful participation by counsel in the process, via the prescription that, if the trial judge elects to conduct the examination of prospective jurors, "the judge shall permit the defense and the prosecution to supplement the examination by such further inquiry as the judge deems proper." Pa.R.Crim.P. 631(D).

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[2] I also have difficulty with the degree of emphasis that the majority places, throughout its opinion, upon the general questions posed by the trial court to venirepersons concerning their ability to be fair in the abstract. See, e.g., Majority Opinion, slip op. at 9-10 & n.6. To me, the majority's approach seems to be in tension with the governing principles that it otherwise identifies in its opinion, such as the role of voir dire in providing a meaningful opportunity to assess juror qualifications, and the "considerable latitude" that is to be made available in the process, id. at 5. Cf. Morgan v. Illinois, 504 U.S. 719, 734, 112 S. Ct. 2222, 2232-33 (1992) (indicating that certain constitutional principles regulating juror qualifications in the capital arena "would be [rendered] in large measure superfluous were this Court convinced that such general inquiries [into fairness in the abstract] could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath").

Here, the record does not suggest the allocation by the trial judge of any meaningful role to the attorneys; indeed, the court's commentary reflects an apparent discounting of the function of voir dire in providing counsel with some sense of perspective on individual venirepersons so that peremptory challenges might be exercised in an intelligent fashion. While I share in the general reluctance to disturb decisions of the trial courts as to the appropriate scope of voir dire, here, I believe that the trial judge abused her discretion by refusing a few modest requests for some relevant questioning, in particular, to inquire into prospective juror attitudes concerning sexually violent crimes in a case of such nature.

Accordingly, I respectfully note my dissent.

Mr. Justice Castille and Mr. Justice Baer join this dissenting opinion.