[J-75-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 153 MAP 2002
	:	
Appellee	:	Appeal from the Order of Superior Court
	:	entered 3-15-2002 (reargument denied 5-
	:	15-2002) at No. 159 MDA 2001 which
v.	:	affirmed the Judgment of Sentence of
	:	Court of Common Pleas of Dauphin
	:	County, Criminal Division, entered 10-27-
THOMAS W. DRUCE, III,	:	2000 at No. 222 CD 2000
	:	
Appellant	:	
	:	
	:	ARGUED: May 15, 2003
	:	
	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: April 29, 2004**

I join the Majority Opinion, writing separately only to explain why I tender my joinder despite the Dissenting Statement I issued when appellant requested and was denied emergency review by this Court before he was sentenced. Madame Justice Newman has set forth the entirety of my Dissenting Statement, which she joined.

I continue to believe that it would have been a wiser course for President Judge Kleinfelter not to have given the interview and made the remarks in question and, once he did, to have recused. As the matter proceeded upon guilty plea, rather than jury or bench trial, reassignment of the matter would have proved minimally disruptive. I viewed intervention by this Court to be important, and appropriate under King's Bench review,

primarily as a supervisory matter. Action at that time would have avoided injecting the current issue into the case. A clear Majority of the Court, however, obviously felt otherwise.

Justice Newman is certainly correct that this Court's decision not to exercise extraordinary review before sentencing has no binding *stare decisis* effect on the recusal issue before us today. Indeed, the order denying review was careful in noting that it was "without prejudice." By the same token, however, the matter is now before the Court in a significantly different posture than before. When appellant requested extraordinary review, this Court had no explanation from President Judge Kleinfelter as to why he had denied recusal; he had simply denied the motion without explanation. Now, however, we are presented with a record in which President Judge Kleinfelter has explored and expressed at some length the reasons why he was satisfied that he had not prejudged the matter and could remain fair and impartial at sentencing. Moreover, appellant is now in sentenced status and his judgment of sentence has been reviewed and affirmed on direct appeal by the Superior Court, the court with primary direct review responsibility. The Superior Court filed a lengthy published opinion disposing of the recusal claim, as well as other claims raised by appellant, on the merits.

In granting limited discretionary review of the Superior Court's determination, this Court posed the single issue as follows: "Does a judge's violation of Judicial Canon 3A(6) establish enough evidence to compel recusal or is more evidence required, *i.e.*, evidence concerning an appearance of bias and prejudice?" The question is not whether, as a supervisory matter, this Court should require that a different judge preside over sentencing. Indeed, the salutary purpose which would have been served by ordering recusal at the pre-sentencing stage -- *i.e.*, preventing the recusal issue from becoming an issue on appeal -- cannot now be achieved. Instead, the question now before the Court is a question of law concerning whether President Judge Kleinfelter was required to recuse, such that his failure to do so obliges us to vacate and remand for resentencing before another jurist.

Resolution of the question affects more than just this case; it will provide guidance in future cases involving recusal standards.

On this narrow but substantive question before the Court, the Majority Opinion does not mince words: it plainly acknowledges that the comments here violated Canon 3A(6) of the Code of Judicial Conduct, and does not condone them. The Majority is also careful to emphasize that "[t]his case illustrates the danger of presentencing judicial comments to the press." Majority slip op. at 10. The Majority ultimately holds, however, that it rejects the notion that recusal is *per se* required for all violations of the Canon and then determines, on the totality of the record, that recusal was not required here.

In my view, Mr. Justice Eakin's analysis of the legal question of whether recusal is required in a circumstance such as this, so that the sentence must be vacated, is thoughtful, persuasive, and correct. Given the posture in which the case presents itself, I join without hesitancy, notwithstanding what I would have preferred to do as a supervisory matter when the case was before this Court in a pre-sentencing posture.