[J-98-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 7 EAP 2005
	:	
Appellee	:	Appeal from the Judgment of the Superior
	:	Court entered September 1, 2004, at No.
	:	1221 EDA 2002 Affirming the Judgment of
v.	:	Sentence Entered on March 25, 2002, in
	:	the Court of Common Pleas of
	:	Philadelphia County, Criminal Division, at
RAVAH DICKSON,	:	0201-0022.
	:	
Appellant	:	
	:	
	:	ARGUED: September 14, 2005

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: March 29, 2007**

I join the Dissenting Opinion by Mr. Justice Eakin, as I agree that the issue upon which the Majority grants relief obviously was waived.[1] I dissent separately to address the merits of the issue the Majority reaches out to decide.

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[1] Furthermore, I note that "declining to resist" a "trial court's unequivocal effort to cut off conversation" is not a valid reason for failure to press, or to make clear, the specific contours of an objection. Majority Slip Op. at 7. As I recently noted in Commonwealth v. Pressley, 887 A.2d 220, 227 n.1 (Pa. 2005) (Castille, J., concurring in the result),"I respectfully disagree with [any] suggestion … that a repeated objection risks 'alienating' the trial judge. It should not alienate a trial judge that a lawyer seeks to protect his client's interest; and I trust in the professionalism of our trial judges to recognize what is an exercise of prudent caution and not to react adversely thereto." In this case, the failure was not one of non-repetition; rather, appellant simply never forwarded the relevant objection. A proper objection could easily and candidly have been phrased thus: "Your Honor, I concede (as is my duty) that the law at the Superior Court level (which binds you), is (continued…)

The Court today disapproves twenty years of Superior Court precedent construing 42 Pa. C.S. § 9712, precedent which became the governing construction of the statute when this Court elected not to exercise review soon after it came into existence (notwithstanding that a panel of the Superior Court had immediately questioned the wisdom of the precedent), or in the years since, precedent which the Superior Court has consistently applied, and precedent which the General Assembly did not seek to undo by modifying the statute in question. I respectfully dissent.

I recognize that this Court, in recent years, has undertaken to modify traditional notions of vicarious liability, thereby narrowing the exposure a criminal defendant faces when charged as an accomplice or conspirator. See generally Commonwealth v. Hannibal, 753 A.2d 1265, 1273-76 (Pa. 2000) (Castille, J., concurring). When the Superior Court first encountered the statute at issue here in 1986, however, I believe that the decision rendered was fully in accord with then-settled notions of the extent of vicarious liability. Indeed, I would not be at all surprised if that fact played a part in this Court's decision not to review the Superior Court's construction in the ensuing score of years.[2] While I certainly do

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(…continued)
settled, is against me, and affords you no discretion but to impose the statutory mandatory minimum sentence. Respectfully, however, I wish to register an objection to the application of the mandatory minimum against my client, who was but an unarmed co-conspirator, so as to preserve that issue in the hope that, upon further review, I can convince our Supreme Court to rule upon the issue, which it has not expressly done to date."

[2] The Majority notes two instances where this Court denied allocatur in cases where published decisions of the Superior Court applied Commonwealth v. Williams, 509 A.2d 1292 (Pa. Super. 1986). See Commonwealth v. Walker, 577 A.2d 889 (Pa. 1990) (*per curiam*); Commonwealth v. Matos, 575 A.2d 563 (Pa. 1990) (*per curiam*). Given the frequency with which Section 9712 is applied throughout the Commonwealth, and that application of Williams to a Section 9712 challenge by an unarmed conspirator would not break new ground, it is safe to estimate that there have been dozens of additional cases where Superior Court panels rejected Section 9712 claims in unpublished memorandum
(continued…)

not deem this Court's repeated denial of review dispositive of the question of statutory interpretation, neither would I deem it insignificant.

In addition to the fact that I am not convinced that the reading of the statute by the panel in Commonwealth v. Williams, 509 A.2d 1292 (Pa. Super. 1986) was clearly erroneous in light of then-prevailing principles of vicarious liability, there is the fact, ably detailed in the Majority Opinion, that the General Assembly, which has since revisited the statute, has not undertaken to modify it in response to the then prevailing interpretation. This development is significant for two reasons. First, as both the Majority Opinion and the Concurring Opinion of the Chief Justice note, this Court's decision in In re Estate of Lock, 244 A.2d 677 (Pa. 1968), supports the proposition that a presumption arises in such circumstances that the General Assembly is satisfied with the construction.[3]

Second, irrespective of any principle of construction or presumption, in the Lock era, the General Assembly has shown itself quite capable of responding to what it believes is a judicial misinterpretation of a statute by an intermediate appellate court. See, e.g. Commonwealth v. Eddings, 772 A.2d 956 (Pa. 2001) (Castille, J., joined by Newman, J., dissenting from *per curiam* affirmance) (noting that General Assembly had already responded to and addressed and corrected the Superior Court decision at issue, which involved a statutory construction question of first impression under the "three strikes" provision of the Sentencing Code). Section 9712 is not obscure or rarely applied, nor is it

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decisions applying Williams, and where allocatur was sought and review denied by this Court.

[3] I am inclined to agree with both the Majority Opinion and the Chief Justice that Lock was wrongly decided, since the Superior Court most certainly is not a court of last resort. But, whether Lock was right or wrong in some absolute sense, it was the law during the ascendancy of the (unreviewed) Williams rule and its holding triggers the presumption of legislative agreement/acquiescence.

rarely applied to unarmed confederates in a crime; the mandatory sentence literally is applied on a daily basis in courts throughout the Commonwealth. The General Assembly has had twenty years to undo the holding in Williams, if it thought it incorrect and thought that criminal confederates deserved more lenient treatment than the person who brandished the firearm. I do not believe it strained or ephemeral to conclude that the Legislature's failure to alter the statute, under these circumstances, signifies its satisfaction with the prevailing construction. Accordingly, I would not recast the jurisprudence today, but instead would leave any amendment to the judgment of the General Assembly.[4]

[4] As it is, of course, the General Assembly can correct the Court's interpretation today by amending the Section to read, "shall, if the person, or the person's conspirator or accomplice, visibly possessed, etc."