[J-17-1997]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 114 Capital Appeal Docket
	:	
	:	Appeal from the Judgment of Sentence of
Appellee,	:	the Court of Common Pleas of
	:	Philadelphia County entered December
	:	12, 1994 at Cap. No. 8406-1394-1396
v.	:	
	:	
	:	
ALFRED JASPER,	:	
	:	
	:	ARGUED: JANUARY 28, 1997
Appellant	:	

CONCURRING OPINION

MR. JUSTICE ZAPPALA **DECIDED: July 21, 1999**

I join the majority opinion, but write separately in order to express my deep concern about statements made in the prosecutor's closing arguments during the penalty hearing. Were review of the issue unavoidable because it was the only question to be decided, I would remand for a new penalty hearing based upon the following comments, which were intended to inflame the jurors' emotions rather than persuade them in their deliberations on mitigating and aggravating circumstances:

> When you're in prison, you wear the same clothes. You get your GED. You go to college. It's free. You don't pay tuition. No loans. You go to classes, vocational training. You can learn to be a carpenter. Maybe get assigned outside the prison to do farm work, yard work. You may not like it when you're in prison. That's too bad. You go to the weight room, work out. Play some basketball in the yard. Talk to the guys. It's almost like being in the military on the base. There might not be any women. You get exercise, food, clothing. You got movies, TV. Even now in State prisons they got cable TV.

> I don't have cable. That flag says they got rights. It's not that bad, and he is used to that kind of life.

N.T. 12/9/94 at 63-64.

Comments such as "I don't [even] have cable," and "[in prison] [y]ou go to college. It's free. You don't pay tuition. No loans," are designed to do nothing more than provoke the jurors into characterizing the sentencing options as whether to sentence the defendant to death or provide him for life with amenities that even law-abiding citizens may not enjoy.

We condemned similar tactics by a prosecutor during the penalty phase of a trial in Commonwealth v. LaCava, 666 A.2d 221 (Pa. 1995). There, we succinctly explained that a new penalty hearing was necessary because:

> [t]he prosecutor attempted to expand the jury's focus from the punishment of appellant on the basis of one aggravating circumstance (i.e., that appellant killed a police officer acting in the line of duty), to punishment of appellant on the basis of society's victimization at the hand of drug dealers. The essence of the prosecutor's argument was to convince the jury to sentence appellant to death as a form of retribution for the ills inflicted on society by those who sell drugs.

666 A.2d at 237. In the case at bar, the prosecutor attempted to expand the jury's focus from the punishment of appellant on the basis of aggravating circumstances to broader policies regarding prison conditions in a manner calculated to inspire resentment. The prosecutor's comments regarding prison conditions might have been appropriate if made in the context of prisoners' rights litigation, but were unacceptable during the penalty phase of a capital trial where the jury is required to "dispassionately and objectively evaluate the evidence in a sober and reflective frame of mind." LaCava, 666 A.2d at 237.

What makes the prosecutor's comments even more egregious is that much of what was said about prison conditions is patently false and had absolutely no support in the record. Indeed, the Commonwealth concedes that certain details in the prosecutor's description of prison life were "technically unsupported." Commonwealth's Brief at 33. In its brief to this Court, the Commonwealth retreats from the prosecutor's argument to the

jury that prisoners have cable television and free college education, instead recognizing that there is merely television in prisons and "at one time at least" inmates were eligible for college grants. Id. at 33-34. The trial judge also recognized that the prosecutor's comments were "unsupported by the record." Trial Court Opinion at 8.[1]

The Commonwealth seems to contend that the prosecutor's comments were nevertheless proper response to defense counsel's reference to prisons as boxes and tiny cells. I find this argument unavailing. Speeches comprised of false comments that lack any support in the record and that are not relevant to any aggravating circumstance are not proper rebuttal to a defense attorney's vague characterization of prisons as boxes or tiny cells. The prosecutor's comments far exceeded the scope of any rebuttal that may have been justified.

This Court has the responsibility to make sure that the ultimate penalty of death is not imposed as a result of "passion, prejudice or any other arbitrary factor." 42 Pa.C.S. § 9711(h)(3)(i). If we are to fulfill this responsibility, then we cannot condone comments like those made by the prosecutor in this case. Thus, in addition to the majority's reliance upon the trial judge's reference to the appellate process in his instructions to the jury as grounds for requiring a new penalty hearing, I would order a new penalty hearing based upon the prosecutor's improper remarks as well.

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[1] The Commonwealth makes the unconvincing argument that although the prosecutor's descriptions of the details of prison life are "technically unsupported," they were not "palpably false." Id. at 33. The only part of the prosecutor's comments, quoted above, that the Commonwealth still stands by in its brief to this Court are the meager assertions that "[Prisoners] get to walk around, enjoy television, and participate in sports." Id. This is a far cry from what the jury heard the prosecutor argue at trial regarding prison life.