[J-144-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 219 Capital Appeal Docket
	:	
Appellee	:	Appeal from the judgment of sentence of
	:	the Court of Common Pleas of
	:	Montgomery County, Criminal Division
v.	:	dated July 23, 1997 at No. 1134-88.
	:	
	:	
ROBERT FISHER,	:	
	:	
Appellant	:	SUBMITTED: September 3, 1998

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: November 24, 1999**

I respectfully dissent. This Court has previously indicated that an aggravating circumstance does not apply in the case of a defendant whose crime preceded the enactment into law of that aggravating circumstance. See Commonwealth v. Sam, 535 Pa. 350, 635 A.2d 603 (1993), cert. denied, 511 U.S. 1115, 114 S. Ct. 2123 (1994).[1] Because

[1] See also California Dept. of Corrections v. Morales, 514 U.S. 499, 509, 115 S. Ct. 1597, 1603 (1995) (explaining that, for purposes of ex post facto analysis, courts must determine whether the challenged statute "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes"); United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994) (stating the general rule applicable in the federal system that the sentencing court must apply the sentencing guidelines manual in effect at the time of sentencing, but noting that where such retroactive application would result in harsher penalties, the court must apply the manual in effect at the time of the offense to avoid improper ex post facto
(continued…)

Section 9711(d)(15) of the Judicial Code, 42 Pa.C.S. §9711(d)(15), was enacted in 1989, nine years after Appellant committed the murder at issue, the jury should not have been allowed to consider the aggravating circumstance set forth in subsection (d)(15).

Nor, in my view, can the reasoning of Commonwealth v. Zook, 532 Pa. 79, 615 A.2d 1 (1992), cert. denied, 507 U.S. 974, 113 S. Ct. 1420 (1993), be relied on to render harmless the jury's finding of this aggravating factor. In Zook this Court declared that the application of an aggravating factor adopted after the commission of the offense was "of no moment," id. at 119, 615 A.2d at 21, because the challenged factor (the defendant having been convicted of another murder, 42 Pa.C.S. §9711(d)(11)) was substantially similar to a factor that had been adopted prior to the offense (the defendant having been convicted of another offense for which a sentence of life imprisonment or death was imposable, or the defendant having committed the offense at issue while serving a sentence of life imprisonment, 42 Pa.C.S. §9711(d)(10)). Since the defendant had committed a prior first-degree murder, this Court reasoned that the Commonwealth could just as well have proceeded under the earlier factor.

The majority concludes that Zook applies here because the aggravating factor listed at Section 9711(d)(5), which had been enacted prior to Appellant's commission of the murder, is "substantially similar" to the (d)(15) aggravator. I agree that these aggravators

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application); State v. Correll, 148 Ariz. 468, 715 P.2d 721 (1986) (concluding that an amendment adding a new aggravating circumstance is a substantive rather than a procedural change, and that the application of such circumstance to an offense committed before the amendment's effective date would constitute an ex post facto law); Bowen v. State, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied, 517 U.S. 1226, 116 S. Ct. 1861 (1996) (concluding same, and observing that while aggravating circumstances may constitute "standards" to guide jury, as stated in Poland v. Arizona, 476 U.S. 147, 106 S. Ct. 1749 (1986), such standards are substantive rather than procedural, as the addition of an aggravator may have a direct effect on the jury's sentencing decision and thus result in a harsher sentence than if such aggravator were not available).

are quite similar. I believe, however, that there is one difference that is material for purposes of this case: Section 9711(d)(5) identifies as an aggravating factor the killing of a prosecution witness for the purpose of preventing his or her testimony, whereas Section 9711(d)(15) specifies the killing of an informant in retaliation for the informant's activities in aid of law enforcement. Under either aggravator, the issue confronting the sentencing jury is what motivated the killing, but the specific factual conclusions which must be reached in order to find the respective aggravators are different. This is unlike the situation in Zook, where the identical, undisputed fact -- the defendant's commission of a prior first-degree murder -- could support the legal conclusion called for by either aggravating factor at issue. Here, the Commonwealth apparently believed that the facts which suggested Appellant's motive for the killing fit more closely the terms of the (d)(15) aggravator, as the district attorney chose to invoke it and not that of Section 9711(d)(5).

Because Appellant was not called upon to defend the allegation that this killing was committed for the purpose of preventing witness testimony, and the jury was neither asked to make nor made such finding, I do not believe that, under Pennsylvania's capital sentencing scheme, the (d)(5) circumstance should be relied upon, in any manner, to support the determination that Appellant was eligible for capital sentencing. Since the (d)(15) aggravator was not available, and was the only aggravating factor found by the jury, I would vacate the sentence of death and remand for the imposition of a sentence of life imprisonment.

Mr. Chief Justice Flaherty joins this dissenting opinion.