2014 PA Super 114

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ROLAND A. SPOTTI, JR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 677 WDA 2011

Appeal from the Judgment of Sentence Entered on March 16, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0010771-2009

BEFORE: BENDER, P.J., FORD ELLIOTT, P.J.E., BOWES, J., GANTMAN, J., DONOHUE, J., ALLEN, J., LAZARUS, J., OTT, J., and WECHT, J.

CONCURRING AND DISSENTING OPINION BY BENDER, P.J.

FILED: June 5, 2014

I am in agreement with the Majority's disposition with regard to Appellant's claims, except for its conclusion that there was sufficient evidence of causation underlying Appellant's four AA-DUI convictions. Although Appellant's criminal conduct was undoubtedly a substantial cause of the injuries sustained by the victims in this case, I believe it to be equally evident that his conduct was not a direct cause of those injuries. Consequently, I would conclude that the evidence was not sufficient to sustain Appellant's AA-DUI convictions and would reverse on that basis. Accordingly, I respectfully dissent.

In ***Commonwealth v. Root***, 170 A.2d 310 (Pa. 1961), our Supreme Court held that "the tort liability concept of proximate cause has no proper place in prosecutions for criminal homicide and more direct causal

connection is required for conviction." ***Id.*** at 314. Stated generally, the ***Root*** standard for criminal causation holds that, in order for criminal liability to attach, "[t]he defendant's conduct must be a *direct* ***and*** *substantial cause* of the injury" that is defined by the charged offense. ***Commonwealth v. Uhrinek***, 544 A.2d 947, 951 (Pa. 1988) (emphasis added).

In this case, I would conclude that the Commonwealth failed to provide sufficient evidence of direct causation to support Appellant's AA-DUI convictions. Appellant's conduct, viewed in a light most favorable to the Commonwealth, was almost by definition an indirect cause, and not a direct cause, of the resulting injuries. This is true unless the distinction between 'indirect' and 'direct' is to be rendered meaningless. The term 'direct,' when used as an adjective to modify 'cause,' connotes "[h]aving no intervening persons, conditions, or agencies; immediate." The American Heritage Dictionary 244 (4th ed. 2001). Clearly, in this case, it was Mr. Chung's collision that was the direct cause of the resulting injuries. That Appellant's conduct was a more substantial cause than Mr. Chung's conduct is immaterial to the question of directness.

The Commonwealth contends that accepting a literal definition of the term 'direct' amounts to a requirement that a defendant's vehicle collide with his victim (or the victim's vehicle) in order to sustain a conviction for AA-DUI. I admit that, as a practical matter, this may largely be true. Proving direct causation for purposes of the AA-DUI statute absent such a collision may indeed be a daunting or insurmountable task. However, the notion that the AA-DUI statute *should* cover Appellant's conduct in this case is an opinion grounded in the understandable belief that Appellant should be held

accountable for his conduct where it was the most substantial factor in causing the injuries that occurred in this case. It is not an opinion grounded in ***Root***'s requirement that causation for criminal purposes be both "direct and substantial," as the plain meaning of the term "direct" is inapplicable to the circumstances of this case.

The division between the Majority's position and my own is not merely an honest disagreement about what reasonable inferences flow from the factual circumstances of this case. What is at stake is the long-held distinction between civil and criminal standards of causation in Pennsylvania jurisprudence. Here, the Majority makes a compelling case for why Appellant *should be held responsible for his behavior*, but not why his conduct was a *direct* cause of the injuries that occurred.

The Majority is not solely to blame for the disintegration of the distinction between the civil and criminal standards of causation. The distinction was first called into question with Pennsylvania's adoption of Section 2.03(1) of the Model Penal Code, the source of the following provision in our Criminal Code:

> **(a) General rule.--**Conduct is the cause of a result when:
>
> > (1) it is an antecedent but for which the result in question would not have occurred; and
> >
> > (2) the relationship between the conduct and result satisfies any additional causal requirements imposed by this title or by the law defining the offense.

18 Pa.C.S. § 303(a).

The terms of section 303(a)(1) express the tort standard of "proximate cause" or "but for" causation. 18 Pa.C.S. § 303 (official comment). Little

more than a decade before section 303(a)(1) was adopted by our legislature, in ***Root***, our Supreme Court held that a stricter standard applies. ***Root***, 170 A.2d at 314 ("[T]he tort liability concept of proximate cause has no proper place in prosecutions for criminal homicide and more direct causal connection is required for conviction.") One might think that the adoption of section 303(a)(1) superseded the criminal standard of causation as expressed by our Supreme Court in ***Root*** and would, therefore, easily resolve the matter before us today.[1] Indeed, the Commonwealth argues that nothing more than "but for" causation is required to sustain a criminal conviction. Commonwealth's Brief at 3.

However, only three months following the adoption of Section 303(a)(1), our Supreme Court endorsed an appellant's citation to ***Root*** for the proposition that "the causal connection required to attach criminal responsibility must be more direct than the tort law concept of proximate cause." ***Commonwealth v. Stafford***, 301 A.2d 600, 602 (Pa. 1973). The following year, our Supreme Court again rejected the application of "the tort theory of causation" to criminal law in ***Commonwealth v. Skufca***, 321 A.2d 889, 894 (Pa. 1974). Both the ***Stafford*** and ***Skufca*** decisions fail to mention Section 303(a)(1) at all. This may be explained away, in part, because the trials of Skufca and Stafford both occurred before Section 303(a)(1) became law. However, no such explanation can be provided for our Supreme Court's endorsement of the ***Root*** principle several years later

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[1] If there is any dispute that Appellant's conduct was the proximate cause of the injuries that occurred in this case, I am unaware of it.

in ***Commonwealth v. Matthews***, 389 A.2d 71, 73 (Pa. 1978) ("So long as a defendant's actions are a direct and substantial factor in bringing about death, legal responsibility may be found.") (citing, *inter alia*, ***Stafford***, ***supra***).

While Section 303 may have merely heralded the erosion of the criminal/civil causation distinction, it did not appear to have any impact for nearly twenty years after its adoption. That is until ***Commonwealth v. Rementer***, 598 A.2d 1300 (Pa. Super. 1991), a panel decision by this Court cited favorably by the Majority. In ***Rementer***, the defendant engaged in a brutal and sustained assault on the victim. The beating continued as the male defendant followed his female victim into her tractor-trailer cab. One witness observed the victim attempting to escape from the cab through a window while shouting "Help me, he's trying to kill me." ***Id.*** at 1302. She briefly managed to escape by falling through that window, only to be dragged back into the cab moments later by the defendant, who continued to beat her. A later escape attempt while the cab was parked on a highway proved fatal. As the victim fled from the cab, she tried to get the attention of a passing station wagon. Fearful, the driver of the station wagon sped away, and in doing so ran over the victim, killing her. The defendant was convicted of third degree murder. In his appeal, he argued that the Commonwealth had failed to prove causation because of the intervening action of the station wagon driver. The ***Rementer*** Court rejected that argument, holding that "[i]t [was] absurd to argue that the fatal result was

so extraordinary or accidental that [the defendant] should not be held criminally liable for the consequences of his conduct." ***Id.*** at 1308.

The ***Rementer*** decision at least paid lip service to the ***Root*** standard, stating that "[i]n order to impose criminal liability, causation must be direct and substantial." ***Rementer***, 598 A.2d at 1304. However, by the conclusion of the ***Rementer*** decision, the ***Root*** standard appears to have been abandoned and replaced. In ***Commonwealth v. Nunn***, 947 A.2d 756 (Pa. Super. 2008), another panel of this Court summarized the ***Rementer*** standard as follows:

> In ***Rementer***, we set forth a two-part test for determining criminal causation. First, the defendant's conduct must be an antecedent, but for which the result in question would not have occurred. ***Rementer***, 598 A.2d at 1305; 18 Pa.C.S.A. § 303(a)(1). A victim's death cannot be entirely attributable to other factors; rather, there must exist a "causal connection between the conduct and the result of conduct; and causal connection requires something more than mere coincidence as to time and place." ***Rementer***, 598 A.2d at 1305, n.3 (quoting LaFave and Scott, Substantive Criminal Law, Vol. 1, Ch. 3., at 391–392 (1986)). Second, the results of the defendant's actions cannot be so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible. ***Rementer***, 598 A.2d at 1305.

Nunn, 947 A.2d at 760.

The first prong of the ***Rementer*** standard is drawn directly from Section 303(a)(1) of the Crimes Code, and, thus, it constitutes the tort standard of causation ('proximate' or 'but for' causation). ***Rementer***, 598 A.2d at 1305; 18 Pa.C.S. § 303 (official comment). This was nothing new, as criminal causation had always been defined in reference to the tort

standard, and the ***Root*** standard could be defined as proximate cause *plus* directness. Thus, a failure to demonstrate that a defendant's actions were the proximate cause of injuries would be fatal to a prosecution. However, a mere showing of proximate cause would also be insufficient under the ***Root*** standard.

The novelty of the ***Rementer*** standard was its second prong: "whether the result of defendant's actions w[as] so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible." ***Rementer***, 598 A.2d at 1305. By replacing the 'directness' element of the ***Root*** standard with a 'fairness' element, I believe the gap between the criminal and civil causation standards was significantly diminished, if not eliminated. What if a jury determines that a showing of proximate cause alone is *fair* in the context of a particular case, either due to the abhorrent intent of the perpetrator, or the severity of the resulting injuries? This type of *ad hoc* causation analysis, explicitly endorsed by the ***Rementer*** Court, invited the comingling of elements and permitted what was not permitted under the ***Root*** standard – a criminal conviction under the civil standard of causation.[2,3]

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[2] In ***Rementer***, the Court rationalized that "criminal causation has come to involve a case-by-case social determination; *i.e.*, is it just or fair under the facts of the case to expose the defendant to criminal sanctions." ***Id.*** at 1304.

And with what authority did the ***Rementer*** Court act in redesigning the criminal causation standard? The decision itself cited Section 303, but as noted *supra*, our Supreme Court largely ignored the implications of Section 303 long after that provision was codified, despite several opportunities to at least address its impact on the preexisting ***Root*** standard. Still, Section 303 defines the proximate cause standard that is identical to the "substantial" language contained in the ***Root*** standard.

For the more troublesome second prong, the ***Rementer*** Court first cited our Supreme Court's decision in ***Commonwealth v. Paquette***, 301 A.2d 837 (Pa. 1973). However, the ***Paquette*** Court cited the ***Root***

(Footnote Continued) ———————————

[3] I am cognizant of the ***Rementer*** Court's statement that its 'fairness' prong is simply another way of phrasing the 'directness' element of the **Root** standard. ***Rementer***, 598 A.2d at 1306-7 ("Thus, the defendant's conduct must bear a direct and substantial relationship to the fatal result in order to impose criminal culpability. *Put another way*, if the fatal result was an unnatural or obscure consequence of the defendant's actions, our sense of justice would prevent us from allowing the result to impact on the defendant's guilt.") (emphasis added). However, I disagree that those standards are interchangeable. In ***Novak v. Jeannette Dist. Mem'l Hosp.***, 600 A.2d 616 (Pa. Super. 1991), this Court defined "proximate cause" as "an issue of law, *i.e.*, whether the defendant's negligence, if any, was so remote that, as a matter of law, he cannot be held legally responsible for harm which subsequently occurred." ***Id.*** at 618 (citing ***Flickinger Estate v. Ritsky***, 305 A.2d 40, 43 (Pa. 1973). With this in mind, it seems that unnatural or obscure consequences of a defendant's conduct are unlikely to permit a finding of proximate causation. Thus, the second prong of the ***Rementer*** test does not provide any additional objective criteria with which to evaluate whether criminal causation has been proven other than what was already required for a finding of proximate causation.

standard and contained none of the 'fairness' language set forth in ***Rementer***. Second, the ***Rementer*** Court cited ***Commonwealth v. Howard***, 402 A.2d 674 (Pa. Super. 1979). That decision was also 'rooted' in the ***Root*** standard. ***Howard*** also cited ***Skufca*** favorably; but ***Skufca*** also purported to apply ***Root***, albeit in peculiar factual circumstances. Therefore, it is apparent to me that the ***Rementer*** Court modified the standard of criminal causation in Pennsylvania without any authority to do so. ***Rementer*** has subsequently been cited as controlling authority by this Court on nineteen occasions, including this one. Our Supreme Court, by contrast, has never cited to ***Rementer*** but for a single occasion when a reference to it was contained in a quotation from the Superior Court decision that was ultimately reversed. ***See Commonwealth v. Gaynor***, 648 A.2d 295 (Pa. 1994) (quoting from ***Commonwealth v. Gaynor***, 612 A.2d 1010 (Pa. Super. 1992)).

Rementer represents a case of bad facts producing bad law. Still, a reasonable argument exists that *the result* in ***Rementer*** was justified under the ***Root*** standard of causation. There was nothing 'indirect' about the appellant's beating of the victim, which began the chain of causation that led to the victim's death. Furthermore, the victim's attempt to escape while being beaten on a highway presented the foreseeable risk that she could be fatally struck by passing traffic. In that sense, the facts of ***Rementer*** were at least somewhat analogous to other cases that held, under the ***Root*** standard, that direct causation was proven where a defendant committed a

violent act and the victim did not die immediately from the inflicted wound, but instead died later from complications created by the wound. ***See Commonwealth v. Cheeks***, 223 A.2d 291 (Pa. 1966) (holding criminal causation proven where stab wound necessitated an operation to save the victim's life, and the victim, while in a disoriented mental state, died after pulling out tubes that been inserted into his body during that operation); ***see also Commonwealth ex rel. Peters v. Maroney***, 204 A.2d 459 (Pa. 1964) (holding criminal causation proven where elderly robbery victim, who had been knocked to the ground and kicked by the defendant, died eight days later of pneumonia in the hospital while being treated for the injuries caused by the defendant). In those cases, as well as in ***Rementer***, there was a direct, violent act that began the chain of causation leading to the victim's death.

However, subsequent decisions, including the instant one, have relied upon ***Rementer*** to dispose of the directness requirement altogether. Of note is ***Commonwealth v. McCloskey***, 835 A.2d 801 (Pa. Super. 2003), a case cited favorably by the Majority. In ***McCloskey***, the defendant permitted her minor daughters to have a keg party with forty other minors in her basement while she was present on the first floor. One of the partygoers, who was intoxicated, drove away from the party with three passengers. The driver sideswiped a vehicle and, while fleeing the scene of that initial accident, flipped his own vehicle, causing his passengers' deaths. A panel of this Court upheld three convictions for involuntary manslaughter

and rejected the defendant's argument that the Commonwealth failed to establish causation. In doing so, the ***McCloskey*** Court specifically cited and emphasized the second prong of the ***Rementer*** standard in reaching its decision. ***McCloskey***, 835 A.2d at 808. In the wake of ***McCloskey***, it is hard to believe that the long-held distinction between civil and criminal causation standards still exists in Pennsylvania, despite lip service still being paid to the ***Root*** standard.

Here, the relationship between Appellant's erratic driving and Mr. Chung's injury causing collision is inherently indirect. The Majority devotes much of its discussion to the causation issue by discussing Mr. Chung's *intent*, in an attempt to strike down Appellant's embellished argument that Mr. Chung was acting as a vigilante. Majority Opinion at 17 – 24. Chung's intent, however, has nothing to do with whether he was an intervening or superseding cause. His intent is a red herring under the ***Root*** standard. It is only relevant to the vague notion of whether it is fair to hold Appellant accountable if Mr. Chung was 'innocent,' and not whether Appellant's actions were the direct cause of the injuries in this case.

Even assuming, for the sake of argument, that causation could be satisfied under the AA-DUI statute without Appellant's being directly involved in the collision, a far more relevant inquiry would be whether Mr. Chung was driving too close to Appellant to avoid a collision. Mr. Chung could not answer this question, despite being in the best position to do so. N.T. 12/3/10, at 131. He saw Appellant "swerving all over … the center line"

and nearly collide with another car *before* he called police. N.T. 12/3/10, at 110-11. And yet, after witnessing the danger presented ahead of him, he did not retreat a safe distance by slowing his vehicle, which would have given him more time to react in the event that Appellant continued doing what Mr. Chung had already observed him doing.

These facts are important because they demonstrate that while Appellant's erratic driving created the possibility that a crash might occur, it was Chung's behavior (irrespective of his intent) that turned that possibility into a near certainty. The Majority suggests that Chung had but three choices: to wreck into Appellant's vehicle, to turn left and wreck into another moving vehicle, or to turn right onto the berm. However, Chung clearly had a fourth choice, which was to maintain a safe distance from a vehicle that he had already observed swerving dangerously in front of him.

This is not to say that Appellant's conduct was not criminal or that he should go unpunished - far from it. The body of criminal law provides numerous criminal sanctions for individuals who create risks of injury or death independent of statutes that require a causal nexus between a criminal act and a victim's injuries. However, when a statute requires causation of a particular result, as does the AA-DUI statute, a defendant's actions must be both a direct and substantial factor in bringing about that result. ***Root***. The uncontroverted evidence established that Appellant did not collide with any of the victims or their vehicles. Although Appellant is

responsible for creating a risk that such injuries could result, such a relationship in causation is inherently indirect.

Thus, under the facts of this case, I would conclude that there was insufficient evidence of direct causation to support Appellant's AA-DUI convictions. I disagree with the Majority's endorsement of the ***Rementer*** standard, which, for the reasons set forth *supra*, constitutes an implicit repudiation of our Supreme Court's criminal causation standard as set forth in ***Root***, and an abandonment of the distinction between criminal and civil causation standards. Similarly, I disagree with the Majority's reliance on ***McCloskey***, as the ruling in that case should be overruled as unsustainable under the ***Root*** standard of criminal causation.

I respectfully dissent.