

**[J-100-2013] [MO: McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 49 MAP 2012

Appellee

v.

GORDON CHARLES WILLIAMS,

Appellant

:
: Appeal from the Order of the Superior
: Court at No. 1357 MDA 2010, Dated May
: 13, 2011, Reversing the Order of the
: Berks County Court of Common Pleas,
: Criminal Division, at No. CP-06-MD-
: 0000961-2010, Dated August 13, 2010,
: and Remanding
:
: ARGUED: November 27, 2012
: RE-SUBMITTED: December 17, 2013

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE

DECIDED: January 21, 2014

I join the Majority Opinion in rejecting appellant's constitutionally-based arguments. I write separately to explain why I am satisfied to join, notwithstanding the manner in which the issue in this case has presented itself, and also to address the tangential questions that have arisen during the process of consideration and decision by this Court.

The trial court order at issue is brief, consisting of a directive that the District Attorney's Office "discuss" with the complainant's mother whether the mother would "provide all appropriate releases and authorization for the child's treating psychologist to discuss all aspects of the child's diagnosis, prognosis and treatment to date with Dr. Richard Small," appellant's expert. Implicit in the order is that if the mother did not agree to waive her child's privilege, the child would not be permitted to testify by closed circuit television, but instead would have to face her alleged abuser face-to-face in the

courtroom, beginning with the preliminary hearing. The order did not go as far as appellant had requested: he had asked the court for permission to have his own expert interview the child, so that his expert could testify in rebuttal.

Not surprisingly, the Commonwealth appealed the interlocutory order. In response, the trial court's brief statement in lieu of an opinion, quoted by the Majority, see Maj. Slip op. at 5, made two points of relevance: (1) the order was bottomed squarely and exclusively upon the right of confrontation; and (2) the purpose of the coercive disclosure was to give appellant "the opportunity to present his own expert testimony concerning [the] complainant's psychological state." The court's statement, although adverting generically to "English common law and Roman law," betrayed no awareness of contemporary American constitutional law involving the right of confrontation; indeed, the statement was unsupported by citation to, or discussion of, any relevant authority.

The Commonwealth's appeal to the Superior Court, which was accepted by that tribunal as an appropriate collateral order subject to immediate appeal under Pa.R.A.P. 313 (for obvious reasons given the privilege of the child at issue), raised two issues. First, the Commonwealth argued that the trial court erred in deciding to compel the release of the child's confidential psychological records for analysis by the defense expert premised simply upon the request that the child be permitted to testify by closed circuit television. Second, the Commonwealth contended that the trial court violated the child's constitutional rights by forcing her mother to waive any privilege the child may have. The Superior Court reversed on the first issue, and did not reach the second.

The core of the Superior Court's analysis was statutory. The panel held that Section 5985 of the Judicial Code -- the statute authorizing testimony by child victims or witnesses by "contemporaneous alternative method" -- provides that the defendant's

counsel has the right to be present at the hearing concerning the child's emotional ability to testify at trial in the presence of the defendant. Super. Ct. Op. at 12-14 (citing 42 Pa.C.S. § 5985(a.2)(2)). But, Section 5985 does not confer a right upon defendant to have his expert examine the child or to have his expert present testimony to contradict the Commonwealth's expert. The panel "decline[d] to look beyond the statute's plain meaning to find such a right." Id. at 13. The panel never mentioned nor did it directly engage the trial court's statement concerning the Confrontation Clause, upon which the decision below was grounded, albeit the panel did discuss Superior Court decisional authority which held that the right to confrontation and compulsory process are not violated by denying access to psychotherapeutic records. As Mr. Justice Saylor explains, the Superior Court's approach in this case was not optimal: the panel did not engage the constitutional question directly nor did the panel discuss the fact that the absence of an affirmatively granted statutory right to that review which the trial court ordered does not equate to the absence of any basis upon which the trial court would be authorized to order such relief.

This Court accepted the interlocutory appeal for further review. Appellant framed the issue as whether a defendant has a "right" to present informed expert testimony to rebut the Commonwealth's evidence in support of its motion to allow the child to testify by closed circuit television. In his brief to this Court, appellant does not root his claim in the Confrontation Clause. Appellant argues that his right derives from the right to counsel (which he says subsumes other rights including compulsory process and confrontation) and also due process. Notably, appellant never acknowledges, discusses, nor attempts to distinguish Maryland v. Craig, 497 U.S. 836 (1990), which forecloses relief upon his claim on appeal, as the Majority explains. Just as notably, the trial court, which also did not acknowledge Craig, did not base its ruling upon due

process or the generalized right to counsel suggested by appellant. One does not need a lawyer in order to confront witnesses; defendants permitted to proceed *pro se* do it all the time.

In response, the Commonwealth engages appellant's various arguments on the merits, not objecting to the fact that appellant's current theories do not necessarily track the trial court's confrontation clause ruling and, presumably, appellant's arguments to the trial court.

Because the Commonwealth does not object to the expansion of the interlocutory appeal to include other theories, and the theories have been briefed here, I have no objection to the Majority's decision to address the broader constitutional claims placed before us. It is a separate theoretical question, not currently before us, whether the trial court had some other discretionary authority to issue the order it issued, in the face of the child victim's own rights, for purposes of discharging its duty under the statute. In light of narrow scope of the interlocutory appeal before us, I would not venture to decide these tangential issues.