[J-89-2012] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 622 CAP
	:
Appellee	: Appeal from the Judgment of Sentence
	: entered on 02/01/2011 in the Court of
	: Common Pleas, Criminal Division, York
v.	: County at No. CP-67-CR-0003162-2009
	:
	:
KEVIN EDWARD MATTISON,	:
	:
Appellant	: ARGUED: September 12, 2012

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: November 21, 2013**

I join the Majority Opinion in full, writing separately only to Part VII, which involves appellant's challenge to his sentences for robbery and burglary, imposed by the trial court following the jury's imposition of the death penalty.

In footnote 13, the Majority states that appellant has posed this claim as implicating the constitutional proscription against double jeopardy, which therefore implicates the legality of his sentence. The Commonwealth, in turn, responded to the claim on the merits and did not argue that the claim (or aspects of it) might be more properly framed as going to the discretionary aspects of sentencing, which cannot be examined on appeal absent compliance with Section 9781 of the Sentencing Code, 42 Pa.C.S. §§ 9701-9799.41, and the procedure outlined in Pa.R.A.P. 2119(f). The Majority acknowledges that there has been division on the Court concerning how to identify whether claims implicate the legality or discretionary aspects of a given sentence, citing the variety of views expressed in Commonwealth v. Foster, 17 A.3d 332 (Pa. 2011). The

Majority concludes that under these circumstances, without an on-point trial court expression or advocacy in briefing to the Court, the best course is to "assume, *arguendo*, the existence of jurisdiction over this claim for purposes of this appeal, and refrain from a superfluous discussion regarding whether the claim also fails on procedural grounds under Pa.R.A.P. 2119(f)." Majority Slip Op. at 22-23 n.13. I have no objection to proceeding to the merits under the circumstances the Majority notes, since the Majority's assumption of hypothetical jurisdiction is the most efficient manner of disposing of the claim in this case arising on our direct capital appeal docket. See Commonwealth v. Abdul-Salaam, 812 A.2d 497, 503 (Pa. 2002); Commonwealth v. Hawkins, 953 A.2d 1248, 1258 n.4 (Pa. 2008) (Saylor, J., concurring). On the merits so reached, I join in full.

However, I would add that, while Rule 2119(f) is certainly "procedural," it exists to ensure a jurisdictional limitation. If a claim implicates the discretionary aspects of a sentence, the direct appeal court -- in capital cases, this Court -- lacks jurisdiction unless the requirement set forth by 42 Pa.C.S. § 9781(b) is met: "The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence . . . to the appellate court that has initial jurisdiction for such appeals. Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate . . . ." Thus, as a matter of jurisdiction, a discretionary sentencing claim cannot be passed upon absent a preliminary determination of a substantial question. Implementing the jurisdictional qualifier, Rule 2119 then provides that the appellant (whether it be the defendant or the Commonwealth) must include in the principal brief a separate "concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence," which "shall immediately precede the argument on

the merits with respect to the discretionary aspects of sentence." Pa.R.A.P. 2119(f). See Commonwealth v. Mouzon, 812 A.2d 617, 621-22 (Pa. 2002) (plurality).

Notably, in Commonwealth v. Tuladziecki, 522 A.2d 17, 18-20 (Pa. 1987), the Court stressed that the Rule 2119(f) concise statement "operates as the 'petition for allowance of appeal' under the Sentencing Code. . . . In effect, the filing of the 'petition for allowance of appeal' contemplated by the statute is deferred by these rules until the briefing stage, where the question of the appropriateness of the discretionary aspects of the sentence may be briefed and argued in the usual manner." And although the concise statement appears in the same filing as the argument on the merits, in this context, they represent distinct inquiries and entail a jurisdictional component:

> So long as the [party seeking appeal] is required at some point to demonstrate a "substantial question" in accordance with the statute to invoke [appellate] jurisdiction, this procedure is sound. [An appeal court] may not, however, be permitted to rely on its assessment of the argument on the merits of the issue to justify *post hoc* a determination that a substantial question exists. If this determination is not made prior to examination of and ruling on the merits of the issue of the appropriateness of the sentence, the [appellant] has in effect obtained an appeal as of right from the discretionary aspects of a sentence. It is elementary that such an enlargement of the appeal rights of a party cannot be accomplished by rule of court. For this reason it is essential that the rules of procedure governing appeals such as this be followed precisely.

Id. at 19.

If appellant's current claim in fact implicates the discretionary aspects of the sentences imposed for his lesser offenses, and no substantial question is raised, this Court would lack jurisdiction to engage in a review of the merits under Section 9781(b). This would appear to be the case here. Appellant's sentencing claim entails a double jeopardy element, and he bandies the phrase about throughout his argument. Nevertheless, much of his argument in this regard reads like a typical challenge to the

discretionary aspects of his sentence. Notably, the Commonwealth's brief, even though it does not pose a Section 9781(b) and Rule 2119(f) challenge, speaks repeatedly of the discretion properly exercised by the trial judge.

Mr. Justice Eakin joins the opinion.