[J-11-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	: No. 37 EAP 2005
	:
Appellee	: Appeal from the Order of the Superior
	: Court dated May 27, 2004, affirming the
v.	: Order of the Court of Common Pleas of
	: Philadelphia County, dated June 16, 2003,
JOHN MCCLINTIC,	: August Term, 2002, No. 0157/0158
	:
Appellant	: ARGUED: March 1, 2006

DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: November 22, 2006**

Because I believe the trial court lawfully imposed an enhanced sentence for each separate crime of violence committed by appellant, I must dissent. Relevantly, appellant was convicted of a June 27 robbery and burglary, and another robbery and burglary occurring July 5. Because of his past convictions, his sentences for all of these crimes were controlled by the "Three Strikes Law." 42 Pa.C.S. § 9714(a)(2). The judge made the sentences for the two June 27 crimes consecutive to each other, and the two July 5 crimes consecutive to each other, but concurrent to those for the June 27 crimes.[1]

[1] That he was sentenced for crimes on two dates may confuse the analysis. Appellant only challenges the requirement that the court enhance each violent crime arising from the same episode, e.g., enhancing both the burglary and robbery of June 27, and likewise enhancing the sentence for both July 5 crimes.

Section 9714(a)(2) requires a 25-year mandatory minimum sentence be imposed if the defendant had two or more prior convictions of violent crimes when he committed the current offense. 42 Pa.C.S. § 9714(a)(2). The majority interprets "current offense" to mean "the crime of violence for which the defendant was charged at the current trial and upon which the defendant is being sentenced," Majority Slip Op., at 14-15, and acknowledges either robbery or burglary, "standing alone[,] qualifies as a 'current offense' for which a sentence enhancement is appropriate." Id., at 15. However, the majority then concludes these crimes for some reason do not stand alone, holding that because appellant committed these offenses in the same criminal episode, only the sentence for one of these crimes may be enhanced.

The majority reaches this conclusion by a somewhat labored interpretation of the simple language of the statute, specifically the phrase "previously been convicted of two or more such crimes of violence arising from separate criminal transactions." Id., at 14. The word "such" is somehow said to refer to "current offense," which it clearly does not. The word does indeed refer to an antecedent, as it modifies the words next to it, "crimes of violence," an antecedent term defined previously in the statute. It does not abut, modify, or even refer to "current offense" -- it manifestly speaks to a defendant's prior convictions, in this case appellant's record before commission of the present offenses. It certainly does not infer any legislative intent concerning multiple offenses before the sentencing court.

Indeed, as the majority notes, the legislature wanted to be sure the prior "strikes" were distinct, with an opportunity to reform between each; hence, the language in the above phrase dealing with prior convictions. However, nowhere is there an indication

the legislature wanted to limit enhancement for multiple violent crimes occurring after two distinct opportunities to reform were not taken. There is no "separate criminal transaction" language when the legislature speaks of the present crimes. The quoted "single transaction" language appears only when speaking of the record that triggers enhancement. "Single transaction" is a concept obviously in the legislature's awareness, making its absence when speaking to enhancement of sentences for the present crimes indicative of a legislative intent to the contrary of the majority's conclusion. I suggest the language is sufficiently clear that we need not even reach legislative intent, but if we do, that intent is manifestly in line with the sentence imposed here.

The events of June 27 may comprise but one transaction if considered for purposes of determining appellant's prior record -- it would only be one "strike" -- but that is not the question. The question is whether, once sufficient separate prior convictions are established, all subsequent crimes of violence, be they in one episode or 20, are enhanced. It seems clear that once appellant was shown to have been convicted of two prior qualifying crimes of violence, the statute requires enhancement of sentence for every violent felony committed thereafter, not just some of them.

If the statute applies (and all agree it does), which crime from June 27 is enhanced under the majority's premise, the robbery or the burglary? Where is the legislative intent to make the court choose but one, or guidance on which of the two to choose? The language is to the contrary -- that the court "shall" impose the enhanced sentence for the offense, not the "transaction." This is not sentencing appellant as a

"third and fourth offender" -- it is sentencing him as a multiple offender with two prior violent convictions.[2]

This Court has expressed disapproval of allowing defendants a "volume discount" on multiple crimes. See Commonwealth v. Anderson, 650 A.2d 20, 22 (Pa. 1994) (this Court will ward against permitting "volume discount"); see also Commonwealth v. Nolan, 855 A.2d 834, 839 (Pa. 2004) (citing Anderson). While Anderson and Nolan dealt with merger and compulsory joinder, the principle is that a defendant who commits numerous violent offenses in one episode should not be treated identically to the defendant who commits a single violent offense. As the Court in Anderson observed:

> If multiple acts of criminal violence were regarded as part of one larger criminal transaction or encounter which is punishable only as one crime, then there would be no legally recognized difference between a criminal who robs someone at gunpoint and a criminal who robs the person and during the same transaction or encounter pistol whips him in order to effect the robbery. But in Pennsylvania, there is a legally recognized difference between these two crimes. The criminal in the latter case may be convicted of more than one crime and sentences for each conviction may be imposed where the crimes are not greater and lesser included offenses.

Anderson, at 22.

The policy against discounts for multiple crimes committed during one incident should apply in the context of recidivism, where the defendant has already been

[2] That the court made the enhanced sentences for each offense consecutive is a matter of discretion, subject to appellate review as would be any other sentence question, but it is not violative of the statute. Had the court made the June 27 offenses concurrent to each other, but consecutive to the July 5 crimes, the same result as here would have been reached. Vacating of these sentences would subject appellant to resentencing, at which the trial court could reach the same result, should that be the court's determination of the appropriate sentencing scheme.

convicted of prior violent offenses. Having decided to engage in yet a third (and fourth) violent criminal episode, the defendant may not escape the Three Strikes Law for multiple separate offenses he commits during another criminal episode.

Madame Justice Newman joins this dissenting opinion.