[J-144-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 244 Capital Appeal Docket
	:	
Appellee	:	
	:	Appeal from the Order of the Court of
	:	Common Pleas of Philadelphia County
v.	:	dated April 30, 1998 at No. 9501-580 2/3
	:	
	:	Argued: October 17, 2000
MICHAEL OVERBY,	:	
	:	
Appellant	:	
	:	
	:	

CONCURRING OPINION

MADAME JUSTICE NEWMAN **DECIDED: October 24, 2002**

I agree with the lead opinion that the proper ultimate disposition of this case is to reverse the Judgment of Sentence imposed by the Court of Common Pleas of Philadelphia County and remand the matter to the court for a new trial. However, I write separately to express my evolving concerns with trying multiple defendants in the same proceeding when one or more, but not all, of the defendants have given a statement or statements to the police, which can be classified as confessionary. After much reflection on this issue, I now believe that in all cases where there are multiple defendants, where one or more of the defendants has given a confessionary statement, where one or more of the defendants who gave confessionary statements will not testify, and where the Commonwealth plans to introduce the confessionary statement(s), the trial should be severed to avoid any

possibility of running afoul of the Confrontation Clause. The only limitation I would place on this proposition is that where there is no chance that the confessionary statement will prejudice the non-confessing co-defendant, it may be admitted and separate trials are not necessary.

The cornerstone case on the Confrontation Clause in this context is Bruton v. United States, 391 U.S. 123 (1968), in which the U.S. District Court for the Eastern District of Missouri tried Bruton and Evans together for armed postal robbery. St. Louis police officers questioned Evans, who was incarcerated in the city jail in St. Louis, Missouri, awaiting trial on state criminal charges, about his involvement in the postal robbery. The officers obtained a confession from Evans, but did not give Evans any Miranda[1] warnings. The officers informed a postal inspector of their success with Evans; on two subsequent dates, the postal inspector questioned Evans, who again confessed and, during the second round of questioning, expressly implicated Bruton in the crime. The court permitted the prosecution to introduce the testimony of the postal inspector on Evans' confession, but instructed the jury that they could only consider the confession against Evans, as "it was inadmissible hearsay against [Bruton] and therefore had to be disregarded in determining [Bruton's] guilt or innocence." Bruton, 391 U.S. at 125. The jury convicted both Bruton and Evans of the crime.

Bruton and Evans appealed to the Court of Appeals for the Eighth Circuit, which vacated the conviction of Evans because "the confessions before the jury were tainted and infected by the poison of the prior, concededly unconstitutional confession obtained by the local officer." Evans v. United States, 375 F.2d 355, 361 (8th Cir. 1967). However, the

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Eighth Circuit affirmed the conviction of Bruton based on the limiting instruction given by the trial court. Bruton sought leave to appeal to the United States Supreme Court, which granted *certiorari* to determine "whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence." Bruton, 391 U.S. 123-124. The Court determined that, "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt, admission of Evans' confession in this joint trial violated [Bruton's] right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." Id. at 126.

The Court reasoned as follows:

> Here the introduction of Evans' confession posed a substantial threat to [Bruton's] right to confront the witnesses against him, and this is a **hazard we cannot ignore**. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating [Bruton], in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for [Bruton's] constitutional right of cross-examination. The effect is the same as if there had been no instruction at all.

Id. at 137 (emphasis added). In a Concurring Opinion, Justice Stewart opined that a "basic premise of the Confrontation Clause . . . is that certain kinds of hearsay are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give." Id. at 138 (Stewart, J., concurring) (internal citations omitted).

Justice White dissented, arguing that irrespective of the admissibility of Evans' confession as against Evans, "nothing in that confession which was relevant and material to Bruton's case was admissible against Bruton. As to Evans, it was inadmissible hearsay,

a presumptively unreliable out-of-court statement of a nonparty who was not a witness subject to cross-examination." Id. at 138 (White, J., dissenting). However, Justice White would have upheld the conviction of Bruton, reasoning as follows: "Just as the Court believes that juries can reasonably be expected to disregard ordinary hearsay or other inadmissible evidence when instructed to do so, I believe juries will disregard the portions of a codefendant's confession implicating the defendant when so instructed." Id. at 142. Justice White believed that the majority had "severely limit[ed] the circumstances in which defendants [could] be tried together for a crime which they [were] both charged with committing." Id. at 143.

Justice White criticized the position of the majority as creating a potentially unfair criminal justice system in which separate trials could have vastly different consequences for "legally indistinguishable defendants." Id. Justice White explained his conception of what the majority had done as follows:

> I would suppose that it will be necessary to exclude all extrajudicial confessions unless all portions of them which implicate defendants other than the declarant are effectively deleted. **Effective deletion will probably require not only omission of all direct and indirect inculpations of codefendants but also of any statement that could be employed against those defendants once their identity is otherwise established.** Of course, the deletion must not be such that it will distort the statements to the substantial prejudice of either the declarant or the Government. If deletion is not feasible, then the Government will have to choose either not to use the confession at all or to try the defendants separately.

Id. at 143-144 (emphasis added). Justice White suggested that "[t]o save time, money, and effort, the Government might best **seek a ruling at the earliest possible stage of the trial**

proceedings as to whether the confession is admissible once offending portions are deleted." Id. at 144 (emphasis added).

While I am mindful of the concerns articulated by Justice White in his dissent in Bruton regarding the practical difficulties of the separate trials and the potential of varying consequences for legally indistinguishable defendants, I agree with his reading of the Majority Opinion in that case. This Court seemed to read Bruton consistently with that view as well. See Commonwealth v. Johnson, 378 A.2d 859, 860 (Pa. 1977) ("If a confession can be edited so that it retains its narrative integrity and yet **in no way refers to defendant**, then use of it does not violate the principles of Bruton") (emphasis added). In Johnson, the trial court rejected a statement that did not mention Johnson by name, but instead utilized the pronoun "we". The trial court ruled that the reference had to be deleted, reasoning that any reference that by "any stretch of the imagination" could refer to Johnson, had to be omitted. Id. at 861.

Muddying the waters in this difficult field of criminal jurisprudence is Richardson v. Marsh, 481 U.S. 200 (1987). In Marsh, over the objection of Marsh, a Michigan state court tried Williams, Martin, and Marsh jointly for two murders and an assault. The prosecution introduced a confession given by Williams to the police, in which Williams referred to both Martin and Marsh. The confession detailed a conversation that the three co-defendants had had in a car before the murders. When introducing the confession at trial, the prosecutor redacted the confession to omit all references to Marsh and all references that anyone other than Williams and Martin were involved in the crime. Even though the confession did not refer in any way to Marsh, the court read to the jury an instruction admonishing them not to use the confession against Marsh. Marsh took the stand in her

own defense and testified that she was in the car, but that she could not hear the conversation between Williams and Martin because the radio was too loud.

Later, during its closing argument, the prosecution linked Marsh's testimony to the confession of Williams as follows:

> "It's important in light of [Marsh's] testimony when she says [Martin] drives over to [Williams'] home and picks him up to go over. What's the thing that she says? 'Well, I'm sitting in the back seat of the car.' 'Did you hear any conversation that was going on in the front seat between [Martin] and [Williams]?' 'No, couldn't hear any conversation. The radio was too loud.' I asked [sic] you whether that is reasonable. Why did she say that? Why did she say she couldn't hear any conversation? She said, 'I know they were having conversation but I couldn't hear it because of the radio.' Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that."

Id. at 205, n.2 (quoting Notes of Testimony from the original trial). Defense counsel for Marsh did not object to this statement. The jury convicted Marsh of the crimes, the Michigan Court of Appeals affirmed, and the Michigan Supreme Court refused to consider Marsh's appeal. Marsh then sought *habeas corpus* relief, which the District Court for the Eastern District of Michigan denied. However, the Court of Appeals for the Sixth Circuit reversed, "reject[ing] the approach which limits the appraisal of the inculpatory value of an extrajudicial statement to the face of the statement itself. Such an approach ignores the true incriminatory effect of the statement, and, with no countervailing benefit, sanctions the use of admittedly inadmissible evidence . . . ." Marsh v. Richardson, 781 F.2d 1201, 1212 (6th Cir. 1986). Accordingly, the Sixth Circuit held that the statement of the prosecutor linking Marsh to the Williams confession violated the Confrontation Clause. The United States Supreme Court granted *certiorari* to address how Bruton applies to situations where the confession does not refer to the co-defendant.

The Court noted the distinction between Bruton and Marsh, in that the confession in Bruton "expressly implicated" Bruton as the accomplice of the confessing co-defendant. Richardson v. Marsh, 481 U.S. at 208. The Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." Id. at 211. The Court refused to rule "on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." Id. at 211, n.5.

Justice Stevens, joined by Justices Brennan and Marshall, filed a vigorous dissent, in which he argued that, pursuant to Bruton, there should be no distinction between "confessions that directly identify the defendant and those that rely for their inculpatory effect on the factual and legal relationship of their contents to other evidence before the jury." Id. at 212 (Stevens, J., dissenting). Justice Stevens wrote that, in his opinion, not all co-defendant confessions expressly mentioning the defendant should be excluded or require separate trials because some do not serve to prejudice the defendant. However, where the confession of the co-defendant is "powerfully incriminating" and would, thus, prejudice the defendant, whether expressly or only by reference to other evidence, admission of the confession creates a "substantial . . . and constitutionally unacceptable risk that the jury, when resolving a critical issue against [Marsh], may have relied on impermissible evidence." Id. at 214, 216-217.

Responding to the concern that separate trials waste judicial resources and lead to vastly different consequences for legally indistinguishable defendants, the Marsh dissent stated:

> The facts that joint trials conserve prosecutorial resources, diminish inconvenience to witnesses, and avoid delays in the administration of criminal justice have been well known for a long time. It is equally well known that joint trials create special risks of prejudice to one of the defendants, and that such risks often make it necessary to grant severances. The Government argues that the costs of requiring the prosecution to choose between severance and not offering the codefendant's confession at a joint trial outweigh the benefits to the defendant. On the scales of justice, however, considerations of fairness normally outweigh administrative concerns.
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> The [majority] expresses an apparently deep-seated fear that an even-handed application of Bruton would jeopardize the use of joint trials. This proposition rests on the unsupported assumption that the number of powerfully incriminating confessions that do not name the defendant is too large to be evaluated on a case-by-case basis. The Court then proceeds to the ostensible administrative outrages of the separate trials that would be necessary, contending that it would be unwise to compel prosecutors to bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. This speculation also floats unattached to any anchor of reality. Since the likelihood that more than one of the defendants in a joint trial will have confessed is fairly remote, the prospect of presenting the same evidence again and again is nothing but a rhetorical flourish. At worst, in the typical case, two trials may be required, one for the confessing defendant and another for the nonconfessing defendant or defendants. And even in that category, presumably most confessing defendants are likely candidates for plea bargaining.

Id. at 217, 219, n.7 (internal quotations and citations omitted).

I agree with Justice Stevens' dissent in Marsh; the goal of our system of criminal justice is to ensure that criminal defendants receive fair trials. Administrative concerns,

while uncontrovertibly important, must not work to deprive a defendant in jeopardy of losing his or her life or liberty from his or her fundamental right to cross-examine adverse witnesses. In fact, I would go a step farther than Justice Stevens. I believe that if a confessionary statement has the potential to prejudice a non-confessing defendant, the trial should be severed, even if the confession is not "powerfully incriminating." It is potentially equally wasteful of judicial resources to permit a joint trial in these situations for the reason that a mid-trial severance or reversal on appeal expends the resources of a court much more than utilizing separate trials from the outset. This consideration, coupled with the potential unfairness to a criminal defendant in a joint trial, leads this Justice to the conclusion that where a confessionary statement of one or more non-testifying co-defendants has the potential to prejudice a non-confessing co-defendant, the trial of the non-confessing co-defendant should proceed separately.

In the case *sub judice*, the prosecutor read the preliminary hearing testimony of Schneyder in open court. At the first trial, the Commonwealth read Schneyder's preliminary hearing testimony to the jury:

> [Response continued]: He [Elliott] said that Lillian opened the door and he said that Lillian gave X a hard way to go. He said that it was him, another person and X, and that they went into the house and Lillian didn't want to give up any stuff and X told him, Wayney, to grab her, and then he grabbed her and held her while another person tied her up. He said that X strangled her.

Notes of Testimony, 11/21/1995, at 24-25. At the second trial, in the portion of the statement containing Elliott's hearsay statement, the name of Michael Overby (Overby) was again changed to "X." As the lead opinion notes, the jury was clearly aware that "X" referred to Overby. This statement undoubtedly prejudiced Overby. Accordingly, as does

the lead opinion, I would reverse the Judgment of Sentence and remand the matter for a new trial on all counts.

Mr. Chief Justice Zappala joins in this concurring opinion.