

[J-146-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 404 CAP
	:	
Appellee	:	
	:	Appeal from the Judgment of Sentence
	:	entered on 10/17/02 in the Court of
v.	:	Common Pleas, Criminal Division of
	:	Dauphin County at No. 1773 CD 2000
	:	
HERBERT J. BLAKENEY,	:	
	:	
Appellant	:	ARGUED: December 4, 2006

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: May 1, 2008

I join Parts I, II, III, V, VI, and VII of the majority opinion. With regard to Appellant's claim that the common pleas court erred by denying funds to retain expert psychiatric assistance (Part IV), I would remand for a fuller explanation concerning the reasons supporting the denial, but for Appellant's indication at the sentencing hearing that he did not wish to pursue the matter further. In my view, the circumstances of Appellant's offenses themselves implicate the possibility that mental and/or emotional issues may have been relevant to sentencing. The trial court's explanation for the denial of funding, however, as set forth in its Rule 1925 opinion, goes only to the issue of constitutional entitlement to funds, not to the discretionary authority to allocate them.¹

¹ I have previously expressed difficulty with the reasoning supporting the prevailing constitutional interpretation of this Court. See, e.g., Commonwealth v. Miller, 560 Pa. 500, 524-25, 746 A.2d 592, 605 (2000) (Saylor, J., concurring). While I recognize that I (continued . . .)

Further, in terms of reasoning, the motions judge's order suggests at most a concern pertaining to the appropriate source of funding, as between the court's budget and that of the public defender. Since I do not believe that decisions concerning funding for the development of defenses to the imposition of the death penalty should turn on budgetary disputes, some further explanation would be beneficial.

Nevertheless, at trial, Appellant's standby counsel attempted to put the funding issue before the trial judge at the outset of the penalty hearing, when the court could have taken measures to address it if warranted, such as by allocating funds and granting a continuance to secure an examination.² Representing himself, however, Appellant stated that he wished to withdraw the motion and asked the trial court to move on. In these circumstances, I agree with the Commonwealth's position that the claim, at this juncture, is appropriately treated as unpreserved for our review.

Mr. Justice Baer joins this concurring opinion.

(. . . continued)

am bound by the precedent concerning the constitutional dynamic, I do not read the constitutional decisions as foreclosing all review of the discretionary aspect of funding decisions pertaining to indigent capital defendants.

² Although the motions judge's position may have remained controlling, the trial judge had the benefit of observing Appellant's behavior throughout trial, and therefore, it is possible that a different decision might have been appropriate, in light of new circumstances. In my view, the salient fact is that the trial judge was never required to make this decision, on account of Appellant's decision to forego the issue.