[J-181A-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 95 W.D. Appeal Docket 1997
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court at No. 2206PGH95 entered June
	:	13, 1997, affirming the Judgment of
v.	:	Sentence of the Court of Common Pleas
	:	of Armstrong County, Criminal Division, at
	:	No. 1991-0370-CRIM entered October 31,
LOUIS SHAFFER,	:	1995.
	:	
Appellant	:	696 A.2d 179 (Pa. Super. 1997)
	:	
	:	ARGUED: September 17, 1998
	:	
	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: JULY 21, 1999**

I continue to believe that this Court erred when it held in Commonwealth v. Besch 544, Pa. 1, 674 A.2d 655 (1996), that the legislature intended for the Pennsylvania Corrupt Organizations Act ("the Act"), 18 Pa.C.S. § 911 et seq., to encompass only legitimate businesses enterprises. However, because Besch was the law at the time the Superior Court reviewed the judgment of sentence and I believe that the Superior Court erred in applying the amendments to the Act retroactively, I am constrained to concur in the result reached by the majority.[1]

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[1] As noted in the majority opinion, the Act was amended in 1996 to provide that PCOA applied to illegitimate as well as legitimate enterprises.

In Besch, the majority held that in order to be subject to the Act, the Commonwealth needed to establish that the "enterprise" was connected to a legitimate business; thus, a connection to an illegitimate business, such as a drug cartel, was not covered under the Act. At the time of the majority's holding, the Act defined "enterprise" as "any individual, partnership, corporation, association, or other legal entity and any union or **group of individuals associated in fact although not a legal entity**, engaged in commerce." 18 Pa.C.S. § 911(h)(3) (emphasis added). The plain language of the statute indicated that the legislature intended for the Act to apply to both legitimate and illegitimate activities. Nevertheless, the majority in Besch disagreed.

In ruling that the Act applied to only legitimate enterprises, the majority took a path divergent from the United State Supreme Court, which in United States v. Turkette, 452 U.S. 576 (1981), considered the identical definition of "enterprise" found in the federal Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1961(4),[2] and concluded that:

> RICO is equally applicable to a criminal enterprise that has no legitimate dimension or has yet to acquire one. Accepting that the primary purpose of RICO is to cope with the infiltration of legitimate businesses, applying the statute in accordance with its terms, so as to reach criminal enterprises, would seek to deal with the problem at its very source.

Id. at 591.[3]

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[2] Under RICO, enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

[3] The decision in Turkette was consistent with a number of federal cases which had held that the definition of enterprise under the RICO statute included illegitimate as well as legitimate enterprises. See, e.g., Russello v. United States, 464 U.S. 16 (1983); United States v. Errico, 635 F.2d 152, 155 (2d Cir.1980) cert. denied, 453 U.S. 911 (1981); United States v. Provenzano, 620 F.2d 985 (3d Cir.), cert. denied, 449 U.S. 899 (1980); United States v. Whitehead, 618 F.2d 523, 525 n 1 (4th Cir.1980); United States v. Aleman, 609 F.2d 298, 304-05 (7th Cir.1979), cert. denied, 445 U.S. 946 (1980); United States v. Rone, 598 F.2d 564, 568-69 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Swiderski, 593 F.2d 1246, 1248-49 (1978), cert. denied, 441 U.S. 933 (1979); United States v. Elliott, 571 F.2d 880, 896-98 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

The majority justified ignoring the plain language of the statute, as well as the United States Supreme Court's interpretation of the identical language, based on one sentence in the Act's preamble which states that:

> The vast amounts of money and power accumulated by organized crime are increasingly used to infiltrate and corrupt legitimate businesses operating within the Commonwealth, together with all of the techniques of violence, intimidation, and other forms of unlawful conduct through which such money and power are derived.

18 Pa.C.S. § 911(a)(3). From this, the majority in Besch went on to conclude that:

> There is no escaping the clear intent of this statute. The General Assembly went to great pains to set forth the parameters of this piece of legislation. Pa.C.O.A. is directed at preventing the infiltration of legitimate business by organized crime in order to promote and protect legitimate economic development within Pennsylvania.

544 Pa. at 10, 674 A.2d at 659.

However, two weeks after this Court's ruling in Besch, the General Assembly acted to correct this Court's erroneous interpretation by beginning the process to clarify the definition of enterprise under the Act to include both legitimate and illegitimate enterprises.[4] At the time of the amendments to the Act, members of both the House of Representatives and the Senate made clear their disagreement with this Court's interpretation of the Act. For example, State Representative Albert H. Masland stated:

> Our Supreme Court, by a four-to- three vote, decided that the Pennsylvania Corrupt Organization's [sic] Act did not apply to those corrupt organizations who wholly engaged in illegal activities. In other words, they said, a corrupt organization had to also be involved in legitimate business enterprises for that to come under the purview of the Corrupt Organizations Act. . . . **That was not the intent**, I do not believe,

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[4] Following the amendments the statute now provides:

> "Enterprise" means any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, engaged in commerce and includes legitimate as well as illegitimate entities and governmental entities.

18 Pa.C.S. § 911(h)(3), as amended, June 19, 1996.

> of this legislature back in 1970 when the act was passed. I do not think it is our intent today, and I think we ought to join with Chief Justice Nix in his dis[s]enting opinion, along with Justices Castille and Sandra Schultz Newman, and change our act so that the rest of the Supreme Court understands what we intend.

Commonwealth v. Shaffer, 696 A.2d 179, 184 (Pa. Super. 1997) (citing Act 55, 180th Legis. (Pa. 1996)) (emphasis added). Moreover, former Senator Michael Fisher (now Attorney General) stated:

> . . . [B]y concurring with the amendments added by the House of Representatives . . . **we are clarifying that statute** to say that, in fact it is our intent that drug organizations and drug enterprises across Pennsylvania and other illegitimate enterprises across Pennsylvania were intended to be covered by this Statute.

Id. at 185 (citing S.D. 1172, 180th Legis; Pa. Legis. Journal No 36, at p. 2028-29 (June 5, 1996)) (emphasis added). The Senate went on to pass the clarifying amendment to the Act by a unanimous vote. "While statements made by legislators during the enactment process are not dispositive of legislative intent, they may be properly considered as part of the contemporaneous legislative history." Washington v. Baxter, 553 Pa. 434, 719 A.2d 733,738 (1998).

Taken together, the legislative comments and the alacrity with which the General Assembly acted following the decision in Besch, provides ample evidence to support the conclusion that the legislature did not intend for the Act to apply only to legitimate enterprises. The majority in Besch erroneously determined the legislature's intent. It is well established in the Commonwealth that "[t]he failure of the General Assembly to change the law which has been interpreted by the courts creates a presumption that the interpretation was in accordance with the legislative intent." Fonner v. Shandon, Inc., 724 A.2d 903, 906 (Pa. 1999) (citing Commonwealth v. Willson Products, Inc., 412 Pa.

78, 87-88, 194 A.2d 162, 167 (1963)).[5] When the General Assembly does act to make clear that the court's interpretation is inconsistent with its legislative intent, we should follow the guidance of the legislature and, where possible, amend earlier erroneous interpretations. See Commonwealth v. Lassiter, 554 Pa. 586, 722 A.2d 657, 661 n.3 (1998) ("actions undertaken in subsequent sessions of the Legislature are relevant in interpreting a statute which was passed in a previous session of the Legislature.")

The majority in the instant matter continues to cling to its unsupported belief that prior to the clarifying amendments by the General Assembly, the Act applied only to legitimate enterprises and that the amendments added new crimes applicable under the Act only in the future. That is not what occurred. The General Assembly in obvious disagreement with this Court's interpretation of the statute, acted to demonstrate to this Court how the Court had erred in trying to determine the General Assembly's intent that the Act cover illegitimate organizations. The majority in the instant matter is unwilling to cede its error.

Nevertheless, when the Superior Court heard this case, Besch was the law of this Commonwealth. Therefore, it was constrained under the doctrine of stare decisis to interpret the statute as encompassing only legitimate enterprises.[6] The Superior Court, as an intermediate appellate court, is obligated to follow and apply the decisions of the Supreme Court of Pennsylvania, even where it disagrees with this Court's decision. "If a majority of the Justices of this Court, after reviewing an appeal before us . . . join in

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[5] Moreover, prior to the decision in Besch, the Superior Court had held that "the term 'enterprise' is unrestricted and sufficiently broad to include both legitimate and illegitimate enterprises." Commonwealth v. Yacoubian, 339 Pa. Super. 413, 489 A.2d 228 (1985). Had this been a wrong interpretation, the legislature was free to act to amend the statute, but since it did not, this Court in Besch should have given greater deference to the presumption that the statutory interpretation in Yacoubian was correct. See Fonner, 724 A.2d at 906.

[6] "The rule of stare decisis declares that for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." Commonwealth v. Tilghman, 543 Pa. 578, 673 A.2d 898, 903 n. 9 (1996).

issuing an opinion, [the] opinion becomes binding precedent on the courts of this Commonwealth." Commonwealth v. Tilghman, 543 Pa. 578, 673 A.2d 898, 903 (1996).

I agree with the majority that the Superior Court's attempt to justify its decision, affirming the trial court and rejecting Besch based on the subsequent amendments to the Act, is flawed. The problem with the Superior Court's reasoning is that while the amendments do provide evidence that the majority in Besch failed to accurately ascertain the legislature's intent, the amendments do not overrule the Besch decision. "It is elementary that the legislature cannot create authority retroactively by passing 'clarifying' legislation." St. Joseph Lead Co. v. Potter, 398 Pa. 361, 368, 157 A.2d 638, 642 (1959). The legislature's failure to expressly provide that the amendments should be applied retroactively prohibit a finding to the contrary by the courts.[7] Therefore, I believe that the Superior Court was constrained to follow Besch, however distastefully.

Stare decisis ensures a level of stability and clarity by providing assured guidance as to what the law is.[8] Haphazard reversals by the judiciary erodes a level of

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[7] As noted by the majority, the effect of the clarifying amendments would have been different had the legislature included a savings provision such that the amendments would apply to all cases on post-trial or on appeal. Commonwealth v. Chamberlain, No. 155 Capital Appeal Docket (Pa. June 10, 1999). In Chamberlain, we held that the legislature's amendments to Section 1420 of the County Code, 16 Pa.S.C. § 1420 (permitting a district attorney to appoint a deputy attorney-general as an assistant) enacted less than a year after this Court's holding in Commonwealth v. Lawson, 548 Pa. 588, 699 A.2d 1246 (1997) (holding under section 1420, district attorney lacks authority to appoint deputy attorney general as an assistant prosecutor in a drug possession case) "eviscerated the holding and rationale of Lawson." This Court went on to state that the amendments "can only be interpreted as a response to Lawson with the evident purpose of correcting our interpretation of the legislative intent underlying" section 1420. Chamberlain is distinguishable from the instant matter, because in the amendments to section 1420, the legislature included the savings provision by specifying in subsection (d) of the amendment that it "shall apply to all cases pending on the effective date of this subsection and all cases thereafter, including, but not limited to, those cases on post-trial or on appeal."

[8] While I have taken a position in certain cases that stare decisis should not be followed, these situations are very limited and my position was warranted under Ayala v. Philadelphia Bd. of Public Education, 453 Pa. 584, 606, 305 A.2d 877, 888 (1973) ("the doctrine of stare decisis is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth process of the law to flourish.") See, e.g., Pennsylvania State Association of County Commissioners v. Commonwealth, 545 Pa. 324, 681 A.2d 699 (1996) (Castille, dissenting) (stare decisis should be abandoned where this Court wrongly held in County of Allegheny v. Commonwealth of Pennsylvania, 517 Pa. 65, 534 A.2d 760 (1987) that the state constitutional

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confidence that people place in the court system. Therefore, while I continue to believe that the decision in Besch was wrongly decided, I feel constrained to concur with the result reached by the majority given the absence of a "savings clause" by the legislature applying its amendments to pending cases.

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requirement that the judicial system be unified requires that the Commonwealth assume all responsibility for funding the judicial branch); Commonwealth v. Karaffa, 551 Pa. 173, 709 A.2d 887 (1998) (Castille, dissenting) (the decision in Commonwealth v. Oleynik, 524 Pa. 41, 568 A.2d 1238 (1990), holding that the submission of written instructions to the jury during deliberations was unfairly prejudicial, was wrongly decided and should be reversed. Trial courts need discretion particularly in long and complicated trials where the jury will be unable to understand or remember the legal principles given in the oral charge); Commonwealth v. Selby, 547 Pa. 31, 688 A.2d 698 (1997) (Castille, dissenting) (the decision in Commonwealth v. Brion, 539 Pa. 256, 652 A.2d 287 (1994) requiring judicial approval before an informer wearing a consensual wiretap may enter another individual's home to record a conversation to be used by the police in an undercover investigation was erroneous. A defendant abandons any expectation of privacy by discussing his criminal involvement with another person).