[J-24-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 46 EAP 2006
	:	
Appellee	:	Appeal from the Judgment of Superior
	:	Court entered on April 20, 2006 at No.
	:	1362 EDA 2004 affirming in part and
v.	:	vacating in part the Judgment of Sentence
	:	entered on April 26, 2004 in the Court of
	:	Common Pleas, Philadelphia County,
EDWARD GORDON,	:	Criminal Division at No. CP-51-CR-
	:	0414381-2002.
Appellant	:	
	:	
		ARGUED: April 16, 2007

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: December 28, 2007**

I join the Majority Opinion, with the exception of the points I set forth below.

Citing a non-binding Superior Court decision, the Majority states that Apprendi[1] claims raise questions implicating the "legality" of a sentence, rather than the discretionary aspects of the sentence. Majority Slip Op. at 2. I certainly agree that a valid Apprendi claim does not implicate discretionary sentencing. Moreover, there is precedent from this Court which supports the Majority's broad statement. See Commonwealth v. Roney, 866 A.2d 351, 359 n.32 (Pa. 2005), cert. denied, 546 U.S. 860 (2005). However, in my Concurring Opinion in Roney, I noted my disagreement with the notion that a new constitutional sentencing rule from the U.S. Supreme Court, which the High Court says is

[1] Appredni v. New Jersey, 530 U.S. 466 (2000).

not to apply retroactively, should operate to make a waived Apprendi-type claim non-waivable. I continue to believe that the Roney footnote obviously was wrong. Apprendi claims are not claims implicating the "legality" of a sentence, at least for purposes of waiver. See id. at 362-63 (Castille, J., concurring).

On a related note, I respectfully disagree with the Majority's characterization of Commonwealth v. Bradley, 834 A.2d 1127 (Pa. 2003), as holding that "a sentence imposed pursuant to 42 Pa.C.S. § 9714 without the necessary proof that the prior crimes arose on separate criminal transactions is an illegal sentence." Majority Slip Op. at 19. This author's analysis in Bradley was more nuanced. As I explained in that decision:

> Moreover, if appellant's claim proved to have merit, it would implicate the legality of his sentence. "An illegal sentence is one that exceeds the statutory limits." Commonwealth v. Hunter, 768 A.2d 1136, 1144 n. 3 (Pa.Super.2001), *quoting* Commonwealth v. Archer, 722 A.2d 203, 209 (Pa.Super.1998) (*en banc*). Appellant was convicted of aggravated assault upon Officer Reigle under 18 Pa.C.S. § 2702(a)(2), which is classified as a felony of the first degree. Id. § 2702(b). The Crimes Code permits a sentence of no more than twenty years of imprisonment for a first-degree felony. See 18 Pa.C.S. § 1103(1). Thus, **the 25 to 50 year sentence imposed by the trial court for this offense would exceed the statutory limit** and be illegal **unless** the "three strikes" provision of Section 9714 applies. Under these circumstances, we conclude that appellant's claim implicates the legality of his sentence. Accordingly, he may raise the question as a matter of right and our jurisdiction over the claim is correspondingly secure. See 42 Pa.C.S. § 9781(a) ("The defendant or the Commonwealth may appeal as of right the legality of the sentence.").

Id. at 1131 (emphasis added). The analysis in Bradley only focused on whether there was "necessary proof" of separate criminal transactions after first considering whether the sentence exceeded the statutory limit in the first instance. If so, then proper application of Section 9714 would be required to save an otherwise illegal sentence from illegality.

Finally, I do not join footnote 11 of the Majority Opinion as I find its discussion unnecessary.

With the exception of the above points, I join the Majority Opinion.