[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,
	:	Criminal Division at No. CP-51-CR-
EDWARD GORDON,	:	0414381-2002.
	:	
Appellant	:	
		ARGUED: April 16, 2007

CONCURRING OPINION

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

I join the majority opinion and its resolution of Appellant's facial constitutional challenge to Section 9714's third strike provision, except in the following respects.

First, I disassociate myself from footnote 11 of the majority opinion, in which a plurality of Justices characterizes the line of federal decisions arising under the Armed Career Criminal Act (the "ACCA") as unpersuasive. See Majority Opinion, slip op. at 12 n.11. In my view, such decisions are analogous, highly instructive, and particularly persuasive -- indeed, they apply a rationale that closely parallels that upon which the majority ultimately settles.[1] These decisions recognize that the salient question of

[1] See, e.g., United States v. Harris, 447 F.3d 1300, 1304 (10th Cir. 2006) ("The time, place, and substance of the prior convictions can ordinarily be ascertained from court (continued…)

"separateness" of criminal offenses for purposes of a recidivist sentencing statute may be fact-driven, but reason that the factual aspect of "separateness" is not different in kind from the types of factual matters already left to the sentencing judge under the Apprendi line of decisions. See Santiago, 268 F.3d at 156. Thus, I am able to agree with both the federal courts and the majority that, in the ordinary case, separateness may be established before a judge in a sentencing proceeding through the use of Shepard-approved sources. Accord Thompson, 421 F.3d at 282-83 (citing Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254 (2005).[2]

(…continued)
records associated with the convictions, and the Supreme Court has held that the Constitution allows sentencing courts to rely on such records to make findings about prior convictions."); United States v. Thompson, 421 F.3d 278, 282 (4th Cir. 2005) ("The Supreme Court has declined to attempt extraction of the mere fact of a prior conviction, stripped of all content."); United States v. Santiago, 268 F.3d 151 (2001) ("The determination of 'the fact of a prior conviction' implicitly entails many subsidiary findings[.]").

The plurality differentiates the federal cases based on the assertion that they implement a rigid "different dates" construction of the ACCA's "separate occasions" requirement. See Majority Opinion, slip op. at 12 n.11. By my reading, however, this line of decisions does not hinge exclusively on the date of a criminal offense, but rather, applies an evaluative separateness rationale very similar to what is required under Pennsylvania's three-strikes provision. See, e.g., United States v. White, 465 F.3d 250, 253 (5th Cir. 2006) (describing the relevant inquiry under the ACCA as subsuming a requirement that the convictions must arise from "separate criminal transactions" and summarizing various cases in which offenses were found to have occurred on "separate occasions," despite their commission on the same day).

[2] I would also note that this Court's holding in Commonwealth v. Shiffler, 583 Pa. 478, 879 A.2d 185 (2005), that Section 9714 requires sequential convictions, when viewed in juxtaposition with the statutory compulsory joinder rule, see 18 Pa.C.S. §110, provides a degree of additional assurance that the individual strikes under Section 9714 are for crimes that are sequential in nature.

Second, I have a modest difference with the majority to the degree that its opinion can be read as addressing Appellant's claim as an as-applied constitutional challenge to the procedure employed by the sentencing court, or as a challenge to the merits of the sentencing court's actual determination of separateness. See, e.g., Majority Opinion, slip op. at 21, n.17 (indicating that the "facts of the prior convictions (sufficient to determine if those convictions arose from separate criminal transactions) were made clear by court records"). In this regard, I have not consulted the original record in light of the facial nature of the actual constitutional challenge accepted for review and presented. Thus, I would only note that the litigants and the sentencing and reviewing courts in their opinions did not focus on a particularized assessment of subsidiary facts associated with the prior convictions, nor did they develop dates and particular locations with regard to the two relevant Philadelphia-based offenses.[3] That said, to the degree that the majority is commenting the propriety of the actual sentence in terms of the separateness inquiry, I do not dispute that, facially, its determination appears to be well founded.

Mr. Chief Justice Cappy joins this concurring opinion.

[3] What is known from the briefs and the judicial opinions is that the arrests for these offenses were on separate occasions.