[J-25-99]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 125 MAP 1998
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered February 7, 1997, at No.
	:	232 Philadelphia 1996, affirming the
v.	:	Judgment of Sentence of the Court of
	:	Common Pleas of Lackawanna County
	:	entered March 30, 1995 at 92CR1447
PETER CHIAPPINI,	:	
	:	695 A.2d 435 (Pa. Super. 1997)
Appellant	:	
	:	ARGUED: February 3, 1999

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR **Decided: July 23, 2001**

Concerning the spousal confidential communications privilege, I would reach the same result as the majority, but by employing a somewhat different analysis. As the majority notes, Section 5914 of the Judicial Code, 42 Pa.C.S. §5914, must be strictly construed. See 1 Pa.C.S. §§1928(a), (b)(8), 1962. Pursuant to the rule of strict construction, it must be presumed that the statute was intended to effect no change in the common law beyond that which is expressly stated. See In re Boles' Estate, 316 Pa. 179, 182, 173 A. 664, 665 (1934). Thus, only such modification of the common law will be recognized as the statute clearly and definitely prescribes. See Heaney v. Borough of Mauch Chunk, 322 Pa. 487, 490, 185 A. 732, 733 (1936).

Section 5914, which states that "in a criminal proceeding neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other," can be read as applying only where the parties to the communications are still husband and wife when the criminal proceeding takes place. It contains no express limitation to that effect, however, and such a restriction should not be implied so as to effect a change from the common law. Rather, the statute "should be so interpreted that it will accord, as nearly as may be, with the theretofore existing course of the common law," Bridgeford v. Groh, 306 Pa. 566, 575, 160 A. 451, 453 (1932) -- in other words, so that, as to confidential communications made while the participants were husband and wife, it applies even after the marriage is terminated by death or divorce. Although certainly this interpretation conflicts with the analysis applied in Dumbach v. Bishop, 183 Pa. 602, 39 A. 38 (1898), I find that it more closely follows the rules of statutory construction. The alternative (that is, interpreting the principle of strict construction as the majority has done) results, in the post-marital context, in the statute being disregarded concerning the very subject which the legislature presumably intended it to control.

Thus, I would approach the issue before us as a straightforward question of statutory interpretation: Does the term "communications" as used in Section 5914 encompass conduct as well as verbal communications? Applying the principle that the words of a statute are to be construed according to their common and approved usage, see 1 Pa.C.S. §1903(a), I would conclude that it does not. Accordingly, I agree with the majority that the trial court did not err in permitting Appellant's ex-wife to testify about Appellant's actions on the night of the fire.

Concerning the question of credit for time served, I must respectfully dissent from the analysis set forth by Mr. Justice Zappala. For the reasons articulated by Mr. Justice Castille in his Concurring and Dissenting Opinion, which I join, I do not believe the legislature intended that a defendant who has been sentenced to a period of total

confinement in a state correctional institution should receive credit against such sentence for time spent in a home confinement/electronic monitoring program pursuant to the terms of a bail order prior to trial and/or pending appeal. As this Court observed in Commonwealth v. Kriston, 527 Pa. 90, 588 A.2d 898 (1991), "[n]umerous provisions of the Sentencing Code . . . demonstrate a legislative intent that sentences of imprisonment are to be served in institutional settings." Id. at 94, 588 A.2d at 900. A similar understanding prevails in the federal system. See Reno v. Koray, 515 U.S. 50, 115 S. Ct. 2021 (1995) (concluding that a federal prisoner is not entitled to credit against his sentence for the period when he was released on bail).[1]

[1]Like Mr. Justice Nigro, I would not foreclose the possibility that, in a particular case, circumstances may warrant the recognition of credit for time served to avoid a manifest injustice to the defendant. See generally Kriston, 527 Pa. at 97-98, 588 A.2d at 901 (awarding credit for the portion of the defendant's sentence served in an electronic home monitoring program to which the defendant had been transferred at the unauthorized initiative of the prison warden). In my view, however, Appellant has failed to demonstrate that this is such a case. As the sole source of his mistaken belief that credit would be given for time spent on bail release, Appellant cites the Lackawanna County Home Detention Program Rules and Regulations, a copy of which is included in the reproduced but not the original record. Provision of this document to a defendant released on bail may have been erroneous; references to contact with the Probation and Parole Office and to payment of fines or restitution suggest that these rules and regulations were designed for inmates who are serving a form of intermediate punishment. Nevertheless, the document makes no reference to receiving credit for time served in the program, and I am not persuaded that this document, without more, would have warranted a justifiable expectation that such credit would be given or, more fundamentally, would establish a manifest injustice.