[J-33-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 2 EAP 2006
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of Luzerne County
v.	:	entered on December 19, 2005, at Nos.
	:	1290, 1506, 1507, 1508, 1519A-1519H,
GEORGE E. BANKS,	:	1520, 1524 of 1982.
	:	
Appellee	:	
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IN RE: GEORGE E. BANKS	:	No. 461 CAP
	:	
APPEAL OF: MARY YELLAND, AS NEXT FRIEND	:	Appeal from the Order of the Court of
	:	Common Pleas of Luzerne County at Nos.
	:	1290, 1506, 1507, 1508, 1519A-1519H,
	:	1520, 1524 of 1982, denying stay of
	:	execution.
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COMMONWEALTH OF PENNSYLVANIA,	:	Nos. 5 EAP 2006
	:	
Appellant	:	Appeal from the Orders of the Court of
	:	Common Pleas of Luzerne County
v.	:	entered on December 19, 2005, January
	:	11, 2006, & January 18, 2006, at Nos.
GEORGE E. BANKS,	:	1290, 1506, 1507, 1508, 1519A-1519H,
	:	1520, 1524 of 1982.
Appellee	:	
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COMMONWEALTH OF PENNSYLVANIA,	:	No. 505 CAP
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of Luzerne County
v.	:	entered on February 27, 2006, at Nos.
	:	1290, 1506, 1507, 1508, 1519A-1519H,
GEORGE E. BANKS,	:	1520, 1524 of 1982.
	:	
Appellee		

SUBMITTED: February 13, 2007

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY **FILED: December 28, 2007**

I dissent. The Majority grants a new competency hearing merely because the trial court precluded the testimony of the Commonwealth's psychiatric expert, Dr. Michals, six weeks before the competency hearing was conducted. Contrary to the Majority, my examination of the record leads me to conclude that the Commonwealth created its own predicament when it failed to abide by the trial court's directive and failed to refute the overwhelming evidence establishing George E. Banks' incompetence. Accordingly, I would affirm the findings and conclusions of law of the Court of Common Pleas of Luzerne County, establishing that Banks is incompetent to pursue clemency proceedings and incompetent to be executed.

Initially, I agree with the Majority that the record does not include a written trial court order requiring defense counsel to be present during psychiatric interviews of Banks. The trial court specifically found, however, that the parties "understood that any contact with Banks by the Commonwealth would be in the presence of defense counsel or other representatives of the defense." Trial Court Opinion at 2. Moreover, the Commonwealth

never proceeded on the theory that it was uninformed of the trial court's directive. At the hearing on the motion to exclude Dr. Michals' testimony, the Commonwealth did not assert that it was unaware that defense counsel had to be present for interviews of Banks. Instead, counsel for the Commonwealth apologized for her "oversightedness" in failing to advise defense counsel that Dr. Michals was going to see Banks a third time. N.T. 11/19/2005 at 25.[1]

Having established that such ruling existed, I would not delve into whether the trial court properly required defense counsel's presence during Dr. Michals' examination of Banks. Simply put, the Commonwealth has not developed this claim. Rather than examining the arguments made by the parties in their briefs, the Majority instead goes to great lengths to refute statements made in Appellee's motion to preclude Dr. Michals from testifying. See Majority Opinion at 10. Such motion is not currently before our Court. The mere fact that we assumed plenary jurisdiction over the matter and retained jurisdiction while the trial court acted as fact finder did not absolve the parties from their obligation to adhere to the trial court's directives and properly address claims of error in their briefs filed in this Court.

While I concede that the Commonwealth raised the issue challenging the propriety of the presence-of-counsel requirement,[2] it does not address the issue directly, but includes

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[1] As an aside, the trial court granted the motion to preclude Dr. Michals' testimony on *two* grounds: (1) that Dr. Michals had an improper third contact with Banks on September 19, 2005 without notice to or the presence of defense counsel; and (2) that Dr. Michals had interviewed employees of the Department of Corrections without notice to or access by the defense. The Majority does not address the alternative ground for the preclusion of Dr. Michals' testimony and report.

[2] In its statement of Issue No. 3, the Commonwealth queries:

> Did the lower court err when it ordered that defense counsel must be present at all future Commonwealth interviews of Banks and Department of Corrections staff and that such interviews must be transcribed?

Appellant's Brief at 6.

in its discussion of the collateral order doctrine an assertion that Ford v. Wainwright, 477 U.S. 399 (1986), does not require defense counsel to be present during competency evaluations. See Appellant's Brief at 24-25. Such assertion is simply insufficient to warrant relief. See generally Commonwealth v. Edmiston, 851 A.2d 883, 899 (Pa. 2004) (holding that defendant's claim that the court failed to provide him with a meaningful opportunity to adduce evidence fails because defendant failed to develop the argument).

Finally, I disagree that, given the trial court's restrictions on the presentation of evidence, the Commonwealth was effectively precluded from presenting evidence. Notwithstanding the fact that the trial court permitted the Commonwealth to utilize Dr. Michals in preparing for the hearing, the Commonwealth did not in any way challenge the reliability of the expert opinions on cross-examination or rebut the substantive evidence presented on behalf of Banks. Further, the Commonwealth had another expert, Dr. Steven Samuel, who did not have improper contact with Banks. The Commonwealth was also free to retain additional experts in the six weeks remaining before the scheduled hearing.

The Commonwealth instead presented the testimony of Dr. Welner, who stated that he did not have sufficient time to review the information to form an opinion as to Banks' competency. The trial court concluded that there was a lack of diligence on the part of the Commonwealth in preparing Dr. Welner for the hearing and a lack of diligence on the part of Dr. Welner in failing to review the records he possessed and/or interview Banks prior to the hearing. These conclusions are supported by the record. At the outset of the competency hearing, the Commonwealth noted that its "participation in this hearing will be in a limited fashion, as the Court will observe when we proceed." N.T. 1/31/2006 at 10. The Commonwealth's strategy in this regard proved to its detriment.

This being said, I would proceed to review the trial court's competency determinations. The standard to determine if one is incompetent to be executed under Ford is whether the person "comprehends the reason for the death penalty and its

implications." Commonwealth v. Jermyn, 652 A.2d 821, 824 (Pa. 1995). Further, we have held that it is the burden of the defendant to establish his or her incompetence by a preponderance of the evidence. Commonwealth v. Zook, 887 A.2d 1218, 1225-26 (Pa. 2005). Banks' counsel clearly satisfied this burden.

The trial court found that under any evidentiary standard of proof, the records and testimony established that Banks lacks the capacity for rational and factual understanding of his death sentences and of the actual reasons for and implications of those sentences. The trial court engaged in a comprehensive analysis of the evidence presented and its findings are not only clearly supported by the record, but are undisputed. Three expert witnesses diagnosed Banks with psychotic disorder, not otherwise specified. N.T. 1/31/2006 at 17 (testimony of Dr. John Sebastian Obrien, II); Id. at 152 (testimony of Dr. Richard G. Dudley, Jr.); Id. at 251 (testimony of Dr. Jethro W. Toomer). The experts explained that Banks is delusional, suicidal, refuses to eat, and speaks of devils and demonic spirits torturing him. Id. at 31, 37. The experts further explained that Banks' delusions go directly to the issue of his death sentence as he believes that he has been pardoned, that he is no longer facing execution, and that he is awaiting release. Id. at 20, 186. The evidence established that Banks self-mutilated his body, referred to his resultant skin disorder as a "flesh-eating demon," and refused medical treatment. Id. at 38, 210. The experts agreed that Banks is not malingering. Id. at 103, 219, 331. This conclusion was based on the consistent documentation of psychotic symptoms over time and in different contexts.

Banks' counsel further submitted hearing exhibits including documentation from the correctional officers, counselors, supervisors, the prison superintendent, nurses, medical doctors, psychiatrists, psychologists, commitment evaluators, and others who had daily contact with Banks. These sources painstakingly documented Banks' psychotic behavior. The conclusions reached by these professionals were entirely consistent with the

conclusions of Banks' experts. The trial court itself further observed that Banks' behavior at the evidentiary hearing was consistent with his mental illness and that it was clear that he was not rationally engaged or able to interact with counsel and lacked the capacity to participate. Trial Court Opinion at 18. In short, the evidence presented establishing Banks' incompetency is nothing short of overwhelming and a second competency hearing is unwarranted.

Accordingly, I would rule that Banks is incompetent to pursue clemency proceedings and incompetent to be executed.

Madame Justice Baldwin joins this dissenting opinion.