

[J-34-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

EARL NIXON, REGINALD CURRY, : No. 004 M.D. Appeal Dkt. 2002
KELLY WILLIAMS, MARIE MARTIN, :
THEODORE SHARP, AND RESOURCES : Appeal from the Order of the
FOR HUMAN DEVELOPMENT, INC., : Commonwealth Court entered December
: 11, 2001 at No. 359 M.D. 2000

Appellees,

v.

ARGUED: April 8, 2003

THE COMMONWEALTH OF :
PENNSYLVANIA, DEPARTMENT OF :
PUBLIC WELFARE OF THE :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF AGING OF THE :
COMMONWEALTH OF PENNSYLVANIA, :
AND DEPARTMENT OF HEALTH OF :
THE COMMONWEALTH OF :
PENNSYLVANIA,

Appellants.

CONCURRING OPINION

MR. JUSTICE CASTILLE

DECIDED: DECEMBER 30, 2003

I agree that the statute is unconstitutional as applied to appellees and I join Mr. Justice Nigro's learned Majority Opinion in its entirety. I write separately only to briefly note my view that, in addition to the constitutional infirmity in the legislation so well articulated by the Majority, the lifetime ban which arises from the broad class of prior convictions covered by the amended Older Adults Protective Services Act (OAPSA), 35 P.S. § 10225.101 *et*

seq., has no rational relationship to the legitimate, desired end of protecting the elderly, disabled and infirm from victimization.

There unquestionably are certain criminal offenses which are of such severity that all reasonable persons might agree that a lifetime ban from this type of employment is both rational and, indeed, required. Some debts to society cannot be entirely repaid. But it is difficult to discern a rational basis for automatically deeming an ancient conviction for theft (see appellee Curry) or for simple possession of a controlled substance (see appellees Nixon and Sharp), for example, as eternally and retroactively prohibiting otherwise qualified care workers from continued employment in these facilities.

In this regard, I would contrast the current version of the statute with the previous version, which imposed a ten-year limitation upon the criminal background check. A ten-year restriction on collateral effects of certain convictions is not unknown in the law. Thus, for example, the Rules of Evidence permit impeachment by evidence of convictions of *crimen falsi* but limit the impeachment to situations where not more than ten years have elapsed “since the date of the conviction or of the release of witness from the confinement imposed for that conviction, whichever is the later date,” with an exception permitted if the probative value of the conviction substantially outweighs its prejudicial effect. Pa.R.E. 609(b).

To be deemed rationally related to the undeniably legitimate interest the General Assembly sought to further, the legislation in this area can be, and should be, much more finely tuned. Finer tuning, including perhaps some form of time limitation for certain crimes (or graduated time restrictions tied to the particular type of crime) would seem particularly called for here. In this regard, I note the helpful amicus brief jointly filed by no less than twelve diverse organizations, including senior citizen organizations, organizations advocating the interests of abused women, and labor organizations. Amici note:

OAPSA's lifetime bar on employment based upon a single criminal conviction at any time in an individual's life has prevented fine caregivers like the petitioners from providing services to needy Pennsylvanians, even where those convictions are decades old and have no bearing on the individual's present character or ability to perform such jobs. . . . OAPSA [also] lacks any mechanism to consider the circumstances surrounding an individual's offense or the individual's post-conviction efforts at rehabilitation.

These deficiencies in OAPSA's criminal record provisions have grave consequences for all affected parties. Rehabilitated workers are prevented from earning a living. Service providers, many of which are already faced with a shortage of qualified applicants for jobs that often pay low wages and involve difficult work, are deprived of the opportunity to employ persons whom they believe to be good caregivers. Vulnerable adults are deprived of the excellent care that could be provided by the appellees in this action and many other ex-offenders like them.

Brief of Amici Curiae Pennsylvania Alliance for Retired Americans et al., 12. The overly-blunt means chosen to effectuate this well-intentioned legislation may operate to create unnecessary dangers for the very citizens it was designed to protect. I am confident that the General Assembly will revisit this area and find more pointed means to achieve its worthy objective.