[J-63-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 5 MAP 2005
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered August 9, 2004 at No. 2807
	:	EDA 2003, affirming the Judgment of
v.	:	Sentence of the Court of Common Pleas
	:	of Wayne County entered August 12, 2003
	:	at No. 543-2002 - Criminal.
DONALD ROBERT CONKLIN,	:	
	:	
Appellant	:	ARGUED: May 17, 2005

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: May 24, 2006**

In Commonwealth v. Dengler, 890 A.2d 372 (Pa. 2005), I concurred in the result but declined to join the Court's rationale because I found flaw in

> those aspects of the Majority Opinion that suggest that a statute setting forth factors to gird a particular scientific inquiry in itself relieves a court from conducting an independent analysis under [Frye v. United States, 293 F. 1013 (D.C. Cir. 1923),] of the novelty of a given theory or method used to address those factors."

Id. at 385 (Baer, J., concurring). In writing separately, I noted that the Court's opinion in that case was amenable of more than one interpretation, and emphasized that I distanced myself only from that interpretation that would permit the legislature to preempt by statute a trial court's independent, discretionary assessment of the novelty of the methodology underlying given expert testimony. In the case *sub judice*, the

Majority vindicates my fears, citing Dengler as authority for the removal from the trial courts of their traditional discretion independently to consider the qualifications of a given expert witness in favor of a broadly worded statute and the self-policing of an administrative body. As in Dengler, I believe a far more limited basis for reaching the same result is available to the Court, and I would resolve the case on that rationale.

The Majority correctly observes that "the question of whether a witness is qualified to testify as an expert is a matter resting in the discretion of the trial judge." Maj. Slip Op. at 11 (citing Commonwealth v. Marinelli, 810 A.2d 1257, 1267 (Pa. 2002)). Thus, as the Court recognized in Dengler, we evaluate trial courts' determinations regarding the admissibility of evidence by an abuse of discretion standard. Dengler, 890 A.2d at 379.[1] Accordingly, we will disturb the trial court's ruling only where that ruling reflects "manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." Id. (quoting Grady v. Frito-Lay, Inc., 839 A.2d 1038, 1046 (Pa. 2003)) (internal quotation marks omitted). Having so established this standard in both cases, however, the Majority proceeds unaccountably to sanction the legislature's evisceration of trial court discretion and replace it with the legislature's own standardized criteria -- criteria that amount to a yes or no checklist that, once satisfied, compels a trial judge to admit a given expert regardless of any case-specific peculiarities that call into question the wisdom or utility of doing so.

To be clear, I do not believe this case presents difficult facts. I agree with the Majority that social workers are not, by virtue of that credential, precluded from testifying as to a sex offender's status as a sexually violent predator (SVP). I take no issue in principle with the legislature's prerogative to establish such criteria, and agree that there

---

[1] I share the Majority's view that this case presents a challenge to the admissibility, rather than the sufficiency of the evidence. See Maj. Slip Op. at 11 n.12.

is a "forensic" component as well as a "clinical" component to an SVP assessment. I do not object to the statutory creation of the Sexual Offender Assessment Board (Board), or its performance, through its members, of the tasks assigned it by statute. Finally, I agree that the social worker who testified in this case was eminently qualified to testify regarding Appellant's SVP status.

I cannot agree, however, that a member of the Board is, as a function of that membership, presumptively qualified to testify in a given case as to whether an offender is an SVP, and I do not believe it is the place of the legislature or an administrative agency to impose such a rule at the expense of trial court discretion. Although I view the Board's current membership criteria as salutary and likely to result in a Board composed of qualified criminal justice experts in the relevant disciplines competent to testify as to offenders' SVP status,[2] I find cause for concern that those criteria were established by the Board for the Board, and that nothing in the law as presently constituted precludes the Board from lowering its bar to membership. Moreover, although I believe that the vast majority of individuals who satisfy the current criteria for Board membership will satisfy any trial court of their qualifications to testify as to offenders' SVP statuses, I have no trouble imagining an individual who satisfies these criteria and yet reasonably may be found unqualified to testify in a given case. According to the Board's own criteria, a person would be qualified to sit on the Board and conduct the assessments here in question with only two semesters of academic work and approximately one year of research regarding sex offenders. Even if the

---

[2] As noted by the Majority, Maj. Slip Op. at 14 n.14, the Board has administratively defined "criminal justice expert" for purposes of qualifying individuals to serve on the Board as someone with at least a Master's degree in social work, counseling, criminology, human sexuality, or criminal justice, and a minimum of 2000 hours of experience with sex offenders through direct service, education, research, or supervision.

criteria were self-evidently exhaustive of all any trial court might reasonably demand of an expert witness, however, that would not vitiate my concern that the Board might, at any time, change its criteria to admit less qualified individuals to its membership.[3] Under the present scheme, the only meaningful hedge against such an eventuality is to preserve trial court discretion to assess each proffered expert on his or her individual merits.

Regarding the narrow question presented, I would find that our legislature, acting well within its province, has made clear the intuitive proposition that social workers, whose professional work often involves counseling sex offenders and others, may be qualified to make diagnoses and assessments of the sort necessary in the SVP assessment context. In fact, I adopt in full the Majority's discussion of the general qualification of social workers to testify regarding SVP status. But expert witnesses, in being identified as such, exercise a powerful and potentially prejudicial influence over juries, and trial judges are best situated to ensure that the title "expert witness" is not abused.

---

[3] For this reason, I reject the Majority's suggestion that the absence of a definition for 'criminal justice expert' in Megan's Law II is "of no moment" simply because the witness in this case is undisputedly qualified. See Maj. Slip Op. at 14. First, there is circularity here, no matter how intuitive it is that the witness in this case is qualified. Second, this observation by the Majority would be far more agreeable had it chosen to decide this case on the narrow grounds of one witness's qualifications. Instead, however, the Majority effectively cedes to an administrative agency that is not directly accountable to the electorate the prerogative to change its criteria at will. Had the legislature seen fit to define this term with some particularity, one would be entitled to the comfort that its modification would require the subscription of a majority of legislators, each directly accountable to the electorate. As it stands, however, a wholly unaccountable body has full discretion to define who is qualified to render testimony that may subject an offender to a lifetime of onerous registration and counseling requirements and harsh penalties should he or she fail to comply.

The Majority notes that Megan's Law II "does not say, or even suggest, that SVP assessments may only be performed by those on the Board who are psychiatrists or psychologists (with expertise in the treatment of sexual offenders)." Maj. Slip Op. at 14. Thus, the Majority finds that the legislature did not intend to exclude social workers, generally, from conducting SVP assessments. As I have already noted, I find no quibble with this proposition. But neither does the statute say, nor even suggest, that the legislature intended, with Megan's Law II, to vitiate the trial court's discretion to reject a particular individual proffered as an expert witness, notwithstanding that he satisfies broadly stated legislative or administrative criteria, because the trial judge finds in his or her discretion that the witness is not qualified to testify under the peculiar circumstance of the witness's own background and experience and the facts of the case in question.

I agree, for the narrow reasons acknowledged by the Majority, that the expert in this case was qualified to testify as to his assessment of Appellant's SVP status, and thus I would affirm the lower courts' rulings to that effect. I disagree, however, that such a ruling needs come at the expense of the time-honored trial court function of discriminating among witnesses and evidence to discern what is fit for consideration in his or her courtroom. I do not believe that a trial judge, in some future case, would *ipso facto* abuse his or her discretion by declining to admit the testimony of a person who had attained membership on the Board for want of some qualifying element. Unfortunately, I believe that the Majority's analysis will bind us to precisely that result.