

[J-69-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 250 MAP 1999
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered December 17, 1998, at No.
	:	38 Harrisburg, 1997, reversing in part and
v.	:	vacating in part the Order of the Court of
	:	Common Pleas of Centre County entered
	:	September 23, 1997, at Nos. 1995-1116
JON ANTHONY SPETZER,	:	and 1996-505
	:	
Appellee	:	722 A.2d 702 (Pa. Super. 1998)
	:	
	:	SUBMITTED: April 13, 2000

DISSENTING OPINION

MR. CHIEF JUSTICE ZAPPALA

DECIDED: DECEMBER 31, 2002

I respectfully dissent. The majority today holds that the entirety of Kim Spetzer's testimony revealing statements made to her by her husband, Appellee, do not qualify as confidential communications under 42 Pa.C.S. § 5914 and the common law definition of confidential communications as explicated in Seitz v. Seitz, 170 Pa. 171, 32 A. 578 (1895), and Commonwealth v. May, 656 A.2d 1335 (Pa. 1995). Although I agree with the majority that we must look to the common law definition of confidential communications to properly interpret Section 5914, I believe that in so doing, the majority errs in giving undue preference to the policy considerations underlying this Court's decision in Seitz, while at the same time minimizing the policy considerations underlying this Court's decision in May.

Seitz was a divorce action which implicated Section 5(c) of the Act of May 23, 1887, P.L. 158, No. 89, 28 P.S. § 317, the predecessor to 42 Pa.C.S. § 5924(b)(1), which

provides an exception in divorce proceedings to the general rule that in a civil matter neither husband nor wife shall be competent or permitted to testify against each other. While I certainly agree with the majority that Seitz teaches "that the marital harmony policy served by the privilege was essential to determining which communications should be deemed confidential[,]" Majority Op. at 18, the Seitz decision was made in the context of a civil action for divorce, in stark contrast to the instant case, which is a criminal proceeding implicating Appellee's liberty. As such, we cannot merely look to the policy considerations underlying the Seitz decision.

As conceded by the majority,

[t]his Court had more recent occasion to examine the question of what communications should be properly deemed confidential for purposes of the privilege in Commonwealth v. May, 656 A.2d 1335 (Pa. 1995), cert. denied, 525 U.S. 1078 (1999). In May, we stated the general rule that the § 5914 privilege encompasses **"any communications which were confidential when made and which were made during the marital relationship."** Id. at 1341-42. At issue in May were communications contained in letters the defendant had written to his wife while in prison. This Court found that the communications were not privileged because the defendant had signed a form permitting prison officials to review all of his incoming and outgoing mail. That fact altered any "reasonable expectation" that the defendant might have had that the communications "would remain confidential." Id. at 1342, citing, inter alia, State v. Smith, 384 A.2d 687, 691 (Me. 1978) (**inquiry should focus on spouse's reasonable expectation of confidentiality**).

Majority Op. at 20 (emphasis added). Like the instant case, May involved an claim of ineffective assistance of counsel in a criminal proceeding where the liberty of the defendant was at stake. I cannot conclude that in this criminal proceeding, Appellee's reasonable expectation that his communications with his wife would remain confidential should be diminished solely by operation of an 1895 decision regarding the spousal privilege in civil divorce proceedings.

Rather, I believe that in its well-reasoned opinion, the Superior Court achieved an appropriate balance that protects the information privately disclosed between husband and

wife in the confidence of the marital relationship, and at the same time denies operation of the privilege to communications which are repugnant to the preservation of marital harmony and the resultant benefits to society from that harmony the privilege is designed to protect. The Superior Court achieves this balance by taking into account the policy considerations underlying this Court's decision in Seitz, without minimizing the policy considerations underlying this Court's decision in May.

The Superior Court's decision and application of the privilege do not insulate those communications made by Appellee to his wife that constituted direct threats to injure or kill her, or information conveyed as part of the threat or physical assault, that was not itself a threat. Instead it extends the privilege to several limited categories of communications between Appellee and his wife: (1) inculpatory statements or confessions; (2) solicitation attempts and communications designed to get certain witnesses to do or say certain things in order to exculpate Appellee, unless the communications were meant to be passed on to others and did not merely direct that Mrs. Spetzer do something that involved communications with others; and (3) Appellee's letters from prison¹ to Mrs. Spetzer, unless the letters, though addressed solely to Mrs. Spetzer, were actually intended to be delivered by Mrs. Spetzer to another. In fashioning these three limited categories of privileged communications, the Superior Court made it clear that the privilege still would not apply if

¹ Following May, the Superior Court noted, there is some question as to the confidentiality due to the possibility of the letters being read by prison officials. If the letters were being read by prison officials and [Appellee] was aware of this then the actual text of the letters would not be confidential because he would have no expectation of privacy. On the other hand, Mrs. Spetzer testified as to aspects of the letters being in "code" or having meaning only to her and [Appellee]. Her divulgence of these aspects of the letters, even if the letters were being read by prison officials, would violate the privilege because the meaning of these terms would remain confidential even if read by others.

Commonwealth v. Spetzer, 722 A.2d 702, 713 (Pa. Super. 1998) (citations omitted).

the communications that fall into these three limited categories were made within the context of a physical assault or threat on Mrs. Spetzer. The Superior Court concluded that the failure of Appellee's trial counsel to object to the admission of the communications that fall into these three limited categories of privileged communications constituted ineffective assistance of counsel. The Superior Court therefore vacated Appellee's conviction on the fifty-eight total counts and remanded to the trial court for a new trial on the thirty-six remaining counts of criminal charges against Appellee.

I would affirm the order of the Superior Court. Accordingly, I respectfully dissent.