[J-39-1998]
THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH EX REL MARK C. BALDWIN, DISTRICT ATTORNEY, COUNTY OF BERKS,	:	No. 11M.D. Appeal Dkt. 1997
	:	Appeal from the Order of the Court of Common Pleas entered December 23, 1996, at No. 96-13461/150-94 A.D.
Appellee,	:	
v.	:	
	:	SUBMITTED: February 5, 1998
EDEN RICHARD, JR.,	:	
Appellant.	:	

CONCURRING AND DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: May 18, 2000**

I agree with the Majority that the trial court had jurisdiction over this action and that the doctrine of laches did not bar the action and, therefore, I join that part of the majority opinion. However, I must respectfully dissent from the Majority's conclusion that appellant's convictions do not constitute "infamous crimes" for purposes of Article II, Section 7 of the Pennsylvania Constitution.

Although the term "infamous crime" as contained in Article II, Section 7 is not defined, this Court held in 1842 that an "infamous crime" was one that rendered a convicted person incapable of serving as a witness. Commonwealth v. Shaver, 3 Watts

& Serg. 338, 342 (1842).[1] In Shaver, this Court noted that at common law the offenses that disqualified a person from giving evidence were "treason, felony, and every species of *crimen falsi* – such as forgery, perjury, subordination of perjury, attaint of false verdict, and other offenses of like description which involve the charge of falsehood, and affected the public administration of justice." Id. The Majority is correct that the few cases decided by this Court since Shaver concerning the definition of "infamous crime" have involved crimes in the nature of *crimen falsi* that might affect the administration of justice. See, e.g., Petition of Hughes, supra at 95, 532 A.2d at 301 (holding that a candidate who was convicted in federal court of conspiracy to obstruct interstate commerce in violation of the federal Hobbs Act[2] was prohibited from holding public office by the "infamous crimes" provision of Article II, Section 7 because the crime was similar to bribery, and bribery was encompassed in the phrase "other infamous crimes"); In re Greenberg, 442 Pa. 411, 416, 280 A.2d 370, 372 (1971) (suspending a Court of Common Pleas judge from office following his conviction for conspiracy to use the United States mail to perpetrate fraud by kiting bank checks); see also Commonwealth ex. rel. Corbett v. Desiderio, 698 A.2d 134, 138-39 (Pa. Cmwlth. 1997) (conviction of accepting money in exchange for official favors in violation of conflict of interest provision of State Ethics Act was "infamous" for purposes of Article II, Section 7).

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[1] The Court noted that both Webster's Dictionary and Tomlin's Law Dictionary then defined an infamous crime as one that would disqualify a person from serving as a witness *or a juror*. However, the Shaver Court proceeded to base its analysis exclusively on those crimes that would disqualify a person from serving as a witness. Id. Currently, a person is disqualified from serving as a juror if he or she has been convicted of a crime punishable by imprisonment for more than one year. 42 Pa.C.S. § 4502(3).

[2] 18 U.S.C. § 1951(a).

However, the Shaver Court recognized that the founders of the Constitution intended "that the law in force for the time being should determine whether a particular crime was infamous or not," thereby implying that the definition of "infamous crime" was subject to change. Shaver, supra at 341. Moreover, this Court has suggested that Shaver is not all-inclusive as to what offenses constitute "infamous crimes." In both Greenberg and Petition of Hughes, this Court cited the Shaver definition of "infamous crime" but noted that it was doing so "without suggesting that this definition is sufficiently inclusive for the modern era." Greenberg, supra. at 417, 280 A.2d at 372; Petition of Hughes, supra at 97, 532 A.2d at 302. Thus, it would appear that the constitutional concept of infamous crimes is not as inflexible as the Majority would have it. See Slip Op. at 7 n.12. Indeed, in Petition of Hughes, a majority of this Court expressly stated that the Court was not limiting disqualification under Article II, Section 7 to the common law grounds. Id. at 99-100, 532 A.2d at 303 (Hutchinson, J., joined by four justices, concurring). Further, by declaring certain officials ineligible to hold office based on their violations of the Hobbs Act and the federal crime of mail fraud, this Court demonstrated that it did not intend to restrict the definition of "infamous crime" to those offenses specifically enumerated in Shaver.[3]

[3] Despite the Majority's stated rationale that the definition of "infamous crime" should not be subject to varying interpretations, the Majority nonetheless continues to approve of a rule that includes felonies within the ambit of infamous crimes. However, the legislature can, and frequently does, alter the complement of crimes that constitute felonies. The legislature may change felonies to misdemeanors and vice versa or, indeed, criminalize acts as felonies that were not previously criminal at all. Thus, even under the Majority's reasoning, the crimes that qualify as infamous will continue to change. I think it far better to focus on the nature of the conduct than the legislatively-determined grading of the crime.

Other than those crimes specifically enumerated in Article II, Section 7, the determination of what constitutes an infamous crime must be based upon the nature of the offense. The fact that this case presents the first opportunity for this Court to determine whether crimes not in the nature of *crimen falsi* may qualify as infamous crimes is insufficient reason in itself to reject the claim outright. I believe that the particular crimes for which appellant was convicted demonstrate that he lacks the high moral character that the citizens of this Commonwealth have a right to expect from their public officials. See Petition of Hughes, supra at 99, 532 A.2d at 302 (citing with approval Delaware Supreme Court holding that similar provision of Delaware Constitution "is essentially a character provision, mandating that all candidates for State office possess high moral qualities."). Appellant's gunpoint assault on his former girlfriend and the concurrent significant restraint of her personal freedom was a violent intentional act that manifested appellant's disregard for the personal safety of another citizen. The public trust requires that our elected officials be above such crimes of violence.[4]

For the foregoing reasons, I believe that appellant has been convicted of infamous crimes for purposes of Article II, Section 7 and is, therefore, ineligible to hold public office. Accordingly, I dissent and would affirm the order of the Court of Common Pleas.

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[4] In determining whether a given crime violates the public trust, the courts must consider the nature of the crime and the passage of time since the crime was committed. Felonies violate the public trust by their very nature and are thus always infamous crimes. Under some circumstances, certain misdemeanor convictions may not undermine the pubic trust and, therefore, would not constitute infamous crimes. This is not such an instance, however.

Mr. Justice Nigro and Madame Justice Newman join this concurring and dissenting opinion.