[J-79-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 7 M.D. Appeal Dkt. 1999
	:	
Appellant,	:	Appeal from the Order of the Superior
	:	Court entered April 28, 1998 at No.
	:	0690PHL97, reversing the Order of the
v.	:	Court of Common Pleas of Lackawanna
	:	County, entered October 31, 1996 at No.
	:	93CR1613.
WILLIAM SARTIN,	:	
	:	
Appellee.	:	
	:	
	:	
	:	ARGUED: April 28, 1999
	:	

OPINION

MR. JUSTICE ZAPPALA **DECIDED: MAY 18, 2000**

This Court granted allocatur to determine whether, in a first-degree murder case in which the Commonwealth intends to seek the death penalty, the Fifth Amendment to the United States Constitution precludes the trial court from ordering the criminal defendant to submit to an independent pretrial psychiatric examination where the defendant has already been examined by his own psychiatrist and only intends to use his psychiatrist's findings to establish mitigating factors during the penalty phase if he is convicted. For the reasons that follow, we conclude that the Fifth Amendment does not preclude a criminal defendant from having to submit to an independent pretrial psychiatric examination under these circumstances. We further conclude that the results of such examination should be placed under seal until such time as the penalty phase commences and Appellee declares his intent to present his own psychiatric evidence in mitigation.

The Commonwealth has charged Appellee with the first-degree murder of a seven-year-old female. The trial court ordered Appellee to furnish to the Commonwealth an expert report from Dr. Matthew Berger, a psychiatrist who expressed in his report the opinion that Appellee was "guilty but mentally ill," as defined in 18 Pa.C.S. § 314(c)(1). The court's order was based upon counsel's initial indication that the report would be used at trial.[1] Through counsel, Appellee subsequently announced orally his intention to use this report only to establish mitigating circumstances[2] at the penalty phase if he was found guilty at the conclusion of the guilt phase.[3] On October 30, 1996, the Commonwealth filed

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[1] The court was authorized to compel discovery of this item based upon counsel's assertion that the report would be used at trial. Pa.R.Crim.P. 305(C)(2)(i) specifies that the trial court may compel a defendant to disclose "the results or reports of physical or mental examinations…which the defendant intends to introduce as evidence in chief."

[2] While Appellee did not specify exactly what mitigating circumstances he intended to substantiate with the help of Dr. Berger's testimony, the following mitigating circumstances would arguably be implicated by a credible determination that Appellee was guilty but mentally ill:

> (2) The defendant was under the influence of extreme mental or emotional disturbance.
>
> (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> . . . .
>
> (8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

42 Pa.C.S. § 9711(e). *See also* Commonwealth v. Faulkner, 545 A.2d 28, 36 (Pa. 1991) (mitigating circumstances set forth at § 9711(e)(2), (3) and (8) arguably implicated by "guilty but mentally ill" determination).

[3] Appellee, of course, is entitled to claim his innocence at trial, as he appears prepared to do, in spite of the opinion of his examining psychiatrist that he is "guilty but mentally ill" and (continued…)

a motion requesting that the trial court enter an order directing that Dr. Timothy Michaels be appointed to examine Appellee for purposes of independently assessing his mental status. On October 31, 1996, the trial court entered the requested order. On November 13, 1996, the Superior Court granted a Petition for Stay, pending the filing and disposition of a Petition for Permission to Appeal. On February 20, 1997, the Superior Court granted the Petition for Permission to Appeal. After hearing argument, the Superior Court issued an opinion reversing the order of the trial court and ordering that Appellee could not be compelled to submit to a pretrial psychiatric examination. The Superior Court determined that compelling Appellee to submit to such an examination, in the absence of his having formally filed a notice of intent to raise a mental infirmity defense,[4] would violate his privilege against self-incrimination under the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. We now reverse.

In Commonwealth v. Morley, 681 A.2d 1254 (Pa. 1996), this Court determined that a defendant who has raised a defense based upon mental infirmity may not refuse to be examined by the Commonwealth's expert on the grounds that such examination would violate his privilege against self-incrimination under the Fifth Amendment to the United States Constitution and/or Article I, Section 9 of the Pennsylvania Constitution. "The rationale supporting our holding . . . is that where a defendant has raised a mental disability defense, a defendant has waived his or her privilege against self-incrimination and may be compelled to submit to a psychiatric examination so that the Commonwealth can prepare

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(…continued)
in spite of the fact that he intends to use this conclusion to establish mitigating factors if he is convicted.

[4] The filing of a formal written notice is a prerequisite to the use of an insanity or mental infirmity defense at trial. *See* Pa.R.Crim.P. 305(C)(1)(b).

its case in rebuttal." Id. at 1258-59 n.5. In concluding that Morley was not applicable to the instant matter, the Superior Court determined that Appellee had not yet filed a notice of insanity or a mental infirmity defense, but had only stated to the trial court an intent to use his expert's report to establish mitigating circumstances at the putative penalty phase. The panel concluded that any consideration with respect to the sentencing process, when Appellee has yet to be convicted, is "speculative and premature." Slip op. at 3 n.2. We disagree with this conclusion and determine that the Fifth Amendment does not preclude the trial court from ordering a criminal defendant to undergo an independent psychiatric examination under the circumstances presented by this case.[5]

In United States v. Hall, 152 F.3d 381 (5th Cir. 1998), the Court of Appeals for the Fifth Circuit reviewed a situation virtually identical to the matter sub judice, in which the defendant sought to interpose the Fifth Amendment as a bar to a pretrial independent psychiatric examination after he had announced his intention to present psychiatric testimony in mitigation of punishment at sentencing. The court held that a defendant who puts his mental state at issue with psychological evidence may not then raise a Fifth Amendment claim to bar the state from rebutting in kind. Id. at 398. "This rule rests on the premise that it is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony." Id. at 576. The court noted that just as a defendant cannot testify at the sentencing hearing

[5] Appellee invokes both the Fifth Amendment to the United States Constitution and its Pennsylvania Constitution counterpart, Article I, Section 9. However, because we have determined that Article I, Section 9 tracks the Fifth Amendment in the context of the self-incrimination clause, the analysis herein proceeds exclusively under the Fifth Amendment. *See* Morley, 681 A.2d at 1257 (in all instances other than the protection given by the Pennsylvania Constitution to reputation, the provision in Article I, § 9 against self-incrimination tracks its federal counterpart)(citations omitted).

regarding his remorse or acceptance of responsibility and then refuse cross-examination on this issue, a defendant also cannot offer expert psychiatric testimony based on his own statements to a psychiatrist and then deny the government the opportunity to do so as well in rebuttal. Id. *See also* Estelle v. Smith, 451 U.S. 454, 461-69 (1981) (holding that the admission of statements made by the defendant during a pretrial psychiatric examination violated his Fifth Amendment privilege against compelled self-incrimination because he was not advised before the examination that he had a right to remain silent and that any statement that he made could be used against him at a capital sentencing hearing, but noting that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase.").

The reasoning of the Fifth Circuit in Hall is sound. There is no principled basis for the distinction created by the Superior Court between an announcement by counsel to the court of an intention to use psychiatric testimony at the penalty phase, as opposed to a formally filed Notice of Intent to proceed with a mental infirmity defense at the guilt phase. In either case, the Fifth Amendment does not preclude the government from gaining a balanced perspective of the defendant's psychological makeup. The Fifth Amendment does not spring to life merely because a defendant's intentions to use psychiatric testimony have been expressed orally rather than through a formal filing, or because the psychiatric testimony will be used in an effort to reduce the defendant's culpability at sentencing rather than at trial. Therefore, we conclude that the Superior Court erred in its determination that the Fifth Amendment barred the examination which the trial court ordered the defendant to undergo in this matter.

Notwithstanding the foregoing, it is important to note that Appellee has not categorically waived his Fifth Amendment privilege against self-incrimination merely by announcing his intention to submit expert psychiatric testimony at the sentencing hearing. *See* Brown v. Butler, 876 F.2d 427, 430 (5th Cir. 1989) (holding that the state could not

introduce expert testimony based upon a previous psychological examination of the defendant where the defendant announced an intention to offer expert psychological evidence but never actually did). The Commonwealth may only utilize the results of its psychological examination in a rebuttal capacity, and only as to those issues which have been implicated by the expert testimony of the defendant's psychiatrist. Moreover, we conclude that the results of the Commonwealth's independent psychiatric examination should be sealed until such time as the penalty phase of Appellee's trial takes place.[6]

On this point we depart from the holding of the Fifth Circuit in Hall and instead follow the reasoning employed by several District Courts in United States v. Beckford, 962 F.Supp. 748, 761-764 (E.D. Va. 1997); United States v. Haworth, 942 F.Supp. 1406, 1408-9 (D.N.M. 1996); *and also* United States v. Vest, 905 F.Supp. 651, 654 (W.D. Mo. 1995). In Beckford, after concluding that the Fifth Amendment did not preclude the court from requiring the defendant to submit to an independent pretrial psychiatric examination where the defendant announced his intention to present his own such report in mitigation during the penalty phase, the court, nevertheless, pointed out that

> courts must remain mindful that the…independent examination sought by the Government [has] the potential for treading on the defendant's Fifth and Sixth Amendment rights.

Id. at 763. Given this concern, the court ordered, among other things, that the results of the government's independent examination be placed under seal, that the court-appointed mental health professional conducting the examination for the government not discuss his examination with anyone unless and until the results were released and that the results only be released if a penalty phase hearing took place at which the defendant confirmed his intent to offer mental health or mental condition evidence in mitigation. Id. at 764.

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[6] The issue of how to treat the results of the independent psychiatric examination is (continued…)

As in Beckford, we too hold that any independent psychiatric pretrial examination conducted by the Commonwealth should be subject to the foregoing safeguards. There are no compelling reasons why the Commonwealth should be entitled to the results of such an examination prior to the time their use becomes relevant. Additionally, it is far more practical to grant the Commonwealth additional time to review the results following the conclusion of the guilt phase, where requested, than to have the trial proceedings possibly interrupted and delayed by the trial court's need to resolve issues regarding their improper use at trial.

In sum, we hold that the Superior Court erred in determining that the Fifth Amendment barred the trial court from ordering Appellee to submit to an independent pretrial psychiatric examination when Appellee had already undergone his own psychiatric examination and had announced his intention to use the results of this examination at the penalty phase if he was convicted. We further hold that the results of such examination should be placed under seal and the additional safeguards outlined above be followed. Accordingly, we reverse and remand for further proceedings consistent with this opinion. Jurisdiction is relinquished.

Mr. Justice Castille files a Concurring and Dissenting Opinion in which Mr. Justice Cappy joins.

(…continued)
intertwined with the issue of whether the examination may be conducted.