[J-119-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 205 Capital Appeal Docket
	:	
Appellee,	:	Appeal from the Judgment of Sentence
	:	entered on April 8, 1996 in the Court of
	:	Common Pleas of Allegheny County,
v.	:	Criminal Division, at Nos. 9500193 and
	:	9500097.
	:	
RALPH BOLDEN,	:	
	:	
Appellant.	:	ARGUED: September 14, 1999
	:	
	:	
	:	
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CONCURRING AND DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: June 20, 2000**

While I agree that there was sufficient evidence to support appellant's murder conviction and that his counsel was not ineffective in the guilt phase of the trial, I disagree with the majority's holding that the trial court erred in instructing the jury that it could find as an aggravating circumstance that, in the commission of the offense, the appellant knowingly created a grave risk of death to another person in addition to the victim of the offense. 42 Pa.C.S. §9711(d)(7). The majority concludes that there was insufficient evidence to support a finding of the §9711(d)(7) aggravating circumstance on the basis that "the Commonwealth presented no evidence that Elder was nearby or within the zone of danger when Calabro was killed." Even more disturbingly, the majority cites with apparent approval appellant's argument that, at a minimum, the Commonwealth was required to

show that the second victim, Elder, could have been struck with the bullet that killed Calabro in order for this aggravating circumstance to apply. In my view, the majority's construction of §9711(d)(7) ignores both the plain language of the statute and our case law interpreting it. Accordingly, I respectfully dissent from the grant of a new penalty hearing.

In determining that appellant did not create a grave risk of death to another person in addition to the victim, the majority focuses its inquiry on the instant that the killing shot was fired. The majority cites a single case, Commonwealth v. Paolello, 542 Pa. 47, 665 A.2d 439 (1995), in support of this focus. In Paolello, the Court surveyed cases decided under §9711(d)(7) and noted that the circumstance had been found in those instances where the "other persons" put at grave risk were "in close proximity" to the decedent "at the time" of the murder "and due to that proximity are in jeopardy of suffering real harm." Id. at 80, 665 A.2d at 456. Paolello later extrapolated from the cases it surveyed a rule that this aggravating circumstance arises only in those factual situations where a "nexus exists connecting the 'other persons' to the zone of danger created by the defendant['s] actions in killing the victim." Id. at 82, 665 A.2d at 457.

Preliminarily, the broad rule suggested by the Paolello survey does not command any conclusion here because it was not necessary to the decision of that case. In Paolello, the defendant beat two men on October 3, 1991. One of the men went to the hospital and survived. The second man refused to seek treatment for his injuries and began ingesting large quantities of vodka that were administered to him by the defendant who said, "the only doctor your [sic] going to see is this vodka." Id. at 63, 665 A.2d at 447. Eighteen hours later, the second man died as a result of a combination of blunt force trauma and alcohol poisoning. No general rule was necessary to decide Paolello. The survivor in Paolello was never exposed to the alcohol poisoning that killed the decedent. The §9711(d)(7) aggravating circumstance unquestionably did not apply.

More importantly, helpful though the survey in Paolello may be to a general understanding of the cases that have arisen under §9711(d)(7), it does not end the matter of the construction of the statute. Indeed, there is a line of cases, relied upon by the trial court and the Commonwealth, but ignored by the majority, in which this Court has held that there is sufficient evidence to support a finding of the §9711(d)(7) aggravating circumstance when the defendant's behavior either before or after the act of killing created a grave risk of death to someone other than the victim.

For example, in Commonwealth v. McNair, 529 Pa. 368, 603 A.2d 1014 (1992), the defendant fatally shot the victim and, after dispatching him, fired several additional shots at a friend of the victim's who was attempting to flee. This Court dismissed the defendant's argument that the shooting of the victim's friend should be considered a separate offense for purposes of the (d)(7) aggravating circumstance, explaining that, "[b]ecause these shots were fired in such a short time and at specific people who were running for safety, the jury was justified in concluding that sufficient evidence exists for a finding that others were placed in grave risk of death during the commission of [the] murder." Id. at 376, 603 A.2d at 1018. Further, we held that the serious injuries sustained by the victim's friend "conclusively establish[ed] that he was put in grave risk of death by [defendant] during the murder." Id.

Similarly, in Commonwealth v. Johnson, 542 Pa. 384, 668 A.2d 97 (1995), we held that there was sufficient evidence to support the jury's finding of the §9711(d)(7) aggravating circumstance in a case where, after the defendant fatally shot the victim six times, the defendant and his co-conspirators fired numerous shots from their getaway car at a man who was attempting to pursue them as they fled the murder scene. Id.at 393, 409, 668 A.2d at 101, 109.

This Court appears to have followed the reasoning of Johnson and McNair in Commonwealth v. Robinson, 554 Pa. 293, 721 A.2d 344 (1998). In Robinson, the

defendant arrived at the apartment of his ex-girlfriend, Tara Hodge, and discovered that Hodge's current boyfriend was taking a shower in the bathroom. Hodge testified that the defendant pointed a gun at her and shot her in the front room of her apartment while her boyfriend was showering in the bathroom. Before she lapsed into unconsciousness, she heard three shots in all and then the defendant ran past her. When she regained consciousness, she went into the bathroom where she discovered the dead body of her boyfriend in the shower stall; he had been shot seven times. Even though the defendant obviously murdered the victim after he had shot Hodge, and even though the victim and Hodge were not even in the same room at the time of either shooting, this Court held that there was sufficient evidence to establish the §9711(d)(7) aggravating circumstance. Id. at 302, 314, 721 A.2d at 349, 355.

Finally, in Commonwealth v. Mitchell, 528 Pa. 546, 599 A.2d 624 (1991), the defendant and three runaways from the Children's Home of York returned to the Home to carry out a conspiracy to kill a counselor who, the conspirators had concluded, had been strict in his treatment of the juveniles. While three of the conspirators, including the defendant, stabbed the counselor to death, the fourth stood guard on the second floor, with instructions to kill anyone who woke up and attempted to help the victim. In fact, no one awoke, and the only person to suffer injury was the murdered counselor. Even though the victim was stabbed to death with no others in the vicinity, this Court held that the offense posed a grave risk of death "to the other residents of the home." Id. at 552, 555, 599 A.2d at 627-28.

Based on the theory espoused in these cases, there plainly was sufficient evidence to permit the jury here to consider the §9711(d)(7) aggravating circumstance, even though the bullet that killed Mr. Calabro posed no specific danger to Mr. Elder and Mr. Elder was not shot until after Mr. Calabro was murdered. The killing of Mr. Calabro occurred in the course of appellant burglarizing the premises. At the time that Mr. Elder entered the store,

appellant had yet to make his escape. I see no significant difference between appellant's shooting Mr. Elder in the face, to facilitate his getaway, and the shooting at pursuers in Johnson, or the separate shootings in McNair and Robinson, or the inchoate danger in Mitchell.

Furthermore, contrary to the majority, I believe that the conduct here warranted submission of the aggravating circumstance to the jury even under the zone of danger theory extrapolated from the case law by Paolello. The zone of danger was the store where appellant killed Mr. Calabro; that zone did not become safe until appellant escaped. As Judge Cercone noted:

> We believe that Mr. Elder unquestionably was within the zone of danger, and was in close proximity to the decedent at the time of the murder. Elder arrived at the store within minutes of its opening. Defendant, who had shot and killed Mr. Calabro, had not yet completed his robbery and getaway. Mr. Elder arrived within minutes o[r] perhaps seconds of Calabro's murder. The murderer/robber was still in the store. If Defendant was to succeed, complete his robbery and effect his escape from his vile deeds, he had to eliminate the only other person present, a co-worker who had arrived within minutes or seconds of Bolden's cold-blooded act. One last witness would need eliminat[ion] in order for defendant to make good on his escape. Unfortunately for Defendant, however, he failed to complete that task, leaving a witness who would help bring justice down upon him.

Trial Court Opinion at 10. I thoroughly agree with this analysis.

Further support for this understanding of the zone of danger test is provided in our recent decision in Commonwealth v. Counterman, 553 Pa. 370, 719 A.2d 284 (1998). In Counterman, the defendant murdered his three children by setting fire to his house and preventing their escape. We held that there was sufficient evidence to support the jury's finding of the §9711(d)(7) aggravating circumstance because, by setting the fire, the defendant created a grave risk of death not only to his wife, who was also in the house, but also to firefighters and his neighbors, who were not. Obviously, by so holding, we recognized that, by setting the fire, the defendant created a zone of danger that remained

not only until the blaze was extinguished, but also extending to individuals who entered this zone after the initial setting of the fire. Similarly, in the instant case, the zone of danger remained until appellant made his escape from the store.

But even if it could be said that the rule Paolello found in its survey of earlier cases supported the result reached by the majority here, I would still dissent. We are concerned with the construction of a statute. The cases construing the statute are a testament only to the "factual situations" that generated them. Paolello, 542 Pa. at 82, 661 A.2d at 457. The mere happenstance that a majority of the cases that have arisen involve a certain type of "factual situation" does not mean that other fact patterns do not fall within the statutory rule. In other words, the case law cannot operate to amend the statutory language.

The plain language of §9711(d)(7), no less than the case law cited earlier, fully supports the trial court's decision to submit this issue to the jury. The statutory aggravating circumstance in (d)(7) governs factual situations where, "In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense." Id. (emphasis added). It is notable that the legislature employed the broad term "offense" for, elsewhere in the same statute, the legislature used narrower terms such as "a killing," 42 Pa.C.S. §9711(d)(6), or "homicidal conduct" or "homicidal acts," §9711(e)(6), (e)(7), in defining various aggravating and mitigating circumstances. Had the legislature intended to confine the grave risk of death aggravator to risks caused by the circumstances surrounding only the killing blow itself as the majority suggests, surely it would have employed one of the narrower terms it proved capable of employing elsewhere. By using the term "offense," rather than "killing" or "homicidal act," the statute requires that the (d)(7) inquiry should not be limited to the instant that the killing took place.

Finally, this case provides a prime example of the wisdom of this aggravating circumstance. Aggravating circumstances exist to provide the appropriate punishment for the most heinous of murders or murderers. Appellant's conduct here went well beyond that

necessary to commit a first degree murder. The "offense" was not simply the intentional shooting of Mr. Calabro, it was a robbery in which appellant displayed an easy willingness to kill anyone in his path. Appellant entered the sporting goods store at 10:00 a.m. -- *i.e.*, at a time when it was open, and when other employees and customers were likely to enter. Indeed, the door to the store was left ajar. During the course of the robbery, appellant smashed a glass display case, shot Mr. Calabro in the head and left his body behind a counter in the front of the store. It was easily foreseeable, even likely, that someone would enter the store during the course of the robbery/murder, notice the smashed display case, look for employees and discover the body of Mr. Calabro before appellant could make his escape. Until that escape occurred, anyone who entered the store, such as Mr. Elder, was in grave danger. Thus, implicit in the offense appellant elected to commit was a grave risk of death to anyone else who might enter the sporting goods store. The second victim was such a person. This grave risk distinguishes this from other first degree murders. I believe it is precisely the type of aggravating circumstance contemplated by §9711(d)(7). Accordingly, I dissent.