

[J-119-1999]

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

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

CONCURRING OPINION

MR. JUSTICE NIGRO

DECIDED: June 20, 2000

I concur with the Majority and write separately solely to address the position taken by Justice Castille in his Concurring and Dissenting Opinion that the trial judge did not err by instructing the jury that it could find the (d)(7) aggravating circumstance.

Justice Castille is accurate in stating that what we are concerned with here is the construction of a statute, namely 42 Pa. C.S. § 9711(d)(7). The (d)(7) aggravating circumstance applies when “[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim.” 42 Pa. C.S. § 9711(d)(7). Justice Castille suggests that the word “offense” within this context should be interpreted to include more than just the defendant’s murderous acts because the legislature did not use a more particular phrase such as “homicidal conduct” or “homicidal acts” in crafting the aggravating circumstance at issue. Accordingly, Justice Castille contends that, for purposes of (d)(7), appellant’s robbery of the sporting goods store

constitutes an “offense” during the commission of which he placed a third person (Mr. Elder) in grave risk of death.

The statutory interpretation advocated by Justice Castille, however, defies logic because the only “offense” for which a defendant can be exposed to the possibility of facing the death penalty is first-degree murder. See, e.g., 42 Pa. C.S. § 9711(a)(1). In addition, Justice Castille’s proposed interpretation of the term “offense” within (d)(7) as referring to crimes other than murder is in contravention of the well-known canon of statutory construction that penal statutes must be construed strictly. See 1 Pa. C.S. § 1928; Commonwealth v. Smith, 528 Pa. 380, 385, 598 A.2d 268, 271 (1991).

As noted above, the (d)(7) aggravator applies only when the defendant knowingly creates a grave risk of death to another person in addition to the victim “in the commission of the offense.” 42 Pa. C.S. § 9711(d)(7). As we clearly stated in Commonwealth v. Paolello, the (d)(7) aggravator is applicable only in those instances where “other persons are ‘in close proximity’ to the defendant ‘at the time’ of the murder.” 542 Pa. 47, 80, 665 A.2d 439, 456 (1995). Thus, notwithstanding Justice Castille’s argument to the contrary, the phrase “in the commission of the offense” plainly means “during the murder” or “at the time of the murder.”

In the instant case, the Majority correctly concludes that there was insufficient evidence to support the Commonwealth’s theory that appellant’s fatal shooting of Mr. Calabro within the sporting goods store placed Mr. Elder in grave risk of death because there was simply no showing that Mr. Elder was put in danger at the time of Mr. Calabro’s murder. To be sure, Mr. Elder was put in danger later, when appellant shot him -- but that shooting simply did not occur “in the commission of the offense,” i.e., during Mr. Calabro’s

murder. While Justice Castille correctly observes that (d)(7) does not apply only to cases where bystanders are located directly behind the intended victim as that person is being shot,¹ I believe that it would undermine the plain meaning and unambiguous intent of the statute in question to find that (d)(7) applies to cases such as the instant one, where there is no indication that a third party was placed in grave risk of death during the murder of the intended victim due to that third party's temporal and spatial proximity to the victim.²

Mr. Justice Cappy joins in the concurring opinion.

¹ See, e.g., Commonwealth v. Robinson, 554 Pa. 293, 721 A.2d 344 (1998) (murder of victim by multiple shootings creates grave risk to victim's girlfriend who is on floor in nearby room); Commonwealth v. Counterman, 553 Pa. 370, 719 A.2d 284 (1998) (murder of victims by house fire creates grave risk to other house members, neighbors and firefighters).

² I therefore believe that the (d)(7) aggravator has no place in cases where the grave risk to a person other than the intended victim is substantially removed in time or space from the commission of the murder, such as in Commonwealth v. Johnson, 542 Pa. 384, 668 A.2d 97 (1995) (shooting murder in street creates grave risk of death to neighbor who pursued defendants by car for several blocks while they were shooting at him).