[J-162-1997]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	No. 81 Capital Appeal Docket
v.	Appeal from the Judgment of Sentence entered in the Court of Common Pleas of Philadelphia County October 25, 1994, Criminal Action 93-04-2839
SHELDON HANNIBAL, Appellant	ARGUED: October 27, 1997

DISSENTING OPINION

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

I respectfully dissent. Specifically, I find the majority's disposition of Appellant's issue raised pursuant to Commonwealth v. Huffman, 638 A.2d 961 (Pa. 1994) and Commonwealth v. Bachert, 453 A.2d 931 (Pa. 1982) to be disingenuous.

In Huffman, this court stated that in order for a defendant to be found guilty of first degree murder, the Commonwealth must establish that the defendant himself possessed the specific intent to kill, and that a defendant could not be convicted of first degree murder solely because his accomplice or co-conspirator who actually committed the homicidal act possessed the specific intent to kill. Id. at 962.

Huffman did not announce a new rule of law. This court's first clear recitation of this principle was delivered in Commonwealth v. Bachert, 453 A.2d 931 (Pa. 1982). Justice (now Chief Justice) Flaherty delivered the opinion of the court, stating that the trial court must instruct the jury that

> [t]o determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; the requisite mental state must be proved beyond a reasonable doubt to be one which the accomplice harbored and cannot depend upon proof of the intent to kill only in the principal.

Id. at 935.

This requirement is not one which this court idly imposed on the trial courts. We have stated that such an instruction is mandatory because "[i]t is the unique harboring of malice with willful premeditation that causes first degree murder to be distinctly villainous. It is precisely because of the deliberate nature of first degree murder that this crime carries the most severe penalty the law can impose--death. To allow a conviction for first degree murder to stand without proof beyond a reasonable doubt establishing that the accused actually harbored the specific intent to kill, would be unconscionable." Commonwealth v. Wayne, 720 A.2d 456, 464 (Pa. 1998). [1]

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[1] In his concurring opinion, Mr. Justice Castille retracts his decision to join the majority opinion in Wayne. Mr. Justice Castille now finds that the court in Wayne impermissibly intruded into the legislative domain by altering the traditional rule of co-conspirator liability as it relates to first degree murder. I must disagree. The court in Wayne did not intrude on the legislative power to define substantive criminal law; rather, it applied the principle that statutes are read in pari materia, thus giving effect to all of the respective elements of conspiracy and first degree murder. The decision in Wayne was not motivated by the severity of the punishment for first degree murder, but rather by the recognition that the legislature, in defining first degree murder, delineated that crime from all other degrees of homicide by the element of a specific premeditated intent to kill. Nor do I find that a jury instruction, which explains that each person charged with first degree murder, whether an accomplice or co-conspirator, must possess the specific intent to kill, places an onerous burden on the prosecution.

Appellant claims that the Huffman and Bachert rule was violated in this matter. Specifically, he points to the trial court's instruction to the jury that Appellant could be convicted of first degree murder if the Commonwealth had established that "the defendant, his accomplice or co-conspirator [shot the victim] with the specific intent to kill and with malice." N.T., 3/9/1994, 135-36. Appellant claims that such an instruction gave the jury permission to convict him of first degree murder even if only his co-conspirator, and not Appellant himself, possessed the specific intent to kill.

The majority rejects this argument by stating that

> [w]hen a series of nouns is separated by a comma and the last two elements of a series are the same entity (accomplice or co-conspirator), the sentence is properly understood to consist of a series of two nouns, not three. Thus, the sentence may be read to say, "the jury may find the accomplice guilty if it finds that the defendant and his accomplice (or your may think of him as a co-conspirator) acted with specific intent to kill and malice."

Majority slip op. at 9.

Had the instruction been given as the majority rephrases it, I would wholeheartedly agree that it met the Huffman and Bachert rule. Yet, this is not the instruction that was given. Rather, it is a concoction derived from the majority's hopes that the jury was privy to the same book of grammar that it had at its disposal.

The plain words spoken by the trial court judge informed the jury that they could find the defendant guilty if the Commonwealth showed that the defendant, his accomplice or co-conspirator shot the victim with the specific intent to kill. In my opinion, this instruction informed the jury that it could find Appellant guilty of first degree murder even if only his accomplice or co-conspirator, rather than Appellant himself, had the specific intent to kill. Unlike the majority, I am unable to transmogrify this simple statement, which I believe clearly violates the Huffman and Bachert rule, into a wholly different instruction. As I believe that it would be unconscionable to allow Appellant's conviction to stand where the

jury was erroneously instructed that the Commonwealth need not prove that Appellant actually harbored the specific intent to kill, I must respectfully dissent.