

[J-240-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 187 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Judgment of Sentence
	:	entered on June 19, 1996 in the Court of
v.	:	Common Pleas of York County, Criminal
	:	at No. 2844 CA 1995
	:	
	:	
JOHN A. SMALL,	:	
	:	ARGUED: November 17, 1998
Appellant	:	

DISSENTING OPINION

MR. JUSTICE ZAPPALA

DECIDED: November 1, 1999

Because I believe that the trial court abused its discretion by not permitting Appellant to question witnesses regarding their continuous chronic alcohol or drug use throughout a fifteen-year period, I dissent.

The majority relies upon Commonwealth v. Drew, 459 A.2d 318 (Pa. 1983), and Commonwealth v. Yost, 386 A.2d 956 (Pa. 1978) (plurality opinion), to support its conclusion that the trial court did not err in limiting questioning about the alcohol and drug use of witnesses. Neither case, however, addresses the issue presently before this Court, that is, whether a witness may be questioned about his or her continuous chronic alcohol or drug use throughout a prolonged period of time between the event about which he or she testifies and the trial, so as to attack the credibility of the witness by establishing, through expert testimony, that the witness's memory or ability to recollect past events could be defective because of the alcohol or drug use.

In Drew, the defendant was convicted of killing her husband, despite her claim that she had acted in self-defense. At trial, the defendant testified that her husband had assaulted her and that only seconds had passed from the time of the assault to the time that she killed him. A prosecution witness, however, testified that over twenty minutes had passed between the assault and the killing. In an attempt to discredit the defendant's testimony, the prosecution questioned the defendant about her intoxication on the night of the crime. On appeal, this Court found that because the prosecution limited its questioning to intoxication on the night of the crime and because "[t]he question of the consumption of alcoholic beverages within this time frame would be relevant to the question of whether [the defendant] did in fact have a reasonable belief of an immediate threat to her life," the trial court did not err in permitting the questioning. 459 A.2d at 321-22.

Similarly, in Yost, the defendant was convicted of murder in the first degree, two counts of murder in the second degree and criminal conspiracy. At trial, a prosecution witness testified that he had heard the defendant admit to having killed the victims. The trial court precluded defense counsel from questioning the witness about general drug use, but allowed questioning about the witness's drug use at the specific time that he had heard the admission. This Court affirmed. The plurality opinion reasoned that evidence of drug use at the particular time of the admission was relevant to whether the witness's mental condition at that time had been impaired so as to affect his ability to remember what he saw or heard. 386 A.2d at 961. The opinion further explained that questioning the witness about general drug use "would have brought out any drug problem that [the witness] might have had at an irrelevant time and was, therefore, properly excluded." Id.

Both Drew and Yost are distinguishable for three reasons.¹ First, these cases did not involve continuous chronic alcohol or drug use. Rather, the witnesses in Drew and

¹ Indeed, all of the cases in this Commonwealth of which I am aware that address the issue of whether a witness can be questioned about his or her alcohol or drug use for the (continued...)

Yost were questioned about alcohol or drug use on a particular occasion, such as at the time of the crime or the admission about which the witness had testified.² The distinction between a specific instance of alcohol or drug use and continuous chronic alcohol or drug use is important. Continuous chronic use could have a strong negative effect on a witness's memory or ability to accurately recall past events, regardless of whether the witness was under the influence of alcohol or drugs at the time of the event that he or she is attempting to recall. Conversely, the effect of a single instance of alcohol or drug use is more limited, as it would only affect a witness's ability to remember what he or she observed while under the influence. This distinction alone nullifies any controlling guidance that Drew or Yost might offer.

Second, Drew and Yost are distinguishable because they did not involve a prolonged period of time between the event about which the witness testified and the trial. Since Drew and Yost did not involve a prolonged delay, they could only have addressed the witness's ability to perceive the event about which they testified. Appellant's case, on the other hand, involved a fifteen-year delay, which would have brought the witnesses' memories and abilities to accurately recall past events into issue. The effect of continuous

(...continued)

purpose of attacking the witness's credibility are distinguishable for these same reasons. See, In the Interest of M.M., 690 A.2d 175 (Pa. 1997) (plurality opinion); Commonwealth v. Gaddy, 362 A.2d 217 (Pa. 1976) (plurality opinion); Commonwealth v. Perdue, 564 A.2d 489 (Pa. Super. 1989); Commonwealth v. Duffy, 353 A.2d 50 (Pa. Super. 1975); Commonwealth v. Dreibelbis, 269 A.2d 387 (Pa. Super. 1970).

² Vague, general questions about drug use, such as those disallowed in Yost, are also distinguishable from specific questions about a witness's continued chronic alcohol or drug use, supported by expert testimony, such as the questioning proposed here. The former is often intended to merely blacken the reputation of a witness, while the latter is expressly intended to show that a witness's memory or ability to recollect past events may be defective.

chronic alcohol or drug use on a witness's memory or ability to accurately recall events that occurred fifteen years beforehand was simply not addressed in Drew or Yost.

The final reason Drew and Yost are distinguishable from the case at bar is that the prosecution in Drew and defense counsel in Yost did not offer or intend to offer expert testimony regarding any effects of alcohol or drugs on a witness. Here, defense counsel did call an expert, Dr. Passananti, to testify about the effects of alcohol and drugs on a witness's memory, ability to accurately recall past events and ability to perceive events.³ This proffer is important because the effect of continued chronic alcohol or drug use on a witness's memory or ability to accurately recall past events is not a matter which a lay juror would normally understand without the assistance of an expert.

In my view, Appellant's claim of error presents a novel question of law and the majority errs in relying on Drew and Yost to decide it. I would hold that a witness may be questioned about his or her continuous chronic alcohol or drug use throughout a prolonged period of time between the event about which he or she testifies and the trial, so as to attack the credibility of the witness by establishing, through expert testimony, that the witness's memory or ability to recollect past events could be defective because of his or her continuous chronic alcohol or drug use during that prolonged period of time.⁴ Because in my view the proposed questioning and expert testimony were relevant and would have aided the jury in deciding the case, the trial court abused its discretion by precluding defense counsel from pursuing these lines of inquiry.

³ The trial court only permitted Dr. Passananti to testify on the effects of alcohol and drugs on a witness's ability to perceive events.

⁴ I express no opinion on whether a witness may be questioned about continuous chronic alcohol or drug use throughout any prolonged period of time, for purposes of challenging his or her memory generally. I address only the propriety of such questioning regarding the particular period of time between the event about which the witness testifies and the trial.

Accordingly, I would reverse the judgment of sentence and remand for a new trial.