

[J-114-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 528 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence of
	:	the Court of Common Pleas of Fayette
v.	:	County entered on February 12, 2007, at
	:	CP-26-CR-0001229-2004.
	:	
JAMES W. VANDIVNER,	:	
	:	
Appellant	:	SUBMITTED: September 13, 2007

CONCURRING AND DISSENTING OPINION

MR. JUSTICE BAER

DECIDED: January 23, 2009

I join the Majority's resolution of Appellant's guilt phase claims. I dissent, however, from the Majority's rejection of Appellant's penalty phase argument that he is ineligible for the death penalty because he is mentally retarded. In Atkins v. Virginia, 536 U.S. 304 (2002), the United States Supreme Court declared that the execution of mentally retarded criminals violated the Eighth Amendment prohibition against cruel and unusual punishment. Id. at 311. The High Court left to the states the task of developing standards and procedures for determining whether a defendant was, in fact, mentally retarded. Id. at 317. This Court undertook that task in Commonwealth v. Miller, 888 A.2d 624 (Pa. 2005). In an opinion by then-Chief Justice Cappy, relying upon the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th Ed. 1992) and the American Association of Mental Retardation's treatise entitled Mental Retardation: Definition, Classification and Systems of Supports 1 (10th

ed. 2002), we determined that a defendant seeking to avoid the death penalty had to prove by a preponderance of the evidence: (1) that he possessed limited intellectual functioning; (2) that such limited intellectual functioning impacted his everyday life (that his adaptive functioning was substantially diminished by his intellectual impairment); and (3) that the limited intellectual functioning impacting his adaptive functioning was apparent prior to his eighteenth birthday. Miller, 888 A.2d at 627. In this capital case, the pragmatic effect of the Majority's holding is that Appellant, and those similarly situated to him, can never prove mental retardation under the above matrix when records are not extant to illuminate his mental condition before his eighteenth birthday. Such analysis is at least unsupported, if not contradicted, by the overarching rationale of Atkins as well as Miller, and I dissent from it.

Prior to Appellant's trial for capital murder, he filed a petition seeking to preclude the Commonwealth from pursuing the death penalty, alleging that he had substantial intellectual impairment; that such impairment impacted his daily adaptive functioning; and that this disability was in existence prior to age eighteen. As the Majority describes in detail, during a four-day hearing, Appellant attempted to prove these premises, derived directly from the three-prong Miller test, by a preponderance of the evidence. In regard to the first element, defense psychologist Adam Sedlock administered an intelligence test and determined that Appellant scored an intelligence quotient (IQ) of 61-71, indicating that Appellant is functioning within the mild range of mental retardation. With regard to the second element, Appellant produced evidence that his adaptive skills are deficient. Finally, regarding the third element of Miller, that onset was before age eighteen, Appellant offered evidence that he was in special education classes until he dropped out of school in the tenth grade. Further, defense expert Dr. Lawson Frederick Bernstein, Jr., a clinical and forensic neuropsychiatrist, testified that

IQ does not change over a lifetime. Based on Dr. Bernstein's testimony, Appellant's present IQ score, Appellant's school records, and interviews with Appellant's sister, defense expert Sedlock concluded that the onset of Appellant's mental retardation occurred prior to age eighteen.

In response, the Commonwealth, rather than addressing the substance of Appellant's case, focused on the lack of testing performed prior to Appellant's eighteenth birthday, and noted the self-evident proposition that children can be placed in special education classes for many reasons other than mental retardation. Dr. Bruce Wright buttressed the Commonwealth's argument by testifying that the only means of definitively establishing the impairment of mental functioning prior to age eighteen is through objective testing that Appellant as a child was never provided.¹ N.T. 12/8/2006, 274.

After the hearing, the trial court analyzed the third element of Miller. Accepting the Commonwealth's assertions, the trial court found that because Appellant failed to offer IQ testing conducted prior to age eighteen, which the trial court believed was the best evidence of age of onset, he did not meet his burden. Further, the trial court noted that Appellant failed to produce school or psychological records proving that his mental retardation manifested itself before age eighteen. Accordingly, the Court rejected Appellant's claim premised on the third element of Miller alone, and declined to determine whether Appellant had established the first two elements of Miller. This Court's Majority accepts the trial court's rationale and determination.

¹ I acknowledge that the Commonwealth also argued that in accord with Miller's first two criteria, Appellant did not have limited intellectual functioning or maladaptive behavior. However, the trial court's decision and this Court's Majority Opinion both turn solely on Appellant's alleged failure to prove the third Miller prong by objective testing and diagnosis prior to age eighteen.

Respectfully, I dissent. I believe that the Majority, through its affirmance of the trial court, imposes an impossible standard on certain defendants for whom there is no objective evidence originating prior to age eighteen. Where, as here, there was no IQ testing conducted before age eighteen and no school records identifying Appellant as mentally retarded, due to the lack of a structured program designed to identify those students with mental retardation,² the Majority's requirement of objective evidence originating before age eighteen precludes defendants such as Appellant from ever meeting their burden of showing mental retardation, and may well lead to the execution of mentally retarded defendants in violation of Atkins and Miller, if they were not fortunate enough to attend a school that tested for IQ and/or maladaptive behavior.

Neither Atkins nor Miller requires IQ testing or objective evidence of behavioral impairment before one's eighteenth birthday to prove age of onset. To require such tests from Appellant's childhood substantively redefines the third criteria of Miller to mandate production of childhood tests for objective intelligence and adaptive functioning, or to face execution, regardless of current realities. To say this is troubling is an understatement. Many defendants, such as Appellant, were not afforded the specialized expert attention, IQ tests, or adaptive assessments memorialized in school records, required by the Majority to corroborate their claim of mental retardation.³

² Ann Peters, the supervisor of special education for the Frazier School District, reviewed Appellant's school files and testified that at the time Appellant attended the school, there was no formalized evaluation procedure for placing students in special education classes. Placement in such classes was informal, and was not based on routine standardized testing. N.T. Nov. 27, 2006 at 56-57, 61-62.

³ The Majority observes that it is possible for a defendant to show age of onset before eighteen in the absence of objective testing from that time by offering school records, social service records, or psychological records to prove that mental retardation manifested before age eighteen. Here, however, according to the trial court and the Majority, Appellant failed to meet his burden of proof because nobody labeled (continued...)

The third component of Miller was intended to differentiate between mental retardation and intellectual deficits that develop after age eighteen, typically due to brain injuries or brain diseases such as dementia.⁴ It was never intended to be the draconian standard established by the Majority to eliminate the benefit of Atkins for legitimately mentally retarded individuals. Contrary to the trial court or the Majority, I believe that whatever evidence is put forward by an Appellant should be considered without the barrier of a talismanic test. Here, Appellant's expert Sedlock interviewed Appellant, Appellant's family, and reviewed Appellant's school records, and concluded, based on this evidence, that the age of onset of mental retardation was before eighteen. The trial

(...continued)

him mentally retarded in his school records, he might have been placed in special education classes because of excessive absences, and his current mental impairments may be the result of something other than mental retardation.

Appellant's burden to prove age of onset is by a preponderance of the evidence, "that is, by a greater weight of the evidence." Commonwealth v. Rainey, 928 A.2d 215, 242 (Pa. 2007). Here, Appellant attempted to meet his burden and overcome the lack of objective testing or the characterization of mental retardation in his school records before his eighteenth birthday by offering expert opinions, as well as the testimony of family members about his adaptive limitations while in school. His experts opined that, considering his school records and contemporary IQ scores, his IQ-related deficiencies were present before age eighteen. Appellant's family members corroborated this conclusion, testifying that his adaptive limitations were present before his eighteenth birthday. In rejecting Appellant's evidence, the trial court focused on his failure to introduce an IQ test administered before age eighteen or to offer any illuminating school, social service, or psychological records, which, again, were extant prior to Appellant's eighteenth birthday, and the Majority affirms this decision. Notwithstanding the Majority's protests to the contrary, I believe that the trial court and Majority have erected an insurmountable wall for defendants such as Appellant who were not tested or labeled through a structured, formal school procedure.

⁴ As noted by the Majority, unlike the circumstance of mental retardation, a national consensus has not been found regarding the propriety of the imposition of the death penalty against individuals whose intellectual deficits develop after age eighteen.

court, and the Majority, has accepted the Commonwealth's position and that of its expert that absent objective evidence of origination of the symptoms of mental retardation prior to age eighteen, Appellant could not meet his burden. Conversely, I believe this case should be remanded to the trial court to assess whether in the absence of preclusive, objective criteria, and weighing all of the evidence put forward by Appellant and the Commonwealth, Appellant established mental retardation. I believe further that the trial court should analyze the two remaining elements of Miller so that upon the next appeal, this Court is in a position to determine whether the credible record evidence establishes mental retardation.

Mr. Justice McCaffery joins this concurring and dissenting opinion.