

[J-134-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 504 CAP
	:	
Appellee	:	
	:	Appeal from the Order entered on 7/29/05
v.	:	in the Court of Common Pleas, Criminal
	:	Division of Philadelphia County dismissing
	:	the PCRA petition at No.93-02-3158-69
	:	
JERMONT COX,	:	
	:	
Appellant	:	SUBMITTED: July 21, 2008

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: November 19, 2009

I join the majority opinion as it concerns guilt-phase claims 1, 5, 7, 8, and 10, concur in the result with regard to the balance of the opinion, and offer the following comments.

As to the issues identified by the majority as guilt-phase claims 3 and 4, I respectfully differ with its assertion that there is not “even a scintilla of evidence” that the prosecutor used the evidence of the Davis killing to bolster the claim that Appellant participated in the Stewart killing. See Majority Opinion, slip op. at 16. As Appellant develops at length, in opening and closing remarks to the jurors the prosecutor employed a “mind of a killer” theme, obviously alluding to the fact that Appellant had committed multiple homicides.¹ In doing so, the prosecutor did not specifically limit his

¹ For example, the prosecutor repeatedly argued:
(continued . . .)

comments to two homicides, as opposed to the three put before the jury, and I find it unreasonable to believe the jurors would so compartmentalize the evidence in interpreting such comments touching upon a criminal defendant's mentality and propensities.² I support the outcome only because, in light of the evidence presented (including Appellant's various confessions) and the trial court's limiting instructions, I find that Appellant has not met his burden of proof concerning prejudice.

Regarding guilt-phase claim 6, the majority's explanation that due process rights are not violated by the government's pursuit of alternate theories of liability is unresponsive to Appellant's argument, relying on Smith v. Goose, 205 F.3d 1045 (8th Cir. 2000), that "the use of inherently factually contradictory theories violates the principles of due process." Id. at 1052 (emphasis added). In the present case, the prosecution opened to the jury by stating that the evidence showed Appellant was an accomplice and coconspirator, but not the shooter, in the Watson and Stewart homicides. Although the district attorney explained to the trial judge that he did not feel he could identify Appellant as the shooter in the Watson homicide in his opening remarks since attorneys may not rely on inferences from the evidence in opening

(. . . continued)

But, like I said, Ladies and Gentlemen, the mind of a killer, it doesn't care about the law. He doesn't care about killing. He showed you through his words and actions that killing is no big deal to him, and he wants you to feel the same way.

N.T., April 10, 1995, at 116.

² Indeed, the prosecutor specifically and repeatedly referenced all three killings in furtherance of his "mind of a killer" theme. See, e.g., N.T., April 10, 1995, at 114-15 (reflecting the following comments of the prosecutor concerning Appellant, "He doesn't care about killing. He doesn't care about the law. . . . What's the difference between two murders and three?").

statements, see N.T., April 6, 1995, at 24, such explanation was erroneous. In this regard, this Court has long recognized that “[s]o long as no liberties are taken with the evidence, a lawyer is free to draw such inferences as he wishes from the testimony and to present his case in the light most suited to advance his cause and win a verdict in the jury box.” Contractors Lumber and Supply Company v. Quinette, 386 Pa. 517, 522, 126 A.2d 442, 444 (1956); accord Commonwealth v. Farquharson, 467 Pa. 50, 63-64, 354 A.2d 545, 552 (1976). The prosecutor should have appreciated that circumstantial evidence is regularly relied upon by Commonwealth and defense attorneys alike in opening arguments and otherwise, and therefore, it is difficult to view his contrary perspective as anything other than an untenable lapse or pretext. In either event, in the absence of some reasonable explanation for the material shift in position concerning affirmative government representations as to material facts at the outset of its case, it seems to me the trial court should have held the district attorney to the position he related to the jurors in his opening remarks. Accordingly, I would dispose of this claim based upon an assessment of the degree of prejudice, in light of the strong evidence of Appellant’s culpability.

In resolving guilt-phase claim 9, the majority theorizes that, if government officials were to act illegally and manufacture evidence, they certainly would make the false evidence consistent with all of the actual evidence. See Majority Opinion, slip op. at 31. I am unaware of any decision of this Court (or any other for that matter) resting on such an assumption, which, notwithstanding the majority’s certitude, I find to be speculative.

On penalty-phase claim 1, I respectfully differ with the majority’s assertion that the Commonwealth’s expert witness disputed Appellant’s evidence that his life circumstances affected his development. See Majority Opinion, slip op. at 36. In fact, the Commonwealth never disputed that Appellant was exposed to poverty, neglect, and

abuse during his upbringing; the effects of such negative factors on development are well known; and the Commonwealth's expert confirmed them during his testimony. For example, one interchange from his cross-examination proceeds as follows:

Q. With respect to [Appellant], can you tell me what kind of impact it may have had on him [--] that type of deprivation that he was subjected to that you described in your report?

A. Well, he may have been -- there was indication that he was humiliated at school, that he found it very difficult, you know. I'm not really -- actually, I'm not sure I can be anymore specific because I really didn't -- I didn't really do a fine-grade analysis of those factors as it impacted [Appellant] in my review of the material.

I mean, I accept the fact, as I did in my report, that these factors are present and they certainly contributed -- make significant contributions to the emotional problems that he dealt with, behavioral difficulties that he had as he got older.

Again, I point out that all those things he still continued in progress in an average fashion in school from -- in terms of his academic skills.

Q. But you would generally agree with me that that kind of thing is not good for a child?

A. Of course I would.

N.T., November 9, 2004, at 40-41 (emphasis added).

I also depart from the majority position to the degree it is asserting that testimony from a mental-health expert concerning the effects of poverty, neglect, and abuse during a capital defendant's upbringing could not sway a rational jury to return a life sentence in a case involving multiple murders. See Majority Opinion, slip op. at 38. Such assessments of the degree of a capital defendant's moral culpability are uniquely left within the province of the jury, acting as the voice of the community, and I would not

denigrate as irrational the decisions of other juries which have found (or might find) a sentence of life imprisonment appropriate in cases of multiple murders, depending on the individualized circumstances involved.

In the present case, however, the jury accepted that Appellant suffered from extreme mental or emotional disturbance -- a finding which apparently derived from the lay testimony concerning the negative effects of Appellant's upbringing and life circumstances -- yet it still returned a sentence of death. While I believe Dr. Dougherty's opinions regarding the effects of childhood deprivation and abuse (or those of the Commonwealth's expert for that matter) would have enhanced the defense mitigation case, it does not seem to me it would have added sufficient weight to persuade jurors who would render a sentence of death, although convinced that Appellant suffered from extreme impairments, to nevertheless impose a life sentence. Thus, ultimately I agree with the majority's finding of insufficient prejudice.

Finally, regarding penalty-phase claim 3, I maintain my difference with the position that this Court's decision in Commonwealth v. Lassiter, 554 Pa. 586, 722 A.2d 657 (1998) (plurality), represented a change in the law. See Commonwealth v. Spotz, 587 Pa. 1, 108-11 896 A.2d 1191, 1255-57 (2006) (Saylor, J., concurring and dissenting). Although I recognize that the Spotz majority and other opinions have held differently, see Spotz, 587 Pa. at 79-82, 896 A.2d at 1238-39, the Court has never effectively reconciled the fact that Lassiter is couched as a plain-meaning interpretation of an existing statute, or Lassiter's finding of deficient stewardship based on a failure to appreciate the plain meaning. See Lassiter, 554 Pa. at 596, 722 A.2d at 662 ("Clearly, trial counsel could have no reasonable basis for failing to explain to the appellant that a strong argument could be made that the death penalty could not be applied to her under Pennsylvania law," as the (d)(6) aggravator does not apply to an accomplice who does

not commit the killing.). Under such circumstances, I cannot see how it can reasonably be maintained that Lassiter represents an affirmative change in the law, insulating present counsel from an ineffectiveness challenge. Thus, I believe the circumstance meets an exception to the doctrine of stare decisis, which, as a general rule, requires respect for precedent. See Mayhugh v. Coon, 460 Pa. 128, 135, 331 A.2d 452, 456 (1975).