[J-116-2012] [MO: McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 1 MAP 2012
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court at No. 2108 MDA 2009 dated June
	:	27, 2011 affirming the Judgment of
v.	:	Sentence of the Cumberland County Court
	:	of Common Pleas, Criminal Division, No.
	:	21-CR-0831-2007 dated May 12, 2009
JEFFREY WAYNE BAKER,	:	
	:	
Appellant	:	ARGUED: October 16, 2012

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: October 30, 2013**

I join the Majority Opinion's Eighth Amendment[1] analysis, subject to the reservation I express below in footnote 6. The issue accepted for review purported to sound specifically and exclusively under Article I, Section 13 of the Pennsylvania Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."[2] The Majority analyzes the constitutional claim exclusively under Eighth Amendment principles governing gross proportionality, however; and properly so because appellant, in point of fact, argues his state

[1] U.S. CONST. amend. VIII.

[2] The issue, as specified in this Court's order granting review, is as follows: "Does the 25-year mandatory minimum sentence of imprisonment imposed under 42 Pa.C.S. § 9718.2 violate Article I, Section 13 of the Pennsylvania Constitution as it is grossly disproportionate to the crime?"

constitutional claim only according to the standards announced by the U.S. Supreme Court which govern Eighth Amendment claims sounding in proportionality. Appellant thus reads Commonwealth v. Zettlemoyer, 454 A.2d 937 (Pa. 1982) (rejecting claim that death penalty was *per se* cruel punishment), abrogated on other grounds by Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003), as having established that the analysis of "cruel punishment" claims under the Pennsylvania Constitution must proceed in congruence with the approach of the U.S. Supreme Court.

In my view, the parties misapprehend both what Zettlemoyer did and what the case stands for. This Court is not obliged by existing precedent to proceed in lockstep in approaching state constitutional "cruel punishment" claims. Moreover, after reviewing this Court's existing decisional law under Article I, Section 13 (including, but not limited to, Zettlemoyer), I believe that the type of claim pursued here could and should warrant a different approach under Article I, Section 13. I write separately to address what I believe would be the proper state constitutional approach.

Initially, Zettlemoyer did not purport to establish that all claims arising under Article I, Section 13 should be treated as if they were subject to the same standards that would govern an equivalent Eighth Amendment claim. Zettlemoyer was not a legislative enactment, but a judicial opinion deciding a specific issue. That issue was posed in *per se* fashion, specifically: whether capital punishment was unconstitutionally cruel under Article I, Section 13. It was a difficult claim to make in a jurisdiction where the death penalty had a long history and where the Legislature had specifically and recently re-approved the punishment.

In Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991),[3] this Court was explicit in its recognition that we are not obliged to follow federal constitutional law in lockstep when construing similar provisions of the Pennsylvania Constitution. There we stated:

> This Court has long emphasized that, in interpreting a provision of the Pennsylvania Constitution, we are not bound by the decisions of the United States Supreme Court which interpret similar (yet distinct) federal constitutional provisions. . . . [While] the federal constitution establishes certain minimum levels which are equally applicable to the analogous state constitutional provision . . . each state has the power to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution.

Id. at 894 (citations omitted).

Notably, the wording of Article I, Section 13, prohibiting "cruel punishments," is not identical to that of the Eighth Amendment which prohibits "cruel and unusual punishments." Moreover, this Court has conducted a separate Article I, Section 13 analysis, both before and after Edmunds, even in instances where the Court determined that the governing Pennsylvania rights and constitutional standards were coextensive with the federal approach. This was so in Zettlemoyer itself,[4] the first Article I, Section 13 case of any real moment issued by the Court. The Eighth Amendment claim in Zettlemoyer was controlled by authority from the U.S. Supreme Court, Gregg v. Georgia, 428 U.S. 153, 169 (1976) ("We now hold that the punishment of death does not invariably violate the Constitution."). But, the Zettlemoyer Court did not stop there,

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[3] Edmunds is the seminal opinion from this Court setting forth the factors to be considered in determining whether a provision of the Pennsylvania Constitution affords broader protections than its federal counterpart.

[4] There is no indication that a separate and developed state constitutional analysis was forwarded in Zettlemoyer's brief; notably, the case predated Edmunds.

notwithstanding its holding that the rights secured by Article I, Section 13 were coextensive with the rights secured by the Eighth Amendment. To the contrary, the Court went on to independently analyze the claim at some length in light of specific indicators in Pennsylvania history. Id. at 967-69. This is significant in and of itself, since two independent jurisdictions, applying the same standard, easily could devise separate principles in application. Thus, Zettlemoyer itself undermines the broad proposition with which appellant begins and ends his state constitutional analysis. Properly understood, Zettlemoyer recognized that even an equivalency in governing constitutional standards does not mean that the Court is absolved of the duty to independently review a properly presented state constitutional claim.

The Opinion Announcing the Judgment of the Court ("OAJC") in Commonwealth v. Means, 773 A.2d 143 (Pa. 2001) ("Means OAJC") further undermines any equivalency assumption. The relevant issue in Means was whether a statute allowing victim impact evidence at the penalty phase of capital trials violated either the Eighth Amendment or Article I, Section 13 of the Pennsylvania Constitution. Under Payne v. Tennessee, 501 U.S. 808 (1991), the Eighth Amendment claim forwarded was meritless. But, the Means OAJC did not stop there; it engaged in an analysis of the issue under Article I, Section 13, pursuant to Edmunds, ultimately concluding that the legislation was not constitutionally infirm. Means, 773 A.2d at 149-58. If the Court had believed that all Article I, Section 13 claims required lockstep devotion to federal law interpreting the Eighth Amendment, the Means OAJC could have refrained from further state constitutional analysis.

And, finally, in Commonwealth v. Batts, 66 A.3d 286 (Pa. 2013) (decided after the briefing here), the Court recently considered, *inter alia*, whether a categorical ban on the imposition of life-without-possibility-of-parole sentences on juvenile murderers was

required by Article I, Section 13, in light of the U.S. Supreme Court's Eighth Amendment decision in Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455 (2012). Mr. Justice Saylor's unanimous Opinion in Batts engaged in an Article I, Section 13 argument on the merits, notwithstanding the fact that the argument was developed primarily in terms of the Eighth Amendment, and that Batts had not provided a fully developed Edmunds analysis. The Batts Court recognized that this Court's prior holdings that Article I, Section 13 was coextensive with the Eighth Amendment arose only in discrete contexts. See id. at 298 n.5.[5] The point is that claims of cruel punishment may warrant a separate analysis under the U.S. and Pennsylvania Constitutions, as the two could conceivably yield different results in the same factual scenario, particularly where there is some basis for a distinct state constitutional approach.

I agree with the Majority that appellant's twenty-five year mandatory minimum sentence for a second offense of possession of child pornography does not run afoul of the Eighth Amendment, given the mandated federal approach. And, since appellant's state constitutional argument assumes that the same approach should be followed under Article I, Section 13, his current claim necessarily fails. But, I view it as an open question whether Pennsylvania should follow a different approach to constitutional sentencing proportionality claims.

There is a colorable claim to be made that the federal test for gross disproportionality should not be followed lockstep in Pennsylvania, certainly at least

[5] The Batts Court cited Zettlemoyer; Commonwealth v. 5444 Spruce St., 832 A.2d 396, 399 (Pa. 2003) (addressing excessive fines provision); and Jackson v. Hendrick, 503 A.2d 400, 404 n.10 (Pa. 1986) (addressing prison conditions). In Means, the Court likewise recognized that Zettlemoyer spoke to a coextensive standard only within the context in which that case was decided. Means, 773 A.2d at 151 (OAJC) (recognizing that Zettlemoyer holding was distinguishable because different Article I, Section 13 challenge was involved).

insofar as it includes a federalism-based constraint that looks to sentences for similar offenses in other states. I recognize that the predicate question would be whether notions of proportionality are subsumed within the Pennsylvania proscription against cruelty at all. But, assuming that key question were answered affirmatively, a defendant pursuing a Pennsylvania sentencing disproportionality claim may allege that comparative and proportional justice is an imperative within Pennsylvania's own borders, to be measured by Pennsylvania's comparative punishment scheme. In that circumstance, it may be that the existing Eighth Amendment approach does not sufficiently vindicate the state constitutional value at issue, where sentencing proportionality is at issue.

In my tentative view, the potential "cruelty" in the existing mandatory minimum sentencing scheme for this recidivist conduct -- if there can be said to be such -- would arise not from the mandatory term of twenty-five years on its face, but in the rationality of the legislatively dictated sentence when considered in light of the broader relevant sentencing construct. Appellant was convicted of multiple counts of possession of child pornography in violation of 18 Pa.C.S. § 6312(d)(1). Any offense involving the abuse and exploitation of children is grave, and the General Assembly is fully empowered to take measures designed both to punish and to deter such offenders. The Majority has explained at length why this crime, though it may not involve the persons who actually committed the horrific assaults upon the children depicted in the images, nevertheless is pernicious and loathsome; the demand for the images directly encourages the unspeakable abuse.[6] See Commonwealth v. Davidson, 938 A.2d 198, 215 (Pa. 2007)

[6] Having said this, certain of the Majority's characterizations are exaggerated if not inaccurate. For example, I do not understand appellant's position as being that his crime was a "simple, non-serious, possessory offense" involving "so-called 'dirty pictures.'" Rather, the core of appellant's argument is that, while an offense against (…continued)

("[t]he purpose of Section 6312 is plainly to protect children, end the abuse and exploitation of children, and eradicate the production and supply of child pornography."). In addition, establishing enhanced penalties for recidivists – for those who, after one corrective round, nevertheless "hardeneth [their] neck[s]"[7] and reoffend – is no less rational a course for the Legislature.

The potential difficulty is with the delivery of comparative justice in punishment. Assuming that Article I, Section 13 requires some sort of rational legislative approach to comparative punishments, measuring proportionality claims by analyzing the legislative treatment of punishments for other crimes in Pennsylvania is the logical starting point, as it offers ascertainable and objective criteria.

Appellant did not himself commit the sexual assaults depicted in the photographs he possessed; the criminal acts depicted subjected those offenders to prosecution under Chapter 31 of the Crimes Code. Notably, the General Assembly has graded both rape and involuntary deviate sexual intercourse ("IDSI") as first-degree felonies, both punishable by a maximum term of twenty years imprisonment, even for first offenses. See 18 Pa.C.S. §§ 3121 (rape), 3123 (IDSI); § 1103(1) (prescribing punishment). By statutory definition, either criminal act with a child under the age of 13 establishes the

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(continued…)
children cannot be taken lightly, his sentence is cruel because it is disproportionate to his crime in that it far exceeds sentences imposed on other offenders for similar behavior, as well as sentences imposed upon those who actually commit sexual assaults upon children, those who commit violent offenses inflicting serious bodily injury, and intentional killers. Appellant does not dispute that punishment for possession of child pornography properly may be severe. The question he poses is: how proportionately severe? Likewise, the Majority's suggestion that appellant was an "after the fact" "willing voyeuristic participant" in the actual commission of the sexual assaults depicted gratuitously overstates the offense.

[7] Commonwealth v. Shiffler, 879 A.2d 185, 195 (Pa. 2005) (quoting Commonwealth v. Dickerson, 621 A.2d 990, 992 (Pa. 1993)) (further quotation omitted).

crime. Only murder convictions (and certain recidivist offenses) expose the defendant to a greater amount of prison time than first-degree felonies.

Nor was appellant convicted of photographing, videotaping, depicting or filming child sexual activity in violation of 18 Pa.C.S. § 6312(b), or of dissemination of photographs, videotapes, computer depictions or films of child sexual activity in violation of Section 6312(c). The General Assembly has classified any conviction under Section 6312(b) as a second degree felony, even for a first offense, exposing a defendant to a maximum of ten years imprisonment for a first offense, or subsequent offenses. See 18 Pa.C.S. 1103(2). A conviction under 6312(c) is legislatively classified as a third degree felony for a first offense (seven year maximum under 18 Pa.C.S. 1103(3)), and a second degree felony for a second or subsequent offense (ten year maximum, 18 Pa.C.S. 1103(2)).

Appellant's relevant convictions were exclusively for possession in violation of Section 6312(d)(1), a crime that, like distribution of child pornography, has been graded by the General Assembly as a third degree felony for a first offense. Under 18 Pa.C.S. § 1103(3), therefore, the maximum term of imprisonment to which an offender might be sentenced for this crime is seven years for a first offense. In fact, for his first offense, appellant was not sentenced to a term of imprisonment at all, but to 60 months of intermediate punishment, with credit for time served. A second conviction for the same offense is classified more seriously, as a second degree felony, but the General Assembly still has not deemed the offense to be as serious as the underlying sexual assaults of children that are depicted. Absent the mandatory sentencing provision, a second time offender would be subject to a maximum term of ten years imprisonment under 18 Pa.C.S. § 1103(2). As a result of 42 Pa.C.S. § 9718.2(a)(1), however, the mandatory **minimum** for a second offense for possession of child pornography is

twenty-five years, which is the same term facing recidivist offenders under Sections 6312(b) and (c).

In short, the overall legislative framework logically recognizes differences in levels of gravity as between sexually assaulting a child (most serious), the filming of such crimes (next most serious), and distributing or possessing the resulting child pornography (third most serious). The recidivist provision, however, draws no such distinctions, and treats the third most serious offense the same as the most serious one. An individual such as appellant, who is convicted of possessing child pornography for the second time, is mandated to serve a least five more years of prison time than the maximum term allowable for a first time child rapist.

By way of further comparison, second time violent offenses such as third degree murder, voluntary manslaughter, manslaughter of a law enforcement officer, third degree murder involving an unborn child, aggravated assault, terrorism, human trafficking, burglary, robbery, drug delivery resulting in death, arson and criminal solicitation to commit murder each carry mandatory minimum sentences of only ten years. 42 Pa.C.S. § 9714(a), (g). Under the legislative scheme, an individual such as appellant, who is convicted of possessing child pornography for the second time, but through no act of violence, is mandated to serve at least fifteen more years of prison time than the minimum term required for a second time violent offender.

There appears to be a rational and carefully calibrated legislative scheme of offense gradation and punishment for first time sex offenders, which disappears when it comes to recidivist offenders. Even aside from potential constitutional concerns, I would invite the General Assembly to examine the issue.

Mr. Justice Saylor and Madame Justice Todd join the opinion.