[J-13-2016] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 33 WAP 2014
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered June 2, 2014 at No. 1312
	:	WDA 2012, affirming the Judgment of
v.	:	Sentence of the Court of Common
	:	Pleas of Allegheny County entered June
	:	26, 2012 at No. CP-02-CR-0013937-
RYAN D. SAFKA,	:	2010.
	:	
Appellant	:	
	:	ARGUED: October 6, 2015
	:	REARGUED: April 5, 2016

DISSENTING OPINION

JUSTICE DOUGHERTY **DECIDED: July 19, 2016**

I respectfully dissent.

This appeal involves an unfortunate set of inopportune circumstances. Appellant's questioning of the event data recorder (EDR) evidence could have been the subject of a formal pre-trial *Frye*[1] motion, which would have better separated the trial court's judicial role from its role as the factfinder. In addition, the Commonwealth could have taken better charge of its case and been prepared to prove the reliability of its scientific evidence, which obviously was important to a successful prosecution. *See Grady*, 839 A.2d at 1045 (emphasizing proponent of expert scientific evidence bears burden of proof on *Frye* issue). Once trial began and the court made plain its concern

[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *See Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1047 (Pa. 2003) (reaffirming adherence to *Frye* rule).

with the defense challenge to the reliability of the scientific evidence, the Commonwealth had a second opportunity to take charge of its case and could have requested a continuance, if that was necessary to carry its burden of showing the reliability of the evidence. Perhaps as a result of these decisions by the parties — as well as the serious nature of the case, with three young victims tragically losing their lives — the trial court, acting in good faith, became unusually active, going so far as to reopen the case and call for additional evidence after the parties had rested.

I am inclined to share the Majority's broad view of the trial court's discretionary authority, but only to a point — and that point has to be deemed reached once the parties rest and all that remains is the verdict. From that point in the trial continuum, I am generally aligned with Justice Donohue's dissent. Absent some extraordinary circumstance or request or agreement of the parties — none present here — the court should not reopen a case after the parties rest.

The paramount inquiry in considering this particular bench trial is the deferred evidentiary issue involved scientific evidence, which implicates *Frye*, and the Commonwealth apparently was unprepared to meet the challenge. The Commonwealth stresses the tardiness of appellant's motion *in limine*, which is true enough, but it never adequately explains its own lapse in preparing to meet that challenge, responding to the challenge once raised, seeking a continuance pre-trial, or seeking a continuance mid-trial once the trial court made plain its reservations.

The Commonwealth obviously knew the importance of the EDR data to its prosecution, and knew, or should have known, the scientific data was subject to challenge, yet the Commonwealth apparently did nothing to prepare to prove the

reliability of the data. For his part, it is true that defense counsel, who was provided the EDR data in discovery well in advance, did not challenge its admissibility until the first day of trial. *Frye* issues arise in both civil and criminal cases and in practice are generally raised before trial, with the trial court serving a gatekeeping function. Perhaps unfortunately, nothing in the procedural rules prohibits counsel from withholding a *Frye* challenge in a criminal case until the day of trial, which of course can encourage gamesmanship. I hasten to add I am not suggesting there was improper gamesmanship at work here: a criminal defense lawyer's duty is to the client, the Commonwealth is responsible for its own case preparation (as well as its response to circumstances it did not foresee) and burden, and appellant's counsel did nothing improper under the existing rules structure. I merely stress the rules do not discourage this defense strategy; this case suggests *Frye* issues may be sufficiently distinct from other evidentiary issues as to warrant a more regularized pre-trial process; and, since the Court is responsible for the procedural rules, it is a matter that may warrant referral to the Committee on Rules of Evidence and the Criminal Procedural Rules Committee.

Pennsylvania Rule of Evidence 702(c), which incorporates *Frye*,[2] states only that an expert witness may testify in the form of an opinion or otherwise if his methodology is generally accepted in the relevant field. Pa.R.E. 702(c). The civil rules address *Frye* and contemplate a gatekeeping function by the trial court. *See*, *e.g.*, Pa.R.C.P. 207.1(a) (trial court shall initially review *Frye* motion to determine if matter should be addressed prior to trial) and (b) (party not required to raise admissibility of expert witness's

[2] *See Grady*, 839 A.2d at 1043 (*Frye* test is part of Pa.R.E. 702).

testimony prior to trial unless court orders him to do so). In contrast, the Rules of Criminal Procedure do not specifically address *Frye* motions. Criminal Rules 578 and 579 generally require an omnibus pretrial motion to be served within 30 days of arraignment and a court to determine all pretrial motions before trial. Pa.R.Crim.P. 578, 579(A). However, the comment to Rule 578 distinguishes motions *in limine*, whether oral or written, challenging the admissibility of evidence, from the pretrial motions subject to these rules. Pa.R.Crim.P. 578, *cmt*. The comment then merely suggests: "The earliest feasible submissions and rulings on such motions are encouraged." *Id.*

Here, the circumstances were such that the trial court decided to consider appellant's evidentiary challenge while simultaneously conducting trial, which is not an unusual course for contingent evidentiary issues. And, as noted, the Commonwealth could have armed itself to meet the evidentiary challenge at trial, or requested time to prepare once the motion *in limine* was filed. But again, I suggest we have the Committees consider whether the better way, in both bench and jury trials, is to encourage a definitive resolution of *Frye* issues before a criminal trial.

Trial courts routinely face circumstances outside their control, and in some instances, the essential neutrality that ensures fair trials requires judicial passivity. In my judgment — again absent some extraordinary circumstance not present here[3] or the request or agreement of the parties — passivity is required once the parties have rested their cases. At that point in a bench trial, the court's remaining task is to issue its

[3] Circumstances within the control of the advocates — such as preparing their cases, being responsible for the evidence they introduce, seeking continuances if necessary — do not qualify as extraordinary.

verdict. Thus, notwithstanding the tragic circumstances giving rise to this prosecution, where three young lives were lost, and the good faith intentions of the learned trial court, I would establish a bright-line rule providing, where the parties have resolved to present no further evidence by resting their cases, a court does not have the discretionary authority to *sua sponte* reopen the record and request additional evidence.[4]

What remains is remedy and mandate. Following the parties' summations, the trial court stated it was not prepared to return a verdict. Whatever the reason for the court's hesitation — whether the sufficiency of the evidence or uncertainty respecting the weight of the evidence — it is difficult to interpret a factfinder's hesitation in a criminal case post-resting as anything but an expression of reasonable doubt.[5] There is

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[4] I share Justice Donohue's view that a **party's** request to present additional evidence is fundamentally different from the court reopening the record *sua sponte* to secure additional evidence respecting the Commonwealth's burden, and the trial court no doubt has discretion in the former circumstance, as this Court recognized in *Commonwealth v. Baldwin*, 58 A.3d 754, 763 (Pa. 2012); *see also id*. at 766-67 (Saylor, J., concurring, joined by Todd, J.). When a party makes the request, the court acts within its role as an impartial arbiter; in the latter circumstance, the court risks taking on the role of a supplemental advocate.

[5] The Court cites the trial court's subsequent opinion stating the EDR evidence was not the difference between verdicts of guilty and not guilty. Majority Slip Op. at 16, *citing* Trial Ct. Op. at 7. I am uncomfortable with reliance on post-trial explanations of the factfinder's internal deliberation especially where, as here, there is contemporaneous record evidence indicating the question is not so simple. *See* Dissenting Slip Op. at 6 (Donohue, J., dissenting). For example, the record shows that, when trial reconvened following the reopening of the record, the court stated "virtually none" of the non-EDR evidence (*i.e.,* the surviving passenger's lay testimony and Trooper Kern's calculations about the speed of appellant's vehicle) "would evidence criminality." N.T. 2/21/12 at 231. The court then stated the EDR data showed a speed of 106 miles per hour and ruled the EDR data was admissible and sufficient to support guilty verdicts. *Id.* at 231-32. It appears the supplemental evidence respecting the EDR data spared the trial (…continued)

thus something to be said for a discharge as remedy, if we were to position ourselves as the trial judge.

However, the issue accepted for review does not involve evidentiary sufficiency, or a motion for judgment of acquittal; it involves the propriety of reopening the record, and that is the juncture at trial when error occurred. Notably, appellant filed a motion after the trial court reopened the record, and before the Commonwealth presented its expert witness, petitioning for a writ of habeas corpus **and entry of verdict**.[6] The court denied relief. In my view, appellant was entitled to precisely that relief: a verdict, on the existing evidence. Accordingly, like Justice Donohue, I would reverse the judgment of the Superior Court, vacate the judgment of sentence, and remand for entry of a verdict, trusting the trial court to candidly assess its record expressions of concern respecting the sufficiency of the non-EDR evidence to prove guilt and to enter a verdict based exclusively on the admissible record evidence when the parties initially rested on February 7, 2012.

For the foregoing reasons, I respectfully dissent.

(continued…)
court the task of determining whether the remaining evidence alone warranted a verdict of guilt beyond a reasonable doubt.

[6] Appellant argued the trial court's *sua sponte* reopening of the record violated the double jeopardy clauses of the United States and Pennsylvania Constitutions, U.S. CONST. amend. V; PA. CONST. Art. I, § 10, as the parties had rested their cases and the trial court had begun deliberation.