

[J-18-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 15 WAP 2009
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered September 3, 2008, at No.
	:	903 WDA 2007, affirming the Judgment of
v.	:	Sentence of the Court of Common Pleas
	:	of Allegheny County entered November
	:	20, 2006 at No. CP-02-0011250-2005.
CALVIN HENDERSON,	:	
	:	
Appellant	:	ARGUED: APRIL 13, 2010
	:	

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE

DECIDED: APRIL 25, 2012

I join the learned Majority Opinion in its entirety. Where, as here, police act pursuant to a warrant and engage in no misconduct, the broad state constitutional *dictum* articulated in Commonwealth v. Melendez, 676 A.2d 226 (Pa. 1996) – purporting to require in all independent source cases that, among other things, the police team involved in the second search must be “truly independent” of the first – simply cannot be sustained. The operative facts here are very different from the circumstances actually at issue in Commonwealth v. Mason, 637 A.2d 251 (Pa. 1993) and Melendez; and I fully agree with the Majority that, “[w]here [] malfeasance is not present, . . . the Murray v. United States, 487 U.S. 533 (1988)] standard strikes the appropriate balance between privacy and law enforcement.” Majority slip op. at 14 (footnote omitted).

Mr. Justice Saylor's restrained, candid and modest attempt to fashion state constitutional jurisprudence along principled lines ameliorates the lack of restraint in the Melendez Court's fashioning a quasi-legislative rule that would govern cases and circumstances not then before us. I, for one, would be inclined to go farther and reexamine Melendez itself, since it was unsupported by a principled state constitutional analysis. See Commonwealth v. Russo, 934 A.2d 1199, 1209 n.11 (Pa. 2007) ("We reiterate that we believe that state constitutional decisions are more secure when they are supported by the searching inquiry contemplated by [Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)].").¹ However, that analysis can await a case where the issue is squarely presented.

¹ I have previously addressed this elemental point as follows:

I am particularly wary of novel expansions of Article I, § 8 that are unaccompanied by an Edmunds analysis. A novel and unexplained holding under Article I, § 8 is a practice that permits a jurisprudence of contrariness or, even worse, arbitrariness. Such an unexplained holding is at least as likely to be a mere expression of a Court majority's personal disagreement with contrary Fourth Amendment jurisprudence, dressed in state constitutional garb in order to avoid correction by the United States Supreme Court, as it is to be an affirmative expression of what the state provision uniquely means and embraces. By previously requiring that novel state constitutional claims be considered in light of our actual experience with Article I, § 8 and with the experience of this Court and other courts with similar search and seizure questions, and with policy concerns "unique" to our jurisprudence, the Edmunds construct at least provides some semblance of a principled constitutional analysis of a particular issue. The inability to even begin to defend a novel holding pursuant to Edmunds, on the other hand, betrays a total disregard for the experience of other courts as well as for this Court's own considered experience and, in my view, raises a presumption that the state constitutional holding is erroneous.

Commonwealth v. Shaw, 770 A.2d 295, 304-05 (Pa., 2001) (Castille, J., joined by Saylor, J., dissenting).

In any event, I write separately primarily to respond to Madame Justice Todd's Concurring Opinion. Justice Todd supports a reaffirmation and extension of the Melendez rule as stated to embrace factual circumstances such as those in the case *sub judice*, i.e., cases, unlike Mason and Melendez, where there was no police misconduct.² I have no doubt that my esteemed colleague's views in this regard are as sincere and heartfelt, Majority slip op. at 11, as those of the Justices who innovated the broad Melendez rule. However, in expressing the view, Justice Todd levels what I believe are unwarranted, and indeed ironic, criticisms of the Majority Opinion.

Justice Saylor has very carefully accounted for the original intentions of the Melendez Court; the sincerity of those intentions; the nature of the constitutional rule there innovated (non-textual and prophylactic); the inherent difficulty with practical application of broadly stated prophylactic rules; the mischief that arises when courts try

² Justice Todd notes that the independent source doctrine has been described by some as an "exception" to the exclusionary rule. See Todd, J., concurring slip op. at 5 n.4, 8-10. Notably, the U.S. Supreme Court's decision in Murray v. United States, 487 U.S. 533 (1988) never referred to the independent source doctrine as an "exception" to the exclusionary rule: the Court spoke of the "doctrine," which arose contemporaneously with the exclusionary rule, and which required an analysis of attenuation and taint. It was the Murray dissenting opinion that characterized the doctrine as an "exception," and then advocated for an expansive *per se* rule.

Bearing silent fidelity to the dissenting view in Murray, both the Mason concurrence and the Melendez majority spoke of the independent source doctrine as an "exception" to the exclusionary rule. But, such an argumentative label puts the proverbial rabbit in the hat. The independent source doctrine does not involve an exclusionary rule "exception," such as the good faith exception, but a question of taint from prior illegality, which implicates principles of independence and attenuation. It is not an "exception" to the exclusionary rule to admit untainted evidence; no rational application of an exclusionary rule would exclude untainted evidence. Indeed, viewed more fundamentally, it is the exclusionary rule that is a policy-based "exception" to bedrock rules of evidence. The independent source cases involve situations where the exclusionary rule "exception" does not apply, and rules of relevance pertain.

to force new facts to fit problematically-broad pronouncements, as occurred in the trial court here (and as is mirrored in Justice Todd's concurrence); and the fact that any serious constitutional analysis must account for society's interest in identifying and punishing wrongdoers as well as the value (protection of individual liberties) served by the prophylactic pronouncement that was the concern of the Melendez Court. The Majority could be far less kind to Mason and Melendez. The Majority could focus on: the absence of an Edmunds analysis in either case, indeed the absence of any authority but the apparent policy preferences of court majorities; the importance of judicial restraint before constitutionalizing evanescent preferences; and the fact that, to the extent Melendez purported to speak to circumstances not involving police misconduct, its prophylactic rule was, by definition, *obiter dicta*.

For its careful effort, the Majority Opinion is met with a concurrence accusing the Court of "choosing" to "radically" constrict the Melendez "rule," and of "truncating" the rule, as envisioned by Melendez, "in a sweeping and prospective fashion." Todd, J., concurring slip op. at 2-3. The irony in the accusations is striking, given the nature of the decision in Melendez.

The "truly independent police or investigative team" requirement at issue was proposed in the Concurring Opinion of Mr. Justice (later Chief Justice) Cappy in Mason, and his position was then "adopted" by a majority of the Melendez Court. Without any explanation, Melendez then applied this new rule retroactively to condemn police conduct that had occurred before the preference was constitutionalized. Melendez, 676 A.2d at 231. But, that was less than half the harm of Melendez because its rule, as fashioned, and as defended by the concurrence here, purported to establish an independent police team requirement in all independent source cases. It was, as Justice Saylor notes, articulated as a prophylactic rule – albeit the Melendez Court did

not admit as much, nor did the Court try to explain or justify such a radically broad pronouncement.

And so, in addition to being applied retroactively to condemn the police in Melendez, the Melendez rule “was sweeping and prospective,” purporting to decide cases not then before the Court – like this one. In this respect, the independent-police-team-in-all-independent-source-cases innovation was unnecessary to the decision, improperly legislative in scope, and as overbroad and ill-informed (in that it did not perceive or discuss the circumstance here) as it was constitutionally unmoored. Whether one agrees with Melendez or not, it was a radical decision, which chose to remake existing constitutional law, chose to severely constrict the police and to condemn police conduct retroactively, and chose to attempt to govern future circumstances not then before the Court, as if the Court were a super-legislature. With apologies to the Bard, at least as against the concurrence’s accusations here, Justice Saylor’s modest and restrained Majority Opinion is, when compared to Melendez, as “Hyperion to a satyr.” Shakespeare, William, Hamlet (I.ii.140).

Justice Todd’s Concurring Opinion also claims that the Majority’s “limitation” on Melendez is “wholly ill-advised and unwarranted.” Todd, J., concurring slip op. at 2. Notably, what was warranted here, at all times, was the conduct of the police. Judicial officers approved the warrants. The concurrence maintains that the “purpose of the Mason/Melendez rule of strict independence of investigative teams, was ... to ensure that, if such evidence is to be used by a court of this Commonwealth in a criminal trial, it has been thoroughly purged of the taint of the original violation of the rights secured by Article I, Section 8.” Todd, J., concurring slip op. at 10. To be clear, the “original violation,” as noted in Justice Todd’s concurring opinion, was not a police violation and there was no police misconduct here. A judicial officer erred, as judicial officers

occasionally do, in assessing probable cause for the first warrant. That judicial error did not operate to taint the police “investigative team.” As the U.S. Supreme Court has recently noted:

It is one thing for the criminal “to go free because the constable has blundered.” People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.). It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs.

Davis v. United States, 131 S.Ct. 2419, 2434 (U.S. 2011).³

If the Magisterial District Judge had declined to issue the first search warrant here, the same police or investigative team would have been free to make use of what information it had, and then to simply refine the affidavit, or gather more evidence, and re-apply for a warrant.⁴ In a system of separated powers, by what logic can a court

³ In its “purging taint” discussion, the concurrence cites to Justice Marshall’s dissenting opinion in Murray as support for an independent police team requirement. Todd, J., concurring slip op. at 10. Notably, however, that position was expressed by Justice Marshall in terms of the Fourth Amendment’s deterrence rationale. Indeed, in the sentence immediately preceding the quotation upon which Justice Todd relies, Justice Marshall argued that: “The strong Fourth Amendment interest in eliminating these incentives for illegal entry should cause this Court to scrutinize closely the application of the independent source exception to evidence obtained under the circumstances of the instant cases; respect for the constitutional guarantee requires a rule that does not undermine the deterrence function of the exclusionary rule.” Murray, 487 U.S. at 548 (Marshall, J., dissenting).

Although the independent police team requirement articulated by Justice Cappy in Mason obviously derives from Justice Marshall’s Murray dissent, Justice Cappy notably did not cite that dissent, perhaps recognizing that Justice Marshall’s deterrence focus would undermine any claim that the rule he was proposing was unique to the Pennsylvania experience under Article I, Section 8.

⁴ Clearly, this alternate fact pattern should be read in the context of the entire paragraph.

assume the constitutional power to coerce the executive into adopting specific police investigative policies merely because a judicial officer has made a legal error? I understand the temptation to employ the exclusionary rule to “punish” or deter acts of police excess. But, it is quite another exercise to pointlessly punish the executive – and victims of brutal crimes -- for a judicial mistake. Nothing in Article I, Section 8 authorizes this sort of judicial micromanagement of police investigations.

The Majority notes that the Commonwealth does not argue that the second investigation and warrant here were “truly independent” of the first one, and reasons that no one could seriously contend otherwise “under a conventional understanding of those words.” Majority slip op. at 9, 12. I agree; thus, if the Melendez dicta were binding, reversal would be required. But, Melendez is not binding and cannot be. This is a case involving a brutal abduction and rape; two warrants issued by judicial officers, the second of which unquestionably was premised upon probable cause; and the seizure of blood (no knocking down doors); and no police misconduct. The notion that such a crime should be rendered non-prosecutable because the Melendez Court, not facing such facts, purported to constitutionalize a minority position from the U.S. Supreme Court concerning the Fourth Amendment which would require an independent police investigative team, as if it were a Pennsylvania state constitutional command, in all cases, without benefit of relevant argumentation or state constitutional analysis, is absurd. Nothing in the Pennsylvania constitutional tradition, which did not even recognize an exclusionary rule, requires this.

The judicially-fashioned exclusionary rule requires police to answer for their actual mistakes; the Majority Opinion here takes responsibility for an obvious judicial mistake in Melendez and mitigates the harm. I join the corrective effort.