

**[J-4A-2013, J-4B-2013 and J-4C-2013] [MO: Eakin, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 9 EAP 2012
:
Appellant : Appeal from the Judgment of the Superior
: Court entered on February 2, 2011 at No.
: 3583 EDA 2009, vacating and affirming
v. : the Judgment of Sentence entered on
: October 29, 2009 in the Court of Common
: Pleas of Philadelphia County, Criminal
NASHIR FISHER, : Division at No. CP-51-CR-0007251-2008
:
Appellee : ARGUED: March 5, 2013

COMMONWEALTH OF PENNSYLVANIA, : No. 10 EAP 2012
:
Appellant : Appeal from the Judgment of the Superior
: Court entered on February 2, 2011 at No.
: 3497 EDA 2009, vacating and affirming
v. : the Judgment of Sentence entered on
: October 29, 2009 in the Court of Common
: Pleas of Philadelphia County, Criminal
KINTA STANTON, : Division at No. CP-51-CR-0007248-2008
:
Appellee : ARGUED: March 5, 2013

COMMONWEALTH OF PENNSYLVANIA, : No. 11 EAP 2012
:
Appellant : Appeal from the Judgment of the Superior
: Court entered on February 2, 2011 at No.
: 3273 EDA 2009, vacating and affirming
v. : the Judgment of Sentence entered on
: October 29, 2009 in the Court of Common
: Pleas of Philadelphia County, Criminal
AMEER BEST, : Division at No. CP-51-CR-0007253-2008
:
Appellee : ARGUED: March 5, 2013

DISSENTING OPINION

I respectfully dissent. As noted by the majority, the Superior Court, in vacating Appellees' convictions for conspiracy to commit third-degree murder, relied on its prior decision in Commonwealth v. Clinger, 833 A.2d 792 (Pa. Super. 2003), as well as the dissent written by this author, and joined by Justice Saylor, in Commonwealth v. Weimer, 977 A.2d 1103 (Pa. 2009).¹ For the following reasons, I remain of the view that conspiracy to commit third-degree murder is not a cognizable offense, and, indeed, consider that conclusion to be the logical implication of our decision in Commonwealth v. Roebuck, 612 Pa. 642, 32 A.3d 613 (2011). Therefore, I conclude the Superior Court did not err in vacating Appellees' convictions on that basis.

As noted by the majority, the Pennsylvania Crimes Code defines the various degrees of murder as follows:

(a) Murder of the first degree.--A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) Murder of the second degree.--A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.

¹ In Weimer, this Court granted review to consider whether conspiracy to commit third-degree murder was a cognizable offense. Ultimately, however, the Weimer majority did not reach this issue because it concluded the jury had convicted the defendant of conspiracy to commit homicide generally, and the sentencing transcript and order incorrectly referenced the defendant's conviction as a conviction for third-degree murder. In my Dissenting Opinion, I opined that the record supported the Appellant's claim that she was convicted of the specific offense of conspiracy to commit third-degree murder; accordingly, I proceeded to address the issue on which this Court granted review, and concluded the defendant's sentence was illegal because conspiracy to commit third-degree murder is not a cognizable offense.

(c) Murder of the third degree.--All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.

18 Pa.C.S.A. § 2502(a)-(c). An “intentional killing” is defined as, *inter alia*, “any . . . kind of willful, deliberate and premeditated killing.” 18 Pa.C.S.A. § 2502(d).

Malice is an essential element of all degrees of murder. Commonwealth v. Gribble, 550 Pa. 62, 77, 703 A.2d 426, 433-34 (1997), *abrogated on other grounds*, Commonwealth v. Burke, 566 Pa. 402, 781 A.2d 1136 (2001). In the legal sense, malice “exists not only where there is a particular ill will, but also whenever there is a wickedness of disposition, hardness of heart, wanton conduct, cruelty, recklessness of consequences and a mind regardless of social duty.” Commonwealth v. Young, 494 Pa. 224, 228, 431 A.2d 230, 232 (1981) (citations omitted).

First-degree murder requires, in addition to malice, the finding of a specific intent to kill, a requirement that distinguishes it from all other kinds of murder. Commonwealth v. Anderson, 538 Pa. 574, 582, 650 A.2d 20, 24 (1994) (a necessary element of first-degree murder is the specific intent to kill). Second-degree murder occurs when a defendant is engaged as a principal or an accomplice in the perpetration of a felony. 18 Pa.C.S.A. § 2502(b).

Finally, “[m]urder of the third degree is a killing done with legal malice but *without specific intent to kill*. Murder of the third degree can, however, in some cases involve the specific intent to harm a victim as long as said intent falls short of the specific intent to kill.” Commonwealth v. Pitts, 486 Pa. 212, 219, 404 A.2d 1305, 1308 (1979) (emphasis added). Malice may be found to exist in an unintentional homicide where a defendant “consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily harm.” Young, 494 Pa. at 228, 431 A.2d at 232 (citing Commonwealth v. Hare, 486 Pa. 123, 129, 404 A.2d 388, 391 (1979)).

Conspiracy is defined under the Crimes Code as follows:

(a) Definition of conspiracy.--A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa.C.S.A. § 903(a).

In order to sustain a conviction for criminal conspiracy, the Commonwealth must prove that a defendant entered into an agreement to commit or aid in an unlawful act with another person or persons, with a shared criminal intent, and that an overt act was done in furtherance of the conspiracy. Commonwealth v. Rios, 546 Pa. 271, 283, 684 A.2d 1025, 1030 (1996). The language of the conspiracy statute requires that the defendant have the specific intent of promoting or facilitating the commission of the crime which is the object of the conspiracy, a requirement which, as this Court recognized in Roebuck, distinguishes the crime of conspiracy from that of accomplice liability. 612 Pa. at 656-57 & n.21, 32 A.3d at 622-23 & n.21 (observing that the culpability requirements for attempt and conspiracy are different from those for accomplice liability, and that conspiracy is a specific intent crime).

Based on the plain language of the relevant statutes, in order to convict Appellees of conspiracy to commit third-degree murder, the Commonwealth was required to prove that Appellees, with the intent of promoting or facilitating third-degree murder, agreed with each other that one or more of them would engage in conduct which constitutes third-degree murder, or engage in an attempt or solicitation to commit

third-degree murder. In other words, the Commonwealth was required to prove that Appellees intended to commit an unintentional killing, a logical impossibility.

In rejecting Appellees' contention that conspiracy to commit third-degree murder is not a cognizable offense because one cannot intend to commit an unintentional act, however, the majority first determines that the "[a]bsence of specific intent is not an element of third degree murder." Majority Opinion at 16. The majority reasons:

[Although] the intent to kill is a defined element of first degree murder – this does not mean an element of third degree murder is the polar opposite of intent to kill, such that the Commonwealth must prove a lack of intent to kill to convict of third degree murder. The Commonwealth has no such obligation; evidence of intent to kill is simply irrelevant to third degree murder. The elements of third degree murder absolutely include an intentional act, but not an act defined by the statute as intentional murder. The act sufficient for third degree murder is still a purposeful one, committed with malice, which results in death – clearly, one can conspire to such an intentional act.

Majority Opinion at 10 (emphasis omitted).

In support of its determination, the Majority cites this Court's decision in Commonwealth v. Meadows, 567 Pa. 344, 787 A.2d 312 (Pa. 2001), wherein the appellant was convicted of, *inter alia*, first-, second-, and third-degree murder. In a Post Conviction Relief Act petition, he argued he was entitled to a new trial because the verdicts were mutually exclusive, in that first-degree murder requires a finding of specific intent, second-degree murder may or may not require such a finding, and third-degree murder specifically does not require a finding of intent. He further argued the trial court erred in molding the verdicts into a conviction for first-degree murder. In rejecting the appellant's argument, our Court noted we addressed the exact issue in Commonwealth v. Young, 561 Pa. 34, 748 A.2d 166 (1999), wherein we determined

there is no inconsistency when a jury convicts a defendant of both first- and third-degree murder and stated:

[T]hird degree murder is not a homicide that the Commonwealth must prove was committed with malice and without a specific intent to kill. Instead, it is a homicide that the Commonwealth must prove was committed with malice, but one with respect to which the Commonwealth need not prove, nor even address, the presence or absence of a specific intent to kill. Indeed, to convict a defendant for third degree murder, the jury need not consider whether the defendant had a specific intent to kill, nor make any finding with respect thereto.

Meadows, 567 Pa. at 353, 787 A.2d at 317 (quoting Young, 561 Pa. at 51, 748 A.2d at 174-75). Based on the language of Meadows and Young, the majority herein concludes “a defendant who acts intentionally in attacking his victim may still be convicted of third degree murder.” Majority Opinion at 16.

Respectfully, I find the majority’s reliance on Meadows and Young unpersuasive. Neither Young, nor Meadows, involved conspiracy convictions for any type of homicide. Rather, those cases addressed the propriety of a molded verdict where a jury convicted the defendants of both first- and third-degree murder.

Furthermore, with respect to the majority’s statement that a defendant who intentionally attacks his victim may be convicted of third-degree murder, it is beyond cavil that a defendant who engages in an intentional and malicious act, which results in an unintentional death, may be convicted of third-degree murder. Moreover, a defendant who conspires to commit an intentional act – assault, for example – which results in an unintentional death, may be convicted of both conspiracy to commit the underlying act (assault) and third-degree murder. However, in holding that a defendant may be convicted of the specific offense of conspiracy to commit third-degree murder,

the majority, in my view, ignores the crucial distinction between an intentional *act* and an intentional *result*.

Pennsylvania's conspiracy statute is derived from Section 5.03 of the Model Penal Code. 18 Pa.C.S.A. § 903, Official Comment-1972. Under the Model Penal Code, where the object crime of a conspiracy is defined in terms of a result of conduct, such as homicide, the actor's purpose must be to promote or facilitate that result. Model Penal Code § 5.03, cmt. 2(c)(i) at 407 (Official Draft and Revised Comments 1985). For example, a conspiracy to destroy an inhabited dwelling, without a specific intent or purpose to kill its occupants, would not constitute a conspiracy to commit homicide. Id. at 408.²

As the American Law Institute, in its Commentary to the Model Penal Code, explained:

[W]hen recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime, as for example when homicide through negligence is made criminal, there could not be a conspiracy to commit that crime. This should be distinguished, however, from a crime defined in terms of conduct that creates a risk of harm, such as reckless driving or driving above a certain speed limit. In this situation the conduct rather than any result it may produce is the element of the crime, and it would suffice for guilt of conspiracy that the actor's purpose was to promote or facilitate such conduct--for example, if he urged the driver of the car to go faster and faster.

Model Penal Code § 5.03 cmt. 2(c)(i) at 408 (Official Draft and Revised Comments 1985).

² The comments to the Model Penal Code are relevant to our interpretation of Section 903 as the comments existed prior to the enactment of Section 903 by the Pennsylvania Legislature in 1972. See 1 Pa.C.S.A. § 1939 ("The comments or report of the . . . entity which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly.")

In his treatise on criminal law, Professor Wayne R. LaFave also opined that, because conspiracy is a specific intent crime, it is not possible to conspire to commit a crime that results from an unintended consequence:

[T]he fact that conspiracy requires an intent to achieve a certain objective means that individuals who have together committed a certain crime have not necessarily participated in a conspiracy to commit that crime It follows, therefore, that there is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result.

Wayne R. LaFave, *Criminal Law*, § 12.2(c), at 630 (4th ed. 2003).³

Notwithstanding the above, the majority cites to a number of cases in which the Superior Court upheld convictions for conspiracy to commit third-degree murder.⁴ However, in at least several of the cases cited by the majority, it is unclear whether the conspiracy conviction was for conspiracy to commit third-degree murder, or whether it was based on some other offense, such as assault, which resulted in the unintentional

³ The high courts of a number of our sister states have adopted the reasoning of LaFave and the Model Penal Code and concluded that it is impossible to conspire to commit a crime that is defined by its unintended consequence. See, e.g., Palmer v. People, 964 P.2d 524, 529 (Colo. 1998) (concluding conspiracy to commit reckless manslaughter was not a cognizable crime because conspiracy is a specific intent crime, requiring both the specific intent to agree to commit a particular crime; and the specific intent to cause the result of the crime to which the conspirators agreed); State v. Donohue, 834 A.2d 253, 257-58 (N.H. 2003) (holding that “one cannot conspire to commit a crime where the culpability is based upon the result of reckless conduct”); State v. Baca, 950 P.2d 776, 788 (N.M. 1997) (holding that the crime of conspiracy requires both an intent to agree and an intent to commit the offense which is the object of the conspiracy); State v. Foster, 522 A.2d 277, 281 (Conn. 1987) (“persons cannot attempt or conspire to commit an offense that requires an unintended result.”).

⁴ The majority also cites this Court’s decision in Commonwealth v. Mobley, 467 Pa. 460, 359 A.2d 367 (1976). However, it is unclear whether the appellant’s conviction for criminal conspiracy therein was based on the fact-finder’s conclusion that there was a conspiracy to commit third-degree murder, or a conspiracy to commit the assault which ultimately led to the victim’s death.

death. See, e.g., Commonwealth v. La, 640 A.2d 1336 (Pa. Super. 1994) (appellant was also convicted of aggravated assault); Commonwealth v. Bigelow, 611 A.2d 301 (Pa. Super. 1992) (trial court found appellant engaged in a conspiracy to commit an aggravated assault).

Additionally, as recognized by the majority, the cases it cites all pre-date the Superior Court's decision in Clinger, wherein the Superior Court held, *inter alia*, that the trial court erred in refusing to allow the appellant to withdraw his guilty plea to conspiracy to commit third-degree murder because there was no factual basis for such a plea. President Judge Emeritus Stephen J. McEwen, Jr. aptly stated:

In the present case, since the crime of third degree murder was not accomplished, appellant could only be guilty of conspiracy to commit a crime if he intended that crime to be accomplished. Logic dictates, however, and this Court has recognized, that it is impossible for one to intend to commit an unintentional act.

833 A.2d at 796 (citing Commonwealth v. Spells, 612 A.2d 458, 460 n.5 (Pa. Super. 1992) (“[a]n attempt to commit murder can only constitute an attempt to commit murder of the first degree, because both second and third degree murder are unintended results of a specific intent to commit a felony or serious bodily harm, not to kill”)); see also Commonwealth v. Barnyak, 639 A.2d 40, 45 n.5 (Pa. Super. 1994) (noting that there is no crime of attempted third-degree murder); Commonwealth v. Griffin, 456 A.2d 171, 177 (Pa. Super. 1983) (holding that an individual cannot attempt to commit murder of the second or third degree because the crime of attempt is a specific intent crime, and an attempt to commit second- or third-degree murder would require proof that the individual intended to perpetrate an unintentional killing, which is logically impossible).

The majority offers that the Superior Court, in Commonwealth v. Geiger, 944 A.2d 85, 92 (Pa. Super. 2008), subsequently “retreated from [its reasoning in Clinger]

and again recognized the offense of conspiracy to commit third degree murder.” Majority Opinion at 13. In my view, the holding of Geiger is not as clear as the majority suggests. Candice Geiger lived in a Philadelphia apartment with her boyfriend, Jerry Chambers, and her four nieces, ages 2 through 10, for approximately nine months. During that period, Geiger and Chambers regularly beat the girls. One evening, after one of the girls reportedly refused to stop watching Geiger and Chambers having sex, Geiger told Chambers to throw the child against the wall. Chambers did so, and the child struck her head on the radiator; she was pronounced dead upon arrival to the hospital. Geiger and Chambers were charged and convicted of third-degree murder, conspiracy, and endangering the welfare of children. On appeal, Geiger challenged, *inter alia*, the sufficiency of the evidence to support her conviction for third-degree murder and conspiracy; she did not, however, appeal her conviction for endangering the welfare of children.

In rejecting Geiger’s claim, the Superior Court explained that, because conspirators are responsible for the actions of their cohorts, Geiger was “accountable for Chambers’ throwing [the victim] across the bedroom (at [Geiger’s] insistence), causing [the victim] to strike her head on a radiator (and her resultant death), and dissuading [the victim’s sister] from rendering assistance.” 944 A.2d at 92 (footnote omitted). The court further concluded:

[W]e find that the evidence was sufficient in quantity and quality to sustain [Geiger’s] convictions for third degree murder and criminal conspiracy, which manifested itself in the hardness of heart, cruelty, and recklessness of consequences associated with the manner and method of [the victim’s] death.

Id.

Significantly, there is no indication in the Superior Court's opinion that Geiger's conspiracy conviction was for the offense of conspiracy to commit third-degree murder. Indeed, it is possible that the conspiracy conviction was based on Geiger's conviction for endangering the welfare of children, which, as noted above, Geiger did not appeal. Thus, while Geiger most certainly could have been convicted of third-degree murder based on her intentional act of assaulting and/or or endangering the welfare of the children, I cannot agree with the majority's determination that the Superior Court's decision in Geiger stands for the proposition that conspiracy to commit third-degree murder is a cognizable offense.

Finally, and most critically, the majority does not square its reasoning with our recent decision in Roebuck, supra. In Roebuck, we considered whether it is possible to be convicted as an accomplice to third-degree murder. Noting that Pennsylvania's accomplice liability statute, see 18 Pa.C.S.A. § 306, is materially identical to Section 2.06 of the Model Penal Code, we first observed that Section 2.06 provides, in part:

(3) A person is an accomplice of another person in the commission of an offense if ... with the purpose of promoting or facilitating the commission of the offense, he ... aids or agrees or attempts to aid such other person in planning or committing it[.]

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

Model Penal Code § 2.06(3)(a)(ii), (4) (enacted as 18 Pa.C.S.A. § 306(c) and (d)).

We then explained:

Section [2.06(4)] thus prescribes that an accomplice may be held legally accountable where he is an "accomplice in the conduct"—or, in other words, aids another in planning or

committing the conduct with the purpose of promoting or facilitating it—and acts with recklessness (i.e., the “kind of culpability ... sufficient for the commission of” a reckless-result offense).

To the extent any aspect of this accountability scheme is unclear, ample clarification is provided in the explanatory note and commentary. As a threshold matter, the commentary explains that the term “commission of the offense,” as used in Section 2.06(3), focuses on the *conduct*, not the result. See id. § 2.06, cmt. 6(b), at 310 (“Subsection 3(a) requires that the actor have the purpose of promoting or facilitating the commission of the offense, i.e., that *he have as his conscious objective the bringing about of conduct that the Code has declared to be criminal[.]*” (emphasis added)). This diffuses any impression that an accomplice must always intend results essential to the completed crime. . . . The commentary then points to the fourth subsection as supplying the essential culpability requirement, as follows:

One who solicits an end, or aids or agrees to aid in its achievement, is an accomplice in whatever means may be employed, insofar as they constitute or commit an offense fairly envisaged in the purposes of the association. But *when a wholly different crime has been committed, thus involving conduct not within the conscious objectives of the accomplice, he is not liable for it unless the case falls within the specific terms of Subsection (4).*

Model Penal Code §2.06, cmt. 6(b), at 311 (emphasis added). According to the commentary, the purport of the fourth subsection is to hold the accomplice accountable for contributing to the conduct to the degree his culpability equals what is required to support liability of a principal actor.

620 Pa. at 651-53, 32 A.3d at 619-20 (footnotes omitted).

Turning to the elements of accomplice liability under Section 306(d) of the Pennsylvania Crimes Code, we stated:

We recognize that the Crimes Code does not contain the wealth of collateral explanatory material which accompanies the Model Penal Code, including the latter's extensive notes and commentaries. Nevertheless, we believe the text of the Pennsylvania Statute is clear enough. In terms identical to those of Section 206 of the MPC, Section 306(d) of the Crimes Code directs the focus, for result-based elements, to the level of culpability required of a principal. See 18 Pa.C.S. § 306(d). In the present factual scenario, the purport is to avoid elevating a recklessness-oriented culpability requirement to a purposeful one relative to an accomplice.

Id. at 655, 32 A.3d at 621 (citations omitted). We rejected the appellant's "attempt" to read Section 306(c) "in isolation," without reference to Section 306(d). Id. at 656, 32 A.3d at 622.

Thus, our decision in Roebuck turned, in large measure, on the fact that subsection (d) of the accomplice liability statute focuses the assessment of liability not on the result of the accomplice's conduct, but on the conduct itself. Id. at 658, 32 A.3d at 623 ("[A]ccomplice liability does not require the defendant to have the conscious objective to cause a particular result when such an outcome is an element of the offense."). In doing so, we unmistakably distinguished accomplice liability from attempt and conspiratorial liability.⁵

⁵ In Roebuck, we observed:

The differences between attempt and conspiracy, on the one hand, and complicity on the other, are reflected, amply, in the decisions from other courts Most, if not all, have held that a defendant can be convicted as an accomplice to an offense encompassing recklessness as the mental state pertaining to the result. Again, accomplice liability does not require the defendant to have the conscious objective to cause a particular result when such an outcome is an element of the offense.

Id. at 657-58, 32 A.2d at 623 (footnote omitted). To elaborate on this point, we quoted at length from the Connecticut Supreme Court's decision in State v. Foster: (continued...)

Notably, neither Pennsylvania’s conspiracy statute at 18 Pa.C.S.A. § 903, nor Section 5.03 of the Model Penal Code, on which Section 903 is based, contains a provision similar to that contained in Pennsylvania’s accomplice liability statute at 18 Pa.C.S.A. § 306(d), or in Section 2.06(4) of the Model Penal Code relating to accomplice liability. This fact, combined with our decision in Roebuck, indicates that a conspirator, unlike an accomplice, may not be held legally accountable for a result-based offense based on his agreement to engage, aid, or assist in the commission of a separate “contributing” offense.

(...continued)

[T]o be guilty of attempt, a defendant’s conscious objective must be to cause the result which would constitute the substantive crime. A person cannot attempt to commit a crime which requires that an unintended result occur, such as involuntary manslaughter, because it is logically impossible for one to intend to bring about an unintended result. Similarly, to be guilty of conspiracy, the defendant, upon entering an agreement, must intend that his conduct achieve the requisite criminal result. When the substantive crime requires an unintended result, a person cannot conspire to commit that crime because it is logically impossible to agree to achieve a specific result unintentionally.

Contrary to the [appellant’s] assertions, and unlike attempt or conspiratorial liability, accessorial liability does not require that a defendant act with the conscious objective to cause the result described by a statute.

* * *

[The accomplice statute] merely requires that a defendant have the mental state required for the commission of a crime while intentionally aiding another.

Roebuck, 612 Pa. at 658-59, 32 A.2d at 623-24 (quoting State v. Foster, 22 A.2d 277, 282-283 (Conn. 1987) (citations and footnotes omitted; emphasis omitted)).

The majority does not attempt to account for the logical underpinnings of our decision in Roebuck, or the differences between Pennsylvania's conspiracy and accomplice liability statutes (and the Model Penal Code provisions from which they were derived) which we found to be significant in that decision. Instead, the majority relies on a concurrence from Roebuck which did not garner a majority of the Court.

In my view, the only logical extrapolation of our decision in Roebuck is that conspiracy to commit third-degree murder is not a cognizable offense, and I would take this opportunity to expressly hold so. Accordingly, I conclude the Superior Court did not err in vacating Appellees' judgments of sentence in this regard.⁶

Mr. Justice Saylor joins this dissenting opinion.

⁶ While I conclude that conspiracy to commit third-degree murder is not a cognizable offense, from my dissenting posture, I do not address the Commonwealth's alternative argument that the Superior Court should have modified Appellees' sentences.