[J-54-2020] [MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 75 MAP 2019
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court at No. 226 MDA
	:	2018 dated January 8, 2019,
v.	:	Reargument Denied March 13,
	:	2019. Affirming the Judgment of
	:	Sentence of the York County Court
MITCHELL GREGORY PECK, JR.,	:	of Common Pleas, Criminal Division,
	:	at No. CP-67-CR-880-2017 dated
Appellant	:	September 1, 2017.
	:	
	:	ARGUED: May 27, 2020

CONCURRING OPINION

JUSTICE WECHT **DECIDED: December 22, 2020**

I join the Court's opinion in full. I write separately to address the trial court's invocation of the absurdity doctrine[1] in denying Mitchell Peck's sufficiency claim, and to caution against hasty applications of that canon in future cases, particularly where the Crimes Code is concerned.

Peck insists that the evidence (which included his delivery of narcotics in Maryland) was insufficient to convict him of drug delivery resulting in death under 18 Pa.C.S. § 2506(a) because he did not deliver heroin to the decedent "in violation of . . . The Controlled Substance, Drug, Device and Cosmetic Act." In pertinent part, that Act

[1] *See* 1 Pa.C.S. § 1922(1) ("In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others may be used: (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.").

expressly prohibits the delivery of narcotics "within the Commonwealth."[2] In rejecting Peck's claim, the trial court twice opined that to do otherwise would produce "absurd" results.[3] The court denied relief without first analyzing the text of the statute itself, a text that today's Court correctly deems "to be clear and unambiguous."[4] In lieu of textual analysis, the trial court relied instead upon its own subjective assumption that the General Assembly could not possibly have intended that a person in Peck's shoes would be let off the hook for supplying a narcotic that resulted in the death of another human being merely because the initial criminal act happened to occur outside of Pennsylvania. This was error. Where the criminal laws are concerned, courts should disabuse themselves of the notion that a consequence is unintended, and thus "absurd," merely because it is not maximally punitive. Otherwise, judges may be tempted to misapply the absurdity doctrine and disregard the plain meaning of a law in pursuit of its hidden "spirit."[5]

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[2] 35 P.S. § 780-113(a).

[3] *See* Tr. Ct. Op., 3/20/2018, at 2 ("Defendant's claim that just because the drug delivery occurred in Maryland the evidence is insufficient to find him guilty of Drug Delivery Resulting in Death is absurd, and would lead to a result the Legislature did not intend."); *id.* at 3 ("It is absurd to think that the PA Legislature intended to preclude drug dealers from liability simply because they sell their drugs across the border in another state, when the result of those drug deals are the deaths of Pennsylvania residents in PA.").

[4] Maj. Op. at 11.

[5] *See* 1 Pa.C.S. § 1921(b); *Koken v. Reliance Ins. Co.*, 893 A.2d 70, 82 (Pa. 2006) ("Where it is unambiguous, the plain language controls, and it cannot be ignored in pursuit of the statute's alleged contrary spirit or purpose."). The principle was perhaps first (or at least most famously) articulated by the late Justice Felix Frankfurter in his oft-cited essay, *Some Reflections on the Reading of Statutes*. 47 COLUM. L. REV. 527 (1947). There, he opined that "[t]he purpose of construction" is to "ascertain meaning"; it is "[n]ot . . . an opportunity for a judge to use words as 'empty vessels into which he can pour anything he will'—his caprices, fixed notions, even statesmanlike beliefs in a particular policy." *Id.* at 529. "To go beyond" that limited judicial function, in Justice Frankfurter's view, would be "to usurp a power which our democracy has lodged in its elected legislature." *Id.* at 533. Accordingly,

Because the Superior Court resolved this case without resort to the absurdity doctrine, we need not contemplate at length the particulars of that interpretive canon. Nonetheless, it frequently arises in our cases and may warrant closer inspection. In that regard, I find the joint perspective of the late Justice Scalia and scholar Bryan Garner to be especially illuminating. To avoid the slippery slope of consequentialism when faced with an unambiguous statute, Justice Scalia and Garner suggest that a law's literal application should be avoided on absurdity grounds only where two limiting conditions are satisfied. First, the ostensible absurdity "must consist of a disposition that no reasonable person could intend."[6] Although an omission or incongruity in the text "may seem odd" when applied to a given circumstance, that anomaly does not necessarily render the consequences of a natural reading of the statute absurd.[7] Rather, as the late Justice Story observed long ago, if "the plain meaning of a provision, not contradicted by any other provision of the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one, where the

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> [a] judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction. . . . Legislative words presumably have meaning and so we must try to find it.

Id. at 533-34.

6 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 237 (2012).

7 *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005) (discussing the possibility of an "unintentional drafting gap" in supplemental jurisdiction statute allowing jurisdiction over plaintiffs permissively joined under Fed. R. Civ. P. 20 but withholding jurisdiction over plaintiffs joined as parties "needed for just adjudication" under Rule 19); *id.* ("If that is the case, it is up to Congress rather than the courts to fix. The omission may seem odd, but it is not absurd.").

absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[8]

If one were to apply this first condition here, it would not be difficult to imagine that a reasonable legislator, presented with subsection 2506(a) and the provisions of the Drug Act referenced therein, would have understood that the *actus rei* that constitute predicate offenses for purposes of the drug delivery resulting in death statute necessarily must be committed "within the Commonwealth" in order to be punishable by the Commonwealth. Given that this Court *unanimously* credits Peck's proffered construction, it can hardly be said that no reasonable person would agree.

Justice Scalia and Garner's second condition is that "[t]he absurdity must be reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously a technical or ministerial error."[9] Excluded from this latter constraint are "substantive errors arising from a drafter's failure to appreciate the effect of certain provisions."[10] Indeed, as one author put it, "[a]bsurdity alone is insufficient to justify application of the doctrine. Rather, there must also exist a non-absurd reading that could be achieved by modifying the enacted text in relatively simple ways."[11] Applied to

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8 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 427, at 303 (2d ed. 1858); *see, e.g.*, *Holy Trinity Church v. United States*, 143 U.S. 457, 461 (1892) (noting, by way of example, that a statute providing "that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire, 'for he is not to be hanged because he would not stay to be burnt'").

9 SCALIA & GARNER, supra n.6, at 238.

10 *Id*.

11 Michael S. Fried, *A Theory of Scrivener's Error*, 52 Rutgers L. Rev. 589, 607 (2000); *see, e.g.*, *Cernauskas v. Fletcher*, 201 S.W.2d 999, 1000 (Ark. 1947) (supplying the phrase "in conflict herewith" to a statute authorizing cities of the first and second class and incorporated towns to vacate public streets and alleys in furtherance of public safety which also purported to repeal "[a]ll laws and parts of laws"); *Stanton v. Frankel Bros.*

the present situation, it is not at all obvious that the Legislature intended the word "within" to also mean "without" when describing the geographic confines of the Drug Act's prohibitions.[12] Nor could the trial court's conclusion be reached without stretching the enacted text beyond all reasonable comprehension. The English language may be flexible, but the need to resort to linguistic gymnastics to achieve that result proves too much.

In sum, the requirement that a predicate Drug Act offense be committed within Pennsylvania's borders in order to sustain a conviction for drug delivery resulting in death is not irrational as literally construed, nor can the trial court's more expansive, retributivist interpretation be achieved via simple typographical correction. The General Assembly *could have* criminalized drug deliveries resulting in death within the Commonwealth where the drug transfer occurred *outside of* Pennsylvania.[13] But it did not. The trial court's own effort to demonstrate that Peck sought an absurd result itself verges on absurdity by doing great harm to the statute. Perhaps that court could not have imagined someone in Peck's position going unpunished. But that is not the court's concern, nor its burden. It is not the court's job.[14] The General Assembly is fully capable of writing

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Realty Co., 158 N.E. 868, 870 (Ohio 1927) (reading the word "of" as "or" in a statute allowing only the "county auditor of any complainant" to appeal an adverse decision by a county tax board); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Serv., Inc.*, 435 F.3d 1140, 1145 (9th Cir. 2006) (holding that "less" meant "more" in a federal statute requiring that an application for an appeal be filed "not less than 7 days" after the entry of the court's remand order).

[12] *Cf. Young v. Pa. Bd. of Probation & Parole*, 225 A.3d 810, 816 (Pa. 2020) (Wecht, J., concurring) ("It would be an unusual exercise in statutory construction to interpret verbs intentionally chosen also to encompass their antonyms.").

[13] *See* 18 Pa.C.S. § 102(a)(1).

[14] In that regard, I think again of the famous exchange between the jurisprudential titans Justice Oliver Wendell Holmes, Jr., and Judge Learned Hand, the latter of whom recounted as follows:

criminal statutes whose scope of prohibited conduct is not confined to conduct that occurs "within the Commonwealth." Here, the operative act unambiguously provides otherwise. It is not for the judiciary to improve upon the legislative branch's efforts in contravention of the law's plain language. We do not and will not assume an intent that is not manifested in the Legislature's written product.

> I remember once I was with [Justice Holmes]; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupé. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and he said: "Come here. Come here." I answered: "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."

LEARNED HAND, *A Personal Confession*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 302, 306–07 (Irving Dilliard ed., 3d ed. 1960).