[J-44-2019][OAJC - Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 57 MAP 2018
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court at No. 266 MDA 2017 dated
	:	4/12/18 vacating the judgment of
v.	:	sentence dated 1/13/16 of the
	:	Lackawanna County Court of Common
	:	Pleas, Criminal Division, at No. CP-35-
	:	CR-0001297-2012 and remanding for
PATRICK TIGHE,	:	resentencing
	:	
Appellant	:	ARGUED: May 14, 2019

CONCURRING OPINION

CHIEF JUSTICE SAYLOR **DECIDED: February 19, 2020**

While it is certainly plausible that the victim would have suffered emotional trauma from having to answer questions personally posed to her by Appellant at trial, I find substantial weight to Appellant's argument that the record is insufficient to support that conclusion. *See, e.g.*, Brief for Appellant at 16. If the Commonwealth sought to restrict, on that basis, Appellant's rights under *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975), the Commonwealth bore the burden to create an adequate record, which it failed to do. *See* Opinion Announcing the Judgment of the Court (OAJC), *slip op.* at 6 (reciting that the Commonwealth elected not to supplement the record with evidence that would tend to show the "negative emotional impact [A]ppellant's personal cross-examination would have" on the victim); *see also id.* at 19. Were this the sole

basis for the dispositions in the trial and intermediate courts, I would be inclined to reverse.

As spelled out more fully by the lead Justices, however, the Commonwealth chose to rely on a forfeiture rationale. *See id.* at 4-5 & n.6. Moreover, in its pretrial ruling the trial court largely adopted that rationale by focusing on Appellant's misconduct in disobeying the relevant provision of the bail order, rather than future harm to the complaining witness. *See* N.T., July 8, 2013, at 21-22.[1]

Despite the prominent role of a forfeiture dynamic in the decisions under review, Appellant framed the issues presented in this appeal to specifically exclude any consideration of a possible misconduct-based limited forfeiture of his self-representational rights. *See Commonwealth v. Tighe*, ___ Pa. ___, ___, 195 A.3d 850, 851 (2018) (*per curiam*). In this circumstance, I ultimately agree with Justice Wecht that the Court should not undertake, of its own accord, to proceed beyond the issues

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[1] As discussed by the lead Justices, *see, e.g.*, OAJC, *slip op*. at 9 & n.13, 18-19, *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990), addressed permissible limitations on the separate Sixth Amendment right to confront adverse witnesses. The Court upheld a Maryland statute which allowed a minor victim of sexual abuse to testify at trial via one-way closed-circuit television, thus curtailing the face-to-face element of the confrontation right. Such limitation was considered constitutionally permissible where (a) it was necessary to further an important public interest, and (b) the reliability of the testimony was otherwise assured. *See id*. at 850-57, 110 S. Ct. at 3166-70.

Whether the right of self-representation can be restricted on similar grounds has not been considered by this Court, but at least one federal appellate court has relied on *Craig* in circumstances similar to those of the present case. *See Fields v. Murray*, 49 F.3d 1024, 1034-35 (4th Cir. 1995) (*en banc*); *cf. State v. Estabrook*, 842 P.2d 1001, 1006 (Wash. Ct. App. 1993) (approving a trial judge's decision to ask the victim-witness any questions posed by the *pro se* defendant, and stating that, under *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944 (1984), a criminal defendant's right to act *pro se* is satisfied where (a) he preserves control over the case he elects to present to the jury, and (b) the jury's perception that the defendant is representing himself is not obviated).

presented for review. *See* Pa.R.A.P. 1115(a)(3); *Commonwealth v. Metz*, 534 Pa. 341, 347 n.4, 633 A.2d 125, 127 n.4 (1993).