

[J-80-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 441 CAP
: :
Appellee : :
: :
v. : Appeal from the Order entered on 3/4/04
: denying portions of PCRA petition in the
: Court of Common Pleas, Criminal Division
: of Lebanon County at Nos. 1993-10899 &
: 1993-11079
BRADLEY MARTIN, : :
: :
Appellant : SUBMITTED: June 2, 2005

COMMONWEALTH OF PENNSYLVANIA, : No. 442 CAP
: :
Appellant : Appeal from the Order Entered on March
: 4, 2004 Granting New Sentencing Hearing
v. : in the Court of Common Pleas, Criminal
: Division of Lebanon County at Nos. 1993-
: 10899 & 1993-11079.
BRADLEY MARTIN, : :
: :
Appellee : SUBMITTED: June 2, 2005

COMMONWEALTH OF PENNSYLVANIA, : No. 443 CAP
: :
Appellee : Appeal from the Order Entered on March
: 4, 2004 Denying Portions of PCRA
v. : Petition in the Court of Common Pleas,
: Criminal Division of Lebanon County at
: Nos. 1993-10899 & 1993-11079.
BRADLEY MARTIN, : :
: :
Appellant : SUBMITTED: June 2, 2005

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: August 17, 2010

I join the majority opinion on the issue centered on asserted deficient stewardship connected with the potential for a provocation-based defense, see Majority Opinion, slip op. at 15-18; and other “key areas” of trial, see id. at 18-20; as well as the claim of an improper conditioning of a plea offer, see id. at 26-27. I concur in the result with respect to the balance of the claims, except that I dissent in favor of a remand with regard to the claim centered on “ghost jurors.” See id. at 24-26. In support of my position, I offer the following comments.

Initially, the majority appears to credit Appellant’s version of the facts, according to which the victim offered money to Appellant seeking sexual favors. See, e.g., Majority Opinion, slip op. at 2, 40, 41. To my knowledge, however, this has never been found to be a fact.¹

On the claim of unlawful interrogation by law enforcement, see Majority Opinion, slip op. at 8-15, Appellant raises the troubling specter of coercive conduct, as follows:

On October 5, 1993 four seasoned F.B.I. agents were seeking incriminating statements from Martin, a mentally ill 21 year old who was in pain. In this unequal contest, Martin frustrated law enforcement by invoking his Fifth Amendment rights to counsel and to keep silent. The agents saw, however, that Martin was in pain from his car accident and hand-cuffing. They therefore simply waited awhile and then sent a fourth agent to engage Martin with a softer approach . . . , and had that agent indicate to Martin that if Martin could

¹ Notably, the PCRA court couched the victim’s asserted actions as “alleged.” See Commonwealth v. Martin, No. 1993-10899 & 11079, slip op. at 31, 33 (C.P. Lebanon Mar. 5, 2004).

just agree to talk to him about his offense without a lawyer, the pain in the right side of his neck and shoulder could be relieved and his handcuffs removed.

Brief for Appellant at 23-24. Appellant complains that the PCRA court engaged in “rank speculation,” by painting the interrogating agent’s motives as innocent. See id. at 24.

I agree with Appellant that there is an unwarranted degree of inference involved in the PCRA court’s determining motivations based solely on extrajudicial documents, untested by cross-examination. Thus, rather than crediting the PCRA court’s findings in this regard, I would rest the decision on the allocation of the burden of proof on post-conviction review to Appellant. In this regard, Appellant equally invites inferences which are not appropriate from the extrajudicial reports alone, and he did not present any additional evidence to support the inferences he would prefer to be drawn.² For these reasons, I also would not reach the merits of the fruits-of-the-poisonous-tree argument, particularly as the pertinent analysis should depend on the nature of an underlying taint. See Majority Opinion, slip op. at 15. My concern, in this regard, is that the analysis of whether, and under what circumstances, an actual taint may be cured may be relatively complex,³ whereas the majority’s treatment does not reflect this. See Majority Opinion, slip op. at 15.

² While the majority indicates that the evidentiary hearing was limited to a single claim, see Majority Opinion, slip op. at 4, the record suggests the hearing was open to multiple claims, including the above one. See Martin, No. 1993-10899 & 11079, slip op. at 12.

³ For example, one court’s summary of potentially relevant factors is as follows:

Over the years, the following factors have been used to assess whether a defendant’s subsequent statement is the tainted fruit of a prior illegality: the purpose and flagrancy of the initial illegal act, the amount of time between the illegal act and the defendant’s subsequent statement, the defendant’s physical and mental condition at the time of the subsequent statement, whether the defendant remained in

(continued . . .)

In terms of the claim centered on trial counsel's failure to present a provocation defense, see Majority Opinion, slip op. at 15-18, as previously indicated, I support the majority's reasoning and holding. I would also note -- since we see recurring claims to the availability of a voluntary manslaughter instruction on proof of some mental, cognitive, or emotional difficulty -- the Pennsylvania General Assembly has taken a narrow approach to provocation, requiring "serious provocation" by the victim (or another person in the case of transferred intent), which would excite intense passion in a "reasonable person." See 18 Pa.C.S. §§2503 & Official Comment, 2301. See generally Douglas J. Brown, Disentangling Concessions to Human Frailty: Making Sense of Anglo-American Provocation Doctrine Through Comparative Study, 39 N.Y.U. J. INT'L L. & POL. 675, 698 -99 (2007) (explaining that most American jurisdictions have rejected the Model Penal Code's approach of allowing for some subjectivity in determining provocation). Thus, in the absence of a constitutional claim, the appropriate forum to make arguments for a more subjective approach encompassing a consideration of the defendant's background and personal characteristics is before the General Assembly.

(. . . continued)

custody or was at liberty during this interval, whether the defendant had the opportunity to contact legal counsel or friends during this interval, whether the subsequent interview took place at a different location, whether the defendant's interrogators were the same officers who committed the prior illegal act, whether the evidence obtained from the prior illegal act affected the defendant's decision to submit to a subsequent interview, whether the police used lies or trickery to influence the defendant's decision, and whether there were other intervening events that affected the defendant's decision.

Halberg v. State, 903 P.2d 1090, 1098 (Alaska Ct. App. 1995) (citations omitted).

On the issue of alleged systemic deficiencies in the provision of counsel for indigent capital defense in Pennsylvania, particularly in light of our ongoing experience on appellate review, I believe this concern merits the Court's continuing attention. Cf. Commonwealth v. Ly, ___ Pa. ___, 989 A.2d 2, 2-5 (2010) (Saylor, J., dissenting). To me, the majority's explanation, that "[w]hatever the shortcomings of Lebanon County's indigent capital defense system may have been in the mid-1990s," the asserted error is not structural, Majority Opinion, slip op. at 23-24, is not very satisfying. Nevertheless, I also appreciate the constraints under which the majority is operating in the context of this post-conviction case and support its decision for the following reason -- if a prisoner is to vindicate a systemic challenge as a component of a post-conviction claim, he will have to establish the deficiencies as a matter of record.

With regard to the alleged "ghost jurors" not included on the master list of prospective jurors required by statute, see Majority Opinion, slip op. at 24-26, I would accept Appellant's argument that material deviations from the regular processes for selection of venirepersons as prescribed by law represents structural error in the first instance. In my view, substantial irregularities in the empanelment of venirepersons goes to the fundamental integrity of the trial, and I believe that, where such errors are timely identified, the burden should fall to the government to take corrective measures. The remaining question, to my mind, is the degree to which this type of structural error is subject to issue preservation requirements.

There appears to be a split of authority among jurisdictions as to whether structural error may be waived. Compare Mains v. Commonwealth, 739 N.E.2d 1125, 1128 n.3 (Mass. 2000) ("Our cases have held that even structural error is subject to the doctrine of waiver."), with State v. Aragon, 210 P.2d 1259, 1262 (Ariz. 2009) (declining to apply waiver principles to an error found to have been structural). On the one hand,

structural error, by definition, impacts the basic integrity of the trial, which must be assured to maintain public confidence in the criminal justice system. On the other hand, there is the possibility, if all structural errors are treated as non-waivable, for the defense to omit an objection to assure a reversal on appeal in the absence of an acquittal. See Reid v. State, 690 S.E.2d 177, 181 (Ga. 2010) (reflecting the position that structural error is waivable).

The advocacy is not well developed here concerning whether, or to what degree, structural error should be subject to general issue preservation requirements. Since the issue is complex and may be circumstance dependent, I believe it would be preferable for the central fact-based determination to be made in the first instance, i.e., whether or not there were in fact “ghost jurors” (i.e., venirepersons who were not selected according to legal requirements) serving on the jury. Thus, I would remand to the PCRA court for further development of this claim, including an evidentiary hearing at which Appellant would be permitted to tender his proofs concerning the alleged, predicate irregularities, as well as responsive findings and conclusions from the court.

On the subject of the Commonwealth’s cross-appeal, I support the majority’s holding and am in substantial agreement with its rationale. Nevertheless, I have some reservations about the award of a new penalty hearing.

In this regard, I note that it is likely that, under Commonwealth v. Sattazahn, 563 Pa. 533, 763 A.2d 359 (2000), the Commonwealth will offer evidence of Appellant’s conviction for a brutal first-degree murder of a woman in Nevada, which ensued in the crime-spree following the Pennsylvania crimes. See id. at 551, 763 A.2d at 369 (explaining that subsequent convictions could be considered in aggravation on retrial); see also 42 Pa.C.S. §9711(d)(9) (embodying the significant-history-of-felony-convictions aggravator). The admission of such evidence, it seems to me, would not only intensify

the weight of the aggravation, but also would diffuse the defense case of a “provocation”-based, episodic killing (since Appellant killed again for very different reasons).

Perhaps for good reason, however, the prejudice standard is not phrased to consider the evidence which may be admitted on a retrial. Moreover, the Commonwealth did not pursue the argument that evidence available on retrial may be considered in a prejudice assessment before the PCRA court or here. Thus, although this Court has the ability to preserve a valid judgment for any reason appearing as of record, and I have taken the position that it is the original jury determination which controls in applying this principle,⁴ as the circumstances have developed here, it does not seem prudent to consider this line of inquiry further. I simply wish to note that the substantial expenditure of public resources for a new penalty proceeding directed from the post-conviction stage is troublesome where the probability of a more favorable outcome is substantially diminished by the availability of additional, weighty aggravation.

⁴ See Hon. Thomas G. Saylor, Right for Any Reason: An Unsettled Doctrine at the Supreme Court Level and an Anecdotal Experience with Former Chief Justice Cappy, 47 DUQ. L. REV. 489, 494 (2009).