[J-89-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 309 CAP
	:	
Appellee	:	
	:	Appeal from the Judgment of Sentence
	:	entered on 12/8/99 (appellate rights
v.	:	reinstated nunc pro tunc on 6/6/00) in the
	:	Court of Common Pleas, Criminal Division
	:	of Allegheny County
WAYNE CORDELL MITCHELL,	:	
	:	
Appellant	:	ARGUED: September 12, 2005

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: July 19, 2006**

I join the majority opinion, except for its discussion of statutory construction principles in its footnote 20 in relation to the mitigating circumstance involving the absence of a significant history of prior criminal convictions. See 42 Pa.C.S. §9711(e)(1).

With respect to such mitigator, I tend toward Mr. Justice Castille's position that offenses committed in conjunction with the murder should not be available to be considered to defeat the finding of this mitigating circumstance. Indeed, it is my perspective that over the years the Court in this and some other respects may not have always employed a narrowing construction of all provisions of the death penalty statute, which I believe should be constantly maintained as an essential check in the capital

arena. Accord Commonwealth v. Stallworth, 566 Pa. 349, 373, 781 A.2d 110, 124 (2001) ("[I]n the context of a statute defining a category of persons against whom it is permissible to impose a sentence of death, such strict construction should militate in favor of the least inclusive interpretation." (citing Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983) (stating that aggravating factors must "genuinely narrow the class of death-eligible persons" in a way that reasonably "justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder"))). Furthermore, I believe that an unnecessarily broad construction of provisions of the death penalty statute renders the statute vulnerable to constitutional attack. Accord Commonwealth v. Robinson, 583 Pa. 358, 392-99, 877 A.2d 433, 453-57 (2005) (Saylor, J., concurring and dissenting) (developing the position that the adoption of an unnecessarily broad construction of the in-perpetration-of-a-felony aggravator, 42 Pa.C.S. §9711(d)(6), is in tension with the requirement of sufficiently narrowing the class of eligible defendants as noted in Zant).

Although my inclination is toward Justice Castille's central substantive position, I respectfully differ with his perspective on many of the decisions that he references for the proposition that the Court frequently engages in sua sponte review of claims for relief from judgments of sentence. For example, Justice Castille references Commonwealth v. Cruz, 578 Pa. 263, 851 A.2d 870 (2004), as an example of sua sponte review. In Cruz, a post-conviction petitioner sought relief grounded on a claim that he had previously raised on direct appeal. In his attempt to surmount the previous litigation bar, the petitioner styled this claim within an overlay of a federal equal protection and due process challenge, which he asserted arose because his co-defendant received an award of relief based on the identical claim. See id. at 271, 851 A.2d at 875. Significantly, however, the petitioner also specifically invoked this Court's

prior decision in Commonwealth v. Tyson, 535 Pa. 391, 394-95, 635 A.2d 623, 624-25 (1993), in which this Court chose not to enforce the previous litigation bar in circumstances that it deemed extraordinary. See id. ("Although Appellant recognizes the substantial burden that he bears in the post-conviction setting, he notes that this Court and others have found relief available in the interests of justice in analogous circumstances." (citing, inter alia, Tyson, 535 Pa. at 394-95, 635 A.2d at 624-25)). Consistent with the principle that reviewing courts should not reach constitutional claims unless absolutely necessary, see Krenzelak v. Krenzelak, 503 Pa. 373, 381, 469 A.2d 987, 991 (1983), this Court chose to apply the line of reasoning from Tyson that was expressly cited by the petitioner in order to consider the underlying question on its merits, rather than to address the equal protection and due process contentions. See Cruz, 578 Pa. at 275-76, 851 A.2d at 877-78. While certainly Justice Castille took the position that this was an example of sua sponte review in his dissenting opinion in Cruz, the fact that such proposition was asserted by a single dissenting Justice in the case simply does not make it so.

Similarly, I also continue my respectful disagreement with Justice Castille's position that the Court awarded relief based on an issue that had not been raised or briefed in Commonwealth v. Flanagan, 578 Pa. 587, 854 A.2d 489 (2004). In Flanagan, appeal was allowed in a post-conviction case to consider a claim that encompassed a challenge to the propriety of a guilty plea in the absence of any discussion of the factual basis for the plea during the plea colloquy, see id. at 589, 854 A.2d at 490, in contravention of the long-standing requirement to develop some factual basis. In affirming the PCRA court's award of relief, this Court observed that the plea court had supplied the wrong legal framework against which to assess the facts, thus "exacerbat[ing] the effect of the substantial deficiency arising out of its failure to adduce

the factual basis and render[ing] the plea unknowing on the face of the record presented." Id. at 609, 854 A.2d at 502. The Court also noted that the matter of the plea court's defective explanation of the law was specifically raised by the petitioner both in his amended PCRA petition and in his brief on appeal. See id. at 598-99, 611 n.14, 854 A.2d at 496, 503 n.14. Additionally, the Court explained in detail why the factual basis and the defective explanation on the part of the plea court were closely interrelated, including both that the defendant's understanding of the applicable law was obviously integral to his understanding of the factual basis for the plea, and that the guiding review standard for assessment of the knowing, voluntary, and intelligent nature of a plea requires a review of the totality of the circumstances. See id. at 610, 854 A.2d at 502-03. Again, certainly Justice Castille expressed his position in Flanagan that the majority there engaged in sua sponte review by considering the plea court's defective explanation of the law as a factor in its analysis, and, since this position continues to be resurrected, again, I find it necessary to reiterate that I see the circumstances much differently.

As exemplified by the above cases, I believe that many of the decisions that Justice Castille cites in his concurring and dissenting opinion are more principled and/or more nuanced than he portrays. That having been said, I agree in the abstract with his ultimate position that, on account of the severity of the penalty involved in capital cases, this Court should maintain some discretion to relax traditional review principles particularly as to penalty phase issues. Accord Commonwealth v. Freeman, 573 Pa. 532, 585-87, 827 A.2d 385, 417-18 (2003) (Saylor, J., concurring and dissenting) (developing the position that the Court should maintain a discretionary application of relaxed waiver in capital direct appeals, limited to claims directly implicating the integrity of the penalty-phase proceedings, and supplemented with a prejudice requirement).

The reason, however, that I cannot join Justice Castille's approach in this case is that the position that I attempted to set out in Freeman did not prevail. There, by majority opinion, the Court abolished relaxed waiver in capital direct appeals, and it did so at least in part based on the need to maintain an orderly, principled, and uniform approach in the review process. See Freeman, 573 Pa. at 559-60, 827 A.2d at 401-02. While left to my own devices I would have drawn the lines differently in Freeman, I fully appreciate the systemic interests that were invoked by the Freeman majority and the reasons why it drew the lines where it did. Thus, absent any argument that it is presently necessary to reach fundamental and plainly meritorious constitutional issues within the exception referenced in Freeman, 573 Pa. at 561, 827 A.2d at 402, I am ultimately constrained to support the present majority's decision to leave reconsideration of the (e)(1) mitigator's proper scope for another day.