[J-10-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 21 WAP 2002
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court, entered June 20, 2000, at
	:	No1323WDA1999, reversing the Order of
v.	:	the Court of Common Pleas of Erie
	:	County, entered August 9, 1999, at
	:	No2529of1997.
RICHARD JOSEPH COSNEK,	:	
	:	
Appellant	:	ARGUED: March 4, 2003

OPINION

MR. JUSTICE LAMB **DECIDED: NOVEMBER 24, 2003**

We granted allocatur in this case to decide whether the Commonwealth may certify an interlocutory appeal from a pretrial ruling that denied its motion in limine to exclude certain defense evidence. For the reasons that follow, we hold that it may not.

This case arose from a fatal car accident on July 5, 1997, in the City of Erie in which Joseph Trigilio was killed. Mark Dylewski was pursuing Richard Cosnek in a high-speed car chase that ended when Cosnek failed to stop at a stop sign and collided with Trigilio's vehicle. Cosnek was charged on November 21, 1997 with several offenses including involuntary manslaughter and vehicular homicide.

Prior to trial, a defense motion to suppress blood-alcohol test results was granted; but, a defense motion to permit expert testimony on "fight or flight" syndrome was denied. The Commonwealth unsuccessfully appealed the suppression of the blood-alcohol test results to the Superior Court, which held on December 2, 1998 that the inevitable discovery rule could not cure a facially invalid warrant.

The case was again scheduled for trial, prior to which the Commonwealth filed a motion in limine to preclude a defense expert in accident reconstruction from testifying that the accident was caused by the chase, not by Cosnek disregarding his duty to stop. After a Frye[1] hearing, the trial court denied the Commonwealth's motion to preclude the testimony, finding that causation was within the scope of an accident reconstructionist's expertise. The Commonwealth appealed, certifying that the admission of the evidence terminated, or substantially handicapped, the prosecution of the case. The Superior Court reversed on June 20, 2000 in a memorandum opinion, relying on its own recent opinions to find that the appeal was properly before it and that the expert testimony would impermissibly bolster witness credibility. The court erred when it relied on its opinions in Commonwealth v. Pitts, 740 A.2d 726 (Pa. Super. 1999), and Commonwealth v. Allburn, 721 A.2d 363 (Pa. Super. 1998), alloc. denied, 739 A.2d 163 (Pa. 1999), to find that the Commonwealth may certify an appeal of a pretrial order admitting defense evidence.

Certification of pretrial appeals by the Commonwealth is an exception to the requirement that appeals may be taken only from final orders. The exception is memorialized as Pa.R.A.P. 311(d), which provides that:

> In a criminal case, under circumstances provided by law, the Commonwealth may take an appeal as of right from an order that does not end the entire case where the Commonwealth certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution.

Pa.R.A.P. 311(d).

The plain language of Rule 311(d) limits its application to "circumstances provided

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[1] In Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), the court held that "[t]he thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." The Frye standard was adopted by this Court in Commonwealth v. Topa, 369 A.2d 1277, 1281 (Pa. 1977), and is currently under review in Grady v. Frito-Lay, Inc., No. 43 Western Appeal Docket 2002 (Argued March 4, 2003).

by law"; therefore, we examine the legal underpinnings of the Rule for its proper application.

Early in the 19th Century, this Court occasionally entertained, without question, Commonwealth appeals from final orders in criminal cases. See Commonwealth. v. Taylor, 5 Bin. 277 (Pa. 1812) (hearing appeal of a dismissal of a burglary charge after verdict of guilt); Commonwealth v. McKisson, 8 Serg. & Rawle 420 (Pa. 1822) (appeal from the dismissal of indictment for fraud for selling a heifer with a broken leg).

However, more recent jurisprudence holds that the Fifth Amendment[2] to the United States Constitution prohibition against double jeopardy places constitutional limits on government appeals in criminal cases; therefore, the government may appeal only pursuant to express statutory authority. Arizona v. Manypenny, 451 U.S. 232, 245 (1981). The United States Supreme Court has held that it is fundamental that "the United States has no right of appeal in a criminal case absent explicit statutory authority." United States v. Scott, 437 U.S. 82, 84-85 (1978). "[A]ppeals by the Government in criminal cases are something unusual, exceptional, not favored." Carroll v. United States, 354 U.S. 394, 400 (1957).

The federal equivalent of Rule 311(d) is 18 U.S.C. § 3731, which provides in relevant part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court **suppressing or excluding evidence** or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

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[2] Double jeopardy protections afforded by the United States and Pennsylvania Constitutions are coextensive and prohibit repeated prosecutions for the same offense. Commonwealth v. Lively, 610 A.2d 7, 8 (Pa. 1992).

18 U.S.C. § 3731 (emphasis added).

The courts have strictly construed Section 3731. U.S. v. McVeigh, 106 F.3d 325, 330 (10th Cir. 1997) (collecting cases) (refusing a government appeal of a sequestration order).

Before the enactment of Section 3731, the United States Supreme Court was unmoved by the argument that in some instances the government might never be able to appeal an adverse ruling, reasoning that:

> Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable. In particular is this true of the Government in a criminal case, for there is no authority today for interlocutory appeals, and even if the Government had a general right to review upon an adverse conclusion of a case after trial, much of what it might complain of would have been swallowed up in the sanctity of the jury's verdict.

Carroll v. U.S., 354 U.S. at 406.

The language of the Pennsylvania Rule 311(d) is derived from Commonwealth v. Bosurgi, 190 A.2d 304 (Pa. 1963), in which this Court established the parameters for handling cases after the United States Supreme Court held in Mapp v. Ohio, 367 U.S. 643, 655 (1961), that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." In Bosurgi, the trial court held that the only evidence against the defendant was illegally seized, which, after Mapp, compelled its exclusion from trial.

This Court found that a pretrial suppression order which terminates or handicaps the prosecution has "such an attribute of finality as to justify the grant of the right of appeal to the Commonwealth." Bosurgi, 190 A.2d at 308. In Commonwealth v. Dugger, 486 A.2d 382, 386 (Pa. 1985), this Court held that when the Commonwealth certifies that a suppression order substantially handicaps or terminates a prosecution that certification "in and of itself, precipitates and authorizes the appeal." On May 6, 1992, effective July 6,

1992, Pa.R.A.P. 311 was amended to permit an interlocutory appeal as a matter of right by the Commonwealth in instances where the Commonwealth asserts that the order will terminate or substantially handicap the prosecution. Pa.R.A.P. 311(d).

The roots of the Rule are planted in the fundament of constitutional law: the Commonwealth has a never shifting burden to prove each element of the crime charged beyond a reasonable doubt. Constitutional due process requires that the government prove every fact necessary to constitute the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 363 (1970). The burden of proof never shifts but rests with the prosecution throughout. Turner v. Commonwealth, 86 Pa. 54, 74 (1878). It is the continuing presumption of innocence that is the basis for the requirement that the state has a never- shifting burden to prove guilt of each essential element of the charge beyond a reasonable doubt. Commonwealth v. Bonomo, 151 A.2d 441, 445 (Pa. 1959).

When a pretrial motion removes evidence from the Commonwealth's case, only the prosecutor can judge whether that evidence substantially handicaps his ability to prove every essential element of his case. Dugger, 486 A.2d at 386. Additionally, only the prosecutor can judge whether he can meet his constitutional burden of proving his case without that evidence. Id.

Bosurgi and Rule 311(d) were read to include motions in limine by Commonwealth v. Gordon, 673 A.2d 866 (Pa. 1996). In a subsequent case, Commonwealth v. Matis, 710 A.2d 12, 18 (Pa. 1998), this Court held that "[a]n order denying a motion for a continuance to secure the presence of a necessary witness has the same practical effect of an order suppressing or excluding evidence" and also allowed the Commonwealth's interlocutory appeal.

In this case, the Superior Court's error in relying on Commonwealth v. Pitts and Commonwealth v. Allburn is the result of a misreading of Gordon and Matis.

In Pitts, the Commonwealth appealed two pretrial rulings, one that suppressed a statement made by the defendant and a second that denied a Commonwealth motion to preclude psychiatric evidence of post-traumatic stress syndrome to support a claim of self-defense. Pitts, 740 A.2d at 732. The panel in Pitts held that both questions were properly before it. The first question, a straight-forward suppression motion, was clearly appropriate under a Rule 311(d) certification.

The second question in Pitts, however, raised the same question which is raised here: whether the Commonwealth may appeal the denial of a motion excluding defense evidence. To answer that question, the Pitts court relied on Allburn, to its detriment. The Pitts panel held that Allburn stood for the proposition that "when the Commonwealth appeals an interlocutory order that allows evidence proffered by the defense, the good faith certification without more, is sufficient to mandate review." Pitts, 740 A.2d at 732.

The difficulty is that Allburn does not stand for that proposition because, in Allburn, the trial court certified the appeal of the question of whether a minor's past sexual conduct could be introduced in a defense to several sex charges including corruption of minors and endangering the welfare of children. In language taken straight from the statute allowing trial courts to certify interlocutory appeals, 42 Pa.C.S. § 702(b), the trial court found that "this case involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an intermediate appeal may advance the ultimate termination of the matter." Allburn, 721 A.2d at 365. The Superior Court in Allburn impliedly granted the permission to appeal required by Section 702(b) when it considered the case. In addition to the trial court certification of the interlocutory appeal, the "appellees did not dispute the appealability of the order." Allburn, 721 A.2d at 365. The panel sua sponte, but unnecessarily, addressed the question of appealability and found that even though the Commonwealth was "appealing an order allowing evidence proffered by the defense . . . The Commonwealth does not have to prove it will be substantially handicapped." Allburn,

721 A.2d at 365. The decision relies on the language in Gordon that there is no substantive difference between suppression rulings and motions in limine "to admit or exclude evidence. In both cases, a pretrial order is being handed down which admits or excludes evidence at trial, and in both cases, once a jury is sworn the Commonwealth may not appeal from an adverse ruling." Allburn, 721 A.2d at 365-66 (quoting Gordon, 673 A.2d at 868).

In Gordon, however, the question was whether the Commonwealth could certify an appeal of a defense motion in limine to exclude evidence of other bad acts which the Commonwealth wanted to offer as evidence of a common scheme, plan or design. Gordon, 673 A.2d at 868. This Court answered the question in Gordon by holding that motions in limine are the same as suppression motions for the purposes of Rule 311(d) appeals. The question in Gordon did not involve proffered defense evidence.

Thus, the line of cases on which the Superior Court relied in this case is without foundation in our decisional law: Pitts cites Allburn which cites Gordon. In neither Gordon nor Allburn was the question raised or decided.[3]

The question on which this Court granted allocatur, does Rule 311(d) allow the Commonwealth to certify an appeal from a ruling admitting defense evidence, is, therefore, squarely before this Court for the first time. For the reasons that follow, we hold that the Commonwealth's right to interlocutory appeals does not extend to appealing the admission of defense evidence.

The United States Supreme Court has held that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against

[3] After we granted allocatur in this case, the Superior Court decided two cases en banc, Commonwealth v. Jones, 826 A.2d 900 (Pa. Super. 2003), and Commonwealth v. Shearer, 828 A.2d 383 (Pa. Super. 2003), in which it continued to rely on the reasoning in Pitts, which we reject here.

the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 4 10 U.S. 284, 294 (1973).

This Court has consistently held that an accused has a fundamental right to present evidence so long as the evidence is relevant and not excluded by an established evidentiary rule. Commonwealth v. McGowan, 635 A.2d 113, 115 (Pa. 1993); see also Commonwealth v. Ward, 605 A.2d 796, 797 (Pa. 1992).

Because an accused has the right to remain silent under the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, with a few rule-based exceptions such as alibi or insanity[4], the defense is under no requirement to disclose its tactics, its theory of the case, its experts or its witnesses before the start of trial. Commonwealth v. Brinkley, 480 A.2d 980, 990 (Pa. 1984) (Nix, J., dissenting).

Were this Court to allow the Commonwealth to appeal rulings admitting defense evidence as of right, the accused would be forced to balance his right to a trial without delay with his fundamental right to present evidence. The chilling effect of such a choice would give the Commonwealth an unwarranted and unfettered influence over the defense case, a practice specifically disapproved in Lewis v. Court of Common Pleas of Lebanon County, 260 A.2d 184, 188 (Pa. 1969) (holding that a prosecutor could not discourage a witness from talking with the defense attorney).

An even more likely outcome would be a reluctance, if not a refusal, of the defense to engage in the mutual pretrial discovery l which is fostered by Pa.R.Crim.P. 573. In the Matter of Pittsburgh Action Against Rape, 428 A.2d 126 ,130 (Pa. 1981) (noting the benefits of liberal discovery rules) (superseded by statute); see also Dennis v. United States, 384 U.S. 855, 870, (1965) (reasoning that "disclosure, rather than suppression, of

[4] Pa.R.Crim.P. 573(C)(a) and (b).

relevant materials ordinarily promotes the proper administration of criminal justice."). Without the ongoing and mutual discovery fostered by the Rule, the wheels of justice might well slow to a halt.

Pre-trial appeal is not the Commonwealth's only recourse. Tactics and theories often change rapidly during trial; today's expert report may become tomorrow's scrap paper. A well-timed objection during trial often persuades a trial judge that foundation is lacking, testimony irrelevant or evidence is cumulative.

Contrary to the suggestion in the dissenting opinions, the Commonwealth is not without the ability to seek review of a pre-trial ruling in favor of a defendant. Like any litigant, the Commonwealth may proceed with an interlocutory appeal by permission pursuant to Appellate Rule 1311 by requesting that the trial court certify the order in accordance with Section 702(b) of the Judicial Code, 42 Pa.C.S. § 702(b), specifically, that the order "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter[.]" Id. Even when a trial court refuses to certify a pre-trial order, the Commonwealth may nevertheless seek review of the refusal. See Pa.R.A.P. 1311 Note (explaining that where a lower court refuses to include the required language under Section 702(b), a petition for review pursuant to Chapter 15 of the Appellate Rules is the proper procedure). Notably, the Commonwealth has successfully invoked this review process in numerous instances involving the precise concerns raised by the dissenting opinions. See, e.g., Commonwealth v. Tilley, 780 A.2d 649, 651 (Pa. 2001) (addressing an interlocutory appeal by the Commonwealth of a discovery order); Commonwealth v. Guy, 686 A.2d 397, 399 (Pa. Super. 1996) (reviewing an interlocutory appeal by the Commonwealth of a Rape Shield Law ruling). Moreover, the standard governing such review are similar to that proposed by Mr. Justice Castille in his concurring opinion, as there

is a requirement that the issue be significant and the appellate court is vested with discretion in determining whether to allow the appeal. See 42 Pa.C.S. § 702(b).

The Commonwealth's ability to take an interlocutory appeal as of right from the suppression or exclusion of its own evidence is rooted in the particular burden which it bears to prove its case. The defense, in contrast, carries a particular privilege to retain control over its own evidence. Both interests are protected when we limit the application of Rule 311(d) to those "circumstances provided by law" in which a pretrial ruling results in the suppression, preclusion or exclusion of Commonwealth evidence.

For all the foregoing reasons, the Order of the Superior Court is reversed and the matter remanded to the trial court.

Mr. Justice Castille files a concurring opinion.

Madame Justice Newman files a dissenting opinion.

Mr. Justice Eakin files a dissenting opinion.