[J-186-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 32 MAP 2004
	:	
Appellee,	:	Appeal from the order of the Superior
	:	Court, No. 1648 MDA 2002, dated
	:	October 3, 2003, vacating and remanding
v.	:	the judgment of sentence of the Court of
	:	Common Pleas of Lancaster County, No.
	:	0676 of 2002, imposed October 1, 2002.
ALBERT S. SHIFFLER,	:	
	:	833 A.2d 1128 (Pa. Super. 2003)
Appellant	:	
	:	ARGUED: November 30, 2004
	:	
	:	
	:	

DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: July 22, 2005**

I respectfully dissent from the Opinion of the Majority. I find myself constrained by the clear and unambiguous language of 42 Pa.C.S. § 9714. Central to the issue is the language chosen by the legislature in enacting Section 9714. The plain language of Section 9714, in which the legislature chose not to include language consistent with a recidivist philosophy, binds me. Although it may be wise for the legislature to revisit the topic, it is not the place of this Court to interject our philosophy into a statute where it in no way violates the Pennsylvania Constitution or conflicts with other laws of this Commonwealth.

The Majority quotes this Court's Opinion in Commonwealth v. Bradley, 834 A.2d 1127 (Pa. 2003), which reads:

> The recidivist philosophy, while a valid policy, is not the only valid sentencing policy, nor is it a constitutional principle or mandate: "the legislature is therefore free to reject or replace it when enacting recidivist sentencing legislation. If the legislature enacts a statute which clearly expresses a different application, the 'recidivist philosophy' possesses no authority which would override clearly contrary statutory language."

Id. at 1135 (quoting Commonwealth v. Williams, 652 A.2d 283, 285 (Pa. 1994)). However, despite acknowledging this basic tenet concerning the power of the legislature, the Majority goes on to impose a recidivist philosophy where none is evident in the legislature's writing. As discussed infra, even when read beyond the plain language of the statute, the clause in question may further a recidivist goal, or be a proper mixture of both recidivist and punitive philosophies.

The exact language at issue provides, "[w]here the person had at the time of the commission of the current offense previously been convicted of two or more such crimes of violence arising from separate criminal transactions, the person shall be sentenced to a minimum sentence of at least 25 years of total confinement[.]" 42 Pa.C.S. § 9714(a)(2). As noted by the Majority, this language is clear and, "[t]here is no dispute that, at the time [A]ppellant committed the current burglary offense on December 26, 2001, he had been previously 'convicted' of not two, but three, qualifying crimes of violence." Majority Op. at 13.[1] In addition, the Majority notes that "none of the triggering terms -- specifically,

[1] There may be some dispute over whether the two crimes committed on February 2, 1997, within one and one-half hours of each other would count as two separate convictions. However, Bradley, would lead one to believe that these two crimes would count as (continued…)

'commission,' 'previous,' or 'conviction' -- have acquired a peculiar and appropriate meaning in the sentencing context, but rather, have been interpreted only according to their common and approved usage. See Bradley, 834 A.2d at 1127; Commonwealth v. Dickerson, 621 A.2d 990, 992 (Pa. 1993)." Id. (citations modified). Because there is no question that, at the time of the commission of the current offense, Appellant had three prior convictions, I conclude that, as mandated by the plain language of the statute, the trial court should have imposed the mandatory sentence.

Despite recognizing the clear language of Section 9714(a)(2), the Majority attempts to look beyond the plain meaning of the statute in interpreting the common and approved usage of the terms "previous" and "convictions." In support of this argument, Appellant cites Dickerson, supra, in which this Court interpreted another part of the statute to contain a requirement that the convictions and sentencing be sequential. Although this Court set forth the normal sequence of events, namely, first offense, first conviction, first sentencing, second offense, second conviction, second sentencing, we did not address the present scenario. Instead, Dickerson may be differentiated on the basis that the second **offense** occurred prior to the first conviction. Read within the plain language of Section 9714, at the time of the commission of the second offense, Dickerson had not been convicted for a prior offense. In that case, Dickerson had committed a second rape on the same day as the first rape. Accordingly, this Court stated that "a conviction cannot be a previous conviction for purposes of [Section] 9714(b) unless the **conviction** for the first offense occurs prior to the **commission** of the second offense." Dickerson, 590 A.2d at 770 (emphasis in original).

(…continued)
separate transactions, making this Appellant's fourth strike. Moreover, even if we were to consider the two February crimes to be one previous transaction, the 1996 criminal event is clearly separate and Appellant would be on his third strike.

Thus, clearly, Dickerson could not be sentenced as a second-strike offender pursuant to the plain language of the statute, and not because the Court imposed either an additional requirement that the convictions and sentences be sequential or a recidivist philosophy.

It is certainly the most likely scenario that a chain of events would unfold as: first offense, first conviction, first sentencing, second offense, second conviction, second sentencing, third offense, third conviction, third sentencing. Nevertheless, the legislature could surely foresee other situations, such as this one.

Appellant and the Majority attempt to stretch the dicta in Dickerson, which discusses the general philosophy behind a three-strikes statute, to destroy the literal meaning of the words within subsection (a)(2). However, Section 1921 of the Statutory Construction Act, 1 Pa.C.S. § 1921, binds us to the words of the statute. "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." Id. The holding adopted by the Majority contravenes the plain language of Section 9417(a)(2). However, if the Majority incorrectly speculated as to the intent of the legislature, and the legislature did in fact desire, as the language of the statute indicates, for the current circumstances to trigger the three-strikes mandatory minimum sentence, the legislature would need to insert unnecessary and repetitive language into the statute; whereas, the current language is a paragon of clarity. My position allows the legislature to modify the statute to reflect its true intent, if, as the Majority avers, the plain language does not currently do so.

Moreover, even when considering a recidivist philosophy, it is far from certain that Appellant had not received his two warnings and chances at reform consistent with general recidivist three-strikes policy. Appellant was sentenced for three criminal offenses in one

previous proceeding. Appellant received a relatively lenient sentence at that time because the sentences imposed were concurrent. It is more than conceivable that such a situation, in the minds of the legislature, does not deserve to lessen the count of prior convictions for a future offense. The Majority notes that Appellant has not foregone two opportunities to reform himself. Majority Op. at 16. In part, the Majority reasons that the concurrent nature of the prior sentences resulted in a single opportunity for reform. However, unanswered by the position set forth by the Majority is the question that must be answered. If Appellant had been sentenced consecutively, it is asked if a single stretch in prison counts as two opportunities to reform. I believe that the distinction between the two is irrelevant because in both scenarios Appellant has received multiple warnings and opportunities to reform. Presently, the concurrent nature of the sentences for multiple offenses was a benefit and kindness bestowed upon Appellant that he could not have expected. As such, it is illogical to allow the concurrent nature of his convictions to override the plain language of the statute.

Further, the statute is not one that is solely recidivist in nature. Rather, one may interpret the three-strikes law to be partially punitive in nature and thus, to act as a deterrent. Such deterrence is only effective when the punishment for future convictions is clear. Presently, Appellant had reason to know that a conviction subsequent to his prior three would expose him to the three-strikes law mandatory minimum sentence. Moreover, it is possible to interpret the statute as purely punitive in nature, creating a harsher penalty not in the interests of rehabilitation of the offender, but because of a defendant's repeated commissions of criminal acts.[2]

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[2] A secondary problem with the case *sub judice* is that the penalty is facially harsh. A twenty-five year mandatory minimum for a seemingly minor offense of burglary of $76.00 and a brassiere is extreme. However, no challenge is before us concerning the (continued…)

A dispute over the proper policy to be adopted by the Commonwealth should be left to the legislature and not to this Court. Although recidivist in nature, the language is clear, and the other sections cited by the Majority do not persuade me to override that language as clearly contrary to the purpose of the statute.

I am bound by the clear language of Section 9714 and conclude that because Appellant "had at the time of the commission of the current offense previously been convicted of two or more such crimes of violence arising from separate criminal transactions," 42 Pa.C.S. § 9714(a)(2), the Superior Court properly held that Appellant should be sentenced to a twenty-five year mandatory minimum sentence.

(…continued)
constitutionality of the punishment. See Ewing v. California, 538 U.S. 11 (2003) (holding, in a five to four decision, that a twenty-five year minimum sentence for stealing three golf clubs pursuant to California's three-strikes law did not violate the Eighth Amendment, and that any criticism for the statute is properly directed at the legislature) (citing Rummel v. Estelle, 445 U.S. 263 (1980), in which a life sentence was given for a three-time felon where the underlying offense was obtaining $120.75 by false pretenses). However, there is precedent for finding an Eighth Amendment violation for an unduly harsh penalty imposed pursuant to a three-strikes law. See Crosby v. State, 824 A.2d 894 (Del. 2003) (holding that an effective life sentence of forty-five years for second-degree forgery was excessive and that a life sentence was cruel and unusual in violation of the Eighth Amendment). See also Solem v. Helm, 463 U.S. 277 (1983) (holding that it was a violation of the Eighth Amendment to sentence a defendant to life for a seventh non-violent felony of writing a bad check for $100.00).