

PENNSYLVANIA'S NEW VICTIM BEHAVIOR EXPERT TESTIMONY STATUTE UPHELD: COMMONWEALTH V. OLIVO

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On November 18, 2015, the Pennsylvania Supreme Court decided *Commonwealth v. Olivo*,² upholding, against state constitutional attack, the new Pennsylvania evidentiary statute³ permitting expert testimony to explain victim behavior in the prosecution of crimes of sexual violence. Before the 2012 enactment of 42 Pa.C.S. § 5920, the courts of Pennsylvania had steadfastly resisted admission of such testimony, despite the widespread acceptance of such evidence by other courts across the country.⁴ In the 2013 pretrial proceedings for prosecution of Olivo's charges involving rape of a child victim, the trial court ruled that the new statute violated Pennsylvania's constitution because it had been enacted by the legislature rather than adopted as an evidence rule by the Supreme Court. Upon review, however, the Pennsylvania Supreme Court rejected the constitutional attack on § 5920 and remanded the case for trial.

FACTS AND TRIAL COURT DECISION

The defendant, Jose Luis Olivo, was arrested on September 17, 2012 and charged with two counts of rape and related crimes stemming from his alleged sexual abuse of a girlfriend's daughter from January 2009 to February 2012. The abuse continued from the time the child was four until she was seven years of age.⁵

Just prior to trial, the defense filed a motion *in limine* to preclude the Commonwealth's presentation of expert testimony under 42 Pa.C.S. § 5920, which allows expert testimony "regarding specific types of victim responses and victim behaviors" in cases involving sexual violence.⁶ The defense argued that § 5920 was unconstitutional because the legislature violated the principle of separation of powers by creating a rule governing courtroom practice and procedure, a subject over which Pennsylvania constitution grants the judiciary full control pursuant to Article V, Section 10(c) of the Commonwealth's constitution. Further, the defense contended that § 5920 was in irreconcilable conflict with the Court's 1992 decision in *Commonwealth v. Dunkle*,⁷ which held that the behavior of child victims of sex crimes was not a proper subject of expert testimony because jurors were capable of understanding such behavior without explanation by an expert. The Commonwealth opposed the motion, arguing that § 5920 violated no constitutional principles and was a proper exercise of legislative authority.⁸

The trial court held a hearing on the motion, at which the Commonwealth made an offer of proof with respect to the proposed expert testimony. The trial court found the testimony to be relevant and helpful to the jury, but barred the testimony on the grounds that § 5920 was a violation of the Supreme Court's rulemaking authority and therefore unconstitutional. The trial court further interpreted the *Dunkle* decision as implicating constitutional principles, requiring that any change in the admissibility of expert testimony to explain victim behavior be the result of judicial rather than legislative action. The trial court therefore "suspended" the statute in accordance with the Pennsylvania Constitution.⁹

PENNSYLVANIA SUPREME COURT

The Commonwealth's appeal of the trial court's decision was transferred to the Supreme Court in accordance with 42 Pa.C.S. § 722(7).¹⁰ The Pennsylvania Coalition Against Rape (PCAR) and the Pennsylvania District Attorneys Association

filed *amicus curiae* briefs in support of the Commonwealth's position that § 5920 was a constitutional exercise of legislative authority, grounded upon reliable scientific research and sound public policy.¹¹ The Supreme Court heard arguments in the case on May 5, 2015, issuing its decision a few months later.

The Supreme Court held that § 5920 is not a procedural rule, but a substantive rule of evidence completely within the purview of the legislature to make, and that the statute did not contravene any constitutional underpinnings of the *Dunkle* decision. The Court reversed the trial court's ruling and remanded the case for trial.

In the majority opinion, written by Justice Baer and joined by Justices Todd and Stevens, the Court relied on its precedent defining substantive law as "that part of the law which creates, defines and regulates rights, while procedural laws are those that address methods by which rights are enforced."¹² Laws governing the admissibility of evidence are substantive in nature, the Court held. "[S]ubject only to constitutional limitations, the legislature is always free to change the rules governing competency of witnesses and admissibility of evidence."¹³ The Court noted with approval that the intermediate Superior Court had, in *Commonwealth v. Carter*,¹⁴ recently upheld the constitutionality of § 5920 on those very grounds.¹⁵

The Court further rejected the argument that its opinion in *Dunkle* was premised on a constitutional prohibition against such evidence. The defense argument in *Olivo* was based upon a specific passage in that opinion: "[W]e do not think it befits this Court to simply disregard long-standing principles concerning the presumption of innocence and the proper admission of evidence in order to gain a greater number of convictions."¹⁶ The Supreme Court agreed with the Commonwealth that this statement in *Dunkle* was "*dicta* and was never intended to control our assessment of the constitutionality of legislative enactments such as Section 5920."¹⁷ The *Olivo* opinion did not address the necessity or importance of expert testimony to explain victim behavior.¹⁸

Justice Saylor filed a concurring opinion, agreeing with the majority's result but advocating for rulemaking authority to be shared by the legislature and judiciary to eliminate the need to make fine distinctions between the procedural and the substantive.¹⁹

Justice Eakin filed a dissenting opinion, agreeing with the majority that the statute was not an unconstitutional infringement on the Court's authority, but expressing his belief that the statute improperly invades the province of the jury to judge credibility and will invite a "battle of the experts" in many cases. He believed a more appropriate approach would be to provide enhanced jury instructions that would address the individuality of victim responses.²⁰

CONCLUSION

The important role of expert testimony in aiding juries to reach just verdicts, unhindered by myths and misconceptions about how "real" victims would behave, has been demonstrated through research and is reflected in widespread judicial and legislative acceptance in jurisdictions across the country. With the *Olivo* decision, affirming the constitutional validity of 42 Pa.C.S. § 5920, the Pennsylvania Supreme Court has cleared the way for presentation of expert testimony to explain victim behavior in cases involving sexual violence. Pennsylvania's reform to permit such testimony came about as a result of legislative action, at the urging of PCAR²¹ and others, to overturn unfavorable case law on the issue. In the 2011 Minnesota Supreme Court decision in *State v. Obeta*,²² the Court overruled its precedent barring expert testimony in cases involving sexual assault of adult victims as a result of painstaking strategic litigation by prosecutors seeking a change in the law.²³ These two cases highlight two promising strategies for legal reform in those few remaining jurisdictions still resistant to expert testimony in cases involving sexual violence and other crimes against women and children.

ENDNOTES

- 1 Teresa M. Garvey is an Attorney Advisor at AEquitas, and Stephanie Ritter is a student at the Georgetown University Law Center.
- 2 127 A.3d 769 (Pa. 2015).
- 3 42 PA. CONS. STAT. § 5920.
- 4 See Christopher Mallios, *And Then There Was One: A Recent Minnesota Supreme Court Decision Has Left Pennsylvania as the Only State That Disallows Expert Testimony to Explain Victim Behavior*, 1 STRATEGIES IN BRIEF (Aug. 2011), available at www.aequitasresource.org/library.cfm.
- 5 *Olivo*, 127 A.3d at 771.
- 6 *Id.*
- 7 602 A.2d 830 (Pa. 1992).
- 8 *Olivo*, 127 A.3d at 771-72.
- 9 *Id.* at 772; see PA. CONST. ART. V, SEC. 10(c).
- 10 Section 722(7) gives the Supreme Court exclusive jurisdiction over appeals from final orders of the courts of common pleas in “[m]atters where the court of common pleas has held invalid [any statute] as repugnant to the Constitution, treaties or laws of the United States, or to the Constitution of this Commonwealth.”
- 11 PCAR’s brief was prepared by AEquitas. Brief of Amicus Curiae Pennsylvania Coalition Against Rape in Support of Appellant, Commonwealth v. *Olivo*, 127 MAP 2014 (Pa. 2014), available at www.aequitasresource.org/library.cfm.
- 12 *Olivo*, 127 A.3d at 777 (quoting *Payne v. Commonwealth Department of Corrections*, 871 A.2d 795 (Pa. 2005)).
- 13 *Commonwealth v. Newman*, 633 A.2d 1069, 1071 (Pa. 1993) (upholding constitutional validity of statute altering the availability of spousal privilege).
- 14 111 A.3d 1221 (Pa. Super. 2015).
- 15 *Olivo*, 127 A.3d at 780.
- 16 *Dunkle*, 602 A.2d at 839.
- 17 *Olivo*, 127 A.3d at 780.
- 18 Such a discussion would have been unnecessary to the Court’s decision in view of the fact that the statute represented a legislative determination of the importance and value of such testimony.
- 19 *Olivo*, 127 A.3d at 781-82 (Saylor, C.J., concurring).
- 20 *Id.* at 782-83 (Eakin, J., dissenting).
- 21 PCAR was a moving force behind the enactment of 42 Pa.C.S. § 5920. In addition to laboring over the drafting of the statute, PCAR shepherded the provision through the legislative process, explaining to lawmakers the need for juries to understand the reasons for such common behaviors of victims of sexual assault as delayed reporting or failure to physically resist an assault.
- 22 *State v. Obeta*, 796 N.W.2d 282 (Minn. 2011).
- 23 See MALLIOS, *supra*, n. 4.

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This article was supported by Grant No. 2009-TA-AX-K024 awarded by the U.S. Department of Justice, Office on Violence Against Women (OVW). The opinions, findings, conclusions, and recommendations expressed in this presentation are those of the author(s) and do not necessarily reflect the views of OVW.

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