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RECENT CASES

EVIDENCE—PRIOR INCONSISTENT STATEMENTS—NOT ADMISSIBLE AS SUBSTANTIVE EVIDENCE, LIMITED IN IMPEACHMENT OF OWN WITNESS. *Commonwealth v. Gee*, __ Pa. __, 354 A.2d 875 (1976).

In *Commonwealth v. Gee*,[1] a plurality decision,[2] the Supreme Court of Pennsylvania reaffirmed its traditional views[3] on the use of prior inconsistent statements and impeachment of a party's own witness. Unswayed by the pronouncement of Justice Roberts that the case presented

> a good example (1) why we should abandon the ancient doctrine that the party producing a witness vouches for his truthfulness and (2) why we should admit the prior inconsistent statements of witnesses as evidence concerning the matters contained in the statement[4]

the court affirmed a conviction of second degree murder. Adhering to established Pennsylvania law on both issues, the court declined to examine the merits of Justice Robert's contentions despite their support by numerous authorities[5] and embodiment in the Federal Rules of Evidence[6] and other codes.[7]

Appellant, Gregory Gee, had been found guilty of second degree

1. __ Pa. __, 354 A.2d 875 (1976).

2. The opinion in this case does not represent a clearcut majority-minority situation. The "majority" (plurality) opinion represents the views of two justices. Two other justices concurred only in the result. Two justices dissented, and the other justice, Jones, took no part in the decision of the case.

3. *See* notes 12-13, 39-41 and accompanying text *infra*.

4. __ Pa. at __, 354 A.2d at 884.

5. *See, e.g.*, C. MCCORMICK, THE LAW OF EVIDENCE § 36 at 71-72, § 38 at 77-78, § 39 at 78, § 47 at 97-100, § 251 at 601-04 (2d ed. 1972) [hereinafter cited as MCCORMICK]; E. MORGAN, BASIC PROBLEMS OF EVIDENCE, 67-70 (1963); 3A J. WIGMORE, EVIDENCE, § 899 at 663-66, § 907 at 694-97, § 1018 at 995-1007 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE]; Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239 (1967).

6. Federal Rule of Evidence 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." Federal Rule of Evidence 801(d)(1) states that a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . .

7. The Uniform Rules of Evidence have been changed to conform with the Federal Rules of Evidence. In the 1953 Uniform Rules of Evidence, rule 63(1) would have admitted any statement of a person present at trial and subject to cross-examination. Rule 20 would allow impeachment of a party's own witness. Model Code of Evidence rule 503 would admit any statement if the declarant is present and subject to cross-examination.

murder for a stabbing during hostilities between two rival gangs. At trial the Commonwealth called only one eyewitness, informing the defense that others who had given statements to the police would not be called because they had changed aspects of their stories and were not considered to be reliable. Despite the apparent eagerness of these witnesses to testify against Gee, the defense decided to call them on its own behalf, disregarding the trial judge's repeated admonitions that if the witnesses testified adversely the defense could not claim surprise and impeach them with prior inconsistent statements. When the witnesses failed to give the desired testimony, all defense efforts to impeach them were prohibited by the court. The supreme court found no ground for reversal in the trial court's action.[8]

The significance of this decision is not in its holding[9] that the trial court did not abuse its discretion by preventing the defendant from impeaching his own witnesses with prior inconsistent statements,[10] but in its presentation of a forum for confrontation between established Pennsylvania law, which limits the use of prior inconsistent statements, and a growing body of modern authority, which urges that such limitations be abandoned as serious obstructions to the ascertainment of truth.

A court's decision to admit or exclude prior inconsistent statements as substantive evidence can be determinative of the outcome of a case. When the use of such statements is limited to discrediting the testimony of a witness, they cannot satisfy a burden of proof. Moreover, on that basis, a directed verdict may be appropriate.[11]

Pennsylvania accords with the majority of jurisdictions[12] in refusing to admit prior inconsistent statements of non-party witnesses as substantive evidence of the truth of matters asserted.[13] This rule exists in most states,[14] although some have altered it by decision[15] or as part of an evidence code.[16]

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8. ___ Pa. at ___, 354 A.2d at 883.

9. The court also made findings concerning the duties of the prosecution with respect to exculpatory evidence, the rights of a defendant to the prosecution's tests, interview sheets and statements of witnesses, and the inadmissibility of polygraph examinations.

10. The supreme court found no denial of due process resulting from the trial court's decision that such important considerations as preventing delay and confusion, which could have been caused by additional testimony, outweighed the need for the testimony.

11. Comment, *Prior Inconsistent Statements and the Rule Against Impeachment of One's Own Witness: Proposed Federal Rules*, 52 TEXAS L. REV. 1383 (1974) [hereinafter cited as 52 TEXAS L. REV.].

12. *E.g.*, State v. Volpe, 113 Conn. 288, 155 A. 223 (1931); Chapman v. State, 302 So. 2d 136 (Fla. App. 1974); People v. Gant, 58 Ill. 2d 178, 317 N.E.2d 564 (1974); Capital Raceway Promotions, Inc. v. Smith, 22 Md. App. 224, 322 A.2d 238 (1974); Durbin v. K-K-M Corp., 54 Mich. App. 38, 220 N.W.2d 110 (1974); Commonwealth v. Tucker, 452 Pa. 584, 307 A.2d 245 (1973).

13. *See, e.g.*, Commonwealth v. Commander, 436 Pa. 532, 260 A.2d 773 (1970); Wilson v. Pennsylvania R.R. Co., 421 Pa. 419, 219 A.2d 666 (1966); Goodis v. Gimbel Bros., 420 Pa. 439, 218 A.2d 574 (1966); Kunkel v. Vogt, 354 Pa. 279, 47 A.2d 195 (1946).

14. MCCORMICK, *supra* note 5, § 251, at 601-02; Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence*, 3 IND. L.F. 309, 325 (1970).

15. Beavers v. State, 492 P.2d 88 (Alaska 1971); State v. Skinner, 110 Ariz. 135, 515 P.2d 880 (1973); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); State v. Igoe, 206 N.W.2d 291 (N.D. 1973); Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609 (1969).

16. FED. R. EVID. 801(d)(1); CAL. EVID. CODE ANN. § 1235 (West 1966); KAN. STAT. ANN. § 60-460(a) (1964); N.J.R. EVID. 63(1); UTAH R. EVID. 63(1).

Despite their recognition of strong criticism of the traditional rule and its abandonment in the Federal Rules of Evidence,[17] the *Gee* plurality supplied no rationale for retaining it. The dissent was more articulate, focusing upon two of the three primary grounds typically advanced for its abrogation.

First, the rule originated as a justification for admitting witnesses' prior statements over a hearsay objection.[18] The hearsay argument noted that the prior statements were not made under oath and that there was no opportunity for cross-examination or observation of the demeanor of the declarant.[19] Courts held, however, that the statement is admissible to discredit a witness as long as it is not used to prove the truth of the matter asserted.[20] The *Gee* dissent reiterated the classic criticisms of this reasoning: because the declarant is present in court for examination and cross-examination, the common hearsay dangers are not present.[21] Yet controversy remains concerning the value of cross-examination that is neither contemporaneous with the statement nor conducted before a trier of fact.[22] Supporters of the orthodox view argue that the principal virtue of cross-examination lies in its immediate application and that its effectiveness is lost unless it occurs when the witness makes the statement.[23] Practically speaking, it is futile to cross-examine a witness concerning a statement if the witness denies having made it, does not remember it, or denies its veracity.[24] Nevertheless, the dissent argued that the trier's observation of the demeanor of a witness attempting to reconcile inconsistencies in accounts is as valuable in evaluating the weight and credibility of the testimony as is the observation of immediate cross-examination.[25]

The dissenters' second criticism of the rule was that, although the oath is lacking, an earlier out-of-court statement is probably more reliable than the witness' in-court statement.[26] The statement's closer proximity to the event would suggest that it is more accurate, having been made while perception and memory were clearer and less likely to have been distorted by outside influences or pressures.[27] Although the plurality did not discuss

17. __ Pa. at __, 354 A.2d at 880 n.5.

18. 52 TEXAS L. REV., *supra* note 11, at 1386.

19. Reutlinger, *Prior Inconsistent Statements: Presently Inconsistent Doctrine*, 26 HASTINGS L.J. 361 (1974).

20. WIGMORE, *supra* note 5, § 1018, at 995.

21. __ Pa. at __, 354 A.2d at 885; *accord*, CAL. EVID. CODE ANN. § 1235, Comment—Law Revision Comm'n (West 1966); MCCORMICK, *supra* note 5, § 39, at 78; WIGMORE, *supra* note 5, § 1018, at 995.

22. Beaver & Biggs, *supra* note 14, at 316; Reutlinger, *supra* note 19, at 364-65.

23. State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939).

24. Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967); Beaver & Biggs, *supra* note 14, at 316-17.

25. __ Pa. at __, 354 A.2d at 885; *accord*, DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925); CAL. EVID. CODE ANN. § 1235, Comment—Law Revision Comm'n (West 1966); Beaver & Biggs, *supra* note 14, at 316-17.

26. __ Pa. at __, 354 A.2d at 885; *accord*, CAL. EVID. CODE ANN. § 1235, Comment—Law Revision Comm'n (West 1966); Beaver & Biggs, *supra* note 14, at 309; Reutlinger, *supra* note 19, at 361; 52 TEXAS L. REV., *supra* note 11, at 1386.

27. Reutlinger, *supra* note 19, at 368.

the rationale behind their decision, some supporters of the orthodox rule contend that the in-court oath cannot ensure the reliability of a former extrajudicial statement.[28] The dissent's argument is also countered by illustrating several situations in which the earlier statement would be no more reliable than the testimony in court. For example, a witness who made a previous statement when it was of no immediate consequence could be affected by the solemnity of his oath.[29] Also, for every case in which the witness was corrupted after making his first statement, there is the equal possibility that a witness who initially lied has since been persuaded to tell the truth.[30] Furthermore, in some cases the statement may have been made long after the event and only a few days before the in-court statement.[31] The accuracy of memory is the only factor that would be enhanced by nearness in time to the event;[32] falsehood, mistake or faulty perception could be exposed only by effective cross-examination.[33]

A third reason for advocating the use of prior inconsistent statements as substantive evidence was not discussed in either the majority or dissenting opinions in *Gee*. It is arguable that since the judge's instruction to the jury that they may not consider prior inconsistent statements as substantive evidence places an impossible burden on them, and hence is rarely effective, the rule should be abandoned.[34] It has been suggested, however, that jurors' disregard of instructions is not an appropriate reason for changing the law if it is based on valid policy.[35] Moreover, the ineffective instruction argument has no force in situations in which a judge is the trier of fact or in which a party fails to meet its burden of proof and the question of a jury verdict is never reached.[36]

Having challenged the traditional Pennsylvania rule concerning the substantive use of prior inconsistent statements, which the plurality had accepted without question,[37] the *Gee* dissenters next attacked the rule limiting the circumstances in which a party may impeach its own witness by prior inconsistent statements.[38] Pennsylvania again follows the established rule[39] that the party producing a witness will not be permitted to impeach the witness' general character or to show his or her prior

28. State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939).
29. Reutlinger, *supra* note 19, at 368.
30. *Id.*
31. *Id.*
32. *Id.* at 368-69.
33. *Id.*
34. United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964); Beaver & Biggs, *supra* note 14, at 321; Reutlinger, *supra* note 19, at 367; 52 TEXAS L. REV., *supra* note 11, at 1386.
35. 52 TEXAS L. REV., *supra* note 11, at 1396.
36. Reutlinger, *supra* note 19, at 367; 52 TEXAS L. REV., *supra* note 11, at 1396.
37. __ Pa. at __, 354 A.2d at 880.
38. *See, e.g.*, Beavers v. State, 492 P.2d 88 (Alaska 1971); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); State v. Igoe, 206 N.W.2d 291 (N.D. 1973).
39. *See, e.g.*, Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432 (1925); Poitier v. State, 303 So. 2d 409 (Fla. App. 1974); Sellman v. State, 232 Md. 344, 192 A.2d 788 (1963); State v. Tilley, 239 N.C. 245, 79 S.E.2d 473 (1954).

contradictory statements. The proponent may discredit its witness only when surprised[40] by affirmatively damaging testimony.[41]

The dissent recognized that elimination of the rule limiting the substantive use of prior inconsistent statements would leave little reason to confine the circumstances in which a party may impeach its own witness.[42] Most jurisdictions that have modified the one rule have also changed the other.[43] The interrelation of the rules reflects one function of the limitation on the right to impeach one's own witness: to prevent litigants from emphasizing prior inconsistencies of their witnesses to the jury when the statements would not be admissible as substantive evidence.[44] Nevertheless, several jurisdictions,[45] following model codes such as the Federal Rules of Evidence,[46] have abandoned the prohibition against impeaching one's own witness. The majority in *Gee*, while noting that the federal rules give "highly persuasive indications of the prevalent trend toward liberalization in this area,"[47] remained ambivalent, neither adopting nor rejecting them.

The original justification for the rule against impeaching one's own witness was based on the notion that by placing a witness on the stand a party vouches for his or her trustworthiness and can not be heard to question it.[48] Yet, a party often has little choice of witnesses, and, as the *Gee* plurality recognized, a strict application of this rule can lead to injustice.[49]

Another justification advanced in support of the rule is the related idea that a party should not be enabled to coerce favorable testimony by threatening to attack the witness' character.[50] This policy, however, does

40. Surprise may be claimed when one's own witness becomes hostile, telling a different story on the stand than the one he had previously told the calling party. Commonwealth v. Delfino, 259 Pa. 272, 102 A. 949 (1918).

41. Commonwealth v. Delfino, 259 Pa. 272, 102 A. 949 (1918); 2 G. HENRY, PENNSYLVANIA EVIDENCE § 808, at 261 (1953). The *Gee* majority noted that Commonwealth v. Gomino, 200 Pa. Super. 160, 188 A.2d 784 (1963), has made the "surprise" exception more flexible in that a trial court has the discretion to allow impeachment in the absence of a strict showing of surprise if the court deems such permission necessary to avoid injustice.

42. __ Pa. at __, 354 A.2d at 886; *accord*, MCCORMICK, *supra* note 5, § 36, at 71-72, § 38 at 75-78; Ladd, *supra* note 5, at 250-51.

43. *See, e.g.*, Beavers v. State, 492 P.2d 88 (Alaska 1971); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); State v. Igoe, 206 N.W.2d 291 (N.D. 1973).

44. MCCORMICK, *supra* note 5, § 38, at 75-76; Comment, *Impeaching One's Own Witness in Missouri*, 37 MO. L. REV. 507 (1972) [hereinafter cited as 37 MO. L. REV.]; 52 TEXAS L. REV., *supra* note 11, at 1398.

45. CAL. EVID. CODE ANN. § 1235 (West 1966); ILL. REV. STAT. ch. 110, § 60 (1976); KAN. STAT. ANN. § 60-420 (1964); MASS. LAWS ANN. ch. 233, § 23 (1959); 20 N.M. STAT. ANN. § 20-2-4 (1953); N.Y.C.P.L.R. § 4514 (McKinney 1963); 12 VT. STAT. ANN. § 1642 (1973); N.J.R. EVID. 20; UTAH R. EVID. 20; Gray v. State, 525 P.2d 524 (Alaska 1974); State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939).

46. FED. R. EVID. 607; UNIFORM RULES OF EVIDENCE rule 20.

47. __ Pa. at __, 354 A.2d at 880 n.4.

48. *See, e.g.*, Oates v. Glover, 228 Ala. 656, 154 So. 786 (1934); Thompson v. Owen, 174 Ill. 229, 51 N.E. 1046 (1898); Clark v. Lansford, 191 So. 2d 123 (Miss. 1966).

49. __ Pa. at __, 354 A.2d at 880; *accord*, Chambers v. Mississippi, 410 U.S. 284 (1972); State v. Wolfe, 109 W. Va. 590, 156 S.E. 56 (1930).

50. B. JONES, THE LAW OF EVIDENCE § 26.11, at 195-96 (6th ed. 1972) [hereinafter cited

not adequately justify the exclusion of prior inconsistent statements, since they are not necessarily based on bad character.[51] The coercion concept helps to explain why Pennsylvania, like many other states, has approved the rule generally but recognizes exceptions in circumstances such as surprise.[52] The general rule effectively prohibits impeachment by means that attack moral character and show the witness to be unworthy of belief.[53] Nevertheless, the surprise exception ensures the right of the party to show inconsistent statements if the witness testifies in an unexpected or hostile manner.[54]

The second requirement imposed upon a party who has shown surprise is particularly revealing of the reason for retention of the substantive use limitation in jurisdictions that limit the use of prior inconsistent statements. The proponent must show not only surprise, but also harm or injury, rather than mere disappointment, from the witness' testimony.[55] Thus in surprise limitation jurisdictions, the impeachment of one's own witness can be used only defensively, to neutralize harmful testimony and to show the jury the reason for calling the witness.[56] The limited nature of the surprise exception demonstrates that the rule against impeaching one's own witness is important as a measure to support the hearsay restrictions on the use of prior inconsistent statements:[57] the rule operates to prevent parties from using impeachment as a vehicle to tempt the jury to consider the content of prior contradictory statements in their deliberations.[58] *Commonwealth v. Nowalk*[59] acknowledged this objective of the rule in holding that if counsel calls a witness for the purpose of bringing prior inconsistent statements before the jury by impeachment, this device of getting hearsay into evidence will not be allowed. The indications are clear that these two evidentiary rules are inextricably intertwined and that they should stand or fall together.[60]

In debating the relative merits of the orthodox rules in this area and the modern trend to jettison them, one underlying consideration remains: any artificial barriers to the effective presentation of relevant facts must be

as JONES]; WIGMORE, *supra* note 5, § 899 at 663; 37 MO. L. REV., *supra* note 44, at 507; Comment, *Impeachment of One's Own Witness in Tennessee*, 35 TENN. L. REV. 497 (1968).

51. M. BROWN, PENNSYLVANIA EVIDENCE 279 (1949) [hereinafter cited as BROWN]; JONES, *supra* note 50, § 26.11, at 195-96.

52. *See* notes 40-41 and accompanying text *supra*. *See also* JONES, *supra* note 50, § 26.11 at 195-96.

53. Dinger v. Friedman, 279 Pa. 8, 123 A. 641 (1924); BROWN, *supra* note 51, at 279; JONES, *supra* note 50, § 26.11, at 195-96.

54. A. JENKINS, PENNSYLVANIA TRIAL EVIDENCE HANDBOOK § 17.17, at 310 (1974); JONES, *supra* note 50, § 26.11, at 195-96.

55. Commonwealth v. Turner, 389 Pa. 239, 133 A.2d 187 (1957).

56. Forrester v. United States, 210 F.2d 923 (5th Cir. 1954); Culwell v. United States, 194 F.2d 808 (5th Cir. 1952); Flauhaut v. State, 66 Okla. Crim. 417, 92 P.2d 587 (1939).

57. Commonwealth v. Nowalk, 160 Pa. Super. 88, 50 A.2d 115 (1946); Barham v. State, 130 Tex. Crim. 233, 93 S.W.2d 741 (1936).

58. MCCORMICK, *supra* note 5, § 38, at 75-78; 52 TEXAS L. REV., *supra* note 11, at 1400; 37 MO. L. REV., *supra* note 44, at 521.

59. 160 Pa. Super. 88, 50 A.2d 115 (1946).

60. *See* notes 42-47 and accompanying text *supra*.

subject to thorough examination.[61] The goal of ascertaining the truth should take precedence over all but the most carefully considered evidentiary safeguards.

In this conservative plurality opinion the Pennsylvania Supreme Court once again reaffirmed the state's traditional unwillingness to allow the use of prior inconsistent statements as substantive evidence or to impeach a party's own witness. In the opinion of two of the justices, however, the majority's decision merely perpetuates irrational boundaries that confound the search for truth. But since the plurality declined to address itself to the trends it noted in the Federal Rules of Evidence, these ideas have yet to be specifically rejected, and the court may seize upon some other opportunity to examine the need for change. For the present, however, it is clear that Pennsylvania's time-worn rules, which substantially limit the use of prior inconsistent statements, remain established law.

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61. Justice Roberts closed his dissenting opinion with these words:

> The majority's result serves only to keep relevant and reliable evidence from the jury. Its result serves no greater principle than judicial inertia. I believe that a trial is, fundamentally, a search for an objective account of the events upon which the criminal charges are based. An evidentiary rule which forces the searcher to ignore relevant clues whose reliability can be tested by cross-examination serves no purpose.

__ Pa. at __, 354 A.2d at 886; *accord*, Reutlinger, *supra* note 19, at 380. [Casenote by Kathryn E. Wohlsen]