

**[J-18-2013] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 637 CAP
	:	
Appellee	:	Appeal from the Order entered on
	:	08/31/2011 in the Court of Common Pleas,
	:	Criminal Division of Washington County at
v.	:	No. CP-63-CR-0001494-1998
	:	
	:	SUBMITTED: March 6, 2013
MICHELLE SUE THARP,	:	
	:	
Appellant	:	

CONCURRING AND DISSENTING OPINION

MR. JUSTICE STEVENS

DECIDED: September 24, 2014

I agree with the majority's conclusion that the PCRA court properly denied relief on Appellant's guilt phase claims. I respectfully dissent, however, from the majority's conclusion that Appellant is entitled to a new penalty hearing based on a claim that her trial counsel rendered ineffective assistance in failing to investigate and present mitigating evidence of Appellant's mental health.

Counsel is presumed effective, and to rebut that presumption, Appellant was required to demonstrate (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) Appellant was prejudiced by counsel's act or omission. Strickland v. Washington, 466 U.S. 668, 687–91, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984); Commonwealth v. Koehler, 614 Pa. 159, ___, 36 A.3d 121, 132 (2012).¹

To establish prejudice in a case involving the failure to investigate and present mitigating evidence, we must consider not only the evidence and argument presented at the penalty phase, but also the evidence and argument that would have been presented at the penalty hearing had trial counsel properly investigated such evidence. Prejudice is demonstrated when it is probable that at least one juror would have accepted at least one mitigating circumstance and found that it outweighed the aggravating circumstance found.

Commonwealth v. Ligons, 601 Pa. 103, 145, 971 A.2d 1125, 1150 (2009) (citations omitted). Here, even if it is assumed that counsel did not properly investigate and present additional mitigating evidence of Appellant's mental health, I would find that it is not probable that at least one juror would have accepted any additional mitigating circumstances, or found that such mitigating circumstances outweighed the aggravating circumstance of the victim's age.

The jurors deliberated the penalty phase of Appellant's trial the day after the guilt phase was concluded. The evidence presented during the guilt phase, thus fresh in the jurors' minds, was incorporated into the penalty phase.² N.T. 11/14/00 at 984. In addition to receiving specific instructions regarding aggravating and mitigating factors, the jury was instructed to "consider all of the evidence and arguments of both the Commonwealth and the defendant, including all of the evidence that you heard during the earlier trial and the statement that the defendant personally made to you when she addressed the jury during the original guilt phase of the trial." Id. at 997-1000, 1003.³

¹ The failure to meet any of these three elements precludes relief. Koehler, 614 Pa. at ___, 36 A.3d at 132 (citing Commonwealth v. Lesko, 609 Pa. 128, 176, 15 A.3d 345, 374 (2011)).

² Appellant did not object.

³ As this Court summarized in affirming Appellant's judgment of sentence on direct appeal, such evidence established that:
(continued...)

Pursuant to these instructions, the jury found that the mitigating circumstances (that Appellant had no prior criminal history and had been abused and neglected herself) did not outweigh the aggravating circumstance (the age of the victim). The particular circumstances of this case lead to the conclusion that not even a single juror would have rendered a punishment other than death, even if counsel had presented additional evidence of Appellant's mental health. Because Appellant has failed to show that she was prejudiced by counsel's representation, she is entitled to no relief.

Appellant's conviction and sentence withstood vigorous review during the direct appeal process. At the post-conviction stage the courts have again exhausted

(...continued)

[A]ppellant possessed a willful, deliberate and premeditated intent to starve her daughter to death. Over a long period of time, [A]ppellant purposely denied Tausha proper nourishment and directed others to do the same. Appellant even went so far as to physically restrain Tausha so that the young girl would be unable to feed herself. Tausha was reduced to surreptitiously eating dog food, picking through the trash, and drinking out of the commode.

Moreover, [A]ppellant continued the deliberate mistreatment of her daughter despite obvious physical indications that Tausha was dangerously malnourished and comments from others that her daughter looked seriously ill. The fact that [A]ppellant was conscious of what she was doing was suggested by her own conduct and admissions. She avoided taking Tausha to the doctor and she removed Tausha when the CYS caseworker was scheduled to visit, thus ensuring that those who might have noticed Tausha's condition and taken steps to help her would be unable to do so. In addition, as noted above, [A]ppellant told Lisa Camp that Tausha "belonged six feet under and in a body bag," and, after her arrest, [A]ppellant stated to one of her prison cellmates: "I'm glad the little retarded baby is dead." N.T. 11/8/00 at 487. Appellant made a similarly disturbing comment to another cellmate, Dena Chandler, when Chandler asked [A]ppellant how she could kill her daughter. Appellant responded: "Easily. I never loved her. She interfered with my life." *Id.* at 508. The further fact that [A]ppellant dumped Tausha's body and concocted a false tale of kidnapping suggests consciousness of guilt.

Commonwealth v. Sharp, 574 Pa. 202, 216, 830 A.2d 519, 527 (2003).

enormous effort to ensure that justice has been served.⁴ Finding no error on the part of the PCRA court, I respectfully dissent from the majority's conclusion to the contrary.

⁴ Appellant's PCRA Petition, filed on her behalf by the Federal Community Defender Association, raised so many claims and involved such a volume of material as to cause the PCRA court to opine that counsels' intent was to delay Appellant's execution by delaying the PCRA proceedings. In deciding this matter, the PCRA court expressly noted that it had considered literally thousands of pages of exhibits, appendices, transcripts and briefs.