[J-99-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 480 CAP
	:	
Appellee	:	Appeal from the Order entered on
	:	04/21/2004 in the Court of Common
	:	Pleas, Criminal Division of Philadelphia
v.	:	County granting a new penalty hearing
	:	and denying motion for a new trial at Nos.
	:	2770-2776 May Term 1991
SHAWN WALKER,	:	
	:	
Appellant	:	SUBMITTED: August 13, 2007

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: November 30, 2011**

I join the Majority Opinion and write only to expand upon the point introduced by the Majority Opinion and two points discussed by Mr. Justice Saylor's Dissenting Opinion related to the ineffectiveness of appellate counsel in the post-McGill[1] era.[2]

---

[1] Commonwealth v. McGill, 832 A.2d 1014 (Pa. 2003).

[2] Although this appeal involves an initial Post Conviction Relief Act petition, 42 Pa.C.S. § 9541-9546, and thus the case has not yet proceeded to federal court, appellant is represented by 4 federal lawyers from the Federal Community Defender Office ("FCDO"), who managed to involve themselves in this state capital matter, supplanting state-appointed counsel. Lead counsel, Billy H. Nolas, Esquire, requested and received nearly five months' worth of briefing extensions, due to a variety of reasons, but including his heavy capital caseload in this and other courts. In addition to the question of the propriety of these unauthorized federal forays into state court, there is a question of the delays created by the FCDO's self-appointment (or "volunteering"). If its caseload is too burdensome for the FCDO to discharge their briefing duties, perhaps the FCDO should return to the actual practice of law which has been authorized by Congress, instead of pursuing its extra-Congressional agenda in state court.

A

McGill addressed a specific, recurring issue: the proper approach to layered claims of ineffective assistance of counsel given the substantive Sixth Amendment requirements of Strickland v. Washington, 466 U.S. 668 (1984). As noted by Justice Saylor, McGill was a compromise decision in hopes of resolving the controversy surrounding the proper presentation of claims of counsel ineffectiveness in circumstances where there was intervening counsel on direct appeal. However, as pointed out by the Majority Opinion, the road in the post-McGill era has been anything but smooth. In light of the continuing difficulties revealing themselves in the transitional period, I agree with the Majority's ultimate McGill-based approach to the layered Strickland claims here: *i.e.*, passing through to the underlying claims concerning the performance of trial counsel.[3]

Furthermore, and respectfully, I do not share Justice Saylor's concern with the difficulty of assessing whether the deficiencies in the appellate brief "mirror" the deficiencies in the PCRA petition pleadings. I view the Majority's statement in this context to simply mean that if the PCRA pleadings did not comply with the "layering" contemplated by McGill, but the PCRA court neither permitted amendment[4] nor dismissed the claim(s) on these

---

[3] Ultimately, the complexities posed by cases involving "layered" claims of counsel ineffectiveness should disappear as Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002), which channels direct appeal ineffectiveness claims to collateral review, takes fuller effect. But, until that time, the McGill framework should be available when the concerns that powered the decision are present.

[4] I refer to amendment only in the "layered" claim context in order to comply with the pleading requirements inherent in layered Strickland claims as noted in McGill. McGill contemplated that there would be a transitional period during which petitioners would be given the opportunity under Pa.R.Crim.P. 905 to conform their pleadings to the McGill paradigm.

grounds, when similar "layering" defects appear in the appellate brief an appellate court should not dismiss the "layered" claims based on those defects.[5]

B

The second point raised by the Dissenting Opinion concerns the professional obligations of direct appeal counsel, in PCRA cases implicating layered ineffectiveness where appeal counsel's performance is at issue. Those obligations are important in layered cases because the scope of counsel's duty on direct appeal can shape or narrow the availability of PCRA review and relief.

Justice Saylor questions whether the Majority's discussion of the "extraordinary circumstances" exception to waiver permits an attorney to rely on his own incompetence in violation of this Court's case law prohibiting the same. See Dissenting Slip Op. at 2-3.

The Majority notes direct appeal counsel's PCRA testimony that he did not investigate extra-record claims based upon the belief that such issues were reviewable on collateral attack, and that the capital relaxed waiver doctrine played a role in his determination not to pursue such claims.[6] The Majority further explains that the relaxed waiver doctrine was not abrogated on PCRA review until Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998), which was decided after appellant's direct appeal. The Majority states that counsel's belief that extra-record arguments were to be reserved for PCRA

---

[5] Accord Commonwealth v. Paddy, 15 A.3d 431, 474-77 (Pa. 2011) (Castille, C.J., concurring).

[6] Direct appeal counsel repeatedly stated that at the time he filed the post-trial motions and direct appeal in this case he believed extra-record claims were for post-conviction proceedings. N.T., 7/24/2002, at 20-23, 28, 38-39, 40-41. On direct and redirect examination, counsel was asked whether he relied on relaxed waiver in formulating this opinion. He first responded, "I think so" and later responded, "that was the law back then." Id. at 19, 41. Notwithstanding this testimony, counsel acknowledged that he raised one extra-record claim relating to the failure to call character witnesses. Counsel noted that the claim was prompted by appellant, who supplied him with the relevant information.

review was "mistaken." The Majority then explicates that PCRA relaxed waiver review was not recognized and established in the collateral review context at the time counsel prepared his direct appeal brief. Thus, the Majority correctly concludes that direct appeal counsel could not reasonably have relied on the established availability of relaxed waiver when he declined to pursue extra-record claims on direct appeal, since that was not the law "back then."

Nevertheless, as the Majority sets forth, this Court did review waived claims in first petitions for collateral relief if the petitioner could demonstrate "extraordinary circumstances." And, extraordinary circumstances included an allegation that all counsel below and on prior appeals or PCHA[7] petitions were ineffective. Commonwealth v. Griffin, 644 A.2d 1167, 1170 (Pa. 1994).

Expanding upon the Majority's observation, one of the pressures underlying the Griffin line of cases was this Court's prior directive in Commonweatlh v. Hubbard, 372 A.2d 687 (Pa. 1977) that all claims of trial counsel ineffectiveness were **required** to be raised for the first time on direct appeal, if new counsel had entered the case, upon pain of waiver.[8]

---

[7] Post Conviction Hearing Act, 42 Pa.C.S. §§ 9541-9551 (repealed), the predecessor to PCRA.

[8] Justice Saylor examined the development of pre-Hubbard case law at some length in his dissenting statement in Commonwealth v. Ly, 989 A.2d 2 (Pa. 2010) (*per curiam* order denying request for reargument). Therein, he noted that before Hubbard, there appeared to be some flexibility in the requirement that claims of prior counsel ineffectiveness must be raised at the time new counsel entered the case, including an exception when "the grounds upon which the claim of ineffective assistance are based do not appear in the trial record." See Ly, 989 A.2d at 3 (Saylor, J., dissenting) (quoting Commonwealth v. Dancer, 331 A.2d 435, 438 (Pa. 1975)). Regardless of whether Hubbard intended to make such an inflexible pronouncement, or whether it squared with Dancer, the fact remains that subsequent case law interpreted the Hubbard rule as being inflexible, see Ly, 989 A.2d at 3-4, and this was the legal landscape governing the professional duties of appellate practitioners on the criminal defense side.

Griffin and related cases ameliorated the effect of Hubbard, and claims of trial counsel ineffectiveness which were defaulted by new counsel on direct appeal were subject to revival by a showing of "extraordinary circumstances," such as the ineffectiveness of prior counsel. Thus, it appears the Griffin line of cases developed, in part, as a response to the Hubbard requirement.

Given this state of the law in 1994, counsel preparing a direct appeal brief in a capital case at that time (or a non-capital case, for that matter) could have believed that any Strickland claims he waived under Hubbard would have been available as PCRA claims of prior counsel ineffectiveness (including his own), which amounted to "extraordinary circumstances" justifying their review. Moreover, as a practical matter, the Court at that time seemed to view global allegations of ineffectiveness (what we later came to describe as "layered ineffectiveness") essentially as pleading mechanisms that opened the door to consideration of the underlying trial level ineffectiveness claim, rather than holding petitioners to the independent showing required by Strickland. Thus, a lawyer fully in tune with the complexity of the law at the time might have felt secure that his direct appeal defaults would not make the claims more difficult to establish.

In this case, I do not know if direct appeal counsel's erroneous reference to relaxed waiver intended to account for the actual legal landscape in 1994, or if it was filtered, by the time of the PCRA hearing many years later, through subsequent experience with the relaxed waiver rule. Given these difficulties, I offer no ultimate view on whether counsel's assessment in 1994, whatever its basis, was "reasonable." However, given the actual legal landscape facing direct appeal counsel at that time, I also cannot flatly conclude that counsel's explanation was unreasonable.

Instead, these pre-Grant cases involving new counsel on direct appeal obviously will be fact-driven, and proper assessment will depend upon specific proffers and testimony from direct appeal counsel. Competing values are at play. On the one hand, Hubbard and

its progeny made clear that new counsel was obliged to raise ineffectiveness claims concerning prior counsel at the earliest opportunity; lawyers routinely raised such claims, including extra-record claims, on direct appeal; and the claims were reached and decided. See Commonwealth v. Ly, 980 A.2d 61, 101-02 (Pa. 2009) (Castille, C.J., joined by Eakin, J., concurring) (collecting cases). Thus, there unquestionably was both a duty and an **opportunity** to raise claims of trial counsel ineffectiveness -- both record-based and extra-record -- on direct appeal. Indeed, direct appeal counsel in this matter raised an extra-record claim on direct appeal. On the other hand, as our decision in Grant recognized, there were practical impediments to pursuing and developing certain extra-record claims given the constraints of the appellate process; and, there is some competing basis in law, under the Griffin line and, later under relaxed waiver, to support an assessment by direct appeal counsel that a direct appeal default of a trial level ineffectiveness claim would not result in the underlying claim escaping collateral review, or being made any more difficult to establish.

I discussed some of the relevant implications in this area in my concurrence in Ly. In that PCRA appeal, the capital appellant deliberately decided not to "layer" a claim of ineffectiveness related to the investigation and presentation of mitigating evidence at the penalty phase. The appellant argued that the underlying claim concerning trial counsel was not "record-based," and therefore, appellate counsel could not pursue the claim due to lack of funds and resources. I agreed with the Majority's rejection of this broad theory and further noted that there was nothing in this Court's prior case law suggesting that "direct appeal counsel 'could not' pursue non-record claims, or could not be faulted for failing to pursue obvious and meritorious non-record claims." Id. at 101. At the same time, I recognized that concerns with the difficulty in pursuing extra-record claims on direct appeal were part of the impetus for Grant's overruling of Hubbard. Id. I also suggested that the

fact that a claim is extra-record could be relevant in assessing appellate counsel's performance:

> The fact that a claim is partially or wholly extra-record may well be relevant to an assessment of appellate counsel's performance and to the prospect for relief, but it does not alter the fact that such claims were available before Grant, and counsel could be held to answer for unreasonable and prejudicial defaults under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Id. at 102.

I continue to believe that the sort of *per se* and generic argument respecting non-record claims that was forwarded in the Ly case -- *i.e.*, that extra-record claims of ineffectiveness implicating trial counsel are raisable as of right, without having to account for appeal counsel -- is not persuasive. As I noted in my concurrence in Ly:

> [I]t defies logic that a defense counsel would deliberately fail to raise a claim on direct appeal, thereby guilefully manipulating the appellate process, in "reliance" on the prospect of delayed, collateral review premised upon a discretionary doctrine [relaxed waiver] . And, most importantly, there has been no proffer or proof that appellant in fact "relied" upon the doctrine in defaulting claims on direct appeal; indeed, it is highly unlikely that any defense counsel could with any candor forward such a claim.

980 A.2d at 99-100. In further explication, I adverted to this Court's abrogation of relaxed waiver on direct appeal in Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003), noting that the abrogation had been made prospective only, so as to protect actual reliance interests involving direct appeals already briefed: "Freeman's concern for parties' 'reliance' on relaxed waiver was limited to those who had actually 'relied' upon the doctrine when briefing claims to this Court." Ly, 980 A.2d at 100.

The Court's further experience in these cases reveals that my prediction of what might be deemed logical may have been mistaken; which calls to mind the wisdom in Justice Holmes' observation that, "[t]he life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). I accept

that there may be cases where direct appeal counsel, in good faith, in fact relied upon some combination of relaxed waiver practice, the Griffin line of cases, or the very availability of the PCRA review process as a reason not to pursue extra-record claims. And, it may be that, in the right circumstances, counsel's decision reflects a reasonable interpretation of the law at the time the direct appeal was litigated.[9] As the U.S. Supreme Court has recently reiterated, counsel is entitled to make reasonable decisions based on the law at the time, which balances limited resources in accord with effective tactics and strategies. See Harrington v. Richter, __ U.S. __, 131 S.Ct. 770, 779 (2011).

With specific regard to the concerns of Justice Saylor, my own considered view is this. In a PCRA matter where the record reveals that new counsel on a direct appeal in the Hubbard era indeed made a conscious, deliberate and reasonable decision not to pursue extra-record claims, the proper response would not be to dismiss a subsequent, "layered" claim of ineffectiveness on grounds that appeal counsel acted reasonably; instead, we should give effect to the very reasonableness of the decision by passing through to the underlying claim of trial counsel ineffectiveness. In short, I would not deem such claims to be subject to "layering." I believe this course squares with the terms of the PCRA itself, at least when those terms are considered in light of the burden imposed by Hubbard.

Section 9544(b) provides that an issue is waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state conviction proceeding." 42 Pa.C.S. § 9544(b). Where direct appeal counsel credibly

---

[9] I recognize that this Court previously has considered a case involving testimony from direct appeal counsel that he conducted no extra-record investigation in the belief that his role was confined to review of the existing record and presentation of record-based claims. Commonwealth v. Gibson, 951 A.2d 1110, 1118 (Pa. 2008). We noted that counsel's understanding was inconsistent with prevailing law under Hubbard. Id. at 118 n.5. The scenario I discuss in text, obviously, is different from the one posed in Gibson.

testifies that he relied on extant case law and reasonably concluded that extra-record claims of trial counsel ineffectiveness would be available on collateral review, I would not view Hubbard as triggering the waiver provision of § 9544(b), and thus secondarily triggering the necessity to "layer" the claim.[10]

In this case, the Majority ultimately passes through the appeal counsel aspect of appellant's layered claims and assesses the underlying merits of the claims of trial counsel ineffectiveness, and properly rejects them on those merits. Accordingly, I join the Majority Opinion.

[10] The General Assembly's clear intent in the PCRA was to channel all collateral claims involving the criminal judgment into a single statutory review process. See 42 Pa.C.S. § 9542. Furthermore, ineffectiveness claims are specifically deemed cognizable. See 42 Pa.C.S. § 9543(a)(2)(ii). As explained more fully in Grant, perpetuation of the Hubbard rule is inconsistent with the General Assembly's intention of creating an avenue for the presentation of ineffectiveness claims on collateral review. We addressed the tension in Grant, and relieved appellants of compliance with Hubbard on direct appeal. Much of our corrective case law has been directed at ensuring that the PCRA functions as the General Assembly intended, which included reserving review of ineffectiveness claims to the collateral review phase. I view the collateral review approach I have described in text as properly balancing the directives of the PCRA, the role of our governing cases at the relevant time, what is required to prove an ineffectiveness claim under Strickland, and the experience-based complications uncovered in the crucible of the actual collateral litigation of cases involving direct appeals litigated in the Hubbard era.