[J-107-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, BAER, BALDWIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 338 CAP
	:	
Appellee	:	Appeal from the Order of the Court of
	:	Common Pleas of Schuylkill County,
	:	Criminal Division, dated April 5, 2001 at
v.	:	No. 269-1995.
	:	
	:	
MARK NEWTON SPOTZ,	:	
	:	SUBMITTED: May 20, 2002
Appellant	:	
	:	
	:	
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	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: May 2, 2006**

I join the Majority Opinion, subject to the three qualifying points set forth below.

First, with respect to Part A(2), pertaining to appellant's claim of ineffective assistance of counsel in failing to allege gender-based discrimination in jury selection, I agree with Mr. Justice Saylor that, under the majority view set forth in Commonwealth v. Uderra, 862 A.2d 74 (Pa. 2004), a petitioner asserting ineffectiveness premised upon a failure to raise a Batson[1] claim must establish actual, purposeful discrimination by a preponderance of the evidence, and cannot rely upon mere inferences. See Uderra, 862

[1] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986).

A.2d at 87. Indeed, in the absence of such a showing, the PCRA petitioner cannot begin to meet the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In addition, I agree with Mr. Justice Saylor that the fact that the defaulted underlying claim in the case *sub judice* involves gender-based discrimination, rather than racial discrimination, is immaterial to appellant's collateral attack burden. In other respects, I join the Majority's ineffectiveness/Batson analysis, mindful that the PCRA decision which is under review here was issued before Uderra was decided.

Second, with respect to Part B(3) of the Majority Opinion, Maj. slip op. at 62-66, concerning appellant's ineffectiveness claim based upon counsel's failure to forward a challenge premised upon the argument later accepted in this Court's decision in Commonwealth v. Lassiter, 722 A.2d 657 (Pa. 1998) (plurality opinion), I concur in the Majority's general analysis, with one caveat and one elaboration. The caveat is that, because the Lassiter plurality decision post-dated the trial in this matter, I am not convinced that the present claim of ineffective assistance can be said to possess arguable merit; be that as it may, however, I certainly agree that appellant has not satisfied the performance prong of Strickland in forwarding this claim premised upon subsequent authority. The point of elaboration concerns the general question of when counsel may be constitutionally faulted for failing to predict a court's future interpretation of a statute. On this question, Mr. Justice Saylor's Concurring and Dissenting Opinion cites the decision in Commonwealth v. Hughes, 865 A.2d 761 (Pa. 2004). I note that I addressed this question in my recent Concurring Opinion in Commonwealth v. Duffey, 889 A.2d 56, 74-75 (Pa. 2005) (Duffey II):

> Hughes, however, does not stand for the broad proposition that counsel may always be faulted for failing to anticipate any and all future judicial interpretations of a statute. Even accepting Hughes' … proposition as a starting point, the analysis in any particular case must depend upon considerations including the clarity and lack of ambiguity in the statutory provision; previous interpretations (if any) of the provision; and the mode of analysis set forth in the subsequent opinion/interpretation the defendant

> invokes -- *i.e.* a first interpretation, unanimous plain language reading is more likely to provide a basis for finding an ineffective "failure to vindicate" than is a reading which is bottomed upon statutory construction, over a dissenting opinion, and disapproving a prior construction. In short, whether counsel can be deemed ineffective in such an instance depends upon the circumstances; it is not an absolute.

Id. at 74 (Castille, J., joined by Eakin, J., concurring). In light of the Majority's analysis of the state of the law at the time of trial here, I am satisfied that counsel cannot be labeled ineffective for failing to predict Lassiter's interpretation of this aggravating circumstance.

Third, with regard to Part B(5), pertaining to appellant's ineffectiveness claim based on trial counsel's failure to request a jury instruction consistent with the United States Supreme Court's decision in Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187 (1994) (plurality opinion), I join the first part of the Majority's analysis, see Maj. slip op. at 70-72, which is all that is necessary to decide the claim. The balance of the analysis consists of the Majority's response to Mr. Justice Saylor's contention that the analysis of the ineffectiveness/Simmons claim must be informed by Kelly v. South Carolina, 534 U.S. 246, 122 S. Ct. 726 (2002), a case which interpreted Simmons but was decided long after the trial in this case. In my view, this new rule/retroactivity debate is academic. The question of whether a decision of the U.S. Supreme Court should be viewed as a "new rule" for federal habeas corpus review purposes is not the same as the question of whether an attorney can be deemed constitutionally ineffective under the Sixth Amendment for failing to anticipate that decision. I have addressed this point at some length in my Concurring and Dissenting Opinion in Commonwealth . v. Duffey, 855 A.2d 764 (Pa. 2004) (Duffey I), where the question was whether trial counsel could be retroactively faulted for failing to anticipate the U.S. Supreme Court's extension of the rule against references to post-Miranda[2] silence set forth in Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240 (1976), to the

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

penalty-phase circumstance in Wainwright v. Greenfield, 474 U.S. 284, 106 S. Ct. 634 (1986):

> I respectfully disagree with the Majority's conclusion that the objectionable nature of the penalty phase references to silence in this case -- which were employed not to impeach a denial of criminal responsibility with insolubly ambiguous silence, but instead as a response to a defense assertion of the mental health mitigating circumstance in the penalty phase -- was made plain by Doyle alone, and does not depend upon Wainwright v. Greenfield's extension of the Doyle rationale. I do not dispute that creative lawyers operating in the post- Doyle, pre- Wainwright v. Greenfield world could have seen the logic in the extension and advocated for such a holding, as Greenfield's lawyer did. But, the question before us is one of reasonable competence under the Sixth Amendment and the circumstances in Wainwright v. Greenfield were so obviously distinct from Doyle that I do not believe that the U.S. Supreme Court would deem a lawyer to be incompetent for having failed to anticipate that decision.
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> It is significant in this regard that the U.S. Supreme Court still has not spoken on the issue of the retroactive application of the Wainwright v. Greenfield rule, much less the question of counsel ineffectiveness for failing to anticipate that extension or, as the Majority would have it, application of the rule. … Notably, the single case that the Majority cites in arguing that Doyle commands its result, Thomas v. State of Indiana, 910 F.2d 1413 (7th Cir.1990), is distinguishable because it did not involve an ineffective assistance of counsel claim, but instead involved federal habeas corpus review of a state prisoner's preserved Doyle/Wainwright claim, which had been rejected in state court. The fact that one of the twelve Circuits believes that the rule in Wainwright v. Greenfield was not "new" for purposes of federal habeas retroactivity purposes does not mean that the Sixth Amendment automatically obliged counsel to predict that extension of the old rule-or, to predict the case that, in the view of the Thomas court, "made explicit what was … implicit." Thomas, 910 F.2d at 1416. In conflating and confusing two distinct areas of law -- comity-based limitations upon federal courts retroactively applying new constitutional rules to state trials upon habeas review versus substantive ineffective assistance of counsel standards under the Sixth Amendment -- which are aimed at very different problems, the Majority goes astray. Though Wainwright v. Greenfield certainly derived from Doyle, it extended Doyle to a new and distinct scenario, and therefore, counsel here cannot be faulted, in hindsight, for failing to anticipate the extension. Thus, appellant's underlying claim respecting trial counsel fails as a matter of law.

Duffey, 855 A.2d at 780-81 (Castille, J., joined by Eakin, J., concurring and dissenting). See also id. at 779 ("Neither lawyers nor trial judges are expected or required to be clairvoyant. Deeming counsel to be ineffective for failing to forward an objection based upon a principle of law that was not then-governing is the very essence of the sort of perverse second-guessing which is not permitted under Strickland and its progeny.")

In my view, the question of whether Kelly involves a "new rule" is relevant only to a situation where the defendant claims that he actually raised and preserved a Kelly-type claim; essentially, the direct review paradigm. Here, appellant did not raise the claim; the Kelly aspect of his current claim (to the extent there is one) is reviewable only as a distinct claim sounding in the ineffective assistance of his trial counsel in failing to predict Kelly. For purposes of assessing that claim, counsel's performance must be viewed in light of a legal landscape that cannot include the Kelly decision itself. And, as the Majority has amply demonstrated, see Maj. slip op. at 75-77, counsel acted reasonably in light of the existing landscape. In my view, that is all that need be said to resolve the claim forwarded.

Finally, I should note that, even if I could agree with the assumption that animates the dispute between the Majority and Mr. Justice Saylor -- *i.e.*, that the question of ineffective assistance is identical to the question of what is a new rule in an instance involving case law development -- it would be difficult to view Kelly as anything but a new rule for Strickland purposes, rather than a retroactively-applicable "clarification" of Simmons' existing rule. This is so because Simmons was a plurality decision. By definition, it is difficult to view such a decision as commanding any particular interpretation, "clarification," or expansion in a future case involving different facts. In this regard, the High Court's decision in O'Dell v. Sutherland, 521 U.S. 151, 117 S. Ct. 1969 (1997), which was also decided after the trial in this matter, is instructive. In O'Dell, the Court considered whether Simmons itself was a "new" rule for federal habeas purposes. In answering that

question in the affirmative, the Court began its analysis by emphasizing that Simmons was a mere plurality decision: "We observe, at the outset, that Simmons is an unlikely candidate for old-rule status [because] … there was no opinion for the Court." Id. at 159, 117 S. Ct. at 1974. By the same token, the Simmons plurality decision would be an odd candidate to become a settled conduit by which counsel could be deemed retroactively ineffective based upon a future interpretation of the plurality's non-majority "rule."