[J-121-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 400 CAP
	:	
Appellee	:	Appeal from the Order of the Court of
	:	Common Pleas of Philadelphia County
	:	entered on December 26, 2002 dismissing
v.	:	PCRA relief at Nos. 1841-1848 May Term
	:	1994
	:	
SAMUEL CARSON,	:	
	:	
Appellant	:	SUBMITTED: May 5, 2004

CONCURRING OPINION

MADAME JUSTICE BALDWIN **DECIDED: December 27, 2006**

I join the majority opinion, with the exception of Part III, Section E, entitled "Simmons Charge," where I only concur in the result. I write separately because I disagree with the majority's analysis in that section. I believe the prosecutor's use of language that stated "enough is enough," "you had your chance," and "[w]e are not going to let anymore people be injured" unquestionably placed Appellant's future dangerousness at issue in this case. Nevertheless, I fail to see how prejudice necessarily resulted from trial counsel's failure to request the instruction in this case. Consequently, while we employ different approaches, I am compelled to reach the same result as the majority.

In order to succeed on a claim of ineffective assistance of counsel, Appellant must demonstrate that: (1) the underlying claim has arguable merit; (2) counsel had not reasonable basis for his action or inaction; and (3) prejudice resulted from counsel's

deficient performance. Commonwealth v. Pierce, 515 Pa. 153, 157-59, 527 A.2d 973, 975-77 (1987). Here, Appellant alleges that his trial counsel was ineffective for failing to request a jury instruction pursuant to Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187 (1994) (plurality), which would have instructed the jury that life imprisonment means life in prison without the possibility of parole. Appellant further argues that appellate counsel was ineffective for failing to raise this alleged error by trial counsel.

In Simmons, a plurality of the United States Supreme Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." Id. at 156, 114 S.Ct. at 2190. As the majority correctly notes, this Court has held that a Simmons instruction is mandated only when: (1) the prosecutor places the defendant's future dangerousness in issue; and (2) the defendant requests the instruction. See Majority Opinion, slip op. at 71 (citations omitted). The majority goes on to find that Appellant's future dangerousness was not placed at issue, and, therefore, Appellant's claim is without arguable merit. I disagree.

The contested language was part of the prosecutor's closing argument. It reads as follows:

> The third aggravating circumstance is that history of felony convictions and when the legislature passed that they were saying to you and to me enough is enough. Mr. Carson, you had your chance. We are not going to let anymore people be injured.
>
> [Three] felonies, ladies, and gentlemen, two of them came out of the same circumstances with guns, with knives. One of them a [fourteen]-year-old. Enough is enough.

N.T. 7/17/1995 at 81.

The majority relies on Commonwealth v. May, 551 Pa. 286, 710 A.2d 44 (1998) in finding that the above language did not inject Appellant's future dangerousness into the case. Rather, the majority concludes that the prosecutor merely focused on Appellant's past conduct and linked that conduct to the purpose of the statutory aggravating circumstance of significant history of violent felony convictions.[1] See Majority Opinion, slip op. at 72. To the contrary, May was not a case that addressed the question before us in the instant matter, because the Appellant in May failed to challenge, or even identify, specific language used by the prosecutor that placed his future dangerousness at issue. We held that no Simmons instruction was required. Stated otherwise, although we rejected the "future dangerousness" argument in May as "meritless," that determination resulted from the legal argument presented in that case. May contended that simply arguing the aggravating circumstance of a significant history of violent felony convictions necessarily injected future dangerousness of a criminal defendant into the case. Id. at 291, 710 A.2d at 47. We did not hold, nor infer, however, that language used while arguing that specific aggravating factor could never amount to placing a defendant's future dangerousness at issue. Thus, May is not dispositive of the matter sub judice. If that were the case, a prosecutor could essentially place future dangerousness at issue, but couch it in an argument pertaining to his history of felony convictions, and do so with impunity. May requires no such result.

In my view, as aforementioned, the prosecutor's argument placed Appellant's future dangerousness at issue. The use of the phrase, "[w]e are not going to let anymore people be injured," coupled with an argument regarding Appellant's prior felonies can only be interpreted to mean that Appellant has committed violent felonies in the past, and unless he

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[1] See 42 Pa.C.S. § 9711(d)(9).

is executed, he will continue to commit violent felonies. Together with the use of the words "enough is enough," and ". . . you had your chance," the undeniable effect of the prosecutor's closing argument was to place Appellant's future dangerousness before the sentencing jury. While the prosecutor did not specifically state that Appellant would be a danger if he was not executed, such language is not required to warrant the instruction. See Commonwealth v. Chandler, 554 Pa. 401, 414-15, 721 A.2d 1040, 1046 (1998) (Simmons instruction was necessary even though the prosecutor did not use specific future dangerousness language. The absence of precise wording could not overcome the effect of the prosecutor's statements). Consequently, I would find that Appellant's claim has arguable merit, meeting the first prong of the Pierce standard for reviewing claims of ineffective assistance of counsel.

I also depart from the majority's finding that even if Appellant's future dangerousness was implicated, "it is doubtful that reasonable attorneys would have believed a Simmons instruction would be warranted under the state of the law at the time [A]ppellant was on trial." See Majority Opinion, slip op. at 72. The majority seemingly interprets Simmons to encompass only the situations where a prosecutor argues future dangerousness as the sole aggravating factor in a capital sentencing phase, and that this concern was unknown prior to the decision in Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726 (2002), which was decided years after Appellant's trial. Kelly expanded Simmons to include a broader array of circumstances that place future dangerousness at issue and require the instruction. The language in Simmons, however, does not support the majority's narrow interpretation.

Although Simmons was a plurality opinion, the core holding is not unclear. Indeed, seven Justices found that due process required informing the jury, either by an instruction or by defense rebuttal, that life in prison means life without parole if future dangerousness of the defendant is injected into the case. See Simmons, 512 U.S. at 156, 114 S.Ct. at

2190;[2] id. at 172, 114 S.Ct. at 2198 (Souter, J., concurring);[3] id. at 174, 114 S.Ct. at 2199 (Ginsburg, J., concurring); id. at 178, 114 S.Ct. at 2201 (O'Conner, J., concurring).[4] In my view, a reasonable attorney, particularly one who undertakes the immense responsibility of representing a capital defendant, should have understood Simmons as warranting a request for a "life means life" jury instruction, if future dangerousness is at issue. Further, Simmons was decided over one year before the commencement of Appellant's trial. Moreover, prior to Appellant's trial, this Court expressly discussed Simmons in Commonwealth v. Christy, 540 Pa. 192, 656 A.2d 877 (1995) (holding that Simmons did not apply retroactively). In Christy, we stated, "Simmons mandates that where future dangerousness is at issue and a specific request is made by the capital defendant, it is a denial of due process to refuse to tell a jury what the term 'life sentence' means." Christy, 540 Pa. at 216, 656 A.2d at 889. Therefore, at the time of Appellant's trial, trial counsel had the benefit of the Supreme Court's decision in Simmons and a decision from this Court interpreting the Simmons holding to require a "life means life" instruction. Trial counsel failed to do so in this case. For these reasons, the majority's conclusion that Appellant's claim lacks arguable merit is puzzling to say the least.

More importantly, the text of Simmons does not support a limited application of the case to only situations where a prosecutor specifically argues future dangerousness or where it is the sole aggravating factor argued. Rather, the Court reached its decision based on general arguments of a prosecutor. The lead opinion employed the following

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[2] Justice Blackman announced the judgment of the Court, which was joined by Justice Stevens, Justice Souter, and Justice Ginsburg.

[3] Justice Souter's concurring opinion was joined by Justice Stevens.

[4] Justice O'Conner's concurring opinion was joined by Chief Justice Rehnquist and Justice Kennedy.

language, ". . . particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury . . . " Simmons, 512 U.S. at 164, 114 S.Ct. at 2194 (emphasis added); "[t]he state raised the specter of petitioner's future dangerousness generally . . . " id. at 165, 114 S.Ct. at 2194 (emphasis added); and "[t]he [s]tate may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness . . . " id. at 171, 114 S.Ct. at 2198 (emphasis added). See also Chandler, supra.

In light of the above, I do not agree that the state of the law at the time of Appellant's trial was in such a state of flux that no reasonable attorney would have believed a Simmons instruction would have been warranted. To the contrary, a competent capital defense attorney should have requested the instruction, particularly when armed with the Simmons decision decided over a year prior to trial and a subsequent decision by this Court. Accordingly, I would find that trial counsel's failure to request a "life means life" instruction was without a reasonable basis. However, I concur in the result because Appellant failed to demonstrate that he suffered prejudice as a result of his counsel's failings. Appellant merely states that he was prejudiced because his sentence was not reversed. Brief for Appellant, at 79. Such a bald assertion is insufficient to meet the prejudice prong of the Pierce standard.

Therefore, while I recognize that this is case is not a direct appeal, rather a claim of ineffective assistance of counsel under the PCRA,[5] I still write separately to restate, and adopt, the position taken by former members of this Court in the past, that a Simmons instruction should be mandated in every capital case, regardless of whether the prosecutor expressly or impliedly places a defendant's future dangerousness at issue, or whether capital defense counsel formally requests the instruction. See Commonwealth v. Clark,

[5] 42 Pa.C.S. §§ 9541-9546.

551 Pa. 258, 283-86, 710 A.2d 31, 43-44 (1998) (Nigro and Zappala, J.J., concurring).[6] I announce my position here because I believe that mandating the instruction will eliminate the endless stream of litigation that accompanies this issue, including claims of ineffective assistance of counsel.

As the United States Supreme Court has recognized, "a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." Simmons, 512 U.S. at 162, 114 S.Ct. at 2193, citing Jurek v. Texas, 428 U.S. 262, 275, 96 S.Ct. 2950, 2958 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.) (noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what sentence to impose."). I do not find it necessary to require the prosecutor to inject future dangerousness into the case or require defense counsel to make a formal request for an issue that, I believe, is implicated in any death penalty sentencing hearing. Mandating the instruction in every case would not be an absurdity. In fact, at the time Simmons was decided, Pennsylvania was only one of three states that had a life without parole sentencing alternative that did not mandate the instruction. See Shafer v. South Carolina, 532 U.S. 36, 49 n.4, 121 S.Ct. 1263, 1271 n.4 (2001). Pennsylvania's status remains unchanged. Lastly, it is not only reasonable, but also likely, that whether a capital defendant will be released on parole if given life imprisonment will enter into the minds of deliberating juries. I see no reason to hide the fact that life imprisonment, in Pennsylvania, means life without parole. I cannot accept the premise that the prosecution would be prejudiced by this simple, relevant truth. Hiding the truth is antithetical to our system of justice. This is of the utmost concern in capital cases.

[6] Former Chief Justice Flaherty joined J. Nigro's concurring opinion.

Mr. Justice Baer joins this concurring opinion.