

**[J-131-1999]**  
**THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 25 W.D. Appeal Docket 1999
	:	
Appellee,	:	Appeal from the Order of the Superior
	:	Court entered on July 7, 1998, at No.
	:	1600PGH97 affirming the Judgment of
v.	:	Sentence of the Court of Common Pleas
	:	of Cambria County, Criminal Division,
	:	entered on March 21, 1994, at Nos. 1391,
FRANK COSTA,	:	1392 & 1393-1993.
	:	
Appellant.	:	724 A.2d 953 (Pa. Super. 1998)
	:	
	:	SUBMITTED: September 14, 1999
	:	
	:	

**DISSENTING OPINION**

**MR. JUSTICE CASTILLE**

**DECIDED: DECEMBER 20, 1999**

It is well established that, in order for petitioner to prevail on a claim of ineffectiveness of counsel, he must show that: (1) the underlying claim is of arguable merit; (2) the particular course of conduct lacked some reasonable basis designed to effectuate his interests; and (3) counsel's ineffectiveness prejudiced him. Commonwealth v. Howard, 538 Pa. 86, 93, 645 A.2d 1300, 1304 (1994). I agree with the majority that the Commonwealth erred in asking a question that drew attention to appellant's post-arrest silence and appellant's claim is, therefore, of arguable merit. However, I believe that, in the context in which the testimony was made, there was a reasonable basis for counsel not to object to the question and that appellant was not prejudiced by the question. I therefore dissent.

During his direct examination of Officer Rok, the officer who filed the charges against appellant, the prosecutor elicited testimony that appellant had made a statement to Officer Rok following the filing of charges involving victim Robert Williams. In that statement, appellant stated that Williams was making up the charges because appellant had not bought Williams a car that Williams believed appellant owed him. N.T. 3/7/99 at 25. The prosecutor later asked Officer Rok if appellant said anything when charges were subsequently filed involving a second victim, Terry Foster. To this question, the officer responded in the negative. N.T. 3/7/99 at 27. However, on cross-examination, trial counsel elicited from Officer Rok that he had not questioned appellant at all concerning the charges relating to Foster or the third victim, Eric McAfee, and that, in fact, the only time that Officer Rok spoke to appellant was when appellant was arrested on the charges relating to Williams, at which time appellant denied the charges relating to Williams. N.T. 3/7/99 at 32, 34-36.

Counsel's decision to clarify for the jury that appellant was never given an opportunity to make a statement to Officer Rok relating to the charges involving Foster rather than object to the statement was a reasonable strategy. By doing so, counsel was able to emphasize that, at the only opportunity appellant had to speak to Officer Rok, he denied any wrongdoing. Thus, rather than the jury being directed to disregard an inference to post-arrest silence, counsel dispelled the implication that appellant had remained silent in the face of questioning. Because I believe that counsel had a reasonable basis for the course of conduct chosen, appellant has failed to satisfy the second prong of the ineffectiveness test.

Furthermore, I do not believe that appellant was prejudiced by the challenged question and answer. In order to establish prejudice, appellant must show that, but for counsel's error, there is a reasonable probability that the outcome of the proceedings would have been different. Commonwealth v. Kimball, 555 Pa. 299, 724 A.2d 326 (1999). In this

case, trial counsel's cross-examination of Officer Rok dispelled any impression created by the prosecutor's improper question that appellant had refused to speak to police following his arrest. Because it was clear at the conclusion of Officer Rok's testimony that appellant was never presented with the opportunity to make a statement to police after the charges relating to Foster were filed, Officer Rok's statement that appellant had not said anything following the filing of those charges would not have influenced the outcome of the case. Therefore, I believe that appellant has failed to satisfy the third prong of the ineffectiveness test.

Because appellant has failed to establish that counsel had no reasonable basis for failing to object to the improper question regarding his post-arrest silence and because appellant was not prejudiced by that question, he has failed to establish that counsel was ineffective. Therefore, I would affirm.

Mr. Justice Zappala and Madame Justice Newman join this dissenting opinion.