[J-193-1997]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	38 M.D. Appeal Dkt. 1997
	:	
Appellant,	:	Appeal from the Order of the Superior
	:	Court entered September 19, 1996 at No.
	:	952PHL95 Reversing/Vacating and
v.	:	Remanding the Order of the Court of
	:	Common Pleas of Northumberland
	:	County, entered February 15, 1995 at
DANIEL KIMBALL,	:	Nos. 30 C 1989 and 31 C 1989.
	:	
Appellee.	:	683 A.2d 666 (Pa. Super. 1996).
	:	
	:	Submitted: October 23, 1997

CONCURRING OPINION

MR. JUSTICE CASTILLE: **DECIDED: JANUARY 22, 1999**

I agree with the majority that appellee failed to establish trial counsel's ineffectiveness pursuant to the standard set forth in Section 9543(a)(2)(ii) of the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541 et seq. However, I believe that the majority has misinterpreted the applicable standard for determining claims of ineffective assistance of counsel under Section 9543(a)(2)(ii). Therefore, I concur only in the result reached by the majority.

At the outset, it is important to note that there exists no constitutional entitlement to collateral appeal at the state level, and no constitutional entitlement to counsel if a state elects to furnish by statute the right to a collateral appeal. Pennsylvania v. Finley, 481 U.S. 551, 557, 107 S. Ct. 1990, 1994, 95 L. Ed. 2d 539 (1987). Since there is no underlying Constitutional right to appointed counsel in state post-conviction

proceedings, there also is no Constitutional right to insist on procedures which are designed solely to protect that underlying right, such as threshold requirements for the performance of counsel in state post-conviction proceedings. Id. As the United States Supreme Court succinctly concluded in Finley:

> In Pennsylvania, the State has made a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position -- at trial and on first appeal as of right. In this context, the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following . . . strict procedural guidelines . . . .

Id. at 559, 107 S. Ct. at 1995.

Consequently, the concern voiced by Mr. Justice Cappy in Commonwealth v. Buehl, 540 Pa. 493, 658 A.2d 771 (1995), that a strict interpretation of the language at issue in the PCRA might result in a violation of the Sixth Amendment's guarantee of effective assistance of counsel, is inapposite, since there is no Sixth Amendment entitlement at all to counsel at the collateral appeal stage. Because no constitutional issues are implicated by this matter, this Court is confronted only with an issue of interpretation. Specifically, this Court must decide what standard the Legislature has created for reviewing claims of ineffective assistance of counsel under section 9543(a)(2)(ii) of the PCRA. As always, this Court's function in matters of statutory interpretation is, first, to attempt to discern the plain meaning of the language at issue. Commonwealth v. Hagan, 539 Pa. 609, 615, 654 A.2d 541, 544 (1995). The language of section 9543(a)(2)(ii) provides:

> § 9543. Eligibility for relief
>
> **(a) General rule. --**To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:
>
> . . .
>
> (2) That the conviction or sentence resulted from one or more of the following:

> . . .
>
> (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

Thus, by the plain words of the statue at issue, the Legislature intended to confine relief to those instances in which the ineffective assistance of counsel undermined the reliability of the process by which truth is determined, such that the final adjudication of guilt or innocence is itself unreliable. However, the majority concludes that relief is warranted in any instance in which a "reasonable probability" exists that the outcome of the proceedings would have been different but for counsel's ineffectiveness. Slip Op. at 16. By putting forth this standard, the majority deviates from the words of the statute in two significant and insupportable ways.

First, the majority's invocation of a mere "reasonable probability" standard stands in plain contravention to the more stringent standard which the Legislature enacted in section 9543(a), which requires the unreliability of the adjudication of guilt, stemming from counsel's ineffectiveness, to be demonstrated by a "preponderance of the evidence." It is certainly possible to demonstrate that there is a reasonable probability that something is true without being able to demonstrate its truth by a preponderance of the evidence. Thus, the standard imposed by the majority is less exacting in degree than that imposed by the Legislature.

However, I am less concerned by the fact that the majority has lowered the degree of proof from that required by the statute itself than I am that the majority has altered the qualitative nature of the facts which must be proven as a predicate for relief. The majority focuses exclusively on whether the outcome of the proceedings would

have been different but for counsel's ineffectiveness, overlooking the fact that the statute itself focuses on whether the reliability of the truth-determining process was compromised. Although at first blush these two concepts might seem coterminous, the United States Supreme Court has properly pointed out that there are instances in which counsel's ineffectiveness would have affected the outcome of the proceedings without rising to the level where it would have affected the integrity of the truth-determining process. In Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), the United States Supreme Court examined a situation in which trial counsel had been deemed ineffective for failing to object in a capital case to the use of the aggravating circumstance that the murder was committed in the course of a robbery. The facts which substantiated this aggravating circumstance had already been used to establish the defendant's guilt at the underlying trial, in which the prosecutor had predicated guilt on a felony murder theory due to the fact that the murder was committed during a robbery. At the time, such "double-counting" of an aggravating circumstance at the penalty phase when it had already been used to establish an element of the crime at the guilt phase had been deemed unconstitutional in the Eighth Circuit.[1] Accordingly, collateral counsel established that a different result would have obtained in the sentencing proceeding but for trial counsel's ineffectiveness in failing to raise the "double-counting" issue, since only one aggravating circumstance had been

[1] By the time the appeal had advanced to the United States Supreme Court, the Eighth Circuit had reversed itself and held that "double-counting" an aggravating circumstance at the penalty phase was constitutionally permissible. However, the United States Supreme Court assumed that, at the time of the sentencing hearing in Lockhart, the defendant would have been entitled to relief on the double-counting issue under the applicable law.

established, and since that aggravator was legally invalid at the time of the sentencing proceeding. Nevertheless, the United States Supreme Court denied relief, stating as follows:

> Under our decisions, a criminal defendant alleging prejudice must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable . . . Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Id. at 369, 113 S. Ct. at 842-43 (emphasis added).

Thus, the United States Supreme Court has provided clear instruction that outcome determination and the reliability of the adjudication of guilt are two separate concepts and should be treated as such for purposes of a claim of ineffective assistance of counsel. Nevertheless, overlooking this clear admonition, the majority asserts: "Reliability of the adjudication of guilt or innocence and the probability that counsel's ineffectiveness caused a different outcome of the proceedings are concepts so closely intertwined and commonly-rooted in Strickland that we refuse to separate them." Slip. Op. at 16.

I believe that, in addition to the situation which confronted the United States Supreme Court in Lockhart, the majority overlooks a great number of other potential situations in which the ineffectiveness of trial counsel would not implicate the reliability of the process by which truth is determined, even though a different verdict would have obtained but for that ineffectiveness. For example, a situation could arise in which the prosecutor's central piece of inculpatory evidence, which demonstrated the guilt of the accused beyond all reasonable doubt, was obtained through execution of an overly

broad search warrant. In such a situation, if trial counsel neglected to move for the suppression of such evidence, an appellate court could easily conclude that the outcome of the trial would have been different but for trial counsel's ineffectiveness in failing to move to suppress the evidence. However, the reason such evidence would be suppressed would not be that the admission of the evidence undermined the reliability of the process by which truth is determined, but rather that admission of evidence obtained through an overly broad search warrant implicated the defendant's privacy rights. Indeed, the admission at trial of such highly probative and relevant evidence would actually serve to enhance the reliability of the process by which truth is determined, even though it would properly be deemed excludible for reasons unconnected to the reliability of the truth-determination process.

In the context of the foregoing hypothetical, our Legislature has plainly determined that a collateral attack on judgment of sentence is not an appropriate vehicle for the vindication of privacy rights which are implicated by counsel's ineffectiveness, even if the violation of those rights would have resulted in dismissal of the charges had a timely motion to suppress been filed. Only in the narrow circumstances where counsel's ineffectiveness undermined the reliability of the process by which the truth is ascertained does the proponent of collateral relief establish an entitlement to such relief under the PCRA.

By limiting ineffectiveness claims in this manner, the Legislature has carefully balanced the interests of convicted defendants with those of the Commonwealth. The Commonwealth has a compelling interest in achieving closure in criminal matters once the judgment of sentence has been affirmed on direct appeal, as such closure

preserves the precious resources of both its law enforcement arm and its judicial arm, and also spares victims and their families the specter of never-ending collateral attacks based on procedural technicalities that do not implicate the defendant's actual guilt or innocence. At the same time, the Legislature has ensured that a convicted defendant is always provided a forum in which to demonstrate that counsel's ineffectiveness resulted in the conviction of an innocent person.[2]

In sum, I believe that the Legislature elected to narrowly confine ineffectiveness claims on collateral review, and that the Legislature acted well within its province by doing so, both constitutionally and also as a matter of policy. Because I believe that this Court has exceeded its proper role by neglecting to implement the standard which I believe the Legislature chose to employ in this context, I concur only in the result reached by the majority.[3]

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[2] It is important again to note that the Legislature did not have to provide such a forum at all. By tampering with the conditions that the Legislature placed on the statutory right of collateral review, this Court risks the possibility that the Legislature will eliminate the right altogether.

[3] I note that the Legislature could easily cure the Court of the misapprehension under which I believe it is laboring by amending section 9543(a)(2)(ii) to provide for collateral relief only in those cases in which it is more likely than not that the ineffective assistance of counsel resulted in the conviction of an individual who is actually innocent in fact. There could be no misinterpreting such a clearly expressed standard, and, as explained at the outset of this Concurring Opinion, such a standard would not pose any constitutional problems.

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