

[J-201-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 384 CAPITAL APPEAL DOCKET
	:	
Appellee	:	Appeal from the Order entered on June
	:	18, 2002 in the Court of Common Pleas,
v.	:	Criminal Division of Philadelphia County,
	:	dismissing the PCRA petition at No. 1156
	:	May Term 1986.
	:	
RUSSELL COX,	:	
	:	
Appellant	:	SUBMITTED: November 6, 2003
	:	
	:	
	:	
	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE

DECIDED: December 22, 2004

I join the Majority Opinion in its entirety, writing separately only to further address appellant’s claim of counsel ineffectiveness for failing to argue on direct appeal that the penalty phase jury charge ran afoul of Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988), a decision which was rendered over a year after the verdict in this case. Appellant did not have the prescience to predict the new rule in Mills and thus lodged no contemporaneous objection to the jury charge on what would later come to be known as “Mills” grounds. Appellant now faults his appeal counsel for failing to seek the benefit of

Mills on appeal, notwithstanding the waiver, by invoking the capital direct appeal relaxed waiver doctrine.¹

For purposes of deciding this collateral appeal, the Majority assumes *arguendo* that appellant indeed could have secured direct appellate review of his defaulted Mills claim by simply invoking the relaxed waiver doctrine. It is of no consequence to assume reviewability at this stage because, as the Majority notes, appellant's Mills claim would have failed on the merits under this Court's existing authority. Slip op. at 29-31. I join the Majority on this particular point because I have no objection to assuming certain points in order to facilitate a disposition, particularly given the typically prolix filings with which this Court is burdened upon capital PCRA review. But, since this Court is likely to encounter this new type of assault upon direct appeal counsel in capital cases with increasing frequency, I believe there are two points worth making about the point assumed by the Majority. First, it is pure speculation whether the Court would have entertained a particular defaulted claim based upon new constitutional authority under the discretionary relaxed waiver doctrine. Indeed, this Court has held that counsel cannot be deemed ineffective on appeal for failing to seek the retroactive benefit of a new constitutional rule that was announced while the appeal was pending, where the claim was not preserved below. Commonwealth v. (Aaron) Jones, 811 A.2d 994, 1005 (Pa. 2002).

Second, there is a fundamental substantive issue that would have to be resolved in the defendant's favor before relief could be granted upon a claim that direct appeal counsel was ineffective in failing to invoke relaxed waiver to seek the benefit of a new federal constitutional rule which was not in existence at the time of trial, and the benefit of which

¹ The discretionary relaxed waiver doctrine formerly applicable in capital cases has been abrogated both on direct review, see Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003), and on PCRA review. See Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998).

was not sought below. Specifically, there is a strong argument to be made that such an ineffectiveness claim should be governed by the heightened prejudice standard set forth in Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838 (1993), rather than the prejudice standard governing more typical Strickland claims. The Lockhart rule is somewhat obscure, and to understand properly its relationship to Strickland, it is best simply to reproduce the High Court's most recent description of the doctrine:

It is true that while the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as Strickland itself explained, there are a few situations in which prejudice may be presumed. ... And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate "prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. Nix v. Whiteside, 475 U.S. 157, 175-176, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

Similarly, in Lockhart we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by our opinion in Strickland. The death sentence that Arkansas had imposed on Bobby Ray Fretwell was based on an aggravating circumstance (murder committed for pecuniary gain) that duplicated an element of the underlying felony (murder in the course of a robbery). Shortly before the trial, the United States Court of Appeals for the Eighth Circuit had held that such "double counting" was impermissible, see Collins v. Lockhart, 754 F.2d 258, 265 (1985), but Fretwell's lawyer (presumably because he was unaware of the Collins decision) failed to object to the use of the pecuniary gain aggravator. Before Fretwell's claim for federal habeas corpus relief reached this Court, the Collins case was overruled. Accordingly, even though the Arkansas trial judge probably would have sustained a timely objection to the double counting, it had become clear that the State had a right to rely on the disputed aggravating circumstance. Because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, we held that his claim did not satisfy the "prejudice" component of the Strickland test.

Cases such as Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), and Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), do not justify a departure from a straightforward application of Strickland when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him. In the instant case, it is undisputed that Williams had a right--indeed, a constitutionally protected right--to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.

Williams v. Taylor, 529 U.S. 362, 391-93, 120 S.Ct. 1495, 1512-13 (2000) (citations and footnotes omitted); accord Lockhart, 506 U.S. at 372, 113 S.Ct. at 844 (prejudice component of Strickland test “focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. ... Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.”) (citations omitted).

As the Majority notes, the Supreme Court has held that Mills established a new constitutional rule, which is not entitled to retroactive operation upon collateral attack. Beard v. Banks, ___ U.S. ___, 124 S.Ct. 2504 (2004). Appellant’s trial in this case, which pre-dated Mills, unquestionably was conducted in conformity with governing pre-Mills law: he was deprived of no substantive or procedural trial right to which the law entitles him. Moreover, since Mills does not apply retroactively to those who failed to preserve a Mills claim for direct review, appellant was not entitled to its benefit on appeal once he had failed to lodge an objection below. In such a circumstance, it would be an arbitrary windfall to allow the doctrine of relaxed waiver -- a doctrine since abrogated by this Court no less than the Collins rule at issue in Lockhart was eventually overturned -- and ineffective assistance

of counsel to permit appellant to upset a final verdict which was fundamentally fair when rendered.²

The meaning and significance of the Beard v. Banks decision in Pennsylvania capital prosecutions is that trials which preceded Mills, such as this one and the prosecution in Beard v. Banks, should not be subject to Mills review unless the defendant actually lodged an objection to the charge upon grounds which are the same as those grounds ultimately accepted in Mills. Where the claim was defaulted at trial, as here, no colorable claim of ineffective assistance of counsel arises.

Mr. Justice Eakin , who also joins the majority, joins this concurring opinion.

² It might be a different circumstance if the defendant could point to an identically situated appellant, whose direct appeal counsel in fact secured the benefit of the new rule by invoking relaxed waiver, resulting in an award of appellate relief. Such is not the case here.