

[J-207-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 368 CAP
	:	
Appellee	:	Appeal from the Order entered on January
	:	18, 2002 in the Court of Common Pleas,
v.	:	Criminal Division of Lehigh County,
	:	denying PCRA relief at No. 1895/1995
	:	
	:	
GEORGE IVAN LOPEZ,	:	
	:	SUBMITTED: October 18, 2002
Appellant	:	
	:	
	:	

CONCURRING OPINION

MR. CHIEF JUSTICE CAPPY

DECIDED: July 22, 2004

I join the majority opinion in all relevant respects. I write separately only to distance myself from the conclusion regarding Appellant’s claim that he was improperly precluded from arguing that the jury should consider his co-conspirators’ sentences as a mitigating factor. After correctly analyzing this as a claim that appellate counsel was ineffective for failing to raise an allegation of trial court error, the majority inexplicably concludes that “trial counsel was not ineffective for failing to pursue this issue...” Majority slip opinion at 8. The reference to trial counsel’s ineffectiveness is inapt since the PCRA petition and the brief before this court raise this as a derivative allegation of trial court error, apparently recognizing, as the majority fails to, that the alleged error that Appellant is complaining about is the trial court’s decision to “preclude” the admission of this evidence.

To the extent that Appellant attempts to also raise this as a claim of trial counsel ineffectiveness in his brief before this court, this claim is waived for failing to include it in the PCRA petition. Moreover, this claim is not properly developed pursuant to the three-prong Pierce¹ standard of ineffectiveness. Accordingly, the majority opinion should merely base its conclusion on the fact that Appellant cannot establish trial court error, and thus, any claim of appellate counsel ineffectiveness necessarily fails.

Mr. Justice Nigro joins this concurring opinion.

¹ Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987).