[J-21-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 6 EAP 2005
	:	
Appellee	:	
	:	Appeal from the Judgment of Superior
	:	Court entered on 2/4/04 at 3511 EDA
v.	:	2001 quashing the appeal from the Order
	:	of the Court of Common Pleas,
	:	Philadelphia County, Criminal Division at
TONY L. BENNETT,	:	9007-00010 2/2 and 9007-0018-0025
	:	
Appellant	:	
	:	SUBMITTED: January 19, 2006

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: August 23, 2007**

The majority repeatedly invokes the plain meaning of Section 9545(b)(1)(ii) of the Post Conviction Relief Act, 42 Pa.C.S. §9545(b)(1)(ii) (providing for an exception to the PCRA's one-year time bar when "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence"), in support of its conclusion that the language of the statute affords the courts jurisdiction to review an otherwise untimely post-conviction claim whenever a post-conviction petitioner alleges that there were some facts that were unknown to him and that he exercised due diligence. See, e.g., Majority Opinion, slip op. at 11, 13. The primary difficulty with the majority's analysis in this regard is that a consistent plain-meaning approach to Section 9545(b)(1)(ii) should also subsume an equally

straightforward approach to the words that the statute employs, including the word "claim."

Section 9543 of the PCRA, entitled "Eligibility for relief," covers the range of claims that may give rise to relief under the statute. Section 9543, on its plain terms, is written to require, as the operative element of each cognizable claim, pleading and proof "[t]hat the conviction or sentence resulted from": 1) a constitutional violation which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place (or that yielded "prejudice"); 2) ineffective assistance of counsel yielding prejudice; 3) an unlawfully induced plea of guilt where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent; 4) improper obstruction by government officials of the petitioner's right of appeal, in certain circumstances; 5) the unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome if it had been introduced; 6) the imposition of a sentence greater than the lawful maximum; or 7) a proceeding in a tribunal without jurisdiction. 42 Pa.C.S. §9543(a)(2) (emphasis added).

It is apparent that Appellant's allegation of ineffective assistance of his post-conviction counsel for failure to file a brief does not qualify as a "claim" that is cognizable under the express language of the PCRA, both because Appellant's conviction and sentence did not result from such ineffectiveness, and because the asserted prejudice does not go directly to the truth-determining process, as the language of the PCRA contemplates. Correspondingly, as a matter of a pure plain-meaning reading of the statute, Appellant's assertion of ineffectiveness in the post-conviction appeal process also is not the subject of Section 9545(b)(1)(ii)'s exception to

the one-year time bar, which clearly contemplates a "claim," of a type such as would be cognizable under the claim provision of the PCRA. 42 Pa.C.S. §9545(b)(1)(ii).

I recognize that this type plain-meaning approach to Section 9543 was adopted by the Superior Court in Commonwealth v. Petroski, 695 A.2d 844 (Pa. Super. 1997), and was overturned by our decisions in Commonwealth v. Chester, 557 Pa. 358, 733 A.2d 1242 (1999), and Commonwealth v. Lantzy, 558 Pa. 214, 736 A.2d 564 (1999). The problem that we encountered in Chester and Lantzy stems from the fact that the Post Conviction Relief Act subsumes incompatible objectives. On the one hand, the Legislature expressly intended for all forms of post-conviction relief, including relief available under traditional habeas corpus doctrine, to be included within the PCRA's jurisdictional and procedural framework. See 42 Pa.C.S. §9542. On the other hand, under the plain language of the PCRA, the statute narrows the categories of claims as to which relief is available, excluding, for example, a claim of ineffective assistance of counsel for failure to file a direct appeal (or, more directly relevant to the present case, ineffective assistance of PCRA counsel for failure to file a brief). See 42 Pa.C.S. §9543(a)(2). The two objectives cannot be wholly reconciled, because claims cognizable on traditional habeas corpus review may not be substantively foreclosed by legislation, since the Pennsylvania Constitution provides, with limited exceptions not applicable in this context, that the privilege of the writ of habeas corpus "shall not be suspended." PA. CONST., art. I, §14. See generally Lantzy, 558 Pa. at 222-23, 736 A.2d at 569. Thus, the Court was presented with a choice of sanctioning a bifurcated system of post-conviction review (in which claims expressly covered by the PCRA would be administered under the jurisdictional and procedural framework of the statute, but the balance of claims not covered by the statute but cognizable under traditional habeas corpus review would be resolved under the common law) and the prevailing

construction that harmonized the incompatible objectives of the PCRA by channeling the broader category of claims into the general jurisdictional and procedural framework of the PCRA. See Lantzy, 558 Pa. at 222-23 & n.4, 736 A.2d at 569-70 & n.4.

My point here is that, in light of the incompatible objectives of the PCRA, the Court was required to move beyond a plain-meaning interpretation of the "claim" provision of the post-conviction relief statute. Since the subject of Section 9545(b)(1)(ii) exception to the one-year time bar concerns a "claim" under the PCRA, and the majority's construction of that provision subsumes a segment of the broader category of claims sanctioned in Chester and Lantzy, whatever kind of approach the majority's is, it is not a plain-meaning one.

This is also apparent from other aspects of the majority rationale. Despite revamping the conventional understanding of the legislative intent underlying Section 9545(b)(1)(ii) with the stated purpose of implementing the plain language, see Majority Opinion, slip op. at 10-11, the majority opinion nonetheless largely approves the effect of the decisions that have held that the Legislature did not intend for derivative allegations of ineffective assistance of counsel to be considered in connection with the Section 9545(b)(1)(ii) exception to the PCRA's one-year time bar. See id. at 14-15 (citing Commonwealth v. Gamboa-Taylor, 562 Pa. 70, 753 A.2d 780 (2000), which had categorically rejected attempts to "interweave concepts of ineffective assistance of counsel and after-discovered evidence as a means of establishing jurisdiction," id. at 79-80, 753 A.2d at 785). The majority, however, does not develop why these decisions are any more deserving of respect under its "plain meaning" approach to the statute than those that it displaces.[1] Further, in place of the conventional understanding of

[1] The majority opinion indicates that "[w]hen the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of following its (continued . . .)

Section 9545(b)(i)(ii), the majority substitutes its own, new limiting principle by transporting to the time-bar context a tailored version of the substantive Sixth Amendment principle of structural error, fashioned loosely upon the doctrine as embodied in United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984). See id. at 15-18. None of these turns finds any basis in the statutory language. Indeed, the majority opinion displaces this Court's previous understanding that "a plain reading of the PCRA's timeliness requirements indicates that they are intended to apply to all PCRA petitions, regardless of the nature of the individual claims raised therein." Commonwealth v. Murray, 562 Pa. 1, 5, 753 A.2d 201, 202 (2000).[2]

Moving beyond the subject of plain meaning, the majority opinion appears to rest primarily on its conclusion that application of the one-year time bar in Appellant's circumstance represents a due process violation. See Majority Opinion, slip op. at 15-17. Thus, the majority invokes the presumption that the General Assembly does not intend an unconstitutional result to support its new construction of Section 9454(b)(1)(ii), namely, that the exception extends to structural error at the post-conviction stage, in the form of a complete or constructive denial of counsel. See id. at 16.

---

spirit." Majority Opinion, slip op. at 9-10 (citing 1 Pa.C.S. §1921(b)). Yet, the majority appears to be comfortable with a policy-based construction to support its own limited construction of Section 9545(b)(1)(ii) to restrict it to only a subset of ineffectiveness claims. See Majority Opinion, slip op. at 15-16.

[2] The shift in course reflected in the majority's approach, in terms of its decision to apply a modified structural-error analysis in the time-bar context, is highlighted by the fact that no one has anticipated it. Appellant's arguments are centered on advancing the extension theory and seeking an overruling of this Court's decision in Commonwealth v. Robinson, 575 Pa. 500, 837 A.2d 1157 (2003), which rejected the extension theory, and the Commonwealth's arguments are responsive to Appellant's. For its part, the Superior Court applied the previous decisions of this Court.

In the first instance, the majority's rationale in this regard does not account for previous decisions of this Court that have held that the one-year time bar applies generally to claims of structural error. See, e.g., Commonwealth v. Baroni, 573 Pa. 589, 593, 827 A.2d 419, 421 (2003). Indeed, previously the Court had squarely rejected invitations to transport aspects of structural error doctrine to the time-bar context. See id. ("The precept that structural errors can never be deemed harmless does not serve to create state court jurisdiction that is otherwise absent.").

The majority's resolution appears to be directed toward ameliorating the discomforting aspect associated with a denial of additional judicial review in the present circumstances.[3] It should be noted, however, that the Superior Court has previously attempted to implement various equitable exceptions to the one-year time bar in circumstances that would seem at least as compelling, see, e.g., Commonwealth v. Robinson, 781 A.2d 152 (Pa. Super. 2002), but those efforts have been consistently rebuffed by this Court, see, e.g., Robinson, 575 Pa. at 500, 837 A.2d at 1157. See generally Commonwealth v. Bennett, 842 A.2d 953, 958 (Pa. Super. 2004) ("The Court in Robinson further sealed shut the door to . . . circumventions, and in doing so, emphatically admonished this Court's 'tinkering' with the jurisdictional mandate of the PCRA."). Further, the majority offers nothing to explain why structural error at the post-conviction stage renders a petitioner more deserving of collateral judicial review than structural error that occurred at trial.[4] In my view, therefore, the limiting principle that

---

[3] As developed below, however, I do not believe that Appellant's case for substantive relief is as compelling as portrayed in the Superior Court's opinion.

[4] For example, under the majority's approach, the PCRA's one-year time bar would foreclose review of the claim of a petitioner who suffered a provable structural error at trial, but whose claim was not raised on account of ineffective assistance on the part of his trial, direct appeal and/or post-conviction counsel, as long as counsel asserted (continued . . .)

the majority imposes cannot fairly be contained along the line that the majority draws -- if the application of Section 9545's one-year time bar is unconstitutional as applied to the present petitioner, having assertedly suffered a structural-type error at a latter stage of the judicial process, I see no logical reason why the Constitution would permit others to be excluded from review merely because the structural component of their claims go to an earlier stage.[5] In either event, if the petitioner's claim of structural error is meritorious, he will have been denied fundamental fairness at a critical stage of the proceedings and may be deserving of post-conviction relief.

Candidly, any formulation of a time limitation curtailing collateral judicial review must accept that some legitimate claims may possibly escape review.[6] Nevertheless, a

---

other, non-meritorious claims. As a matter of pure fundamental fairness, there would seem to be no reason why such a litigant is any less deserving of review than one who suffered structural-type error at the post-conviction stage, but whose trial may have been conducted entirely consistent with constitutional norms.

[5] The Cronic doctrine of presumed prejudice arises in the substantive relief context -- the doctrine simply was not designed to address a jurisdictional time bar. Cronic highlights the deleterious effect of a certain narrow category of errors that are so fundamentally connected with the integrity of the adjudicatory process that, by their very character, they necessarily undermine confidence in a verdict. See Cronic, 466 U.S. at 658-60, 104 S. Ct. at 246-47. The doctrine does not distinguish between persons who are and are not substantively entitled to review and/or relief, but rather, merely provides an evidentiary advantage to a claimant suffering structural error by relieving him of the requirement to establish prejudice. Under Cronic, other petitioners who can prove the same element, namely prejudice, may still be afforded relief upon the appropriate evidentiary showing.

[6] The standard of proof governing criminal liability also does not require that absolute certainty be had or maintained. For example, the Federal Judicial Center Pattern Jury Instructions, which have been cited with approval by various members of the United States Supreme Court, provide: "There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt." FJC Pattern Jury Instruction #21 (1998).

time bar applicable to post-conviction review is a rational, and perhaps necessary, legislative response to serial challenges raised by prisoners that undermine finality and tax government resources, and to effectively implement a limitation, exceptions by their nature must contain effective boundaries to prevent them from undermining the general rule. As reflected in Commonwealth v. Peterkin, 554 Pa. 547, 722 A.2d 638 (1998), consistent with constitutional norms, the Legislature may impose reasonable limitations on state collateral review in criminal cases. See id. at 556, 722 A.2d at 642. Notably, the judicial process contains multiple and overlapping checks, including the trial, direct-appeal, and post-conviction procedures and the affordance of counsel to indigent criminal defendants at each stage.[7] It remains my position that this scheme allows criminal defendants the reasonable opportunity to vindicate meritorious legal challenges, and the time bar represents and remains a reasonable limitation on habeas corpus review, even in the absence of the availability of an endless series of potential as-applied challenges and/or the new construct that the majority fashions to address the present one. I joined Peterkin based on this belief, which I reaffirm today.[8]

Finally, in a footnote, the majority explains that Appellant's issue is significant, because the Superior Court ultimately granted a new trial to a codefendant, Kevin Wyatt, based on his similar claim under Commonwealth v. Huffman, 536 Pa. 196, 638

---

[7] Although Appellant did not pursue a direct appeal in the Superior Court, the system provided him the opportunity to do so. Moreover, Appellant was provided with legal counsel at trial, and a neutral common pleas judge reviewed the challenges that he initially raised there.

[8] Notably, the statutory after-acquired evidence exception to the time bar should accommodate claims on the part of a post-conviction petitioner acquires proof of actual innocence, which is a central concern underlying both the PCRA and traditional habeas corpus review. As developed below, I do not regard Appellant's claims as being within this category.

A.2d 961 (1994). See Majority Opinion, slip op. at 3 n.3. It should be noted, however, that, in terms of their culpability, Appellant and Wyatt are not identically situated relative to the underlying robbery-homicide, since Wyatt did not supply the accomplice with the handgun used to perpetrate it, as Appellant did. See Majority Opinion, slip op. at 2. Moreover, as the Commonwealth develops at length in its brief, the Huffman issue is a discrete type of claim that goes solely to a conviction for first-degree murder. See Huffman, 536 Pa. at 198, 638 A.2d at 962. Given Appellant's conviction for the associated robbery and the jury's express finding that the killing was perpetrated in the course thereof, the crime of second-degree murder is a lesser included offense to his first-degree murder conviction. See Commonwealth v. Roberts, 484 Pa. 500, 503, 399 A.2d 404, 405 (1979). Since Appellant's challenge does not impact on this lesser included offense, I believe that the most that Appellant should be able to expect from his Huffman claim, if it were to prevail, is a modification of his sentence from first- to second-degree murder. See generally James A. Strazella, The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies, 79 Marq. L. Rev. 1, 183-89 (1995) (collecting cases relative to the appellate courts' power to modify judgments of sentence in cases in which trial error does not affect lesser included offenses). Notably, such a change would have no impact on the life sentence that Appellant is serving. See 18 Pa.C.S. §1102(b) (requiring the imposition of a life sentence upon a conviction for second-degree murder). Thus, as the Commonwealth argues, on its merits, this case can be viewed as presenting a largely academic exercise, and one that the Post Conviction Relief Act was not designed to address.

In accordance with the above, I respectfully dissent, as I would uphold the traditional understanding of the after-discovered evidence exception to the PCRA's one-

year time bar, since I believe that it is more closely in line with the Legislature's intent than the majority's present construction and appropriately has been held to satisfy constitutional requirements.

Mr. Justice Castille joins this dissenting opinion.