[J-22-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant v. GREGORY REAVES, Appellee	No. 21 EAP 2005 Appeal from the Order of the Superior Court entered on August 24, 2004 at 3190 EDA 2003 reversing the Order of the Court of Common Pleas of Philadelphia County entered on September 19, 2003 at C.P. 9612-0569 SUBMITTED: January 19, 2006

DISSENTING OPINION

MADAME JUSTICE BALDWIN **DECIDED: May 31, 2007**

A majority of this Court today holds that prejudice is not to be presumed when an attorney fails to object to a sentencing court's failure to follow mandatory sentencing procedures, and further fails to make a motion for reconsideration of that sentence.[1] Here, such failings by Appellee's counsel resulted in a record without an explanation for the harsh sentence imposed, and waiver of Appellee's only meritorious basis for appeal. I respectfully dissent because I find that the sentencing process was undermined by this ineffectiveness, and that the magnitude of Appellee's loss is great. I would affirm because I find that litigating the existence of prejudice is unjustified in a scenario such as this.

Nearly a quarter century ago, the United States Supreme Court explained that criminal defendants need not show that prejudice resulted from certain types of Sixth

[1] It appears that Appellee *asked* his attorney to make a motion for reconsideration.

Amendment claims, where the reliability of the trial process was so undermined by counsel ineffectiveness. United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Cronic acknowledged the possibility of "circumstances that are so likely to prejudice the accused that the cost of litigating their effect . . . is unjustified." Id. at 658, 104 S.Ct. at 2046.

The majority dismisses Appellee's argument that this is a matter of presumed prejudice by concluding that because other avenues of appellate review remained open, the right to appeal was not lost. In reliance upon language drawn from Commonwealth v. Halley, 582 Pa. 164, 870 A.2d 795 (2005), the majority finds that "counsel's lapse did not deprive [A]ppellee of his right to appellate review; at most, his attorney's conduct at the trial level 'narrowed the ambit' of the appeal new counsel pursued." Majority slip op. at 8. Here, the majority acknowledges that Appellee lost the right to direct appeal of the only meaningful issue in his case—and yet dismisses Appellee's position that he has suffered a species of presumed prejudice. Where the ambit is narrowed, however, to a degree that effectively forecloses all meaningful review, presumed prejudice should be available. This may be an example of the proverbial forest and trees. Appellee lost the right to appeal the only issue having merit.

The majority opinion suggests that precedent from this Court has only "extended" application of presumed prejudice "to instances where counsel's lapse ensured the total failure of an appeal requested by the client." Majority slip op. at 13. The majority's characterization of this Court's past holdings as extensions of Cronic is unfortunate because, read closely, they are cases in which application of Cronic was appropriate on their facts. No extension beyond Cronic was made. While it appears that appellate

review of all issues was lost due to counsel ineffectiveness in Commonwealth v. Liebel, 573 Pa. 375, 825 A.2d 630 (2003), Commonwealth v. Lantzy, 558 Pa. 214, 736 A.2d 564 (1999), and Halley, there is no language in any of these cases limiting the holdings so narrowly.[2] Yet, whether the loss of appellate rights was a total loss was not the basis, as the majority suggests, for the provision of presumed prejudice in those cases. Rather, we explained in Liebel that, just as in Lantzy, presumed prejudice existed because counsels' failings amounted to a wholesale denial of counsel, "which establish[ed] that the truth-determining process has been undermined . . . ." Liebel, 573 Pa. at 384, 825 A.2d at 635-36.

Given our past emphasis on the effect on the fairness of the process, I disagree with the majority's election to dispose of the presumed prejudice argument in this case by placing primary importance upon the following language from Halley: "The difference in degree between failures that completely foreclose appellate review, and those which may result in narrowing its ambit, justifies application of the presumption in the more extreme instance." Majority slip op. at 13, 14, citing Halley, 582 Pa. at 173, 870 A.2d at 801. This Court has not defined how narrow that ambit must be before presumed prejudice becomes available.

Although the "difference in degree" discussed in Halley justified the holding in that case, I do not read Halley as further holding that presumed prejudice is, ipso facto, unavailable simply because any other appellate issue remained. Rather than insisting upon a total loss of all avenues of appellate review, I find that Cronic, and the related

[2] As discussed below, Halley addressed the loss of "all claims asserted" on direct appeal resulting from counsel's failure to file a Rule 1925(b) statement of matters complained of on appeal.

precedent from this Court, suggest that where what is lost is of a magnitude that is virtually certain to undermine confidence that the proceedings were fair, presumed prejudice should be available.

Despite what the Commonwealth argues, and the majority holds, the United States Supreme Court has been clear that the determination as to whether presumed prejudice applies does not stem from a determination that all avenues of appellate review were lost. Rather, it "turns on the *magnitude of the deprivation* of the right to effective assistance of counsel." Roe v. Flores-Ortega, 528 U.S. 470, 482, 120 S.Ct. 1029, 1037 (2000) (holding that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.") (emphasis added). Indeed, *we noted this* in Halley. Halley, 582 Pa. at 172, 870 A.2d at 801 (citing Flores-Ortega, and holding that it is well established that the existence of presumed prejudice is tied to the magnitude of the deprivation). In this case, Appellee lost all appellate review of his only meaningful issue. A conclusion that Appellee was not foreclosed from all appellate review by pointing out that Appellee could have raised other issues, such as a challenge to the legality of the sentence, ignores the magnitude of what Appellee lost, disserves the spirit of the right to counsel, and fails to comport with precedent. From the instant Appellee's perspective, the magnitude of this loss could hardly be any greater.

I also note that, in Halley, appellate review of the claims *asserted* was lost. "[T]he failure to file a [Pa.R.A.P.] 1925(b) statement on behalf of a criminal defendant seeking to appeal his conviction and/or sentence, resulting in a waiver of *all claims*

asserted on direct appeal, represents the sort of actual or constructive denial of assistance of counsel falling within the narrow category of circumstances in which prejudice is legally presumed." Id. at 173, 870 A.2d at 801. Thus, in Halley, we focused our finding of presumed prejudice on the waiver of "all claims asserted." This is in contrast to the majority's dismissal of the presumed prejudice argument here by insisting that fewer than all *available* avenues of review were foreclosed by counsels' inaction.

Given the magnitude of the loss suffered by Appellee, and the indefensible failings of his counsel, I cannot agree that the instant case can be distinguished from cases in which we found prejudice to be presumed. This conclusion is not novel, and it would not open the door to any new species of presumptive prejudice. It is an even more "modest" and less "incremental" step than that which we made in Halley. Rather, it is recognition that denial of appellate review has been protected by this presumption in the past. Here, Appellee was constructively denied the effective assistance of counsel, and therefore suffered presumed prejudice, because his attorneys' inaction resulted in the loss of all *meaningful* appellate review. His attorney said not a single word during the sentencing hearing. What was originally an eleven-and-one-half to twenty-three month term of incarceration with a two-year probationary period evolved into a four to eight year term of incarceration.

After concluding that presumed prejudice should not apply in this matter because all avenues of appellate review were not lost, the majority takes what I find to be an additional, unnecessary step and insists that counsels' inaction following the sentencing court's failure to adhere to the requisites of Rule 708 is not an appropriate

basis for application of presumed prejudice because such a "[r]ule is not an end in itself, at least for purposes of collateral attack." Majority slip op. at 15. The majority's further discussion of Rule 708, I feel, is dicta that serves only to undermine precedent in this area.

Rule 708's requirement that a judge state the reasons for Appellee's sentence on the record is, of course, not an end in itself. Rather, like the argument raised in Liebel regarding counsel's failure to comply with the Rules of Appellate Procedure that circumscribe the process for seeking discretionary review by this Court, the argument raised here does not simply seek adherence to a procedural rule for the rule's sake. The process is necessary to ensure the fairness of the sentence, and to create a record for subsequent appellate review. I fail to see a material distinction between the claim raised here and that at issue in Liebel, where this Court restored the direct appeal right to file a rule-based petition for allowance of appeal on collateral review. In both Liebel and the instant matter, no constitutional right was implicated by the *procedural mechanism* at issue. Yet, the logic employed in Liebel is perfectly applicable here. In Liebel we said, "only by [operation of Pa.R.A.P. 1114] can a petitioner avail himself of the opportunity to have this Court at least consider whether his claims warrant our review and if so, whether those claims ultimately entitle him to relief." Liebel, 573 Pa. at 384, 825 A.2d at 635. I discern little difference between our analysis in Liebel and the reasoning behind Appellee's rule-based right to application of Pa.R.Crim.P. 708(C)(2). While the majority's characterization of the Rule 708(C)(2) procedural mechanism is accurate, the further deduction that presumed prejudice is therefore inapplicable fails to

reconcile this Court's prior willingness, in Liebel, to find prejudice in the context of a purely rule-based, i.e. non-constitutional, deprivation.

Does the majority opinion today foreclose application of presumed prejudice in any collateral review context in which the procedural rule at issue is not tied to a constitutional right, even in situations where, as the majority insists, all avenues of appellate review are lost?[3] [4] The potential for the exercise of unbridled discretion by a

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[3] In Commonwealth v. Lassiter, 554 Pa. 586, 722 A.2d 657 (1998) (Opinion Announcing the Judgment of the Court), decided some five years before Liebel, this Court denied relief for want of prejudice where there was no question that counsel failed to properly advise appellant related to the right to trial by jury. Mr. Justice Saylor, in dissent, acknowledged his view that deprivations of such constitutionally-guaranteed rights require a presumption of prejudice without commenting that no such presumption is appropriate in a non-constitutional claim. I note this because the majority opinion here emphasizes that presumed prejudice is inapplicable where the deprivation at issue is a procedural claim. Majority slip op. at 14-15.

[4] I also specifically distance myself from Footnote 12 of the Majority Opinion. The majority speculates that there are practical reasons for not pursuing a Rule 708 objection, including the short length of violation of probation (VOP) hearings, the defendant's weak position as a litigant in such hearings, and the vast discretion bestowed upon the court to impose sentence. Although it is obvious that a defendant's disadvantage at VOP hearings is frequently a result of his own actions, and that a sentencing court is vested with wide discretion in fashioning an appropriate sentence for those actions, the exercise of that discretion is quite simply not immune from review. The defendant has a right to explain to the sentencing court why the sentence imposed is not appropriate, and to appeal the exercise of that discretion to the appellate courts. Where the sentencing court abuses its discretion, the defendant may gain relief. Thus, beyond Judge Means' assertion that he would have issued the same sentence one way or the other, Appellee was denied the benefit of the other purpose of Rule 708, which is to provide the appellate court with a record upon which it may assess the efficacy of the sentencing court's exercise of its discretion. Whether the defendant chooses to forgo that right is his decision and may be determined following the hearing. In my view, the unlikelihood of a successful challenge to the discretionary aspects of the sentence *at the hearing*, or *on reconsideration*, does not provide a reason to fail to preserve appellate review of those aspects of the sentence. An attorney's obligation is to (continued…)

sentencing court, without explanation for the sentence given, which results from the majority's focus on procedure leads, in my view, to very substantive problems.

I further reject the majority's speculation that "VOP sentencing defendants, who often have no legitimate substantive complaint since the proceeding emanates from a breach of the sentencing court's trust," would remain silent at sentencing rather than insist that the court state the reasons for its sentence on the record, "in the hopes of securing 'automatic' relief on collateral review on mere procedural grounds." Majority slip op. at 16. This is unnecessary for at least three reasons.

First, the majority is without reason to suggest that no legitimate substantive complaints about VOP sentences imposed will arise simply because, in order to get to such a VOP sentencing hearing, a defendant must have already violated the court's trust in disregarding the terms of the probation. One mistake does not justify another. Judges, like persons on probation, may make a bad decision. The underlying probation violation and the exercise of judicial discretion related to the sentencing that follows are subject to mutually exclusive analyses. Second, the majority suggests that adopting Appellee's argument would lead to the availability of some sort of nebulous "automatic" relief. To be clear, the relief available would simply be a sentencing proceeding that comports with the Rules established by this Court.[5] No windfall would result. No finding

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(…continued)
preserve his or her client's rights. Together, attorney and client may well decide against raising an appeal, but at least the option to do so remains.

[5] The official Comment to Rule 708 specifically warns attorneys that, "[i]n deciding whether to move to modify sentence, counsel must *carefully consider* whether the record created at the sentencing proceeding is adequate for appellate review of the issues, or the issues may be waived." Pa.R.Crim.P. 708, Comment (emphasis added).

of presumed prejudice here would somehow result in reassessment of the underlying probation violation finding. Finally, I find it unlikely that any sentencing defendant would do as the majority suggests and calculatedly remain silent upon realizing that his VOP sentencing judge has failed to state the reasons for the sentence on the record in order to gain yet another sentencing hearing.

I fear that the majority has lost sight of the stated reason behind the initial recognition of presumed prejudice, and that today's holding eases further down the road to rendering this valuable concept ineffectual. Although the effective assistance of counsel is not an end in itself, our criminal justice system requires effective assistance of counsel "because of the effect it has on the ability of the accused to receive a fair trial." Cronic, 466 U.S. at 658, 104 S.Ct. at 2046. Presumed prejudice cases present such clear examples of unfair proceedings that litigating the issue is not worth the expense. It is important to preserve the spirit of the words chosen by Justice Stevens, in Cronic, to explain the paramount nature of an accused's right to effective counsel: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." Id. at 653-54, 104 S.Ct. at 2044-45.

A criminal defendant should not be made to pay for the ineffectiveness of attorneys who fail to read the applicable rules of procedure, raise obvious challenges to questionable exercises of discretion, or seek reconsideration of apparently harsh sentences unsupported by record explanation. Restoration of appellate rights is the proper remedy where a defendant has been deprived of appellate review because of ineffective assistance of counsel. Halley, 582 Pa. at 171, 870 A.2d at 801; Liebel, 573

Pa. at 385, 825 A.2d at 636. Therefore, I would affirm the order of the Superior Court and remand the matter to the sentencing court so that Appellee may raise his challenge to the sentence issued. I respectfully dissent.

Mr. Justice Fitzgerald joins this dissenting opinion.