

[J-222-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : Nos. 421 & 422 CAP
:
Appellant/Cross-Appellee : Appeals from the Orders of the Court of
: Common Pleas of Philadelphia County,
: dated May 14, 2002 and May 29, 2003,
v. : granting in part and dismissing in part the
: petition for relief under the Post Conviction
: Relief Act.
CHRISTOPHER WILLIAMS, :
:
Appellee/Cross-Appellant :
: SUBMITTED: December 27, 2004

CONCURRING AND DISSENTING OPINION

MR. JUSTICE EAKIN

DECIDED: November 26, 2007

I respectfully dissent from the majority's affirmance of the PCRA court's conclusion that this Court would have reversed appellee's PaCOA conviction on direct appeal, had appellate counsel raised Commonwealth v. Besch, 674 A.2d 655 (Pa. 1996) (PaCOA not applicable to wholly illegitimate organizations).

Trial counsel could not be found ineffective for failing to anticipate Besch, which was not decided at the time of trial. At the time of trial, the PaCOA had been held to apply to both legitimate and illegitimate enterprises. See Commonwealth v. Yacoubian, 489 A.2d 228 (Pa. Super. 1985). Thus, trial counsel cannot be deemed ineffective, and any layered claim of appellate counsel's ineffectiveness premised on this underlying claim necessarily fails.

The ineffectiveness inquiry here is whether appellate counsel was ineffective for failing to argue, on direct appeal, that Besch should apply retroactively, rendering appellee's PaCOA conviction a nullity. The relevant period for assessing appellate counsel's stewardship is during appellee's direct appeal. See Commonwealth v. Bond, 819 A.2d 33, 51 (Pa. 2002) (fair assessment of attorney performance requires evaluation of conduct from counsel's perspective at time).

At the time appellate counsel filed his appellate brief in this case, the legislature had amended the PaCOA in immediate response to Besch,¹ making clear that the statute encompassed both legitimate and illegitimate organizations; Commonwealth v. Shaffer, 734 A.2d 840 (Pa. 1999) (holding Besch applies retroactively to date of PaCOA's enactment) had not been decided. Appellate counsel should not be deemed ineffective for failing to anticipate the holding in Shaffer. Therefore, I cannot agree with the majority's conclusion that appellate counsel was per se ineffective for failing to challenge appellee's PaCOA conviction when the law at the time of trial and direct appeal supported the conviction.

Accordingly, I would reverse the order of the PCRA court vacating appellee's PaCOA conviction; in all other respects, I join the majority's disposition.

¹ Besch was decided April 17, 1996, and the PaCOA was amended June 19, 1996, effective immediately. I am of the view that Besch, although now of limited applicability since the 1996 amendments, incorrectly interpreted the prior version of § 911(h)(3) of the PaCOA in the first place. Appellate counsel filed his brief March 31, 1997; Shaffer was not decided until 1999.