[J-4-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 40 EAP 2009
	:	
Appellant	:	Appeal from the Order and Opinion of the
	:	Superior Court at No. 2834 EDA 2006,
	:	dated December 11, 2008, vacating and
v.	:	remanding the order of the Philadelphia
	:	County Court of Common Pleas, Criminal
	:	Division, No. 0101-1188 1/1, dated
JULES JETTE,	:	September 28, 2006
	:	
Appellee	:	
	:	
	:	SUBMITTED: January 15, 2010

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: June 22, 2011**

I join the Majority Opinion. I write separately to respond to some points forwarded by Mr. Justice Baer in his Concurring and Dissenting Opinion.

Preliminarily, I note that, if the Superior Court had been choosing an appropriate vehicle, it would have been hard-pressed to find a more aptly named case for the unwieldy procedure the court implemented in Commonwealth v. Battle, 879 A.2d 266 (Pa. Super. 2005). As the Majority explains, the procedure obviously cannot stand under: 1) our governing cases such as Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993); 2) a proper understanding of what is encompassed by the right to counsel; 3) a proper understanding of the deference due to counsel; and 4) an appreciation of this Court's more recent cases

(which I recognize were decided after the panel issued its decision in this case), addressing whether PCRA[1] appeals can and should become the repository for what are, in effect, serial PCRA petitions assailing PCRA counsel's representation. See Commonwealth v. Colavita, 993 A.2d 874, 893 n.12 (Pa. 2010) (unanimous opinion) ("[C]laims of PCRA counsel ineffectiveness may not be raised for the first time at the direct appeal level, much less at the discretionary appeal level.") (citing Commonwealth v. Pitts, 981 A.2d 875, 880 n.4 (Pa. 2009)).

I write to address two points made in Justice Baer's Concurring and Dissenting Opinion, with which I respectfully disagree. First, Justice Baer does not agree that the Battle procedure improperly provided petitioners with an additional round of collateral review. Respectfully, in my view, it certainly did.

The PCRA appeal in this case was briefed in the Superior Court and was ready for disposition -- until the counseled appellant Jette (appellee here) forwarded his *pro se* Petition for Remand, as authorized by the Battle procedure. In accordance with Battle, the subject of the Petition was the performance of PCRA appeal counsel, with Jette faulting counsel for failing to indulge Jette's whim to assert additional claims. The Petition was, for all purposes, a serial PCRA petition, focused solely upon PCRA counsel.

Indeed, the Petition was treated as such by the panel below. Rather than merely referring the *pro se* pleading to counsel for whatever action counsel might deem appropriate, as our decision in Ellis clearly would command, the panel, per Battle, ordered counsel to explain himself to the court. This is no trivial matter. When PCRA petitions are formally filed, the lawyer under attack is called upon to answer only if a sufficient proffer has been made to prove arguable merit and Strickland[2] prejudice, and an issue of material fact

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1 42 Pa.C.S. §§ 9541-9546.

2 Strickland v. Washington, 466 U.S. 668 (1984).

concerning counsel's strategy remains for resolution. The Battle procedure effectively incorporates a serial PCRA process, while casting aside the presumption that lawyers are effective. Moreover, the panel's mandate, after the ensuing twenty month delay, included removal of PCRA appeal counsel and appointment of new counsel. It is pure fiction to treat: 1) the claim that PCRA appeal counsel was ineffective; 2) the process of an appellate court assuming the claim has merit and caused prejudice, and directing counsel to explain himself; and 3) the relief of ordering summary removal of counsel and remand -- as encompassing mere review of "already-asserted PCRA claims."

Further proof of this fiction is that the case was remanded for new counsel "to investigate" the claims the panel assumed were meritorious and to "prepare a new, amended PCRA petition raising those claims counsel considers meritorious after a thorough investigation." If the mandate comprised mere review of already-asserted claims, the panel could have simply directed the filing of a new brief premised upon the existing record. But, even this goes too far: the reality here is that the claims appellee faulted his lawyer for failing to include may have been asserted in the PCRA court, but they were not asserted on appeal -- until the Superior Court, through Battle, inserted itself into the client-counsel relationship and invited the client to file an appellate-level serial PCRA petition attacking his PCRA appeal counsel. In short, the Battle procedure obviously implicates Pitts, Commonwealth v. Liston, 977 A.2d 1089 (Pa. 2009), and Colavita, and the Majority rightly rejects the procedure, in part, because of this reality.

Second, Justice Baer would devise a rule allowing the counseled appellant an extra window of thirty days after appellate counsel files a brief on his behalf within which to review the brief and decide whether to proceed *pro se*. Perhaps this proposed procedure should be called the "Skirmish" rule, to distinguish it from Battle. In any event, I do not support the procedure, which would obviously be in tension with Pitts, Liston and Commonwealth v. Ligons, 971 A.2d 1125 (Pa. 2009), and would implicate overruling

footnote 12 in Colavita. 993 A.2d at 893 n.12. Those authorities amply explain why we are not obliged to devise *ad hoc* procedures to allow a represented PCRA petitioner to act upon concerns with the performance of PCRA appeal counsel.

I recognize that if the procedure suggested by Justice Baer were confined to claims that were raised in the PCRA court, but not pursued in counsel's appellate brief, it would be distinguishable from the procedure at issue in Colavita, Pitts, and related cases. But, I do not support adoption of a cumbersome procedure, designed merely to afford criminal defendants on collateral appeal in effect a veto power over the contents of the briefs prepared by their court-appointed attorneys, and a second chance to decide whether to represent themselves. The legal foundation for this Court's earlier expressions of a "right" to self-representation was removed when the U.S. Supreme Court decided Martinez v. California, 528 U.S. 152 (2000). The right to self-representation on appeal not being secure, I see no reason to devise an *ad hoc* procedure to allow for belated invocations -- particularly since, in virtually all instances, it will be of little ultimate benefit to the client, and it will frequently burden the appellate court with hybrid or unintelligible pleadings. Id. at 163 ("The requirement of representation by trained counsel implies no disrespect for the individual inasmuch as it tends to benefit the appellant as well as the court."); Ellis, 626 A.2d at 1140 ("Tails should not wag dogs. Merely because an appellant believes that the irrelevant is relevant is no reason to turn the system on its head and solemnly contemplate the wisdom of a person who does not have the sense to be guided by experts in an area where he himself possesses no expertise.").

Moreover, even assuming that this Court would one day find an independent basis in law for conferring or recognizing such a right, the decision to proceed with counsel, once made, should not include reservation of a veto power and a power to change one's mind concerning counsel, after counsel has already been put to the task. The procedure inverts the attorney-client relationship. Just as defendants have no "right" to taxpayer-financed

counsel of their choice, I see no reason in law or logic to assume they have a right to dictate the issues to be pursued on collateral appeal (or direct appeal for that matter), once counsel is appointed. The proper repository for complaints concerning counsel is the PCRA, and not a cumbersome process once the case is already on appeal and briefed. Furthermore, because the proposed procedure, in essence, would merely provide an end-around the PCRA, I cannot support it.

Madame Justice Orie Melvin joins this concurring opinion.