[J-54-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 180 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Order entered on February 26, 1997, by the Honorable Jeffrey A. Manning in the Court of Common Pleas of Allegheny County, Criminal Division at Nos. CC 8504383 and 8504687
v.	:	
SALVADOR CARLOS SANTIAGO,	:	
Appellant	:	SUBMITTED: February 7, 2000

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: August 17, 2004**

I join the Opinion Announcing the Judgment of the Court in the disposition of appellant's claims with the exception of the discussion pertaining to appellant's mental competency which I would hold as waived. The lead opinion today *sua sponte* converts a preserved claim of layered counsel ineffectiveness for failing to assert that appellant was mentally incompetent to stand trial into the underlying claim of incompetence itself -- a claim which I believe is waived under the plain language of Section 9544 of the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.*, because it was not raised either before appellant's second trial or on his direct appeal therefrom. In so doing, the lead opinion inadvertently resurrects the capital case relaxed waiver rule which this Court abrogated on PCRA review in Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998). The

lead opinion further proceeds to evaluate the merits of the waived mental competency claim, but cites no support for its decision to *sua sponte* convert the claim actually posited on this appeal. As support for its decision to ignore the PCRA waiver provision and the clear holding in Albrecht, the lead opinion cites to quarter-century-old cases involving direct appeals and the proper application of this Court's jurisprudential waiver doctrines. These cases provide no authority for the lead opinion's decision to negate the PCRA waiver provision; to resurrect relaxed waiver on PCRA appeals; or to declare that belated, court-raised claims of competency to stand trial are beyond the constitutional power of the General Assembly to deem waivable. Although the lead opinion ultimately denies relief upon the waived claim it raises and decides, the rule that it would craft, and the violence such a rule would do to the PCRA and our recent precedent compels me to register my respectful disagreement.

The lead opinion recognizes that appellant -- who was presumed to be mentally competent and who was represented by counsel at all times -- failed to raise a claim that he was mentally incompetent at the time of his retrial. Appellant also failed to raise this claim on his ensuing direct appeal to this Court. It is indisputable that appellant had a full and fair opportunity to raise, at the appropriate time, the issue of his competency to stand trial. In addition, under this Court's earlier precedent, appellant had the right to raise the claim belatedly upon direct appeal, even though the claim had not been preserved at trial.[1] The counseled appellant, however, never raised the competency claim and his judgment became final, subject only to collateral attack.

[1] The waived claim would have been reviewable both under this Court's then-existing capital direct appeal relaxed waiver rule and under the direct appeal competency cases the lead opinion today *sua sponte* invokes, and radically expands, to nullify the requirements of the PCRA.

On collateral attack, appellant's current counsel explicitly recognize that his mental competence to stand trial was not challenged either at trial or upon direct review and, for that reason, they pose the current claim as a federal, Sixth Amendment claim sounding in the "layered" ineffective assistance of all of his previous counsel. See, e.g., Initial Brief of Appellant, 12 ("The counsel who represented [appellant] at the retrial rendered woefully inadequate assistance in failing to raise, in any way, the questions about his lack of competency;" in so doing, "these counsel did not function as the counsel envisioned by the Sixth Amendment…") (emphasis original); id., 30-33 (same, while adding that all previous counsel were ineffective for failing to properly raise and litigate the competency issue); Appellant's Reply Brief, 1-9 (same). The Commonwealth responds to this Sixth Amendment-based claim as the ineffective assistance of counsel claim that it is. The lead opinion nevertheless would *sua sponte* convert the claim into the underlying, but constitutionally distinct and waived, due-process-related claim of competency to stand trial. The lead opinion neither acknowledges nor attempts to defend its constitutional alchemy.[2]

The lead opinion's conversion of the claim leads it to a totally unnecessary examination of the propriety and contours of "retrospective" competency hearings.[3] In that

[2] This Court's general proscription against raising and reviewing issues *sua sponte* is well-settled. E.g., Danville Area School Dist. v. Danville Area Educ. Ass'n, 754 A.2d 1255, 1259 (Pa. 2000); see also Commonwealth v. Overby, 809 A.2d 295 (Pa. 2002) (Castille, J., dissenting) (disagreeing with plurality's *sua sponte* conversion of ineffective assistance of counsel claim into underlying but waived claim of trial court error from which it derived). Furthermore, as Justice (now Chief Justice) Cappy noted in Danville: "This jurisprudential tenet that a court will consider only the controversies preserved by the litigants even applies to allegations of constitutional error." 754 A.2d at 1259.

[3] This Court may someday have to pass upon the propriety of retrospective competency assessments: for example, where a defendant timely requests, but is erroneously deprived of, a competency hearing. But there is no reason to convert the ineffectiveness claim raised here in order to reach out and decide that question in this case.

examination, the lead opinion suggests that there may be instances when a "new trial must be awarded" in response to a belated competency claim raised for the first time upon collateral review because a "meaningful" retrospective competency examination cannot be had. Opinion Announcing Judgment of Court, slip op. at 7. The combination of this *dictum* with the lead opinion's *ad hoc* nullification of the PCRA waiver provision would create a powerful incentive for trial counsel who perceive marginal or non-existent claims of mental incompetence deliberately to forego requesting competency examinations in the hopes of building in a better claim for the type of PCRA relief promised by the lead opinion's *dicta*.

Collateral attacks upon final state convictions in Pennsylvania are supposed to be governed exclusively by the terms of the PCRA, and not by *ad hoc* doctrines judicially crafted by this Court. See Commonwealth v. Cruz, 851 A.2d 870, 879 (Pa. 2004) (Castille, J., dissenting). This Court has explicitly "acknowledged that the General Assembly is authorized, consistent with the Pennsylvania Constitution, to impose reasonable restrictions on the various forms of post-conviction review." Commonwealth v. Abdul-Salaam, 812 A.2d 497, 501 (Pa. 2002) (*citing* Commonwealth v. Peterkin, 722 A.2d 638, 642 (Pa. 1998)). One such reasonable restriction is the PCRA waiver provision, which unambiguously states that, "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S. § 9544(b); see Commonwealth v. Bond, 819 A.2d 33, 39 (Pa. 2002) (issues are waived under PCRA if appellant could have presented them on direct appeal but failed to do so); Commonwealth v. Bracey, 795 A.2d 935, 940 (Pa. 2001) (same). Under the plain language of this provision any claim that appellant was incompetent to stand trial is waived, since Pennsylvania affords ample opportunity to raise claims of incompetence both at trial and upon direct appeal.

The PCRA waiver provision makes no mention of exceptions for hindsight-based claims of mental incompetence to stand trial first forwarded years later by PCRA counsel

upon collateral attack. Nor does the PCRA require that a waiver of a claim affirmatively appear to be “knowing and intelligent” or “competent” for the waiver provision to apply. In addition, the provision does not state that claims which this Court has deemed to be unwaivable if pursued for the first time on direct appeal -- a rule which makes it even easier for a defendant to present the claim at a time when a meaningful hearing might be held -- are not subject to the waiver provision. Instead, the PCRA is written logically: claims are deemed waived if there existed a fair opportunity to litigate the claims before final judgment.[4] Since this Court has deemed competency claims to be non-waivable on direct appeal, the always-counseled appellant here had more than a fair opportunity to litigate his competency to stand trial prior to final judgment. It is incongruous that, in declaring that competency claims raised before an appellate court upon collateral appeal are an ”exception” to the PCRA waiver provision, the lead opinion never cites or discusses the terms of the statute itself. In addition to flying in the face of the actual language of the PCRA, the lead opinion’s view is contrary to this Court's existing PCRA jurisprudence. For

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[4] It is notable that, in the U.S. Supreme Court cases cited by appellant concerning the propriety of retrospective competency hearings, see Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975) and Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836 (1966), the grant of federal habeas corpus relief essentially turned upon the respective states’ failure to provide a fair opportunity for litigation of the competency claim at the time of trial. That is simply not the case in Pennsylvania. Moreover, in light of the changes to the federal habeas review paradigm in the thirty-plus years since Drope was decided, including most notably the decision in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), and the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it is unlikely that the Supreme Court today would be as dismissive of reasonable state procedural regulation of competency claims. In any event, nothing in these cases suggests that all belated claims of incompetency raised for the first time upon state collateral attack must be entertained as if the defendant had requested and been denied a timely determination, or as if the trial court had defaulted on an independent obligation to raise the issue itself. In short, there is nothing in federal constitutional law which commands or supports the lead opinion’s negation of the PCRA waiver provision.

example, in Abdul-Salaam, Justice (now Chief Justice) Cappy noted that, "following Commonwealth v. Albrecht . . ., we require strict adherence to the statutory language of the PCRA and a petitioner will only be entitled to relief 'where a petitioner shows that the statutory exceptions to waiver in the PCRA apply [found in the pre-1995 version of the PCRA], or where petitioner properly raises claims of counsel's ineffectiveness.'" 812 A.2d at 503 (*quoting* Bracey, 795 A.2d at 941). See also Commonwealth v. Eller, 807 A.2d 838, 845 (Pa. 2002) (courts have no authority to create exceptions to PCRA in addition to those delineated in PCRA) (construing time-bar provision).

The lead opinion's inexplicable return to relaxed waiver leads it to suggest a review paradigm which betrays an uncharacteristic misapprehension of the very operation of the PCRA. Most claims which could have been raised at trial or on direct appeal but were not -- including claims implicating fundamental rights and claims of constitutional dimension -- are waived under the PCRA. But, that is not the end of the matter. By deeming claims premised upon the ineffective assistance of counsel to be cognizable upon collateral review, the PCRA appropriately channels and allows waived claims to form the basis for constitutionally-distinct claims arising under the Sixth Amendment. The actual claim raised by appellant here -- that his prior counsel were ineffective for failing to challenge his competency to stand trial -- is no less amenable to rational, jurisprudentially sound decision-making than other claims of counsel ineffectiveness deriving from foregone rights of constitutional magnitude, such as the validity of a jury waiver or a guilty plea or a waiver of counsel, etc.

When a claim of trial court error -- such as a court's permitting an allegedly incompetent defendant to be tried -- has not actually been raised at the appropriate time before final judgment, it is unrealistic to entertain collateral attacks upon that final judgment which are premised upon a pretense that the claim has been preserved. Indeed, the perversity of pretending that waived claims have not been waived is what led to this Court's

abrogation of relaxed waiver on PCRA review in Albrecht. This Court's increasing familiarity with the deficiencies inherent in the relaxed waiver rule was also a major reason why the Court recently abrogated that judicial doctrine in direct capital appeals, where the waiver derives from judicial doctrines rather than statutory command. Commonwealth v. Freeman, 827 A.2d 385, 395-96 (Pa. 2003). Collateral claims which are cognizable under the PCRA as claims of ineffective assistance of counsel should be litigated as such -- particularly given the governing rule that criminal defendants are presumed to be mentally competent,[5] and that their lawyers, who are ethically obliged to raise meritorious claims of client incompetence, are presumed to be professionally competent. The lead opinion today would overturn those presumptions.

The General Assembly, of course, could have exempted claims of mental incompetence from its collateral review paradigm, but it chose not to do so. The reasons for this are not difficult to imagine. An exception for waived claims of mental incompetence

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[5] As Justice (now Chief Justice) Cappy noted in Commonwealth v. Porter, 728 A.2d 890 (Pa. 1999):

> A defendant is presumed to be competent to stand trial. Commonwealth v. duPont, 545 Pa. 564, 681 A.2d 1328, 1330 (1996). Where a defendant claims he was incompetent to stand trial, he must establish his claim by a preponderance of the evidence. Id. In order to prove that he was incompetent to stand trial, Appellant must show that at that time of trial, he suffered from a mental illness or defect such that he did not have the ability "to consult with counsel with a reasonable degree of rational[] understanding," and did not have "a rational as well as factual understanding of the proceedings." Commonwealth v. Appel, 547 Pa. 171, 689 A.2d 891, 899 (1997) (citations and internal quotation marks omitted). We stress that the temporal focus of this inquiry is limited to the time of trial or when other legal proceedings occurred. Id. at 899 n.8.

728 A.2d at 897 n.7. The presumption of competency has long been reflected in Pennsylvania legislation as well. See, e.g., 50 P.S. § 7403.

would be absurd, given the presumption of competency and the inherent complications in retrospective competency assessments which concern the lead opinion. The practical difficulty in retrospective competency determinations and the very real prospect of meritless claims are factors which should caution against judicially manufacturing an "exception" to the PCRA waiver provision to indulge this claim above all others. A competent trial lawyer presumably can be trusted to ascertain those instances where his client's mental competency may be called into question, *i.e.*, those instances where his client is so beset by mental disease or defect that he could not even consult with counsel or could not even understand the proceedings as they were occurring. Indeed, it is difficult to imagine a situation where ethical and competent counsel would fail to perceive and timely raise the incompetence of the client, if the client truly were incompetent. When a claim of incompetence is not pursued by counsel before final judgment despite ample opportunity, a rational system of collateral review, such as is embodied in the PCRA, dictates that the proper claim must focus upon counsel's reasons for not pursuing such a claim.

The lead opinion cites to no constitutional basis for concluding that this single type of waived claim falls beyond the power of the General Assembly to channel review through the logical lens of counsel's performance. Instead, the plurality would simply usurp the authority of the General Assembly.

It is also notable that the lead opinion's approach -- that ineffectiveness claims relating to failures to litigate competency challenges must be *sua sponte* converted into the underlying claim and then deemed impervious to the PCRA waiver provision -- is squarely contrary to recent precedent from this Court. In Commonwealth v. Marrero, 748 A.2d 202 (Pa. 2000) the PCRA petitioner, like appellant here, asserted a layered claim of counsel ineffectiveness based upon trial counsel's alleged failure to inquire into the petitioner's competence to stand trial by seeking psychological and/or intelligence evaluations. This Court addressed and rejected the layered claim of ineffective assistance of counsel upon

its merits under Sixth Amendment standards. We did not *sua sponte* convert the claim into the waived, underlying claim of incompetence to stand trial and then review that claim as if the General Assembly lacked constitutional authority to deem it waived. Id. at 204.

In support of its declaration that competency claims stand as a proper, court-manufactured exception to the PCRA's waiver provision, the lead opinion cites no case decided under the PCRA, or even to a case involving a collateral attack upon a final judgment. Instead, the lead opinion relies upon two cases which predate the PCRA by years, and which involved questions of judicial waiver and issue preservation for purposes of direct appeal. See Commonwealth v. Tyson, 402 A.2d 995, 997 (Pa. 1979) (question of competence to stand trial not waived on direct appeal, even though defendant failed to comply with judicial rule requiring that issue be raised in post-verdict motions); Commonwealth v. Marshall, 318 A.2d 724, 727 (Pa. 1974) (issue of competency to stand trial, which was properly raised in post-verdict motions, not waived on direct appeal for failure to comply with judicial rules requiring that issue be raised pre-trial or during trial). These cases pre-dating the PCRA and involving the scope and propriety of judicial rules respecting issue preservation for direct appeal are irrelevant to the question of statutory waiver under the PCRA. Certainly, these direct appeal cases did not act to overrule anticipatorily or restrict the PCRA's valid waiver provision. Nor do these cases operate to overrule the settled legal presumption that a person is competent -- a presumption that should negate the "virtual oxymoron" that confounds the lead opinion.

The lead opinion fails to recognize the fundamental distinction between this Court's authority to modify waiver doctrines emanating from this Court's procedural rules and practices as opposed to waivers which result from application of the terms of a statute, such as the PCRA. In my Concurring Opinion in Bracey, supra, I explained that, while this Court obviously has the power to refine or modify waiver doctrines of its own creation to

better balance jurisprudential concerns, we do not have the same unbridled power when interpreting a statute:

> the calculus is entirely different when the waiver at issue arises from a non-judicial source such as the legislative commands of the PCRA. When an issue is waived under the PCRA, it is not because of our appellate preservation/waiver doctrine, but because a legislative judgment has been made as to what types of claims should be available **at all** on collateral review. We cannot simply ignore that legislative judgment as if it were a judicial concern subject to weighing against other judicial concerns.

795 A.2d at 956. In purporting to usurp the PCRA waiver provision today, and ignoring concomitant separation of powers concerns, the lead opinion does not suggest that application of the PCRA waiver provision to waived claims of mental incompetence is either unconstitutional or unreasonable. Indeed, no party has forwarded such an argument, since the only claim asserted arises under the Sixth Amendment. It is beyond perplexing that the lead opinion would reach out to do this violence to the PCRA.

My research has found one case from this Court, not cited or relied upon by the lead opinion, which has discussed the reviewability of claims of competence to stand trial upon collateral attack. Commonwealth v. Nelson, 414 A.2d 998 (Pa. 1980) is a plurality opinion that was decided under the Post Conviction Hearing Act (PCHA), the statutory predecessor to the PCRA. In Nelson, the defendant was convicted of third-degree murder and he failed to appeal the verdict. He later filed a *pro se* petition under the PCHA alleging, among other things, that he was incompetent to stand trial. Counsel was appointed but inexplicably failed to amend the petition and failed to argue or develop the issues at the PCHA hearing, electing instead to present argument on two new issues at that hearing. On appeal to this Court, the defendant raised three arguments, all sounding in the ineffective assistance of counsel, including as his third claim that trial counsel was ineffective for failing to request a hearing on the defendant's competency to stand trial. Id. at 999.

The plurality opinion by Justice O'Brien recognized that the three issues on appeal were not properly raised and preserved in the PCHA proceeding below. The Nelson plurality accordingly held that the defendant's first two issues were waived. With respect to the ineffectiveness claim respecting competency, however, the Nelson plurality reasoned otherwise. Citing the same cases the lead opinion cites today, *i.e.*, Marshall and Tyson, the Nelson plurality noted that this Court had been "loath to find a waiver" of claims involving the mental competence of an accused. Unlike today's lead opinion, the Nelson plurality explicitly acknowledged that the PCHA waiver issue was distinct from the direct appeal paradigm and, also in contrast to today's lead opinion, the Nelson plurality did not *sua sponte* convert the claim of ineffectiveness into the underlying claim of competency to stand trial. The Nelson plurality reasoned as follows:

> It is, of course, true that Tyson . . . and Marshall . . . were direct appeals . . . . Nevertheless, our waiver doctrine, although judge-made and not statutory, is one we stringently apply. We have expressly discarded the "fundamental error" rule. . . . Thus, while not recognizing fundamental error, we nevertheless will not permit the waiver of a claim of incompetency, so basic is it to our concepts of justice that a trial of an incompetent is no trial at all. Although we recognize the PCHA includes a waiver provision of its own . . ., having held the competency of an accused to be an absolute and basic condition of a fair trial, we further hold the no-waiver rule in Tyson to be applicable here as well.
>
> Instantly no competency hearing was held, nor was one requested. The issue as it had survived for us, then, is not whether appellant would have passed the two-pronged test for competency, it is rather only whether his counsel was ineffective for failing to raise the claim that he would not.
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> Since counsel elected not to argue this issue at the PCHA hearing, we have no record before us relevant to the claim of incompetency. The two psychiatric evaluations which are of record are concerned with the question of insanity and legal culpability. These are not the same as competency to stand trial. There is, moreover, no evidence of record indicating what information relative to appellant's competency may have been available to counsel, or what considerations prompted counsel not to seek a hearing on the issue.

> Accordingly, the case is remanded for an evidentiary hearing to determine whether trial counsel had "any reasonable basis" for foregoing a claim of "arguable merit." Following such hearing should the court determine trial counsel was ineffective for not requesting a competency hearing, it should order such a hearing. If no ineffectiveness is found, the judgment of sentence is affirmed.

414 A.2d at 1001 (footnote and citations omitted) (emphasis supplied).

As a plurality opinion, of course, Nelson has no precedential value. In addition, the Nelson plurality was construing the PCHA, not the PCRA, and the vitality of the decision is further diminished by this Court's extensive interpretations of PCRA waiver practice, including our decision in Albrecht which restored respect for the authority of the waiver provision. What is notable about Nelson is that, at the very same time that the plurality reaffirmed the importance of providing an opportunity to inquire into an accused's competency, it also recognized that, once that claim has been foregone, the only appropriate inquiry must focus upon counsel's performance in failing to pursue it. The plurality did not *sua sponte* convert the ineffectiveness claim into the competency claim from which it derived.

Appellant here raises the same claim of counsel ineffectiveness that was at issue in Nelson. There is no reason in law or logic for this Court to convert it into the waived constituent claim from which it derives -- a claim which appellant had a full opportunity to raise and as to which no contemporaneous record was made.

Here, the presumptively competent appellant was represented by presumptively competent counsel at the guilt phase of his second trial, by presumptively competent new counsel at the penalty phase, and by yet another new, presumptively competent counsel upon his direct appeal. There was nothing to prevent these lawyers -- who were in the best position to determine whether there was a legitimate question of appellant's competence to stand trial -- from raising a claim concerning competency if there were a factual basis for

doing so. Since counsel did not challenge appellant's competence, the claim is waived under the PCRA. The only claim available to appellant now must sound in counsels' alleged ineffectiveness.

The practical effect of the rule posed by today's plurality would be to impose a burden upon prosecutors to take preemptive measures against meritless collateral claims of incompetence that are sure to follow from the lead opinion. Since prosecutors and trial judges will no longer be able to rely upon the presumption of competency, and the presumption that defense counsel are competent and ethical, the only way to protect against belated, meritless, collateral claims of incompetency will be to insist upon a pre-trial competency determination in all serious cases. It is ironic, to say the least, that the lead opinion adverts to this Court's recent attempts to make some sense of our capital PCRA jurisprudence in Commonwealth v. Rush, 838 A.2d 651 (Pa. 2003) and Commonwealth v. McGill, 832 A.2d 1014 (Pa. 2003) in the same case in which it would reintroduce the arbitrariness occasioned by the wrongful application of this Court's relaxed waiver rule on capital PCRA matters, and that the lead opinion takes this backwards step *sua sponte*.

On the merits of the question of counsels' effectiveness for failing to allege appellant's incompetence to stand trial, the PCRA court's findings, the testimony of appellant's trial counsel, and the PCRA court's recollection of its own observations of appellant's interaction with counsel at the trial, prove that the claim lacks even arguable merit and therefore fails under Strickland. Because I agree that appellant is not entitled to relief on any of his other claims, I concur in the result.[6]

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[6] In passing upon appellant's other claims of ineffective assistance of counsel, the lead opinion does not make it plain that it appreciates that federal claims are at issue and that it is federal law which governs. Indeed, the lead opinion cites no federal cases. In the past, this Court's lack of clarity in this regard has led to avoidable complications when matters pass on to federal habeas corpus review. See, e.g., Rompilla v. Horn, 355 F.3d 233, 246-50 (3d Cir. 2004); Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000), cert. denied, 532
(continued…)

Mr. Justice Eakin joins this concurring opinion.

(…continued)
U.S. 980, 121 S.Ct. 1621 (2001). In one instance, a Third Circuit panel inexplicably seized upon the failure of a Superior Court panel to include a citation to any federal case when applying this Court's familiar three-part formulation of the unitary Strickland/Pierce test as a reason to ignore the Superior Court's analysis of the ineffectiveness claim and the deferential standard of review required by AEDPA. Everett v. Beard, 290 F.3d 500 (3d Cir. 2002), cert. denied, 537 U.S. 1107, 123 S.Ct. 877 (2003). As a matter of clarity and comity, and to facilitate appropriate federal habeas review should it occur, I would make it plain, where the lead opinion does not, that this Court recognizes that appellant presents his Strickland claims under federal law and that the test for ineffective assistance of counsel stated and applied herein is the same under the Pennsylvania Constitution as under the federal Constitution. E.g. Commonwealth v. Bomar, 826 A.2d 831, 855 (Pa. 2003); Rompilla, supra.