

[J-267-98]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 0229 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Order of the Court of
	:	Common Pleas of Beaver County Dated
	:	April 29, 1998 at No. 356A of 1992
v.	:	
	:	
	:	
ANDRE STEVENS,	:	SUBMITTED: December 29, 1998
	:	
Appellant	:	
	:	

DISSENTING OPINION

MR. JUSTICE ZAPPALA

DECIDED: October 27, 1999

I respectfully disagree with the majority's conclusion that Appellant was not prejudiced by his trial counsel's failure to pursue a defense of diminished capacity during the guilt phase of his trial.

According to the majority, "the trial court found through circumstantial proof that the Commonwealth had established beyond a reasonable doubt that Appellant had the specific intent to kill, and therefore determined that Appellant suffered no prejudice by pursuit of a defense that would have been unsuccessful had Appellant's counsel presented it." (Majority Op. at 13). This implies that anytime the Commonwealth has established the elements of a crime then the defendant's criminal liability is unassailable. The majority's sweeping conclusion calls into question the existence of affirmative defenses and diminishes the role of defense counsel.

Counsel may be ineffective where the defense of diminished capacity is available, reasonable investigation would have made counsel aware of the availability of the defense, and the defense does not conflict with other trial strategies. See Commonwealth v. Legg, 711 A.2d 430 (Pa.1998). Furthermore, counsel may also be ineffective where pursuit of a possible defense was curtailed by the lack of reasonable investigation. See Commonwealth v. Mabie, 359 A.2d 369 (Pa. 1976).

Appellant's contention is that his counsel failed to provide relevant materials to Dr. Martone and that the absence of these materials, especially the writings that comprised Appellant's journal, led to Dr. Martone's initial misdiagnosis of Appellant. It was this misdiagnosis which Appellant's counsel relied upon in not pursuing a diminished capacity defense. This meant that no further psychiatric examinations were made, no witnesses were interviewed, and no trial strategy was devised regarding the diminished capacity defense.

The PCRA court determined that Appellant suffered no prejudice by his counsel's failure to pursue this defense. It held that it would have found that Appellant had, and exhibited, the specific intent to kill despite Dr. Martone's revised diagnosis as presented at the PCRA hearing. I believe that the PCRA court as well as the majority fails to consider the full effect of counsel's error in failing to provide the documents needed to correctly diagnose Appellant. Rather, their consideration is limited to whether Dr. Martone's testimony during the PCRA hearing would have been sufficient to establish reasonable doubt when set against the evidence offered by the Commonwealth at trial. This may have indeed been the proper analysis had Appellant presented Dr. Martone's revised diagnosis as after-discovered evidence. However, Dr. Martone's revised diagnosis, set against her testimony at trial, is offered to show counsel's ineffectiveness in failing to pursue a vigorous and viable defense. Counsel's failures precluded not only Dr. Martone's correct testimony at trial, but also any other evidence, which was not discovered due to counsel's failure.

Since it is impossible for the trier of fact to fully anticipate and properly weigh a defense that was never prepared and never presented, it is impossible for the PCRA court to state that Appellant was not prejudiced by such failure.

I dissent, as I would remand to the PCRA court to reconsider Appellant's claim that counsel could have developed a viable diminished capacity defense had counsel provided Dr. Martone with the proper materials to obtain a correct diagnosis in the first instance.