[J-149-2012] [Per Curiam Opinion]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 653 CAP
	:	
Appellee	:	
	:	Appeal from the Order of the Court of
	:	Common Pleas of Dauphin County,
v.	:	Criminal Division, dated January 31, 2012,
	:	at CP-22-CR-0001773-2000
	:	
HERBERT BLAKENEY,	:	
	:	
Appellant	:	SUBMITTED: December 11, 2012

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: December 29, 2014**

I join the Per Curiam Opinion in its entirety. I write separately to address my continuing concerns respecting attempts by the Federal Community Defender's Office ("FCDO") to extend this Court's unfortunate decision in Commonwealth v. Brown, 872 A.2d 1139 (Pa. 2005) (plurality), and further negate the PCRA's[1] waiver provision, thereby allowing capital defendants to undo trial level defaults through the guise of dubious – or, in this case, beyond dubious – retrospective claims of incompetency.

The FCDO's abusive brief in this appeal simply assumes – without candid acknowledgment or discussion – that if it attaches a claim of incompetency to a defaulted trial level claim, the PCRA waiver provision disappears. The attempt expands the narrow exception in Brown beyond recognition. This abuse deriving from Brown, at

[1] Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546.

least in the hands of the FCDO, leads me to reiterate and expand upon my fixed disagreement with extensions of the Court's decision in Brown, as well as with the Brown decision itself. See Commonwealth v. Bomar, -- A.3d --, 2014 WL 6608963, **31-33 (Nov. 21, 2014) (Castille, C.J., concurring).

I.

There is a presumption of free will and self-determination in the criminal justice system in America, which manifests itself in jurisprudence recognizing that a citizen charged with a criminal offense is free to waive his right to counsel and to represent himself. Faretta v. California, 422 U.S. 806, 834 (1975) (right of self-representation guaranteed under structure of Sixth Amendment to U.S. Constitution); Commonwealth v. Starr, 664 A.2d 1326, 1334-35 (Pa. 1995). A capital defendant likewise is free to waive more discrete rights, such as his case in mitigation, so long as the waiver is knowing, intelligent and voluntary, as it was here. Commonwealth v. Puksar, 951 A.2d 267, 288 (Pa. 2008). In the case of a counseled defendant, the defendant's lawyer cannot later be held ineffective for following his client's instructions in this regard. See, e.g., Schriro v. Landrigan, 550 U.S. 465, 475-76 (2007). There are consequences of self-representation, of course, and properly so; most relevant here, a defendant who knowingly and voluntarily waives his right to counsel and represents himself at trial cannot later seek to revive defaulted claims by alleging his own ineffectiveness, or the ineffectiveness of his standby counsel. Commonwealth v. Fletcher, 896 A.2d 508, 522 (Pa. 2006); see also Commonwealth v. Bryant, 855 A.2d 726, 736 (Pa. 2004). There is nothing unfair in this circumstance: citizenship includes certain responsibilities, and trials are momentous events.

In this case, appellant chose to represent himself at trial; he deliberately elected to waive mitigation evidence; he was fairly tried under the circumstances he demanded;

and he was convicted and sentenced to death by a unanimous jury of his peers. Given appellant's criminal conduct – brutally stabbing Duana Swanson and then murdering his fourteen-month-old stepson Basil by cruelly slitting his throat – the penalty verdict likely was a foregone conclusion. Represented by counsel on direct appeal, who dutifully litigated the most important issue – appellant's waiver of counsel – among other claims, appellant's conviction was unanimously affirmed. Commonwealth v. Blakeney, 946 A.2d 645, 654, 662 (Pa. 2008), cert. denied, 555 U.S. 1177 (2009).

Given a pre-trial finding of competence to stand trial, and appellant's valid waiver of counsel, this should have been a relatively simple PCRA matter. As recognized by the Per Curiam Opinion, appellant's own choices and defaults severely restricted his potential universe of properly cognizable, non-frivolous claims on collateral attack. But, enter the self-appointing FCDO, with its seemingly endless federal resources, see Commonwealth v. Spotz, 99 A.3d 866 (Pa. 2014) (single-Justice Opinion by Castille, C.J.), which is as monomaniacal as Captain Ahab in Moby-Dick in seeking to confuse and thereby subvert Pennsylvania state procedural default doctrines in capital cases. Here, the FCDO employs a scheme this Court has seen before: the FCDO tries to find ways to avoid the natural and proper consequences of the pre-trial finding of competency; appellant's ensuing deliberate decision to represent himself at trial; and his equally deliberate decision not to pursue an affirmative case in mitigation. [2]

[2] Given that appellant's circumstances arise from his self-representation, the FCDO had more incentive than usual to create delay in this case. And so, the FCDO requested five extensions of time to brief the appeal, and also requested permission to exceed the then-70-page briefing limitation. Both requests were granted (at a time when the Court was less attuned to the FCDO's obstructionist agenda in capital cases). Despite the narrow universe of properly available claims, the FCDO then abused the Court with a brief of 98 pages, raising 14 claims, some of which include sub-claims. The Court should be mindful not to tolerate these sorts of abuses in the future.

As I recently noted in my concurrence in Bomar, Brown, whether right or wrong, "established a judicially-manufactured narrow 'exception' to the waiver command of the [PCRA], 42 Pa.C.S. §§ 9541–9546, limited to claims of competency to stand trial which were defaulted on direct appeal. Brown, 872 A.2d at 1155–56 (claim respecting competence to stand trial not subject to PCRA waiver); see also Commonwealth v. Fletcher, 604 Pa. 493, 986 A.2d 759, 778, n.24 (Pa. 2009) (Brown spoke to single competency issue and did not speak to issue of competency to waive right to counsel for post-trial proceedings)." Bomar, ___ A.3d at ___, 2014 WL 6608963, *31 (Castille, C.J., concurring). The exception to waiver created in Brown was well-intended, I know, but I respectfully remain of the view that the rule was wrong when announced, see Brown, 872 A.2d at 1161 (Castille, J., concurring, joined by Eakin, J.), and the FCDO's abuse of the rule in this case and in other recent cases reveals an unintended and harmful consequence of the rule set in Brown. The General Assembly cannot correct this Court's error in Brown. I would overrule both Brown and its accidental progeny.

As I noted in my Bomar concurrence:

> It is difficult to conceive of a claim that more directly implicates Strickland v. Washington, [466 U.S. 668 (1984)] -- and does not warrant usurping the PCRA's waiver provision – than a defaulted competency to stand trial issue. Who knows better than trial counsel whether the client was "incapable of meaningfully assisting in his defense" at the relevant time? Indeed, if a capital defendant truly was incompetent – was so impaired that he could not even communicate with and assist counsel -- it is difficult to believe that his counsel would not notice, unless counsel himself was incompetent. And, we have Sixth Amendment principles to govern that eventuality: there is no reason to negate a salutary provision of the PCRA.

Bomar, ___ A.3d at ___, 2014 WL 6608963, *32 (Castille, C.J., concurring).

Setting aside logic and separation of powers principles, Brown remains the law until a Court majority is convinced of its error, and the Per Curiam Opinion, which proceeds to the merits per the precedent in Brown, properly explains why appellant's retrospective claim of incompetence to stand trial is meritless. As in Bomar, the FCDO in this case was able to turn to its stable of compliant experts and produce Dr. Richard Dudley, M.D., a forensic psychiatrist[3] -- to conduct a retrospective competency evaluation and opine that, yes indeed, appellant was not competent at the time of his trial. However, this opinion, which was produced by the FCDO solely in conjunction with its collateral attack upon appellant's trial level defaults, was squarely contradicted by multiple contemporaneous sources: the pre-trial findings by the Mayview State Hospital psychiatrist who evaluated appellant prior to trial, the trial record reflecting appellant's actual performance in representing himself, and the trial court's extensive first-hand observations of a defendant who actually tried his own case. As I explained in Bomar, retrospective competency claims are particularly ripe for abuse by anti-death penalty advocacy groups like the FCDO, like-minded experts in their effective employ, and capital defendants themselves, who obviously have nothing to lose by abetting a fraudulent claim. The courts should properly be skeptical of such retrospective claims, particularly in circumstances like this case, where the defendant was evaluated prior to trial, and then conducted his own defense. Bomar, 2014 WL 6608963 at 9-10; see also Commonwealth v. Hackett, 99 A.3d 11, 39 (Pa. 2014) (Castille, C.J., concurring)

[3] Dr. Dudley has predictably testified on behalf of FCDO-represented capital defendants in numerous other capital cases, including Bomar, 2014 WL 6608963 at *10; Commonwealth v. Baumhammers, 92 A.3d 708, 718 (Pa. 2014); Commonwealth v. Fears, 86 A.3d 795, 813 (Pa. 2014); Commonwealth v. Sepulveda, 55 A.3d 1108, 1120 (Pa. 2012); and Commonwealth v. Banks, 29 A.3d 1129, 1135-37 (Pa. 2011), cert. denied, 133 S.Ct. 100 (2012).

(explaining similar incentives with retrospective claims of mental retardation/intellectual disability brought under Atkins v. Virginia, 536 U.S. 304 (2002)). To its credit, the PCRA court in this case did not allow itself to be misled by the FCDO's agenda and the frivolous claims of incompetency it pursued here. Given the record circumstances reflecting appellant's ability to understand the trial proceedings and to assist in his defense contemporaneous to the trial, this case is revealing because it shows just how far the FCDO will go to promote its cause.

The FCDO tactic here is not new: the FCDO has employed it in prior cases, seeking to undo valid waivers and attack a defendant's reasoned decision to waive counsel or the presentation of mitigation evidence by raising retrospective claims of incompetency. See Michael v. Wetzel, 570 Fed. Appx. 176, 181-84 (3d Cir. 2014) (alleging capital defendant's incompetency to waive right to federal *habeas corpus* review); Commonwealth v. Spotz, 18 A.3d 244, 266-67 (Pa. 2011) (alleging capital defendant's incompetency to waive counsel); Commonwealth v. Ali, 10 A.3d 282, 288-91 (Pa. 2010) (alleging capital defendant's incompetency to waive right to counsel for collateral review); Puksar, 951 A.2d at 268-69 (alleging capital defendant's incompetency to waive presentation of mitigating circumstances); accord Commonwealth v. Sam, 952 A.2d 565, 568 (Pa. 2008) (noting that FCDO counsel initiated PCRA proceeding for non-FCDO client by filing PCRA petition without authorization, claiming he was doing so on petitioner's "behalf"). The effect of Brown having manifested itself, we should overrule that case and discourage this particular strain of fraudulent claims.

The FCDO proceeds under an assumption that the Brown decision opened the door to relaxed waiver of other kinds. This is not the first time the FCDO has sought to expand Brown and, as noted by the Per Curiam Opinion, the Court unfortunately has

reviewed unpreserved challenges to the very different claim of competency to waive the right to counsel on at least two other occasions, broadly stating that a majority of the Court has agreed that competency claims are not subject to the waiver provision of the PCRA. Spotz, 47 A.3d at 79, n.6; Spotz, 18 A.3d at 262, n.10. These broad statements were mistaken when they were made, and represented an unexplained extension of Brown. I regret my failure, and the Court's failure, to then perceive what was at work (buried as we were by the deliberately abusive avalanche of claims in the FCDO briefs in the Spotz cases). But, it is now crystal clear what the FCDO is up to: it dresses up other defaulted claims in the garb of "incompetence" in an attempt to get the defendant out from under his knowing and voluntary decision to represent himself. I remain of the belief that the decisions in Brown and Spotz should be prospectively overruled.

II.

As the Court notes, appellant's first four claims all posit that his alleged incompetency affected the trial. The only two competency challenges currently cognizable per Brown and Spotz are: the attack on appellant's competency to stand trial and the attack on his decision to waive the right to counsel. The Court correctly rejects appellant's arguments and disposes of these twin frivolous issues, based upon the pre-trial findings by the Mayview State Hospital psychiatrist, the trial record, the contemporaneous evidence, and the trial court's first-hand observations.

Appellant's claims relating to his competency to waive the right to present mitigation evidence (Claim II) and the related challenge to the adequacy of the waiver colloquy (Claim III), however, are defaulted per statutory command of the PCRA, and I would explicitly say so. Appellant made the decision to represent himself at trial and he raised no objections in this regard. Appellant was both presumed to be competent to

stand trial, and was actually found to be competent. That contemporaraneous competency determination subsumed appellant's lesser-included claims of incompetency for specific purposes now forwarded retrospectively by the FCDO. These claims are plainly waived under the PCRA; nothing in Brown supports a judicial negation of the legislative judgment embodied in the PCRA; and appellant forwards no developed argument as to why the legislation should be ignored. These claims should be identified and dismissed as frivolous.

Separately, appellant challenges the adequacy of the waiver of counsel colloquy, a claim he has already pursued and lost on direct appeal. Appellant now alleges direct appeal counsel ineffectiveness in litigating the claim (Claim III). Appellant avers that "there are readily identifiable reasons why the trial court's colloquy was inadequate to sustain a waiver of counsel…. Appellate counsel, however, failed to bring those specific deficits to this Court's attention." Appellant's Brief at 54. Appellant cites this Court's observation on direct appeal that he did "not identify, let alone elaborate upon, any information or right that the court failed to explain to him" in support of his challenge to the colloquy. Blakeney, 946 A.2d at 656. Indulging a typical FCDO tautology, appellant also argues that appellate counsel should have known that appellant's waiver was not knowing, intelligent and voluntary because, of course, appellant was incompetent at the time he waived his right to the assistance of counsel. This claim likewise is frivolous. Although dressed up as an attack on appellate counsel's failures on direct appeal, appellant is actually challenging the failure to object at trial to an allegedly deficient colloquy. By choosing to represent himself, appellant alone is responsible for that trial level default, and there is no cognizable claim of appellate counsel ineffectiveness: this is just more FCDO obstruction and smoke screen.

Many of appellant's remaining claims are waived: Claims VI, VII, X, and XII each could have been raised at trial, but were not preserved and were not raised on direct appeal. Accordingly, they are unavailable under the PCRA, and the FCDO's frivolous pursuit of them contemptuously burdens the Court gratuitously.

I write to supplement the analysis of the Court only with respect to Claim VIII, which alleges that two jurors failed to disclose biases affecting their ability to be fair and impartial. Although inartfully phrased, appellant's apparent intention in this claim is to argue that the jurors' alleged bias was not discovered until after the trial, and could not have been previously raised, and, for that reason the claim is not waived. I would hold that this sort of claim – premised upon a collateral attack upon the honesty and integrity of members of the jury – is not cognizable under the PCRA. The cases appellant cites speak to the jury selection process, and involve preserved challenges. See Appellant's Brief at 81. None of those cases remotely suggested that a cognizable constitutional claim arises from a party's later collateral attacks upon jurors. Moreover, even if such a practice were someday deemed proper, the "new" information the FCDO alleges about the two jurors does not remotely demonstrate juror "bias" in a constitutional sense. This issue plainly is frivolous.

Mr. Justice Stevens joins this opinion.