

[J-135-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 553 CAP
	:	
Appellee	:	Appeal from the Order entered on
	:	10/11/2007 denying PCRA relief in the
	:	Court of Common Pleas, Criminal
v.	:	Division of Monroe County at No.
	:	CP-45-CR-0001522-2001.
	:	
MANUEL MARCUS SEPULVEDA,	:	
	:	
Appellant	:	SUBMITTED: July 25, 2008

CONCURRING AND DISSENTING OPINION

MR. JUSTICE EAKIN

DECIDED: November 28, 2012

I respectfully disagree with the majority’s decision to vacate and remand to the PCRA court for inquiry into prejudice with respect to appellant’s claim of ineffective assistance of counsel concerning the investigation, development, and presentation of mitigation evidence in the penalty phase. In all other aspects, I join the majority.

The majority finds counsel’s performance deficient, “considering the reasonableness of counsel’s investigation, the mitigation evidence that was actually presented, the additional or different mitigation evidence that could have been discovered and presented, and the Commonwealth’s failure to muster any relevant argument in defense of counsel’s performance[.]” Majority Slip Op., at 29. Further, the majority holds the result concerning prejudice is not self-evident in this case; thus, a remand is required for the PCRA court to conduct a prejudice inquiry. Id., at 31. As I believe appellant’s ineffectiveness claims associated with the investigation, development, and presentation of mitigation evidence in the penalty phase must fail, I

cannot join the majority's decision regarding counsel's deficient performance, and thus, cannot join the decision to remand.

In Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court held capital counsel has an obligation to thoroughly investigate and prepare mental health and other mitigating evidence. Id., at 395-96. Counsel cannot meet this requirement by relying on "only rudimentary knowledge of [the defendant's] history from a narrow set of sources." Wiggins v. Smith, 539 U.S. 510, 524 (2003). Further, this Court has previously noted:

Under prevailing constitutional norms as explicated by the United States Supreme Court, capital counsel has an obligation to pursue all reasonable avenues for developing mitigating evidence. Counsel must conduct a thorough pre-trial investigation, or make reasonable decisions rendering particular investigations unnecessary. Strategic choices made following a less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitation of the investigation. In undertaking the necessary assessment, courts are to make all reasonable efforts to avoid distorting effects of hindsight. Nevertheless, courts must also avoid "post hoc rationalization of counsel's conduct."

Commonwealth v. Williams, 950 A.2d 294, 303-04 (Pa. 2008) (citations and footnote omitted). The United States Supreme Court has further clarified what Strickland requires concerning investigation and preparation of penalty phase mitigating evidence:

The Sixth Amendment entitles criminal defendants to ... representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." That standard is necessarily a general one. ... Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009) (quoting Strickland v. Washington, 466 U.S. 668, 686, 688 (1984)). Thus, the Court noted the standard Williams and Wiggins

applied is flexible enough to account for the prevailing professional norms at the time of counsel's performance. See Strickland, at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

Additionally, the reasonableness of counsel's investigation and the presentation of mitigating evidence depend, in large part, on the extent to which appellant assisted counsel's investigation and presentation of mitigating evidence. See, e.g., Commonwealth v. Tedford, 960 A.2d 1, 44 (Pa. 2008) ("[C]ounsel has no duty to introduce and argue evidence of mitigating circumstances where his client has specifically directed otherwise.") (quoting Commonwealth v. Sam, 635 A.2d 603, 612 (Pa. 1993)); Commonwealth v. Rega, 933 A.2d 997, 1026 (Pa. 2007) ("reasonableness ... depends ... [on] ... information supplied by ... defendant"); Commonwealth v. Rios, 920 A.2d 790, 811 (Pa. 2007) (counsel not ineffective for not providing testimony of defendant's family members when defendant instructed counsel not to present their testimony); Commonwealth v. Uderra, 706 A.2d 334, 340 (Pa. 1998) ("Appellant's own failure to cooperate with counsel in order to apprise him of allegedly relevant information cannot now provide a basis for ineffectiveness claims.").

Here, the PCRA court found appellant opposed any investigation into his background. This finding is supported by the record. Counsel noted appellant did not wish to involve his family members. Appellant's family members consistently testified appellant did not ask for their assistance, or even inform them of the seriousness of the charges, until after he was sentenced to death. Had appellant wanted counsel to investigate evidence from his background, including the alleged domestic abuse he suffered, it is unlikely he would have instructed counsel not to contact his family while

downplaying the severity of the charges against him to his family members. Further, even though Alex Sepulveda, appellant's relative, is an attorney whose family members frequently asked for help with their legal problems, appellant did not once contact him before sentencing. Thus, where appellant consistently opposed investigating his background, I do not believe he has proven counsel was unreasonable in not investigating that background.

Further, the PCRA court concluded counsel had no reason to believe appellant suffered from mental health issues. I would find this conclusion is supported by the record, as Dr. Puente noted the information appellant provided about his background was "not enough to put up a red flag." N.T. PCRA Hearing, 6/12/07, at 74. Further, Dr. Stewart admitted someone without mental health training would not be able to notice appellant's indicia of Post Traumatic Stress Disorder. See N.T. PCRA Hearing, 6/11/07, at 93. Thus, it was not obvious to counsel that appellant was suffering from a mental health problem. Further, counsel did consult a mental health expert, Dr. Fine, who reviewed appellant's confession and concluded an in-person evaluation was unnecessary. Accordingly, pursuant to the prevailing professional norms at the time of counsel's performance, I would conclude counsel's "decision not to seek more' mitigating evidence from [appellant]'s background, ... fell 'well within the range of professionally reasonable judgments.'" Bobby, at 19 (quoting Strickland, at 699).

As to the issue of appellant's pre-trial prison records, the PCRA court concluded these records did not contain any "red flags" because stress from facing trial on capital charges could have caused appellant's symptoms. Although Dr. Stewart noted guilt could have caused appellant's symptoms, appellant's experts consistently testified neither stress nor guilt could have caused appellant's hallucinations. Thus, I would

hold the record does not support the PCRA court's conclusion that stress could have caused the symptoms recorded in appellant's pre-trial prison records.

Nonetheless, I do not believe appellant has proven counsel acted unreasonably in not reviewing these records. The PCRA court determined appellant did not demonstrate any obvious signs of mental illness, and Dr. Fine did not inform counsel that appellant had mental health issues. As counsel had no indication appellant suffered from any mental illness, he acted reasonably in not reviewing prison records for signs of an illness he had no cause to believe existed. Additionally, appellant opposed any investigation into his background. Thus, counsel did not have any reason to ignore his own observations of appellant, Dr. Fine's advice, and his client's wishes, by reviewing appellant's prison records in hopes of uncovering signs of mental illness. Accordingly, I would hold appellant has failed to establish counsel was ineffective in not reviewing his prison records.

As a result, I cannot agree counsel's performance was deficient, thus requiring a remand for the PCRA court to conduct a prejudice inquiry. While hindsight always provides this Court with a clear view of the most prudent path counsel could have taken, that path here was blurred for counsel by appellant's lack of cooperation and desire to keep his background and family out of the courtroom. The lack of red flags and reasons to further investigate appellant's pre-trial prison records distorted matters even further. Although we now have a 20-20 view of a better path counsel could have taken, our governing case law instructs us not to be swayed by this view, but rather by the reasonableness of the chosen path. Because I find counsel's pursuit to have been reasonable, I must respectfully disagree with the majority's decision to remand to the PCRA court.