[J-134-2011] [MO: Eakin, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 579 CAP
	:	
Appellee	:	Appeal from the Order of the Court of
	:	Common Pleas of Allegheny County,
	:	Criminal Division, dated December 1,
v.	:	2008, at Nos. CP-02-CR-0008705-1994,
	:	CP-02-CR-0009095-1994, and CP-02-CR-
	:	0009201-1994
LEROY FEARS,	:	
	:	
Appellant	:	SUBMITTED: February 11, 2011

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: February 19, 2014**

I join the Majority Opinion. I write separately to paint a fuller picture as to why I conclude that the Majority properly denies relief on appellant's claims in his first petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546.

To the extent appellant's current claims depend upon a finding that counsel was ineffective on direct appeal, my own examination of the direct appeal record convinces me that appellant is not entitled to a remand for an evidentiary hearing. Two examples suffice to make my point. I turn first to appellant's claim that trial counsel was ineffective in failing to present a diminished capacity defense. The Majority correctly observes that appellate counsel raised this claim on direct appeal and developed expert testimony in support of the claim. What is not fully or adequately conveyed by either this Court's

opinion on direct appeal or today's Majority Opinion is the comprehensiveness of appellate counsel's presentation of this claim.[1]

This was not an instance where direct appeal counsel raised a non-record-based claim with little or no support; instead, a review of the direct appeal briefs and evidentiary hearing transcripts reveals appellate counsel's competent performance. Counsel's brief in this Court argued that trial counsel should have had appellant examined by a psychiatric expert prior to the entry of his guilty plea to first-degree murder. This position was supported by appellate counsel's questioning of trial counsel at the post-trial evidentiary hearing, where she pointedly asked trial counsel questions as to why he did not explore obtaining an expert before advising appellant to plead guilty, especially given the circumstances surrounding the murder which suggested that appellant had engaged in sexual acts with a dead victim. See N.T., 6/27-28/2000 (evidentiary hearing), at 93-96, 106-07. Appeal counsel also adduced through

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[1] The analysis and rejection of this issue was contained in a footnote in this Court's opinion on direct appeal. The Court performed a cursory analysis, combining the issue with a claim that trial counsel should have pursued a second-degree murder theory, stating:

> Appellant also argues that counsel was ineffective for advising him to plead guilty to first degree murder because the evidence establishes a lesser degree of homicide. In Commonwealth v. Marsh, 440 Pa. 590, 271 A.2d 481, 483 (Pa. 1970), we held that the key question is whether the defendant had the opportunity to make a reasonable choice. This claim lacks arguable merit because Appellant was advised of the elements of first degree murder as well as the differences between the various degrees of criminal homicide prior to the entrance of his plea in open court. … Thus, Appellant had an opportunity to make a reasoned decision.

Commonwealth v. Fears, 836 A.2d 52, 64 n.11 (Pa. 2003) (record citation omitted). The relative brevity of our analysis, of course, does not reflect upon the performance of counsel in raising and developing the issue.

questioning trial counsel that Dr. Christine Martone, M.D., the chief psychiatrist at the Allegheny County Jail who was appointed by the trial court to evaluate appellant, only examined appellant after the entry of the guilty plea. Upon further questioning by appellate counsel, trial counsel testified that he relied on Dr. Martone's expert report instead of obtaining a defense expert because he believed that she would be "neutral" and that there were only limited funds available for hiring experts by the Allegheny County Public Defender's Office. However, counsel further admitted that he never made an inquiry about such funds. Id. at 117; see also Fears, 836 A.2d at 73.[2]

Furthermore, also during the evidentiary hearing, direct appeal counsel presented expert testimony in support of a diminished capacity theory via Dr. Ralph Tarter, Ph.D., who specialized in clinical psychology and neuropsychology. Dr. Tarter conducted neuropsychological testing of appellant, reviewed background records provided by appellate counsel (which coincidentally were not obtained by trial counsel, see N.T., 6/27-28/2000, at 109), and reviewed the trial transcripts and police reports. Dr. Tarter testified to possible mitigating circumstances, but, more importantly for purposes of the instant claim, unequivocally opined that appellant was acting under diminished capacity at the time of the murder. See id. at 225 ("Based upon everything that I said this morning, I think quite strongly that the circumstances around that event, Mr. Fears decompensated, was psychotic and he certainly was functioning under extreme diminished capacity. I am sure he had no capacity at that point to clearly link behavior and intent to consequences.").

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[2] The U.S. Supreme Court has recognized that counsel is "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." Harrington v. Richter, ___ U.S. ___, ___, 131 S.Ct. 770, 789 (2011). Failure even to attempt to secure limited funding, of course, is not reasonable.

It is true that direct appeal counsel ultimately tied her claim of trial counsel's ineffectiveness for failing to explore evidence in support of third-degree murder, *i.e.*, diminished capacity, to the overarching theory that trial counsel should never have advised appellant to plead guilty to first-degree murder. But, the fact remains that a claim of trial counsel ineffectiveness for failing to explore a diminished capacity defense was developed by appellate counsel at the hearing, and the claim was presented, and eventually rejected, on direct appeal. In my view, under these circumstances, the present layered ineffectiveness claim, which must focus upon appellate counsel, lacks merit, and indeed, amounts to little more than hindsight second-guessing. As the Majority observes, "[m]erely because appellate counsel could have presented more or different experts does not prove she acted unreasonably." See Majority Slip Opinion at 9.

Second, regarding appellant's claim that his mental health impairments prevented him from entering a knowing, voluntary, and intelligent guilty plea and waiver of a jury for purposes of the penalty phase, a more thorough review of direct appeal counsel's performance likewise sheds important light. The Majority determines that appellant cannot demonstrate that he was prejudiced by direct appeal counsel's presentation of this claim. The Majority bases its conclusion on the fact that "appellate counsel posited 12 factors to be considered" by this Court on direct appeal and provided a list of trial counsel's alleged deficiencies. See Majority Slip Op. at 10-11.

I would supplement this analysis by noting that, in the Reply Brief of Appellant filed on direct appeal, counsel addressed the prospect that this Court would decide that a totality of circumstances review was appropriate to decide appellant's challenge to the voluntariness of his guilty plea (the course the Court in fact ultimately followed). Counsel indeed posited twelve factors that should be considered in conducting such an

analysis. As the Majority notes, eight of the enumerated factors specifically focused on trial counsel's performance. These were the eight factors:

> 4. Trial counsel, an Allegheny County Assistant Public Defender, testified at an evidentiary hearing that he was unaware of this Court's case law requiring a degree of guilt hearing;
> 5. Counsel conducted no investigation prior to the guilty plea;
> 6. Counsel retained no psychiatric expert before the guilty plea;
> 7. Counsel did not attempt to argue 2nd or 3rd degree murder although the record supports both;
> 8. Counsel left defendant alone in the bull pen to complete [the] guilty plea colloquy;
> 9. Counsel advised defendant to plead guilty to IDSI [involuntary deviate sexual intercourse] for which the Commonwealth now concedes there is no factual basis;
> 10. Counsel testified he had no training in capital cases;
> 11. Counsel testified he had no understanding of the concept of mitigation for sentencing purposes….

See Reply Brief of Appellant (on direct appeal), at 7-8. After providing this list of trial counsel's deficiencies respecting the plea, direct appeal counsel pointedly concluded that, "A thorough and unvarnished analysis of the totality of the circumstances in this case should make this Court shudder at the cavalier approach to the death penalty taken by the lower court, the prosecution, and most unfortunately, **by defense counsel**." Id. at 8 (emphasis added). In light of direct appeal counsel's efforts, I am unconvinced by appellant's current attack upon counsel respecting the voluntariness of appellant's guilty plea.

Mr. Justice Saylor's Dissenting Opinion notes that trial counsel's conduct was "troubling" as demonstrated by counsel's apparent decision to take the path of least resistance at various phases of the proceedings and the related observation that the Commonwealth has an obligation to provide an indigent capital defendant with essential resources necessary to his defense. I share these sentiments generally. However, in this case, we have the interposition of new appointed counsel on appeal, who litigated

claims focusing upon trial counsel and, in my view, this must change the calculus. Many of appellant's positions here, forwarded by lawyers from the Philadelphia-based Federal Community Defender Office ("FCDO"), merely take claims identified and developed by appeal counsel and rejected by this Court, and spin off new theories of support or criticism. This all-out attack upon prior counsel is typical of the FCDO's litigation style in these many cases where they have involved themselves questionably in state-court capital litigation.

The alleged deficiencies of trial counsel seized upon by federal counsel here did not escape the notice of direct appeal counsel. Notably, in the direct appeal brief, counsel argued that trial counsel had abdicated his responsibility to meaningfully test the prosecution's case by advising appellant to plead guilty to first-degree murder; allowing a waiver of appellant's right to a sentencing jury while failing to fully inform appellant of the ramifications; conducting no independent investigation into appellant's background for sentencing purposes; and moving into evidence the entire pre-sentence investigation report without limiting consideration of the highly prejudicial and inadmissible portions of the report. Indeed, counsel's direct appeal brief is not unlike the Dissenting Opinion, as appellate counsel pointedly asserted, "[i]n the most critical areas of this case, counsel acquiesced to the prosecution's legal theories…. Counsel's total capitulation caused him to take the bad with the good." See Brief of Appellant (on direct appeal), at 97-98.

Furthermore, appellate counsel also pointed out that in 1998 (after appellant's trial), Allegheny County was sued by indigent criminal defendants, alleging that severe understaffing, excessive caseloads, inadequate policies and procedures and other systemic deficiencies made it unlikely that the indigent could receive adequate Sixth Amendment representation. The lawsuit resulted in a settlement agreement, which was

discussed by appellate counsel in her brief and was also the subject of extensive questioning of trial counsel during the evidentiary hearing. See id. at 98-99.[3] Appellate counsel also pointed to numerous changes that had taken place in the Allegheny County Public Defender's Office since the time of appellant's trial as proof of the deficiency in prior policies. See N.T., 6/27-28/2000, at 106-07. In short, the alleged failings of trial counsel's representation, both personal and systemic, did not escape the notice of appellate counsel; and in this case, at least, appellate counsel's performance must be accounted for when the underlying claim sounds in the deficiencies of trial counsel. To secure relief, appellant must prove that appellate counsel performed below constitutional standards. See Smith v. Robbins, 528 U.S. 259, 285-86 (2000); Smith v. Murray, 477 U.S. 527, 535-36 (1986). Furthermore, this Court considered appellant's claim that he was constructively denied counsel in violation of the Sixth Amendment, as outlined above, but rejected the claim, "[b]ecause we ha[d] determined that there were no errors warranting relief…." See Fears, 836 A.2d at 74.

The gravamen of appellant's complaints concerning direct appeal counsel have more to do with his disagreement with the Court's decision on direct appeal, rather than

[3] See also N.T., 6/27-28/2000, at 96 (trial counsel acknowledged that Allegheny Public Defender's Office did not have a policy to have every capital defendant examined prior to trial at time of appellant's trial, but policy had changed; trial counsel also acknowledged there were no minimum continuing legal education requirements regarding death penalty cases within office); id. at 97-98 (trial counsel acknowledged he had no specific training at his office regarding representation of death penalty clients prior to his representation of appellant, although situation had since changed); id. at 99 (trial counsel stated that appellant's case was his second death penalty case to go to trial and only one in which capital defendant had admitted to committing crime); id. at 99-100 (trial counsel testified that he was not assigned another lawyer to help him prepare case for trial); id. at 100 (trial counsel stated that position of mitigation expert "didn't exist" in office at time of appellant's trial); id. at 116 (trial counsel testified there were no funds to hire psychiatric expert).

with the actual performance of direct appeal counsel in forwarding those claims. On the Sixth Amendment claims as so forwarded on this appeal, I join the Majority Opinion.