[J-124-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 339 CAP
	:	
Appellee	:	Appeal from the Order of the Court of
	:	Common Pleas of Bucks County, Criminal
	:	Division dated May 21, 2001 at Docket
v.	:	No. 88-741, dismissing Appellant's petition
	:	brought pursuant to the Post Conviction
	:	Relief Act, 42 Pa.C.S. §§ 9541-46
FRANK CHESTER,	:	
	:	
Appellant	:	
	:	SUBMITTED: September 6, 2005
	:	
	:	
	:	

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: March 21, 2006**

As I agree with the overall disposition of the majority opinion, I write separately only to distance myself from the broad view espoused by the majority with regard to the after-discovered evidence exception to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. Whereas the majority would find that counsel's DUI arrest was public record, and therefore, generally discoverable through an exercise of due diligence on the part of Appellant, I would find that the particular circumstances of this case lead to the conclusion that PCRA counsel, through the exercise of diligence, should have uncovered counsel's DUI arrest. Specifically, the allegations made by PCRA counsel in Appellant's first PCRA petition indicate that by exercising due diligence, PCRA counsel would have further

uncovered trial counsel's criminal history. Thus, I would not go so far as the majority does to hold that criminal defendants are generally responsible for the arduous task of uncovering the criminal record of their attorney, where no basis for such discovery exists. For the following reasons, I concur.

The majority opinion posits that trial counsel's DUI arrest could not be characterized as "unknown" to Appellant because the information was a matter of public record. I believe, however, that there is danger in placing such an onerous burden on a criminal defendant to search public records to determine whether there are pending charges against his attorney during that defendant's trial. Rather, in affirming, I would rely solely upon the record *sub judice*, and conclude that if where, as here, PCRA counsel, who represented Appellant at his first PCRA hearing, had exercised due diligence, he would have uncovered trial counsel's DUI arrest. Because PCRA counsel for Appellant alleged during the first PCRA proceeding that trial counsel had a substance abuse problem and had been suspended from practicing law, there was some basis upon which to suspect that further investigation of trial counsel may have uncovered relevant information. Thus, based on this knowledge, PCRA counsel, through the exercise of due diligence, could reasonably have discovered the DUI arrest which was of record at the time.

In this regard, the PCRA court below noted the following:

> While [Appellant] argues that he could not have reasonably been expected to know about trial counsel's criminal conduct, our review of the record indicates that [Appellant] raised the issue of trial counsel's purported 'substance abuse' problem in his first PCRA petition. In addition, following the first PCRA hearing, [Appellant] filed a Motion to Re-open the Record wherein [Appellant's] counsel asserted that he was aware that [Appellant's trial attorney] had been suspended from the practice of law prior to the first PCRA hearing. Certainly these facts placed [Appellant] or his counsel on notice that some infraction of the law occurred. Given that notice the defendant had every opportunity to raise that substance abuse problem in the context of a criminal record. [Appellant] has not demonstrated that information concerning [trial counsel's] criminal record was not known or knowable to him

> at the time of trial or shortly thereafter, let alone at the time of his first PCRA when he specifically raised substance abuse problems.

Trial Court Op. at 11. (footnote omitted.)

As such, I concur, finding that the facts surrounding the case *sub judice* pointed to the possibility of trial counsel's criminal conduct which could have been revealed through the exercise of diligence, rather than finding that the DUI arrest was public record and, therefore, automatically discoverable.

Mesdames Justice Newman and Baldwin join this opinion.