[J-139-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 331 CAP
	:	
Appellee	:	
	:	Appeal from the Order entered in the
	:	Court of Common Pleas, Criminal
v.	:	Division, Philadelphia County, on 1/8/01
	:	denying PCRA relief at No. 2809 January
	:	term 1991
RONALD GIBSON,	:	
	:	
Appellant	:	SUBMITTED: June 26, 2002

CONCURRING AND DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: July 24, 2008**

As the majority notes, I dissented from the prior remand to the PCRA court because I felt the record supported Attorney Gaskins' decision to present only Appellant's positive qualities at the penalty phase, and this was not an unreasonable strategy. See Commonwealth v. Gibson, 940 A.2d 323, 327-29 (Pa. 2005) (Eakin, J., dissenting statement); Majority Slip Op., at 8 n.3. I now dissent from this second remand to the PCRA court.

Although claims of trial counsel's ineffectiveness raised for the first time in a PCRA petition are no longer waived, Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002), that holding does not apply here because Appellant's direct appeal concluded prior to Grant. See Commonwealth v. Washington, 927 A.2d 586, 594 (Pa. 2007). In pre-Grant cases, allegations of trial counsel's ineffectiveness are waived if they are not

raised in post-trial motions or direct appeal proceedings. Id., at 594 (citing 42 Pa.C.S. § 9544(b); Commonwealth v. D'Amato, 856 A.2d 806, 812 (Pa. 2004)). Appellant's ineffectiveness claims therefore have to be analyzed under the pre-Grant framework, where the PCRA court can only review direct appeal counsel's ineffectiveness. Id. Appellant must argue each layer of ineffectiveness, on all three prongs of the ineffectiveness standard. Id.

In his statement of questions presented, Appellant includes boilerplate language that all prior counsel were ineffective. Appellant's Brief, at 1. Thus, he met his burden of pleading direct appeal counsel's ineffectiveness for failing to raise the issue of trial counsel's ineffectiveness. See Commonwealth v. Rush, 838 A.2d 651, 656 (Pa. 2003). However, Appellant must also present argument as to direct appeal counsel's deficient representation, developing each of the three ineffectiveness prongs. Washington, at 595. Appellant has satisfied that requirement regarding direct appeal counsel's failure to appeal Attorney Gaskins' choices regarding investigation and presentation of certain mitigation evidence. Appellant's Brief, at 44.

Here, the majority determines it is "debatable" which trial counsel, Attorney Ciccone or Attorney Gaskins, should be attributed with ineffectiveness, but states that issue is only collateral to our inquiry. Majority Slip Op., at 19. However, that issue is central to our inquiry since this is a pre-Grant case; the conduct of Gaskins and Ciccone had to be raised on direct appeal. Appellant raised "numerous claims of ineffective assistance of trial counsel [on direct appeal]." Commonwealth v. Gibson, 688 A.2d 1152, 1165 (Pa. 1997). This Court found trial counsel effective. Id., at 1165-69. Only the conduct of Appellant's direct appeal counsel is reviewable in the instant PCRA petition.

Since our remand in this case, the United States Supreme Court in Abdul-Kabir v. Quarterman, 127 S.Ct. 1654, 1659 (2007), addressed an issue that is not identical to the issue here, but the dissenting justices provided persuasive summaries of the nature of ineffectiveness law concerning mitigation evidence. Justice Scalia opined:

> While one can believe that "the impetuousness and recklessness that may dominate in younger years can subside," [Johnson v. Texas, 509 U.S. 350, 368 (1993)], one can also believe that a person who kills even in his younger years is fundamentally depraved, and more prone to a life of violent crime. Johnson itself explicitly recognized this point, denying relief despite "the fact that a juror might view the evidence of youth as aggravating, as opposed to mitigating." [Id.].

Id., at 1686 (Scalia, J., dissenting).[1]

As articulated by Justice Scalia, I disagree with the belief that introducing negative aspects of defendants' lives at the penalty phase is per se beneficial for

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[1] Regarding the nature of jury instructions concerning mitigation evidence, Chief Justice Roberts persuasively opined:

> We give ourselves far too much credit in claiming that our sharply divided, ebbing and flowing decisions in this area gave rise to "clearly established" federal law. If the law were indeed clearly established by our decisions "as of the time of the relevant state-court decision," Williams v. Taylor, 529 U.S. 362, 412 … (2000), it should not take the Court more than a dozen pages of close analysis of plurality, concurring, and even dissenting opinions to explain what that "clearly established" law was. … When the state courts considered these cases, our precedents did not provide them with "clearly established" law, but instead a dog's breakfast of divided, conflicting, and ever-changing analyses. That is how the Justices on this Court viewed the matter, as they shifted from being in the majority, plurality, concurrence, or dissent from case to case, repeatedly lamenting the failure of their colleagues to follow a consistent path. Whatever the law may be today, the Court's ruling that 'twas always so — and that state courts were "objectively unreasonable" not to know it, Williams, supra, at 409, … — is utterly revisionist.

Abdul-Kabir, at 1676 (Roberts, C.J., dissenting) (emphasis in original).

defendants. See Majority Slip Op., at 17 n.11. While some cases call for presentation of mental considerations and other negative aspects as mitigation evidence, similar evidence may at other times hurt a defendant's cause. The decision is for defense counsel's judgment, and if a reasonable basis for the decision exists, our jurisprudence does not allow us to second-guess it on appeal. Sentencing counsel's conduct in this area is best reviewed on a case-by-case basis under the traditional ineffectiveness inquiry without deferring to the but often general, impracticable thoughts of scholarly writers.

Regarding the prejudice prong, the majority remands again to the PCRA court to determine if there is a reasonable probability Appellant's sentence would have been different if Gaskins presented negative aspects of Appellant's life, including mental health mitigation, instead of the positive aspects that were presented. Majority Slip Op., at 17-18. Since there are conflicting views on whether presenting mitigation evidence of a defendant's negative attributes helps a defendant at sentencing, and some of Appellant's witnesses already testified to his troubled childhood at sentencing, Majority Slip Op., at 16, I do not see how it is reasonably probable the sentence imposed here would have been different if such negative mitigation evidence was presented. While the majority criticizes this opinion for relying on dissenting opinions from two United States Supreme Court opinions, Majority Slip Op., at 15 n.8, the majority's "authority" for the notion that presentation of mental health mitigation evidence can be beneficial for a defendant at sentencing is a law review article, three federal court decisions, and one Illinois state court decision — none of which are binding authority on this Court. Majority Slip Op., at 17-18 n.11. The law review article and one of the federal court decisions were published after we affirmed on direct appeal; thus, direct appeal counsel could not be ineffective for not being aware of that law. Commonwealth v. Williams, 936

A.2d 12, 28 (Pa. 2007) (counsel not ineffective for failing to foresee changes in law). Since the effect of negative mitigation evidence is uncertain, and the law regarding such evidence was not clear when this case was on direct appeal, I would not find direct appeal counsel ineffective for not raising Ciccone's or Gaskin's conduct in this regard as an ineffectiveness claim on direct appeal.

Regarding the remaining ineffectiveness prongs, the majority states counsel has to conduct a thorough investigation or make reasonable decisions rendering such investigations unnecessary. Majority Slip Op., at 18 (citations omitted). As I noted in my dissenting statement, "[Attorney Gaskins] admittedly did not investigate or present the [negative aspects of Appellant's life], but he did present the [positive aspects], in detail." Gibson, 940 A.2d at 327 (Eakin, J., dissenting statement). As the majority also states, Appellant made an "eleventh hour" decision to employ Gaskins in place of Ciccone before trial, yet now complains of Gaskins' conduct. Majority Slip Op., at 3. Gaskins apparently requested a continuance with the trial court, which was denied. See Gibson, 940 A.2d at 324 (Nigro, J., concurring and dissenting statement); Majority Slip Op., at 27-28. The majority notes Appellant's decision to change counsel appears "well founded" since original counsel Ciccone had not conducted a mitigation investigation. Majority Slip Op., at 19 n.12. Under the circumstances, Gaskins' decision to concentrate on the guilt phase was quite understandable and not unreasonable, particularly in light of Appellant's tardiness in bringing him into the case, and the trial court's apparent denial of Gaskins' request for a continuance. It is not surprising Gaskins focused on pursuing a not guilty verdict; in fact, if he had not focused enough

time on that purpose, he would have been deemed ineffective for not focusing on the guilt phase.[2]

At sentencing, Gaskins presented nine witnesses and "tried extensively to personalize [A]ppellant and not leave the jury with only those negative aspects of his life extrapolated during the trial." Gibson, 940 A.2d at 328 (Eakin, J., dissenting statement). Gaskins' conduct may or may not have provided the absolute best choice, but that is not the test; if his decisions were reasonable under the circumstances, we cannot intervene because we in hindsight feel a different strategy should have been utilized. See Majority Slip Op., at 19 (citing Commonwealth v. Basemore, 744 A.2d 717, 735 (Pa. 2000) ("The reasonableness of counsel's decisions cannot be based upon the distorting effects of hindsight.")). Due to his late entry at Appellant's request, it was reasonable for Gaskins to focus on exoneration rather than mitigation, and to present Appellant's positive aspects as he did through extensive testimony at sentencing. Thus, direct appeal counsel did not err in not raising Gaskins' ineffectiveness in this regard on direct appeal.

The majority's rationale creates the potential for abuse of the litigation and PCRA process. If capital defendants choose to make an "eleventh hour" replacement of counsel, counsel will be under extreme time pressure to prepare and conduct a capital trial; if investigation of mitigation evidence is truncated by this decision, despite counsel's hard work under those circumstances created by the defendant, counsel's conduct should not be susceptible to a meritorious ineffectiveness claim.

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[2] Appellant raised ineffectiveness claims for counsel's conduct during the guilt phase. See Majority Slip Op., at 6-7.

I join the remainder of the majority's opinion,[3] with the following exception. I join the majority's conclusion police presence at trial did not prejudice Appellant. Majority Slip Op., at 46-47. However, I do not join the broad statement that "police officers' attendance at trial may cause concern with regard to jurors' perceptions and courtroom atmosphere." Id., at 46. Certainly if their presence were so pervasive and domineering as to make one afraid merely by their number or attitude, a problem may be seen, but likewise their presence may add a measure of security to the atmosphere. Something more than mere attendance[4] would have to exist to trigger such concerns, much less prejudice to a defendant, and I hope the majority's statement will not be interpreted as discouragement of their presence.

[3] On all remaining ineffectiveness claims, I join the majority opinion as I interpret the majority's analysis of those claims to be a review of direct appeal counsel's conduct.

[4] Police officers may attend a trial as can any other member of the public. See generally Commonwealth v. Contakos, 453 A.2d 578, 579 (Pa. 1982) (courts open to public); Richmond Newspapers v. Virginia, 448 U.S. 555, 573 (1980) (same). Their status as police officers alone cannot prevent them from exercising that right.