

[J-156-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 248 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence
	:	entered on February 12, 1991, in the
	:	Court of Common Pleas of Philadelphia
v.	:	County, Criminal Trial Division at Nos.
	:	3222 to 3231
	:	
KENNETH FORD,	:	
	:	
Appellant	:	SUBMITTED: August 17, 2000

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: October 25, 2002

I join Madame Justice Newman's concurring opinion in this matter.

I also write separately to address the dissent's position regarding the Court's recent capital PCRA jurisprudence involving the importance of properly pleading, proving, and briefing layered claims of ineffective assistance where the defendant was represented by new counsel on direct appeal. In this regard, the dissent maintains that Appellant's claims are procedurally barred, as he failed to adequately plead, prove, and brief a layered claim of ineffectiveness, particularly, that associated with representation of direct appeal counsel. See Dissenting Opinion, slip op. at 9-11.

At the time Appellant filed and litigated his petition in the post-conviction court, this Court had in effect its policy of relaxed waiver, which was then applied not only on direct appeal, but also in the post-conviction context. Indeed, the PCRA court relied upon such

doctrine in addressing Appellant's claims. As the dissent acknowledges, relaxed waiver permitted review of the underlying allegation on its merits, without the necessity of establishing ineffectiveness. Accord Commonwealth v. Nelson, 514 Pa. 262, 277, 523 A.2d 728, 736 (1987). Consequently, Appellant's focus in both his PCRA petition and at the PCRA hearing upon the failure of trial counsel to present available mitigation evidence in the penalty phase was consistent with the then existing relaxed waiver rule.

In Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693 (1998), the Court eliminated relaxed waiver in the post-conviction context, see id. at 45, 720 A.2d at 700, and subsequently, determined that such change was to be implemented retroactively as a mere clarification to the applicable review paradigm. See Commonwealth v. Pursell, 555 Pa. 233, 252-53, 724 A.2d 293, 303 (1999).

I joined in the Court's elimination of relaxed waiver, and in directing the retroactive effect of this change, for a number of reasons, foremost among which were the substantial tension between relaxed waiver and amendments to the legislative scheme for post-conviction relief,¹ and what I saw as continuing abuses of the relaxed waiver doctrine.² Nevertheless, I acknowledge that the doctrine had, in fact, been made broadly available by the Court, more broadly than I believe was originally intended, and therefore, post-conviction petitioners operating under the then-prevailing rules, such as Appellant, were

¹ The PCRA contains a specific set of waiver precepts, which the General Assembly has enhanced through the amendatory process. See 42 Pa.C.S. §§9543(a)(3), 9544(b).

² Relaxed waiver was utilized by petitioners to justify the assertion of new claims on an ad hoc basis throughout the post-conviction process, up to and including reply briefs in post-conviction appeals. Particularly where the effort was directed, not to the raising of a single, compelling basis for relief arising out of the existing record, but rather, to inundating the Court with dozens of additional non-record-based claims outside the framework designed for orderly review of such claims, I saw this effort as inconsistent with the intent and design of the relaxed waiver doctrine as first articulated in Commonwealth v. McKenna, 476 Pa. 428, 449, 383 A.2d 174, 181 (1978).

justified in invoking the doctrine in styling and litigating their claims for relief. It is unjust, in my view, to penalize them for failing to frame and pursue their claims according to a far more stringent set of rules subsequently implemented by the Court.

Thus, upon reflection, I am now of the view that the abolition of relaxed waiver should have been applied prospectively, and that its retroactive elimination has contributed to the Court's present difficulty in achieving a consensus concerning the appropriate principles to be applied in its absence, as reflected in the number of divided opinions in this area. See, e.g., Commonwealth v. Lambert, ___ Pa. ___, 797 A.2d 232 (2002) (opinion announcing the judgment of the court); Commonwealth v. Bracy, ___ Pa. ___, 795 A.2d 935 (2002); Commonwealth v. Gorby, 567 Pa. 370, 787 A.2d 367 (2001) (opinion announcing the judgment of the court); Commonwealth v. Meadows, 567 Pa. 344, 787 A.2d 312 (2001) (plurality opinion); Commonwealth v. Simmons, ___ Pa. ___, 786 A.2d 943 (2001) (opinion announcing the judgment of the court); Commonwealth v. Rivers, 567 Pa. 239, 786 A.2d 923 (2001) (opinion announcing the judgment of the court). It now appears to me that, by retroactively eliminating relaxed waiver and now imposing upon post-conviction petitioners the requirement to plead and prove entitlement to relief through a layered ineffectiveness standard, the Court has not simply clarified the standard of review, but rather, has altered the standard of proof. Notably, the federal courts have declined to treat the retroactive elimination of relaxed waiver as a procedural bar to federal habeas corpus relief. See, e.g., Pursell v. Horn, 187 F. Supp.2d 260, 296-97 (W.D. Pa. 2002); Bronshtein v. Horn, 2001 WL 767593, *7-8 n.17 (E.D. Pa. 2001) (describing the abolition of relaxed waiver in capital PCRA cases as a "sea change"). This position seems particularly appropriate as applied to those petitioners, such as Appellant, who no longer had the opportunity to amend their pleadings and offer evidence as of the time relaxed waiver was abolished. Accord Walker v. Attorney General, 167 F.3d 1339, 1345 (10th Cir. 1999) ("A defendant cannot be expected to comply with a procedural rule that does not exist at the

time, and should not be deprived of a claim for failing to comply with a rule that only comes into being after the time for compliance has passed." (citations omitted)).

In summary and in retrospect, I believe that the Court's effort to align its jurisprudence with the terms of the PCRA and to curb the abuses to the relaxed waiver doctrine should have been accomplished prospectively, thereby allowing pending cases to be reviewed in accordance with the standards governing the presentation of claims prevailing at the time when the claims were presented. Left to my own devices, I would take this opportunity to correct our jurisprudence in this regard.