[J-83-2001]
THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 305 Capital Appeal Docket
	:	
Appellee,	:	On appeal from the orders of the
	:	Washington County Court of Common
	:	Pleas, No. 555(a)(b) 1986, dated April 18,
v.	:	2000, and May 12, 2000, denying post-
	:	conviction relief
	:	
THOMAS J. GORBY,	:	
	:	
Appellant.	:	SUBMITTED: May 3, 2001
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	:	
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CONCURRING AND DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: December 31, 2001**

To the extent the Court denies PCRA relief, I concur in the result. I respectfully dissent, however, from the order remanding the case to the PCRA court.

The Court inexplicably remands this matter, which has already been the subject of a PCRA hearing at which appellant's trial counsel testified in response to the claim that he was ineffective in failing to develop and present mitigation evidence, for a further PCRA hearing at which appellant will be permitted to attempt to prove what is alleged in affidavits he has attached to his brief. I disagree with the remand for two reasons. First, the claim that trial counsel was ineffective in this regard is waived under the PCRA since appellant could have raised the claim on direct appeal, but did not. Second, in remanding, the Court simply ignores the fact that the PCRA court passed upon the merits of a **non-waived**, layered version of this ineffectiveness claim. The PCRA court concluded that the claim

lacked merit because trial counsel's PCRA testimony revealed that counsel's consultations with appellant and his family revealed no basis for him to pursue a mental health-based defense at the penalty phase; accordingly, appellant "has failed to prove that his trial counsel was ineffective or that his subsequent counsel was ineffective for failing to bring a meritless claim" on direct appeal. PCRA op. at 8. In disposing of the layered claim, the PCRA court apparently accepted appellant's affidavits at face value, noting that trial counsel's testimony "does not conflict with the testimony as proposed in the affidavits." Id. at 4. Given this posture of the case, a further hearing would be required only if this Court concluded that the PCRA court erred in finding that counsel were not ineffective for failing to pursue a childhood trauma/mental health mitigation claim, the basis for which was never revealed to counsel by appellant or his family members. Because I cannot agree with the Court's unexplained and apparently arbitrary grant of a remand here, I respectfully dissent.

The Court remands for an ineffectiveness hearing "on the issues of [appellant's] mental history and capacity and trial counsel's failure to investigate." This claim of trial counsel ineffectiveness, however, is waived. "To be eligible for relief under the PCRA, Appellant must . . . show that none of the claims raised in his petition has been previously litigated or waived." Commonwealth v. Pierce, ___ A.2d ___, ___ (Pa. 2001), No. 207 CAP, slip op. at 7. An issue is waived under the PCRA "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state postconviction proceeding." 42 Pa.C.S. § 9544(b). See Commonwealth v. Ragan, 743 A.2d 390, 395 (Pa. 1999). Thus, the "very terms" of the PCRA "exclude[] waived issues from the class of cognizable PCRA claims." Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998).

This Court has repeatedly recognized that, "[i]n order to preserve claims of ineffectiveness of counsel under the PCRA, the claims must be raised at the earliest stage in the proceedings at which the allegedly ineffective counsel is no longer representing the

claimant." Commonwealth v. Kenney, 732 A.2d 1161, 1164 (Pa. 1999), quoting Commonwealth v. Griffin, 644 A.2d 1167, 1170 (Pa. 1994). Accord Commonwealth v. Green, 709 A.2d 382, 384 (Pa. 1998) ("It is well-established that a claim of ineffectiveness must be raised at the earliest possible stage in the proceedings at which counsel whose effectiveness is questioned no longer represents the defendant") (collecting cases); Commonwealth v. Hubbard, 372 A.2d 687, 695 n.6 (Pa. 1977).[1]

Appellant had a full opportunity to claim that trial counsel's stewardship at the penalty phase was ineffective before finally raising it in this PCRA proceeding. Appellant's retained trial counsel, Daniel Chunko, Esquire, was permitted to withdraw on February 17, 1987, after the trial but before post-trial motions. The Washington County Public Defender, John Liekar, Esquire, (who is now deceased), was appointed to represent Appellant in his post-trial motions and on direct appeal. PCRA op. at 2 n.2. Obviously, appellant could have raised this claim of ineffectiveness of trial counsel on post-trial motions and on direct appeal, yet failed to do so. Thus, the claim of trial counsel ineffectiveness is waived under the terms of the PCRA. Pierce, ___ A.2d at ___, slip op. at 7-8 ("Because all of Appellants assignation of trial court error and claims of ineffective assistance of counsel could have been raised in his post-verdict motions or on direct appeal, those claims are waived"); Commonwealth v. Williams, 782 A.2d 517, 526 (Pa. 2001) ("[T]hose claims that were not raised at the earliest opportunity . . . would be deemed waived" under 42 Pa.C.S. § 9544); id. at 534 (Castille, J., concurring) (same); Commonwealth v. Marrero, 748 A.2d 202, 204 (Pa. 2000) (Nigro, J., concurring) (pursuant to 42 Pa.C.S. § 9544(b), "Appellant has waived all of his ineffective assistance of trial counsel claims by failing to present them at his first

[1] This Court recently granted allocatur to determine whether this Court's practice of requiring counsel to raise claims of ineffectiveness at the first opportunity where new counsel enters the case, which began with the footnote in Hubbard, should be reconsidered. See Commonwealth v. Grant, 780 A.2d 601 (Pa. 2001).

opportunity to do so when his trial counsel no longer represented him, which was on his direct appeal to this Court").

As the PCRA court recognized, appellant also challenged the effectiveness of his subsequent counsel with regard to mental health mitigation evidence. Unlike his claim of trial counsel ineffectiveness, which appellant could have raised on direct appeal, a claim that appellate counsel was ineffective for failing to challenge trial counsel's effectiveness in this regard could not be raised until this PCRA proceeding, which was appellant's "first opportunity to attack the stewardship of his prior appellate counsel." Marrero, 748 A.2d at 204 (Nigro, J., concurring). Appellant in fact raises, as a separate claim in his brief, an argument that "all prior counsel were ineffective for failing to raise each and every issue presented herein." Initial Brief of Appellant at 91. This boilerplate argument apparently is intended to raise a distinct Sixth Amendment claim involving direct appeal counsel.

Claims of appellate counsel ineffectiveness are distinct constitutional claims which are governed by the Sixth Amendment test set forth in Strickland v. Washington, 466 U.S. 668 (1984), and Smith v. Robbins, 528 U.S. 259, 285-89 (2000). See Williams, 782 A.2d at 525; id. at 535-36 (Castille, J., concurring). Although appellant's boilerplate argument that all prior counsel were ineffective may be enough to require merit review of his claims under this Court's recent precedent, Williams, 782 A.2d at 525-26; Marrero, 748 A.2d at 203-04 n.1, it does not even begin to satisfy the substantive Strickland standard with respect to appellate counsel. See Williams, 782 A.2d at 534-37 (Castille, J., concurring) (discussing test for counsel ineffectiveness in direct appeal context). Boilerplate allegations have never been sufficient to discharge the affirmative burden to rebut the presumption that counsel was effective. Pierce, ___ A.2d at ___, slip op. at 23; Commonwealth v. Pettus, 424 A.2d 1332, 1335 (Pa. 1981) (court will not consider boilerplate claims of ineffective assistance); see also Commonwealth v. Morris, 684 A.2d 1037, 1045 (Pa. 1996) (speculative claim of ineffectiveness summarily rejected; ineffectiveness claims cannot be

raised in vacuum) (citing cases); Commonwealth v. Hutchinson, 556 A.2d 370, 372 (Pa. 1989) (defendant bears burden of proving allegations of ineffective assistance by submission of relevant proofs); Commonwealth v. Hentosh, 554 A.2d 20, 24 (Pa. 1989) (same). Accord Commonwealth v. Ragan, 645 A.2d 811, 829 (Pa. 1994) (boilerplate allegation is no basis for relief in capital PCRA appeal). Accordingly, the claim of appellate counsel ineffectiveness, though not waived, fails on the merits.

In addition to granting an evidentiary hearing on a waived claim, the Court grants the hearing in the face of the PCRA court's finding that the underlying claim of trial counsel ineffectiveness is meritless. The PCRA court heard and credited evidence from trial counsel, who testified and explained why he did not pursue evidence of appellant's alleged childhood abuse and neglect. Trial counsel explained that he was never given any indication by appellant or his family that such a history existed. As the PCRA court summarized in its opinion rejecting this claim:

> As [is] evident from [trial counsel's] testimony, he had no knowledge of any of the alleged mental health problems of the Petitioner nor did his lengthy conversations with the Petitioner's mother, the Petitioner's stepfather, or the petitioner himself give any indication that such problems existed. Furthermore, there were no other indications that should have placed trial counsel on alert as to the possibility of the existence of mental health evidence. The Petitioner's medical and hospital records do not include MRIs or other examinations of the brain. The Petitioner himself spoke articulately and intelligently. He has an IQ of 105. … The Petitioner has failed to prove that his trial counsel was ineffective or that his subsequent counsel was ineffective for failing to bring a meritless claim and this claim is dismissed.

PCRA Court op. at 8.

The Court does not explain what deficiency, if any, there is in the PCRA court's substantive analysis, such as to require a remand. I see none. Trial counsel's credited testimony that his consultations with appellant and his family gave him no reason to inquire

into this area established that his conduct was objectively reasonable. As the U.S. Supreme Court explained in Strickland:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
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> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

466 U.S. at 690-91. Because trial counsel cannot be faulted for failing to divine what was never disclosed to him, direct appeal counsel was not ineffective for failing to discover and pursue this claim. See Pierce, supra.

With respect to appellant's other claims, which the Court summarily rejects, I would note that those claims, like the claim discussed above, are waived except to the extent they sound in the alleged ineffectiveness of direct appeal counsel. That version of the claims fails, however, because it is mere boilerplate. I also write separately on this point to

address the suggestion in the Concurring Opinion by Mr. Justice Saylor that a dismissal of appellant's remaining claims based upon their inadequate development is erroneous because the brief in this case was filed before this Court's decision in Williams. The *dicta* in Williams upon which the concurrence relies did not announce or establish the substantive standards governing Sixth Amendment claims of counsel ineffectiveness; those standards have existed all along. Appellant's failure even to address the constitutional standards governing his claims is a perfectly appropriate ground for disposition.