

[J-83-2001]
IN 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

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MR. CHIEF JUSTICE FLAHERTY

DECIDED: December 31, 2001

This is an appeal from the denial of post-conviction relief in a capital case.¹ On January 10, 1996 Gorby filed a pro se PCRA petition, which was subsequently amended by counsel and filed on May 30, 1997. The amended petition consisted of 188 pages and 22 claims for relief. The trial court granted a hearing only with respect to the claim that defense counsel was ineffective in failing to investigate and present mitigating evidence of Gorby's abusive childhood, his substance abuse and his cognitive impairments. After hearing, the court denied all claims.

¹ This court affirmed the conviction on direct appeal at Commonwealth v. Gorby, 588 A.2d 902 (Pa. 1991).

The Post Conviction Relief Act, 42 Pa.C.S. § 9543, provides, in pertinent part:

§ 9543. Eligibility for relief

(a) General rule. -- To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

* * *

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocent could have taken place.

* * *

(3) That the allegation of error has not been previously litigated or waived.

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

All of the claims raised by Gorby are controlled by these provisions of the PCRA.

We have classified the nineteen claims raised in this petition into five categories. The first category concerns claims of ineffectiveness of counsel at the guilt phase. In each guilt phase ineffectiveness claim Gorby must demonstrate not only that he has met the pleading and proof requirements of the PCRA, but also that:

(1) the underlying claim is of arguable merit; (2) counsel's performance was unreasonable; and (3) counsel's ineffectiveness prejudiced defendant. An appellant cannot obtain post-conviction review of claims previously litigated on appeal by alleging ineffective assistance of prior counsel and presenting new theories of relief to support previously litigated claims.

Commonwealth v. Chester, 733 A.2d 1242, 1251 (Pa. 1999).

Thus, each ineffectiveness claim must conform to:

- the pleading and proof requirements of the PCRA (i.e., the circumstances of the case, the undermining of the truth-determining process, the unreliability of the adjudication of guilt or innocence).
- the requirement that traditional ineffectiveness elements are pled and proved (claim is of arguable merit, performance was unreasonable, prejudice).

None of Gorby's guilt phase ineffectiveness claims is presented in terms of the circumstances of the case and for this reason alone, they must fail. At the guilt phase, the concern with counsel's ineffectiveness is that the ineffectiveness rendered the adjudication unreliable. Thus, any guilt phase ineffectiveness claim² must be considered in terms of the

² Gorby's guilt phase claims of ineffectiveness are: counsel failed to develop and present evidence of Gorby's diminished capacity and mental infirmities; failed to investigate or (continued...)

circumstances of the case, which at a very minimum, consist of evidence supporting a finding of guilt.³ Because Gorby fails to recite the circumstances of the case, these claims must be denied.

The second category of claims in this PCRA appeal is claims concerning errors committed by the trial court and by the prosecutor.^{4 5} One of the requirements of the PCRA with respect to such claims is the pleading and proof :

(...continued)

challenge forensic and medical testimony; failed to adequately voir dire jurors as to whether they were impermissibly biased in favor of the death penalty.

³ Among the circumstances of this case are that Gorby was seen drinking with the victim shortly before his death; the victim was displaying a large wad of cash and buying drinks for the whole bar; the victim gave Gorby a ride to another bar, where his dead body was later found in his car; Gorby appeared in the second bar flush with cash, buying drinks for the whole bar, and in possession of a distinctive belt similar to that worn earlier in the evening by the victim, a wallet that was similar to that of the victim, and a knife with blood stains on it. Gorby then returned to the first bar, where he appeared with the victim's belt. One witness noticed blood stains on his pants. In addition, Gorby confessed to his girlfriend that he committed the crime. Gorby placed the victim's wallet, belt and leather jacket in a dumpster at a motel where he had been staying with his girlfriend. A motel employee found these items and called police because the name of the victim was embossed on the back of the belt buckle, and the employee had read of the victim's murder in the newspaper. Shortly after police questioned Gorby, he fled the jurisdiction to Texas, where he was later arrested using a false name.

⁴ Claims of trial court error are that the trial court: failed to provide the jury an opportunity to consider mitigating evidence; erred in admitting evidence of prior convictions as aggravating circumstances; failed to provide a life without possibility of parole instruction; improperly refused to strike for cause jurors biased in favor of the death penalty; issued improper verdict slip and jury instructions with respect to unanimously finding mitigating circumstances.

⁵ Claims of prosecutorial error are: the prosecutor improperly indicated at the guilt phase that Gorby had a prior record; the prosecutor improperly argued that guilt could be inferred from flight; the prosecutor improperly used peremptory challenges to exclude women; the (continued...)

(3) That the allegation of error has not been previously litigated or waived.

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

42 Pa.C.S. § 9543, supra. Since none of these issues contains a discussion of whether the issue was previously litigated or waived, or why failure to litigate could not have been the result of any rational strategic or tactical decision by counsel, these claims must be denied. The mere boilerplate allegation that all claims raised in the PCRA petition are to be construed as being claims of ineffectiveness of all prior counsel is insufficient to cast these claims in an ineffectiveness context. But even if such claims were considered as claims of ineffectiveness of counsel, none is discussed in the circumstances of the case, and each would be denied for that reason alone.

The third category of issues encompasses claims that the cumulative errors of the case entitle Gorby to a new trial and that Gorby needs additional discovery. Neither claim is meritorious since it has not been established that any error occurred and also because neither claim is presented in the context of the circumstances of the case or in the context of pleading and proof that the allegations have not been previously litigated or waived or that failure to litigate could not have been the result of any rational strategic or tactical decision of counsel.

(...continued)

prosecutor failed to disclose in a timely manner evidence that was material and exculpatory in both the guilt and penalty phases of trial.

Fourth, Gorby asserts that this court erred in failing to provide meaningful proportionality review. This claim is without merit as we have already addressed and denied a similar claim in Commonwealth v. Gribble, 703 A.2d 426, 440-41 (Pa. 1997).

Finally, with respect to penalty phase claims⁶ of ineffectiveness of counsel, Gorby asserts that trial counsel was ineffective for not investigating and presenting to the jury evidence that Gorby was intoxicated at the time of the crime, evidence of diminished capacity, and evidence that Gorby experienced an abusive childhood, had a history of drug and alcohol problems, and had organic brain damage. At the PCRA hearing, Gorby presented various affidavits concerning his mental state and history, but he did not present for cross-examination the witnesses who made these affidavits. Although the Commonwealth objected to the admission of these affidavits into evidence without cross-examination of the affiants, and although the PCRA court considered the affidavits only as a proffer, Gorby now attempts to argue from the affidavits that counsel was ineffective for failing to pursue these matters.

It is well established that trial counsel has an “obligation to conduct a thorough investigation of the defendant’s background.” Williams v. Taylor, 529 U.S. 362, 396 (2000).

Trial counsel testified at the PCRA hearing that he was given no reason to perform an investigation into Gorby’s mental history. The PCRA found this testimony credible and

⁶ The penalty phase claims of ineffectiveness of counsel are: counsel failed to develop and present evidence of Gorby’s diminished capacity and mental infirmities at the penalty phase; counsel’s closing argument at penalty phase was ineffective; counsel was ineffective in failing to object to the state’s closing argument at the penalty phase.

determined that counsel had no reason to investigate further than he did. The Commonwealth's position is that these witnesses are only the usual collection of expert and character witnesses who are often uncovered after a sentence has been returned.

The Commonwealth points out that the affidavits are not a part of the record in the case, and in the absence of a record, the Commonwealth is unable to respond to the claim that counsel was ineffective for failing to investigate Gorby's mental history and capacity. We agree. Accordingly, we remand the case to the PCRA court for a hearing at which Gorby may present witnesses, who will be subject to cross-examination, on the issues of Gorby's mental history and capacity and trial counsel's failure to investigate.

The PCRA court is affirmed in all respects except that the case is remanded on the issue of counsel's ineffectiveness for failure to investigate and present additional evidence of Gorby's mental history and capacity.

Mr. Justice Cappy files a concurring opinion.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Zappala concurs in the result.

Mr. Justice Nigro concurs in the result.

Madame Justice Newman concurs in the result.

Mr. Justice Castille files a concurring and dissenting opinion.