[J-83-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 358 CAP
	:	
Appellee	:	Appeal from the Order entered on
	:	September 26, 2001 in the Court of
	:	Common Pleas, Criminal Division, of
v.	:	Washington County at Nos. 686-668 of
	:	1985
	:	
ROLAND WILLIAM STEELE,	:	
	:	
Appellant	:	SUBMITTED: March 27, 2003
	:	

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: December 18, 2008**

I join the learned Majority Opinion, but write to two points of elaboration and to address an issue raised by Mr. Justice Saylor's Dissenting Opinion, regarding whether it would be appropriate to *sua sponte* remove present counsel for perceived briefing deficiencies.

First, to the Majority's analysis of appellant's claims, I would add that this Court recognizes that appellant's ineffectiveness claims are posed under the Sixth Amendment, and thus, the governing standard is Strickland v. Washington, 466 U.S. 668 (1984). "To secure relief under Strickland, a defendant must plead and prove both that his 'counsel's performance was deficient' and that the 'deficient performance prejudiced the defense.'" Commonwealth v. Reaves, 923 A.2d 1119, 1127 (Pa. 2007), quoting Strickland, 466 U.S. at 687.

While the Majority does acknowledge Strickland, the Majority also speaks of the defense burden "[i]n Pennsylvania." Majority Slip Op. at 8. I would emphasize that the three-pronged Pennsylvania approach is not a distinct or weaker test for counsel ineffectiveness, but merely a more focused manner of applying the governing two-part Strickland test. "'It is settled that the test for counsel ineffectiveness is the same under both the Pennsylvania and Federal Constitutions: it is the performance and prejudice test set forth in Strickland v. Washington … .'" Commonwealth v. Williams, 936 A.2d 12, 19 (Pa. 2007), quoting Commonwealth v. Gribble, 863 A.2d 455, 460 (Pa. 2004) (collecting cases). Accord Commonwealth v. Washington, 927 A.2d 586, 594 n.8 (Pa. 2007); Commonwealth v. Hawkins, 894 A.2d 716, 721 n.10 (Pa. 2006). "This Court has consistently applied the [Strickland] performance prong by examining both the arguable merit of the claim lodged against counsel in addition to the objective reasonableness of the actions taken by counsel." Williams, 936 A.2d at 19 (citation omitted). Appellant's failure to include within his claims of ineffectiveness non-boilerplate argument relevant to the Strickland performance and prejudice test requires their rejection.

Second, both the Majority Opinion and Justice Saylor's Dissenting Opinion discuss Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998). Albrecht abrogated the discretionary relaxed waiver doctrine on PCRA review because, among its other jurisprudential failings, relaxed waiver was squarely inconsistent with the PCRA waiver provision. I have elsewhere addressed at length the effect of Albrecht, including whether it could accurately be described as "clarifying" relaxed waiver and whether it could rightly be applied "retroactively" to a PCRA petition filed before the abrogation occurred and which relied upon the doctrine. See Commonwealth v. Bracey, 795 A.2d 935, 948-57 (Pa. 2001) (Castille, J., concurring); see also Commonwealth v. Ford, 809 A.2d 325, 346 n.8 (Pa. 2002) (Castille, J., dissenting), *cert.* denied, 540 U.S. 1150 (2004). Albrecht was decided before appellant filed the amended PCRA petition which is the subject of this appeal, and

appellant does not challenge its legitimacy or reach. Thus, it poses no retroactivity issue, and, indeed, no Albrecht issue is raised.

Turning to Mr. Justice Saylor's Dissenting Opinion, although my esteemed colleague does not agree with the Court's assessment of the adequacy of appellant's briefing in this case and the resultant waiver of claims, he suggests that, given our findings of waiver, *sua sponte* removal of counsel and remand for appointment of new PCRA counsel is warranted. Dissenting Slip Op. at 4. For purposes of responsive discussion, I will assume that, in an appropriate case, this Court properly may remove PCRA appeal counsel *sua sponte*, that we may do so without allowing counsel to be heard, and that no finding of Strickland-type prejudice is required.[1] I agree with the Majority's findings of waiver. In my view, however, on the record here, the fact that counsel has chosen not to develop appellant's claims of ineffective assistance in a fashion designed to ensure merits review under Strickland does not support the *sua sponte* removal of counsel.

Appointed counsel of record on appeal is Noah Geary, Esquire, who hails from Washington County, the County where the murders occurred and appellant was tried and convicted. Mr. Geary has filed a 98-page Initial Brief, a 9-page Reply Brief to the Commonwealth's cursory (and distinctly unhelpful) Brief for Appellee, and a thick Appendix of Exhibits. From the record, it is apparent that appellant and his appointed counsel have proceeded with the additional substantial assistance of what is now the Defender Association of Philadelphia's specialized unit dedicated to capital litigation.

Appellant's modest, initial "*pro se*" PCRA petition was filed in 1996 with the volunteer assistance of Billy Nolas, Esquire, who at that time was litigation director of the Pennsylvania Post-Conviction Defender Organization (PPCDO). Along with that filing,

[1] I do note, however, that it is not self-evident why (1) counsel should not be heard before removal; and (2) counsel should be replaced, and the PCRA appeal expense doubled, rather than be ordered to file a conforming brief.

Attorney Nolas offered that his organization would be willing to represent appellant if it were appointed to do so by the trial court. See Nolas Letter to Washington County Clerk of Court, 6/5/96. The following year, on May 15, 1997, Nolas and co-counsel Robert Dunham, Esquire, who were then associated with a successor Pennsylvania capital defense organization with the moniker Center for Legal Education and Defense Assistance (CLEADA), renewed the request to be appointed to represent appellant. In an opinion dated June 6, 1997, the PCRA judge denied the request, noting that appellant was not entitled to appointed counsel of his choice, and that competent PCRA defense counsel was available for appointment in the county. The court appointed a local attorney to represent appellant; the initial appointed PCRA counsel was permitted to withdraw, however, and the court then appointed Peter K. Darragh, Esquire.

Meanwhile, the Defender Association of Philadelphia, Federal Division, absorbed many of the lawyers who had comprised CLEADA, including Attorneys Nolas and Dunham, and also assumed and expanded the capital defense assistance function which had been engaged in by the PPCDO and CLEADA.[2] The lawyers who served in these successive organizations continued working on appellant's case on a voluntary basis, with the approval of Attorney Darragh. Thus, in 1999, Darragh secured a continuance because the Defender Association of Philadelphia was assisting him in researching and preparing appellant's amended PCRA petition. On January 10, 2000, Darragh ultimately filed the 95-page, nineteen claim amended PCRA petition which is the subject of this appeal.

After the Commonwealth responded to the amended petition, the Court scheduled a PCRA hearing for May 30, 2000. At the outset of that hearing, the court recited the history

[2] According to a recent article in The Legal Intelligencer, the size of the Federal Defender's capital habeas unit has ballooned from three lawyers in 1996 to "to 36 lawyers and an overall staff of 83" today. Shannon P. Duffy, *Skipper is New Chief Federal Defender*, THE LEGAL INTELLIGENCER, Dec. 2, 2008, at 1.

of the case, including its approval of the Philadelphia Federal Defender's voluntary assistance to appointed counsel, which had led the court to grant a continuance. Also on that day, Attorneys Nolas and Anne Saunders, of what was now styled the Federal Defender Capital Habeas Unit, formally entered their appearances as voluntary counsel for appellant. The PCRA hearing was held that same day, and Defenders Nolas and Saunders conducted all defense examinations of witnesses.

After the hearing, and while the PCRA petition was still pending, Darragh was granted permission to withdraw and Attorney Geary was appointed. With the exception of the Atkins claim, the Brief filed by Geary in this Court tracks the amended PCRA petition which the Federal Defender had helped to prepare. In addition, the Brief is very familiar in format, style and substance: it reads very much like the briefs the Federal Defender files in capital PCRA cases where it is counsel of record.

In assessing counsel's Brief, I would consider the background summarized above. Counsel has filed substantial pleadings, and the PCRA litigation strategy employed throughout was arrived at with the benefit of consultation with the Federal Defender. The Federal Defenders are well-financed, sophisticated and capable capital defense advocates. They well know -- better than this Court knows -- the effect that their state-side litigation advice and decisions will have upon the prospect for federal habeas corpus relief. I believe that the structure and content of appellant's petition below, and his Brief in this appeal, are the result of a fully realized capital collateral litigation strategy, one whose primary concern is with laying the groundwork for anticipated federal habeas corpus relief.

This Brief, like other briefs filed by the Federal Defender in the same general time frame, poses the issues in a very distinct and deliberate way. In its statement of the scope and standard of review, in its summary of argument, and in the lengthy preamble to the argument (entitled "Eligibility For Relief And The Nature Of Appellant's Claims"), the Brief is careful to characterize claims in the alternative. Thus, the Brief first declares that appellant

is eligible for relief on his "substantive claims of federal constitutional error." In this regard, the Brief says that appellant "seeks substantive review of his claims under the established principles of constitutional law noted in this brief" and cites the direct review harmless error standard. The Brief then asserts, as "additional claims," that the same arguments entitle appellant to relief under the rubric of ineffective assistance of counsel. Finally, the Brief poses, as a third version of the same basic claims, that appellant is entitled to relief under "State Law" and the PCRA, which counsel would have us believe is different than federal law. Initial Brief of Appellant at 1-2, 5-6, 6-11.

A defendant's prospects for federal habeas relief can turn upon the form of a claim. A preserved "constitutional" claim, subject to a direct appeal standard of review (where harmless error would have to be proven beyond a reasonable doubt by the Commonwealth), is preferable to a derivative constitutional claim, such as ineffective assistance of counsel. Under Strickland, there is a presumption of competency to overcome, mere error is not enough if counsel acted reasonably, and actual prejudice must be proven by the defense. A defendant with counsel who are savvy to federal habeas standards would make every effort to pose his state collateral claims in a way that maximizes the prospect of securing the more favorable review standard. I believe that it is highly likely that counsel in this case have their federal strategy carefully mapped out, and that strategy dictated the form of the Brief, including the allocation of space to development of direct review claims versus collateral claims. It is a strategy that may be borne of an anticipation that, if and when appellant proceeds to federal review, he will argue something along the lines of: I posed my PCRA claims as claims of direct constitutional error in state court; I was entitled to do so under relaxed waiver or some other theory; the Pennsylvania Supreme Court's findings of procedural default should not be honored; and my underlying claims therefore should be reviewed, on their merits, without deferring to anything the Pennsylvania state courts had to say. Even with respect to appellant's alternative

allegations of counsel ineffectiveness, collateral counsel will probably articulate a theory of why they believe the state defaults this Court has found should be disregarded.

Material briefing deficiencies respecting the Strickland versions of appellant's claims are important to this Court, of course, because Pennsylvania law does not permit appellants to pursue waived claims, and Strickland claims are not self-proving. But, as I have addressed elsewhere, there is a difference between what this Court has the power to do, given the terms of the PCRA, and the respect our restrained decisions will be shown on federal habeas review. See Ford, 809 A.2d at 346 n.8. State court defendants with an eye toward federal habeas relief have a powerful incentive to seize upon whatever they can to argue that state courts have engaged in unequal treatment, or have unreasonably failed to review the defendant's preferred form of his claims, thereby opening the door for *de novo* federal consideration. And a lower federal court with a predisposition to engaging in non-deferential *de novo* review whenever possible will be receptive to such arguments. This Court has no control over how the federal courts will construe our decisions; we must simply discharge our duties. And, to the extent we would concern ourselves with the coin-flip that is federal habeas review, the result can be very bad law, since every state court response to a particularly egregious, unusual circumstance will be argued, in federal court, as proof that state rules of procedural default are uneven and should not be honored.

For purposes of *sua sponte* assessing the performance of PCRA counsel here, the point is that a capital defendant's collateral litigation incentives do not necessarily dovetail with this Court's limited, authorized review on collateral attack. Appellant's counsel may view compliance with Strickland (and the PCRA itself) as a comparative waste of time (and briefing space): the familiar tone and content of the Brief here indicate as much. Counsel may believe that the less that is said about the ineffectiveness claims, the easier it will be to claim in federal court that appellant was not obliged to raise his waived "constitutional" claims here under the derivative guise of Strickland. Of course, absent a hearing and

counsel's candid testimony, we cannot know counsel's strategy for sure, and counsel may be disinclined to reveal it, particularly where appellant has not sought counsel's removal. What is plainly apparent, however, is that the briefing in this case is not a function of negligence or inattention -- it is deliberate and sophisticated, if not entirely candid. And, given the federal court's seeming receptiveness to theories allowing them to ignore Pennsylvania state court procedural defaults in capital cases, it cannot be said that counsel's PCRA briefing strategy is unreasonable. Counsel simply has a different agenda.

Justice McCaffery joins this opinion.