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

COMMONWEALTH OF PENNSYLVANIA,	:	No. 358 CAP
	:	
Appellee	:	
	:	Appeal from the Order entered on 9/26/01
	:	denying the PCRA petition in the Court of
v.	:	Common Pleas, Criminal Division of
	:	Washington County at Nos. 686-688 of
	:	1985
ROLAND WILLIAM STEELE,	:	
	:	
Appellant	:	SUBMITTED: March 27, 2003

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: December 18, 2008**

Appellant raises nine claims going specifically to the guilt phase of his trial, which he labels IV through XI and XV. The majority indicates that claims IV, VI, VIII, IX, X, and XI are unreviewable due to a deficient appellate presentation and denies review in part on claims V and VII for the same reason.[1] Only guilt-phase claim XV appears to be treated entirely on its merits.

The majority thus declines to review approximately seventy percent of Appellant's guilt-phase claims, due to the repeated failure on the part of his present attorney to meet requirements for appellate briefing. Appellant's brief, however, was

[1] Specifically, the majority focuses on present counsel's failure to develop his arguments in terms of the standard governing claims for ineffective assistance of counsel. See, e.g., Majority Opinion, slip op. at 12.

filed in 2003, in a time period in which the requirements for appellate briefing in capital cases were in transition, given that the Court had recently abolished the doctrine of relaxed waiver and was divided concerning the form and degree of development required. Appellant attempts to address such difficulty as follows:

> It is respectfully submitted that this Court's recent opinions regarding pleading and proof in capital PCRA cases are confusing, inconsistent and constantly shifting.[5] Appellant's brief is his attempt to comply with the vacillating requirements of the Court's decisions.
>
> ---
>
> [5] See Commonwealth v. Uderra, No. 5152-5158, Oct. Term 1991 (Phil. CCP May 24, 2002) (Poserina, J.) at 5 n.5 (this Court's "recent decisions [on issues of ineffective assistance of counsel] show a fractured court, with no clear majority consensus on these issues"); Commonwealth v. Jerry Marshall, 810 A.2d 1211 (Pa. November 22, 2002) (reviewing merits of claim with "boilerplate" allegations of ineffective assistance); id. at 1229-33 (Castille, J.) (lamenting lack of consistent application of pleading rules to such claims); Commonwealth v. Jerome Marshall, 812 A.2d 539 (Pa. December 18, 2002) (declining to review merits of claims with "boilerplate" allegations of ineffective assistance).

Brief for Appellant at 7-8.[2] This introductory comment is followed by a lengthy discussion of the prevailing requirements governing post-conviction review and claims of ineffective assistance of counsel. See id. at 6-11. From my perspective, Appellant's brief generally reflects an effort to present claims within an acceptable framework,

---

[2] In various contexts, this Court has acknowledged the difficulties presented in addressing capital litigation. See, e.g., Commonwealth v. Gibson, ___ Pa. ___, ___, 951 A.2d 1110, 1121 (2008) ("We recognize that, for some time now, both this Court and the United States Supreme Court have been operating with slim majorities and swing votes in the arena of capital-sentencing ineffectiveness claims.").

particularly when assessed against the time frame in which it was filed, and the majority's summary treatment of various arguments is overly stringent.[3]

By way of example, the majority indicates that Appellant failed, in several subparts of his claim of ineffectiveness deriving from expert hair analysis presented by the Commonwealth, to make any mention of prejudice. See, e.g., Majority Opinion, slip op. at 13. However, Appellant described the challenged expert testimony as "sweeping and damaging," Brief for Appellant at 43, and indicated that, "[t]he testimony likely affected the jury's verdicts, as it was the only direct physical evidence connecting Mr. Steele with the victims, and was emphasized by the prosecutor in arguing Mr. Steele's guilt. See N.T. 1450-51, 1457." Id. at 42. I see no need for Appellant to have repeated these assertions within every subpart of his claim attacking the presentation of this evidence, when the gist of his argument is express and apparent.[4] In my view, the

---

[3] Indeed, in terms of depth of development, I am unable to distinguish Appellant's treatment of various of his claims from presentations garnering merits review in the recent past.

I also respectfully maintain my difference with the characterization of Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693 (1998), retroactively abolishing the relaxed waiver practice in capital post-conviction cases, as "merely a clarification." Majority Opinion, slip op. at 8 n.9. While I remain bound by the decision of a majority of the Court to maintain course, I have come to regard our decision in Albrecht as implementing a substantial change. Further, I am not prepared to say that the retroactive abolition of an entrenched jurisprudential doctrine to the potential detriment of parties who have relied upon it does not implicate constitutional concerns. Indeed, I continue to believe that we made a mistake in directing retroactive application of Albrecht. See Commonwealth v. Ford, 570 Pa. 378, 398-99, 809 A.2d 325, 337-38 (2002) (Saylor, J., concurring).

[4] Notably, the majority ultimately undertakes to address the argument concerning prejudice, albeit in connection with a single subpart of Appellant's claim. See Majority Opinion, slip op. at 15-16.

finding of a deficiency in the briefing on this point, as well as several others, results from an unduly formalistic and/or compartmentalized approach to the arguments presented.

In light of the majority's holding that Appellant's counsel has forfeited seventy-percent of his claims by failing to meet briefing requirements, I note that a capital post-conviction petitioner maintains a rule-based entitlement to effective assistance of PCRA counsel on a first petition. See Commonwealth v. Privolous, 552 Pa. 364, 368, 715 A.2d 420, 422 (1998). In capital cases in which the Court finds such pervasive ineffectiveness manifest upon the face of the appellate submissions, I believe that the appropriate course is to remand for the appointment of substitute counsel. Cf. Commonwealth v. Williams, 566 Pa. 553, 566, 782 A.2d 517, 525 (2001) (citing Commonwealth v. Spence, 561 Pa. 344, 750 A.2d 303 (2000) (per curiam), and Commonwealth v. Saranchak, 559 Pa. 111, 739 A.2d 162 (1999) (per curiam)).

The majority does undertake to resolve, on the merits, Appellant's claim of deficient stewardship for failing to investigate and present mitigating circumstances at the penalty phase of trial. See Majority Opinion, slip op. at 47-59. Initially, the majority finds sufficient evidence to sustain the PCRA court's conclusion that trial counsel conducted a reasonable investigation of Appellant's background. See id. at 49-50. To support this conclusion, the majority relies on the investigation conducted by Michael Reid, as well as trial counsel's own investigative efforts. See id.

In my view, the majority's reasoning rests on an incomplete assessment of both the record and the prevailing requirements of the law. As to the record, I find it important that Reid testified that he had no experience with investigating mitigating circumstances, and that he was not asked to conduct a mitigation investigation until

after the guilty verdict was rendered. See N.T., May 30, 2000, at 22-23, 30.[5] Notably, this occurred around noon on the day immediately preceding commencement of the penalty proceedings. According to his testimony, Reid's contact with Appellant's sister, upon which the majority relies, occurred in a public venue, namely, the lobby of the courtroom, again, immediately after the verdict. See id. at 25. I fail to see how a mitigation investigation in a capital case conducted under such circumstances can be deemed reasonable. Accord People v. Towns , 696 N.E.2d 1128, 1138 (Ill.1998) (citing cases for the proposition that "in a capital case, where the defendant's life is at stake, it may be objectively unreasonable for an attorney to wait until after a guilty verdict to begin to prepare for the imminent capital sentencing hearing."). Even if undertaken by an experienced professional, the timing allows insufficient time for gathering records; interviewing witnesses in an environment conducive to trust, reflection, and candid disclosure; pursuing leads as they may develop; consulting other professionals as need be; and making reasonable selection decisions concerning the evidence to be presented.[6]

[5] The majority mentions such factors in passing, as well as others discussed below, see Majority Opinion, slip op. at 41, but it does not appear to consider them in its actual disposition of Appellant's claim, see id. at 47-51.

[6] The importance of a thorough life-history investigation is due to its potential impact on the penalty verdict. See generally Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 2947 (1989) (explaining that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse" (quoting California v. Brown, 479 U.S. 538, 545, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring))).

Reid's testimony concerning the timing of his investigation was supported by trial counsel. See, e.g., N.T., May 30, 2000, at 92-93. Further, counsel repeatedly indicated that he, himself, conducted no penalty-phase investigation. Counsel explained:

> I can say that my main focus was on the trial and whether or not [Appellant] would be convicted.
>
> That was my main focus. That was what I was focused on, not what I was going to do, you know, down the road. I certainly wasn't planning on worrying about the sentencing, I was planning on defending him, which I think I did.

N.T., May 30, 2000, at 92; see also id. at 93 ("My assignment was to try the guilt phase, period."); id. at 97 ("As I said to you, my focus was on the trial, not the penalty phase after we lose. No, I wasn't focused on that."). When asked what it is that he did before trial for purposes of the penalty phase, counsel indicated, "I, personally, probably did nothing." N.T., May 30, 2000, at 95.

While it is unknown whether predecessor counsel may have conducted a more thorough mitigation investigation, it seems reasonably clear that the one undertaken by trial counsel and Reid was insufficient in and of itself. Moreover, since an appropriate investigation is a predicate to reasonable strategic choices, see Strickland v. Washington, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 2066 (1984), I also differ with the PCRA court's, and the majority's, finding that this record demonstrates the exercise by trial counsel of reasonable professional judgment. See Majority Opinion, slip op. at 50.[7]

[7] In finding reasonable strategy, the majority also faults Appellant for failing to advise counsel of childhood abuse. See Majority Opinion, slip op. at 51 n.28. Counsel, however, testified that he doubted that he asked Appellant or his family about abuse. See N.T., May 30, 2000, at 146-47. While the majority correctly relates that information supplied by a capital defendant and his family may be relevant, it does not account for the associated principle that "[t]he onus is not upon a criminal defendant to identify what types of evidence may be relevant and require development and pursuit. Counsel's duty is to discover such evidence through his own efforts, including pointed questioning (continued . . .)

In this case, trial counsel's ineffectiveness is also manifest on the actual record of the penalty-phase proceedings, where he berated the jurors for their guilt verdict, see Majority Opinion, slip op. at 31, in the face of prosecution evidence described by the majority as overwhelming. See id. at 15.[8] Further, counsel sarcastically encouraged the jurors to rush to judgment and left the courtroom, in complete disregard of his responsibility to his client. Particularly given this abjectly deficient stewardship, and in light of Appellant's evidentiary proffer, I believe that he was entitled to a full opportunity to develop his claim of prejudice at hearing.

At the center of this issue is the PCRA court's approach in making various credibility judgments based on written witness declarations. See Commonwealth v. Steele, Nos. 686, 687, 688 of 1985, slip op. at 37-38, 41 (C.P. Wash. Sept. 26, 2001). This is in substantial tension with our rules, which implicate an evidentiary hearing where there are material facts in issue. See Pa.R.Crim.P. 909(B). Given the breadth of the written submissions rejected by the PCRA court on credibility grounds, it seems to me that the majority strays well into uncharted territory in terms of authorizing post-conviction courts to issue summary dispositions despite factual controversy. Moreover,

---

(. . . continued)
of his client." Commonwealth v. Malloy, 579 Pa. 425, 459, 856 A.2d 767, 788 (2004); see also Wiggins v. Smith, 539 U.S. 510, 525-26, 123 S. Ct. 2527, 2537-38 (2003) (framing the relevant inquiry in terms of counsel's duties, and not obligations on the part of the capital defendant himself or the witnesses).

[8] Counsel testified that his overriding strategy in the penalty proceedings was to "try to put doubt back into [the juror's] minds." N.T., May 30, 2000, at 73; accord id. at 196 (reflecting counsel's characterization of residual doubt as "the only chance we had"). Even if such strategy was not ill conceived in the first instance when viewed against the Commonwealth's case for guilt, proper implementation obviously would require reasonable sensitivity to the jurors' perspective. Such sensitivity, however, clearly is lacking in trial counsel's actual performance.

in the absence of a consistent direction set by this Court, it appears evident that we will continue to see disparate approaches among different PCRA judges concerning when, and to what degree, a hearing is permitted. In my view, the interests of justice would be best served by consistently requiring adherence to the core principle that, where there are disputed facts in issue, a hearing is required to permit fair development. Thus, I would remand for a supplemental post-conviction hearing.[9]

Finally, in the remand, I would permit supplementation of the post-conviction pleadings to encompass Appellant's claim under Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002). This Court has treated similar claims of death ineligibility (which do not directly attack the underlying conviction or sentence, but rather, challenge the continued vitality of the sentence) as matters arising under state habeas corpus. See Commonwealth v. Judge, 591 Pa. 126, 141-42, 916 A.2d 511, 520-21 (2007).[10] Such claims are not properly subject to the PCRA's jurisdictional time deadlines. See id. See generally Atkins, 536 U.S. at 321, 122 S. Ct. at 2252 (explaining that "the [United States] Constitution 'places a substantive restriction on the State's power to take the life'

---

[9] The majority's rejection of the mental-health evidence appears to be based, in large part, on a set of enhanced requirements for evidentiary proffers. See Majority Opinion, slip op. at 53-56. Notably, the asserted deficiencies are curable, and our rules of procedure reflect a policy of fair notice and an ability to remedy such matters. See Pa.R.Crim.P. 909(B)(2)(a). Further, although the majority repeatedly indicates that Appellant has failed to "prove" elements of his claims, see, e.g., Majority Opinion, slip op. at 55, it bears repeating that he was not permitted to develop his primary proofs on an evidentiary record. Stated differently, our rules do not require a post-conviction petitioner to affirmatively prove elements at the pleading stage.

[10] Appellant specifically argues that his Atkins claim is cognizable in habeas corpus, independent of the PCRA. See Brief for Appellant at 16-17. The majority, however, summarily declares that such claims are subject to the PCRA's one-year time bar without any developed consideration of this argument. See Majority Opinion, slip op. at 29.

of a mentally retarded offender" (quoting Ford v. Wainwright, 477 U.S. 399, 405, 106 S. Ct. 2595, 2599 (1986))). Further, I see no reason why a capital post-conviction proceeding and habeas corpus matters cannot proceed in consolidated fashion to foster efficiency. Thus, given the substantial age of this case, and as I believe that a remand is warranted in any event, I would permit supplementation as noted and require the resolution of Appellant's Atkins claim on a developed evidentiary record.