[J-84-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 385 CAP
	:	
Appellee	:	Appeal from the Order of the Court of
	:	Common Pleas of Washington County,
	:	Criminal Division, entered on May 23,
v.	:	2003 at No. 555(a)(b) 1986, denying
	:	PCRA petition
	:	
THOMAS J. GORBY,	:	
	:	
Appellant	:	SUBMITTED: March 27, 2003
	:	
	:	
	:	
	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: JUNE 20, 2006**

I respectfully dissent.

The Majority reverses the determination of the PCRA[1] court and awards appellant penalty phase relief from a sentence of death, finding that counsel on appellant's direct appeal was ineffective (as a matter of law) in 1990 for failing to argue that appellant's trial counsel was ineffective (also as a matter of law) in 1985 for failing to investigate and present mitigation evidence. In 2001, when this Court remanded the matter to permit appellant an additional opportunity to develop his underlying claim concerning trial counsel's alleged failure to investigate appellant's "mental history and capacity," I

[1] Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq*.

dissented. See Commonwealth v. Gorby, 787 A.2d 367, 379-85 (Pa. 2001) (Castille, J., concurring and dissenting). I noted that the claim of trial counsel ineffectiveness was waived under the PCRA because appellant had failed to raise it on direct appeal. Second, and directly applicable to the layered ineffectiveness claim upon which today's Majority grants a new penalty hearing, I observed that the PCRA court had passed upon the merits of that claim and had properly rejected it. I noted the following:

> 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 [Court] op. at 8. In disposing of the layered claim, the PCRA court apparently accepted appellant's affidavits [,concerning his mental state and history which were attached to his brief,] at face value, noting that trial counsel's testimony [at the initial PCRA hearing] "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.

Id. at 380. I went on to note that the Court never explained what deficiency, if any, there was in the PCRA court's existing analysis. Id. at 384.

The PCRA court's resolution in 2000 was in accord with what, at least until very recently, had seemed to be settled authority from this Court concerning the obligations of capital counsel at trial. See Commonwealth v. Collins, 888 A.2d 564, 586-92 (Pa. 2005) (Castille, J., joined by Eakin, J., concurring and dissenting) (collecting cases); Commonwealth v. Zook, 887 A.2d 1218 (Pa. 2005); Commonwealth v. Hall, 872 A.2d 1177 (Pa. 2005); Commonwealth v. Brown, 872 A.2d 1139 (Pa. 2005); Commonwealth v. Malloy, 856 A.2d 767 (Pa. 2004); Commonwealth v. Fears, 836 A.2d 52 (Pa. 2003); Commonwealth v. Bond, 819 A.2d 33 (Pa. 2002); Commonwealth v. Johnson, 815 A.2d

563 (Pa. 2002); Commonwealth v. Miller, 746 A.2d 592 (Pa. 2000); Commonwealth v. Basemore, 744 A.2d 717 (Pa. 2000); Commonwealth v. Rollins, 738 A.2d 435 (Pa. 1999); Commonwealth v. Howard, 719 A.2d 233 (Pa. 1998). The law apparently is changing in this area, and what used to be viewed as reasonable attorney performance at trial is now labeled, in hindsight, unreasonable as a matter of law. I continue to find it difficult to blame counsel retroactively for failing to predict new obligations and refinements in obligations imposed by courts literally decades after counsel's conduct occurred. Consistent with my position in 2001, I continue to believe that this underlying claim of trial counsel ineffectiveness is meritless.

Even if I could agree that trial counsel's performance was deficient, I could not join the Majority's summary finding that appellate counsel's performance was incompetent as a matter of law. Majority slip op. at 29 & n.16. The Majority largely engages in a bootstrapping analysis; *i.e.*, because the Majority believes that trial counsel appears to have been ineffective in hindsight, appellate counsel must have been incompetent for failing to raise that claim on direct appeal. In so easily labeling appellate counsel incompetent, the Majority cannot consider the actual investigation counsel conducted because counsel died in the years before appellant filed his PCRA petition. I have written at some length in the past concerning what I believe is required under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) to prove appellate counsel ineffective, and I need not repeat that summary here. See Commonwealth v. May, ___ A.2d ___, ___ (Pa. 2006), 2006 WL 1439805, *15-*16 (Pa. 2006) (Castille, J., joined by Cappy, C.J., and Eakin, J., concurring); Commonwealth v. Jones, 815 A.2d 598, 613, 614 (Pa. 2002) (Opinion Announcing Judgment of Court by Castille, J.). It is enough to note that appellant bore the burden of proof; that counsel's demise does not discharge appellant's burden to prove that counsel could not have had a reasonable basis for his strategic decisions on appeal; and that we do not know on this record what sort of investigation was actually

undertaken by appellate counsel, what sort of appellate strategy he adopted, and what sort of cooperation he received from appellant and his family. Contrast May, supra.

Moreover, to prove counsel incompetent, in 1990, for failing to raise this sort of ineffectiveness claim, one must consult the **then-existing** legal landscape. See Commonwealth v. Hughes, 865 A.2d 761, 818 (Pa. 2004) (Castille, J., joined by Eakin, J., concurring and dissenting) ("The requirement that counsel's conduct be viewed in light of contemporaneously-governing law is central to any rational assessment of a claim of ineffectiveness."). The fact that later decisions of this Court and the U.S. Supreme Court have faulted the penalty phase investigations of certain trial lawyers, under certain facts, does not necessarily prove that all reasonable appellate lawyers were required to raise such claims in 1989-90, which is when appellant's direct appeal was briefed and argued by counsel. In my view, appellant has not discharged his affirmative burden of rebutting the presumption that appellate counsel's performance nearly two decades ago was reasonable under the law prevailing at the time.

Finally, I write to address the fact, noted and summarized by the Majority, but wisely not relied upon in its legal analysis, that appellant attempted to discharge his burden of proving appellate counsel ineffective by presenting the opinion testimony of two criminal defense lawyers who, not surprisingly, each felt that appellate counsel -- who was not alive to rebut the opinions -- was incompetent. See Majority slip op. at 22-23. I fail to see any relevance in this sort of testimony whatsoever. Certainly, lawyers learned in the law, and experienced in criminal defense appeals, have a reasonable pretension to specialized knowledge in this area and, if the question were one for a jury, their opinions may be relevant. But such opinions are not relevant to the ultimate Strickland question courts must decide upon collateral attack. The question of constitutional effectiveness is decided only by jurists, and a judge is hardly in need of the "expert" testimonial views of lawyers in order to make that determination. Courts are at least equally suited to assess attorney

performance; indeed, given the obvious potential for bias on the part of lawyers caught in an adversarial system, courts are better situated. If the approach were otherwise, all PCRA hearings would be reduced to contrasting "expert" opinions from lawyers presented by the defense (and countered by the opinions of prosecution "experts") as to just who was ineffective (and who wasn't) in the conduct of a trial. Also, if the approach were otherwise, this Court and the Superior Court could be inundated with the "expert" views of lawyer amici telling us how we should decide Strickland questions. The role of lawyers on the question of ineffectiveness is as advocates, not as experts; anything an "expert" would say from the stand, the defendant's lawyer can simply argue from the bar or, more properly, argue in the brief. Thus I, for one, do not view the opinion testimony of lawyers as relevant proof of the effectiveness, or lack of effectiveness, of the defendant's prior counsel. See Commonwealth v. Neal, 618 A.2d 438 (Pa. Super. 1992) (error to admit attorney-expert testimony on issue of trial counsel's ineffectiveness).[2]

Mr. Justice Eakin joins this opinion.

[2] On the separate question of the appellate standard of review, I agree with the Chief Justice that, evidentiary and credibility questions aside, no particular deference is due to a PCRA judge's determination of the Strickland question. Indeed, this precept was a prime basis for my penalty-phase dissent in Collins. See 888 A.2d at 590 (Castille, J., joined by Eakin, J., concurring and dissenting) ("Although this Court must defer to the credibility findings of the PCRA court in cases where contested material facts are at issue, the determination of the reasonableness of counsel's conduct under the Sixth Amendment -- the performance prong of Strickland -- is not one warranting any particular deference to the PCRA hearing judge, particularly where, as here, that judge is not the same judge who presided at trial.").