

[J-27-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA ,	:	No. 243 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Order of the Erie County
	:	Court of Common Pleas dated September
v.	:	16, 1998 at docket number 645 A & B of
	:	1994
JOSE ANTONIO MARRERO,	:	
	:	
Appellant	:	SUBMITTED: January 19, 1999
	:	

CONCURRING OPINION

MR. JUSTICE NIGRO

DECIDED: February 22, 2000

The majority reaches the merits of two of Appellant's five claims of ineffective assistance of counsel on appeal to this Court. In my view, Appellant has waived all of his claims of ineffective assistance of counsel by failing to properly layer and develop them. However, since the majority concludes that Appellant's ineffectiveness claims do not entitle him to relief, I concur in the result reached by the majority.

In Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693 (1998), this Court held that the relaxed waiver rule no longer applies to capital PCRA appeals. Id. at 44, 720 A.2d at 700. Accordingly, in order to establish his eligibility for relief under the PCRA, Appellant must prove by a preponderance of the evidence that his allegations of error have not been waived. 42 Pa.C.S. § 9543(a)(3). An issue raised in a PCRA petition is deemed waived if the petitioner could have raised the issue but failed to do so before trial, at trial, on direct appeal or in a prior state postconviction proceeding. 42 Pa.C.S. § 9544(b).

All but one of the claims raised by Appellant in his appeal to this Court are framed in terms of ineffective assistance of trial counsel. The Commonwealth contends, and I agree, that 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 opportunity to do so when his trial counsel no longer represented him, which was on his direct appeal to this Court.

However, Appellant does list in the questions presented for review section of his brief to this Court a catchall claim of ineffective assistance of prior appellate counsel, which, if properly presented, would not be considered waived, since this was Appellant's first opportunity to attack the stewardship of his prior appellate counsel. See, e.g., Commonwealth v. Wallace, 724 A.2d 916, 921 (Pa. 1999) (ineffectiveness claims raised by a defendant in a PCRA petition will not be deemed waived so long as the PCRA petition represents his first opportunity to challenge the stewardship of his allegedly ineffective prior counsel)(citations omitted). Appellant's catchall claim of ineffective assistance of prior appellate counsel is listed as follows: "Whether the Appellant was afforded ineffective assistance of counsel in that appellate counsel failed to preserve and raise the foregoing claims [of ineffective assistance of trial counsel] in the prior direct appeal to this Court?" (Appellant's Brief at 2.)

Importantly, Appellant presents absolutely no argument in support of his catchall claim of ineffective assistance of prior appellate counsel in his brief to this Court. Instead, Petitioner simply argues the merits of his various claims of ineffective assistance of trial counsel. In my opinion, and consistent with this Court's prior caselaw, Appellant has therefore also waived his catchall claim of ineffective assistance of prior appellate counsel.

See Commonwealth v. LaCava, 542 Pa. 160, 176 n.9, 666 A.2d 221, 228 n.9 (1995)(issues not mentioned, much less developed in the argument section of a brief to this Court are deemed waived).

Although this is a capital case, the clear language of the PCRA and the rules established by this Court's caselaw cannot be circumvented - Appellant has effectively waived both his catchall claim that his prior appellate counsel was ineffective for failing to raise his various claims of ineffective assistance of trial counsel on his direct appeal, and all of his underlying claims of ineffective assistance of trial counsel.

Mr. Justice Castille and Madame Justice Newman join in the concurring opinion.