[J-92-1998]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 162 Capital Appeal Dkt.
	:	
Appellee,	:	Appeal from the Judgment of Sentence
	:	entered March 14, 1995, in the Court of
	:	Common Pleas of Lackawanna County at
v.	:	83-CR-748
	:	
	:	
DAVID CHMIEL,	:	
	:	ARGUED: April 27, 1998
Appellant.	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: August 19, 1999**

The majority holds that to allow the now deceased counsel's testimony from a prior ineffectiveness hearing to be used to impeach appellant at his second trial would violate appellant's Sixth Amendment right to counsel. The majority reasons that allowing the use of such testimony would result in criminal defendants having the Hobson's choice of deciding whether to disclose information covered by the attorney-client privilege for the purpose of proving an ineffectiveness claim, knowing that the disclosures could be used against them in a later proceeding, or to refrain from bringing an ineffectiveness claim, thereby possibly giving up their right to the effective assistance of counsel under the Sixth Amendment. In so holding, the majority is effectively permitting appellant to resurrect a waived attorney-client privilege in order to prevent counsel's sworn testimony from the ineffectiveness hearing to be used to impeach

appellant's perjurious testimony at his second trial. I respectfully dissent because subsequent use of this testimony (which was initially obtained pursuant to a waiver of the attorney-client privilege and made part of the public record on a meritless ineffectiveness claim) does not implicate appellant's Sixth Amendment right to counsel. The right to effective assistance of counsel does not encompass the right later to testify falsely under oath once the ineffectiveness claim has been asserted.

Initially, appellant sought to prevent the disclosure of his trial counsel's testimony, arguing that the attorney-client privilege barred such disclosure.[1] It is axiomatic that the attorney-client privilege is intended to foster candid communications between legal counsel and the client so that counsel can provide legal advice based upon the most complete information possible from the client. The historical concern has been that, absent the attorney-client privilege, the client may be reluctant to fully disclose all the facts necessary to obtain informed legal advice if these facts may later be exposed to public scrutiny.

The attorney-client privilege, however, is not an absolute privilege. The privilege is not available to protect attorney-client communications where the client attacks the effectiveness of the attorney's representation. Loutzenhiser v. Doddo, 436 Pa. 512, 518, 260 A.2d 745, 748 (1970). In addition, once the attorney-client communications have been disclosed to a third party, the privilege is deemed waived. See United States v. Fisher, 692 F.Supp. 488, 494 (E.D. Pa. 1988)(any voluntary disclosure by the holder of the privilege that is inconsistent with the confidential nature of the relationship thereby waives the privilege).

Here, appellant challenged trial counsel's stewardship after his first trial, by alleging, inter alia, that his trial counsel was ineffective for failing to call him as a witness

[1] The attorney-client privilege is codified at 42 Pa.C.S. § 5916.

on his own behalf and for failing to present certain alleged alibi witnesses. In order to rebut the charges of ineffectiveness, trial counsel testified under oath at the evidentiary hearing on his effectiveness that he chose not to present appellant as a witness or to pursue an alibi defense because appellant, in preparation for trial, had told him three contradictory versions of his whereabouts at the time of the crime. Specifically, trial counsel testified that appellant first told him that he was near the victims' residence, casing it out for a future robbery, when he saw his brother, Martin Chmiel, emerge from the house, run down an alley, and disappear into a waiting car. Five months later, appellant informed trial counsel that he had not been at the crime scene that night at all, but rather was in the company of various other persons throughout the course of the night. Appellant's third statement regarding the killing was that his brother had confessed to him that he and two accomplices had killed the victims.

Notwithstanding the disclosure of these communications in open court that included appellant's initial statement that he had been at the crime scene on the night of the murders, appellant took the stand at his second trial and testified that he had *not* been in the vicinity of the crime scene when the murders were committed. The Commonwealth then sought to impeach appellant with trial counsel's testimony from the ineffectiveness hearing where counsel testified that appellant told him that he *had* been present at the crime scene.

The trial court allowed such cross-examination. The majority now finds that the trial court erred in so doing because such practice would have a "chilling effect" on a party's assertion of his Sixth Amendment right to effective counsel. Thus, the issue becomes whether otherwise public, relevant information which would bear directly upon appellant's credibility should be excluded from a subsequent trial because the information was made public in order for appellant to raise an ineffective assistance

claim. I would allow such communications to be used against the defendant at a later proceeding.

A defendant's Sixth Amendment right to counsel entitles him to allege and attempt to prove that his counsel was ineffective during the course of the representation. Apparently, the Majority here believes that, by allowing appellant's trial counsel to furnish impeachment testimony at his retrial, there would be a chilling effect on appellant's right to the effective assistance of counsel by, inter alia, rendering it less likely that he would ever choose to bring an ineffectiveness claim in the first place following a finding of guilt. As a matter of logic, the Majority's reasoning is quite simply incorrect, for reasons which I state below. As a matter of policy, the Majority's reasoning troubles me greatly, as I believe it is tantamount to placing this Court's judicial imprimatur on the practice of perjury in the Commonwealth.

First, appellant himself has defeated the notion that he would not bring a claim of ineffective assistance knowing that his attorney might be allowed to provide impeachment testimony against him if he won a retrial and then tried to change his defense. Quite simply, appellant did bring an ineffectiveness claim under such circumstances. It is inconceivable to me that this Court would order a new trial on the basis of a "chilling" of appellant's Sixth Amendment right when appellant quite clearly exercised that right as vigorously as it can be exercised. Moreover, it is equally inconceivable that any criminal defendant in appellant's situation would ever decline to bring a meritorious claim of ineffective assistance on the grounds that such a course of action might impair the defendant's freedom of imagination in the event that the defendant won a new trial. I do not believe I am making a bold prediction when I suggest that defendants will find the alternative of death by lethal injection to be less palatable than the prospect of bringing a claim of ineffective assistance while knowing that they will not be able to concoct a new story inconsistent with what they have

already told their attorneys. Consequently, I believe that the Majority's concerns related to the putative chilling effect on appellant's Sixth Amendment rights are logically unsound.[2]

Second, I am troubled by what I perceive to be the policy ramifications of the Court's decision. It is beyond peradventure that the attorney-client privilege is waived when a criminal defendant brings a claim of ineffective assistance of counsel. Essentially, the Court's decision today resuscitates the already-waived attorney-client privilege under the guise of protecting the defendant's Sixth Amendment right to effective assistance of counsel and concomitant right to seek a new trial. What the Court is really protecting, however, is not the right of a criminal defendant simply to seek a new trial, but rather the right to seek a new trial in which he is free to commit perjury without consequences. The attorney-client privilege should not provide a cloak of immunity for such a nefarious purpose. Once the privilege is waived for purposes of an ineffectiveness claim, it should remain waived for purposes of cross-examination in a second trial, rather than act as a shield which prevents the factfinder from being exposed to the defendant's naked perjury. The purpose of the privilege is to promote candor with one's attorney; the only situation in which an attorney will be called as an

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[2] To the extent that the Majority rests its decision on the chilling effect on a defendant's ability to be candid with his attorney in the first instance, I would note again that the unsettled state of the law in this area did not exactly impair appellant from testing out with his attorney the various versions of his defense. Moreover, affirmation in this matter would have no chilling effect whatsoever on the ability of any criminal defendant to be candid with his attorney, since the only purpose behind the Commonwealth's use of trial counsel as an impeachment witness was to show either that appellant was not candid with his attorney or else that he was not candid with the Court under oath. If appellant tells his attorney the truth and tells the Court the truth on retrial, then there will be no purpose to calling the attorney as an impeachment witness, and the spirit of full candor will be vindicated. By prohibiting the attorney from testifying in these circumstances, this Court necessarily condones one of two things: either a duplicitous relationship between the defendant and his trial counsel or a duplicitous relationship between the defendant and the Court.

impeachment witness is a situation like this in which the defendant has already abused the concept of candor (by lying to either the attorney, the court, or both) and, therefore, subverted the very basis for assertion of the privilege in the first place. To be succinct, judicial expansion of the traditional attorney-client privilege is inappropriate at best when the very point of the expansion seems to be to facilitate the deception of the judicial system itself by prevaricating defendants. Accordingly, I believe that policy considerations militate heavily against the decision of the Majority.

In sum, for reasons of logic and of policy, I would affirm the judgment of sentence. I respectfully dissent.

Madame Justice Newman joins this dissenting opinion.