[J-197-1997]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 173 Capital Appeal Docket
	:	
Appellee,	:	Appeal from the Order of the Court of
	:	Common Pleas of York County at No.
	:	3699 CA 1993, entered March 7, 1997,
v.	:	denying post-conviction relief.
	:	
	:	
HUBERT MICHAEL,	:	
	:	SUBMITTED: October 24, 1997
Appellant.	:	
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	:	
	:	
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CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: July 20, 2000**

I join in the majority opinion with the exception of the explanation of why it reaches the merits of appellant's claims in this case where appellant has, at various times, expressed a desire not to proceed with his appeal.

On April 16, 1998, after this PCRA appeal had been briefed and submitted to the Court, appellant wrote to the Commonwealth requesting that it forward to the appropriate court a letter in which he stated that he did not wish to pursue any further appeals. Based upon that letter, the Commonwealth requested a remand to the PCRA court for a colloquy under Commonwealth v. Fahy, 549 Pa. 159, 700 A.2d 1256 (1997), i.e., to determine whether appellant was competent to waive further collateral review. Over the opposition of appellant's counsel, we remanded the case to the PCRA court on July 9, 1998, directing

it to conduct a colloquy to determine whether appellant fully understood the consequences of his request to withdraw his appeal and waive further collateral review. At the August 27, 1998, remand hearing, the PCRA court conducted a thorough colloquy during which appellant reiterated his desire to withdraw this appeal and not to pursue any "further court litigation." At the conclusion of the hearing, the court found, as a matter of fact, that appellant fully understood the consequences of his request. N.T. 8/27/98 at 4-7, 16.

On December 8, 1998, upon consideration of the colloquy transcript, this Court remanded to the PCRA court for another hearing to augment the record to include psychiatric evidence relating to appellant's withdrawal request, including whether, as appellant's counsel claimed, an underlying mental illness was the predicate for appellant's request. The PCRA court scheduled the hearing for February 23, 1999. However, on February 18, 1999, appellant's counsel wrote to the court and attempted to have the hearing cancelled, on the ground that appellant had prepared a new affidavit on January 28, 1999. In that affidavit, appellant averred that he did not wish to undergo any psychiatric examination, nor did he wish to undergo "any proceedings in York County about my desires with regard to my case." Instead, appellant now claimed to prefer a "quick decision on the merits" of his pending appeal in this Court, requesting that his appeal "be moved up ahead of other cases." The PCRA court denied the request to cancel the hearing.

At the February 23, 1999, hearing, Dr. Larry A. Rotenberg, a board-certified psychiatrist and neurologist and director of psychiatry at the Reading Hospital and Medical Center, testified that appellant suffered from no major mental illness, but had a narcissistic personality disorder, which led him to believe that he was entitled to special treatment. N.T. 2/23/99 at 8-13. Dr. Rotenberg's opinion was based in part upon a psychiatric evaluation he completed on December 12, 1996, in anticipation of appellant's trial, since Appellant had refused to submit to a new examination. Dr. Rotenberg further stated that appellant's desire to waive further collateral review was not based on a mental illness, but rather upon

his desire for a speedy resolution to his appeal because he could not tolerate delay. Specifically, Dr. Rotenberg, who observed appellant testify at the hearing, testified that "[t]he Defendant [today] showed himself to be lucid, coherent and somewhat manipulative, and so it showed him to be logical,. . . nondepressed, nonpsychotic, nondemented, and not suffering from any mental illness." Id. at 38.

At the same hearing, the PCRA court asked appellant whether his January 28, 1999, letter requesting a speedy resolution of his appeal represented a change in his wishes:

> Court: [I]n your affidavit you state that you want your issues decided quickly by the Pennsylvania Supreme Court. To me that indicates that you do want your appeal decided and you are changing your mind and you are no longer saying withdraw the appeal.
>
> [Appellant]: I guess we could sum it up by saying, I want this to move forward as fast as possible. I would like it to go into the Supreme Court and have them settle it one-way [sic] or another.

Id. at 32-33. This testimony certainly seemed to corroborate Dr. Rotenberg's opinion. At the conclusion of the hearing, the PCRA court found appellant "mentally competent" and also found that there was no "mental health component" to his previous request to withdraw his appeal and waive further review. N.T. 2/23/99 at 41. The court also recognized, however, that appellant's January affidavit, the import of which he essentially adopted in his testimony at the February hearing, suggested a "change of mind."

Before we could rule on the appeal, including the question of whether appellant had validly waived his right to further collateral review, appellant apparently changed his mind yet again. In a letter dated June 17, 1999, and addressed "To the Courts," but forwarded to the Commonwealth, appellant again stated that he does not wish to pursue any further appeals.[1] The Commonwealth included that letter as an Exhibit to a Motion to Dismiss

[1] The June 17, 1999, letter reads as follows:
(continued…)

appellant's appeal on the ground that, through the letter, he had again indicated a desire not to pursue further review. Appellant's counsel filed an answer in opposition, stating that, at best, the letter allegedly written by appellant was another example of appellant's "vacillation" concerning his desire to pursue further review.

In explaining why it is reviewing appellant's claims on the merits, the majority refers only to appellant's January 28, 1999, affidavit, which it construes as "essentially repudiating" his previous request to withdraw the appeal. Majority Slip Op. at 4. If that were all there was to this question, I could not agree, as I believe such reasoning to be inconsistent with this Court's opinion in Fahy, supra.

While Fahy's serial PCRA appeal was pending before this Court, Fahy filed a handwritten petition asking this Court to allow him to waive all collateral proceedings and to withdraw any appeals so that his death sentence could be carried out. Fahy's appointed counsel subsequently requested a remand to determine whether Fahy was competent to waive all collateral proceedings. We remanded the matter for a colloquy to determine whether Fahy fully understood the consequences of his request to withdraw his appeal and

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(…continued)

> To the Courts:
>
> I would like it known that I, Hubert Michael, do not wish to have any further appeals regarding my homicide conviction in York county. Nor do I wish any appeals regarding any other convictions. I pled guilty to homicide because I was guilty. I was not coerced into making this plea, nor was I promised anything in return for making this plea.
>
> There are no insanity issues to be raised in this case. I was of sound mind at the time of the homicide. I was of sound mind at the time of my arrest. I was also of sound mind during all court proceedings, and I am of sound mind as I type this letter.
>
> The attorney's [sic] who claim to represent my best interests in court are only trying to promote their own agenda. As they are opposed to the death penalty. They know in their hearts that I am mentally competent, and have in fact expressed this to me in conversation.

to waive all collateral proceedings. On remand, the PCRA court conducted a full colloquy during which Fahy testified consistently with his petition, i.e., he did not want any further petitions filed by his appointed counsel or by counsel from the Center for Legal Education, Advocacy and Defense Assistance (CLEADA), who had involved themselves in the case. After conducting a full colloquy, the PCRA court found that Fahy was competent and that he knowingly waived his right to further collateral and appellate review. 549 Pa. at 164, 700 A.2d at 1259.

Notwithstanding Fahy's stated desires on the record, counsel from CLEADA filed an appeal, ostensibly on Fahy's behalf, alleging that Fahy did not actually waive his rights to collateral and appellate review. CLEADA's position was based upon a non-record "declaration" purportedly made by Fahy, as well as a "declaration" from CLEADA counsel, both dated after the waiver hearing, which would impeach the record evidence of waiver. Upon review, we affirmed the finding of waiver. We noted that the trial court had conducted a colloquy during which Fahy "clearly and unambiguously" waived his right to further review and stated that he did not want his attorneys to file any further appeals or petitions on his behalf. Fahy's representations, we noted, led the PCRA court to accept his waiver. We determined that the PCRA court's waiver colloquy was adequate. Furthermore, with respect to CLEADA's claim that Fahy's waiver was not knowing and voluntary, we noted that '[t]here is literally nothing in the record to support counsel's representation." 549 Pa. at 165, 700 A.2d at 1259.

Under Fahy, the January 28, 1999, affidavit cited by the majority most certainly cannot undo a record waiver of further review. But, as I have detailed above, there in fact is record evidence of appellant's desire to pursue the appeal in this case. That is because the January 28 affidavit was actually introduced at the February 23 hearing and, more importantly, appellant testified at that hearing to a desire to pursue the appeal. This fact, and not the existence of a non-record "affidavit," distinguishes Fahy.

But the matter is still not so simple. The record evidence regarding appellant's desire to pursue this appeal is equivocal at best. At one hearing, appellant insisted that he did not wish to pursue his appeals. At the next hearing, he stated the opposite. Shortly thereafter, he purportedly wrote another letter reverting to his waiver position. Moreover, given the nature of our remand orders, we do not have a finding regarding waiver at any particular point in time; instead, we have fully supported findings that appellant is competent to make that determination, and that he understands the consequences of a decision to waive.

At this point, it seems to me that we could remand yet again for a definitive factual determination of whether appellant, who is competent and understands what a waiver entails, wants to proceed with his appeal or withdraw/waive it. But, given appellant's established track record, I see little prospect that this course would resolve the matter since, before we could review the finding, appellant could change his mind again. Since there is no finding of a valid waiver to review at this point (unlike in Fahy), and since appellant's last record expression was to pursue the appeal, I agree with the majority's determination to review the claims presented in this appeal.

I would also note that reaching the claims, rather than remanding, is sensible here because appellant's vacillation already has created an unnecessary and substantial delay in the orderly resolution of this matter. Although it may not have been this appellant's conscious intention, I am mindful that such vacillation could be deliberately employed as a delaying tactic in capital cases. Any party, including a death-sentenced convict, is free to choose not to pursue collateral review. This Court, however, is not a fact-finding body. When faced with a dispute concerning a request to withdraw, and the knowing, intelligent, and voluntary nature of an expression to waive further review, we must of necessity remand the matter for a factual determination. Continued vacillation by the defendant could create an endless ping-ponging of the matter between the trial and appellate courts.

In capital cases, of course, delay is often an end in itself for the death-sentenced prisoner. As Chief Justice Rehnquist has noted, there are "different litigating incentives facing capital and noncapital defendants." Lindh v. Murphy, 521 U.S. 320, 340, 117 S.Ct. 2059, 2070 (1997) (Rehnquist, C.J., dissenting).

> Noncapital defendants, serving criminal sentences in prison, file habeas petitions seeking to be released, presumably as soon as possible. They have no incentive to delay. . . . In contrast, capital defendants, facing impending execution, seek to avoid being executed. Their incentive, therefore, is to utilize every means possible to delay the carrying out of their sentence.

Id. I would be careful not to create any incentive for a capital defendant to build delay into his appeal. Thus it is that, on this record, I am satisfied to review appellant's claims, notwithstanding his on-again, off-again expressions of disinclination to pursue relief.