

**[J-64-2011] [MO: McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 587 CAP

Appellee

v.

CHRISTOPHER RONEY,

Appellant

:
: Appeal from the Order entered on April 20,
: 2009 in the Court of Common Pleas of
: Philadelphia County, Criminal Division, at
: No. CP-51-CR-0208663-1996
:
:
:
: SUBMITTED: April 15, 2011

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE

DECIDED: October 30, 2013

I join the Majority Opinion, writing separately to address supplemental points.

First, I would recognize that, to the extent that appellant's claims implicate the performance of direct appeal counsel, the High Court's refinement of Strickland v. Washington, 466 U.S. 668 (1984) in Smith v. Robbins, 528 U.S. 259 (2000) and related cases provides the controlling standard. See Commonwealth v. May, 898 A.2d 559, 577-79 (Pa. 2006) (Castille, J., concurring, joined by Cappy, C.J. & Eakin, J.) (surveying governing federal law). I realize that this Court has maintained a curious aversion to acknowledging this standard governing claims of appellate counsel ineffectiveness, but the standard controls nevertheless. Notably, appellant never cites the appropriate standard, nor does he attempt to satisfy it, in any of the many instances where he alleges that his direct appeal counsel was ineffective, and where such a claim must succeed before relief could issue.

Second, I would supplement the Majority's analysis of appellant's derivative Strickland claim arising from the Commonwealth's alleged use of its peremptory challenges in jury selection in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Majority Slip Op. at 32-41. This Court has explained that when a defaulted Batson claim is raised on collateral attack, under the necessary guise of asserted ineffective assistance of counsel, it must be analyzed in a distinct manner:

Defaulted Batson claims argued through the derivative guise of ineffectiveness are not, indeed cannot, be treated the same as properly preserved Batson objections. See Commonwealth v. Uderra, 580 Pa. 492, 862 A.2d 74, 86 (2004). When there is no Batson objection during jury selection, "a post-conviction petitioner may not rely on a *prima facie* case under Batson, but must prove actual, purposeful discrimination by a preponderance of the evidence ... in addition to all other requirements essential to overcome the waiver of the underlying claim." Id. at 87. In the absence of such a showing, the petitioner cannot meet the Strickland standard. Furthermore, "[a] finding by the trial court as to an absence of discriminatory intent must be given great deference on appeal." Commonwealth v. Spatz, 587 Pa. 1, 896 A.2d 1191, 1212 (2006) (quoting Commonwealth v. Jones, 542 Pa. 464, 668 A.2d 491, 518 (1995)).

Commonwealth v. Sepulveda, 55 A.3d 1108, 1132 (Pa. 2012) (footnote omitted). Appellant has not cited or attempted to satisfy Uderra, either in his principal brief or in his prolix reply brief; the Commonwealth specifically argued the point, citing cases applying Uderra, see Commonwealth's Amended Brief at 26, but the Majority does not engage it. (The Majority cites Uderra, but not for this governing principle.)

As the Majority notes, appellant raised a Batson objection at trial, but pursued no Batson claim on appeal: specifically, trial counsel objected to two of the prosecutor's peremptory strikes of African-American venirepersons. Majority Slip Op. at 33, 35-39. Those objections were available to direct appeal counsel, but counsel did not pursue a claim premised upon them; thus, appellant's allegation of direct appeal counsel

ineffectiveness, to the extent that it focuses upon the claims preserved at trial, does not have to contend with Uderra, albeit it still must account for Robbins.

The vast bulk of appellant's current Batson allegations, however, do not involve points or arguments made at trial. Thus, these new aspects of appellant's defaulted Batson claim are subject to Uderra. Appellant's new theories also require an accounting of the actions of both trial and direct appeal counsel. For example, appellant's citation to studies and statistics presents arguments that he never raised and preserved at trial. If direct appeal counsel had raised a Batson claim, it would have been confined to the record at trial, including the narrow scope of the argument that trial counsel made. That record does not include any of the external materials appellant's current counsel – the Federal Community Defender Organization ("FCDO") – has gathered up and now relies upon. Speaking in terms of direct appeal counsel's stewardship in defaulting appellant's "preserved" Batson claim, the Majority correctly explains why the claim must fail, since the trial court accepted the Commonwealth's non-discriminatory explanations for use of those two peremptory strikes, and appellant made no argument, or showing, how this was error.

However, appellant's additional arguments, citing statistics, opinions, the "McMahon tape," and supposed "strike rates," in fact pose an entirely distinct claim that is cognizable only to the extent it sounds in layered ineffectiveness – encompassing both trial and appellate counsel. In addition to satisfying Uderra, and having to prove actual discrimination, appellant must show that both trial and direct appeal counsel were obliged to argue the external materials that his current counsel have amassed on collateral attack. Appellant has not attempted to show how or why his prior lawyers could have, or should have, amassed these external materials that he now claims, in boilerplate fashion,

prove both the merit of his foregone claim and the incompetence of both his trial counsel and his direct appeal counsel.

With specific respect to appellant's hindsight claim premised upon peremptory challenge "strike rates" by the prosecution, this Court has noted elsewhere that such statistics have little meaning where, as here, the defendant does not account for his own exercise of challenges, and the effect his peremptory strikes had upon the composition of the jury pool.

[A]ppellees do not account for the inevitable effect on the "pattern" of strikes created by the defense exercise of strikes. In other words, particularly in multiple-defendant cases, if the defense strikes one race of jurors at a heightened rate, it would automatically reduce the number of jurors of that race available to the prosecution for strikes. Appellees do not discuss the nature of their own strikes and the effect those strikes had upon the Commonwealth's strikes; thus, their accounting is incomplete.

Commonwealth v. Daniels, 963 A.2d 409, 433 n.18 (Pa. 2009). I explained the obvious deficiency in this approach further in Commonwealth v. Ligons, 971 A.2d 1125 (Pa. 2009) (Castille, C.J., concurring, joined by Eakin & McCaffery, JJ.):

This Court is routinely presented with collateral Batson claims where the defense argues the Commonwealth's supposedly revealing "strike rate" without accounting for the skewing of the jury pool resulting from the defendant's own pattern of strikes. "A true assessment of strikes must account for the composition of the panel as a whole, and the conduct of other lawyers exercising strikes. It must be remembered that Batson works both ways: the right of jurors being at issue, neither the defense nor the prosecution may discriminate, and discriminating actions of one side, if unaccounted for, result in an incomplete picture." Commonwealth v. Hackett, 598 Pa. 350, 956 A.2d 978, 991 (2008) (Castille, C.J., concurring). This reality, as borne out by the possibly discriminatory defense strikes here, underscores the propriety and common sense of this Court's holding in Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176, 1182 (1993), that Batson review requires a consideration of the totality of the circumstances.

Id. at 1170-71; see also Sepulveda, 55 A.3d at 1132 (“Appellant’s argument ... relies heavily upon bare statistical evidence, focusing on the Commonwealth’s strikes in isolation, with no account of the effect that his own peremptory challenges had upon the jury pool.”).

Third, I write to note my express agreement with the Majority’s enforcement of this Court’s procedural Rules, which do not allow a PCRA¹ petitioner to simply amend his petition or claims at will, and at any time; rather, the Criminal Rules require that the court grant leave to amend in order to amend the filing. See Majority Slip Op. at 24-28; see also Pa. R.Crim.P. 905(A); Commonwealth v. Porter, 35 A.3d 4, 12 (Pa. 2012). This is a common FCDO tactic: to keep “amending” or “supplementing” prior petitions and claims, building in more delay, and creating more burden upon the Commonwealth and the PCRA courts. See, e.g., Commonwealth v. Edmiston, 65 A.3d 339, 357 (Pa. 2013) (FCDO motion for DNA testing belatedly forwarded in context of serial PCRA petition years after petition was initiated (causing stay of federal *habeas* review) and only as serial petition was approaching decision; held: “our own review of the record and circumstances surrounding Appellant’s post-conviction DNA testing request leads to the conclusion that this motion was untimely as a matter of law and was forwarded only to delay further the execution of the sentence.”); See also Porter, 35 A.3d at 15-17, 22-23; Commonwealth v. Spatz, 18 A.3d 244, 329 (Pa. 2011) (Castille, C.J., concurring, joined by McCaffery, J.). The PCRA courts are not obliged to indulge strategies of delay. The trial court in this case stated the point succinctly: “Defense counsel has raised an unending litany of issues and at some point this court has to adjudicate the claims before it.” PCRA Court Slip Op. at 73-74, ¶ 167.

¹ Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-46.

Moreover, to the extent PCRA “supplements” and “amendments” attempt to raise new claims, as here, trial-level courts are not obliged to indulge such sabotaging of the PCRA’s jurisdictional time-bar. See Porter, 35 A.3d at 11-15. See also Commonwealth v. Moore, 805 A.2d 1212, 1225 (Pa. 2002) (Castille, J., concurring and dissenting, joined by Newman & Eakin, JJ.) (“[T]here is something to be said for a construction [of the PCRA time-bar] that would limit the petitioner to claims that were identified in his petition in a timely fashion, while, of course, permitting amendment to develop and support the timely-identified claims. Significantly, that is the approach the U.S. Court of Appeals for the Third Circuit has taken in construing the federal *habeas corpus* statute of limitations. See United States v. Duffus, 174 F.3d 333, 337 (3d Cir. 1999) (stating that district court was correct in denying petitioner’s motion to amend to add new claim filed after time allowed for appeal, because allowing such amendment would frustrate very intent of Congress in creating time-bar). There is obvious force to such an argument; indeed, a contrary rule, permitting endless and untimely amendments to add new substantive claims . . . would totally eviscerate the PCRA time-bar.”).

Finally, I write to note concerns with the initial brief the FCDO filed in this case. In my Concurring Opinion in Commonwealth v. Spotz, I detailed the tactics of the FCDO in that capital PCRA matter, including tactics of delay; I also described in great detail the abusive and improper brief that the FCDO had filed. The FCDO brief in Spotz was exactly 100 pages; that length was a result of this Court’s indulgence since, by the Rule in effect at that time, briefs were not to exceed 70 pages without leave of court. I noted in my concurrence that the FCDO had flouted that indulgence by dispensing with several of the required elements of a brief, such as a Statement of the Case, thus creating space for the FCDO to burden the Court with more claims. I described with specificity other abuses in the Brief:

The Brief pretends to raise “only” 20 issues, which would be burdensome enough. But, within those twenty claims are multitudes of additional claims or sub-claims. My conservative count of the total number of distinct “claims” presented in the Defender’s Brief, including both derivative and subsidiary allegations, exceeds 70. How does the Defender manage to “litigate” 70 claims in a 100-page brief? It employs a number of additional tricks.

For example, in 100 pages of Brief, the Defender includes no less than 136 single-spaced footnotes, many of extreme length, and then routinely advances distinct substantive arguments in those footnotes. See, e.g., Initial Brief of Appellant, nn.15, 18, 20-29, 32-33, 37-39, 43-51, 53, 59, 61-70, 72-77, 79-85, 94-95, 103, 107-18, 123-25, 127-34. The Defender also seizes more briefing space by single-spacing, and not indenting, its Statement of Questions Presented, making them virtually unreadable in the process. See, e.g., id. at 2 (containing 40 single-spaced lines of text running margin to margin). Another common Defender abuse, immediately recognizable to those of us charged with attempting to read their Briefs, is to list distinct claims or sub-claims by single-spaced bullet point in text, essentially doubling the number of points to be made. To make the abuse worse, these bullet points often simply declare the sub-claims without development or legal support; other times, the Defender will append footnotes, which may contain factual support or substantive argument, or may provide no meaningful development or explanation of the relevance of bald citations. See, e.g., id. at 29-30 & nn.27-29; 47-48 & nn.53-57; 53; 64-65 & nn.82-83; 66-67 & nn.86-92; 71-72 & nn.96-101; 75-76; 83; 95-98 & nn.125-34. The time-consuming burden is then placed on the Court to attempt to decipher the arguments.

18 A.3d at 333-34. I also stressed the untoward burden that these FCDO abuses placed upon both trial-level PCRA courts and this Court. I also noted that the FCDO had taken to making complaints about delay in capital cases, including a complaint in a federal case, Commonwealth v. Dougherty, 585 CAP, which falsely accused this Court of bearing prime responsibility for capital case delay. The Porter Court briefly described the federal pleading in Dougherty as follows:

The Dougherty pleading alleged, among other things, that this Court was the primary cause of delays in Pennsylvania capital cases, indeed that this Court was indifferent to, “and incapable of managing,” its capital docket. The Spotz concurrence offered examples from capital cases, including

many adverted to by the FCDO in its federal motion in Dougherty, where the FCDO's conduct was the primary cause of delay, a fact the FCDO had inexplicably failed to disclose in Dougherty.

35 A.3d at 22.

In light of the FCDO's disingenuous complaints about delays in capital cases, given that organization's central role in creating such delays, as well as other factors detailed in the Spotz concurrence, I made the following suggestions respecting appellate briefing in capital PCRA matters, "[t]o curb the rampant abuses in this case and other cases":

(1) Direct the Supreme Court Prothonotary to immediately reinstate a briefing limit of 70 pages in capital PCRA appeals, with no exceptions absent: (a) a showing of extraordinary circumstances; and (b) the explicit concurrence of the Commonwealth.

(2) Direct the Supreme Court Prothonotary to amend briefing notices to advise parties that: (a) substantive arguments and sub-arguments are not to be set forth in footnotes or other compressed texts, such as block quotes or single-spaced bullet points, since such practices facilitate violation of the restrictions on the length of briefs; and (b) arguments set forth in such fashion will not be considered. I would also refer the matter to the Appellate Procedural Rules Committee to recommend changes to our Rules to curb these abuses, including: (a) limitations on the number of words in a brief, such as are found in the Federal Rules, and (b) required certification from counsel that the brief is compliant.

18 A.3d at 349 (Castille, C.J., concurring, joined on this point by McCaffery & Orié Melvin, JJ.).

Beginning immediately after the decision in Spotz, the Court as a whole implemented measures along the lines of my suggestions. For example, the Court's briefing notice in capital PCRA appeals was amended to provide that page limitations would be strictly enforced; that "substantive arguments and sub-arguments are not to be set forth in footnotes or other compressed texts, such as block quotations or

single-spaced bullet points”; and that points set forth in such a manner would not be considered.

Thereafter, the Appellate Court Procedural Rules Committee responded to the concerns by proposing revisions to the Appellate Rules to rein in the kind of abuses found in the FCDO brief in Spotz. These revisions were approved by this Court in an order entered on March 27, 2013, effective in sixty days. Tracking aspects of the federal rules of appellate procedure, the revisions set forth restrictions on the font size used in briefs and changed the method by which to measure the length of briefs. See Pa.R.A.P. 124 & 2135. A principal brief, for example, is now limited to 14,000 words, unless the brief does not exceed thirty pages. The revised rules also require that counsel file a certificate of compliance if, for example, a principal brief exceeds thirty pages and is measured by use of the word count alternative. Id.

This appeal was pending when Spotz was decided, already having been briefed and submitted. Soon after Spotz was decided, however, this Court acted upon the fact that the FCDO brief in this case was abusive in the same fashion as the Spotz brief had been. Thus, by *per curiam* order, the Court directed that a conforming brief be filed:

AND NOW, this 9th day of June, 2011, upon review of the briefs in this submitted capital PCRA appeal, the Court has determined that counsel for Appellant [the FCDO] have filed a brief that does not conform with the Pennsylvania Rules of Appellate Procedure.

The non-conforming brief does not contain a Statement of the Case, the inclusion of which is described and is mandatory, pursuant to Pa.R.A.P. 2111(a)(5) and Pa.R.A.P. 2117. In addition, while purporting to raise thirteen issues, in actuality, by conservative count, the brief raises over seventy issues, many of which are undeveloped. Further, counsel have burdened the Court with seventy-eight single-spaced footnotes, many of which purport to raise substantive arguments. Accordingly, the indulgence of the Prothonotary's May 4, 2010 administrative order granting leave to file

a brief in excess of page limitation set forth in Pa.R.A.P. 2135(a)(1) having been abused, that order is hereby VACATED.

The Prothonotary is to return the Initial Brief for Appellant, along with the Appendix of Initial Brief of Appellant, to counsel for Appellant to file a brief conforming to the Rules of Appellate Procedure within thirty days of this order. ... Page limitations will be strictly enforced, and substantive arguments and sub-arguments are not to be set forth in footnotes or other compressed texts such as block quotations or single-spaced bullet points. Such practices facilitate violation of the restrictions on the length of briefs, and arguments set forth in such fashion will not be considered.

Order, 6/9/11.

The Court's decision today, by a Majority Opinion in excess of seventy pages, is in response to the conforming briefs we directed in the wake of Spotz.

It is also notable, given the FCDO's claims respecting delay in capital cases, that before filing its initial brief here, the FCDO requested seven extensions of time, including three requests forwarded after a directive that no further extensions would be granted. Those seven requests alone caused over seven months of delay. In all but the last of its extension requests, the FCDO cited to its workload, including its workload in state PCRA matters. Since the FCDO's "voluntary" activities involving first-petition capital PCRA matters are not by way of federal court appointment, every delay occasioned by the organization due to manpower or workload is chargeable to the FCDO's extensive private agenda in state court which, it is apparent, includes strategic delay. In the future, unless the FCDO is acting pursuant to explicit federal court appointment and authority to pursue an initial PCRA petition, I would not accept FCDO workload as a relevant or legitimate basis for delay in the PCRA courts, or on appeal in this Court.