

FILED

JUN - 9 2004

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

Criminal Appeals Unit
First Judicial District of PA

COMMONWEALTH OF PENNSYLVANIA : CRIMINAL DIVISION

v.

ANTHONY G. FLETCHER

March Term, 1992
NOS. 6001, 6002, 6003 and
6004

OPINION

YOUNGE, J.

Before this Court is a petition under the Post-Conviction Relief Act (42 Pa.C.S. § 9542, et seq.), which was assigned to this court following the death of the Honorable Robert A. Latrone and the elevation of the Honorable Legrome Davis to the United States District Court for the Eastern District of Pennsylvania.

I. Procedural Background

The relevant procedural history of this case is as follows: In January 1993, Anthony Fletcher was convicted of murder in the first degree and possession of an instrument of crime by a jury before the Honorable Judge Latrone. Following a penalty hearing, the jury determined that two aggravating circumstances existed and imposed a sentence of death for the murder conviction, despite finding the existence of some mitigating evidence. The death sentence was formally imposed in February 1993. Fletcher's conviction was affirmed by the Pennsylvania Supreme Court in March 2000 and certiorari was denied by the United States Supreme Court in December 2000. On

January 18, 2001, Mr. Fletcher filed a pro se PCRA petition. Mr. Fletcher's present counsel filed an amended petition December 3, 2001.

At his initial trial, Anthony Fletcher was represented by court-appointed counsel Stephen Patrizio, Esquire. Fletcher was represented by then attorney, now the Honorable Willis J. Berry for his post-trial motions. Fletcher was represented by court-appointed counsel, John Cotter, Esquire on direct appeal. Fletcher was represented by Jerome J. Shestack, Esquire for his Emergency Motion for Stay of Execution and was represented by Joseph Crawford, Esquire, Jarett Decker, Esquire and Lindsay Pockers, Esquire for the PCRA Evidentiary Hearing.

In his PCRA petition, Anthony Fletcher alleged twenty (20) violations upon which relief should be granted. In September 2003, this court granted Fletcher's request for an Evidentiary Hearing but permitted argument on only 5 of the 20 alleged grounds, including:

1. Trial counsel failed to present compelling exculpatory testimony from Dr. Hydow Park, the pathologist who performed the decedent's autopsy and also failed to expose a critical error by the testifying pathologist, Dr. Hood;
2. The police in this case lost or withheld critical physical evidence regarding the decedent's clothing, and trial counsel was ineffective for failing to investigate and raise this issue of deficient police work at trial;
3. Trial counsel was ineffective for failing to investigate, develop, and present significant mitigating evidence, including mental health evidence;
4. Trial counsel was ineffective for failing to object where the jury found that the aggravating circumstance of "grave risk of death" to a person other than the victim existed based upon improperly admitted evidence, unconstitutionally broad jury instructions and improper argument by the prosecution; and
5. Trial counsel was ineffective for failing to object to the trial court's instruction regarding the possibility of parole.

Of the five issues heard by this court at the Evidentiary Hearing, issues one and two requested relief in the form of a new trial. The third, fourth and fifth issues requested relief in the form of a new penalty phase hearing. Because of the courts decision on the first issue, no decision was reached on issues three, four and five. With respect to the second issue, the court flatly rejected this claim. However, this court granted relief on the first issue: the failure by trial counsel to call Dr. Park, the pathologist who performed the autopsy and failure by trial counsel to expose a critical error by Dr. Hood. Based on a finding that this issue warranted relief, in accordance with Pa. R. Crim. Proc. 909(b)(3), this court issued an order vacating the sentence of death and granting Mr. Fletcher a new trial. The Commonwealth of Pennsylvania appeals this decision, and presents three questions for review: (1) whether the claim on which relief was granted had been waived; (2) whether defendant proved actual prejudice; and, (3) whether defendant proved that there was no reasonable basis for trial counsel's decision not to attempt to present evidence from Dr. Park.

II. Factual History

The relevant facts of this case are as follows: In the early morning hours of March 2, 1992, Anthony Fletcher shot Vaughn Christopher on a Philadelphia street corner outside of a drug house. The motive and sequence of events leading up to the shooting were the only issues for determination at trial. While the defendant's statement, introduced by the Commonwealth, alleged the shooting occurred in self-defense following a struggle, the Commonwealth introduced the eye witness testimony of Natalie Grant, who alleged that Fletcher demanded money from Christopher, shot the victim execution-style, and subsequently fled the scene. During the guilt phase of trial, another

eyewitness, Ronald Williams, recanted his eyewitness account provided to the police days after the incident and denied having provided police with a statement implicating Anthony Fletcher. His initial statement was therefore admitted as substantive evidence. In that statement, Ronald Williams gave a similar version of events as Grant. The Commonwealth also introduced Anthony Fletcher's statement to police to show that Fletcher was responsible for the shooting death of Christopher. In Fletcher's statement to police, taken approximately a week after the shooting, Fletcher admitted that he committed the shooting, but claimed that the shooting occurred in self-defense after he and Christopher struggled following an argument.

In order to disprove self-defense on the part of the defendant, the Commonwealth presented evidence from the Office of the Medical Examiner in the form of testimony by Dr. Ian Hood. Dr. Hood testified that no evidence of a struggle existed despite a large bruise apparent on the chest of Christopher. Dr. Hood further testified that a bullet lodged in Christopher's chest probably caused the bruise, despite defense counsel's contention that Christopher could have received the bruise during the struggle Fletcher mentioned in his statement. When questioned as to whether the bruise could have been inflicted during the alleged struggle between Fletcher and Christopher, Dr. Hood stated at trial: "I don't think it's probable that the victim had his hands or wrists around the barrel or close to the barrel of the gun when it was fired...I cannot say from the physical evidence that there was any evidence of struggling on the part of the decedent, but it doesn't mean it didn't occur." See N.T., January 26, 1993, Page 43-44. It is important to note that Dr. Hood did not perform the autopsy on the body of the decedent or prepare the resulting report. In his testimony before the jury he merely presented his interpretation of

the autopsy report prepared by Dr. Hydow Park. Based solely upon his interpretation of the autopsy report, Dr. Hood testified that the bruise found on the decedent's chest was more than likely caused by a bullet and no evidence of a struggle existed to indicate self-defense.

At the Evidentiary Hearing, Dr. Ian Hood testified that for the first time in his twenty-year career as medical examiner, he felt the need to retract testimony he had given at trial. See Evidentiary Hearing Notes, 9/5/03, p. 53. Dr. Hood stated that he had made a mistake in interpreting the autopsy report of Dr. Park. He further testified that he could no longer say whether evidence of a struggle existed. Dr. Hydow Park also testified at the Evidentiary Hearing and stated that it was unclear whether evidence of a struggle existed, but that it was unlikely that the bruise was caused by the bullet. See Evidentiary Hearing Notes, 9/4/03, p. 188-191.

III. Discussion

It is important to note that this is a capital case, and that, as noted in Ford v. Wainwright, 477 U.S. 399, 411 (1986), "death is different." For this reason, this court's analysis of the issues presented in this case considers the interests of justice in equal measure with the applicable law. Anthony Fletcher was sentenced to death primarily based upon evidence that has since been retracted by the Office of the Medical Examiner.¹ Even the Commonwealth, in an attempt to bolster its theory of the execution-style shooting, reinforced the lack of evidence of a struggle primarily based upon the testimony of Dr. Hood. During closing arguments, the Commonwealth stated: "[t]he

¹ Eye-witness testimony was also provided by Natalie Grant, an admitted crack addict who was a fugitive on six outstanding bench warrants when she first gave her statement accusing Fletcher, over three weeks after the shooting occurred. Her credibility as an eyewitness was clearly an issue. It is obvious that Dr. Hood's claim that no physical evidence of a struggle existed was essential to the jury's finding the shooting did not occur in self-defense. See N.T. 1/22/93 at p. 112-114.

Medical Examiner is absolutely important to this case, because it refutes the defendant's version of what happened", " and, "Dr. Hood said no, there was no evidence of a struggle here, no bruising or anything..." See N.T. 1/27/1993, p. 149, 156. The importance of what is at stake in this capital case is not lost on this court.

In his PCRA Petition, Anthony Fletcher claims that his trial and appellate counsel were ineffective for failing to present the expert testimony of Dr. Hydow Park, the pathologist who performed the decedent's autopsy and for failing to expose the critical error by the testifying pathologist, Dr. Ian Hood. To establish an Ineffective Assistance of Counsel claim, the Defendant must prove by a preponderance of the evidence that: (1) the underlying claim had merit, (2) that counsel's performance had no reasonable basis, and (3) that counsel's ineffectiveness worked to his detriment. Commonwealth v. Copenhefer, 553 Pa. 285, 300 (1998). See also, Commonwealth v. Stevens, 559 Pa. 171, 180 (1999) (stating trial counsel's action must have "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place").

To establish a claim for failure to present expert testimony, the defendant must allege that (1) the witness existed, (2) the witness was available, and (3) the witness was willing to testify for the defense about the facts presented at the PCRA hearing, (4) trial counsel knew of or should have known of the existence of the witness, and (5) the absence of the testimony of such witness was so prejudicial as to have denied him a fair trial. See Commonwealth v. Smith, 544 Pa. 219, 237-38 (1996); Commonwealth v. Holloway, 524 Pa. 342, 351 (1990). Trial counsel need not call an expert witness where counsel is able to effectively cross-examine the Commonwealth's expert and elicit helpful testimony. See Commonwealth v. Williams, 537 Pa. 1, 29 (1994):

Commonwealth v. Showers, 2001 Pa. Super 242, 782 A.2d 1010, 1021 (2001). Finally, Defendant must show there is a reasonable probability that the outcome of the trial would have been different had the expert been presented by the defense. See Commonwealth v. Showers, 2001 Pa. Super. 242, 782 A.2d 1010, 1021 (2001).

Anthony Fletcher, through his counsel, has met this burden and proven by a preponderance of the evidence that prior counsel was ineffective for failing to present the expert testimony of Dr. Hydow Park. Dr. Hydow Park (who obviously existed) was available and willing to testify at trial. Dr. Park testified at the Evidentiary Hearing that he was in the country and available to testify in the trial of Anthony Fletcher on January 19th and 20th, 1993. See PCRA Transcript, Sept. 4, 2003, p. 166-170. Trial counsel knew or should have known of the existence of Dr. Park and the evidence Dr. Park testified to at the Evidentiary Hearing. Dr. Park signed the autopsy report received by trial counsel, who should have known the evidence surrounding the alleged struggle was critical to the defense's case. The absence of testimony from Dr. Park was obviously prejudicial to the defense's case. Here, the jury relied on the eyewitness testimony of an eyewitness, Ms. Natalie Grant to find beyond a reasonable doubt that Fletcher was guilty of an execution-style shooting. Further, Dr. Hood erroneously testified at the trial that there was no evidence of a struggle, ruling out the possibility of self-defense. Since Dr. Park, who actually performed the autopsy would have stated that he could not rule out a struggle based on his medical findings concerning the victim, there is a reasonable probability that the jury would not have convicted Mr. Fletcher had they heard the testimony of Dr. Park. Finally, trial counsel was not able to effectively cross-examine Dr. Hood, the substitute expert regarding these issues since Dr. Hood was not even aware

that his own conclusions were erroneous. See Evidentiary Hearing Transcript, 9/5/03, p. 53-63. Accordingly, defense counsel has met his burden showing trial counsel was ineffective for failing to call Dr. Hydow Park.

Mr. Fletcher has also met his burden with regards to an Ineffective Assistance of Counsel claim. First, the underlying claim clearly has merit. The issue of whether evidence of self-defense existed went to the heart of the defense's theory of the case, and was relevant to rebut the Commonwealth's allegations that no self-defense evidence existed. See Evidentiary Hearing Transcript, 9/4/03, p. 69-70. Second, trial counsel admitted he had no reasonable basis for failing to call an expert to support his own theory of the case or to rebut the Commonwealth's evidence. See *Id* at p. 71-73. Finally, trial counsel's failure to call Dr. Park clearly worked to Mr. Fletcher's detriment, since the jury obviously believed the Commonwealth's evidence that no evidence of a struggle existed, and therefore, self-defense was not likely.

In its appeal, the Commonwealth presents three questions for review: (1) whether the claim on which relief was granted had been waived; (2) whether defendant proved actual prejudice; and, (3) whether defendant proved that there was no reasonable basis for trial counsel's decision not to attempt to present evidence from Dr. Park. Those questions are addressed as follows:

A. Whether the claim on which relief was granted had been waived

First, it is important to note that this is a capital case where a death sentence has been imposed. It is critical to "the interest of justice" and fairness to only impose such a sentence where the evidence is constitutionally presented and a fact finder with accurate and reliable information has decided such a punishment is merited. To deny this PCRA

petition on a “technicality” or procedural error in such questionable circumstances would constitute a miscarriage of justice.

However, addressing this claim of waiver on its face, this court finds that although this issue has not been raised previously by trial or appellate counsel, this Ineffective Assistance of Counsel claim has not been waived, consistent with Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (2002). The Commonwealth alleges that this claim has been waived since the defendant, on post-conviction motions and direct appeal, “was free to raise any claims he identified – including those he now contends should have been raised.” Commonwealth Post-Hearing Memorandum, p. 2-3. The Commonwealth argues that since Fletcher elected to represent himself at his post-conviction motions, and the current petition alleges all prior counsel was ineffective, he should not now be allowed to allege his own ineffectiveness on appeal to the PCRA Court.² See Id.

In Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (2002), the Supreme Court of Pennsylvania addressed this issue at length as to when an Ineffective Assistance of Counsel claim should be brought. The court stated:

We now hold that, as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review. Thus, any ineffectiveness claim will be waived only after a petitioner has had the opportunity to raise that claim on collateral review and has failed to avail himself of that opportunity. Our holding today does not alter the waiver provision of the PCRA, 42 Pa. C.S. § 9544(b); it merely alters that time when a claim will be considered waived. Simply stated, a claim raising trial counsel ineffectiveness will no longer be considered waived because new counsel on direct appeal did not raise a claim related to prior counsel’s ineffectiveness.

² There is some discrepancy as to whether Fletcher represented himself at his post-trial motions or was represented by the Honorable Willis Berry. Despite this, under Pennsylvania case law, this is not relevant since this is the proper forum for these issues to be raised, regardless of who represented Fletcher.

Grant, 572 Pa. at 67, 813 A.2d 738 (2002). See also, Commonwealth v. Mitchell, 839 A.2d 2002, 207 (Pa. 2003); Commonwealth v. Johnson, 838 A.2d 663, 673 (Pa. 2003); Commonwealth v. Overby, 836 A.2d 20, 22 (Pa. 2003). The Supreme Court of Pennsylvania has indicated that the PCRA petition is the appropriate time to raise claims of Ineffective Assistance of Counsel. In this case, the defendant alleged a layered claim of ineffective assistance of his trial and appellate counsel. This is proper and Fletcher's claims are not waived. See Grant, 572 Pa. at 59-60. See also, Commonwealth v. Craig Williams, 566 Pa. 553, 782 A.2d 517, 527 (2001); Commonwealth v. Marrero, 561 Pa. 100, 748 A.2d 202, 203 (200).

Regarding the Commonwealth's claim that Fletcher's pro se filing of post-conviction motions precludes this claim of ineffective assistance of counsel, this court finds that this claim also fails. While it is true that a defendant may not claim his own ineffectiveness, See Commonwealth v. Tilley, 566 Pa. 312, 780 A.2d 649, 653 (2001), this court does not believe the filing of post-conviction motions constitute the type of self-representation that precludes future claims of ineffective counsel. In this case, Fletcher filed his post-conviction motions pro se, and was then represented by then attorney, now the Honorable Willis Berry on those motions. This is clearly distinguishable from those cases where a defendant attempts to represent himself at trial or a hearing and later is precluded from claiming his own ineffectiveness at that trial or hearing. See, e.g. Id. See also, Commonwealth v. Auker, 545 Pa. 521, 681 A.2d 1305, 1319 (1996). Under the facts of this case, Fletcher's pro se filing of his post-conviction motions did not constitute a waiver of this ineffective assistance of counsel claim.

B. Whether defendant proved actual prejudice

The Commonwealth alleges that Fletcher has failed to prove actual prejudice regarding the expert testimony of Dr. Hood and Dr. Park . This, too, is without merit. In this case, the sole issues at trial were Fletcher's motive and the events leading up to the shooting of Christopher Vaughn. While defense counsel alleged self-defense, the Commonwealth attempted to establish through eyewitness and expert medical testimony that the shooting did not occur in self-defense.³ Dr. Hood's testimony established a lack of evidence of a struggle based on scientific evidence and analysis and completely ruled out the defense's version of events. Further, the Commonwealth re-emphasized the lack of evidence of a struggle in its closing arguments. The Commonwealth is therefore hard-pressed to allege the presentation of this faulty evidence of Dr. Hood and lack of evidence by Dr. Park did not constitute prejudice to the defense. In this capital case, the defense was unable to effectively cross-examine the medical examiner and unable to present a proper defense without the accurate assessment of the autopsy report of Dr. Park. Having heard the retraction of Dr. Hood's trial testimony and his subsequent opinions, and the evidence Dr. Park would have presented at trial, this court is convinced that this defendant was in fact prejudiced by his trial and appellate counsel's failure to present the expert testimony of Dr. Park, a known expert witness who could have given an accurate assessment of the autopsy.

C. Whether defendant proved that there was no reasonable basis for trial counsel's decision not to attempt to present evidence from Dr. Park

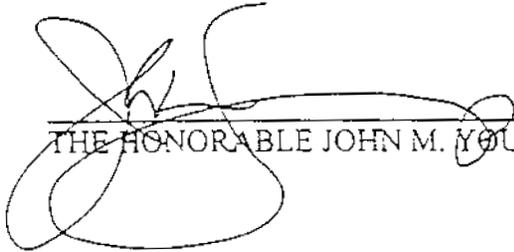
³ It is important to note that self-defense only became an issue because the Commonwealth made it an issue. The Commonwealth introduced the defendant's statement in its case in chief. It therefore became the Commonwealth's burden of disproving self-defense and it attempted to do so using the expert testimony at issue here.

Regarding this claim, trial counsel, Stephen P. Patrizio, Esquire testified at the Evidentiary Hearing. Mr. Patrizio testified that he did not consider interviewing Dr. Hydow Park and had no strategic reason for failing to call Dr. Park as a witness. Evidentiary Hearing Notes, 9/4/03, p. 71-73. This court has no reason to believe Mr. Patrizio was not completely honest and forthright with this court. This court believes him when he testified he did not focus his attention on the autopsy report or the possibility of error by Dr. Hood. The Commonwealth's claim has no merit.

IV. Conclusion

Based on the previous discussion, this court grants defendant's petition for post-conviction relief, in the form of a new trial.

BY THE COURT:



THE HONORABLE JOHN M. YOUNGE