

[J-101-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 472 CAP
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of York County, Criminal
v.	:	Division, dated December 21, 2004 at No.
	:	2844 CA 1995
	:	
	:	
JOHN AMOS SMALL,	:	
	:	SUBMITTED: June 6, 2006
Appellee	:	RE-SUBMITTED: January 5, 2009

COMMONWEALTH OF PENNSYLVANIA,	:	No. 484 CAP
	:	
Appellee	:	Appeal from the Order of the Court of
	:	Common Pleas of York County, Criminal
v.	:	Division, dated December 21, 2004 at No.
	:	2844 CA 1995
	:	
	:	
JOHN AMOS SMALL,	:	
	:	SUBMITTED: June 6, 2006
Appellant	:	RE-SUBMITTED: January 5, 2009

DISSENTING OPINION

MADAME JUSTICE TODD

I respectfully dissent. On collateral review, the PCRA court, after conducting a hearing, awarded Appellee John Amos Small a new trial based, *inter alia*, upon its conclusion that counsel's stewardship was constitutionally deficient for failing to interview and produce two witnesses who would have testified regarding an admission to the murder

by an individual other than Small. In doing so, however, the court did not make any express evaluation of these witnesses' credibility. In light of our proper role as an appellate court of limited review, our recent case law emphasizing that PCRA court credibility findings are essential to fulfilling this role, and the unique circumstances surrounding this prosecution, I believe that a remand is required for the PCRA court to make specific credibility findings regarding the testimony of these witnesses.

Our role under the PCRA is one of limited appellate review. Commonwealth v. Johnson, __ Pa. __, __, 966 A.2d 523, 532 (2009) (“Our standard of review in PCRA appeals is limited to determining whether the findings of the PCRA court are supported by the record and free from legal error”). In fulfilling this role, Chief Justice Castille, writing for a unanimous Court, recently emphasized the import of a PCRA court’s express credibility determinations in evaluating the prejudice prong of the Strickland/Pierce test.¹ “A PCRA court passes on witness credibility at PCRA hearings, and its credibility determinations should be provided great deference by reviewing courts.” Johnson, __ Pa. at __, 966 A.2d at 539. As we indicated in Johnson, when a PCRA hearing is held, “we expect the PCRA court to make necessary credibility determinations.” Id. at __, 966 A.2d at 540; see also Commonwealth v. Washington, 592 Pa. 698, 717, 927 A.2d 586, 597 (2007) (opining that even with recantations that might appear dubious, the PCRA court must in the first instance assess the credibility and significance of the recantation); Commonwealth v. Basemore, 560 Pa. 258, 293-94, 744 A.2d 717, 737 (2000) (offering that particularized assessment of the credibility of testimony is essential to resolution of ineffectiveness claims and that such assessment “is most appropriately accomplished, in the first instance, by the finder of fact”). Indeed, when PCRA courts have failed to make necessary credibility

¹ Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987) (adopting United States Supreme Court holding in Strickland v. Washington, 466 U.S. 668 (1984)).

determinations, we have not hesitated to remand for such findings. See, e.g., Johnson, (remanding for credibility determinations related to guilt phase claims); Basemore, (remanding for credibility determinations related to penalty phase claims).

In the appeal before us, our review focuses on the PCRA court's award of a new trial on the basis of trial counsel's failure to interview and produce two witnesses, Darick Sofi and Robert Elzey. These witnesses would have testified that Lawrence Tucker made the statement, "this is where I iced this chick," implicating him as the murderer of the victim, Cheryl Smith. Tucker added that he believed the police were stupid and that he would get away with it. At trial, however, Tucker implicated Small as Smith's killer. Employing our Commonwealth's three-prong Strickland/Pierce test, the PCRA court found that Small's ineffectiveness claim based upon counsel's failure to call Sofi and Elzey at trial had merit, that there was no reasonable trial strategy for failing to obtain this witness testimony, and that Small was prejudiced by this failure.

Justice Saylor's Concurring Opinion, as well as the Concurring Opinion of Justice Baer, persuasively explain that witness testimony undermining Tucker's testimony was relevant and would have cast doubt upon the strongest evidence connecting Small to Smith's murder. Thus, the underlying legal issue has arguable merit. Moreover, no strategic reason for failing to call witnesses Sofi and Elzey existed, satisfying the prong requiring that counsel's actions lacked a reasonable basis. Both Justice Saylor and Justice Baer surmise, however, contrary to the PCRA court, that the failure to call Sofi and Elzey would not likely have changed the outcome of Small's trial. Thus, according to the Majority, as well as the concurring Justices, Small failed to establish the prejudice prong of his ineffectiveness claim.²

² Similar to the concurring Justices, I am not in accord with the Majority's determination that Small's communication to his wife, "[t]hat's the girl we killed," was not confidential in nature due to the circumstances in which it was conveyed. Majority Op. at 12-13. I do agree, (continued...)

Yet, as Justice Saylor cogently points out in his concurring opinion, noticeably absent from the PCRA court's analysis in granting Small relief are any express credibility findings concerning witnesses Sofi and Elzey. Concurring Op. (Saylor, J.) at 6. In my view, such credibility determinations are absolutely essential because of the circumstances surrounding this prosecution. Tucker was the Commonwealth's primary witness. Additionally, Tucker was sexually intimate with Smith, abused her, and threatened to kill her. In fact, the Commonwealth initially charged Tucker with criminal homicide. Tucker, however, testified against Small after he entered into an agreement with the Commonwealth for the reduction in charges against him. Not only would have Sofi and Elzey's testimony cast doubt upon Tucker's testimony against Small, but the prosecution highlighted the absence of their testimony to the jury to convict Small. The import of Sofi and Elzey's testimony was not inconsequential – the extent of Small's participation in the murder of Williams may have been the difference between first-degree murder and second-degree murder.

While prior decisions by this Court suggest that, in certain factual scenarios, appellate review of ineffectiveness claims may be conducted where a lack of credibility is facially apparent, see, e.g., Commonwealth v. Gibson, 597 A.2d 402, 450 n.20, 951 A.2d 1110, 1139 n.20 (2008), I believe that our recent decision in Johnson properly reinvigorates and makes manifest the requirement that PCRA courts make credibility determinations in the first instance. Thus, in light of our proper role as an appellate court of limited review, the superior point of view held by the PCRA court to make credibility determinations, the PCRA court's duty to set forth express credibility findings in the first instance, and, most importantly, the unique circumstances underlying this capital appeal, I believe the

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however, that such marital privilege was vitiated due to Small's similar confession to at least one other individual in addition to his wife.

jurisprudentially prudent course of action is to remand the matter to the PCRA court for express credibility findings concerning witnesses Sofi and Elzy.

For these reasons, I respectfully dissent.