

[J-111-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 324 CAP
	:	
Appellee	:	Appeal from the order of the Court of
	:	Common Pleas of Lackawanna County,
	:	Criminal Division at No. 84 CR 176
v.	:	entered on 12/19/2000
	:	
	:	
STEVEN LEWIS DUFFEY,	:	
	:	SUBMITTED: May 28, 2002
Appellant	:	

OPINION

MR. CHIEF JUSTICE CAPPY

DECIDED: August 18, 2004

This is an appeal from the denial of post-conviction relief pursuant to the Post Conviction Relief Act, 42 Pa.C.S. §9541-46 (“PCRA”). For the reasons set forth herein, we remand for further proceedings consistent with this opinion.

This matter has a convoluted procedural history. Following a jury trial in February 1985, Appellant was convicted of first degree murder¹ and robbery² for the death of Kathy Kurmchak.³ The jury returned the death sentence for the first degree murder conviction.⁴

¹ 18 Pa.C.S. §2502(a).

² 18 Pa.C.S. §3701.

³ The facts of the case are set forth more fully at Commonwealth v. Duffey, 548 A.2d 1178 (Pa. 1988).

⁴ The jury found one aggravating circumstance - that the defendant committed a killing while in the perpetration of a felony. 42 Pa.C.S. §9711(d)(6). The mitigating circumstances (continued...)

Following the denial of Appellant's post-trial motions, the trial court imposed a sentence of death on August 4, 1986. John Cerra, Esquire and Paul Ackourey, Esquire (collectively, "trial counsel") represented Appellant through the post-trial motion stage. New counsel, Charles Witaconis, Esquire and Thomas Brown, Esquire, represented Appellant on direct appeal (collectively, "direct appeal counsel") (their appearance does not appear on the docket sheet, however). On October 14, 1988, this Court affirmed Appellant's judgment of sentence. Duffey, 548 A.2d at 1178.

On September 22, 1994, the Governor signed a death warrant scheduling Appellant's execution for the week of December 4, 1994. The Pennsylvania Capital Case Resource Center ("PCCRC") sent the trial court judge a letter dated November 15, 1994 that included the original and a courtesy copy of Appellant's "Pro Se Motion for Stay of Execution to Identify and Appoint Counsel and to Permit Counsel Time to Prepare a PCRA Petition". On November 18, 1994, the trial court denied the motion, concluding that it lacked jurisdiction. On November 20, 1994, Appellant filed a Motion for Reconsideration, which the trial court denied on November 22, 1994. On that same day, Appellant filed a "Renewed Motion for Stay of Execution to Permit Counsel Time to Prepare PCRA Petition" with a PCRA Petition attached ("Renewed Motion"). The Renewed Motion was an unsigned pleading; the front page indicated that Appellant filed it pro se. On November 28, 1994, Appellant commenced habeas corpus proceedings in federal court. On November 29, 1994, the trial court denied the Renewed Motion. While the trial court's order did not

(...continued)

offered were that the defendant was under the influence of extreme mental or emotional disturbance, id. §9711(e)(2); the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, id. §9711(e)(3); the age of the defendant at the time of the crime, id. §9711(e)(4); and any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense. Id. §9711(e)(8). The verdict slip did not indicate which mitigating circumstances were found, only that the aggravating circumstance outweighed any mitigating circumstances.

expressly dispose of the PCRA petition attached to the Renewed Motion, the trial court's opinion made it clear that the court found the attached PCRA petition to be "frivolous on its face and without merit".

PCCRC attorneys Yvonne R. Bradley, Esquire and David Wycoff, Esquire, "prepared" notices of appeal from the trial court's orders of November 18, 1994 (denying Appellant's Motion for a Stay of Execution) and November 29, 1994 (denying the Renewed Motion), although the appeals purported to be "for Steven Duffey, pro se". On December 5, 1994, this Court denied (1) Appellant's pro se Petition for Writ of Prohibition and Exercise of King's Bench Powers; (2) Emergency Motion for Stay of Execution; and (3) appeals from the orders of the trial court denying stays of execution. That same day, the federal court granted Appellant's request to proceed in forma pauperis and his request for appointment of federal habeas corpus counsel.⁵

On or about January 9, 1995, the record reflects that Richard Bernstein, Esquire entered his appearance for Appellant (although no such notation appears on the docket). On May 8, 1995, while the matter was still pending in federal court, Appellant, now with counsel's assistance, filed an Amended Petition for PCRA relief. After the federal litigation ended, the Commonwealth moved to strike the Amended Petition on the basis that the trial court had previously denied Appellant's PCRA petition on November 22, 1994. On

⁵ The district court also issued a temporary stay of execution, but subsequently denied the request for a stay and vacated the temporary stay it entered on December 5, 1994. Appellant appealed to the Court of Appeals for the Third Circuit, which granted a temporary stay of execution. Following oral argument, the Court of Appeals reversed the district court, but subsequently granted reargument en banc. Prior to reargument, Appellant moved to dismiss the appeal as moot because the district court's appointment of counsel to represent him changed the procedural posture of the case pursuant to applicable federal law. He also asserted that the appeal was moot since the death warrant issued for the week of December 4, 1994 had expired. The Court of Appeals heard oral argument and agreed with Appellant. Thus, on May 22, 1996, it dismissed the appeal and vacated the district court's order denying the stay of execution. See Duffey, 713 A.2d 63, 67 n.4.

December 2, 1996, the trial court granted the Motion to Strike. Appellant appealed that order to this Court, and we remanded the matter to the trial court for consideration of the merits of Appellant's Amended Petition for PCRA relief. Commonwealth v. Duffey, 713 A.2d 63 (Pa. 1998).⁶

A hearing on the amended PCRA petition was scheduled for February 19, 1999. At that hearing, Appellant submitted a "Motion for Summary Grant of Relief Under the Post-Conviction Relief Act" in which he raised several issues.⁷ During the course of that hearing, and subsequently in an order and opinion dated September 20, 1999, the trial court denied all of the relief requested in that Motion and hearing. Due to the number of issues raised as well as the volume of testimony that Appellant sought to produce, the hearing was continued. Additional hearings on the Amended PCRA Petition were held on September 20-24, 1999 and December 13-17, 1999. Ultimately, the PCRA court denied the PCRA petition.

Appellant raises several claims of trial and appellate counsels' ineffectiveness. Appellant is presenting a "layered" claim of ineffective assistance of counsel. We recently set forth the standard for such layered ineffective assistance of counsel claims in Commonwealth v. McGill, 832 A.2d 1014 (Pa. 2003).

⁶ We concluded in pertinent part that although PCCRC was assisting Appellant in preparing his first PCRA petition, that petition was filed pro se; the attorneys for PCCRC who signed the notices of appeal became Appellant's attorneys of record for the appeal when they filed them on November 30, 1994; and Appellant was still unrepresented when the trial court denied the Renewed Motion on November 29, 1994, and thus the trial court erred when it held that Appellant's first PCRA petition was counseled and not pro se. We also determined that the trial court erred in denying the pro se PCRA petition without appointing counsel, and then granting the Commonwealth's Motion to Strike the Amended PCRA petition. Instead, the trial court should have allowed Appellant to litigate the Amended PCRA petition with the assistance of counsel.

⁷ While this pleading does not appear on the docket, it was acknowledged by the trial court and is appended to both parties' briefs to this Court.

Pursuant to McGill, when a court is faced with a layered claim of ineffective assistance of counsel, the only viable ineffectiveness claim is the one related to the petitioner's prior appellate counsel. See id. at 1022. To preserve a claim of ineffectiveness, the petitioner must plead in his PCRA petition that such appellate counsel was ineffective for failing to raise all prior counsel's ineffectiveness. Id. The petitioner must also present argument on each prong of the Pierce⁸ test as to appellate counsel's deficient representation. McGill, 832 A.2d at 1022.

In McGill, we then elaborated on how a petitioner must present his claim of ineffectiveness. Consistent with Pierce, a petitioner must prove the three prongs of appellate counsel's ineffectiveness, namely, that the claim has arguable merit, that appellate counsel lacked a reasonable basis for his or her chosen course, and that the petitioner was prejudiced thereby, i.e., that there is a reasonable probability that the outcome of the proceedings in which appellate counsel was the attorney of record would have been different. Id. at 1022-23. To demonstrate the first prong (arguable merit), the petitioner must set forth all three prongs of the Pierce test as to trial counsel's action or inaction. Commonwealth v. Rush, 838 A.2d 651, 656 (Pa. 2003). If the petitioner does not satisfy any one of the three prongs as to trial counsel's ineffectiveness, he will have failed to establish an ineffectiveness claim as to appellate counsel, since a claim of appellate counsel ineffectiveness is merely a derivative claim related to trial counsel's ineffectiveness. Id. But if the arguable merit prong of appellate counsel's ineffectiveness is established, i.e., the petitioner demonstrates trial counsel's ineffectiveness, the inquiry proceeds to the remaining two prongs of the Pierce test as to appellate counsel's ineffectiveness. Id.

⁸ Commonwealth v. Pierce, 786 A.2d 203 (Pa. 2001).

As a threshold matter, then, we must determine whether Appellant has preserved his claims. In his amended PCRA petition, Appellant asserts that he did not receive effective assistance of trial counsel as to his several claims (Amended Petition at 108) and that his appellate counsel was ineffective insofar as they failed to raise each issue addressed in the amended PCRA petition. Amended Petition at 110. Thus, we conclude that Appellant has properly pled his claims. See Rush, 838 A.2d at 657 n.5.

Additionally, as to the claims we address herein, in his brief to this court, Appellant presents argument as to trial counsel's and appellate counsel's deficient representation. Specifically, he addresses all three prongs of the Pierce test as to trial counsel and direct appeal counsel. Consequently, as Appellant has adhered to the pleading requirements, we will first consider the arguable merit prong of the appellate counsel claim. In other words, we will first address the claim related to trial counsel's conduct, since it is only if trial counsel was ineffective that the remaining prongs related to appellate counsel's conduct need to be addressed.^{9 10}

As a final matter, we note that to be eligible for PCRA relief, the petitioner must plead and prove that an issue has not been previously litigated. 42 Pa.C.S. §9543(a)(3).

⁹ Appellant's first PCRA petition was filed on November 22, 1994, and the Amended Petition was filed May 8, 1995. Therefore, the claims raised in these petitions are subject to the PCRA which was in effect prior to the 1995 amendments. See Commonwealth v. Bond, 819 A.2d 33, 37 (Pa. 2003) (PCRA claims subject to 1995 version of the PCRA when the initial petition was filed prior to effective date of 1995 amendments, i.e., prior to January 16, 1996).

¹⁰ Appellant also asserts that under the pre-1995 version of the PCRA, a petitioner is entitled to relief for any claim "which would require the granting of Federal habeas corpus relief", 42 Pa.C.S. §9543(a)(2)(v) (Repealed, 1995, Nov. 17, P.L. 1118, No. 32 (Spec. Sess. No. 1), §1), and that all of the claims that he raises fall within that category. Given our resolution of the issues we address herein, we need not delve further into Appellant's interpretation of the pre-1995 version of the PCRA.

Initially, we will address Appellant's challenges to the inclusion and exclusion of certain venirepersons in the jury. Appellant first claims that trial counsel was ineffective by failing to move to strike juror Richard Fagerlin for cause and in failing to use a preemptory strike against this juror, and that appellate counsel was ineffective for failing to preserve this issue. Appellant asserts that Fagerlin was improperly included on the jury panel because he was predisposed to impose the death penalty.¹¹ Appellant contends that the seating of a juror who would vote for death in every murder case violates the Sixth and Fourteenth Amendments to the United States Constitution. See Ross v. Oklahoma, 487 U.S. 81, 85 (1988). Appellant further asserts that the seating of such a juror violates the Eighth Amendment right to a reliable and individualized capital sentencing proceeding. See Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality) (indicating that imposition of a death sentence for all murders does not allow for individualized sentencing that considers mitigating factors). Appellant, as the party seeking exclusion of the juror, has the burden of establishing that the juror was not impartial. Wainwright v. Witt, 469 U.S. 412, 423 (1985).

Appellant points to the fact that Fagerlin stated: "The way I feel, if a man commits a murder - a crime - he should be put to death." N.T. 1/22/85 at 175; accord N.T. 1/22/85 at 164-65 ("If the person did it, and he is found guilty, I believe he should" receive the death penalty.). Appellant claims that Fagerlin never stated that he could overcome his belief and apply the court's instructions, only that he would "try", N.T. 1/22/85 at 178; that he was unable to say with certainty that he would not draw adverse inferences if Appellant failed to testify, N.T. 1/22/85 at 180-82; and that he expressed concern about his ability to return a not guilty verdict, stating only that he "guess[ed]" he could do so. N.T. 1/22/85 at 179.

¹¹ The PCRA court held a hearing relative to this claim and denied relief but did not specifically address this issue in its opinion. Nonetheless, we find it unnecessary to remand to the PCRA court as we find no merit in Appellant's contentions.

When the entire testimony is read in context, it is evident that the seating of this juror was not improper. Fagerlin repeatedly indicated that he could follow the judge's instructions. N.T. 1/22/85 at 176-77, 178,180-82. Trial counsel recalled that he believed that Fagerlin would be a fair and impartial juror, as Fagerlin impressed counsel as someone who was "deliberate" and "thoughtful", the type of man who would not make a "snap judgment" and "someone who was really going to listen very carefully". N.T. 12/17/99 at 42-43. Counsel also believed that Fagerlin made an earnest effort, noting that Fagerlin stated "I'll try, I really will. He wasn't just saying I'll try...." N.T. 12/17/99 at 42. Appellant cannot establish that trial counsel was ineffective, and consequently, his claim of appellate counsel's ineffectiveness necessarily fails.

Next, Appellant raises several ineffectiveness issues with regard to the alleged improper exclusion of several venirepersons who were improperly dismissed for cause on the Commonwealth's motion when they voiced reservations about imposition of the death penalty. The exclusion of venirepersons simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction is unconstitutional. Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). A prospective juror may be excluded for cause when his views on capital punishment are such as would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985); Commonwealth v. Cox, 728 A.2d 923, 929 (Pa. 1999). The trial court has the discretion to strike a juror for cause, and that decision will not be disturbed absent an abuse of discretion. Commonwealth v. Rollins, 738 A.2d 435, 442 (Pa. 1999). After reviewing the relevant testimony, we find no merit in these claims.

Appellant acknowledges that trial counsel properly objected to the dismissal of Rose Mark and Lynn Judge; therefore, this is not a "layered" ineffectiveness claim under McGill. Appellant must still establish the three prongs of the Pierce ineffectiveness test in relation

to appellate counsel's deficient performance. Appellant claims that appellate counsel was ineffective for failing to raise the Witherspoon errors with regard to these jurors. We find that these claims lack arguable merit. Mark's testimony indicated that she would "more than likely" exclude the death penalty from her deliberations and that it might affect her judgment in rendering a verdict on guilt or innocence. N.T. 1/22/85 at 208-211. Similarly, Judge expressed her opposition to the death penalty and repeatedly indicated that she did not believe that she could impose it. See N.T. 1/24/85 at 110, 112, 124, 125, 127. Consequently, these jurors were substantially impaired and were properly stricken for cause. Because the claims lack arguable merit, the assertion of appellate counsel ineffectiveness fails.

Appellant also assigns as error trial counsel's failure to object to the dismissal of prospective juror Rosalie Walters, and appellate counsel's failure to preserve this issue. Upon questioning, Walters indicated to defense counsel that although she had "religious, moral or personal objections" to the death penalty, she could follow the court's instructions. N.T. 1/23/85 at 180. Walters answered affirmatively when the prosecutor asked if she would find Appellant guilty if the Commonwealth met its burden of proof. N.T. 1/23/85 at 200. The prosecutor then asked:

Q. Is there just a little bit of hesitation?

A. Yes.

Q. Okay, and tell me what it is.

A. I don't know if I could give the death penalty.

Q. You don't think you could deal with the death penalty?

A. Deal with it.

Q. Let me ask you a few questions about that. Do you have any moral, religious, or conscientious objections to the death penalty as you're sitting here thinking about it now?

A. I guess moral.

N.T. 1/23/85 at 200. Subsequently, Walters stated:

A. I'm not opposed to the death penalty per say [sic], it's hard to explain.

Q. Let's try, all right? Now, do you have some moral problems with the death penalty?

A. Yes, yes.

N.T. 1/23/85 at 201. Afterwards, Walters again stated that she could impose the death penalty if her verdict was guilty and that she could follow the instructions of the judge. N.T. 1/23/85 at 205-08. Nonetheless, the voir dire indicates that Walters was somewhat unclear as to her convictions regarding imposition of the death penalty, and these concerns could have substantially impaired her ability to function as an impartial juror. See Cox, supra. The trial court was in the best position to make that determination. We therefore cannot say that the court abused its discretion in dismissing this prospective juror for cause. Accordingly, Appellant has not demonstrated that trial counsel was ineffective for failing to object to the dismissal of this juror, and Appellant's claim of appellate counsel ineffectiveness fails.

Next, we turn to the claims Appellant raises regarding the penalty phase. We find that one of these claims may entitle Appellant to relief and that a remand is necessary for an evidentiary hearing.

Appellant contends that his trial and appellate counsel were ineffective for failing to challenge the prosecution's impermissible use of Appellant's silence at a psychiatric examination against him, after promising him that it would not do so.¹² During pre-trial

¹² The PCRA court declined to address the claim that references to Appellant's post-arrest silence were improper, deeming it to have been previously litigated. N.T. 2/19/99 at 95-96. We disagree. In the amended PCRA petition, counsel raised two instances of alleged improper references to Appellant's post-arrest silence: those made by Trooper Carlson (continued...)

proceedings, the defense considered offering the defense of insanity and pursuant to then-Pa.R.Crim.P. 305 (renumbered Pa.R.Crim.P. 573), notified the Commonwealth, and turned over reports of the defendant's experts. Prior to trial, Appellant, in the presence of his counsel, was evaluated by the Commonwealth's psychiatrist, Dr. John Hume. Dr. Hume advised Appellant that "[y]our rights permit you to refuse to answer any questions you might choose to so if something comes up that you don't want to respond to, that's your perfect right and that doesn't necessarily draw any particular inferences or not." Tr. of Proceedings at Psychiatric Examination, 1/25/85 at 2. Appellant thereafter did not respond to several of Dr. Hume's questions. At trial, Appellant did not take the stand, nor present an insanity defense. He did, however, present mental health evidence in mitigation during the sentencing phase, including 42 Pa.C.S. §9711(e)(3) (the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired). The Commonwealth, in turn, called Dr. Hume to testify to rebut those mitigating circumstances. Dr. Hume testified, in pertinent part, that Appellant was someone who had the capacity to make voluntary choices and that he was able to control his impulses and behavior:

(...continued)

after Appellant's arrest and those made by Dr. Hume. At the PCRA hearing, the parties focused on the references made by Trooper Carlson. Counsel for the Commonwealth argued that this issue had been previously litigated because during the direct appeal, this Court concluded that there were no impermissible references to Appellant's silence during the trial. N.T. 2/19/99 at 90; N.T. 12/17/99 at 140. However, the issue we addressed on direct appeal was completely different. During closing arguments, defense counsel claimed that the evidence was insufficient to support the crime of attempted rape. Counsel for the Commonwealth responded that the testimony established that the victim was neat and presumably would not leave a button undone on her pants as she was found. He further stated that this testimony was uncontradicted. We concluded that the prosecutor's remarks were not impermissible references to Appellant's silence, nor did they prejudice Appellant since he was not convicted of attempted rape. Duffey, 548 A.2d at 1184. The issue raised here is materially different, and has not been previously litigated.

Q. Is there anything that says that he unconsciously cannot deal with that, in your interpretation of his reports, the clinical history and your evaluation and all of the tests that have been taken, that says he cannot control his behavior whatsoever, he does this unconsciously?

A. There was nothing in the records or in the evaluation that I did which suggested that.

Even in the examination that I did, there were some questions which he declined to answer relating to his mental capacity, his cognitive abilities, for which there was no particular reason that he could not or should not have answered them. He simply chose not to.

Q. That indicates what, Doctor?

A. A voluntary decision not to in that part of the exam answer the questions.

N.T. 2/7/85 at 209-10.

During his closing argument, the prosecutor emphasized that Appellant could conform his conduct to the requirements of law, when he chose to do so:

The man has an anti-social personality, summed up in plain, ordinary English, he's a bad guy. He doesn't obey the law. He chooses when he obeys the law. Remember that. He chooses the times when he obeys the law.

Steven Duffey says to himself, I am judge of when I obey the law and when I don't. That is a conscious, deliberate decision on his part. It reflects a mind that is capable of evaluating the nature and circumstances of what's going on. And if he chooses, he will do it; if he doesn't, he won't.

* * *

[D]oes he have the ability to make the choice? Is that ability to make the choice impaired? That is the key question, not whether he did or he didn't, one way or the other, but is that ability, that cognitive ability impaired?

The answer has been - The only answer that we received here, the only person that's answered that question from the stand has been Dr. Hume. And he said, no. He has the capacity to conform his conduct to the requirements of law.

He has the capacity, except he chooses not to when he wants to. That, ladies and gentlemen, is no excuse to give him life imprisonment.

N.T. 2/7/85 at 241, 243.

Appellant contends that the use of his silence against him to obtain a death sentence, after he had been assured that he could exercise his right to silence without it being used against him, violated his due process and Fifth Amendment rights. Appellant relies on Doyle v. Ohio, 426 U.S. 610 (1976), and Wainwright v. Greenfield, 474 U.S. 284 (1986), for the proposition that the use of a defendant's post-Miranda warnings silence to rebut a mental health defense violates due process.

In Doyle, the defendants offered an exculpatory story for their participation in a drug transaction. On cross-examination, the prosecutor impeached their testimony by asking them why they had not explained their conduct at the time of arrest. The United States Supreme Court held that such cross-examination was fundamentally unfair and violated the Due Process Clause of the Fourteenth Amendment. The unfairness derived from the implicit assurance in the Miranda warnings "that silence will carry no penalty." 426 U.S. at 618. Since its holding in Doyle, the High Court has repeatedly reaffirmed that breaching the implied promise of the Miranda warnings violates the Due Process Clause. See Wainwright, supra (collecting cases). Appellant argues that this rule applies equally to the penalty phase. Estelle v. Smith, 451 U.S. 454, 462 (1981).¹³

¹³ Appellant also discusses the High Court's more recent decision in Wainwright, wherein the Court relied on Doyle to explain that the prosecution cannot use post-arrest, post-Miranda silence in order to prove sanity in attempting to rebut an insanity defense. The Court rejected the prosecutor's argument that the defendant's exercise of his right to remain silent was probative of his sanity and that Doyle did not control because proof of sanity is significantly different from proof of the commission of the underlying offense:

We find no warrant for the claimed distinction in the reasoning of Doyle and of subsequent cases. The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise to overcome a defendant's plea of insanity. In both situations, the State gives

(continued...)

The Commonwealth contends that Doyle and Wainwright are distinguishable because Appellant, unlike the defendants in those cases, did not remain silent, but waived his right to silence by choosing to answer some of Dr. Hume's questions. The Commonwealth asserts that once an individual waives that right, anything he says can be used against him, including his choice not to answer certain questions. The sole authority the Commonwealth cites in support of this assertion is its selective citation of a footnote in Doyle, in which the High Court noted that an analogous situation occurred in Johnson v. United States, 318 U.S. 189 (1943), and further stated:

A defendant who testified at his trial was permitted by the trial judge to invoke the Fifth Amendment privilege against self-incrimination in response to certain questions on cross-examination. This Court assumed that it would not have been error for the trial court to have denied the privilege in the circumstances, see id., at 196, 63 S.Ct., at 553, in which case a failure to answer would have been a proper basis for adverse inferences and a proper subject for prosecutorial comment.

Doyle, 426 U.S. at 619 n.9.

The remainder of this footnote, however, explains that due process requirements make such references to silence impermissible:

But because the privilege has been granted, even if erroneously, "the requirements of a fair trial" made it error for the trial court to permit comment upon the defendant's silence. Ibid. "An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one Elementary fairness

(...continued)

warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Wainwright, 474 U.S. at 292.

requires that an accused should not be misled on that score.” Id. at 197, 63 S.Ct., at 553.

Id.

Moreover, this Court has recognized that “[i]t is irrelevant whether a defendant elects to assert the constitutional right to remain silent from the outset or makes a voluntary statement and then asserts the right.” Commonwealth v. DiPietro, 648 A.2d 777, 779 (Pa. 1994) (citations omitted). The reference to post-arrest silence is not permitted. Nor may a prosecutor make references to the defendant’s resumption of silence. Id.

In this matter, Dr. Hume commented specifically on Appellant’s silence at the examination. Relying on that expert testimony, the prosecutor then impermissibly referred to Appellant’s silence and suggested damaging inferences from that silence. This clearly was error. Accordingly, we find that the underlying claim of trial counsel ineffectiveness has arguable merit.¹⁴

We also find that Appellant was prejudiced by the reference, i.e, there is a reasonable probability that the outcome of the proceedings would have been different. It is evident that the prosecutor capitalized upon the expert testimony regarding Appellant’s silence during the closing argument. The jury found several mitigating circumstances, but

¹⁴ Mr. Justice Castille’s concurring and dissenting opinion faults the majority for applying Wainwright to this case since, in his view, Wainwright “represented a significant extension of the Doyle rule” regarding use of a defendant’s post-Miranda silence. Concurring and Dissenting Opinion at 3. Of course, counsel’s actions must be judged according to existing law at the time of trial, and counsel cannot be deemed to be ineffective for failing to predict changes or future developments in the law. See Commonwealth v. Todaro, 701 A.2d 1343, 1346 (Pa. 1997). We think it plain that Wainwright did not announce a change in the law, as the dissent suggests. See Thomas v. State of Indiana, 910 F.2d 1413, 1416 (7th Cir. 1990) (“Wainwright did not announce a new rule but merely made explicit what was inescapably implicit in Doyle v. Ohio...”). In any event, our decision today is based on Doyle, which was the governing law at the time of Appellant’s trial. Pursuant to Doyle, the Commonwealth was not permitted to use Appellant’s silence against him following Miranda warnings.

concluded that they did not outweigh the single aggravating factor. Given the expert's impermissible reference to Appellant's silence as well as the prosecutor's use of that expert testimony in his closing, we find that Appellant was prejudiced. See Doyle, supra; see also DiPietro, 648 A.2d at 781 (prejudice from failure to issue curative instructions after prosecutor's reference to post-arrest silence was compounded by prosecutor's exploitation of Appellant's silence during closing argument).

But we cannot at this juncture address the reasonable basis of trial counsel's action. At the PCRA hearing, the PCRA court concluded that this issue had been previously litigated, see supra, n.12, and therefore precluded Appellant's counsel from asking in-depth questions regarding trial counsel's strategy in failing to object to the references to Appellant's silence. N.T. 12/17/99 at 140-43.¹⁵ Thus, Appellant's counsel could not elicit whether trial counsel had a reasonable basis for his actions, and pursuant to McGill, this court should refrain from gleaning whether such a reasonable basis exists. McGill, 832 A.2d at 1022 (only when the record clearly establishes that the act or omission of trial counsel was without a reasonable basis should the court resolve the reasonable basis prong absent a remand for an evidentiary hearing as to counsel's strategy).

¹⁵ After the Commonwealth interposed an objection to PCRA counsel's line of questioning, the PCRA court allowed PCRA counsel to continue so that the PCRA court could hear the full question. PCRA counsel proceeded as follows:

Q. Do you recall a reason for not objecting at the penalty phase when Dr. Hume drew inferences which he, himself, had indicated to Mr. Duffey would not be drawn from his refusal to answer questions at the evaluation?

A. I don't recall that.

Q. Do you recall a reason? Why didn't you object?

N.T. 12/17/99 at 140. At this point, the Commonwealth attorney again interposed an objection, which the PCRA court sustained.

In summary, Appellant's assertion that trial counsel should have objected to the references to Appellant's post-arrest silence has arguable merit, and prejudice resulted thereby. But we cannot address the reasonable basis of trial counsel's failure to preserve this issue, and consequently, cannot address this aspect of the ineffectiveness of appellate counsel. Therefore, a remand for an evidentiary hearing addressing the reasonableness of trial counsel's actions is necessary. Moreover, at this hearing, Appellant should present testimony related to appellate counsel's conduct, in order to prove his claim of appellate counsel ineffectiveness. We direct that an evidentiary hearing take place encompassing both questions and that the trial court complete the hearing and issue a supplemental opinion within ninety (90) days.

For the reasons stated above, we find that a limited remand is necessary for an evidentiary hearing including findings of facts and conclusions of law as to the reasonableness of trial and appellate counsel's actions. The remainder of the issues that Appellant raises in this appeal shall be held in abeyance until resolution of this issue. This Court will retain jurisdiction over the matter.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Castille files a concurring and dissenting opinion in which Mr. Justice Eakin joins.