

SUPREME COURT OF PENNSYLVANIA

Commonwealth v. Bardo

Bardo · No. Nos. 650 CAP and 651 CAP · Decided December 16, 2014

SUMMARY

This is a concurring opinion by Justice Todd of the Supreme Court of Pennsylvania in consolidated capital post-conviction appeals involving Michael Bardo. The opinion addresses ineffective assistance claims concerning a requested change of venue and pretrial publicity, and supports affirmance of the PCRA court’s grant of penalty-phase relief while agreeing that guilt-phase relief should be denied.

CASE DETAILS

COURT	Supreme Court of Pennsylvania
WRITING FOR THE COURT	Madame Justice Todd
JURISDICTION	Pennsylvania
DECIDED	December 16, 2014
DOCKET	Nos. 650 CAP and 651 CAP
DISPOSITION	affirmed
PROCEDURAL POSTURE	Cross-appeals from the Luzerne County Court of Common Pleas order dated December 30, 2011, in a post-conviction proceeding. The concurrence addresses the denial of guilt-phase relief and the grant of penalty-phase relief.
STANDARD OF REVIEW	For an ineffective-assistance claim, prejudice requires a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.
PRECEDENTIAL VALUE	Concurring opinion; the legal analysis is not independently binding.
PARTIES	Michael Bardo, Commonwealth of Pennsylvania v. Commonwealth of Pennsylvania, Michael Bardo

TOPICS

- post-conviction relief
- ineffective assistance
- jury selection
- sentencing
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether trial counsel was ineffective for failing to obtain a change of venue because of allegedly prejudicial pretrial publicity.
2. Whether the PCRA court properly rejected the change-of-venue ineffectiveness claim for lack of arguable merit.
3. Whether the PCRA court properly granted penalty-phase relief based on counsel's mitigation advocacy and the possibility that the mitigation evidence could have persuaded at least one juror not to impose the death penalty.

HOLDINGS

1. Under the unique circumstances presented, Bardo failed to establish that the pretrial publicity so pervaded the community as to warrant a presumption of prejudice; therefore, his change-of-venue ineffectiveness claim lacked arguable merit.
2. In the PCRA context, the prejudice inquiry is whether there is a reasonable probability that counsel's failure to obtain an out-of-county venue change affected the result, including by precluding an acquittal or a different penalty; juror assurances of impartiality, unexhausted peremptory strikes, and jury instructions do not necessarily resolve whether inherently prejudicial publicity caused prejudice.
3. The PCRA court's grant of penalty-phase relief was properly affirmed because its determination regarding the comparative persuasiveness of trial and PCRA counsel's mitigation advocacy was free of legal error and supported by the record.

KEY QUOTATIONS

“Indeed, in his attempt before this Court to make that showing, Bardo merely asserts that only one prospective juror “had not read or heard anything about the case” and that 40% of prospective jurors formed an initial opinion regarding his guilt or innocence.” (1)

“Instead, this Court has typically engaged in a holistic, qualitative evaluation of all relevant evidence to determine if the publicity’s nature and dissemination throughout the community, in the context of the particular circumstances of the case, warrants a presumption of prejudice notwithstanding empaneled jurors’ indications that they can be fair and impartial.” (1)

“Accordingly, and in light of the fact that the PCRA court and the majority properly dispose of Bardo’s claim as lacking arguable merit, I decline to join this unnecessary and, in my view, erroneous alternative rationale.” (2)

FACTUAL BACKGROUND

Bardo challenged trial counsel's failure to obtain a change of venue in light of pretrial publicity. He asserted that only one prospective juror had not heard anything about the case and that 40 percent of prospective jurors had

formed an initial opinion concerning his guilt or innocence. The PCRA court nevertheless found no arguable merit and alternatively found no prejudice based on the jurors' assurances of impartiality, Bardo's failure to exhaust peremptory strikes, and the trial court's instructions. The PCRA court also granted penalty-phase relief based in part on the comparative persuasiveness of trial and PCRA counsel's mitigation advocacy.

PROCEDURAL HISTORY

The Luzerne County Court of Common Pleas granted penalty-phase post-conviction relief and denied guilt-phase relief. The Commonwealth and Michael Bardo filed cross-appeals in the Supreme Court of Pennsylvania. Justice Todd concurred in affirming the order, agreeing that guilt-phase relief was properly denied and that penalty-phase relief was properly granted.

DISPOSITION

affirmed

CASES CITED

- Commonwealth v. Pierce, 303 A.2d 209, 213 n.3 (Pa. 1973)
- Marshall v. United States, 360 U.S. 310, 312 (1959)
- Commonwealth v. Brado, 368 A.2d 643, 645 (Pa. 1977)
- Commonwealth v. Reaves, 923 A.2d 1119, 1127 (Pa. 2007)