Criminal Law - Appellate Review - Basic and Fundamental Error

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protected by pension rights, seniority, or perhaps unemployment compensation, his job and his fifth amendment rights will not be protected.

Janet L. Zoltanski

Criminal Law—Appellate Review—Basic and Fundamental Error—The Supreme Court of Pennsylvania has held that allegations of basic and fundamental error will no longer enable appellants in criminal cases to seek reversal for alleged errors not properly raised in the trial court.


Alvin Clair was convicted of murder in the second degree and, on direct appeal to the Pennsylvania Supreme Court, sought reversal for error in the trial judge's charge to the jury. Clair contended that the judge invaded the jury's province, prejudiced him while reviewing the testimony, and erroneously instructed the jury on the law. Appellant's counsel did not object at trial to the alleged errors; nevertheless, Clair claimed the errors were basic and fundamental and could be reviewed by the court despite the failure to preserve them below. The court rejected this argument and, overruling precedents on which appellant had relied on appeal, abrogated the doctrine of basic and fundamental error in criminal cases.

The Clair court pointed to the difficulty of determining which errors are basic and fundamental and to the anomalous situation created: while all reversible error is not basic and fundamental there is no readily apparent difference between them. Furthermore, the court noted that in Dilliplaine v. Lehigh Valley Trust Co., it had abrogated the fundamental error doctrine in civil cases. There the court had reasoned that the doctrine excused inadequate preparation and discouraged alert professional representation, penalized the opposing party, denied the trial court the opportunity to correct the error, impaired the finality of trial court holdings and encour-

2. Id. at 274. Justice Nix wrote the opinion for the court.
3. Id. at 273.
aged trivial appeals. The Clair court concluded that these considerations were equally pertinent in criminal cases and, since the rules of civil procedure and criminal procedure each require timely objections to preserve error for appeal, no distinction would be made for purposes of the fundamental error doctrine. The court bolstered its decision by pointing out that due process defects in a defendant's trial are more properly remedied in a post-conviction proceeding through a claim of ineffective assistance of counsel. The court did not restrict its holding to errors in jury charges but held the fundamental error doctrine could no longer be used to obtain review of unobjected-to errors in the presentation of evidence.

The Clair dissenters argued that the analogy between civil and criminal cases was tenuous. Asserting that the fundamental error doctrine was designed to assure a fair trial to every defendant, they criticized a rule which would penalize defendant and counsel for inevitable human errors. They also disputed the majority's reliance on the need for judicial economy, maintaining that the majority's proposed alternative would lead merely to more appeals from post-conviction hearings on claims of ineffective assistance of counsel, with no net savings of judicial resources.

The Pre-Clair Status of the Fundamental Error Doctrine in Pennsylvania

As a general rule, appellate courts will not review allegations of errors that were not properly preserved by objection or exception.

5. Id. at 257-59, 322 A.2d at 116-17.
6. The rules of civil and criminal procedure both apply to charges to the jury and require that objection be made before the jury retires. Pa. R. Civ. P. 227; Pa. R. Crim. P. 1119. Although Dilliplaine applied only to error in jury instructions, it should be noted that Clair applies both to those errors and to errors in the presentation of evidence.
7. 326 A.2d at 274.
8. Appellant also contended that during the trial he had been prejudiced by improper questioning of a witness. Defense counsel had not objected to the testimony when it was given and had not made a motion to have it stricken. Id.
9. Id. at 275.
10. Id.
This rule seeks to discourage the withholding of objections solely to assure a basis for appeal and to preserve judicial resources by having all claims of error presented in a timely fashion so that the trial judge may take corrective action. The interests of the judicial system, however, may conflict with the interests of criminal defendants. Accordingly, Pennsylvania courts had recognized, in the doctrine of basic and fundamental error, an exception to the strict requirements of the general rule. In exceptional cases, courts were willing to overlook a mistake or inadvertence of trial counsel and review unpreserved error that jeopardized the fundamental fairness of a defendant’s trial.

To support his claim that the court could review an unpreserved but fundamental error, Clair relied on the court’s recent leading decision in Commonwealth v. Williams. The Williams decision, however, must be analyzed in conjunction with Commonwealth v. Scoleri, which was handed down on the same day and dealt also with failure to object to errors. Critics of the doctrine charged that its application in these cases led to inconsistent results. In Clair the court vindicated such criticism by approvingly citing Justice

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Robert's dissent in *Williams,* therefor effectively overruling that case. A discussion of these cases would now be in order.\(^{17}\)

In *Williams* the court found fundamental error in a confusing charge that permitted the jury to convict even though it entertained a reasonable doubt.\(^{18}\) In *Scoleri* the court affirmed the conviction despite a claim of denial of access to counsel during a mid-day recess in the trial.\(^{20}\) The policy of guaranteeing a fair trial which underlies the fundamental error doctrine would seem to require sim-


Justice Roberts consistently opposed the use of the doctrine, objecting to the test of severity of the error and to the "subjective" nature of the inquiry. He proposed an alternative "correctible" standard focusing on counsel's opportunity to raise the error at trial and the trial judge's ability to correct the error:

- First, the relevant standard must be *not how severe was the error, but how easily can it be corrected.* . . . Then, this Court will reverse for (1) those errors which were so severe that any attempt to correct them could not dispel the earlier taint and (2) those objections which the trial court overruled and which we find meritorious. Commonwealth v. Simon, 432 Pa. 386, 390-91, 248 A.2d 289, 291 (1968) (Roberts, J., opinion in support of the order).

Justice Roberts speaks of "severe" error and "taint," but he does not precisely define his test. Writers who had some difficulty in interpreting the test have suggested that the Justice proposed two tests: 1) that the appellate court will never reverse on unpreserved error, and 2) that the court may reverse if it determines that an objection at trial would have been useless because no action by the judge could have corrected the error. Comment, *supra* note 13, at 496. However, language in *Simon* seems to better support the interpretation that appellate courts will review claims of error only if they were preserved below by an objection that was either sustained, although judicial corrective action was ineffective, or overruled. Commonwealth v. Simon, 432 Pa. 386, 391, 248 A.2d 289, 291 (1968) (Roberts, J., opinion in support of the order) ("[W]e must insist that counsel object to all of those events which counsel alleges to be error. . . .") (emphasis added). Thus Justice Roberts' alternative was theoretically a very strict standard aimed at defense counsel's strategies to preserve grounds for appeal.

\(^{18}\) Commonwealth v. Simon, 432 Pa. 386, 248 A.2d 289 (1968) was a companion case to *Williams* and *Scoleri* which also dealt with unpreserved error. There the appellant, who had been tried for murder, contended that the judge incorrectly instructed the jury that a finding of intent to kill would preclude a verdict of voluntary manslaughter. *Id.* at 387, 248 A.2d at 289. Simon's conviction was affirmed per curiam without opinion by an evenly divided court. Justice Roberts filed an "opinion in support of the order." *Id.* at 396, 248 A.2d at 293. Because the court gave no rationale for its decision, *Simon* itself is not so clearly subject to criticism as are *Williams* and *Scoleri*.

\(^{19}\) 432 Pa. at 567, 248 A.2d at 306.

\(^{20}\) Scoleri had taken the stand to testify on his own behalf and, as midday approached, he was still on direct examination. Before adjourning for lunch, the court admonished Scoleri that he was not to discuss the case with anyone, including his attorney, during the break. Counsel did not object at that time to the admonition. *Id.* at 575, 248 A.2d at 296-97.
ilar disposition of *Williams* and *Scoleri*. The right asserted in *Williams*—to have the state bear the burden of proving guilt beyond a reasonable doubt—is part of the fair trial required by due process.21 The right to assistance of counsel asserted in *Scoleri* is an enumerated federal constitutional right and, in Pennsylvania, has been held to encompass the right to consult counsel while the court is in recess.22

Critics of the fundamental error doctrine attributed the inconsistent results to the court's failure to express its standards adequately.23 Case law had shown that determinative factors could include not only the type of error involved,24 but also the ease with which trial counsel could have raised the error25 and the grossness of the error.26 In other words, the court apparently took an ad hoc approach27 that arguably led to increased expenditures of time and appeal funds.28

That the doctrine could be unwieldy or unpredictable does not negate its potential usefulness in assuring a fair trial. In *Williams*, for example, had the appellate court adopted a strict view and re-

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22. *Commonwealth v. Vivian*, 426 Pa. 192, 231 A.2d 301 (1967) (admonition that defendant not discuss case with his attorney during lunch recess constituted reversible error even without a showing of prejudice).
23. See Comment, supra note 13, at 506-07, suggesting that the court, to meet criticism of the doctrine, articulate its standards and expose the logic of each of its decisions dealing with fundamental error. For example, the court failed to justify the treatment of the claim in *Scoleri* despite precedent that seemed to mandate a different result. See note 22 supra. The decision, however, may have been influenced by Scoleri's three trials for the same offense (all ending in convictions imposing the death sentence). But see *Commonwealth v. Simon*, 432 Pa. 386, 397, 248 A.2d 289, 294 (1968) (O'Brien, J., dissenting) where an attempt at articulating standards was made. There Justice O'Brien implied that where the evidence only barely supports the verdict any error would have a prejudicial effect and therefore would be basic and fundamental.
quired objection below to preserve the claim of error, the conviction would have stood even though, under the jury charge given, the state might not have proved its case beyond a reasonable doubt.\footnote{29. See text accompanying notes 19-21 supra.} The doctrine of fundamental error thus served a valid function from the defendant's viewpoint.\footnote{30. The court apparently made few attempts to redefine the nature of the fundamental error doctrine. Several possible alternative approaches were available. See note 17 supra for Justice Roberts' proposals, and TEMPLE Comment, supra note 27, at 233-37, proposing two others: 1) hearing any claim of error on direct appeal, and 2) hearing claims of unpreserved error if they assert an enumerated constitutional right.} The Clifford court apparently concluded that the same aim of encouraging professional competence and judicial efficiency that led to the abrogation of the doctrine in civil cases outweighed the potential benefits to criminal defendants.

**Validity of the Dilliplaine Rationale as a Basis for Clifford**

The decision in *Dilliplaine v. Lehigh Valley Trust Co.*,\footnote{31. 457 Pa. 255, 322 A.2d 114 (1974).} abrogating the fundamental error doctrine in civil cases, was based on the court's perception of practical problems that it felt made the doctrine unworkable in a modern judicial system. The court concluded that the doctrine was not a principled test, but was a vehicle harmful to the trial and appellate process, used for arbitrary reversal according to the predilections of a majority of the court.\footnote{32. Id. at 257, 322 A.2d at 116.} The major emphasis was placed on the doctrine's effect on preparation by the attorney and on the caseload of appellate courts; excusing the failure to preserve error condoned poor preparation by attorneys and penalized the opposing party.\footnote{33. Id., 322 A.2d at 116.} The court did not distinguish between deliberate and inadvertent failure to object, but strongly suggested that any failure could only be seen as falling short of the alert professional representation to be demanded of the bar.\footnote{34. Id. at 258, 322 A.2d at 116.}

The *Dilliplaine* rationale does not provide a valid basis for Clifford. Since in a civil case a party is usually represented by an attorney of his choice, binding him to omissions of his counsel is justifiable.\footnote{35. The decision to impose a stricter standard of preparation and conduct on attorneys in civil cases comports with traditional conceptions of the adversary system and a party's identification with his attorney.} That result is not so readily acceptable in criminal cases. As the
Clair dissenters noted, a great number of criminal defendants are indigent and represented by counsel whom they have not personally chosen. Although it is clear that a criminal defendant may be bound by actions of his counsel taken as part of a deliberate trial strategy, penalizing appellants for all failures to object ignores the relative weakness of the average criminal defendant vis à vis the state. It is also obvious that in criminal cases the interest at stake is the life or liberty of the defendant; arguably this should weigh more heavily than the pecuniary interests which are at stake in civil cases.

The application of the Dilliplaine rationale to criminal cases also slights the origins of the doctrine of basic and fundamental error. Admittedly, the general rule restricting the scope of appellate review to preserved error sought to prevent parties from trying to assure grounds for appeal by failing to raise an objection at trial. The fundamental error exception was conceived not as condonation of such tactics, but as a guarantee of fundamental fairness. As the Clair and Dilliplaine dissenters intimated, in abrogating the doctrine in criminal cases the majority may have over-emphasized the flaws in the doctrine without giving sufficient weight to its underlying purpose or to the interests it sought to protect.

The Claim of Ineffective Assistance of Counsel as an Alternative to the Fundamental Error Doctrine

With Clair, a shift in perspective has taken place. The fundamental error doctrine had provided a limited means on direct appeal of correcting egregious trial errors for which the defendant could not always be held responsible. The effect of Clair will be to delay relief until the defendant can file a petition for a post-conviction hearing and prove not that his trial was unfair, but that his attorney's conduct was not minimally competent.

A claim of ineffective assistance of counsel is one basis for relief

36. 326 A.2d at 275.
38. See text at note 12 supra.
41. PA. STAT. ANN. tit. 19, § 1180-3(6) (Supp. 1975) provides that a petitioner is eligible for relief if he can show "[t]he denial of his constitutional right to representation by competent counsel."
under the Pennsylvania Post-Conviction Hearing Act. The standard used to judge the claim was set forth in Commonwealth ex rel. Washington v. Maroney, where the court held that counsel's assistance is "effective" if there is some reasonable basis for his conduct. The attorney's chosen course is examined in light of all available alternatives, but the outcome does not depend on whether the most reasonable alternative was taken; the balance will tip in favor of finding effective assistance of counsel as soon as the court finds any reasonable basis for counsel's actions. Ineffective assistance of counsel has also been defined as that assistance which is a "mockery of justice," so insubstantial as to cast doubt on the hypothesis that counsel made a deliberate informed choice, and not "within the permissible range of prudent representation of a client's interests." However phrased, the standard implies a presumption in favor of finding competence of counsel. Under the fundamental error doctrine the defendant had to show that the unobjected-to error denied him a fair trial, but there was no presumption in favor of the state. Clair seems to add a burden to the defendant that he did not bear when alleging fundamental error.

It is questionable that Clair will ease the difficulty of determining when unpreserved error will entitle a defendant to relief. The standard that the Clair court termed more workable than the fundamental error test seems to suffer from similar infirmities. As criteria,

42. Id. §§ 1180-1 to -14 (Supp. 1975). The act encompasses the writ of habeas corpus and provides a uniform procedure for post-conviction proceedings.
43. 427 Pa. 599, 235 A.2d 349 (1967). In Maroney the court found that counsel's failure to object to admission of an allegedly coerced confession, on which the Commonwealth's entire case rested, was explained most satisfactorily by insufficient preparation by the defense counsel, a member of the Legal Aid Society. Two other actions by counsel, failure to investigate prior convictions of an accomplice in order to impeach his testimony and failure to investigate possible witnesses, were held to be valid trial decisions. Id. at 601, 609-11, 235 A.2d at 351, 355-56.
44. Id. at 604-05, 235 A.2d at 352-53.
46. Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 604, 235 A.2d 349, 352 (1967). See also Commonwealth v. Hill, 450 Pa. 477, 480, 301 A.2d 587, 588 (1973) (where challenged jury instruction was fair and neutral, defendant's counsel was not ineffective because of failure to object to the charge).
47. Commonwealth v. Ganss, 440 Pa. 602, 606, 271 A.2d 224, 226 (1970) (where counsel was attempting to avoid the imposition of the death penalty, failure to object was a tactic within the permissible range of prudent representation).
"insubstantial assistance," "permissible range of prudent representation," and "mockery of justice" are no more concrete than "fundamental fairness." The real test for ineffective assistance of counsel should probably be widely-held, established standards of professional conduct and judgment in criminal cases. That as a practical matter such standards do not exist weakens the court's assertion that an old unworkable test has been discarded for a more meaningful test.

Further, it is unlikely that claims of unpreserved error will be disposed of differently under the ineffective assistance of counsel test than under the fundamental error test. In at least one instance the court in effect equated the two tests, holding that where counsel had no reasonable basis for failing to object, the failure was fundamental error and counsel's representation was ineffective. The ineffective counsel standard does not impeach reasonable strategic decisions by counsel. Similarly, in applying the fundamental error doctrine the court has sometimes required the defendant to show that counsel's failure to object was not part of a trial strategy. Thus the determinative factors may in many cases be identical under both tests.

It is also questionable that the Clair decision will have the effect of reducing the caseload of appellate courts. Under a post-

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49. Id. at 292. But see Finer, Ineffective Assistance of Counsel, 58 CORNELL L. REV. 1077, 1080 (1973) [hereinafter cited as Finer], suggesting as a viable standard "whether counsel exhibited the normal and customary degree of skill possessed by attorneys who are fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar." (emphasis in original).

50. 326 A.2d at 274. In addition, a psychological factor may cloud the decision-making process in cases raising the issue of ineffectiveness of counsel. A court could not ignore the stigma which would attach to any attorney whose conduct was declared so ineffective as to constitute "a mockery of justice." This must be contrasted to the situation on direct when a claim of fundamental error is raised. There the effectiveness of counsel is not directly put in issue; the inquiry goes to the overall fairness of the defendant's trial.

51. Commonwealth v. Miller, 448 Pa. 114, 290 A.2d 62 (1972) (counsel's failure to object to error had the effect of destroying the defendant's only defense).

52. See text accompanying notes 43-44 supra.


54. The Post-Conviction Hearing Act is intended to correct errors of constitutional dimensions. PA. STAT. ANN. tit. 19, § 1180-3 (Supp. 1975) provides for thirteen types of constitutional errors which compel relief. In cases applying the fundamental error doctrine, that the error had constitutional dimensions did not automatically determine that it was fundamental error. See notes 19-22 supra and accompanying text. Deprivation of a substantive constitutional right, however, may have been the only readily identifiable category of error which the courts deemed to be fundamental. TEMPLE Comment, supra note 27, at 229 & n.12.
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conviction petition claiming ineffective assistance of counsel, more so than with other claims that may be made under the Act, it is likely that the hearing court will grant an evidentiary hearing before ruling on the merits of the claim. In addition, adverse rulings are appealable to a higher court. As the Clair dissenters emphasized, the saving of judicial resources envisioned by the majority may not materialize. It is most likely that the cost of the administration of criminal justice will not be reduced but will be merely redistributed among defendants and trial and appellate courts.

The factors relevant to Clair's effect on judicial economy are relevant as well to the court's contention that the decision will encourage the finality of trial court holdings. Although Clair will reduce the claims of error on direct appeal, the finality of the decision can still be challenged in collateral proceedings. In fact, it appears that the most effective way to create more finality in criminal cases would be to inject that finality at the direct appeal stage. Although the court may believe that a collateral proceeding is a more expeditious process, it seems to be more practical to dispose of all possible claims on direct appeal. The Post-Conviction Hearing Act provides that once an issue has been finally litigated on direct appeal it may not be raised in a collateral proceeding. By hearing all possible

56. PA. STAT. ANN. tit. 19, § 1180-11 (Supp. 1975) provides:
The party aggrieved by an order [of the hearing court] may, within thirty days from the day on which the order is issued, appeal to the court having appellate jurisdiction over the original conviction.
57. 326 A.2d at 275.
58. Id. at 274.
59. See Temple Comment, supra note 27, at 238.
60. Thus claims of error need not be dealt with individually on direct appeal, but are approached through a general inquiry into effectiveness of counsel in collateral proceedings. For instance, cf. Bines, Remedy Ineffective Representation in Criminal Cases: Departures from Habeas Corpus, 59 VA. L. REV. 927, 987 (1973) suggesting that the United States Supreme Court is relying increasingly on the concept of competent representation to deny prisoners review of the merits of their claims. But see text accompanying notes 45-50 supra.
61. PA. STAT. ANN. tit. 19, § 1180-3(d) (Supp. 1975) provides in part:
To be eligible for relief under this act, a person . . . must prove . . . [t]hat the error resulting in his conviction and sentence has not been finally litigated or waived.
Id. §§ 1180-4(a)(2), (3) provide:
An issue is finally litigated if . . . [the] Superior Court . . . of Pennsylvania has ruled on the merits of the issue and the petitioner has knowingly and understandingly failed to avail himself of further appeals; or . . . [t]he Supreme Court . . . of Pennsylvania has ruled on the merits of the issue.
claims of error, whether preserved or not, on direct appeal, the number of collateral proceedings could be reduced.

CONCLUSION

The fundamental error doctrine served the valid purpose of protecting the criminal defendant by providing a mechanism to insure overall fairness in his trial. In allowing relief on appeal despite an attorney's failure to object below, it was an exception to the general premise of the adversary system that a defendant chooses his advocate and should bear the consequences of the attorney's mistakes. With the growing burden on appellate courts and the availability of a collateral remedy in a claim of ineffective assistance of counsel to cure errors of constitutional dimension, the need for the doctrine appeared to be diminished. The court so held in Clair.

Clair's use of a rationale which may be appropriate for the abrogation of the doctrine in civil cases undermines the persuasiveness of its holding. The court failed to consider that in criminal cases, as distinguished from civil cases, counsel is more often appointed than retained. Furthermore, in criminal cases there are more effective and appropriate methods of improving the quality of representation given to defendants than by abrogating the doctrine of basic and fundamental error. The court also failed to give weight to the differences between the interests in life and liberty at stake in criminal cases and the pecuniary interests at stake in civil cases.

The Pennsylvania Supreme Court in Clair focused on the need to improve trial advocacy, placing more responsibility on the bar to assure the validity of trial court holdings and thereby reduce the strain of increasing appellate caseloads. While the objective is valid, Clair reflects the philosophy that courts, both trial and appellate, are essentially passive, and that the burden of maintaining the adversary character of the system should fall on the shoulders of trial counsel. Arguably the court could have considered an alternative

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62. In 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 856, at 374-75 (1969) the author makes this point in discussing the analogous federal plain error rule.
63. Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 263, 322 A.2d 114, 119 (1974) (Pomeroy, J., concurring & dissenting); see Finer, supra note 49, at 1116-20 (requiring attorneys to pass special examinations dealing with criminal procedure, evidence, and trial tactics, providing defense counsel with a check list of functions to be performed preparatory to trial, and increasing compensation paid to appointed attorneys).
approach that would have retained the salutary features of the fundamental error doctrine without condoning inadequate trial preparation or abuse of the doctrine. If allegations of basic and fundamental error, coupled with an inquiry into whether procedural defaults were the result of a deliberate bypass and trial strategy\(^\text{64}\) were heard on direct appeal, every possible claim which the defendant could raise would be directly examined. Strategic defaults would be disposed of and defendants would not be penalized for counsel's or the trial judge's inadvertence or mistake. Relief dispensed on direct appeal would relieve the burden on the avenues of collateral proceedings. Further, time and resources would be saved for the defendant (and counsel who represents him), thus accommodating both the interest of the defendant and the state.

Margaret K. Krasik

Constitutional Law—Freedom of Speech—Public Forum—Captive Audience—Transit Advertising on Municipally Owned Transit System—The United States Supreme Court has held that a municipality does not violate a candidate's right of free speech and equal protection under the first and fourteenth amendments to the United States Constitution when it sells space on its transit vehicles for commercial and service advertisements but refuses to accept political advertising of a candidate for public office.


Harry J. Lehman, petitioner, sought to promote his candidacy for public office by purchasing car card space on a transit system owned and operated by respondent, the City of Shaker Heights.\(^1\) Although space was then available, the respondent denied petitioner's re-

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\(^{64}\) See Temple Comment, *supra* note 27, at 237-38.

\(^1\) The text of the proposed advertisement read as follows:

HARRY J. LEHMAN IS OLD-FASHIONED!
ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT
State Representative—District 56 [X] Harry J. Lehman