[J-161-97]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	71 Capital Appeal Docket
	:	
Appellee,	:	
	:	Appeal from the Judgment of Sentence
	:	entered on August 11, 1994 in the Court
v.	:	of Common Pleas of Philadelphia County,
	:	Criminal at No. 2093-2104, December
	:	Term, 1992
KELLY O'DONNELL,	:	
	:	
Appellant.	:	ARGUED: OCTOBER 20, 1997

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: October 28, 1999**

The majority holds that a court's defective waiver colloquy per se requires that a defendant's sentence be vacated notwithstanding other evidence which would demonstrate that appellant's waiver of a jury during the penalty phase was knowingly and voluntarily made. The majority ignores not only appellant's counsel's statement on-the-record that appellant *had* been made aware of her rights before she waived her right to a penalty-phase jury, but also appellant's extensive guilt phase jury waiver colloquy. I believe sufficient evidence exists of record to demonstrate that the waiver was valid; however, I would remand the case to the trial court to conduct an evidentiary hearing to determine whether trial counsel's assertions about informing appellant of her rights were sufficiently credible to support the conclusion that appellant made a knowing, voluntary and intelligent waiver. To hold otherwise, allows a defendant to sit idly by as the court

conducts a possibly deficient colloquy concerning a waiver of a jury trial and then claim error once an unfavorable verdict and sentence is imposed. The crux of the issue in question is whether appellant knew and understood her rights so that a valid waiver of those rights could occur, not whether the court informed her of those rights. Whether a trial court informs a defendant of her rights on the record is simply one factor for consideration, not a litmus test.

In the instant matter, there are several factors which confirm that appellant's waiver was knowing, voluntary and intelligent. The trial record reflects that the Commonwealth asked the trial judge to conduct a jury waiver colloquy prior to proceeding to the sentencing phase in this bifurcated capital case. The trial judge proceeded with a colloquy of appellant and her co-defendant, William Gribble,[1] regarding their right to a jury during the sentencing phase in a capital case. Specifically the colloquy was as follows:

> Prosecutor: Your honor, again I would ask the court's indulgence, if the court would briefly colloquy the defendants as to their agreement to waive a jury trial for the purposes of this penalty phase.
>
> The Court: All right.
>
> Let me say this: the defendants do not have to answer.
>
> I want to make it clear that they are entitled to a jury trial in the death penalty phase.
>
> We can go through the jury selection process, and they can present testimony that you want to present in mitigation of the death penalty, and then the jury would be asked to consider everything in connection with the case that you want to bring out.
>
> The entire record would be open to the jury and the jury can make the final decision. That's their right at this point.

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[1] See Commonwealth v. Gribble, 550 Pa. 62, 703 A.2d 426 (1997)

> If they want to waive the jury, of course, then it has to be agreed to by the Commonwealth.
>
> It does not matter to me one way or the other. If they wish a jury trial, they are entitled to have it.
>
> The jury would be entitled to be made aware of everything in the record that you want to bring out to the jury.
>
> The record would be in front them and anything you want to bring out in mitigation of the death penalty.

After the court's colloquy, the attorney for the co-defendant stated in open court in the presence of appellant and her counsel:

> I have explained to Mr. Gribble, your honor what his rights are, that he would be entitled to a jury trial.
>
> Also that they would be entitled to consider the evidence, and they would make the final decision.
>
> Mr. Gribble agrees that he will waive a jury and have your honor decide his fate.

Appellant's counsel then proceeded to make the following statement:

> Miss O'Donnell has been made aware of her rights and she also will waive her right to a jury.

(N.T. 6/30/93 p. 545-546).

Moreover, prior to appellant's waiver of a jury during the guilt phase of the trial, the trial judge engaged in an extended colloquy with appellant apprising her of her constitutional rights. Before beginning the colloquy, the trial judge encouraged appellant to ask questions if there was any aspect of the colloquy she did not understand. The trial judge proceeded to ask appellant several questions regarding her educational background and mental state. The court also advised her of the various aspects and differences between a jury trial and a trial without a jury. Prior to completing the colloquy, the court urged appellant to inquire further if during the trial

there was some aspect which she did not understand. The court stated: "If you do not understand anything that is going on, you have a right to tell your attorney and make it known to the judge." (Emphasis added). Clearly, in assessing whether appellant was adequately apprised of her right to a jury trial, the fact that the trial court adequately explained to her the aspects of a jury prior to proceeding to the guilt phase of the trial, evidences, in part, that appellant was cognizant of her right to a jury so that she could have made a knowing, voluntary, and intelligent waiver of a jury at the sentencing phase of the same matter without a repetitive waiver colloquy.

While the record may not be clear as to whether trial counsel's statement was accurate (i.e., whether appellant was adequately advised of her rights and then waived them), it is equally unclear that the statement was inaccurate. Therefore, a better course than simply reversing the sentence in this capital case would be to remand the matter to the trial court for an evidentiary hearing to consider whether appellant's waiver was knowing, voluntary and intelligent; notwithstanding the alleged defective court colloquy.

Recently, in Peguero v. United States, 119 S.Ct. 961 (1999), the United States Supreme Court considered whether a trial court's failure to advise a defendant of his right to appeal a sentence, as required by Federal Rule of Civil Procedure 32(a)(2), provides a basis for collateral relief even when the defendant was otherwise made aware of his right to appeal.[2] In Peguero, based upon the defendant's testimony at the

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[2] In 1992, when the defendant in Peguero was sentenced, Federal Rule of Civil Procedure 32(a)(2) provided:

> Notification of Right To Appeal.--After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

evidentiary hearing that, upon being sentenced, he immediately asked his attorney to file an appeal, the trial court determined that the defendant's request that an appeal be taken indicated that he was aware of his right to appeal at sentencing and, therefore, that he was not entitled to collateral relief. Id. at 963. The United States Supreme Court agreed. The Court recognized that the trial judge committed error in failing to advise the defendant on the record of his right to appeal and that the requirement that a trial judge inform the defendant of his right to appeal serves important functions, but, nevertheless, held that the defendant was not entitled to relief since he had full knowledge of his right to appeal, notwithstanding the trial court's error.

Past decisions of this Court are consistent with Peguero. In Commonwealth v. Williams, 454 Pa. 368, 312 A.2d 597 (1973), this Court considered the consequences of a trial judge's failure to comply with Pennsylvania Rule of Criminal Procedure 1101 by failing to conduct an on-the-record inquiry prior to accepting a defendant's waiver of a trial by jury.[3] After exhausting direct appeals, the defendant filed a petition under the Post-Conviction Hearing Act ("PCHA"),[4] contending that the trial court's failure to

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[3] The Version of Rule 1101 in effect at the time of the trial in this case provided:

> Rule 1101. Waiver of Jury Trial.
>
> > In all cases, except those in which a capital crime is charged, the defendant may waive a jury trial with the consent of his attorney, if any, the attorney for the Commonwealth, and approval by a judge of the court in which the case is pending, and elect to be tried by a judge without a jury. The judge shall ascertain from the defendant whether this is a knowing and intelligent waiver and such colloquy shall appear on the record. The waiver shall be in writing, made a part of the record and shall be in the following form . . .

The Rule has been amended several times since 1973 and currently provides:

> In all cases, the defendant may waive a jury trial with approval by a judge of the court in which the case is pending, and elect to be tried by a judge without a jury. The judge shall ascertain from the defendant whether this is a knowing and intelligent waiver and such colloquy shall appear on the record. The waiver shall be in writing, made a part of the record, signed by the defendant, the judge, and the defendant's attorney as a witness.

[4] 42 Pa.C.S. § 9541, et seq. The PCHA was modified in part, repealed in part, and renamed the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541, et. seq., effective April 13, 1988.

conduct an on-the-record waiver as required under Rule 1101 vitiated the entire proceedings and entitled him to a new trial. The defendant argued that this Court "should make a per se prophylactic rule reversing convictions for failure to comply with Rule 1101" and conduct an on-the-record colloquy "despite the fact that a subsequent full and fair hearing proved the waiver of the constitutional right was knowing and intelligent." Id. at 372, 312 A.2d at 599-600. (emphasis added). This Court rejected the argument stating: "a prophylactic exclusionary rule is applied only in **extreme cases** where **all other attempts** to secure compliance have proven unsuccessful." Id. (emphasis added). Moreover, this Court recognized that:

> where there is a subsequent proceeding in which the waiver is proven to be knowing and intelligent on the record such a prophylactic rule seems unnecessary since the purposes of the rule to ensure the constitutionality of the waiver and our ability to review it, are satisfied.

Id. at 372-73, 312 A.2d at 600.[5] In the matter sub judice, by reversing the sentence without first remanding for an evidentiary hearing to determine whether the defendant's waiver was knowing, intelligent, and voluntary, the majority ignores the Williams' Court's admonishment against establishing a per se prophylactic rule.

Furthermore, in Commonwealth v. DeGeorge, 506 Pa. 445, 485 A.2d 1089 (1984), this Court considered an order of the Superior Court reversing the judgment of sentence on direct appeal based on trial counsel's ineffectiveness for failing to object to the trial court's acceptance of the defendant's waiver of a jury trial without first

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[5] In Williams, this Court went on to find after considering the subsequent hearing, that the record failed to establish that the defendant had sufficient knowledge of the essential ingredients of a jury trial such that his waiver could be deemed knowing and intelligent and, therefore, awarded a new trial. The Court listed the essential ingredients basic to a jury trial, including:

> that the jury be chosen from members of the community (a jury of one's peers), that the verdict be unanimous, and that the accused be allowed to participate in the selection of the jury panel.

Id. at 373, 312 A.2d at 600.

conducting an on-the-record colloquy as prescribed by Rule of Criminal Procedure 1101. The Superior Court in DeGeorge had relied on this Court's decision in Commonwealth v. Morin, 477 Pa. 80, 383 A.2d 832 (1978), which held that a reversal and remand for a new trial was the only remedy where the colloquy was inadequate under Rule 1101.[6] This Court in DeGeorge, however, rejected the per se approach mandated by Morin and recognized that later opinions of this Court "permit the consideration of circumstances outside the content of the of-record colloquy in determining the validity of the waiver." DeGeorge, 506 Pa. at 448-49, 485 A.2d at 1091 (citing Commonwealth v. Anthony, 504 Pa. 551, 475 A.2d 1303 (1984) (rejecting defendant's post-conviction relief claim that he was entitled to withdraw his guilty plea since the trial court failed to advise him that a jury verdict must be unanimous prior to accepting the plea, where the record was clear that defendant's plea was knowingly and intelligently entered); Commonwealth v. Carson, 503 Pa. 369, 469 A.2d 599 (1983) (defendant not entitled to a new trial, notwithstanding defendant's post-conviction relief claim that waiver of jury trial colloquy was defective where the trial court did not inform defendant that the jury would be chosen from members of the community or from his peers, since the record established that defendant fully understood the ingredients of a jury trial and made a knowing and intelligent waiver); Commonwealth v. Smith, 498 Pa. 661, 664, 450 A.2d 973, 974 (1982) (on direct appeal holding that trial counsel was not ineffective for failing to object to jury trial waiver colloquy, notwithstanding trial judge's failure to explore defendant's understanding that the verdict would have to be

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[6] In Morin, this Court found that its holding was mandated by this Court's earlier decision in Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974). In Ingram, this Court adopted a per se approach, similar to the rule advocated by the majority here, and held that a defendant's knowledge and understanding prior to entering a guilty plea was tested solely by the adequacy of the on-the-record guilty plea colloquy. If the colloquy failed to demonstrate that the defendant understood the charge, the guilty plea was deemed invalid. The decision in Ingram was overruled by this Court in Commonwealth v. Schultz, 505 Pa. 188, 477 A.2d 1328 (1984).

unanimous and that defendant could participate in jury selection, "where the written form signed by [defendant], his counsel and the court states that [defendant] was indeed fully aware of these requirements."); Commonwealth v. Williams, 454 Pa. 368, 312 A.2d 597 (1973) (rejecting per se rule reversing convictions for failure to comply with Rule 1101 where subsequent post-conviction relief evidentiary hearing proves the waiver was knowing and intelligent); Commonwealth v. Schultz, 505 Pa. 188, 477 A.2d 1328 (1984) (rejecting on direct appeal the per se approach of invalidating a guilty plea where the on-the-record guilty plea colloquy did not demonstrate that defendant's plea was voluntary and knowing); Commonwealth v. Gardner, 499 Pa. 263, 452 A.2d 1346 (1982) (defendant not entitled to withdraw guilty plea under PCHA, even though trial court did not inform defendant that he had a right to participate in the jury's selection and that the jury would be selected from the community since at a subsequent evidentiary hearing, trial counsel testified that prior to the inadequate colloquy he had twice informed defendant of the rights not mentioned by the trial court); Commonwealth v. Martinez, 499 Pa. 417, 419, 453 A.2d 940, 942 (1982) (holding on direct appeal that defendant was not entitled to withdrawal of guilty plea even though the trial court did not inform defendant of "the elements of the crimes or explanation of malice as an element of murder of the third degree" as mandated, where the record established that defendant received sufficient knowledge to establish that the plea was knowingly and voluntarily entered); Commonwealth v. Shaffer, 498 Pa. 342, 446 A.2d 591 (1982) (holding on direct appeal that defendant was not entitled to withdrawal of guilty plea for trial court's failure to explain the elements of the crimes to which the guilty pleas were entered)). Therefore, rather than reverse the judgment of sentence, this Court has consistently and categorically concluded that the better course was to remand the case to the trial court "for evidentiary proceedings to determine whether the waiver of trial by jury was knowing and intelligent." Id. at 450, 485 A.2d at 1091. The DeGeorge opinion

embraces the concept that, when considering whether waiver of a trial by jury was knowing, voluntary and intelligent, the court should consider the totality of the circumstances rather than rely solely on the on-the-record colloquy.

Similarly, in Commonwealth v. Schultz, 505 Pa. 188, 477 A.2d 1328 (1984), this Court rejected the per se approach of invalidating a guilty plea where the on-the-record guilty plea colloquy did not demonstrate that defendant's plea was voluntary and knowing. This Court favored a more enlightened approach of allowing the court to consider the "totality of the circumstances" to determine if all of the circumstances surrounding the entry of the plea indicate the defendant's entry of the plea was knowing, intelligent and voluntary. I believe this is a more reasoned approach than the per se approach advocated by the majority.

In Commonwealth v. Gardner, 499 Pa. 263, 452 A.2d 1346 (1982), the defendant contended that he should be entitled to withdraw his guilty plea because the court failed to inform him that he had a right to participate in the jury selection and that the jury would be selected from members of the community when he entered the plea.[7] In considering the defendant's claim of ineffective assistance of counsel, this Court examined not only the oral and written plea colloquy, but also the off-the-record discussions between the defendant and trial counsel. In rejecting the defendant's claim, this Court credited the testimony of the defense trial counsel at the post-conviction evidentiary hearing that he twice informed the defendant of his rights not mentioned by the trial court in the record. The majority fails to consider the concept that the Gardner court made clear-- off-the-record communications between an attorney and client are

[7] In Gardner, the trial court did explain to the defendant "that he had a right to be tried by twelve individuals and that a jury's verdict of guilty would have to be unanimous." Id. at 265, 499 Pa. at 1346-47.

relevant to the question of whether the waiver was voluntarily, knowingly, and intelligently entered.

Most recently, in Commonwealth v. Orville Allen, __ A.2d __, 1999 WL 326279 (Pa. May 25, 1999), we considered whether a defendant was entitled to post-conviction relief where the guilty plea colloquy failed to reflect on the record that the defendant was made aware of the possibility that consecutive sentences may be imposed. Again, we rejected appellant's request that we "create a per se rule which presumes that a miscarriage of justice has taken place whenever a plea colloquy does not contain a record of the trial court specifically informing a defendant about the possibility of consecutive sentences." Id. at *4. (emphasis added). Rather, we held that the trial court should determine defendant's actual knowledge by looking at the totality of the circumstances to distinguish whether the plea was voluntarily, knowingly, and intelligently made. In Allen, notwithstanding the trial court's failure to adequately advise the defendant on the record, the PCRA court determined that, when he entered his guilty plea, the defendant was aware that the sentences could be consecutive; therefore, we concluded that the defendant was not entitled to any post-conviction relief.[8]

As these cases uniformly demonstrate, this matter should be remanded so that the trial court can consider the totality of the circumstances to determine whether appellant's waiver was knowing, intelligent and voluntary based on the conversations alluded to between appellant and trial counsel and the lengthy colloquy conducted by

[8] Conversely, in Commonwealth v. Persinger, 532 Pa. 317, 615 A.2d 1305 (1992), this Court held that defendant was entitled to withdraw his guilty plea where the trial court failed to inform him that sentences for multiple counts could be consecutive. Unlike in Orville Allen, however, in Persinger, the trial court made a factual determination that the defendant's waiver was not knowingly, voluntarily and intelligently entered, and specifically noted that "neither defense counsel nor the court explained to appellant that the sentences could result in consecutive terms of imprisonment." Id. at 332 n.4, 615 A.2d at 1308 n.4. Here, there is evidence to suggest that appellant was explained and understood her rights; thus, Persinger does not dispose of this matter.

the trial court earlier in the proceedings. This Court should follow the practical and sound reasoning of the United States Supreme Court's decision in Peguero and of the various decisions of this Court and remand this matter for a hearing on the issue of whether the totality of the circumstances surrounding the waiver demonstrate that appellant's waiver was knowingly and voluntarily made, rather than declare that a defective colloquy per se warrants reversal where a defendant is otherwise fully aware of the ramifications attendant to the waiver of a jury trial at one's penalty phase. Accordingly, I respectfully dissent.

Madame Justice Newman joins this dissenting opinion.