**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee<br><br>v.<br><br>JOHNATHAN COLE,<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br><br>No. 1944 EDA 2012 |

Appeal from the Judgment of Sentence June 8, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR-0010313-2009

BEFORE: GANTMAN, J., OLSON, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: April 29, 2013

Appellant, Johnathan Cole,[1] appeals from the judgment of sentence entered following his convictions for attempted murder, aggravated assault, and related charges stemming from his initiation of a gunfight on a Philadelphia sidewalk. We affirm.

The trial court set forth the facts of this case as follows:

> On December 10, 2008, the victim, Antonio Villacorta, was a club manager at a popular Kensington nightclub and he normally carried large sums of money on his person. The victim was getting out of his car at his girlfriend's home . . . when he

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* Retired Senior Judge assigned to the Superior Court.

[1] We note that Appellant's first name is also spelled "Johnatan" on several documents contained in the certified record. However, Appellant's brief, his notice of appeal, and the trial court's 1925(a) opinion reflect the spelling of his first name as "Johnathan."

> was approached by [Appellant]. [Appellant] was holding a 9mm handgun and said "Don't move, poppy" and shot the victim twice in the stomach. The victim was also shot in the back with the spray of a sawed off shotgun by [Appellant's] co-conspirators from across the street. The victim and [Appellant] began to physically fight on the sidewalk when the victim, who legally possessed a gun, pulled it out and shot [Appellant], wounding him. . . The co-conspirators fled the scene, taking [Appellant's] gun with them.

(Trial Court Opinion, 10/17/12, at 2).

Police arrested Appellant and charged him with attempted murder, aggravated assault, criminal conspiracy, two firearms violations, simple assault, and recklessly endangering another person.[2] On October 6, 2011, following a three-day non-jury trial, the trial court found Appellant guilty of the above-stated offenses.[3] On March 22, 2012, Appellant filed a "Pre-sentence Motion for a New Trial as a Result of a Reversibly Defective Jury Waiver Colloquy and Ineffective Assistance of Counsel," which the trial court denied on May 18, 2012, following a hearing. On June 8, 2012, the court sentenced Appellant to an aggregate term of no less than thirty-three and a

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[2] 18 Pa.C.S.A. §§ 901(a), 2702(a), 903, 6106(a)(1), 6108, 2701(a), and 2705, respectively.

[3] The court ordered that a pre-sentence investigation report and mental health evaluation be prepared prior to sentencing. (***See*** Trial Ct. Op., 10/17/12, at 1). Appellant engaged new counsel for sentencing purposes following his conviction. (Motion for New Trial, 3/22/12, at 6 ¶ 25).

half nor more than sixty-seven years' incarceration. This timely appeal followed.[4]

Appellant raises the following two issues for our review:

> 1. Whether the trial [court] committed an error of law where it found that the Appellant had validly waived [h]is right to trial by jury where the court did not administer a jury waiver colloquy, the jury waiver colloquy that was administered was

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[4] Because the thirtieth day of the appeal period fell on July 8, 2012, which was a Sunday, Appellant's notice of appeal filed on Monday, July 9, 2012, was timely. ***See*** Pa.R.A.P. 903(a); ***see also*** 1 Pa.C.S.A. § 1908.

We note with disapproval that Appellant filed his Rule 1925(b) statement of errors on September 21, 2012, thirty-six days beyond the deadline set by the trial court. ***See*** Pa.R.A.P. 1925. An *en banc* panel of this Court, in ***Commonwealth v. Burton***, 973 A.2d 428, 432-33 (Pa. Super. 2009) (*en banc*) held that:

> the untimely filing [of a Rule 1925(b) statement by a represented criminal defendant] is *per se* ineffectiveness because it is without reasonable basis designed to effectuate the client's interest and waives all issues on appeal . . . Thus, if there has been an untimely filing, this Court may decide the appeal on the merits if the trial court had adequate opportunity to prepare an opinion addressing the issues being raised on appeal. If the trial court did not have an adequate opportunity to do so, remand is proper.

Because the trial court has filed a 1925(a) opinion addressing the issues raised in Appellant's Rule 1925(b) statement, we will review the merits of his issues on appeal.

We also note with disapproval that Appellant's concise statement is a re-filing of his post-trial motion. However, because the statement identifies the pertinent issues on appeal in sufficient detail, we decline to find waiver. ***See*** Pa.R.A.P. 1925(b)(4)(ii).

> defective, and the Appellant did not execute a written jury waiver form[?]
>
> 2. Whether the trial [court] abused its discretion and/or committed an error of law where it refused to consider the Appellant's claims of ineffective assistance raised in post verdict motions where trial counsel's ineffective assistance was patent and blatant on the record[?]

(Appellant's Brief, at 4).

In his first issue, Appellant claims that the trial court erred in determining that he knowingly and voluntarily waived his right to a jury trial. (***See*** Appellant's Brief, at 8). Specifically, he argues that his waiver colloquy was "manifestly defective under the requirements of Pa.R.Crim.[P.] 620" because defense counsel administered the colloquy (instead of the court); he was not informed and did not understand that any jury verdict would have to be unanimous; and he did not sign a written waiver. (***Id.***; ***see also id.*** at 5-11). We disagree.

As an initial matter, we recognize that an issue implicating the interpretation of the Rules of Criminal Procedure presents a question of law. ***See Commonwealth v. Dowling***, 959 A.2d 910, 913 (Pa. 2000). Therefore, our standard of review is *de novo* and our scope of review plenary. ***See id.***

While a defendant has a constitutional right to a jury trial, a defendant may waive that right if the wavier is knowing and voluntary, and the accused is aware of the essential components of a jury trial. ***See id.*** Waiver of the

right to a jury trial is governed by Pennsylvania Rule of Criminal Procedure 620, which provides:

> In all cases, the defendant and the attorney for the Commonwealth may waive a jury trial with approval by a judge of the court in which the case is pending, and elect to have the judge try the case 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 signed by the defendant, the attorney for the Commonwealth, the judge, and the defendant's attorney as a witness.

Pa.R.Crim.P. 620. In examining Rule 620, our Supreme Court has explained:

> A waiver colloquy is a procedural device; it is not a constitutional end or a constitutional "right.". . . **[T]he absence of an on-the-record colloquy concerning the fundamentals of a trial by jury does not prove, in an absolute sense, that a defendant failed to understand the right he waived by proceeding non-jury**. Consider, for example . . . a career criminal defendant with previous, first-hand experience with jury trials. . . **The record colloquy contemplated by Pa.R.Crim.P. 620 serves a salutary prophylactic purpose**, as it makes plain that a jury waiver is knowing and voluntary and it creates a record in the event of a later, collateral attack on the waiver. For the same twin reasons, an on-the-record colloquy is a useful procedural tool whenever the waiver of any significant right is at issue, constitutional or otherwise . . . [b]ut the colloquy does not share the same status as the right itself.

***Commonwealth v. Mallory***, 941 A.2d 686, 697 (Pa. 2008), *cert. denied*, 555 U.S. 884 (2008) (emphases added).

A jury trial waiver colloquy must inform the defendant of the essential elements of a trial by jury: that a jury would be selected from members of the community, that the verdict must be unanimous, and that the defendant

would be permitted to participate in the selection of the jury. ***See Commonwealth v. Foreman***, 797 A.2d 1005, 1015 (Pa. Super. 2002). In determining whether a jury trial waiver is valid, this Court employs a totality of the circumstances analysis, which examines, among other things, the extent to which counsel and the defendant discussed the waiver. ***See id.*** We must go beyond the colloquy and examine the record as a whole and the circumstances surrounding the waiver. ***See id.***

Here, Appellant waived his right to a jury trial on August 29, 2011. Before the court proceeded to a bench trial, the following colloquy took place:

> [BY TRIAL COUNSEL:]
>
> [Q]: Do you understand you have a right to be tried by a jury as well?
>
> [A]: Yes.
>
> [Q]: If we had a jury trial, we would bring 40 people in here, and you and myself and the DA would select members to serve on the jury; do you understand that?
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> [A]: Yes.
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> [Q]: Do you understand we would pick 12 jurors and two alternates to serve on this case?
>
> [A]: Yes.
>
> [Q]: Do you understand that you and myself and the DA would select jurors and that we would not strike anybody because of their race, their sex or their religion; do you understand that?
>
> [A]: Yes.

[Q]: Do you understand that you have decided in this case to have your trial heard by [the trial judge]; correct?

[A]: Yes.

[Q]: So you are essentially waiving your right to a jury trial and having [the trial judge] hear your charges.

[A]: Yes.

[Q]: Is this what you want to do?

[A]: Yes.

[Q]: Have I discussed that with you?

[A]: Yes.

[Q]: It is your desire to have this trial heard by [the trial judge]; right?

[A]: Yes.

* * *

[Q]: Do you have any questions about what you are doing in this case?

[A]: No.

[Q]: You and I have discussed the case and you understand all the charges against you?

[A]: Yes.

[Q]: And it is your desire, as I said, no one threatened you, forced you or coerced you to be tried by [the trial judge]; correct?

[A]: Yes.

[Q]: Are you satisfied with everything up to this point?

[A]: Yes.

* * *

THE COURT: Very well. I accept the waiver.

(N.T. Trial, 8/29/11, at 7-11).

Applying the totality of the circumstances test, we conclude that Appellant's waiver was knowing, voluntary, and intelligent. ***See Foreman supra*** at 1015. Before Appellant's case proceeded to a bench trial, he expressly waived his right to a jury trial on the record. (***See*** N.T. Trial, 8/29/11, at 7-11). He engaged in a lengthy oral colloquy in which he was appraised of his right to a jury trial, informed that a jury would be comprised of members of the community, and advised that he would be allowed to participate in the jury selection process. (***See id.***). He assured the court that he understood those rights, that he had discussed the waiver with counsel, that he did not have any questions, that he was satisfied with the proceeding, and that he had decided to go forward with a bench trial rather than a jury trial. (***See id.***).

Furthermore, approximately four months prior to Appellant's August 29, 2011 jury trial waiver, he was tried by a jury on unrelated charges. (***See*** Trial Ct. Op., 10/17/12, at 9). That case resulted in a mistrial because the jury was unable to reach a unanimous verdict. (***See id.***). Therefore, Appellant's previous, first-hand experience with jury trials renders his present claim that he was unaware of the requirement of jury verdict unanimity disingenuous. ***See Mallory supra*** at 697; (***see also*** Appellant's Brief, at 5). Given these facts, we agree with the trial court's determination

that Appellant's waiver was knowing, voluntary, and intelligent. ***See Foreman supra*** at 1015. Appellant's first issue does not merit relief.

In his second issue, Appellant argues that the trial court abused its discretion by refusing to consider the claims of ineffective assistance of trial counsel raised in his post-trial motion, where counsel's ineffectiveness was "patent and blatant on the record." (Appellant's Brief, at 12).[5] We disagree.

Because this case is a direct appeal from Appellant's judgment of sentence, we are guided by our Supreme Court's holding in ***Commonwealth v. Grant***, 813 A.2d 726, 738 (Pa. 2002), that, "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." ***Grant, supra*** at 738 (footnote omitted). In ***Commonwealth v. Barnett***, 25 A.3d 371, 377 (Pa. Super. 2011) (*en banc*), an *en banc* panel of this Court examined Supreme Court precedent subsequent to ***Grant***, and held that, unless an appellant makes an "express, knowing, and voluntary waiver" of review pursuant to the Post Conviction Relief Act (PCRA),[6] this Court will not engage in review of ineffective assistance of counsel claims on direct appeal. ***See Barnett supra*** at 377. The ***Barnett*** Court explained that "defendants are not

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[5] Appellant claims that trial counsel was ineffective for failing to object to the jury waiver colloquy, for failing to interview and call witnesses who could have exonerated him, and for failing to object to hearsay testimony from a ballistics witness. (***See id.***).

[6] 42 Pa.C.S.A. §§ 9541-9546.

entitled to two chances at collateral review, once on direct appeal and once pursuant to the PCRA." ***Id.*** at 376.

Here, Appellant has not waived further PCRA review, and this Court therefore cannot consider his ineffective assistance of counsel claims on direct appeal. ***See id.*** at 377. Accordingly, we dismiss his claims of ineffective assistance of counsel without prejudice to raise them on collateral review, and affirm the judgment of sentence.

Judgment of sentence affirmed.