NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellant v. RICHARD HOLSTON	: : : : : : : : :	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 223 EDA 2016

Appeal from the Order December 21, 2015
In the Court of Common Pleas of Bucks County Criminal Division at No(s): CP-09-CR-0005331-2015

BEFORE: SHOGAN, J., SOLANO, J., and PLATT*, J.

CONCURRING MEMORANDUM BY SOLANO, J.: **FILED NOVEMBER 20, 2017**

I join the memorandum affirming the Court of Common Pleas' order dismissing the conspiracy and insurance fraud counts. In addition, for the reasons stated in the trial court's opinions dated December 18, 2015 and April 22, 2016, I agree that the trial court's order dismissing the counts of perjury and obstruction of justice should be affirmed.

However, I respectfully disagree with the lead memorandum's decision to deem the issues raised by the Commonwealth with respect to the perjury and obstruction of justice charges waived due to the absence from the certified record of the transcript of Richard Holston's testimony before the grand jury on September 16, 2014. There is no question that the transcript was before both the magisterial district judge and the trial court. ***See*** N.T. 8/9/15, at 101 (referencing Com. Exs. 147, 200); N.T. 10/5/15, at 6; ***see***

* Retired Senior Judge assigned to the Superior Court.

also Tr. Ct. Op., 12/18/15, at 10 ("I had the luxury of being able to read and re-read the Grand Jury transcript"). Nor is there any question that the transcript has been provided to this Court as part of the reproduced record filed by the Commonwealth. ***See*** R. 889-970. No party challenges the accuracy of the copy that has been included in the reproduced record. In this circumstance, the absence of the transcript from the certified record presents no impediment to our review of these issues.

In ***Commonwealth v. [Dwayne] Brown***, 52 A.3d 1139 (Pa. 2012), the Supreme Court of Pennsylvania considered a written plea colloquy with the defendant. Although the colloquy was not in the certified record, a copy was included in the reproduced record. The Court stated that although the colloquy "is contained only within the Reproduced Record . . . , the accuracy of the reproduction has not been disputed and, thus, we may consider it." 52 A.3d at 1145 n.4. One year later, the Court amended the Official Note to Rule 1921 of the Rules of Appellate Procedure to state that parties may rely on the list of documents in the record that is transmitted to them under Appellate Rule 1931(d) and that —

> If the list shows that the record transmitted is complete, but it is not, the omission shall not be a basis for the appellate court to find waiver. This principle is consistent with the Supreme Court's determination in ***Commonwealth v. Brown***, __ Pa. __, 52 A.3d 1139, 1145 n.4 (2012) that **where the accuracy of a pertinent document is undisputed, the Court could consider that document if it was in the Reproduced Record, even though it was not in the record that had been transmitted to the Court**. Further, if the appellate court determines that something in the original record or otherwise

> presented to the trial court is necessary to decide the case and is not included in the certified record, the appellate court may, upon notice to the parties, request it from the trial court *sua sponte* and supplement the certified record following receipt of the missing item. ***See*** Rule 1926 (correction or modification of the record).

Pa.R.A.P. 1921, Note (emphasis added). The 2013 amendment to Rule 1921 codifies the Supreme Court's holding in ***Brown*** that an appellate court may rely on a document in the reproduced record so long as its accuracy is not disputed, even though that document is missing from the certified record. We have relied on the holding in ***Brown*** several times to avoid a finding of waiver in situations similar to that here. ***See, e.g.***, ***Commonwealth v. Barnett***, 121 A.3d 534, 545 n.3 (Pa. Super.), ***appeal denied***, 128 A.3d 1204 (Pa. 2015), ***cert. denied***, 136 S. Ct. 2391 (2016); ***Commonwealth v. Britt***, 83 A.3d 198, 200 n.3 (Pa. Super. 2013). ***See also Rickard v. American Nat'l Prop. & Cas. Co.***, ___ A.3d ___, No. 774 WDA 2015, at 5 n.5 (Pa. Super., Oct. 25, 2017) (en banc).

The lead memorandum, at pp. 9-13 & n.6, cites several of our decisions to support its view that we may not consider the Holston transcript because it is not in the certified record, even though an undisputed copy of the transcript has been included in the reproduced record. With one exception, every one of those decisions pre-dates the ***[Dwayne] Brown*** decision and the 2013 amendment to Rule 1921. The exception is ***Commonwealth v. [Gregory] Brown***, 161 A.3d 960, 968 (Pa. Super. 2017), but that case did not involve the availability of a document in the

reproduced record. Rather, the appellant in that case asked the Court to consider illegible documents that he attached to his appellate brief, and the Court observed that the appellant had not fulfilled his responsibility to provide us with "all of the materials necessary for the reviewing court to perform its duty." The Commonwealth fulfilled that duty here.

Finally, if, for some reason, the Court were unwilling to rely on the transcript of Holston's testimony that is in the reproduced record, it could, as the Official Note to Rule 1921 instructs, request the missing document from the trial court and use it to supplement the certified record. We followed such a course long before adoption of the 2013 amendments. ***See, e.g.***, ***Commonwealth v. O'Black***, 897 A.2d 1234, 1238 (Pa. Super. 2006).

I would affirm the decision below, but, with respect to the perjury and obstruction of justice counts, I would do so on grounds different from those stated in the lead memorandum.