

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
GERALD TRAVIS BUTERBAUGH	:	
	:	
Appellant	:	No. 1152 MDA 2017

Appeal from the PCRA Order June 22, 2017
 In the Court of Common Pleas of Franklin County Criminal Division at
 No(s): CP-28-CR-0001229-2010

BEFORE: BOWES, J., MURRAY, J., and PLATT,* J.

MEMORANDUM BY BOWES, J.: **FILED OCTOBER 10, 2018**

Gerald Travis Buterbaugh appeals from the order that dismissed his petition filed pursuant to the Post-Conviction Relief Act ("PCRA"). We affirm.

On May 31, 2010, Appellant killed Dale Steven Henry by running him over with his pickup truck outside a bar where Mr. Henry had been in an altercation with Appellant's friend. As a result, a jury convicted Appellant of third-degree murder. Pursuant to the sentencing guidelines' deadly weapon enhancement, the trial court imposed a standard-range sentence of fifteen to forty years imprisonment.

Appellant, with new counsel, filed a post-sentence motion challenging the sufficiency and weight of the evidence, evidentiary rulings, and the propriety of his sentence. With leave of court, Appellant supplemented his post-sentence motion to raise the claim that his trial counsel rendered ineffective assistance of counsel ("IAC"). In order to pursue the IAC claims

* Retired Senior Judge assigned to the Superior Court.

on direct appeal, Appellant executed a form entitled "Waiver of PCRA Rights to Allow Ineffectiveness Claims on Post-Sentence Motions and Direct Appeal." Further, the trial court conducted an oral colloquy to confirm that Appellant's waiver of his PCRA rights was knowing, intelligent, and voluntary in compliance with the most recent pronouncement of this Court. **See Commonwealth v. Barnett**, 25 A.3d 371, 377 (Pa.Super. 2011) (*en banc*), *order vacated*, 84 A.3d 1060 (Pa 2014) ("[T]his Court cannot engage in review of ineffective assistance of counsel claims on direct appeal absent an 'express, knowing and voluntary waiver of PCRA review.'").

The trial court, after conducting a hearing to address all of the issues, denied Appellant post-sentence relief. This Court, sitting *en banc*, ultimately affirmed Appellant's judgment of sentence, finding no merit in his IAC claims or claims of trial court error,¹ and our Supreme Court denied Appellant's petition for allowance of appeal. **Commonwealth v. Buterbaugh**, 91 A.3d 1247 (Pa.Super. 2014) (*en banc*), *appeal denied*, 104 A.3d 1 (Pa. 2014).

Less than one year after the deadline for seeking review in the United States Supreme Court, Appellant filed a *pro se* PCRA petition claiming that trial counsel was ineffective in failing to investigate and present exculpatory

¹ The IAC claims Appellant litigated were that trial counsel failed to: introduce evidence of the victim's violent character; object to the jury instructions on causation, malice, and voluntary manslaughter; object to improper questioning of a Commonwealth witness; and object to the admission of Appellant's criminal record.

evidence, that direct appeal counsel was ineffective in failing to raise the additional claims of trial counsel IAC, and that his waiver of further PCRA review was not knowing and voluntary. PCRA Petition, 2/8/16, at 4. Counsel was appointed, but did not file a supplemental or amended petition. Rather, counsel requested a hearing on the claims raised in Appellant's *pro se* petition. After initially indicating its intent to dismiss the petition without a hearing, the PCRA court scheduled a hearing that took place on March 30, 2017, at which it heard evidence concerning whether Appellant's waiver of PCRA rights had been valid. Following additional briefing by the parties, the PCRA court dismissed Appellant's petition.

Appellant filed a timely notice of appeal, and both Appellant and the trial court complied with Pa.R.A.P. 1925.

Appellant presents the following question for this Court's review.

Whether the Trial Court's refusal to apply ***Commonwealth v. Holmes***[,]79 A.3d 562 (Pa. 2013)[,] retroactively constituted an abuse of discretion as ***Holmes*** set forth new substantive criminal law which, pursuant to ***Fiore v. White***, []757 A.2d 842 (Pa. 2002)[,] and ***Commonwealth v. Eller***, []807 A.2d 838 (Pa. 2002), requires the rules set forth in ***Holmes*** be applied on collateral review, and once applied to the present case, render the [Appellant's] PCRA waiver invalid as the waiver was not knowingly made?

Appellant's brief at 3.

We begin with the relevant law. "When reviewing the denial of a PCRA petition, our standard of review is limited to examining whether the PCRA court's determination is supported by evidence of record and whether it is free

of legal error.” ***Commonwealth v. Jordan***, 182 A.3d 1046, 1049 (Pa.Super. 2018).

“To be entitled to PCRA relief, a petitioner bears the burden of establishing, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa.C.S. § 9543(a)(2)[.]” ***Commonwealth v. Mason***, 130 A.3d 601, 617 (Pa. 2015). Those circumstances include ineffective assistance of counsel. 42 Pa.C.S. § 9543(a)(2)(ii). However, “PCRA relief is not available for alleged errors raised in a PCRA petition that have been previously litigated or waived.” ***Jordan, supra*** at 1049.

After conducting a hearing, the PCRA court determined that Appellant’s waiver of PCRA rights was knowing and voluntary, and that his direct appeal counsel did not provide ineffective assistance in informing Appellant of his PCRA rights and claims. PCRA Court Opinion, 6/22/17, at 4-13. Those findings are amply supported by the record.

For example, the PCRA court noted that the oral colloquy the trial court conducted included the following exchange between the court and Appellant.

THE COURT: Do you understand that . . . you will not at any time get a second bite at the apple, so if things don’t come out the way you want them to come out, you will not be able to make another attack on [IAC] claims at any time in the future, do you understand that?

[APPELLANT]: Yes, I do.

THE COURT: Do you understand that that is the case both with respect to ineffectiveness claims that [Attorney] Foster[,

direct appeal counsel,] has raised and with respect to ineffectiveness claims that [Attorney] Foster could have raised but didn't raise at this stage of the proceedings?

[APPELLANT]: Yes, I do, Your Honor.

THE COURT: Or might have raised if you consider them. Do you understand that?

[APPELLANT]: Yes, I do.

THE COURT: Do you think you have had an adequate opportunity to discuss all of this with [Attorney] Foster?

[APPELLANT]: Yes, I have.

THE COURT: Do you feel like you have been put under any pressure to make a decision to do this now?

[APPELLANT]: No.

THE COURT: Do you have any questions for me about the rights you are giving up to further review on these claims if we proceed today, and questions at all for me about that?

[APPELLANT]: No, Your Honor.

THE COURT: Do you feel comfortable proceeding this way today?

[APPELLANT]: Yes, I do.

N.T. Post-Sentence Motions, 8/25/11, at 7-8. Further, the PCRA court determined that Appellant's claim that Attorney Foster was ineffective was meritless because, *inter alia*, he had a reasonable basis for his decisions regarding unitary review:

Attorney Foster testified at the PCRA hearing that he thought the ineffectiveness of trial counsel claims raised in the post-sentence motion were strong and to this day believes those claims had merit, even though the Superior Court disagreed. Attorney Foster

also stated that after reviewing the entirety of the file, he chose the six [IAC] claims he believed had reasonable merit. Relatedly, Attorney Foster reasoned that because of the strength of those [IAC] claims, having the right to oral argument on direct appeal would be more beneficial than not getting to argue at the PCRA stage. At the time, Attorney Foster also understood that [Appellant] wanted to pursue his best chance of getting a new trial quickly, rather than waiting for PCRA review of the [IAC] claims. [Appellant] reiterated this sentiment, stating "Time was an issue. We was trying to hurry up and get a new trial. . . . If we did it right then, that we had a chance of getting a new trial and getting a jump start on everything." . . . Therefore, this court finds that Attorney Foster's decision to advise his client to execute the waiver was reasonably based upon the desire to quickly dispose of strong issues which he hoped would yield a new trial and the guaranteed opportunity to argue those issues before the Superior Court.

PCRA Court Opinion, 6/22/17, at 12-13 (citations and unnecessary capitalization omitted); **see also** N.T. PCRA Hearing, 3/30/17, at 30-31 (wherein Attorney Foster testified that he reviewed the entire case and raised every issue he thought had reasonable merit). Therefore, the PCRA court held that Appellant's waiver was valid and enforceable.

On appeal, Appellant contends that the PCRA court's ruling is inconsistent with our Supreme Court's holding in **Holmes**. In **Holmes**, the Court reaffirmed its holding in **Commonwealth v. Grant**, 813 A.2d 726 (Pa. 2002), that claims of IAC should be deferred until PCRA review, rather than raised on direct appeal. **Holmes, supra** at 576. However, it noted two exceptions to that general rule: (1) cases where a claim of IAC is "both meritorious and apparent from the record so that immediate consideration and relief is warranted," and (2) cases where review is sought of "multiple and

fairly common ineffectiveness claims, with the review differing from the comprehensive review available under the PCRA only in its timing[.]” **Id.** at 577. A trial court should agree to the second type, known as unitary review, “only upon good cause shown and after a full PCRA waiver colloquy.” **Id.** at 580. To make sure that defendants who obtain unitary review do not receive a benefit beyond those who do not, the Court explained that

the accompanying PCRA waiver must embrace more than exhaustion of the defendant’s first PCRA petition, but instead must make clear that **any** further collateral attack is subject to the time-bar restrictions of Section 9545(b) (*i.e.*, petition must be filed within sixty days of date new claim could have been presented and must fall within one of three exceptions: government interference; new facts; new constitutional right of retroactive effect). . . .

. . . .

. . . Since unitary review effectively advances a PCRA attack to the post-verdict stage, to equalize matters, the time spent litigating collateral issues on unitary review must count toward the one year within which a PCRA petition must be filed. Thus, the waiver of PCRA review that is a *sine qua non* of unitary review must make clear to the defendant that any further collateral attack under the PCRA will be subject to the restrictions in Section 9545(b). . . .

There are other considerations attending unitary review that a trial court and counsel should be mindful of, and that must be conveyed to the defendant before he would waive PCRA review in order to secure unitary review. First, it is one thing for new counsel on post-verdict review to read a cold record, notice some colorable but defaulted claims, and decide to pursue claims of trial counsel ineffectiveness. But, PCRA review is designed to embrace all cognizable claims deemed worth pursuing, in counsel’s judgment. Thus, counsel must be cognizant that the PCRA embraces ineffectiveness claims other than record-based ones, which may require further investigation and research, and the PCRA embraces claims other than ineffectiveness, which likewise

may require development. Unitary review should not be pursued where it may compromise the fullness of the defendant's options for collateral attack represented by the PCRA, absent an appropriate waiver. The more involved and complicated the case, no doubt, the less likely it may be a candidate to waive the defendant's PCRA rights in order to secure unitary review on post-verdict motions.

Id. at 579-80 (emphasis in original; footnote omitted).

Appellant claims that **Holmes** announced a new substantive criminal law that should apply retroactively. Appellant's brief at 9. Therefore, he contends, because his waiver colloquy did not encompass all of the elements required by **Holmes**, his waiver was not valid, and he should be permitted to pursue his PCRA claims at this time. **Id.** We disagree.

The PCRA court addressed Appellant's argument as follows.

[C]aselaw at the time of [Appellant's] proceeding was uninstructional on the specific content of the waiver required for unitary review. [Appellant] now prompts this court to retroactively apply the standards set by the **Holmes** Court[,] two years after the post-sentence motion hearing took place[,] to negate his waiver. This court finds that at the time [Appellant] executed the waiver, the court and Attorney Foster sought to comply with the then-existing waiver requirements set out by **Barnett** by supplementing the waiver with additional questioning as to [Appellant's] knowledge of his rights. This court will not and is not obligated to rewind the clock to now denounce or negate the lawful actions of the trial court at the time.

PCRA Court Opinion, 6/22/17, at 9 (citation and unnecessary capitalization omitted).

Appellant in no way develops his argument that **Holmes** invalidated waiver colloquies conducted under the law as it existed before **Holmes**. Rather, he merely cites **Fiore v. White**, 757 A.2d 842 (Pa. 2000), and

Commonwealth v. Eller, 807 A.2d 838 (Pa. 2002), for the proposition that “any new substantive law shall be applied retroactively.” Appellant’s brief at 9. The applicability of those cases is neither obvious nor explained by Appellant. Indeed, those decisions could be read to support the argument that ***Holmes*** announced a new rule of law that does **not** apply retroactively. ***See Fiore, supra*** at 846-47 (“In Pennsylvania, it is well established that a new rule of law will not apply retroactively to any case on collateral review When this Court issues a ruling that overrules prior law, expresses a fundamental break from precedent, upon which litigants may have relied, or decides an issue of first impression not clearly foreshadowed by precedent, this Court announces a new rule of law.”).

Moreover, it is apparent from the record that Appellant suffered no detriment from the PCRA court’s application of pre-***Holmes*** law on waiver. The only portions of a waiver colloquy that are required by ***Holmes*** but were not included in Appellant’s colloquy were (1) the indication that all PCRA claims, IAC and non-IAC, would be waived if not litigated on direct appeal, and (2) acknowledgment that any subsequent PCRA claims would be subject to the sixty-day requirement of 42 Pa.C.S. § 9545(b). Brief for the Defendant, 6/5/17, at 5. That information has no relation to the instant case.

The PCRA court considered Appellant’s PCRA petition, filed within one year after his judgment of sentence became final, to be a first, timely-filed petition, whereas under ***Holmes***, it would have been deemed an untimely

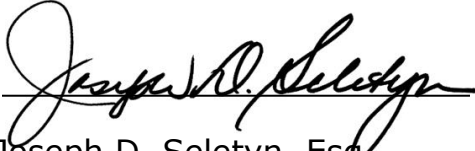
serial petition. Further, the PCRA court limited the scope of Appellant's waiver to all claims he could have raised during unitary review. In his PCRA petition, the claims Appellant sought to pursue (other than invalidating his waiver) were claims that trial counsel was ineffective in failing to investigate and present witnesses, and that direct appeal counsel was ineffective in failing to raise the claim that trial counsel should have presented those witnesses. PCRA Petition, 2/8/16, at 4.

As discussed above, the PCRA court properly found the claim of trial counsel IAC waived because Appellant expressly acknowledged that he was waiving the right to file a subsequent PCRA petition raising any IAC claims in the future, whether they were raised or not in the unitary review. However, the PCRA court did not apply waiver to Appellant's claim that Attorney Foster rendered IAC, but rather addressed, and rejected, that claim on its merits.

Accordingly, Appellant has failed to meet his burden of convincing us that the PCRA court erred and relief is due. ***Commonwealth v. Miner***, 44 A.3d 684, 688 (Pa.Super. 2012) ("It is an appellant's burden to persuade us that the PCRA court erred and that relief is due.").

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath it.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/10/2018