NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	No. 2387 EDA 2011
RAHEEM ISAAC,	:	

Appeal from the Order, August 2, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0015423-2008

BEFORE: FORD ELLIOTT, P.J.E., MUNDY AND FITZGERALD,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MAY 17, 2013**

Raheem Isaac (hereinafter "appellee") was convicted of voluntary manslaughter, criminal conspiracy, and related claims. Thereafter, he filed a post-sentence motion in which he had argued that certain statements of his co-conspirator had been inadmissible as they were made after the conspiracy had ended. The trial court granted appellee's motion and ordered a new trial. The Commonwealth appealed. Following careful review, we reverse and remand.

A recitation of the relevant facts will aid in understanding the issue. On July 4, 2007, at approximately 3:00 p.m., Jose Zapata was in his store at 6501 Wister Street in Philadelphia awaiting a delivery when a group of men entered. (Notes of testimony, 12/14/10 at 95.) The men were arguing loudly and gunfire then erupted. Zapata dove to the floor and was unable to

* Retired Justice specially assigned to the Superior Court.

identify any of the men. (***Id.*** at 99.) The shooting continued outside the store on Wister Street. (***Id.*** at 103-104.)

John Anderson ("Anderson") testified that on July 4, 2007, he was driving his vehicle north on Wister Avenue and heard gunfire. He saw two men running from Wister Street and turn west on Chelton Avenue. One of the individuals, who he described as being a shorter male, was pushing a gun down his belt or pants. He described the shorter male as being 5'5" and the taller male as being 5'11". Anderson could see the victim, Erek Williams, had been shot in the face lying in the middle of the street.

Warren Stewart ("Stewart"), a Comcast installer, was on his way to a job as two groups of men exchanged gunfire across Wister Street. (***Id.*** at 11-12, 16.) He also saw two individuals, one tall and the other short, walking southbound on Wister Street at a high rate of speed. (***Id.*** at 16-19.) Stewart described them as being fair-skinned. The shorter man shoved a silver gun into the waistband of his pants before the two proceeded up Wister Street at a fast pace. (***Id.*** at 13-18.)

Stewart was approached by police officers on the scene who asked him to accompany them to the hospital where he identified an individual inside an operating room as the tall individual he saw leaving the scene, later identified as Jacob Johnson ("Johnson"), appellee's accomplice. Johnson had been shot in the arm during the incident. The Commonwealth's theory was that since Johnson is 6' tall and appellee is 5'4" tall, they were likely the two

men Stewart and Anderson saw leaving the scene with appellee shoving a gun down his pants.

Earlier in the afternoon, the victim had gone to the Cheltenham Square Shopping Mall with Derrick Spivey ("Spivey"). The two briefly returned to the home of Spivey's mother, Melanie Sheppard ("Sheppard"), on Wister Street. Shortly after the men left, Sheppard heard rapid-fire gunshots. When the shooting stopped, she found the victim outside on the pavement; he was unresponsive. The victim, who was 18 years-old, had been shot in the face. The police transported him to the hospital where he was pronounced dead of multiple gunshot wounds. One shot, to the back, penetrated several vital organs.[1] The police recovered 21 fired cartridge casings and 8 bullets or bullet fragments at the scene that had been fired from six different guns.

The victim and Spivey had been captured on the Cheltenham mall's video camera at the T-Mobile kiosk. Shortly after the victim left the kiosk, appellee approached and purchased a cell phone. At some point while in the mall, appellee called his friend Rondell Minor ("Minor"). Minor was interviewed by the police on February 18, 2008 and gave a statement as to the events of July 4, 2007. Minor explained that he and appellee both lived

[1] The victim had been wearing a jacket with the inscription, "R-I-P, Jarvis" commemorating his friend Jarvis Davis who had been murdered in December 2006. Appellee had been at the scene with his friend, LJ, who was a suspect at one time but had been cleared of the murder. Appellee, whose nickname was "Ra" or "RaRa" had been questioned in connection with that killing.

on Pastorius Street and had known each other for years. Minor described the July 4th call from appellee, who stated that he was trapped at the mall due to the guys with whom they had been having problems with. Minor stated that he believed this was in reference to the men from Wister Street and the prior murder of a man he referred to as LJ on Wister Street.[2] Appellee asked Minor to "send some boys from the block" to the mall to help him.

Minor also told the police that after he received the call from appellee at the mall, appellee, his twin brother Rocky, and Johnson returned to Pastorius Street. The men briefly went into appellee's home and then left. The Commonwealth also presented evidence that on the night of the murder Minor had another conversation with appellee's brother Rocky. Minor told the police that Rocky informed him that appellee had fled to Florida where he had relatives. Minor had also spoken to appellee on the phone and asked when he was returning to Philadelphia; appellee replied that he was not coming back. "Evidently," Minor told the police appellee "had to run from what happened on Wister Street." (Notes of testimony, 12/15/10 at 111-112.)

[2] Minor did testify that he had been mistaken in telling police that LJ was dead; evidently he had meant that the boys on the block had been feuding over the murder of Jarvis Davis in which LJ had been a suspect.

However, Minor was called to testify and repudiated much of his statement to the police[3]; the statements were admitted as a prior inconsistent statement pursuant to ***Commonwealth v. Lively***, 530 Pa. 464, 466, 610 A.2d 7, 8 (1992) and ***Commonwealth v. Brady***, 510 Pa. 123, 130, 507 A.2d 66, 70 (1986). Thus, the Commonwealth was permitted to read the statement Minor had previously adopted.

Also read into the evidence was Minor's description of a conversation he had with Rocky and Johnson two days after the murder.

> I went over to where Rocky was and he told me they went up there and were trying to talk to the young man about it and then they went into a store and one of the two guys swung on Rocky and that's when [appellee], I think they said [appellee], shot at the guy and then they all ran out of the store. And that the guys from Wister Street came out of the store and those guys were shooting at Ra, Rocky and [Johnson] while they were running away.
>
> [Johnson] walked up while Rocky was talking about what happened. He had just came [sic] back, from the hospital. [Johnson] said the detectives talked to him. Rocky asked [Johnson] if he was snitching on him. [Johnson] said he didn't tell the detectives anything. He said to Rocky, you knew how we do it. You know I got you.

[3] At a sidebar, the trial court noted the drastic change in Minor's cooperative demeanor at the preliminary hearing to his negative attitude at trial. (Notes of testimony, 12/15/10 at 78-86.) The court observed that friends and family of appellee were staring at and making faces at Minor in the courtroom. Minor's attorney was contacted and urged him to testify truthfully. Despite that and the trial court's warning that he could be charged with perjury since his testimony was so different from that at the preliminary hearing, Minor continued to repudiate material portions of his police statement.

Id. at 109-110.

Based on the information received by Minor, an arrest warrant for appellee was obtained on March 11, 2008. Appellee turned himself in to the police on March 18, 2008. On December 20, 2010, a jury found appellee guilty of voluntary manslaughter, criminal conspiracy, recklessly endangering another person, carrying an unlicensed weapon, and possession of an instrument of crime. Appellee was sentenced on April 8, 2011 to a term of 10 to 20 years' imprisonment for voluntary manslaughter and a concurrent term of 3½ to 7 years' imprisonment for the firearms violation to be followed by consecutive terms of probation totaling 12 years.

Appellee retained new counsel and a post-sentence motion was filed. A hearing was held and appellee argued that the trial court had erred in admitting Minor's statement to the police. Specifically, appellee argued that Minor's statements to the police wherein he recounted events that transpired two days after the murder should not have been admitted as the conspiracy among appellee, his brother and Johnson supposedly had ended. (Notes of testimony, 8/2/11 at 18-19.) Appellee argued, and the court agreed, that the statements did not meet the co-conspirator exception to the hearsay rule as there was no evidence that the conspiracy continued beyond the victim's death. The trial court noted that appellee, who had been given a standing objection during trial based upon ***Brady***/***Lively***, had not objected to this portion of the statement on such a basis. (***Id.*** at 43.) Nonetheless,

the trial court vacated the judgment of sentence and awarded a new trial as this portion of the statement was "highly prejudicial" and did not come within an exception to the hearsay rule. (***Id.*** at 38.)

The Commonwealth filed a motion for reconsideration, reiterating its position that appellee's claim was waived and that this portion of Minor's statement was admissible as a declaration against penal interest on the part of Rocky and Johnson. The motion was denied and the Commonwealth appealed. The following issue has been presented for our review:

> Did the trial court err in granting defendant a new trial on post-sentence motions where the evidentiary claim on which relief was granted had been waived at trial, and the lower court's determination in its later opinion that trial counsel was ineffective is premature and improper at this juncture since there has been no evidentiary hearing at which trial counsel has been called to testify?

Commonwealth's brief at 2.

We agree with the Commonwealth's position that the issue on which relief was granted had been waived as it was not raised by objection during trial. While appellee had repeatedly objected to Minor's testimony and to the Commonwealth's confrontation of that witness with his prior statement under the ***Brady***/***Lively*** rule, appellee did not object on the present basis at trial. Rather, appellee attempted to raise this theory for the first time in his post-sentence motion.

Our decision is guided by our rules of procedure. At the outset, we note that post sentence motions serve the dual function of allowing the trial

court to rectify errors which may have been committed at trial and of framing the issues to be considered should there be an appeal. ***Commonwealth v. Nock***, 606 A.2d 1380 (Pa.Super. 1992); ***Commonwealth v. Hutson***, 245, 363 A.2d 784 (Pa. Super. 1976). ***See also*** Comment to Pa.R.Crim.P. 720.

> Only issues that are properly raised and preserved in the trial court may be considered on appeal. Pa.R.A.P. 302(a). Issues raised before or during trial are properly preserved for appeal. Pa.R.Crim.P. 720(B)(1)(c). So are issues raised in a timely optional post-sentence motion, provided those issues were properly preserved at the appropriate point in the proceedings. Pa.R.Crim.P. 720(B). For example, a criminal defendant could not assert a claim in a post-sentence motion for a new trial that evidence was erroneously admitted during his trial if he hadn't lodged an objection during the trial when the evidence was admitted. Failure to object results in a waiver of the claim.

Commonwealth v. Kohan, 825 A.2d 702, 706 (Pa.Super. 2003); ***Commonwealth v. Melendez-Rodriguez***, 856 A.2d 1278, 1287 (Pa.Super. 2004) (***en banc***) (where criminal defendant failed to object to admission of photograph at trial and objected for the first time in his Pa.R.A.P. 1925(b) statement, trial court's leniency in addressing the issue did not prevent Superior Court from refusing to do so because issue had never been raised at trial). Moreover, for any claim required to be preserved, this court cannot review a legal theory in support of that claim unless that particular legal theory was presented to the trial court. ***Commonwealth v. Thur***, 906 A.2d 552, 566 (Pa.Super. 2006).

As the trial court noted, appellee repeatedly objected on ***Brady*/*Lively*** grounds to the admission of Minor's statement. However, he never raised an objection on the grounds of the co-conspirator hearsay exception that he presented in his post-sentence motion and on which the court granted relief. ***See Commonwealth v. Gordon***, 528 A.2d 631, 638 (Pa.Super. 1987) (holding that this court cannot review a theory of error different from the theory presented to the trial court even if both theories support the same basic allegation of error giving rise to the claim for relief). Thus, as relief was granted on a claim that was waived, the order for a new trial must be vacated.

Additionally, in its Rule 1925(a) opinion, the trial court apparently recognizes that the claim upon which relief is granted was waived. The trial court now opines that appellee is entitled to a new trial because trial counsel was ineffective in failing to make the specific objection that Minor's statement constituted inadmissible hearsay. (Trial court opinion, 5/2/12 at 14.) The trial court posits "[s]ince [appellee] was represented by new counsel on his post-trial motion, and the trial court conducted a full evidentiary hearing regarding [appellee's] claims raised, [appellee] is not required to wait until collateral review." (***Id.*** at 13.) We disagree.

Pursuant to ***Commonwealth v. Grant***, 572 Pa. 48, 67, 813 A.2d 726, 738 (2002) "[a]s a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." The trial court,

however, purports to rely on the exception to the ***Grant*** rule set forth in ***Commonwealth v. Bomar***, 573 Pa. 426, 826 A.2d 831 (2003). In ***Bomar***, our supreme court recognized an exception to ***Grant***'s bar of review of ineffective assistance of counsel claims on direct appeal where the "claims have been raised and fully developed at a hearing in the trial court." ***Bomar***, ***supra*** at 466, 826 A.2d at 855. We conclude that ***Bomar*** is inapplicable to the instant case. In ***Bomar***, the defendant, through new counsel, raised his ineffective assistance of trial counsel claim in post-sentence motions. The trial court then conducted a complete hearing at which trial counsel testified. Thus, the full record was developed upon which the trial court based its determination that trial counsel was ineffective. ***Id.*** at 463-464, 826 A.2d at 853-854.

Instantly, appellee did not raise an allegation of ineffectiveness in his post-sentence motion. While a hearing on appellee's post-sentence motion was held, the court did not conduct a hearing on the issue of trial counsel's ineffectiveness. We disagree with the trial court's statement that "a full evidentiary hearing" had been conducted. (Trial court opinion, 5/2/12 at 13.) At the August 2, 2011 hearing, the prosecutor and appellee's new attorney both presented oral argument to the court; no testimony was taken and no witnesses were presented. Appellee's original trial counsel was not present.

Further, this court has recently recognized the further limitations imposed by our supreme court on the exception in ***Bomar***.

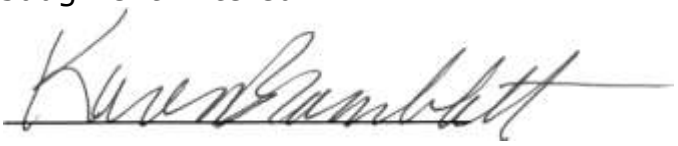
> Based on the opinion of a majority of participating justices in [***Commonwealth v.***] ***Wright***, [599 Pa. 270, 961 A.2d 118 (2008)] and [***Commonwealth v.***] ***Liston***, [602 Pa. 10, 977 A.2d 1089 (2009)] this Court cannot engage in review of ineffective assistance of counsel claims on direct appeal absent an "express, knowing and voluntary waiver of PCRA review." ***Liston***, [***supra*** at 21-22, 977 A.2d at 1096] (Castille, C.J. concurring). With the proviso that a defendant may waive further PCRA review in the trial court, absent further instruction from our Supreme Court, this Court, pursuant to ***Wright*** and ***Liston***, will no longer consider ineffective assistance of counsel claims on direct appeal.

Commonwealth v. Barnett, 25 A.3d 371, 377 (Pa.Super. 2011) (***en banc***) (footnote omitted). The exception in ***Bomar*** is also currently being reviewed by our supreme court in ***Commonwealth v. Holmes***, 606 Pa. 209, 209-210, 996 A.2d 479, 479-480 (2010) (granting allowance of appeal on issues concerning the appealablity of ineffectiveness of counsel claims on direct appeal in light of ***Grant*** and ***Bomar***).

Thus, we agree that the trial court's ruling was erroneous as appellee's underlying claim is waived and the ultimate finding of trial counsel's ineffective assistance was decided without the benefit of a full evidentiary hearing.

Order reversed. Case remanded for reinstatement of sentence.

Judgment Entered.



Prothonotary

Date: 5/17/2013