

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37
COMMONWEALTH OF PENNSYLVANIA, IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

LEONARD DW SMITH,

Appellant

No. 266 MDA 2013

Appeal from the Judgment of Sentence Entered November 27, 2012
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0001134-2011

BEFORE: BENDER, P.J., WECHT, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, P.J.

FILED DECEMBER 03, 2013

Appellant, Leonard DW Smith, appeals from the judgment of sentence of 209 to 460 months' incarceration, imposed after a jury convicted him of involuntary deviate sexual intercourse with a child (IDSI), indecent assault of a complainant less than 13 years of age, unlawful contact with a minor, and corruption of minors. On appeal, Appellant presents several claims involving ineffective assistance of his trial counsel (IAC). For the reasons that follow, we conclude that Appellant must wait to present those claims until collateral review. Accordingly, we affirm.

We briefly summarize the facts of Appellant's case as follows. Appellant was arrested and charged with the above-stated crimes after his stepdaughter, J.C., accused him of sexually abusing her. At Appellant's jury

* Former Justice specially assigned to the Superior Court.

trial, J.C. (who was 11 years' old at the time of trial) testified that when she was between the ages of 4 and 5, Appellant inserted his penis into her mouth. J.C. did not report this incident of abuse until she was approximately 10 years old. At that time, Appellant and J.C.'s mother ("Mother") had divorced, and Mother had a new boyfriend who also sexually abused J.C. When J.C. was interviewed about the abuse by Mother's new boyfriend, she confided in investigators that Appellant had also sexually abused her on one occasion.

At the close of Appellant's jury trial, he was convicted of the offenses stated *supra*. He was subsequently sentenced to a term of 200 to 400 months' incarceration for his IDSI conviction, a consecutive term of 9 to 60 months' incarceration for his indecent assault offense, a concurrent term of 72 to 240 months' imprisonment for his crime of unlawful contact with a minor, and a concurrent term of 9 to 84 months' imprisonment for his offense of corruption of a minor. Therefore, Appellant received an aggregate sentence of 209 to 460 months' incarceration.¹

Appellant filed a timely post-sentence motion seeking a new trial due to the ineffective representation of his trial counsel.² The trial court denied that motion. Appellant then filed a timely notice of appeal, as well as a

¹ The trial court erroneously states that Appellant's aggregate sentence is 17½ to 30 years' imprisonment. His sentence actually amounts to approximately 17.42 to 38.33 years' incarceration.

² Appellant obtained new counsel after his trial and before his sentencing proceeding.

timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, Appellant presents three issues for our review:

- I. Where the ineffective assistance of trial counsel is patently observable from a review of the trial record, and the result of the ineffective assistance is that Appellant was deprived of his right to a fair trial, does the trial court commit error when it refuses to consider such claims on direct appeal?
- II. Did the trial court commit error when it effectively denied [Appellant's] post[-]sentence motion for a new trial because of trial counsel's failure to object to the admission of evidence of Appellant's alleged prior bad act, or criminal conduct?
- III. Did the trial court commit error when it effectively denied Appellant's post-sentence motion for a new trial where trial counsel had failed to object to evidence being introduced by the prosecution of Appellant's mental health during the Commonwealth's case-in-chief[?]

Appellant's Brief at 5.

While Appellant attempts to phrase two of his issues as allegations of trial court error, each of his claims centers on trial counsel's ineffectiveness. The main error Appellant alleges was counsel's failure to object when the Commonwealth elicited testimony from Appellant that when he was "14, [or] 15 years old," he was "accused of sexually molesting [his] sister," who was "less than a year younger than [Appellant]." N.T. Trial, 5/7/12-5/9/12, at 104. Appellant also contends that his attorney was ineffective for failing to object to the Commonwealth's admission of evidence regarding Appellant's history of mental health issues.

We must first determine if we are able to review these claims on direct appeal. While Appellant raised his IAC claims in his post-sentence motion,

the trial court declined to assess their merits, reasoning that “they are not properly raised on appeal but must be pursued on collateral review.” Trial Court Opinion, 3/5/13, at 1 (citing **Commonwealth v. Thomas**, 54 A.3d 332, 344 (Pa. 2012); **Commonwealth v. Grant**, 813 A.2d 726, 738 (Pa. 2002) (holding that, “as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review”)).

Appellant, however, contends that “the rule announced in **Grant, supra**, does not ‘absolutely prohibit raising a claim of trial counsel’s ineffectiveness on direct appeal, particularly where counsel’s ineffectiveness might be apparent and established from the existing record.’” Appellant’s Brief at 12 (quoting **Commonwealth v. Rosendary**, 818 A.2d 526, 527 (Pa. Super. 2003)). Appellant avers that here, counsel’s ineffectiveness – namely, counsel’s failure to object to the evidence that he had previously been accused of sexual misconduct with a minor victim – is amply apparent from “the record that currently exists.” Appellant’s Brief at 13. Accordingly, he asks that we review his IAC assertions and award him a new trial.

Appellant’s argument disregards this Court’s *en banc* decision in **Commonwealth v. Barnett**, 25 A.3d 371 (Pa. Super. 2011). There, we held that “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.’” **Id.** at 377 (quoting **Commonwealth v. Liston**, 977 A.2d 1089, 1096 (Pa. 2009) (Castille, C.J., concurring)). Appellant does not claim that a waiver of his right to PCRA review was conducted in this

case. Accordingly, **Barnett** precludes our review of his IAC claims on direct appeal.

In any event, we note that after the appellate briefs were filed in this case, our Supreme Court decided **Commonwealth v. Holmes**, 2013 WL 5827027 (Pa. 2013), which clarified “the proper roles for direct appeal and the [Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546,] respecting claims of trial counsel ineffectiveness.” **Id.** at *21. While reaffirming its prior holding in **Grant** that claims of ineffectiveness should generally be deferred to PCRA review, the Court recognized two exceptions to that rule. **Id.** at *1. In explaining those exceptions, the Court stated:

First, we appreciate that there may be extraordinary circumstances where a discrete claim (or claims) of trial counsel ineffectiveness is apparent from the record and meritorious to the extent that immediate consideration best serves the interests of justice; and we hold that trial courts retain their discretion to entertain such claims.

Second, with respect to other cases and claims, including ... [**Commonwealth v. Bomar**], 826 A.2d 831 (Pa. 2003), *cert. denied*, 540 U.S. 1115 (2004),] and the matter *sub judice*, where the defendant seeks to litigate multiple or prolix claims of counsel ineffectiveness, including non-record based claims, on post-verdict motions and direct appeal, we repose discretion in the trial courts to entertain such claims, but only if (1) there is good cause shown, and (2) the unitary review so indulged is preceded by the defendant’s knowing and express waiver of his entitlement to seek PCRA review from his conviction and sentence, including an express recognition that the waiver subjects further collateral review to the time and serial petition restrictions of the PCRA.

Id. (footnotes omitted).

We need not determine whether **Holmes** applies retroactively to Appellant's case because, even if it did, it would not change our disposition. From the Court's language in **Holmes**, it is clear that the trial court retains the discretion to apply one of the above-stated exceptions and review claims of IAC raised in a post-sentence motion. Here, the trial court declined to assess the merits of Appellant's claims. For the reasons that follow, we ascertain no abuse of discretion in that decision.

First, because Appellant did not waive his right to further PCRA review, it is obvious that the second **Holmes'** exception does not apply. Moreover, we disagree with Appellant that the merit of his ineffectiveness claims are so apparent from the face of the record that the interests of justice require they be decided immediately.

[A] properly pled claim of ineffectiveness posits that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice befell the petitioner from counsel's act or omission.

Commonwealth v. Johnson, 966 A.2d 523, 533 (Pa. 2009) (citations omitted).

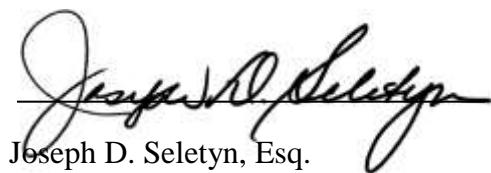
Here, viewing the record of Appellant's trial alone is not enough to establish the second prong of the IAC test. There is nothing in the record indicating the basis for counsel's decisions not to object to the evidence that Appellant had been accused of sexual misconduct with a minor in the past, or to the admission of evidence regarding Appellant's mental health history. While it is hard to fathom a reasonable strategic basis for not objecting to

this type of evidence, we hesitate to conclude that none existed without permitting counsel to offer an explanation on the record. Therefore, even if **Holmes** applied retroactively to Appellant's case, we would conclude that the trial court did not abuse its discretion in declining to address the merits of Appellant's ineffectiveness arguments.

In sum, we agree with the trial court that Appellant must wait to raise his ineffectiveness claims on collateral review. As he has presented no other challenges to his convictions or sentence, we affirm.³

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/3/2013

³ It is unfortunate that Appellant's current counsel chose not to raise any issues appropriate for direct appeal, such as a challenge to Appellant's lengthy sentence. While we cannot raise discretionary aspects of sentencing claims *sua sponte*, we note that the record of the sentencing hearing reveals that the court provided a scant (and questionable) statement of its reasons for imposing the significant term of incarceration in this case. **See** N.T. Sentencing, 11/27/12, at 6-7.