NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. WILLIE A. WYNDER JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 413 WDA 2012

Appeal from the Judgment of Sentence of February 3, 2012
In the Court of Common Pleas of Crawford County
Criminal Division at No(s): CP-2-CR-0000432-2011

BEFORE: GANTMAN, J., WECHT, J., and FITZGERALD, J.*

MEMORANDUM BY WECHT, J. Filed: January 25, 2013

Willie A. Wynder, Jr. ("Appellant"), appeals the judgment of sentence entered on February 3, 2012. We affirm.

The trial court set forth the factual and procedural background of this case as follows:

> [Appellant] was convicted by a jury of Count 1, Possession with Intent to Deliver, an ungraded felony under the Controlled Substance Device Cosmetic Act and Count 2, Possession under the Controlled Substance Device Cosmetic Act following a trial that commenced on November 14, 2011, for an incident that occurred on July 25, 2010. On that date it was alleged by the Commonwealth that [Appellant] sold .34 grams of cocaine to a confidential informant by the name of Thomas Jones. Mr. Jones testified that on July 25, 2010, he entered the establishment known as the Paradise Club with the intent to purchase drugs. Mr. Jones had been given approximately fifty dollars with which

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* Former Justice specially assigned to the Superior Court.

> to purchase the drugs. Mr. Jones eventually testified that he purchased a "50 sack" of cocaine from [Appellant].

Trial Court Opinion, 4/17/2012 ("T.C.O."), at 1-2. Appellant was sentenced to 27 months' to 54 months' imprisonment, and charged $250 in fines and court costs.

Appellant raises the following two issues on appeal:[1]

> I. WHETHER OR NOT THE COURT COMMITTED ERROR WHEN IT DENIED THE APPELLANT'S OBJECTION AND REQUEST FOR A CURATIVE INSTRUCTION FOR THE INTENTIONAL MISSTATEMENT OF THE LAW AND FACT IN THE COMMONWEALTH'S CLOSING?
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> II. DID THE TRIAL COURT ERR BY NOT ALLOWING THE APPELLANT NEW COUNSEL TO REVIEW AND POSSIBLY RAISE INEFFECTIVENESS ISSUES DURING POST SENTENCE MOTIONS?

Brief for Appellant at 4.

In his first issue, Appellant asserts trial court error in its refusal to offer a curative jury instruction as a corrective for the following statement by the Commonwealth during its closing argument:

> [Mr. Jones] also told you he is no longer on probation. As he sat there and testified to you, the police are holding nothing over his head. He has no incentive to come in here and lie to you. His sentence is done. The police can do nothing else to him.

Notes of Testimony, 11/15/2011 ("N.T."), at 12.

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[1] Appellant was directed by the trial court to file a concise statement of the errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied, and the trial court prepared an opinion pursuant to Pa.R.A.P. 1925(a).

Immediately after this statement, Appellant objected, and the following discussion was held at side bar:

> [Appellant's counsel]: [Mr. Howe on behalf of the Commonwealth] knows very well that is not true. They are misstating the law. They can file charges against [Mr. Jones] for false reports for – for making the previous statement and withdrawing the previous statement. They do it all of the time. If he doesn't testify consistent[ly] with his statement when he testifies now, they can charge him with false reports to law enforcement.
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> The Court: Mr. Howe?
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> Mr. Howe: Your Honor, he is not facing those charges. He didn't testify untruthfully. I mean, he – he and – the argument was he wasn't facing this sentence so the police could do nothing about those charges.
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> [Appellant's counsel]: If that is true, I would not have objected –
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> The Court: I think that's what he said and he also said there is nothing hanging over his head at this point.
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> [Appellant's counsel]: He said there is nothing the police can do.
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> The Court: That's true. At this stage, there is nothing. I understand. The objection is overruled for a number of reasons. One of which is, I don't think that Mr. Howe's position was factually inaccurate. But second of all, because it is argument at this point and I don't think that he's beyond the scope of what would be appropriate argument, so I'll overrule the objection.

N.T. at 13-14. Following the Commonwealth's closing, Appellant renewed his objection and requested a curative instruction. N.T. at 15 ("Judge, I would ask given the closing of the Commonwealth, that you instruct the jury that there are provisions that if a person changes his statement to the police

between the – the written statement that they gave and their testimony, that there are charges that can be filed against that person."). After hearing further argument, the trial court denied the request. ***Id.*** at 16.

The applicable standard of review of a trial court's ruling finding no impropriety in the Commonwealth's closing argument is well-settled:

> A prosecutor may make fair comment on the admitted evidence and may provide fair rebuttal to defense arguments. Even an otherwise improper comment may be appropriate if it is in fair response to defense counsel's remarks. Any challenge to a prosecutor's comment must be evaluated in the context in which the comment was made. During closing argument . . ., a prosecutor must be afforded reasonable latitude, and permitted to employ oratorical flair . . . .
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> Not every unwise, intemperate, or improper remark made by a prosecutor mandates the grant of a new trial:
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> > Reversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict.
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> ***Commonwealth v. Cox***, 983 A.2d 666, 685 (Pa. 2009) (citation omitted); ***see also Commonwealth v. Carson****,* 913 A.2d 220, 242 (Pa. 2006).

Commonwealth v. Spotz, 18 A.3d 244, 288 (Pa. 2011) (some citations omitted; citations modified); ***accord Commonwealth v. Romero***, 938 A.2d 362, 393 (Pa. 2007).

Regarding challenges to a trial court's instructions to the jury, or its decision not to issue a requested instruction, our Supreme Court has held that "[the courts] will not evaluate the adequacy of the instructions based on

isolated references; rather, the charge is reviewed as a whole, with deference accorded the trial court's discretion in phrasing its instructions." ***Commonwealth v. Hughes***, 865 A.2d 761, 788 (Pa. 2004).

Appellant argues that the Commonwealth's summation in the challenged regard was inaccurate, and thus improper, because its unqualified statement that "[t]he police can do nothing to [Mr. Jones]" neglected to acknowledge the possibility that Mr. Jones could face charges for changing his story on the stand. Brief for Appellant at 8 (citing 18 Pa.C.S. § 4906 ("False reports to law enforcement authorities")). Thus, Appellant asserts, to say that Mr. Jones faced no adverse consequences for any prior charges, and thus had no incentive to lie, constituted an improper effort to bolster Mr. Jones' credibility.

Appellant further argues in this regard that the Commonwealth violated ABA Standards 5-5.8(a) by "intentionally misstat[ing] the evidence or mislead[ing] the jury as to the inferences it may draw," and 3-5.9 by "intentionally refer[ing to] or argu[ing] on the basis of facts outside the record." Brief for Appellant at 9 (citing ABA Standards for Criminal Justice: Prosecutor and Defense Function (3d ed. 1993)).

Appellant cites only one case even slightly on-point with regard to these considerations. However, that case, ***Commonwealth v. Howard***, 543 A.2d 1169 (Pa. Super. 1988), is inapposite. The conduct complained of there was two-fold: First, in response to defense counsel's request to handle three bullets in evidence, the prosecutor responded that it did not

trust counsel, and asked that a ballistics witness handle the bullets. ***Id.*** at 1174. Second, at sidebar, the prosecutor referred to the appellant's attorney as a "sucker." ***Id.*** This Court denied relief as to both comments, based on the fact that the appellant had failed to demonstrate that "the unavoidable effect of the prosecution's remarks [was] to prejudice the jurors, forming in their minds bias and hostility toward the [appellant] to such an extent that they could not weigh the evidence objectively and render a true verdict." ***Id.***

We fail to see how ***Howard*** in any way establishes Appellant's asserted entitlement to relief. While it is true that the Commonwealth's case essentially rose or fell on the testimony of the Commonwealth's confidential informant, Appellant in no way rebuts the trial court's observation that the Appellant had, and availed himself of, every opportunity to cross-examine Mr. Jones regarding the events that led him to serve as an informant and his incentives and motives for doing so. ***See*** T.C.O. at 6. Moreover, even given the Commonwealth's dependence on Mr. Jones' testimony, Appellant fails to satisfy the high bar for prejudice that cases such as ***Howard*** long have maintained. Appellant fails to explain how the Commonwealth's comments were so factually or legally inaccurate that they exceeded the latitude afforded the Commonwealth in its closing arguments to a jury; how those comments established such prejudice as **unavoidably** to compromise the jury's consideration of Mr. Jones testimony; or why this Court should intrude

upon the trial court's discretion in determining how to charge the jury. Thus, Appellant is not entitled to relief on this basis.

In Appellant's second issue, he argues that the trial court erred in denying him the opportunity to pursue his claims of ineffectiveness of trial counsel, via new appointed counsel, in post-trial proceedings. The trial court explained its ruling as follows:

> The courts of the Commonwealth have recently ruled that claims of ineffective assistance of counsel will no longer be considered on direct appeal, and instead should be brought in a collateral review of the issue pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-46.
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> Beginning with the case of ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), the Pennsylvania Supreme Court asserted a general rule that a defendant "should wait to raise claims of ineffective assistance of trial counsel until collateral review." ***Id.*** at 738. . . .
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> Thereafter, the Supreme Court . . . outlined a narrow exception to this general rule in the case of ***Commonwealth v. Bomar***, 826 A.2d 831 (Pa. 2003)[,] when an ineffectiveness claim had been raised in the trial court, a hearing devoted to the question of ineffectiveness was held at which trial counsel testified, and the trial court rule[d] on the claims. Under those circumstances, the Court ruled, an ineffectiveness claim was permissible on direct appeal.
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> Since the decision ***Bomar***, the courts have recognized that the ***Bomar*** case has limited applicability. For instance, [in] the recent case of ***Commonwealth v. Barnett***, 25 A.3d 371 (Pa. Super. 2011) (*en banc*), the court noted that "[w]ith the proviso that a defendant may waive further PCRA review in the trial court, absent further instruction from our Supreme Court, this Court . . . will no longer consider ineffective assistance of counsel claims on direct appeal." ***Id.*** at 377; ***see also Commonwealth v. Quel***, 27 A.3d 1033 (Pa. Super. 2011).
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> With regard to claims of ineffective assistance of counsel, though a narrow exception has been outlined by the courts requiring a

> very specific set of facts and circumstances, the general rule of the ***Grant*** case remains, in that claims of ineffective assistance of counsel are more properly raised in a collateral appeal pursuant to the Post Conviction Relief Act.

T.C.O. at 4-5 (citations modified).

Appellant contends that, per ***Barnett***'s acknowledgment of the limiting proviso necessary to even consider the ***Bomar*** approach, he was prepared to waive his right to collateral relief in service of arguing trial counsel's ineffectiveness in post-trial proceedings. Brief for Appellant at 12. However, Appellant never so much as hinted that this was the case. Following sentencing, Appellant separately filed a Motion for Appointment of New Counsel and post-sentence motions, both of which the trial court denied by separate orders on February 17, 2012. In both filings, Appellant expressly sought the appointment of new counsel for purposes of challenging the effectiveness of trial counsel. However, in neither filing did Appellant indicate in any way that he intended to waive his right to collateral relief in exchange for the opportunity to challenge the effectiveness of trial counsel in post-sentence proceedings. ***Barnett*** speaks clearly that, in order to address ineffectiveness claims prior to collateral proceedings (where Pennsylvania courts repeatedly have insisted such claims best belong), the party seeking such review must provide an "express, knowing and voluntary waiver of PCRA review." 25 A.3d at 377.

We do not believe that Appellant would be entitled as of right to post-sentencing review of the effectiveness of trial counsel even had he expressly

indicated his willingness to accept ***Barnett***'s *quid pro quo*. That is to say, we are aware of no law that **obligates** a trial court to permit a defendant to proceed in that fashion, even when the case arguably falls within the narrow exception found in ***Bomar*** and its progeny. But, in any event, Appellant failed to indicate any willingness to sacrifice his right to collateral review before the trial court, and we cannot entertain his assertion to that effect here, when we are the first venue in which he has proposed to do so. ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

Judgment of sentence affirmed. Jurisdiction relinquished.