NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. GREGORY T. GRIFFIN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 578 WDA 2012

Appeal from the Judgment of Sentence October 17, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0014151-2010

BEFORE: BENDER, J., MUNDY, J., and STRASSBURGER, J.*

MEMORANDUM BY MUNDY, J.: FILED: May 17, 2013

Appellant, Gregory T. Griffin, appeals from the October 17, 2011 judgment of sentence of 21 to 42 months' incarceration followed by five years' probation, imposed following his conviction by a jury of delivery of a controlled substance.[1] After careful review, we conclude Appellant's issue is without merit and affirm based on the thorough and well-reasoned August 9, 2012 opinion of the trial court.

The trial court has fittingly summarized the factual and procedural history of this case in its August 9, 2012 opinion, and we need not reiterate

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* Retired Senior Judge assigned to the Superior Court.

[1] 35 P.S. § 780-113(a)(30).

that history in full here. ***See*** Trial Court Opinion, 8/9/12, at 1-3.[2] Pertinent to this appeal, we note that Appellant, at the commencement of jury selection on October 13, 2011, signed a waiver, along with his counsel and the assistant district attorney, stating, "… I waive the presence of a Judge and Court Reporter for *Voir Dire* in [the instant case]." Waiver, 10/13/11, at 1. Following his conviction and sentencing, Appellant retained new counsel and filed a post-sentence motion raising a claim of ineffective assistance of trial counsel.

On March 7, 2012, the trial court held a hearing on Appellant's motion at which he waived the right to pursue relief under the Post Conviction Relief Act,[3] if permitted to pursue his ineffective assistance of trial counsel claim in his post-sentence motion and on direct appeal. ***See*** N.T., 3/7/12, at 3-8; Defendant's Consent to Unitary Review, 11/3/11, at 1-2. The trial court denied Appellant's post-sentence motion on March 13, 2012. Appellant filed a timely notice of appeal on April 5, 2012.[4]

On appeal, Appellant raises a single issue for our consideration.

> Did Appellant's Trial Counsel render ineffective assistance when he failed to ensure that Appellant's

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[2] The pages of the trial court's opinion are not numbered. We have supplied sequential pagination for reference, beginning with the cover page as page one.

[3] 42 Pa.C.S.A. §§ 9541-9546.

[4] Appellant and the trial court have complied with Pa.R.A.P. 1925.

> waiver of his right to have a Judge preside over the Jury Selection Hearing of his trial was an intelligent and knowing waiver, and when he failed to object to Appellant's unintelligent and unknowing waiver being accepted?

Appellant's Brief at 3.

We first address whether Appellant's claim of ineffective assistance of trial counsel is properly raised in this direct appeal. Appellant recognizes our Supreme Court's holding in ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002) that defendants should wait until the collateral review phase to raise claims of ineffective assistance of counsel. Nevertheless, Appellant avers that this case is governed by the exception to the rule in ***Grant*** set forth in ***Commonwealth v. Bomar***, 826 A.2d 831 (Pa. 2003), as further circumscribed by this Court in ***Commonwealth v. Barnett***, 25 A.3d 371 (Pa. Super. 2011) (*en banc*). Appellant's Brief at 19. In ***Bomar***, our Supreme Court recognized an exception to ***Grant's*** bar to a 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 855. Additionally, 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***, [961 A.2d 119 (2008)] and [***Commonwealth v.***] ***Liston***, [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 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.

Barnett, ***supra*** at 377 (footnote omitted).

Instantly, after sentencing, Appellant obtained new counsel who filed a timely post-sentence motion, which alleged ineffective assistance of trial counsel. The trial court conducted a hearing, developing a record on the ineffectiveness of counsel issue, at which trial counsel testified. Prior to the hearing, Appellant signed a "Consent to Unitary Review,"[5] and Appellant

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[5] The Consent to Unitary Review form provided as follows.

> DEFENDANT'S CONSENT TO UNITARY REVIEW
>
> I, Gregory T. Griffin, a/k/a Gregory Tot, agree to forego litigation of a Post-Conviction Relief Action at Allegheny County Criminal Complaint No. 2010-14151 if (A) I am permitted to raise claims of Ineffective Assistance of Pretrial Counsel, Ineffective Assistance of Trial Counsel, and Ineffective Assistance of Sentencing Counsel via a Post-Sentence Motion filed pursuant to Pa.R.Crim.P. 720, and I receive review of those claims; (B) I am permitted to do via an action that grants me an Evidentiary Hearing into my post-sentence claims; (C) my attorney is afforded a reasonable opportunity to secure and review Notes of Testimony from any pretrial hearing that was held in my case, from my trial, and from my sentencing hearing; and (D) I am permitted to take a timely appeal from the denial of my Post-Sentence Motion or am otherwise afforded a

(Footnote Continued Next Page)

performed an on the record colloquy acknowledging his intent to waive future Post Conviction Relief Act review. N.T., 3/7/12, at 6-8. The trial court ruled on Appellant's ineffective assistance of counsel claims and has included its analysis in its Rule 1925(a) opinion. Under these circumstances, we conclude that ***Bomar*** and ***Barnett*** are applicable, and that we may address Appellant's ineffective assistance of counsel issue.

We observe the following standard when reviewing ineffective assistance of counsel claims. "The law presumes that counsel has rendered effective assistance." ***Commonwealth v. Brooks***, 839 A.2d 245, 248 (Pa. 2003).

> Counsel will be found to be ineffective where (1) there is arguable merit to the underlying claim; (2) the course chosen by counsel does not have a reasonable strategic basis designed to advance the defendant's interests; and (3) the error of counsel prejudiced the petitioner, *i.e.,* there is a reasonable probability that, but for the error of counsel, the outcome of the proceeding would have been different. Counsel will not be deemed ineffective for failing to raise a baseless claim.

Commonwealth v. Henke, 851 A.2d 185, 187 (Pa. Super. 2004) (citations omitted), *appeal denied*, 863 A.2d 1144 (Pa. 2004). "A claim of ineffectiveness may be denied by a showing that the petitioner's evidence

(Footnote Continued) ———————————

> remedy in the event my assigned attorney fails to perfect an appeal from the denial of said motion.

Defendant's Consent to Unitary Review, 11/3/11, at 1-2.

fails to meet any of these prongs." ***Commonwealth v. Washington***, 927 A.2d 586, 594 (Pa. 2007) (citation omitted).

The procedure for conducting jury selection is prescribed by Pennsylvania Rule of Criminal Procedure 631. Pertinent to this appeal, the Rule provides as follows.

> **Rule 631. Examination and Challenges of Trial Jurors**
>
> (A) *Voir dire* of prospective trial jurors and prospective alternate jurors shall be conducted, and the jurors shall be selected, in the presence of a judge, unless the judge's presence is waived by the attorney for the Commonwealth, the defense attorney, and the defendant, with the judge's consent.
>
> ...
>
> (C) *Voir dire*, including the judge's ruling on all proposed questions, shall be recorded in full unless the recording is waived. ...

Pa.R.Crim.P. 631(A), (C).

Appellant contends his trial counsel was ineffective for failing to ascertain and recognize that Appellant's waiver of the necessity that the presiding judge and a court reporter be present during jury selection proceedings was not knowing and intelligent. Appellant's Brief at 21. He argues trial counsel was therefore ineffective for failing to object to proceeding with jury selection without the presence of the presiding judge and a court reporter. ***Id.***

> Appellant's ineffectiveness claim, however, is not grounded on the assertion that Trial Counsel ineffectively failed to ensure that Appellant's waiver of his Criminal Rule 631(A) right was valid; it is, instead, grounded on the assertion that Trial Counsel ineffectively failed to ensure that Appellant's waiver of his state and federal constitutional rights to judicial presence at the jury selection hearing was valid — a waiver that, he believes, must be intelligent and knowing, not merely voluntary.

Id. at 24 (footnote omitted).

Appellant's argument originates from his assertion that the presence of a judge and court reporter at jury selection is a constitutional right requiring a knowing and intelligent waiver. Appellant argues as follows.

> Two questions arise from the foregoing assertions. The first is whether or not there is in fact a constitutional right to judicial presence at the jury selection hearing, or is that right merely a non-constitutional right established by Rule 631(A) — a matter of importance since, if no constitutional right exits, then Appellant's voluntary waiver of his Rule 631(A) right was good enough, given [***Commonwealth v.***] ***Mallon***, [421 A.2d 234 (Pa. Super. 1980)] and thus there was no need for Trial Counsel to object to the waiver's acceptance or to provide more information, thus defeating the ineffective counsel claim. The second question that raises [sic] is, assuming the existence of a constitutional right, whether a waiver of that right must indeed be Intelligent and Knowing in order to be valid, as Appellant asserts.

Id. at 24-25

The trial court determined that our decision in ***Commonwealth v. Fitzgerald***, 979 A.2d 908 (Pa. Super. 2009), *appeal denied*, 990 A.2d 727 (Pa. 2010) squarely addressed and rejected Appellant's contentions. Trial

Court Opinion, 8/9/12, at 5. We agree and find Appellant's attempt to distinguish ***Fitzgerald*** unavailing. Appellant claims the appellant in ***Fitzgerald*** argued only that counsel was ineffective for failing to insist that an on the record colloquy be made when the appellant waived the presence of the judge at jury selection. Contrastingly, Appellant insists his ineffectiveness claim is distinct and based on counsel's failure to object to an unknowing and unintelligent waiver.

> That is to say, while the appellant in ***Fitzgerald*** cared only about the fact that there was no oral on-the-record colloquy and cared not at all for whether the waiver itself was or was not intelligent and knowing, Appellant in the appeal *sub judice* cares only about the fact that his waiver was unintelligent and unknowing, and cares not at all whether or not an oral on-the-record colloquy was or was not conducted. It is therefore a different claim than was addressed by ***Fitzgerald***, thus making that case inapplicable.

Appellant's Reply Brief at 6-7 (footnote omitted).

Contrary to Appellant's assertion, the appellant in ***Fitzgerald*** did assert his waiver was defective as unknowing and unintelligent. ***Fitzgerald***, ***supra*** at 910. The ***Fitzgerald*** Court specifically held as follows.

> Contrary to Appellant's contention that *voir dire* requires similar procedures as waivers of the rights to counsel and a jury trial, where a defendant, in consultation with counsel, waives his right to have a judge present during *voir dire,* neither the statute nor any case law requires that the defendant's waiver be knowing, voluntary, and intelligent or confirmed by an on-the-record oral colloquy.

Id. at 912.

Accordingly, we agree with the trial court that ***Fitzgerald*** controls, and that Appellant's voluntary waiver of the presence of the judge and court reporter during jury selection need not be knowing and intelligent. We further agree that Appellant has failed to establish prejudice by merely asserting that if advised of certain facts he would not have executed the waiver. Appellant has not alleged any impropriety in the *voir dire* process or in the composition of the jury empanelled in this case.[6] ***See Fitzgerald***, ***supra*** (noting where an appellant "makes no assertion that his conviction was the product of [potentially] biased jurors," prejudice is not shown); ***cf. Commonwealth v. Noel***, 53 A.3d 848, 857 (Pa. Super. 2012) (requiring a showing of actual prejudice when counsel failed to object to incorrect *voir dire* procedure).

The well-reasoned opinion of the trial court provides a thorough and accurate analysis of the law of this Commonwealth as it relates to the issues presented by Appellant in this case. Therein, the trial court wholly refutes each of Appellant's arguments. Accordingly, we conclude that the August 9, 2012 memorandum opinion of the Honorable Thomas E. Flaherty

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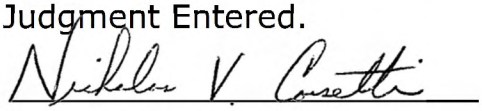
[6] Appellant proceeds with the assumption that his waiver was in fact unknowing and unintelligent. In light of its ruling, the trial court did not reach this issue. We likewise in no way endorse Appellant's conclusion that because he was not advised that prospective jurors might respond to *voir dire* differently in the presence of a judge, that a decision not to execute the waiver could not later be used against him, or that he could revoke the waiver, in fact resulted in an unknowing and unintelligent waiver.

comprehensively addresses and correctly disposes of Appellant's claims. Therefore, we adopt the trial court's memorandum opinion as our own for purposes of this appellate review.

Judgment of sentence affirmed.

Judge Strassburger files a concurring memorandum.

Judgment Entered.



Deputy Prothonotary

Date: May 17, 2013

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v.

Gregory Griffin,

Defendant

CC No: 2010 - 14151

Superior Court No: 578 WDA 2012

OPINION

JUDGE THOMAS E. FLAHERTY

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, CC No: 2010 - 14151

Superior Court No: 578 WDA 2012

v.

Gregory Griffin,

OPINION

FLAHERTY, J. August 9, 2012

Defendant Gregory Griffin (Defendant) appeals from this Court's March 13, 2012 Order of Court denying his Post-Sentence Motion for a new trial based on a claim of ineffective assistance of trial counsel.

On August 26, 2010, the Defendant was arrested and charged with one count of Delivery of a Controlled Substance (35§780-113§§A30), one count of Possession of a Controlled Substance with Intent to Deliver (35§780-113§§A30), and one count of Possession of a Controlled Substance (35§780-113§§A16). A jury trial commenced on October 14, 2011. At *voir dire*, the Defendant waived his right to have the judge and court reporter present during jury selection. On October 17, 2011, the jury returned a verdict of guilty as to the charges of Delivery of a Controlled Substance and Possession of Controlled Substance. The Defendant was found not guilty on the charge of Possession of a Controlled Substance with Intent to Deliver.

On October 17, 2011 the Defendant was sentenced to a minimum of twenty-one (21) months to a maximum of forty-two (42) months of confinement at a State

Correctional Institution on the Delivery of a Controlled Substance conviction – with credit for time previously served. Additionally, a consecutive term of five years of probation was imposed. No punishment was imposed on the Possession of a Controlled Substance conviction.

The following were the facts as presented at trial. On June 24, 2010 the Mount Oliver Police Department conducted an undercover narcotics operation in which an informant purchased crack cocaine from the Defendant. The transaction was conducted by Officer Matthew Juzwick. Prior to the buy, Officer Juzwick searched the informant for contraband and found none. Officer Juzwick then gave the informant $40.00 in official police funds to purchase crack cocaine.

Officer Juzwick then followed the informant to the location of the purchase and witnessed the transaction take place. Officer Juzwick watched the Defendant approach the informant, and observed the informant hand Griffin the official police funds and receive crack cocaine from the Defendant in return. After the Defendant left the area, Officer Juzwick followed the informant back to the predetermined meeting place. Then, Officer Juzwick searched the informant and recovered the two bags of crack cocaine which were purchased from the Defendant.

The Defendant, through new counsel, timely filed his Post-Sentence Motion on October 27, 2011 in which he requested a new trial based on a claim of ineffective assistance of trial counsel. Ultimately, the Defendant's Post Sentence Motions were denied and this appeal followed. On April 12, 2012, the Defendant filed his Concise Statement of Errors, wherein he raised the following three issues:

I. Whether the Defendant's rights under Pennsylvania Constitution Art. I, §9 and United States Constitution Amend. VI and XIV were violated when he was

convicted at a trial in which the judge and court reporter were not present during *voir dire*.

II. Whether the Defendant's right to have a judge and court reporter present during *voir dire* are fundamental rights which require a voluntary, knowing, and intelligent waiver in order for the waiver to be valid.

III. Whether the Court erred in denying Defendant's Post-Sentence Motion.

First, the Defendant claims that the right to have a judge present during jury selection cannot be waived. To begin, "the manner in which *voir dire* will be conducted is left to the discretion of the trial court." Com. v. Moore, 756 A.2d 64, 66 (Pa.Super.2000). Thus, if "it is customary in this county not to have a judge or court reporter present during jury selection in non-capital cases, [an] Appellant is not [] entitled to relief simply because of some imperfections in the trial, so long as he has been accorded a fair trial." Com. v. Wright, 961 A.2d 119, 135 (Pa. 2008). Additionally, in Pennsylvania, the *voir dire* of jurors is governed by Pa.R.Crim.P. 631, which states, in pertinent part:

> *Voir dire* of prospective trial jurors . . . shall be conducted, and the jurors shall be selected, in the presence of a judge, **unless the judge's presence is waived** by the attorney for the Commonwealth, the defense attorney, and the defendant, with the judge's consent.

Pa.R.Crim.P. 631(A) (emphasis added).

The Defendant also argues that the right to have *voir dire* recorded cannot be waived. As stated earlier, the *voir dire* of jurors is governed by Pa.R.Crim.P. 631. Specifically, Pa.R.Crim.Pa. 631(C), states:

> *Voir dire*, including the judge's ruling on all proposed questions, shall be recorded in full **unless the recording is waived**. The record will be transcribed only as upon written request of either party or order of the court.

Pa.R.Crim.P. 631(C) (emphasis added). The Rule that governs the *voir dire* of jurors, Pa.R.Crim.P. 631, explicitly allows for the waiver of the presence of the judge and the court reporter during jury selection. Moreover, "Pennsylvania law does not require an oral colloquy when a defendant waives the presence of the court and a court reporter during *voir dire* and the court finds that such a colloquy is unnecessary." Com. v. Fitzgerald, 979 A.2d 908 (Pa. Super. 2009), citing, PCRA Ct. Op., 11/10/08, at 2.

In Allegheny County, waiver of the presence of the judge and court reporter is made by executing a form prior to selection of the first juror. In addition, a vast majority of the jury trials commenced in Allegheny County do not have the judge and court reporter present during jury selection. On October 13, 2011, the Defendant, with his attorney, and the attorney for the Commonwealth signed a waiver in which the Defendant waived his right to have the judge and court reporter present during jury selection. Thus, the Defendant satisfied the requirements of Pa.R.Crim.P. 631 and properly waived his right to have the judge and court reporter present during *voir dire*

Next, the Defendant claims that in order to validly waive the right to have a judge and court reporter present during *voir dire*, the waiver must be voluntary, knowing, and intelligent.

In Com. v. Fitzgerald, 979 A.2d 908 (Pa. Super. 2009), the Defendant was convicted of first degree murder and filed a petition under the Post Conviction Relief Act ("PCRA"). The trial court denied his PCRA Petition and the Defendant appealed. On appeal, the Defendant raised an ineffective assistance of trial counsel claim and asserted that his constitutional rights were violated when there was neither a judge nor a court reporter present during jury selection and that his counsel was ineffective for failing to

object to such proceedings. Fitzgerald, 979 A.2d, at 909. Additionally, the defendant claimed that a waiver of these rights required a voluntary, knowing, and intelligent waiver. Id. at 909. The Fitzgerald court found that Pa.R.Crim.P. 631 governs *voir dire* and stated that Rule 631 "provides no requirements that the waiver be in writing, on the record, or knowing, voluntary, and intelligent." Id. at 912. Furthermore, "where a defendant, in consultation with counsel, waives his right to have a judge present during voir dire, **neither the statute nor any case law** requires that the defendant's waiver be knowing, voluntary, and intelligent." Id. at 912 (emphasis added).

As indicated by Rule 631 and the Fitzgerald court, there is no requirement that a waiver of the aforementioned rights be voluntary, knowing, and intelligent. All that is required is that the Defendant, his attorney, and the attorney for the Commonwealth sign a waiver indicating the Defendant's desire to waive the presence of the judge and court reporter during *voir dire*. As noted earlier, the Defendant, his attorney, and the attorney for the Commonwealth did sign such a waiver on October 13, 2011. Therefore, the Defendant satisfied the requirements of Rule 631 and properly waived his right to have the judge and court reporter present during jury selection.

The Defendant's final claim is that the Court erred in denying his Post-Sentence Motion for a new trial based on a claim of ineffective assistance of trial counsel. Specifically, the Defendant claims his trial counsel was ineffective for his failure to object to an unrecorded and judgeless *voir dire*.

Until a decade ago, a defendant's new counsel was to raise claims of previous counsel's ineffectiveness at the first opportunity, even if that first opportunity was on direct appeal and the claims of ineffectiveness were not raised in the trial court. Com. v.

Hubbard, 372 A.2d 687 (Pa. 1977). Then, in 2002, the Supreme Court of Pennsylvania overruled Hubbard in Com. v. Grant, 813 A.2d 726 (Pa. 2002). Consequently, now ineffective assistance of counsel claims must be brought at the collateral review stage and not on direct appeal. Grant, 813 A.2d at 739. However, this Court permitted the Defendant to raise an ineffective assistance of counsel claim in his Post-Sentence Motion hearing, even though this Court does not believe that the issue is raised at the appropriate time.

To prevail on a claim of ineffective assistance of counsel, the Defendant must overcome the presumption of competence by showing that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceedings would have been different. Com. v. Pierce, 527 A.2d 973 (Pa. 1987). Failure to satisfy any prong of the Pierce Test results in rejection of the claim. Com. v. Hammond, 953 A.2d 544, 556 (Pa.Super. 2008). Furthermore, "in accord with these well-established criteria for review, an appellant must set forth and individually discuss substantively each prong of the Pierce test." Com. v. Steel, 961 A.2d 786, 797 (Pa. 2008). If the Defendant "fails to prove by a preponderance of the evidence any of the Pierce prongs, the Court need not address the remaining prongs of the test." Com. v. Rios, 920 A.2d 790, 799 (Pa. 2007).

The Defendant must demonstrate that his claim has arguable merit to satisfy the first prong. Rios, 920 A.2d at 799. In this case, the Defendant's claims fail to overcome the presumption that counsel is effective. Defendant's claims – that *voir dire* must be

conducted on the record and in the presence of a qualified judge or waived voluntarily, knowingly, and intelligently – lack arguable merit. As stated earlier, "Pennsylvania law does not require an oral colloquy when a Defendant waives the presence of the court and a court reporter during voir dire and the trial court finds that such a colloquy is unnecessary." Com. v. Fitzgerald, 979 A.2d 908 (Pa. Super. 2009), citing, PCRA Ct. Op., 11/10/08, at 2. Moreover, the Defendant, his attorney, and the attorney for the Commonwealth all signed a waiver wherein the Defendant waived his right to have the judge and court reporter present during jury selection – the only requirement that must be satisfied to validly waive such rights.

Therefore, because Rule 631 does not require a voluntary, knowing, and intelligent waiver and, the Defendant, his trial counsel, and the Commonwealth agreed to waive the presence of the judge and court reporter during *voir dire,* his claim lacks arguable merit, and thus, fails to meet the first prong of the Pierce test.

As the Defendant failed to satisfy the first prong of the Pierce test, the Court need not determine whether the Defendant has met his burden with respect to the other two prongs. Rios, A.2d at 799. However, this Court finds that Defendant also failed to meet his burden with respect to these prongs. To establish the second prong, the Court does not "question whether there were other more logical courses of action which counsel could have pursued; rather [it] must examine whether counsel's decisions had any reasonable basis." Id. at 799.

In Allegheny County, it is customary to not have the court and court reporter present during jury selection. Additionally, Pa.R.Crim.P. 631 explicitly allows for the waiver of said rights. Clearly, trial counsel had reasonable basis for not objecting to a

waiver of the Defendant's right to have the judge and court reporter present for purposes of *voir dire*. Thus, the Defendant failed to satisfy the second prong of the Pierce test.

Moreover, the Defendant's prejudice argument is misplaced. To prove prejudice, "the appellant must show that but for the act or omission in question, the outcome of the proceedings would have been different." Rios, 579 A.2d at 799. The Defendant argues that he was prejudiced because there is a reasonable probability that, had he been informed of his rights, he would not have agreed to an unrecorded and judgeless jury selection proceeding. However, when the right at issue is not a constitutional right, the proper standard of prejudice is whether the outcome of the proceedings would have been different but for counsel's ineffective assistance, not whether the Defendant would have chosen not to waive the right in question. Fitzgerald, 979 A.2d at 912.

Here, there is no indication that the outcome of the jury selection proceedings would have been different had the Defendant's trial counsel objected to the waiver of the presence of the judge and court reporter during *voir dire*. There are no signs that the panel was not impartial and there was no reason to believe that a different panel would have been selected had trial counsel objected to the waiver. Thus, the Defendant fails to satisfy the last prong of the Pierce test, prejudice.

For the foregoing reasons, this Court's denial of Defendant Gregory Griffin's Post-Sentence Motions should be affirmed.

BY THE COURT,

Thomas E. Flaherty, J.

Thomas E. Flaherty
Court of Common Pleas