

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

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| COMMONWEALTH OF PENNSYLVANIA | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellee | |
| v. | |
| LEON PARHAM | |
| Appellant | No. 919 WDA 2012 |

Appeal from the PCRA Order June 1, 2012,
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0014431-2005

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

CONCURRING MEMORANDUM BY STRASSBURGER, J.: **FILED MAY 13, 2013**

I agree with the Majority that no case law or statute requires that a defendant's waiver of the presence of a judge and reporter during *voir dire* be knowing, intelligent, and voluntary as confirmed by an on-the-record colloquy.¹ **See** Majority Memorandum at 6-7 (citing ***Commonwealth v. Fitzgerald***, 979 A.2d 908 (Pa. Super. 2009)). I write separately to address Appellant's argument that the United States and Pennsylvania constitutions, as opposed to any statute or precedent, compel such a colloquy.

What suffices for waiver depends on the nature of the right at issue. [W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. For certain fundamental rights, [e.g., the right to counsel and the

¹ I also agree with the Majority that Appellant has failed to show that he was prejudiced by the absence of a judge and court reporter at jury selection.

*Retired Senior Judge assigned to the Superior Court.

right to plead not guilty,] the defendant must personally make an informed waiver. For other rights, however, waiver may be effected by action of counsel. Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial.

Gonzalez v. United States, 553 U.S. 242, 248 (2008) (quotations and citations omitted).

Applying this standard, courts have held that informed waiver, confirmed by an on-the-record colloquy, is not required when a criminal defendant's *voir dire* is conducted by a federal magistrate judge rather than a district judge, ***see id.*** at 253 ("Although a criminal defendant may demand that an Article III judge preside over the selection of a jury, the choice to do so reflects considerations more significant to the realm of the attorney than to the accused. Requiring the defendant to consent to a magistrate judge only by way of an on-the-record personal statement is not dictated by precedent and would burden the trial process, with little added protection for the defendant."); or when a defendant waives his right to confront witnesses by proceeding with a stipulated non-jury trial, ***see Commonwealth v. Brown***, 18 A.3d 1147, 1161-1163 (Pa. Super. 2011). Nor is any constitutional right violated when a defendant is excluded from portions of *voir dire* conducted at side bar, ***see Commonwealth v. Hunsberger***, 58 A.3d 32 (Pa. 2012); or when there is no transcription of interactions

between a judge and a juror, **see *United States v. Gagnon***, 470 U.S. 522, 526 (1985).

Based upon this precedent, I would hold that a colloquy to confirm that a defendant's decision to waive the presence of a judge and court reporter is knowing, intelligent, and voluntary is not constitutionally required. ***Accord Fitzgerald v. Klopotoski***, C.A. No. 09-1379, 2010 WL 3629682, at *10 (W.D.Pa. September 9, 2010) (applying ***Gonzalez, supra*** in deciding Fitzgerald's petition for *habeas corpus* relief) ("It is notable that the Pennsylvania Superior Court has held that, 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. ... [Fitzgerald] has failed to demonstrate that Pennsylvania law in this regard is in violation of the United States Constitution....").