[J-147-2012] [MO: Castille, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 627 CAP
	:
Appellant	: Appeal from the Order entered on May 25, 2011 in the Court of Common Pleas of Lehigh County, Criminal Division, at No.
v.	: CP-39-CR-0003716-1996
	:
	: SUBMITTED: November 13, 2012
JAMES T. WILLIAMS,	:
	:
Appellee	:

DISSENTING OPINION

MADAME JUSTICE TODD **DECIDED: February 19, 2014**

While I agree with much of the Majority Opinion, I cannot join the majority's determination that good cause did not exist for discovery under the circumstances in this matter because the majority does not analyze whether our Court has jurisdiction over the good cause issue under the collateral order doctrine. Further, in this capital appeal, in which Appellee's conviction was based largely upon the testimony of his co-conspirators, the Post Conviction Relief Act ("PCRA") court failed to set forth any meaningful analysis of the good cause standard for discovery, the work-product doctrine, the circumstances in this matter that led to its conclusion that the good cause requirement was met, or why the work product doctrine did not protect the Commonwealth from discovery. Thus, even assuming it is appropriate for our Court to reach the good cause issue, rather than reaching the merits (a conclusion I do not embrace), I would remand the matter to the PCRA court for the drafting of an opinion explaining the relevant standards of good cause, work product, the respective burdens

of proof, and an analysis of the application of these standards to the circumstances of this matter. In my view, it is only with a meaningful explanation of the lower tribunal's rationale that we may properly evaluate the PCRA court's determination under the deferential abuse of discretion standard for appellate review that is to be applied to discovery and privilege determinations. Furthermore, consistent with my approach regarding the Federal Community Defender's Office ("FCDO"), I dissent to the majority's *sua sponte* mandate to remand to the PCRA court the question of the role of the FCDO as standby counsel. My reasoning follows.

Initially, while I agree that our Court has jurisdiction over the work product privilege issue, I, like Justice Saylor, question the necessity of an analysis of the requirements of the collateral order doctrine with respect to privileged material after our decision in Commonwealth v. Harris, 32 A.3d 243 (Pa. 2011). However, even if our Court desires to require our judges to engage in this analysis for purposes of privilege assertion, I believe the majority has unwittingly and improperly injected concepts of good cause for discovery into its work product analysis. This, in my view, is contrary to the proper approach under the collateral order doctrine and this Court's case law, undercuts the validity of the majority's analysis as it stands, and will only lead to confusion for the bench and bar.

Specifically, before us are two distinct legal challenges to Appellee's motion for discovery. The first is an assertion by the Commonwealth that there was not good cause to justify the discovery order under Pa.R.Crim.P. 902(E)(2). The second separate challenge is that, even if good cause exists for discovery, certain of the Commonwealth's material is covered by the work product doctrine, and, thus, is protected from discovery.

In addressing the threshold jurisdictional question, the majority properly notes how limited the exceptions are to the otherwise broad requirement of a final order before appellate review is permitted, and that the collateral order doctrine must be narrowly construed. Consistent with this overall approach of construing the collateral order doctrine narrowly, the appellate courts must, however, separate those aspects of multifaceted orders that are collateral from those aspects that are not collateral, and courts should review only those legal issues that meet the collateral order test. Thus, as our Court recently, and unanimously, held, "the collateral order rule's three-pronged test must be applied independently to each distinct legal issue over which an appellate court is asked to assert jurisdiction pursuant to [Pa.R.Crim.P.] 313." Rae v. Pa. Funeral Directors Assoc., 977 A.2d 1121, 1130 (Pa. 2009); see also Barley v. Consolidated Rail Corp., 820 A.2d 740, 742-43 (Pa. Super. 2003) (finding two rulings within order did not satisfy collateral order test, that a third ruling was based on a record insufficient to determine whether the test was met, and that a fourth ruling within the order met the test); G. Ronald Darlington, et al., Pennsylvania Appellate Practice, § 313:2, at 3-187 (2d ed. 2004). Thus, when addressing a multi-issue order, our Court has applied Rule 313 issue-by-issue.

Here, however, the majority does not separately analyze the distinct aspects of the discovery order at issue: (1) whether there was good cause for discovery under Pa.R.Crim.P. 902(E)(2); and (2) whether certain of the Commonwealth's material is covered by the work product doctrine. While the majority analyzes the Commonwealth's assertion of the work product doctrine under all three prongs of the collateral order test, it does not do so with respect to the Commonwealth's challenge to the good cause determination. While it is true that there must be good cause for discovery under Pa.R.Crim.P. 902(E)(2), our case law makes clear that this question is

separate from, and cannot serve as part of, the analysis regarding our Court's jurisdiction for immediate appeal of the work product privilege issue.

Indeed, the majority opinion could be erroneously interpreted to suggest that a mere allegation of the absence of good cause for discovery is also immediately appealable under the collateral order doctrine. Again, consistent with the narrow nature of the collateral order doctrine, the majority, having reviewed the work product determination under the collateral order doctrine to determine whether we have jurisdiction, was limited to addressing that issue on the merits. Whether the good cause for discovery issue meets the collateral order doctrine is a separate question, and the majority does not apply all three prongs of the collateral order test to this distinct legal issue.[1] Declining to engage in an analysis of whether the good cause issue meets the jurisdictional three-prong collateral order test, the majority proceeds to resolve the appeal on an issue that has not satisfied the jurisdictional test, in direct contravention of our case law. See Rae.

Further, the majority improperly engrafts the concept of whether there was good cause for discovery into the jurisdictional calculus for the assertion of the work product privilege. Majority Opinion at 15-16. By injecting into the work product jurisdictional analysis the question of whether good cause is shown, the majority, in my view, fatally undercuts its assertion under the first prong of the collateral order doctrine that the question on which collateral review is based is truly distinct from the merits of the underlying Brady claim,[2] which is one of the principal issues being litigated in Appellee's PCRA petition; it also seemingly undermines the second prong that the claim must

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[1] Indeed, I believe a significant question exists as to whether the mere determination of good cause for discovery satisfies the exacting requirements of the collateral order doctrine as expressed in Rule 313.
[2] Brady v. Maryland, 373 U.S. 83 (1963).

implicate interests deeply rooted in public policy important to individuals other than those involved in the case.

A demonstration of good cause, as articulated by the majority, requires "an explanation why the exculpatory information was unavailable to prior counsel and must identify specific documents or items that were not disclosed pre-trial or during the trial proceedings." Majority Opinion at 29. Yet, such considerations — establishing exculpatory information, justifying the failure to previously obtain the material, and the identification of specific documents — overlap with the merits of the underlying Brady claim.[3] Thus, if, as we have held, that every one of the three prongs be "clearly present" before collateral review is allowed, Melvin v. Doe, 836 A.2d 42, 47 (Pa. 2003), and good cause is part of the work product jurisdictional analysis, then it strongly appears the discovery order is **not** "entirely distinct from the merits [of the] Brady claim appellee hopes to develop," Majority Opinion at 16, and the first prong of the collateral order test regarding jurisdiction based upon work product cannot be satisfied. Similarly, and again, unlike the work product privilege, I question whether the mere determination of good cause for discovery implicates a claim that involves interests deeply rooted in public policy considered too important to be denied review, Geniviva v. Frisk, 725 A.2d 1209, 1214 (Pa. 1999), and which transcends the immediate parties.

In sum, with respect to the threshold jurisdictional issue, in my view, the majority errs by: (1) in failing to conduct an independent analysis of whether the separate good cause issue meets the jurisdictional three-prong collateral order test; and (2) engrafting the distinct question of good cause for discovery onto the issue of whether the assertion

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[3] To establish a Brady violation, a petitioner must prove: "(1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it impeaches; (2) the evidence was suppressed by the prosecution, either willfully or inadvertently; and (3) prejudice ensued." Commonwealth v. Spotz, 47 A.3d 63, 84 (Pa. 2012).

of the work product privilege may be immediately heard on appeal under the collateral order doctrine.

Regardless, even if we could reach the good cause issue, in my view, we should not resolve the question on the merits. As noted by the majority, the PCRA court's explanation for permitting discovery and denying the Commonwealth the protection of the work product doctrine is cursory and divorced from any applicable legal standards. Rather, in light of the circumstances of this appeal, the lack of a meaningful opinion or explanatory order by the PCRA court, and our standard of review in which we consider whether the lower court abused its discretion, I believe the proper disposition should be to remand the matter to the PCRA court for a written opinion detailing its exercise of discretion in determining that discovery was proper and the work product privilege unavailing.

Generally speaking, the purpose of discovery is, ultimately, to allow a fair trial on the merits. Lomish v. Morris Nimelstein Sportswear Co., Inc., 80 A.2d 805, 807 (Pa. 1951) ("Discovery . . . having a salutary effect upon the administration of justice in that it enables parties litigant to secure facts which would otherwise be denied them and thus constitutes a useful and practical implement in the search for and the presentation of truth"). In my mind, this goal reasonably applies to both pre-trial and post-trial discovery. While, under the PCRA, the default is to prohibit discovery, discovery is nonetheless permitted upon the moving party establishing "good cause." Pa.R.Crim.P. 902(E)(2). Related thereto, there is a continuing duty to disclose exculpatory material pursuant to Brady. Further, the present matter involves a death sentence based on a conviction grounded largely on the testimony of Appellee's co-conspirators, and, thus, Appellee's allegations regarding a change in testimony by Commonwealth witnesses which allegedly was not disclosed to defense counsel have added importance. As

noted by the majority, however, the PCRA court's three-sentence explanation permitting discovery is devoid of analysis, including any consideration of the applicable legal standards. Thus, the PCRA court has failed to supply this Court with an analysis of the good cause standard, the work-product doctrine, proper burdens of proof, or a meaningful application of these standards to the circumstances in this matter that led to the court's conclusion that good cause was met and the work product doctrine did not protect the Commonwealth from discovery.

Yet, for appellate review, an explication of the lower tribunal's rationale is essential, as decisions involving discovery matters are within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. Commonwealth v. Edmiston, 65 A.3d 339, 353 (Pa. 2013). An abuse of discretion "is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will . . . discretion is abused." Commonwealth v. Selenski, 994 A.2d 1083, 1087 (Pa. 2010). Further, an abuse of discretion may not be found merely because an appellate court might have reached a different conclusion on the record before it. Commonwealth v. Walls, 926 A.2d 957, 961 (Pa. 2007). Indeed, in light of the absence of a meaningful PCRA court opinion, it appears that the majority has done just this, and rather than review for an abuse of discretion, has improperly engaged in *de novo* review. In my view, it is difficult in the extreme, and certainly imprudent in this capital matter, to analyze whether the PCRA court abused its discretion in these circumstances without an understanding of its rationale. Thus, I would remand this matter to the PCRA court for the drafting of an opinion explaining the basis for its discovery determinations. Only then will we be in a proper position to review the exercise of its discretion.

Finally, consistent with my prior position in this area, that any impropriety in the FCDO's participation in state court matters should be dealt with in the normal course of disciplinary proceedings, I respectfully dissent from the majority's *sua sponte* directive to the PCRA court to resolve on remand the propriety of the FCDO's participation in state court proceedings. See Commonwealth v. Wright, 78 A.3d 1070 (Pa. 2013) (Todd, J. concurring and dissenting). Notably, the Commonwealth, although identifying the potential issue, does not request any action on our part.

For all of these reasons, I must respectfully dissent.