[J-112-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 15 WAP 2003
	:	
Appellant	:	
	:	Appeal from the Order of the Superior
	:	Court entered April 17, 2002, at No.
v.	:	2041WDA2000, affirming the Order of the
	:	Court of Common Pleas of Crawford
	:	County entered November 8, 2000 at No.
DAVID JOSEPH DINICOLA,	:	1998-450.
	:	
Appellee	:	ARGUED: September 9, 2003
	:	

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: JANUARY 19, 2005**

Like Madame Justice Newman, I join the portion of the majority's opinion applying the fair response doctrine under United States v. Robinson, 485 U.S. 25, 108 S. Ct. 864 (1988). Also in line with Justice Newman's position, however, as regards Appellee's claim of ineffective assistance of his trial counsel for implicating the disclosure to the jury that Appellee did not cooperate in police efforts to investigate K.H.'s accusation against him, I respectfully differ with the majority's decision to dispose of the claim on the basis that Appellee suffered no prejudice as a result of the disclosure. On this point, I believe that the majority's analysis does not give sufficient recognition to the central role of Appellee's credibility at trial, in light of the absence of direct evidence to support K.H.'s accusation of criminal conduct on his part. Furthermore, in its prejudice analysis, the majority affords no express consideration to

the long line of this Court's decisions recognizing the potential impact that disclosure of a criminal defendant's silence or assertion of privilege in the face of accusation or questioning may have upon a jury determination of guilt versus innocence. See, e.g., Commonwealth v. Clark, 533 Pa. 579, 587, 626 A.2d 154, 157-58 (1993) (indicating that improper references to a defendant's post-arrest silence are innately prejudicial); Commonwealth v. Turner, 499 Pa. 579, 583, 545 A.2d 537, 539 (1982) ("The view of this Court that there exists a strong disposition on the part of lay jurors to view the exercise of the Fifth Amendment privilege as an admission of guilt is well established."); Commonwealth v. Haidman, 449 Pa. 367, 371, 296 A.2d 765, 767 (1972) ("We would be naïve if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt." (quoting Walker v. United States, 404 F.2d 900 (5th Cir. 1968)).[1]

[1] Accord Snyder v. State, 762 A.2d 125, 133 (Md. 2000) ("Many of our sister states that have considered this issue have expressed their distrust of evidence of pre-arrest silence as probative of a consciousness of guilt, noting its inherently low probative value and its high potential for unfair prejudice.") (collecting cases). Indeed, a number of states have crafted evidentiary rules that presume that the potential for prejudice inherent in such evidence outweighs its probative worth in absence of unusual circumstances. See, e.g., People v. Conyers, 420 N.E.2d 933, 934 (N.Y. 1981); People v. DeGeorge, 541 N.E.2d 11, 13-14 (N.Y. 1989).

In place of a discussion of the many decisions concerning prejudice arising from references to a defendant's silence or assertion of privilege in the face of accusation or questioning, the majority diverts its attention to a passage from Commonwealth v. Dravecz, 424 Pa. 582, 227 A.2d 904 (1967), that addresses the low probative value associated with silence in the face of an accusation of criminal conduct. See Majority Opinion, slip op. at 13 n.8. As pertains to the relevant issue of prejudice, however, Dravecz is entirely consistent with the other decisions of this Court that have recognized the reality that lay jurors may attribute such silence to consciousness of guilt. See, e.g., Dravecz, 424 Pa. at 588, 227 A.2d at 907 (characterizing the assertion of a tacit admission as "as insidious as monoxide gas which does not proclaim its presence through sound or smell" and as "a diesel locomotive silently but relentlessly moving forward without audible signals and striking the victim unawares").

While I therefore tend toward Appellee's position regarding the prejudice prong of the ineffectiveness inquiry, in the present posture of the case, I have greater difficulty with his case in terms of the arguable merit and reasonable strategy requirements.

I recognize that counsel's strategy of attacking the police investigation was questionable, in the first instance, as it was clear that the officer's opportunities to uncover direct evidence concerning the alleged criminal conduct were limited (since Appellee and K.H. were the only eyewitnesses); the officer had interviewed a range of staff members and discerned that Appellee was in a position to have perpetrated the alleged criminal act at the time and in the location described by K.H.; the officer had uncovered circumstantial evidence of Appellee's previously having reached or exceeded the boundaries of a professional relationship with K.H; and counsel was unable to point to any particular exculpatory information that the officer should have learned. Thus, there were apparent downsides to the strategy in terms of drawing the Commonwealth's fair response reference to Appellee's failure to cooperate in the investigation, repetition before the jury of already developed Commonwealth evidence, and fostering of potentially negative impressions that may be associated with assertive examination of a witness at trial, and in particular, one who carries the authority of the state. On the other hand, in the arena of adversarial litigation, occasionally such aggressive tactics will bear fruit. Additionally, as apparently the defense contemplated that Appellee would testify from the outset of the trial,[2] the strategy did not appear to conflict with the overall design of the defense.

[2] See N.T., Nov. 19, 1998, at 291 (reflecting trial counsel's explanation to the jury that it was essential for Appellee to present his version of the events that occurred only in his and K.H.'s presence).

The above demonstrates, at a minimum, some of the mixed considerations in play in the evaluation of trial strategy. However, a more concrete weighing, from the appellate perspective, of the strategy, as it relates to the consequence of counsel's implicating the Commonwealth's fair-response reference to Appellee's failure to cooperate in the police investigation, is hampered by the absence of properly focused findings and conclusions from the trial court. This deficit is a result of the proceedings in this case having strayed afield from the essential task of weighing the quality of trial counsel's strategy of attacking the police investigation against the quantum of prejudice inherent in the responsive revelation to the jury of the fact of Appellee's pre-arrest silence.

At the outset, the trial court grounded its first opinion on an incorrect legal conclusion that the case simply did not involve the kinds of concerns associated with references to pre-arrest silence.[3] Thus, the trial court, in the first instance, failed to produce essential and directed factual findings and legal conclusions, grounded in an evidentiary record (indeed, there appears to be no record at all of the initial, post-sentence hearing). On appellate review, the relevant issue was further clouded by the Superior Court panel's mistaken belief that Appellee did not testify at his trial. See Commonwealth v. DiNicola, 751 A.2d 197, 202 (Pa. Super. 2000) ("DiNicola I").

[3] I would explicitly reject this conclusion. Although there may be permutations in which revelation of a defendant's decision to decline an interview may implicate lesser degrees of potential prejudice, cf. State v. Purvey, 740 A.2d 54, 64 (Md. 1999) (holding that a defendant's refusal to reduce a statement to writing, without more, is not an invocation of his or her right to remain silent, thus the admission of such silence in response to a detective's subsequent observation is not in error), here, in addition to the fact of a general denial, the investigating trooper related Appellee's decision to consult with his counsel, and counsel's specific admonition that Appellee would invoke his Fifth Amendment right to remain silent at any interview. Cf. Combs v. Coyle, 205 F.3d 269, 286 (6th Cir. 2000) (analyzing a defendant's statement to police "talk to my lawyer" as an instance of pre-arrest silence).

Moreover, DiNicola I did not consider the matter along the lines of the fair response doctrine under Robinson, 485 U.S. at 25, 108 S. Ct. at 864, and thus, did not recognize the interrelationship between trial counsel's initial strategy in questioning the scope of the arresting trooper's investigation and the viability of an objection to the Commonwealth's cross-examination of that officer. The result was that the panel errantly bifurcated its analysis of trial counsel's initial strategy choice and his later failure to object to responsive cross-examination. This is particularly significant because the Superior Court held that the initial strategy choice was reasonable, see DiNicola I, 751 A.2d at 200, a conclusion which is fatal to Appellee's present claim and which could not be disturbed in the course of the remand proceedings in the trial court. However, the Superior Court panel's approval of counsel's line of inquiry as supported by a reasonable strategy was via a generalized and conclusory reference to its potential to prove Appellee's innocence, see id., without evaluation of the strategy in terms of its likelihood of achieving that result, or its effect on the availability of an objection to responsive references to Appellee's silence (about which trial counsel was warned at sidebar).

Combined with DiNicola I's incorrect, blanket proscription against any reference to silence where a defendant does not testify, see DiNicola I, 751 A.2d at 201, these errors had the effect of misdirecting the focus of the proceedings on remand, so that, again, a trial court opinion assessing arguable merit, reasonable strategy, and prejudice in the proper factual and legal context was not produced. Indeed, in light of the trial court's understanding of DiNicola I's holding, namely, that references to pre-arrest silence were never admissible under any circumstances, it was a relatively simple matter for the court to conclude that counsel should have objected to the Commonwealth's cross-examination of the trooper which implicated Appellee's silence.

While the Superior Court in Commonwealth v. DiNicola, 797 A.2d 966 (Pa. Super. 2002) ("DiNicola II"), did recognize DiNicola I's most patent error, the en banc panel also overlooked the Robinson fair response doctrine and therefore accepted the bifurcated manner of review fashioned in DiNicola I, refraining from discussion of the ineffectiveness claim in terms of the selection and pursuit of the overall trial strategy of attacking the police investigation, in light of the prior panel's disposition of that issue. Moreover, in the absence of a sufficient opinion from the trial court, the DiNicola II court was relegated to speculation in material respects. For example, as the Commonwealth has correctly noted, the reasoning supporting DiNicola II's finding of prejudice (namely, that the disclosure of Appellee's pre-arrest silence impeded his remaining silent at trial), is unsupported as of record. In this regard, there is no evidence that the defense trial strategy would have been any different had the disclosure not been made; indeed, as noted, trial counsel explained to the jury that it was essential for Appellee to present his version of the events that occurred in only K.H.'s and his presence. See supra note 2.

In this landscape, I would not attempt to undertake, from the appellate perspective and for the first time in this case, a merits determination concerning arguable merit, reasonable strategy, or prejudice in their proper context, particularly as the necessary inquiry is bound up in judgments that may be affected by impressions that are not apparent on the face of the written record. See generally Commonwealth v. Grant, 572 Pa. 48, 66, 813 A.2d 726, 737 (2002) (observing that "the trial court is in the best position to review claims related to trial counsel's error in the first instance as that is the court that observed first hand counsel's allegedly deficient performance"). Thus, for this case to be decided on the merits, I would agree with Madame Justice Newman that it would be most appropriate for it to be returned to the trial court for the necessary assessment in the first instance.

Appellee, however, presents the argument that further consideration of the merits of his claim is unnecessary, contending that waiver principles should be applied to resolve the appeal, since the DiNicola I panel's order was a final one, and the Commonwealth did not appeal the panel's adverse determination with respect to several of its core arguments.

Appellee is correct that under Pennsylvania Rule of Appellate Procedure 1112(b), an order of the Superior Court remanding an appeal, in whole or in part, constitutes a final order subject to such review as may be allowed by this Court under its discretionary review procedures. See Pa.R.A.P. 1112(b). Further, at least one intermediate appellate court decision supports Appellee's view that arguments resolved contrary to a litigant's position in a remand opinion of an intermediate appellate court will be deemed waived if the litigant does not seek allowance of appeal prior to effectuation of the remand (or successfully pursue reargument). See AT&T v. WCAB (DiNapoli), 816 A.2d 355, 359 (Pa. Cmwlth. 2003). Moreover, no party to this appeal expressly advocates a contrary position.[4]

However, it is significant, in my view, that the en banc panel in DiNicola II supplanted DiNicola I's merits determinations as concerns the arguments that had been resolved unfavorably to the Commonwealth, in apparent application of the exceptional circumstances exception to the law of the case doctrine.[5] Additionally, the legal

[4] The Commonwealth did not file a reply brief in answer to Appellee's waiver argument.

[5] Under the law of the case doctrine, upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court. See Commonwealth v. Starr, 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995). The extraordinary circumstances exception is implicated, however, where the prior holding was clearly erroneous and would create a manifest injustice if followed. See id. at 575-76, 664 A.2d at 1332.

questions involved pertain to separate but interrelated facets of a single test for assessing the stewardship of counsel.[6] In such circumstances, I would not treat the Commonwealth's issues as waived based on its decision to accede to the remand following DiNicola I.[7]

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[6] Particularly in the circumstance involving strategic weighing decisions by a trial attorney, the arguable merit and reasonable strategy prongs of the ineffectiveness test may overlap substantially.

[7] Moreover, I am of the view that the Commonwealth's failure to appeal DiNicola I did not deprive this Court of its ability to sustain a valid judgment for any reason appearing as of record in appropriate circumstances, without requiring of the judgment winner strict adherence to principles of issue presentation and preservation. See generally McAdoo Borough v. Commonwealth, Pa. Labor Relations Bd., 506 Pa. 422, 428-29 n.5, 485 A.2d 761, 764 n.5 (1984); E.J. McAleer & Co. v. Iceland Products, Inc., 475 Pa. 610, 613 n.4, 381 A.2d 441, 443 n.4 (1977); Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 145-46, 189 A.2d 271, 274 (1963); Sherwood v. Elgart, 383 Pa. 110, 115, 117 A.2d 899, 901 (1955). Significantly, the focus of the right-for-any-reason doctrine in Pennsylvania is on upholding the judgment of the fact-finding tribunal, not that of the intermediate appellate court. See, e.g., E.J. McAleer, 475 Pa. at 613 n.4, 381 A.2d at 443 n.4 ("We may, of course, affirm the decision of the trial court if the result is correct on any ground . . .." (emphasis added)); Commonwealth v. Katze, 540 Pa. 416, 425, 658 A.2d 345, 349 (1995) (opinion divided on other grounds) ("The Commonwealth, as the [verdict winner and] non-moving party before the trial court in the instant matter, had no obligation to preserve issues at the post-trial stage in the appeal process."). This approach mirrors that of virtually every other jurisdiction. See, e.g., Helvering v. Gowran, 302 U.S. 238, 245-46, 58 S. Ct. 154, 158 (1937); Southtrust Corp.. v. Jones, 880 So.2d 1117, 1122 (Ala. 2003) ("we are cognizant of the settled rule that '[t]he appellate courts will affirm the ruling of the trial court if it is right for any reason'"); State v. Canez, 42 P.3d 564, 582 (Ariz. 2002) ("we are obliged to uphold the trial court's ruling if legally correct for any reason"); National Tax Funding, L.P. v. Harpagon Co., 586 S.E.2d 235, 240 (Ga. 2003) ("even though the trial court's ruling was based upon an insufficient analysis, it was nonetheless correct and is hereby affirmed under the 'right for any reason' rule"); Robeson v. State, 403 A.2d 1221, 1223 (Md. 1964)("Where the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm."). The precept derives from the same doctrinal roots as does the principle that testimony on appeal must be considered in the light most favorable to a verdict-winner, see generally Hader, 410 Pa. at 145-46, (continued . . .)

In advancing his theory of waiver, however, Appellee overlooks that he also suffered a material adverse determination in DiNicola I that he also did not appeal -- the conclusion that trial counsel's attack on the police investigation was grounded in a reasonable strategy. See DiNicola I, 751 A.2d at 200. Moreover, there are substantially better reasons to treat Appellee's omission in this regard as a waiver of further appellate review of the resolution of that issue in DiNicola I. In the first instance, Appellee bore the burden of offering any facts essential to his claim into evidence and presenting a full and complete record to the Superior Court in DiNicola I, see Commonwealth v. Chopak, 532 Pa. 227, 236 n.5, 615 A.2d 696, 701 n.5 (1992), which, for reasons undisclosed as of record, he failed to do. See Majority Opinion, slip op. at 4-5 & n.2. Since the Court is presented with no evidence or argument to the effect that Appellee was denied the opportunity to develop his evidence in the post-sentence proceedings, the material deficit in the record discerned by the DiNicola I panel should have been deemed fatal to Appellee's initial appeal and should not have resulted in the remand that ensued. Just as critically, in failing to challenge by way of reargument or appeal DiNicola I's conclusion that trial counsel's strategy of attacking the police investigation was reasonable, Appellee acceded to a narrowly tailored remand that, by design, would result in a trial court opinion that was again lacking in terms of findings and conclusions

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(...continued)
189 A.2d at 274; accord First Union Nat'l Bank v. Turney, 839 So.2d 774, 777 (Fla. Dist. Ct. App. 2003) (citing Cohen v. Mohawk, Inc., 137 So.2d 222, 225 (Fla. 1962)), and is also applied in furtherance of judicial economy and the orderly administration of justice. See, e.g., Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d 1141, 1154 (9th Cir. 2000) ("Where precisely the same result could have been reached on other grounds apparent from the record, sending the case back to the district court is wasteful both for the courts and for the litigants."); Robeson, 403 A.2d at 1223. The right-for-any-reason doctrine is, of course, a prudential one, and must be applied with due regard for fairness and its interrelationship with other prevailing precepts of appellate review.

essential to success on his claim for relief. In this regard, I note that one of the primary reasons underlying the waiver doctrine is to ensure that the appellate court is provided with the benefit of the trial court's reasoning. See Commonwealth v. Metz, 534 Pa. 341, 346 n.3, 633 A.2d 125, 127 n.3 (1993).[8] Finally, Appellee himself urges upon this Court the theoretical position concerning waiver that would foreclose further argument on his part pertaining to material aspects of the central issue of reasonable strategy in his counsel's attack on the police investigation, and this is consistent with presently prevailing law as established by the intermediate appellate courts and in the absence of a definitive ruling by this Court.[9]

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[8] The majority addresses the waiver argument as it pertains to the Commonwealth's arguments by concluding that the DiNicola II's correction of DiNicola I's erroneous assumptions "wiped the slate clean" as concerns waiver. Majority Opinion, slip op. at 12 n.7. Significantly, however, the erroneous assumptions that were corrected did not in any way go to the deficiencies in Appellee's position, in particular, the Superior Court's initial (and never-altered) finding of reasonable strategy on the part of counsel in attacking the police investigation, and Appellee's failure to assure that an adequate record was presented to the Superior Court in the first instance.

[9] Particularly since both sides of the question are not presented by the parties, I would refrain from a categorical ruling concerning the obligation of a party suffering an adverse determination concerning one particular line of argument in the intermediate appellate courts to file a petition for allowance of appeal in order to preserve the opportunity for further review of that issue. In this regard, I note that, on the one hand, a remand directive bears hallmarks of an interlocutory decision, as the matter is being returned to the adjudicatory level for production of a record (or supplemental record) predicate to any further appellate review. In light of the potential interdependence of issues, and since at least one issue material to the outcome of the case remains to be decided, concerns for fairness and efficiency militate against requiring a potentially interim and unnecessary appeal. On the other hand, there are instances, as here, in which the intermediate appellate court's resolution of issues and arguments may integrally affect the scope of the proceedings on remand, thus militating in favor of requiring any contest to occur prior to effectuation of the remand.

In the circumstances, I deem Appellee's arguments concerning the reasonableness of his trial counsel's strategic attack on the police investigation waived as of his failure to appeal DiNicola I's adverse determination in this regard.[10] This would have the effect of deferring any further review to the post-conviction stage, at which time Appellee should be permitted to develop any claims of ineffectiveness of counsel in acceding to the Superior Court's initial finding of reasonable strategy, and in failing to present an adequate record to the Superior Court in the first instance. Further, such a decision would highlight this Court's expectation that litigants who have suffered an adverse judgment must ensure that the essential predicates to appellate review are thereafter maintained, or frame their subsequent submissions to the appellate courts to include a challenge to the manner in which their ability to ensure these essential predicates was impeded.

[10] While I recognize that the Commonwealth has not pursued this line of waiver argumentation in its brief, I believe that traditional review principles, available to be exercised by this Court of its own accord, permit the Court to look down on the record and determine where the proceedings went awry, and if fault is attributable to the judgment-loser, to uphold the verdict. See supra note 7. Here, I find such approach to be greatly preferable to a merits analysis that is grounded on an incomplete record and out of sync with this Court's long-standing understanding of the effect that jurors in their deliberations may give to evidence of a defendant's silence or assertion of privilege in the face of accusation or questioning.