[J-141-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 12 EAP 2001
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered July 3, 2000, at 1782 EDA
	:	1999, affirming the Order of the Court of
v.	:	Common Pleas of Philadelphia County
	:	entered on May 11, 1999, at No. 94-10-
	:	0765.
ALBERT BUTLER,	:	
	:	756 A.2d 55 (Pa. Super. 2000)
Appellant	:	
	:	SUBMITTED: August 7, 2001
	:	
	:	
	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: December 19, 2002**

I join the majority opinion, which affirms the order of the Superior Court, which affirmed the denial of appellant's petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§9541-46. I write separately to address points made in the dissenting opinion by Mr. Justice Nigro.

The majority holds that appellant's failure to properly file a statement of matters complained of on appeal, in response to the PCRA court's directive that he do so under Pa.R.A.P. 1925(b), results in the waiver of any appellate issues he would have raised. This holding is commanded by Commonwealth v. Lord, 719 A.2d 306 (Pa. 1998). As the majority notes, in Lord, this Court, in an opinion authored by Mr. Justice Nigro, specifically held that:

> [F]rom this day forward, in order to preserve their claims for appellate review, Appellants **must comply** whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925. **Any issues not raised in a 1925(b) statement will be deemed waived**.

719 A.2d at 309 (emphases supplied). The "day forward" referred to in Lord was the date of the decision, *i.e.*, October 28, 1998. It was not until June 25, 1999, almost eight months later, that appellant was ordered to file an Appellate Rule 1925 statement in this case. His failure to do so, under the plain and unequivocal language of Lord, requires affirmance of the Superior Court's order.

As the majority recognizes, the bright line interpretation of Appellate Rule 1925(b) ultimately set forth in Lord was not commanded by the actual language of the rule, since it is expressed in purely discretionary terms, *i.e.*, "A failure to comply with such direction **may** be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of." Pa.R.A.P. 1925(b) (emphasis supplied). As the majority also aptly notes, Lord "eliminated any aspect of discretion" in treating a failure to comply with an Appellate Rule 1925(b) directive. The very fact that this Court altered the nature of the Rule from permissive to mandatory obviously is one of the reasons our bright-line construction was given prospective effect only.

I have no qualms about the merit of the construction prospectively adopted in Lord. Requiring compliance with an Appellate Rule 1925 directive aids the trial judge in identifying which issues to write upon, it helps to ensure effective appellate review, and it provides for a certainty and evenness in application that is difficult, if not impossible, to achieve via a discretionary rule. Moreover, since Appellate Rule 1925 is a rule of our own creation, I had no difficulty in Lord, and I have no difficulty now, with our effectively amending the rule via a prospective decision, rather than through the formal rulemaking process.

The dissent offers a narrowing construction of Lord's unequivocal, prospective holding, suggesting that it was powered by the interplay between Appellate Rule 1925 and Criminal Procedure Rule 720 (then-Rule 1410), which governs post-sentencing procedures. Since Lord involved a direct criminal appeal, and spoke to the interplay of Appellate Rule 1925 and a post-verdict rule, the dissent suggests, Lord's holding should be confined to direct appeals. The dissent objects to what it views as the majority's "expansion" of the holding in Lord, which it deems "unwarranted and unfair." In my view, the dissent's quarrel is with Lord and not with the majority's proper application of that unequivocal decision.

Whatever may have been the factual and procedural posture of the case in Lord, the **holding** at issue was specifically rendered under Appellate Rule 1925, it was rendered **without qualification**, and it was rendered in light of the purpose which **Appellate Rule 1925** is designed to serve. The Rules of Appellate Procedure govern **all** appeals, not just criminal appeals, and not just direct criminal appeals. See Pa.R.A.P. 103 ("Scope of Rules") ("These rules govern practice and procedure in the Supreme Court, the Superior Court and the Commonwealth Court, including procedure in appeals to such courts from lower courts…."). The distinction offered by the dissent is not recognized in the Rules, nor was it recognized in Lord.

Indeed, the issue in Lord was not whether there was something unique to criminal direct appeals which required that Appellate Rule 1925 be construed differently than it would be in all other appellate contexts, **but the very opposite**: did the fact that Criminal Rule 720, which was relatively new and which provides that issues raised before or during trial shall be deemed preserved for appeal irrespective of whether the defendant renews them in a post-sentence motion, render a potential waiver under Appellate Rule 1925 inoperative? The question, in essence, was whether direct criminal appeals were **excepted** from the general **appellate** waiver rule set forth in Appellate Rule 1925.

In deciding the question, the Court in Lord noted that the Superior Court had interpreted the new criminal rule as relieving criminal defendants of the obligation to "list[] all appellate issues in a 1925(b) statement" if the issues not raised could be effectively reviewed from the record. We explicitly "disagree[d]" with those decisions, not because of anything unique to direct criminal appeals, but because of the purpose of Appellate Rule 1925:

> The absence of a trial court opinion poses a substantial impediment to meaningful and effective appellate review. Rule 1925 is intended to aid trial judges in identifying and focusing upon those issues that the parties plan to raise on appeal. Rule 1925 is thus a crucial component of the appellate process.

Lord, 719 A.2d at 308. Accord Commonwealth v. Johnson, 771 A.2d 751, 755 (Pa. 2001) (plurality opinion). Accordingly, we held that direct criminal appeals were **not** excepted from Appellate Rule 1925 and, in so holding, we announced the prospective interpretation of the appellate waiver standard set forth in Appellate Rule 1925(b). Nothing in Lord remotely suggested that the Appellate Rule 1925 holding was **limited** to direct criminal appeals, as if the unitary language and purpose of the Rule means one thing for some appeals, and something entirely different for others.

As noted above, I recognize, as the majority does, that our prospective interpretation of Appellate Rule 1925 in Lord was stricter than what the rule's plain language suggested. But the strictness of our prospective interpretation had nothing to do with the fact that Lord involved a direct criminal appeal, rather than a civil appeal, or a PCRA appeal, or any other appeal; it had to do with the necessary and salutary function of Appellate Rule 1925 as a rule of **appellate** procedure. As such, it is an interpretation that necessarily must apply to **all** cases on appeal. Notably, both the Superior Court and the Commonwealth Court have applied the teaching of Lord to civil cases no less than to criminal cases. Lobaugh v. Lobaugh, 753 A.2d 834, 837-38 (Pa. Super. 2000); Giles v. Douglass, 747 A.2d 1236,

1236-37 (Pa. Super. 2000); Municipality of Monroeville v. Monroeville Police**,** 767 A.2d 596, 599 n.6 (Pa.Cmwlth. 2001), *allocatur denied*, 782 A.2d 551 (Pa. 2001); Cheltenham Twp. Sch. Dist. v. Slawow, 755 A.2d 45, 48 (Pa.Cmwlth. 2000). I would not undo Lord's salutary effect in an *ad hoc* fashion.

Even if I believed that Appellate Rule 1925, as construed in Lord, was subject to equitable exceptions upon an *ad hoc* basis, I see nothing "unfair" in holding PCRA appeals subject to the rule. Indeed, in my view, an exception for PCRA appeals would be perverse. First, it is difficult to understand why notions of fairness would require favoring a collateral appeal in a criminal case over the direct appeal. Indeed, the equities work in the opposite direction. The right of direct appeal is constitutional while the right of PCRA review exists only by statute, with the right of PCRA appeal being secondarily triggered. Moreover, the claims available upon PCRA review are far more restricted than are available upon direct appeal; although PCRA review may be a "safety valve" to permit review of some issues not previously or properly raised, it is by no means a substitute for a direct appeal.

More importantly, the PCRA affords criminal defendants something which is afforded to no other litigant: a second bite at the review apple. Application of Lord on a direct civil appeal puts that appellant out of court **forever** with respect to the waived claims. Those civil appellants who have their claims deemed waived under Lord (or under any waiver doctrine) have no "safety valve" whatsoever. I would not place a greater value upon an appeal of a collateral attack upon a final judgment, an attack not available to all, than I would place upon the right of appeal, which is available to all. Thus, in my mind, if Lord sufficiently balances the equities in the direct appeal context, it necessarily is fair in the context of collateral appellate review of final criminal judgments.

The majority rightly applies Lord in this appeal. I join the opinion without reservation.