

[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
	:	

DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: December 19, 2002

I disagree with the majority's conclusion that the failure of Appellant's counsel to file a court-ordered Pa.R.A.P. 1925(b) statement resulted in the automatic waiver of all the claims that Appellant raised on appeal from the denial of his PCRA petition. In my view, the strict waiver rule from Commonwealth v. Lord, 719 A.2d 306 (Pa. 1998), is not applicable to the unique circumstances of a PCRA appeal. Thus, I must respectfully dissent.

Appellant filed a *pro se* PCRA petition on February 26, 1998, which was later amended by appointed counsel. Over one year later, on May 11, 1999, Appellant's amended petition was dismissed without a hearing, the PCRA court having determined that a decision could be made from the existing record. Appellant filed a notice of appeal to the Superior Court, and on June 25, 1999, the PCRA court ordered him to file a statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant's counsel did

not file a Rule 1925(b) statement on his behalf and, as a result, in its Rule 1925(a) opinion the PCRA court addressed only the issues Appellant raised in his amended PCRA petition.

The Superior Court affirmed the PCRA court's denial of Appellant's PCRA petition without considering the merits of any of his appellate issues. Commonwealth v. Butler, 756 A.2d 55 (Pa. Super. 2000). Instead, the court deemed all of Appellant's claims waived due to his failure to file a Rule 1925(b) statement, concluding that a PCRA petition may not serve as a substitute for a 1925(b) statement. I agree with Appellant that the Superior Court erred in refusing to address the merits of the issues he raised in his PCRA petition.

In Commonwealth v. Lord, this Court considered whether Pennsylvania Rule of Criminal Procedure 720 (formerly Rule 1410(B)(1)(c)) precludes an appellate court from deeming an issue waived when an Appellant fails to raise that issue in his Rule 1925(b) statement. 719 A.2d at 307. Thus, Lord involved the interplay between Rule 1925(b) and Rule 720, which states that issues raised before or during trial are preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues.¹ After examining the intent behind Rule 720 and the importance of Rule 1925 to the appellate

¹ Some lower courts had concluded that, pursuant to post-trial procedures under Rule 720, appellants on direct appeal were not required to list all appellate issues in a 1925(b) statement as long as the issues not raised in the statement could be effectively reviewed from the record. As we explained in Lord, Rule 720 was enacted in order to eliminate the "double waiver" doctrine:

Prior practice required that to preserve an issue for appeal, the matter must have been raised initially when it occurred either before or during trial, and then be included in the Post-verdict Motion. Failure to include an issue in the Post-verdict Motion resulted in it being waived on appeal and often led to subsequent attacks on the conviction claiming counsel's ineffectiveness. New [Rule 720] was intended to eliminate this cumbersome process and allow the first appeal to address the issues properly raised before and during trial.

Lord, 719 A.2d at 308-09 (citation omitted).

process, we determined that the Rules were not in conflict, and that Rule 720 did not modify the operation of Rule 1925. Given this determination, we held that in order to preserve their claims for appellate review, appellants must comply whenever the trial court orders them to file a 1925(b) statement and that any issue not raised in an appellant's 1925(b) statement will be deemed waived. Id. at 309.

Given this analysis and reasoning, it is clear to me that the strict waiver rule of Lord applies only in the context of direct appeals. The majority essentially agrees with this conclusion, but then expands the strict waiver rule to PCRA appeals, explaining that because the purpose of Rule 1925 is to aid trial judges in identifying the issues a party plans to raise on appeal, the need for a 1925(b) statement still exists at the PCRA level. As a result, the majority finds that Appellant's PCRA petition cannot serve as a substitute for a 1925(b) statement, and instead concludes that the strict waiver rule from Lord applies to Appellant's appeal from the denial of his PCRA petition. In my view, this expansion of Lord is not only unwarranted, but simply unfair.

Importantly, when a court applies the strict waiver rule of Lord on direct appeal, the appellant still has the safety valve of PCRA review. See Commonwealth v. Johnson, 771 A.2d 751, 759 n.1 (Pa. 2001) (Nigro, J., concurring and dissenting) ("Appellant, however, may still seek relief for his ineffective assistance of counsel claim under the [PCRA]"). This protection, however, is clearly absent on appeal from the denial of a PCRA petition. While I recognize that the PCRA represents the General Assembly's attempt to provide some finality to criminal appeals, I nonetheless believe that, by applying the Lord waiver rule to PCRA appeals, the majority fails to provide a reasonable opportunity for those who have been wrongly convicted to demonstrate the injustice of their conviction.² With the firm time

² The PCRA is "the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose..., including habeas corpus and (continued...)"

restrictions mandated by the PCRA,³ the majority effectively precludes Appellant, and all similarly situated future PCRA appellants, from receiving even one appellate review of their claims on the merits, through no fault of their own. As I cannot endorse such a result, I must respectfully dissent.⁴

(...continued)

coram nobis." 42 Pa. C.S. § 9542; see Commonwealth v. Lantzy, 736 A.2d 564, 569 (Pa. 1999).

³ See 42 Pa.C.S. § 9545(b)(1) (any PCRA petition, including a second or subsequent petition, must be filed within one year of the date the judgment of sentence becomes final); Commonwealth v. Peterkin, 722 A.2d 638, 641-42 (Pa. 1998).

⁴ My conclusion here is consistent with the view I have expressed in other cases regarding waiver under the PCRA. For example, in addressing the issue of whether an appellant could obtain reinstatement of his direct appeal rights *nunc pro tunc* when he failed to file a timely PCRA petition, I stated:

I am troubled by the prospect that a defendant who, for example, instructed counsel to file a direct appeal, was told by counsel that an appeal was being filed, was subsequently reassured by counsel that the appeal was filed, but later found out after the one-year limitation period expired that counsel never filed the appeal, is forever precluded from receiving at least one appellate review of his case. In my view, a rule that penalizes a defendant who reasonably relies in good faith upon his counsel to protect his appellate rights is contrary to the purpose of the PCRA, and such a defendant should be entitled to, at a bare minimum, one appellate review.

Commonwealth v. Hall, 771 A.2d 1232, 1237 (Pa. 2001) (Nigro, J., concurring). See also Kenney, 732 A.2d at 1166 (Nigro, J., dissenting) ("Under these circumstances, I cannot agree that simply because [present counsel] recognized a meritorious issue overlooked by prior counsel yet failed to use the operative words in his brief to overcome waiver of this issue by prior counsel, Appellee's Persinger claim should, in effect, never be subject to review on its merits.")