

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 043-SA-2016
	:	
ROLANDO HORSFORD,	:	
	:	
Defendant	:	
Seth E. Miller, Esquire		Counsel for the Commonwealth
Asst. District Attorney		
Rolando Horsford		Pro Se

MEMORANDUM OPINION

Serfass, J. - February 28, 2017

Defendant, Rolando Horsford, (hereinafter "Defendant"), has taken this appeal from his conviction on the charge of violating 75 Pa.C.S.A. §1501(a) (drivers required to be licensed) following a trial *de novo* held before the undersigned on December 1, 2016. Defendant was sentenced to pay the costs of prosecution and a fine of one thousand dollars (\$1,000.00), and to undergo imprisonment for a period of not less than forty-five (45) days nor more than ninety (90) days. We file the following Memorandum Opinion in accordance with Pennsylvania Rule of Appellate Procedure 1925(a) and recommend that our Order of Sentence be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL HISTORY

The facts, when viewed most favorably to the Commonwealth as verdict winner, begin on June 8, 2016 when Officer Shawn Nunemacher

of the Lansford Police Department, received a call from dispatch concerning an unrelated incident. Officer Nunemacher testified that while responding to that call, he noticed a Chrysler sedan with tinted windows. Officer Nunemacher recognized this automobile as the same vehicle from a previous traffic stop he had made which also involved Defendant. He recalled that earlier in the year he had stopped Defendant and ultimately cited him for operating a vehicle without a valid driver's license. Officer Nunemacher then followed the vehicle until it stopped at a local convenience store. A few seconds after Defendant parked and the marked police cruiser pulled up behind Defendant's vehicle, Officer Nunemacher observed Defendant exit the vehicle from the driver's seat. The officer then watched Defendant walk from his car into the convenience store. At that time, Officer Nunemacher and his partner proceeded on to the call that they were originally responding to prior to spotting Defendant's vehicle. Later that day, Officer Nunemacher returned to the Lansford police station, printed a certified copy of Defendant's suspended driver's license and sent Defendant a traffic citation via the United States Postal Service.

As noted hereinabove, the citation was issued for violating 75 Pa.C.S.A. §1501(a)-driving without a license. The June 8, 2016 citation is Defendant's third violation of 75 Pa.C.S.A. §1501(a) within the past seven (7) years which triggers enhanced penalties

pursuant to 75 Pa.C.S.A. §6503(b). Defendant's prior violations occurred on August 29, 2009, and January 6, 2016, respectively.

On December 1, 2016, a trial *de novo* was held before this Court during which both Officer Nunemacher and Defendant testified as to their version of the facts surrounding the incident of June 8, 2016. Upon conclusion of the trial, this Court recognized that the disposition of the case turned on the credibility of the witnesses. Ultimately, we determined that Officer Nunemacher's testimony was most credible and we found Defendant guilty, sentencing him to pay the costs of prosecution and a one thousand dollar (\$1,000.00) fine, and to undergo imprisonment in the Carbon County Correctional Facility for not less than forty-five (45) days nor more than ninety (90) days, pursuant to 75 Pa.C.S.A. §6503(b).

On December 27, 2016, Defendant filed a notice of appeal which contained a list of questions presented for appellate review. Defendant essentially raises one issue: whether his attorney, Andrew B. Zelonis, Esquire, was ineffective as legal counsel leading up to and during the December 1, 2016 *de novo* trial. Specifically, Defendant claims that Attorney Zelonis was ineffective in the following respects: (1) failing to request the testimony of Officer Nunemacher's partner as well as the police cruiser dashboard camera footage; (2) fabricating a theory in which Defendant had to use the driver's side door because the passenger door was inoperable; (3) failing to question Defendant's

prospective witnesses and, without consulting Defendant, opposing an oral continuance request made by the Commonwealth which, if granted by the Court, may have afforded Defendant additional time to ensure that his witnesses would have been available to testify; and (4) failing to question Officer Nunemacher as to why dispatch sent him to follow a vehicle that was not visibly violating any traffic laws.

On January 3, 2017, this Court entered an Order modifying bail and staying Defendant's sentence pending disposition of his appeal with the Superior Court of Pennsylvania.

DISCUSSION

Prior to 2002, the general rule in Pennsylvania regarding ineffective assistance of counsel was that such claims had to be raised at the earliest stage in the proceedings at which the allegedly ineffective lawyer no longer represented the defendant. Commonwealth v. Hubbard, 372 A.2d 687 (Pa. 1977). In Commonwealth v. Grant, the Pennsylvania Supreme Court announced a new general rule, holding that a defendant may not raise the issue of ineffective assistance of counsel on direct appeal, but rather, must wait to raise such claims until collateral review. Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002). The Supreme Court altered the original rule based upon the following considerations: (1) that requiring the petitioner to raise the issue of ineffectiveness immediately upon obtaining new counsel

created impracticalities such as the layering of ineffective counsel claims, Id at 733; (2) appellate courts generally do not consider matters and evidence not contained in the record, Id at 737; and (3) appellate courts are not fact finders. Id.

The appellate decisions generated in the wake of Grant outline the Superior Court's refusal to address claims of ineffective assistance of counsel raised for the first time on direct appeal. See Commonwealth v. Wilson, 825 A.2d 710 (Pa. Super. 2003); Commonwealth v. Thornton, 822 A.2d 31 (Pa. Super. 2003); and Commonwealth v. Ruiz, 819 A.2d 92 (Pa. Super. 2003). Based on the general rule set forth in Grant, it is clear that claims of ineffective assistance of counsel are to be deferred until the post conviction collateral review stage of a proceeding. Commonwealth v. Liston, 977 A.2d 1089, 1091 (Pa. 2009).

A narrow exception to the Grant rule has been carved out by the Superior Court pursuant to which claims of ineffective assistance of counsel may be reviewed on direct appeal in situations where the trial court addressed the issue on the merits after determining that the existing record had been sufficiently developed to resolve such claims. Commonwealth v. Watson, 835 A. 2d 786 (Pa. Super. 2003). While the trial court retains discretion to entertain claims of ineffective assistance

of counsel raised in post-sentence motions, the ineffectiveness asserted by the defendant must be merit-based and apparent from the record, and the defendant must waive his right to review pursuant to the Post Conviction Review Act (PCRA)¹. Commonwealth v. Holmes, 79 A.3d 562, 577-78 (Pa. 2013). The waiver of the defendant's right to PCRA review must be express, knowing, and voluntary. Commonwealth v. Barnett, 25 A.3d 371 (Pa. Super. 2011).

We do not find Defendant's allegations of ineffective assistance of counsel to be obvious based on the record. In his issues presented on appeal, Defendant poses several questions that simply cannot be addressed by reviewing the record in this case. Defendant raises questions such as, why Attorney Zelonis opposed a continuance requested by the Commonwealth, and why Attorney Zelonis did not seek the testimony of Officer Nunemacher's partner or dashboard camera footage from the police cruiser. Not only were these matters not addressed at the December 1, 2016 *de novo* trial, but the record is devoid of evidence surrounding these issues prior to Defendant's direct appeal. The case at bar is not an instance where the alleged ineffective assistance of counsel is apparent based upon a

¹ Pursuant to Pennsylvania Rule of Criminal Procedure 720(D), we note that there are no post-sentence motions in summary case appeals following a trial *de novo* in the court of common pleas.

review of the record. Moreover, Defendant has not made an express, knowing, and voluntary waiver of his PCRA review rights. Therefore, Defendant's appeal does not fall within the exception outlined in Holmes because he has failed to satisfy both prerequisites which would allow this Court to review his claims regarding ineffective assistance of counsel.

Similarly situated defendants have attempted to argue that their relatively short sentences should create an exception to the general rule outlined in Grant. However, our Supreme Court has explicitly held that a short sentence does not warrant an exception to the general rule precluding consideration of ineffectiveness of counsel claims on direct appeal. Commonwealth v. O'Berg, 880 A.2d 597 (Pa. 2005). Under the plain language of the Post Conviction Relief Act, an appellant is only eligible for post-conviction relief if he is "currently serving a sentence of imprisonment, probation or parole for the crime." 42 Pa.C.S. §9543(1). Pursuant to the Grant decision, claimants must wait until the collateral review stage before raising claims of ineffective assistance of counsel. In O'Berg, the Supreme Court acknowledged that the net effect of these two rules is that claimants may not have the opportunity to raise a claim challenging trial counsel's effectiveness if their direct appeal is final at a time when they are no longer serving a

sentence of imprisonment, probation or parole. Id. at 599. As noted by then-Justice Castille in his concurring opinion:

The appropriate forum for litigating claims of ineffectiveness is under the PCRA. That "short sentence" defendants may not be able to pursue such claims is an appropriate consequence of a legislative choice made by the people's duly-elected representatives.

Id. at 605.

Therefore, even if a defendant is not eligible for PCRA relief, he still may not raise the issue of ineffective assistance of counsel on direct appeal. Commonwealth v. Straub, 936 A.2d 1081 (Pa. Super. 2007). Defendant's attempts to do so in the instant matter must fail.

CONCLUSION

For the foregoing reasons, we respectfully recommend that Defendant's appeal be denied and that our Order of Sentence dated December 1, 2016 be affirmed accordingly.

BY THE COURT:

Steven R. Serfass, J.