[J-26B-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 42 EAP 2004
	:	
Appellant	:	Appeal From the Order Entered On 1/16/2004 in the Superior Court at No. 2694 EDA 2002 Vacating the Judgments of Sentence Entered On 6/21/1999 in the Court Of Common Pleas of Philadelphia County at No. 8901-0980
v.	:	
HECTOR CASTILLO,	:	
	:	ARGUED: April 11, 2005
Appellee	:	

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: December 29, 2005**

As the majority notes, this appeal was allowed to reconsider the decisions in Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 306 (1998), and Commonwealth v. Butler, 571 Pa. 441, 812 A.2d 631 (2003), which mandate a strict application of the waiver rule under Pa.R.A.P. 1925(b) pertaining to defects associated with the filing of a statement of matters complained of on appeal.

Both the Commonwealth and amicus recognize that the bright-line rule adopted in Lord, solidified in Butler, and reaffirmed by the majority in the present case covers a vast range of circumstances, falling within several broad categories, including total non-

compliance by failing to file any Rule 1925(b) statement; imperfect procedural compliance (such as late filing or failure to secure proper docketing and/or transmission to the trial judge); and imperfect substantive compliance (for example, a failure to include or sufficiently describe claims to be pursued in the appeal). In a number of the circumstances, as in the companion case, Commonwealth v. Schofield, ___ Pa. ___, ___ A.2d ___ (2005), the purposes of the rule may be entirely satisfied, as the trial court will have actually received the Rule 1925(b) statement and utilized it in preparing its opinion under Rule 1925(a).[1] In other instances, an opinion (or additional opinion) of the trial court may not be truly necessary for appellate review, as where post-trial or post-sentence motions have been litigated and fully addressed by the trial court, or where the claim to be pursued on appeal concerns a purely legal issue that is subject to de novo appellate review.[2]

In this broad universe of circumstances, although I recognize the validity of the concerns that motivated Lord and Butler and which underlie the majority's present

---

[1] In Schofield, the Superior Court, relying on Butler, determined that the appellant must file a 1925(b) statement with the judge and the clerk of courts; therefore, merely sending the statement to the judge was insufficient, and resulted in waiver. However, Butler involved an unverified 1925(b) statement that appellant claimed to have provided to the court. See Butler, 571 Pa. at 446-47, 812 A.2d at 634. In Schofield, the trial judge indicated that he had received the statement.

[2] In Commonwealth v. Alsop, 799 A.2d 129 (Pa. Super. 2002), President Judge Del Sole explained: "There is no functional difference when the issues are addressed in a trial court opinion written in response to a 1925 statement, or when anticipated issues are addressed by the trial court absent such a statement. In either case, the existence of the trial court opinion allows for 'meaningful and effective' appellate review." Id. at 136 (Del Sole, P.J., concurring). Additionally, President Judge Del Sole noted that "sound policy reasons exist not to find waiver. The public is better served when disputes are resolved on their merits rather than by default." Id. Along these lines, in Schofield, Judge Klein dissented from the Superior Court's finding of waiver, stating, "If a trial court understands the issues and has provided th[e] [appellate] court with an explanation for its order in the 1925(a) opinion, we are able to conduct meaningful appellate review and need not be concerned with the timeliness of the filing of the statement. To do otherwise undermines the integrity of this court and confidence in the appellate review process."

reasoning, on balance, I favor the discretionary review paradigm that is reflected in the explicit terms of Rule 1925(b), which can and has been implemented under guidance supplied in seminal decisions of this Court and the intermediate appellate courts channeling the exercise of discretion. Accord Butler, 571 Pa. at 453, 812 A.2d at 638 (Saylor, J., concurring). In this regard, I agree with amicus that, relative to counseled appeals, the policy allowing for discretionary review (coupled with curative remands, where appropriate, to secure a sufficient Rule 1925(a) opinion) better serves the ends of justice than the mechanical elimination or curtailment of direct appellate review on account of attorney derelictions. Indeed, I believe that reflexive displacement of appeals, in whole or in part, based on factors outside the litigants' direct control is in substantial tension with the right to direct appellate review conferred by the Pennsylvania Constitution. See PA. CONST. art. V, §9. Concerning pro se litigants, particularly as applied in cases such as Schofield in which there has been meaningful and substantial compliance and the policy ends of Rule 1925 have been satisfied, see supra note 1, the strict waiver policy also seems to me to be unnecessary and an unduly harsh sanction.

Certainly the majority is correct that, in certain circumstances in the criminal context, the availability of post-conviction relief based on a claim of ineffective assistance of counsel may ameliorate the consequences of counsel's noncompliance with Rule 1925(b).[3] However, in other cases, the litigant forced into the post-conviction context generally will be faced with enhanced procedural and substantive requirements. These include compliance with the procedural framework dictated by the Post Conviction Relief Act, 42 Pa.C.S. §§9541-9546, and a substantial and unfavorable realignment of burdens, as the post-

---

[3] For example, in the event of unjustified, total noncompliance attributable to counsel, full reinstatement of the direct appeal is warranted, see Commonwealth v. Halley, 582 Pa. 164, 173, 870 A.2d 795, 801 (2005), and the petitioner thus will be restored to the position that he should have been in but for counsel's dereliction.

conviction petitioner will generally be required to prove prejudice associated with an otherwise meritorious claim, as distinguished from the standard pertaining to preserved error cognizable on direct appeal, which places the burden on the Commonwealth to demonstrate harmlessness beyond a reasonable doubt. Cf. Commonwealth v. Howard, 538 Pa. 86, 100, 645 A.2d 1300, 1307 (1994) (elaborating on the distinction between the respective burdens relative to a preserved claim of trial court error versus one raised via ineffectiveness). In various situations as well, post-conviction review will be foreclosed, such as when the defendant's sentence will expire prior to the completion of the review, see Commonwealth v. O'Berg, ___ Pa. ___, ___, 880 A.2d 597, 602 (2005), or where the litigant acted pro se at the time that the appeal was lodged, and therefore, cannot proceed under an ineffectiveness theory. The availability of some latitude under Rule 1925(b) in criminal cases was also particularly significant in Pennsylvania, because the Court has abrogated the policy against enforcing waiver in the face of basic or fundamental error affecting substantive rights, see Commonwealth v. Clair, 458 Pa. 418, 423, 326 A.2d 272, 274 (Pa. 1974), as distinguished from the practice of many other jurisdictions including the federal courts, which allow for discretionary plain error review in exceptional circumstances. See, e.g., Fed. Rule Crim. P. 52(b). See generally 5 AM. JUR. 2D APPELLANT REVIEW §767 (2005).[4]

---

[4] Pertaining to the civil context, the approach of fostering collateral litigation seems to me to be questionable, particularly where the post-trial motion procedure already serves as a mandatory prerequisite to issue preservation for appeal, see Chalkey v. Roush, 569 Pa. 462, 466-67, 805 A.2d 491, 494 (2002), thus already putting claims subject to appellate review directly before the trial court. Accord Butler, 571 Pa. at 452 n.2, 812 A.2d at 637 n.2 (Saylor, J., concurring) (commenting on the pronounced impact of the waiver doctrine in civil appeals, in light of the multiple, overlapping steps required to preserve issues). Additionally, given the time, expense, and uncertainty associated with malpractice claims, such relief may not provide a meaningful remedy for counsel's noncompliance with the rule, particularly where the foregone issues are non-monetary.

In summary, I believe that the prospect of waiver in appropriate circumstances pursuant to the express terms of Rule 1925(b) and the availability of contempt sanctions for violation of a Rule 1925(a) order provide sufficient incentives to facilitate Rule 1925's policy without unduly impinging upon the constitutional right to a direct appeal. Accordingly, I do not favor maintaining Lord's rule strictly foreclosing curative remands and discretionary authority such as were previously available to the intermediate appellate courts to accomplish meaningful appellate review in appropriate circumstances.

Finally, I recognize the Commonwealth's position that Lord represented the prevailing rule as of the time of the material noncompliance in this case, the Superior Court was bound to apply it, and any change in its dictates should be made by this Court on a prospective basis.[5] Nevertheless, this Court framed the reconsideration issue as a material one in this case, there have been persistent and legitimate questions concerning Lord's appropriate scope, and I believe that sound jurisprudential principles favor according the litigant the benefit of a change or clarification in such circumstances. Although I therefore support the Superior Court's decision to conduct merits review of Appellee's claim, having reviewed the Commonwealth's substantive position on the merits of the resultant award of a new trial, I believe that it may have merit. Thus, I would not merely affirm the award at this juncture. Rather, I would issue a supplemental grant order and briefing schedule to permit the Court to address the award, since, in light of our limited grant order, Appellee has not developed his position in support of its validity.

For these reasons, I respectfully dissent relative to the Court's mandate.

---

[5] Notably, in this regard, the Lord rule itself was announced prospectively. See Lord, 553 Pa. at 420, 719 A.2d at 309.