NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. GARY LEE GERBER, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 591 MDA 2015

Appeal from the Judgment of Sentence February 26, 2015
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0006395-2003

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY LAZARUS, J.: **FILED FEBRUARY 01, 2016**

Gary Lee Gerber, Jr. appeals from the judgment of sentence imposed by the Court of Common Pleas of Berks County following his conviction for violating the Pennsylvania Solid Waste Management Act (SWMA), 35 P.S. §§ 6101.101-6018.1003. We affirm based on the thorough and well-reasoned opinion of the Honorable James M. Bucci.

This Court previously set forth the facts and procedural history of the case as follows:

> Gerber was convicted of violating section 6018.610(1) of the SWMA after a jury determined that he illegally buried solid waste on the site of the Reading Industrial Scrap Company (RISCO), located in Berks County, Pennsylvania. Section 6018.610(1) of the SWMA states:
>
> It shall be unlawful for any person or municipality to:
>
> (1) Dump or deposit, or permit the dumping or depositing, of any solid waste on the surface of the ground or underground or into the waters of the

> Commonwealth, by any means, unless a permit for the dumping of such solid wastes had been obtained from the department; provided the Environmental Quality Board may by regulation exempt certain activities associated with farming operations as defined by this act from such permit requirements.

35 P.S. § 6018.610.

> After the jury rendered its verdict convicting Gerber of violating section 6018.610(1), Gerber orally moved for judgment of acquittal, arguing that the Commonwealth failed to present sufficient evidence that there was no permit authorizing the dumping of solid waste at the RISCO site. The trial court granted Gerber's motion and the Commonwealth filed a timely notice of appeal, as well as a timely concise statement of [errors] complained of on appeal pursuant to Pa.R.A.P. 1925(b). In its Rule 1925(b) statement, the Commonwealth averred that it presented sufficient evidence that there was no permit for the RISCO site.

Commonwealth v. Gerber, No. 581 MDA 2010, unpublished memorandum at 1-2 (Pa. Super. filed May 31, 2011).

On appeal, this Court concluded "the jury was able to find, beyond a reasonable doubt, that there was no permit authorizing Gerber's act of burying solid waste at the RISCO site." ***Id.*** at 5. Accordingly, we vacated the order of acquittal and remanded for resentencing.

Gerber filed a petition for allowance of appeal, which our Supreme Court denied on January 30, 2012. ***Commonwealth v. Gerber***, 30 A.3d 553 (Pa. 2012). After a lengthy delay, due in part to Gerber serving a life sentence after being convicted of first-degree murder in an unrelated matter, the court sentenced him on February 26, 2015, to one to twelve months' incarceration, with credit for 365 days' time served.

Gerber filed a timely post-sentence motion on March 4, 2015, which the trial court denied on March 9, 2015. Following the appointment of new counsel, Gerber filed a notice of appeal on April 1, 2015. In response to an order from the trial court, Gerber filed a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). The trial court filed its Rule 1925(a) opinion on July 17, 2015.

On appeal, Gerber raises the following issues for our review, *verbatim*:

> 1. Should this matter be remanded to hold a hearing on [Gerber's] claims of ineffective assistance of counsel, when [Gerber's] sentence is 1 year and he was given credit for 365 days' time served and his sentence will not be eligible for post conviction relief?
>
> 2. Was the evidence insufficient to support a conviction where the Commonwealth failed to prove [Gerber] committed any crime on the address listed in the criminal complaint?
>
> 3. Was the evidence insufficient to support the conviction when the Commonwealth failed to prove that [Gerber] was not exempt from needing a permit under the applicable Pa. Code section?

Brief of Appellant, at 4.

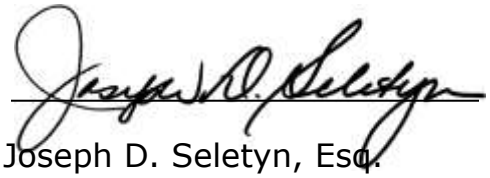
Our review of Judge Bucci's Rule 1925(a) opinion leads us to conclude that it thoroughly and comprehensively addresses the issues raised by Gerber, including the claim that he should be permitted to raise issues of ineffective assistance of counsel on direct appeal.

We affirm the judgment of sentence based on Judge Bucci's decision. We direct the parties to attach that decision in the event of further proceedings in the matter.

Because we agree with Judge Bucci that Gerber is precluded from raising claims of ineffective assistance of counsel on direct appeal, we dismiss Gerber's application for remand to consider such claims.

Judgment of sentence affirmed. Application for remand denied.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016

COMMONWEALTH OF PENNSYLVANIA	:IN THE COURT OF COMMON PLEAS :OF BERKS COUNTY, PENNSYLVANIA : CRIMINAL DIVISION
v.	:
	: CP-06-CR-0006395-2003
	:
GARY LEE GERBER, JR.	: Assigned to: Judge James M. Bucci

Kevin Feeney, Esquire
Attorney for Appellant

Andrea F. McKenna, Esquire, Senior Deputy Attorney General
Attorney for the Commonwealth

MEMORANDUM OPINION **James M. Bucci, J.,** **July 15, 2015**

Gary Lee Gerber, Jr. ("Appellant") was charged with violating various provisions of the Pennsylvania Solid Waste Management Act (the "SWMA")[1] in 2001 following an investigation by the Pennsylvania Department of Environmental Protection (the "DEP") of the site of the former Reading Industrial Scrap Company ("RISCO") in Reading, Berks County, Pennsylvania. Appellant sought to exclude the results of certain tests that had been performed on soil from the site by the DEP. On April 19, 2005 this court granted the Appellant's motion to exclude said results. On May 13, 2005 the Commonwealth appealed that order, which was initially affirmed on June 27, 2006 by the Commonwealth Court, but was ultimately reversed by the Pennsylvania Supreme Court on February 19, 2009. The case was then remanded for further proceedings. Newly-appointed defense counsel filed another Omnibus Pretrial Motion seeking to exclude the same evidence relating to the soil samples destroyed by the DEP, which motion was denied on February 2, 2010 based on the higher court's determination. After a four-day trial, Appellant was found guilty of Unlawful Conduct for the dumping, depositing, or

[1] 35 PS §6018.401(a); 35 PS §6018.301; 35 PS §6018.610(1).

permitting the dumping or depositing, of solid waste without the requisite permit(s)[2] and acquitted by the jury of the two counts of Management of Hazardous Waste. The attorney for Appellant then made a Motion for Judgment of Acquittal on the charge of Unlawful Conduct based on the Commonwealth's failure to present evidence that the Defendant lacked the requisite permits under the SWMA, which this court granted. On March 26, 2010 the Pennsylvania Attorney General appealed our ruling, arguing that it was error for this court to have granted an acquittal, where the Defendant admitted under oath that he did not obtain necessary permits under the SWMA. We addressed the issue in our 2010 Memorandum Opinion:

> The Commonwealth argues in its Memorandum of Law that the oral testimony of Dale Smith, the project manager of the RISCO site, as well as the admission by the Defendant, that no permits were obtained in connection with the Defendant's activities at the RISCO site, sufficiently established the lack of DEP permits.
>
> The portion of the Judiciary Act of 1976 concerning evidence in support of the existence or non-existence of official records is instructive, though not dispositive. See 42 Pa. C.S.A. §6101 *et seq.* Section 6103 of the Act sets forth guidelines for admitting official records maintained by the Commonwealth of Pennsylvania, and further provides a method by which the absence of such record(s) may be established. 42 Pa. C.S.A. §6103 (a), (b). Specifically the lack of a record may be established by, "a written statement that after an examination of the records of the government unit no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subsection (a), is admissible as evidence that the records contain no such entry."[3] 42 Pa. C.S.A. §6103(b). As the relevant case law points out, "Section 6103(b) merely provides an uncomplicated method of proving the lack of an official record through the use of a written statement, but does not mandate that method as the exclusive manner of proof." City of

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[2] Count 3 of the Information, Unlawful Management of Residual Waste, was withdrawn prior to trial.

[3] It should be noted that there was no challenge to the admissibility of any of the evidence presented at trial regarding the lack of permits, and is, therefore, not being addressed by this Court.

Pittsburgh v. Open Doors for the Handicapped, 631 A.2d 751 (Pa.Cmwlth. 1993) (holding that the City of Pittsburgh met its burden of proving that the defendant failed to file require tax returns by offering the testimony of a city auditor rather than by submitting an official record).

Careful review of the notes of testimony reveals that there was, in fact, adequate evidence that Defendant lacked any DEP permits. Commonwealth witness and co-defendant Dale Smith testified that, in his capacity as project manager for the RISCO site, he personally informed the Defendant that there were no permits obtained for the burying of waste. *Notes of Testimony, Jury Trial, February 2 to February 5, 2010 at 12, 13. ("NT, Jury Trial").* The Defendant then testified on direct examination that he did not seek nor did he obtain any permits related to his work at the RISCO site, based upon his understanding that the permits were obtained, or were to be obtained, by other parties. *NT, Jury Trial, 271, 291.* The Court notes that, even if the Defendant believed this to be the case, he could nonetheless the be criminally liable for failing to obtain the necessary permits pursuant to the holding in Commonwealth v. Packer, 798 A.2d 192 (Pa. 2002) (the General Assembly did not intend to limit liability under Section 610(1) of the SWMA to those individuals or entities that have a duty to obtain permits, but rather the statute imposes absolute liability).

Because we conceded that the Commonwealth had, in fact, presented sufficient evidence to support the guilty verdict, we respectfully requested that the case be remanded for sentencing. On May 31, 2011 the Superior Court issued an opinion concurring with the above wherein the Court specifically concluded that "the jury was able to find, beyond a reasonable doubt, that there was no permit authorizing Gerber's act of burying solid waste at the RISCO site". Thereafter, the case was remanded for sentencing. Appellant's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on January 30, 2012. After a lengthy delay, Appellant (who is presently serving a life sentence in an unrelated docket) was sentenced by this court to a term of incarceration of 1 to 12 months, and given credit of 365 days. The Commonwealth agreed to waive any costs and fines in connection with the imposition of

this sentence. Appellant's trial counsel then filed a timely post-sentence motion challenging both the weight and sufficiency of the evidence of Appellant's conviction and seeking a new trial. This court denied Appellant's post sentence motion and this appeal followed.

Issues Raised On Appeal

Appellant raises the following issues in his Concise Statement of Matters Complained of On Appeal Pa.R.A.P. 1925 ("Concise Statement").

1. The trial court erred in denying and dismissing defendant's timely filed post-sentence motion.

2. The trial court erred in failing to charge the jury on the exception to the permit requirement contained in 25 Pa. Code §287.101(b)(7) where there was a factual question as to whether Appellant was exempt from the permit requirement.

3. Trial counsel was ineffective for failing to request the jury instruction relating to an exemption to the permit requirement.

4. The evidence presented at trial was insufficient to convict Appellant of illegally dumping at 2001 Centre Avenue where the evidence at trial related only to Appellant's activities at 200 North 5th Street Highway.

5. Trial counsel was ineffective for failing to seek a judgment of acquittal at the conclusions of the Commonwealth's case.

Denial of Post Sentence Motion

Appellant complains that this court erred in denying and dismissing his post-sentence motion[4] Appellant's trial counsel filed a timely post-sentence motion, which motion challenged both the weight and sufficiency of Appellant's conviction.

Sufficiency of the Evidence

With respect to the sufficiency of the evidence, we note that in connection with the Commonwealth's appeal of this court's prior acquittal of Appellant's conviction, the Superior Court specifically concluded and held that there was sufficient evidence to find that Appellant had improperly buried solid waste without a permit in violation of the SWAMA. Therefore, to the extent that Appellant is challenging the sufficiency of the evidence that he buried solid waste and that he did so without a permit, we submit that this issue has been determined by the Superior Court and we are bound by that holding.

To the extent that Appellant is challenging the sufficiency of another aspect of the conviction, we will address this issue.

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[4] Appellant does not specifically include a challenge to the weight or sufficiency of the evidence within the four corners of his Concise Statement. Rather, the first issue of Appellant's Concise Statement reads as follows: "The Court erred in denying and dismissing defendant's timely filed post sentence motion. Defendant incorporates that motion by reference". The purpose of a Concise Statement is to succinctly set forth the matters on appeal, and therefore the practice of incorporation by reference of other documents has been disapproved. See Commonwealth v. Dodge, 859 A.2d 771 (Pa.Super. 2004) (in a challenge to the legality of the sentence, the Superior Court deemed two issues waived where the defendant complained that the trial court had erred in denying portions of his Omnibus Pretrial Motion, *citing* Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 306 (1998) and Commonwealth v. Dowling, 778 A.2d 683, 686-87 (Pa.Super. 2001).

> Evidence presented at trial is sufficient when, viewed in the light most favorable to the Commonwealth as verdict winner, the evidence and all reasonable inferences derived therefrom are sufficient to establish all elements of the offense beyond a reasonable doubt.

Commonwealth v. Blakeney, 596 Pa. 510, 520, 946 A.2d 645, 651 (2008) *citing* Commonwealth v. Edwards, 588 Pa. 151, 903 A.2d 1139, 1146 (2006), *cert. denied*, 549 U.S. 1344, 127 S.Ct. 2030, 167 L.Ed.2d 772 (2007) (internal citations omitted).

Appellant was convicted of one count of Unlawful Conduct in contravention of Section 6018.610(1) of the Pennsylvania Health and Safety Code, referred to as the Solid Waste Management Act ("SWAMA"). The relevant provision of the SWMA makes it a crime to "dump or deposit, or permit the dumping or depositing, of any solid waste on to the surface of the ground or underground or into the waters of the Commonwealth, by any means, unless a permit for the dumping of such solid waste has been obtained from the department". 35 P.S. §6018.610. Appellant challenges the sufficiency of the evidence against him, arguing that all of the testimony at trial related to Appellant's actions at 200 North 5th Street Highway when the charge of which he was convicted only relates to the adjoining parcel of land at 2001 Centre Avenue.

The Commonwealth presented ten witnesses and 97 exhibits at trial to support their allegations that Appellant engaged in, *inter alia,* Unlawful Conduct under the SWAMA. First, Commonwealth witness Dale Smith testified that in 2000 he was employed as a project manager by Group One Properties, a local real estate development company. *Notes of Testimony, Jury Trial, February 2 to February 5, 2010 at 8. ("NT, Jury Trial").* He also indicated that at some point in 2000, CEO of Group One

Properties, Frederick Snyder, purchased a property referred to as the "RISCO or Reading Industrial Scrap Company". *See id.* Importantly, Mr. Smith specifically testified that the "RISCO Site" to which his testimony refers was located on Centre Avenue, Reading, Berks County Pennsylvania. *See id.* He explained that Appellant was contracted by a related company, Group Two Properties, to remove scrap metal from said RISCO Site. *See id. at 9.* According to Smith, Appellant was tasked with cleaning up the RISCO Site, which "included taking scrap metal, steel, aluminum, or whatever it was". *Id. at 10.* Appellant undertook these activities until the scrap metal was depleted. *See id. at 11.* Residual waste was hauled to a landfill, and the remainder of the residual waste that was on the RISCO site "got buried". *Id.* As to what was buried, Smith testified he observed the burying of "waste matter, anything that was not scrap metal, paper or cardboard, rubber pieces, wood pieces of trees, just rubble. The best way that I can describe it is rubble." *Id.* He also testified that he saw 55-gallon drums, with unknown contents, being buried on the site. *See id. at 11-12.* He recalled that these activities took place around July or August of 2001, that he witnessed Appellant operate heavy equipment and push the items into a pit or pits. *See id. at 13-14.* Mr. Smith testified that he informed Appellant that they lacked permits to bury waste on the RISCO Site. *See id. at 13.* During his testimony, Mr. Smith discussed a contract (admitted as Commonwealth Exhibit 20) under which these activities were performed, entered into between Group Two Properties and an entity called Mt. Carbon Industrial Services. *See id. at 15.* The contract is signed by Frederick Snyder on behalf of Group Two Properties, Inc. and by Appellant, and lists his position as "Pres.", presumably indicating that he was the president of Mt. Carbon Industrial Services (the "Contractor"). Of particular import to

Appellant's contention that the Commonwealth failed to show that Appellant engaged in illegal activities at the Centre Avenue Address is the fact that this contract specifically designates 2001 Centre Avenue, Reading, PA 19601 as the location of the project that is the subject of said contract. See Commonwealth Ex. 20. In sum, Mr. Smith's oral testimony, as well as the agreement to which he refers in his testimony, concerns activities relating to 2001 Centre Avenue in Reading.

The Commonwealth next called Charles Jones, an individual who had worked at the Reading Industrial Scrap Company for Larry Goldberg in 2000, who testified that in 2001 Mr. Goldberg sold the property to Fred Snyder. *See id. at 43.* Mr. Jones indicated that he and Appellant had worked together in the summer of 2001. *See id. at 44-45.* Mr. Jones was familiar with the contract between Fred Snyder/Group Two Properties and Appellant and testified that he was a subcontractor to Appellant under this same agreement, receiving compensation in the amount of $2,000/month. *See id. at 60.* Mr. Jones was at the RISCO site during the summer of 2001 on a daily basis "overseeing things" and making sure no one was taking scrap. *See id. at 45.* He testified that was involved in the contract with Appellant to clean up the site. *See id. at 46.* According to his testimony, Mr. Jones had taken photographs of the RISCO Site during the summer of 2001-2002 and given them to a friend, who ultimately "turned them in" to the Attorney General. *See id. at 46-47.* He identified this friend as Joe Pastora. *See id. at 47.* On the stand, Mr. Jones identified four photographs that he had taken, which were admitted into evidence as Commonwealth's Exhibits 1 through 4. All four photographs were of the RISCO Site. Commonwealth Exhibit 1 was a photograph of drums, some of which Mr.

Jones saw being buried "up on the hill" on the RISCO Site. *Id. at 48.* In looking at an aerial photograph, Commonwealth's Exhibit 19, Mr. Jones identified the area where the drums were buried to the jury. *See id. at 49.* He further testified that all the drums in the photographs were buried in the pit, as indicated the same exhibit. *See id. at 52.* Mr. Jones testified that in addition to 55-gallon drums, material that he believed to be slag was also buried in the pit. *See id. at 54.* He believed the drums contained such things as "[a]ll kinds of transmission fluid and metal grinds and slab". *Id. at 61.*

Mr. Jones explained that he was was "somewhat familiar with the type of material that came into that yard" having worked for its previous owner, Larry Goldberg, although he testified that he was not at that particular site often in his employment with Mr. Goldberg. *Id. at 62.* He also testified on re-direct that he had seen old car batteries and drums labeled "Sunoco" filled with transmission fluid being buried in the pit. *See id. at 73-74.*

According to Mr. Jones' testimony, at some point in the past, items from the RISCO Site had been taken to a landfill, but that practice had ended when the landfill would no longer accept the materials. *See id. at 62.* Thereafter a decision was made "[t]o dig a pit and bury it". *Id.* He recalled that there may have been two pits, and that he had personally witnessed Appellant bury "whatever the trucks dumped" in to the pits. *Id. at 62-63.* "Dump trucks would be loaded" they would drive up to the pit, and Appellant or another individual inside the pit would bury the items with the excavator. *Id. at 65.* He went on to explain that this burying took place "on a daily basis" for approximately a

month or two, and that the hole was larger than the courtroom, both bigger and deeper, and there was a also a truck ramp for access. *Id. at 66.* He specifically identified Appellant operating equipment in the pit and digging the pit. *See id. at 56.*

The Commonwealth presented the testimony of Roseanne Clement of the Pennsylvania State Attorney General's Office and who had been a special agent with the Environmental Crimes Section before becoming a supervising agent in the Internal Affairs Unit. *See id. at 150.* In July of 2002 Ms. Clement was involved in the Attorney General's investigation of the RISCO Site and, in that capacity, had interviewed Appellant. *See id. at 151.* Appellant confirmed to her that he was the owner of Mr. Carbon Industrial Services and that he had been hired to removed scrap from the RISCO site. *See id. at 152.* He explained that he was a party to an agreement with Mr. Snyder and that he had agreed to dig pits at the RISCO Site for the purpose of disposing of waste on the site. *See id. at 153.* Ms. Clement testified that Appellant told her the waste included such things as:

> Scrap metal which could have included refrigerator parts. There were drums that had some waste from a place called the Dana Corporation. There was slag that had come from some type of a mill, rubber, plastic, just whatever was accepted as scrap I assume, and it was laying around the property.

Id. at 153. Appellant relayed to Ms. Clement that that the practice of taking the scrap to a landfill was discontinued, potentially over Mr. Snyder's failure to pay the landfill fees, and thereafter Mr. Snyder had directed Appellant to dig a hole in which to bury the waste. *See id. at 154.* Appellant disclosed to this witness the magnitude of the operation:

> There was approximately 2 to 300 drums that went into a 100 foot by 200 foot deep hole -- excuse me 100 foot deep. This held two pallets of drums. He indicated that he buried approximately 300 tons of slag that went into a 15 foot deep by 20 foot wide hole. One of the pits that he initially was involved in was approximately 55 feet wide and 40 to 50 feet deep. Others were as high as 40 feet.

Id. at 155. Appellant acknowledged to Ms. Clement that some of the drums he was burying "were in bad shape...some had rusted, had deteriorated.. and they were bluish in color and contained some kind of lubricant". *Id. at* 156-57. Ms. Clement testified that Appellant told her there were pits at the north end of the property, another in an area that contains a building and that there were some near the warehouse. *See id. at 157.*

Lastly, Appellant took the stand in his own defense and he also characterized the RISCO Site as "the 2001 Centre Avenue Site" and testified that he had been hired by Frederick Snyder "to clean the 2001 Centre Avenue up". *Id. at 261.* He explained that at some point in June of 2001 he "entered into a contract to work for four weeks there to cleanup the 2001 Centre Avenue site of scrap metal". *Id. at 262.* He stated that after the landfill refused to accept their trucks, Group One Properties rented large excavating equipment "to dig a pit up behind 2001 Centre Avenue Site". *Id. at 267.* Appellant testified that he had dug the second pit. Although he stated that the pits at issue in this case were all located on the 5th Street Highway property, he did testify as follows with respect to the 2001 Centre Avenue portion of the RISCO Site:

> There was a pit that Smith asked me to dig on 2001 Centre Avenue. Now it is - - it is directly under the Glidden Warehouse. There were a couple of pieces of slag

> there...Mr. Smith asked me to dig a trench there, and Smith pushed them in with a Cat loader. I dug the trench, and Smith pushed them in.

Id. at 273-74. Even if the other testimony was unclear about the location of the various activities on the RISCO Site, Appellant here acknowledges that he participated in the burying of slag on the 2001 Centre Avenue location.

Based on all of the above, and in consideration of the Superior Court's previous ruling that the Commonwealth had presented sufficient evidence to sustain Appellant's conviction, we submit that there was sufficient evidence presented at trial to support the verdict.

Weight of the Evidence

In addition to challenging the sufficiency of the evidence against him, Appellant also challenges the weight of the evidence presented by the Commonwealth.

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witness.

Commonwealth v. Champney, 574 Pa. 435, 832 A.2d 403, 408 (2003) (citations omitted), Commonwealth v. Ferguson, 107 A.3d 206 (Pa.Super. 2015). "A verdict is against the weight of the evidence 'only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice." Commonwealth v. Blakeney, 596 Pa. 510, 946 A.2d 645, 652 (2008) (*citing* Commonwealth v. Cousar, 593 Pa. 204, 928 A.2d 1025, 1036 (2007).

There was, admittedly, testimony by Appellant and other witnesses that was inconsistent with the Commonwealth's assertion that Appellant buried waste on the

Centre Avenue portion of the RISCO site in contravention of the SWAMA, however this testimony does not necessarily support a finding that the verdict reached by the jury was contrary to the weight of the evidence:

> Assessing the credibility of witnesses at trial is within the sole discretion of the fact-finder. A trial judge cannot grant a new trial merely because of some conflict in testimony or because the judge would reach a different conclusion on the same facts, but should only do so in extraordinary circumstances, "when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.

Blakeney, *supra*, at 523, 653 (internal citations omitted).

In support of Appellant's position that he was not derelict in his duty to obtain the any permits, Dale Smith conceded that the contract between Group Two Properties and Appellant vested the responsibility for obtaining the requisite permit in Group Two Properties and not in Appellant. *See id. at 28.* Mr. Smith also conceded on cross-examination that he had never seen Appellant bury any 55-gallon drums, rather he had only ever witnessed him bury "construction debris". *See id. at 34.*

With respect to Appellant's assertion that there was no evidence that he had engaged in Unlawful Conduct at 2001 Centre Avenue as charged, Dale Smith testified under cross-examination that the RISCO Site was comprised of both the warehouse area and a "residual site", and that he had seen Appellant burying items on the residual site, and that the pit was located on the residual site. *See id. at 37-38.* It appears that the both

parcels were considered to be part of the RISCO Site however the evidence as to the location of each incident of burying was not always clear.

Commonwealth witness Mr. Jones testified that Dale Smith had told him and Appellant that he had secured the necessary permits. *See id. at 53-54.* As to Mr. Jones' credibility, he acknowledged on cross-examination that he had met former owner of the RISCO Site Larry Goldberg in prison. *See id. at 67.* His testimony shows that the decision to dig the pit and to bury waste rather than to take it to a landfill was made by Frederick Snyder, owner of the RISCO Site. (Mr. Yessler: Do you remember Mr. Snyder saying everything goes in the hole, don't take it to the dump, take it to the hole?" Mr. Jones: "Yep". *Id. at 70*). He also acknowledged that multiple persons, including himself, two of Appellant's brothers, and even Dale Smith, operated equipment and participated in the burying of waste on the RISCO Site. Notwithstanding this testimony, the fact that Appellant may have been directed to bury waste or that other individuals also may have done the same does not impact the weight of the evidence against Appellant.

Commonwealth witness Roseanne Clement of the Pennsylvania Attorney General's Office testified on cross-examination that Appellant was very candid with her and yet he maintained that any decision to dig pits on the RISCO Site was made by Mr. Snyder and Mr. Smith, that Mr. Smith directed Appellant to cover the pits after they were filled, and that Mr. Smith showed him where to dig the pits . *See id. at 158, 160.* Further, Ms. Clement testified that, according to Appellant, Mr. Smith had reassured

Appellant that the materials in the drums were "water soluble lubricant and that it was okay to put them in the ground". *Id. at 160.*

Appellant testified that in 2001 he had been hired by Frederick Snyder to clean up the RISCO Site at 2001 Centre Avenue, but that under the contract Mr. Snyder was responsible for securing any necessary permits and further that Mr. Snyder told him he had done so. *See id. at 263.* According to Appellant, he hauled the scrap metal to a company approximately five miles from the RISCO Site called Royal Green Company, that shreds metal. *See id. at 264.* He testified that he also hauled structural steel to other locations such as the Bethlehem Steel Works or Atlantic States Foundry, and separated debris (paper, cardboard, wood, glass, and plastic) to be sent to a landfill in Morgantown. *See id.* According to Appellant, there were three other contractors on the site who all reported to Mr. (Dale) Smith. *See id.* Appellant testified that at some point in mid-June or mid-July, the BFI landfill started turning away their trucks. *See id. at 265.* He believes it was due to payment issue caused by Mr. Snyder. He explained as follows:

> When the landfill refused to let our trucks come back down that day, we – we kept cleaning up scrap metal. But sometime shortly thereafter, Dale Smith said they had obtained permission from DEP to dig a pit in the back to store this ...this is when I brought the machine to screen the material to separate it.

NT, Jury Trial at 267. He insisted that the drums he was hired to dispose of contained only "metals, scrap metals, and material called grinding swarf." *Id. at 268.* He acknowledged that he did put material in the pits but that it was limited to "byproducts

from (his) metal screening operation, the wood, class, plastic, paper...". *Id. at 269.* Appellant explained that all the pits were located on a lot adjacent to the 2001 Centre Avenue location ("It was known as the 5th Street Highway property. That was where the holes were dug. The holes were not dug on the 2001 Centre Avenue.") *Id.* The two lots were separated by a fence with a gate. *See id. at 270.* Appellant testified that he never placed anything "hazardous" into the pit, and further that even though he was reassured that the necessary permits had been obtained, he is "exempt" from the permit requirement. *Id. at 271-72* ("I actually am excluded from needing a permit to store that on a temporary basis. The law does not require me to have a permit for that."). Despite his testimony that all the pits were on the 5th Avenue Property, he did testify that he dug a trench for the purpose of burying slag on the 2001 Centre Avenue property. *See id. at 274-74.* Appellant testified that there were various other contractors on the RISCO Site, all reporting to Dale Smith, and he paints a picture of a long-polluted industrial site with leaky barrels and the presence of an "oily sludge" that had been hauled to the site from Dana Corporation by the site's previous owner. However, Appellant denies burying anything other than debris, and insists that he only dug the pits but never covered them after they were filled. *See id. at 274-276.* He even testified that he refused to cover them despite being asked to for additional compensation. *See id. at 278.* Appellant testified that he contacted the DEP, which led to him being excluded from the RISCO Site except to retrieve his equipment, some of which he claims was destroyed in retaliation. *See id. at 280-81.* When asked by his attorney if he had ever stored hazardous materials at the site, he replied that the hazardous materials had been there from the previous owner, Reading Industrial Scrap, and that neither he nor his employees stored or transported any

hazardous material *See id. at 282-83.* "No, the only thing that we did transport was recyclable scrap metal, wood, and debris...that went to BFI Landfill, and that was it." *Id. at 283.*

Despite all of these qualifications and explanations, on cross-examination, Appellant acknowledged that he had filled the first hole on the site with "500 tons" of byproducts from his "recycling operation", which included "wood, plastics, rubber tires, glass and basically whatever was left after metal was stripped off in the scrap yard". *Id. at 292.* He also reiterated that he had dug (on the Centre Avenue site) a hole for Dale Snyder to bury a piece of slag "the size of a Volkswagon" because Mr. Snyder and Mr. Smith did not want to pay to have it removed from the site. *Id. at 294.*

In sum, there was contradictory evidence presented at trial with respect to permits and with respect to the location of the pits into which waste was dumped, however the jury heard Appellant's version of events as well as certain other witnesses who corroborated some aspects of Appellant's testimony. After weighing all of the testimony presented by both sides, the jury determined that Appellant had engaged in Unlawful Conduct under the SWAMA.

Jury Instruction

Appellant asserts that the trial court erred in failing to give a jury instruction relating to an exemption to the permit requirement found for individuals involved in the beneficial recovery of scrap metal. Appellant was convicted of Unlawful Conduct under

the Health and Safety Code, which makes it unlawful for an individual (or municipality) to:

> Dump or deposit, or permit the dumping or depositing, of any solid waste onto the surface of the ground or underground or into the waters of the Commonwealth, by any means, unless a permit for the dumping of such solid wastes has been obtained from the department; provided, the Environmental Quality Board may by regulation exempt certain activities associated with normal farming operations as defined by this act from such permit requirements.

35 Pa.C.S.A. § 6018.610(i). To support his position that Appellant was somehow exempt from this requirement and, more specifically that this court erred in failing to instruct the jury as to an exemption found in the Environmental Protection Code, Appellant directs the court to Section 287 of the Environmental Protection Code's "General Requirements for Permits, which admittedly lists certain exceptions to permit requirement. The pertinent section of Section 287 reads as follows:

> (a) Except as provided in subsection (b), a person or municipality may not own or operate a residual waste disposal or processing facility unless the person or municipality has first applied for and obtained a permit for the activity from the Department under this article.
>
> (b) A person or municipality is not required to obtain a permit under this article, comply with the bonding or insurance requirements of Subchapter E (relating to bonding and insurance requirements) or comply with Subchapter B (relating to duties of generators) for one or more of the following:
>
> (7) Processing that results in the beneficial use of scrap metal.

25 Pa Code 287.101. Appellant's argument is that subsection (b)(7) contains a potentially applicable exemption to the permit requirement contained in subsection (a).

There are several reasons why the court's failure to give a jury instruction as to this exemption cannot be error. The first is that trial counsel never asked for any such instruction, no ruling was made, and therefore the issue is not preserved for appeal. The second is that even if such a motion had been made, Appellant has not shown that there was evidence to support the proposition that the actions for which Appellant was convicted could constitute "processing that results in the beneficial use of scrap". Thirdly, Appellant was not convicted of failing to obtain a permit under 25 Pa. Code. 287.101(a), the permit requirement to which subsection b(7) relates. Rather, he was convicted under the Health & Safety Code for failing to obtain a permit under Section 35 Pa C.S.A. § 6018.610(i). There is nothing presently before the court to suggest that the exemption the Environmental Protection Code applies to the permit requirement in the Health and Safety Code. Lastly, even if the proffered exemption would be applicable, the following section qualifies the exemption as follows:

> (c) Subsection (b) *does not relieve a person or municipality of the requirements of the environmental protection acts or regulations promulgated thereto*. Notwithstanding subsection (b), the Department may require a person or municipality to apply for, and obtain, an individual or general solid waste permit, or take other appropriate action, when the person or municipality is conducting a solid waste activity that harms or presents a threat of harm to the health, safety or welfare of the people or the environment of this Commonwealth.

25 Pa. Code. 287.101(c) (emphasis added). Appellant has not demonstrated that even if the exemption from a different code section applied, the exemption would not be limited by the above language. For all of the above reasons, we believe that there was no error on the part of the court for failing to give jury instructions on the exemption to the permit requirement as asserted by Appellant.

Ineffective Assistance of Counsel

Appellant raises a number of ineffective assistance of counsel claims, and in doing so on direct appeal, relies on an exception to the long-standing and well-entrenched Grant rule that claims of ineffectiveness are reserved for collateral review. In considering Appellant's argument, we note that the Pennsylvania Supreme Court recently addressed the propriety of direct review of ineffectiveness claims in the unanimously-decided Commonwealth v. Stollar. See 84 A.3d 635, 2014 WL 241864 (Pa. 2014). The Stollar Court's analysis is instructive:

> For more than ten years, this Court has applied the rule that claims of ineffectiveness of counsel must be raised on collateral review, not on direct appeal. See Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726, 738 (2002). However, and exception arose under the case law premised on upon the supposition that when the relevant ineffectiveness claims have been properly raised and preserved at the trial court, the trial court holds a hearing on those claims, and the trial court addresses the merits of the claims in a subsequent opinion, these ineffectiveness claims may be reviewed on direct appeal pursuant to the so-called "Bomar exception" See Commonwealth v. Rega, 593 Pa. 659, 933 A.2d 997, 1018 (2007); Commonwealth v. Bomar, 573 Pa. 426, 826 A.2d 831, 853-55 (2003).

Stollar at 84 A.3d 651-52. We do not address whether the claims of ineffectiveness have been properly preserved, however we note that we have not held a hearing nor have we addressed the merits of these claims as they were only raised after the Notice of Appeal was filed. The Stollar Court goes on to explain that the Bomar exception has created significant difficulty and there have been "significant criticisms" of the exception which have "raised questions concerning the appropriateness of its continued viability". Id. at

652. These concerns stem from the fact that the Bomar exception has not been uniformly applied, effectively creating a bifurcated system under which certain defendants are afforded the right to pursue claims of ineffectiveness both on direct and collateral review, while others are limited to collateral review under similar factual circumstances. See Commonwealth v. Holmes, (see which judges concurred on this issue) 621 Pa. 595, 79 A.3d 562 (2013). The Court goes on to state that these questions have been resolved in favor of the bright line, pre-Bomar rule under which claims of ineffective assistance of counsel are properly raised on collateral review. See Holmes, 621 Pa. 595, 79 A.3d 562 (2013).

> Grant's general rule of deferral to PCRA review remains the pertinent law on the appropriate timing for review of claims of ineffective assistance of counsel; *we disapprove of expansions of the exception to that rule recognized in Bomar;* and we limit Bomar, a case litigated in the trial court before Grant was decided and at a time when new counsel entering a case upon post verdict motions was required to raise ineffectiveness claims at the first opportunity, to its pre-Grant facts.

Stollar at 652, *quoting* Holmes at 598. The Holmes Court recognized two limited exceptions to the bright line rule, the applicability of both of which are within the discretion of the trial court. See Holmes at 598. The Holmes Court explicitly re-affirmed Grant and held that, absent the two exceptions discussed below

> claims of ineffective assistance of counsel are to be deferred to PCRA review; trial courts should not entertain claims of ineffectiveness upon post-verdict motions; and such claims should *not* be reviewed on direct appeal.

Holmes at 620, 576 (emphasis added).

Despite re-affirming the rule in Grant and expressing a clear preference for deferral of claims ineffectiveness claims until collateral review, the Holmes Court did allow for two exceptions to this rule. The first such exception is the existence of

> extraordinary circumstances where a discrete claim (or claims) of trial counsel ineffectiveness is apparent from the record and meritorious to the extent that immediate consideration best serves the interests of justice

621 Pa. 595, 599, 79 A.3d 562, 564. There is little guidance on what constitutes extraordinary circumstance other than the following overview:

> [T]here may be an extraordinary case where the trial court, in the exercise of its discretion, determines that a claim (or claims) of ineffectiveness is both meritorious and apparent from the record that immediate consideration and relief is warranted. The administration of criminal justice is better served by allowing trial judges to retain the discretion to consider and vindicate such distinct claims of ineffectiveness, and we hereby approve such a limited exception to Grant.

621 Pa. 595, 621, 70 A.3d 562, 577. There is nothing in the record to suggest that this is such a case. Appellant has not argued the existence of such circumstances to this court such that a determination can be rendered. In the second footnote to his his Concise Statement, Appellant contends that the short nature of his sentence effectively deprives him of the opportunity of collateral review, because he will not be serving any portion of his sentence[5] at the time collateral review would become available. While we recognize the hypothetical legal conundrum this may present, we are nonetheless constrained to point out that for the same reason Appellant is foreclosed from pursuing collateral relief,

[5] Appellant was sentenced on the sole count of which he was found guilty to 1 to 12 months of incarceration and was given 365 days of credit time. Therefore, Appellant could at no time be "serving" the sentence to which this appeal relates.

he will effectively have suffered no consequence or prejudice in connection with this sentence, not only because it is brief, but also because Appellant been given credit time for 100% of said sentence, and lastly because Appellant is presently serving a life sentence for an unrelated homicide[6]. There is case law on point that addresses Appellant's contention that his due process rights have been damaged by the fact that his period of incarceration or parolee is *too short* to have adequate time during which to seek collateral review. The "short sentence" has been determined to be an inadequate basis upon which to allow direct appeal of claims of ineffectiveness (See Commonwealth v. O'Berg 584 Pa. 11, 880 A.2d 597 (2005)) however the Holmes Court acknowledges that the this may be a justification for allowing the trial court to address the issue. See Holmes at 622-23. "[U]nitary review offers defendants who receive shorter prison sentences or probationary sentences the prospect of litigating their constitutional claims sounding in trial counsel ineffectiveness" where such review would be unavailable under the PCRA due to the requirement that a petitioner must serving a sentence to be eligible for relief[7]. Id. While there may be some circumstances where the brevity of the sentence itself may constitute grounds to permit direct review of claims of ineffectiveness, there is nothing to suggest that it is mandatory.

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[6] In 2007 at Docket No. CP-45-CR-0000112-2007 Appellant was charged with the August 8, 1993 killing of Robert Hagan. Although he originally entered into a negotiated plea agreement under which he pled guilty to 3rd degree murder and received a sentence of 10 to 20 years, Appellant succeeded in having his guilty plea withdrawn, was granted a new trial, found guilty by a jury of First Degree Murder on July 14, 2010, and sentenced to life imprisonment.

[7] [T]he legislature was aware that the result of the custody or control requirement of §9543(a)(3)(I)(i) would be that defendants with short sentences not be eligible for collateral relief. Indeed that as the apparent intent: to restrict collateral review to those who seek relief from a state sentence. Commonwealth v. Turner, 80 A.3d 754, 766 (Pa. 2013).

With respect to the second exception, prolix and non-record-based claims of ineffectiveness where the defendant has expressly waived future collateral review, it does appear that non-record information (*i.e,* trial counsel's testimony as to his strategic decisions) would be necessary to resolve at least one of Appellant's claims of ineffectiveness. From a procedural standpoint, however, and in consideration of the reasoning in Bomar, we believe that Appellant cannot pursue these claims of ineffectiveness on direct appeal in this instance. The basis for the Bomar ruling allowing the trial court to address the claims of ineffectiveness was that the trial court had *already* conducted an evidentiary hearing on the subject, based on the claims raised in the defendant's post trial motion. See Holmes at 611, 571. Here, no such issues were raised in Appellant's post trial motion and therefore there was no evidentiary hearing or ruling on any such issue. The justification for allowing unitary review in Bomar simply does not exist here. Moreover, because the case is presently on appeal we are unable to conduct the requisite evidentiary hearing.

The second exception to the rule also requires both a showing of good cause and an express waiver of the right to later pursue such claims under collateral review. Appellant here raises two claims of ineffectiveness, that trial counsel was ineffective for failing to request certain jury instructions and ineffective for failing to seek a Judgment of Acquittal based on the Commonwealth's purported failure to demonstrate Appellant's activities at the address listed in the charges. While Appellant indicates in the Concise Statement that he would waive his right to pursue these claims in any future Post

Conviction Relief Act proceeding, these claims do not meet this second requirement because Appellant has not shown good cause, nor do these two claims constitute "prolix" claims, nor has there been a proper PCRA waiver colloquy. "A court should agree to such review only upon good cause shown and after a full PCRA waiver colloquy." Holmes at 627, 580.

Although we do not believe that this issue of trial counsel's ineffectiveness is properly raised on direct appeal, we will briefly address the merits of each allegation of ineffectiveness for purposes of completeness. First, Appellant contends that trial counsel was ineffective for failing to request that the jury be instructed about an exemption to the permit requirement. As we discussed above in connection with Appellant's second issue (that the court erred in failing to give said jury instruction), we are not certain the instruction would have been proper where there was no reason to believe that the exemption applied to the code section Appellant was found to have violated and, even if it did, there is nothing in the record to suggest that Appellant's activities would have qualified for the exemption. Accordingly, we cannot agree that trial counsel should be deemed ineffective for failing to request the jury instruction suggested by appellate counsel. Second, Appellant indicates that trial counsel was ineffective for failing to ask for a judgment of acquittal when the evidence did not show that Appellant had engaged in the prohibited burying of solid waste at 2001 Centre Avenue, the address charged in the complaint. According to Appellant, the evidence at trial only demonstrated Appellant's actions at 200 North 5th Street Highway, an adjacent property. It should be noted that both at the conclusion of the evidence at trial and after the verdict of guilty was

recorded, trial counsel made oral motions for a Judgment of Acquittal, and also filed a Memo in Support of Motion for Judgment of Acquittal. In this Memo, trial counsel indicated that he had, at trial, requested a judgment of acquittal because:

> the Commonwealth failed to offer sufficient evidence of an essential element of the charges, namely that [the] Commonwealth did not submit sufficient evidence that no permits were issued for the activities on the site in question.

See ¶ 3, Defendant's Memo in Support of Motion for Judgment of Acquittal, February 25, 2010. While the primary argument in favor of acquittal related to the fact that the Commonwealth relied on lay witness, among which there was inconsistency, to show that Appellant lacked the requisite permits rather than presenting the custodian of the records of the DEP, the Motion was successful: this court *granted* trial counsel's Motion for Judgment of Acquittal. Although it was ultimately overturned on appeal, we cannot agree that trial counsel was ineffective in his representation of Appellant when he successfully attained a Motion for Judgment of Acquittal on his behalf.

CONCLUSION

For all of the foregoing reasons, we respectfully request that Appellant's appeal be DENIED.

COMMONWEALTH OF PENNSYLVANIA	:	**SUPERIOR COURT OF**
	:	**PENNSYLVANIA**
vs.	:	
	:	**591 MDA 2015**
	:	
Gary Lee Gerber, Jr	:	

PROOF OF SERVICE

I hereby certify that I am serving the foregoing documents upon the person and in the manner indicated below which service satisfies the requirements of Pa. R.A.P. 121:

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