[J-66-2013]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 40 MAP 2010
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered July 15, 2009, at 932 MDA
	:	2008, remanding the Order of the Court of
v.	:	Common Pleas of Centre County entered
	:	May 16, 2008 at No. CP-14-CR-0002169-
	:	2005
JUSTIN DAVID HOLMES,	:	
	:	
Appellee	:	SUBMITTED: October 26, 2010
		RESUBMITTED: August 13, 2013

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: October 30, 2013**

I join the majority opinion in full. Initially, I commend the majority for reevaluating the jurisprudence arising from the purportedly unintended expansion of this Court's decision in Commonwealth v. Bomar, 826 A.2d 831 (Pa. 2003), and for creating a limited procedure for litigating claims challenging counsel's stewardship on post-verdict motions and direct appeal. The majority's thoughtful analysis has caused me to reconsider my personal position on the matter. As explained infra, to obtain consensus and provide clear guidance to the bench and bar, I now join the majority's sentiments that our holding in Bomar, which permitted certain claims of ineffective assistance of counsel to be raised on direct appeal, should be limited to cases litigated in the trial court before this Court decided the seminal case of Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002). As described below, I reach this compromise of position as I believe

that my prior concerns about limiting the Bomar exception are accommodated by the majority's new approach.

Under the majority's holding, trial courts will not have unfettered discretion to entertain claims of ineffective assistance of counsel on direct appeal, but may do so only if: (1) there are extraordinary circumstances where a claim of ineffective assistance of trial counsel is apparent from the record and meritorious to the extent that immediate consideration of the claim best serves the interests of justice; or (2) the defendant demonstrates good cause to raise multiple or prolix ineffectiveness claims on direct appeal, including non-record based claims, and expressly and knowingly waives his right to seek subsequent PCRA review ("good cause/PCRA waiver exception").

I support adoption of the "extraordinary circumstances" exception as it allows for immediate vindication of a clearly meritorious record-based claim of ineffective assistance of counsel. I also support adoption of the good cause/PCRA waiver exception because, in my view, it affords a defendant serving a "short sentence" as discussed in Commonwealth v. O'Berg, 880 A.2d 597 (Pa. 2005), a viable opportunity to obtain collateral review prior to expiration of his sentence. However, as set forth infra, I would caution defendants to employ the good cause/PCRA waiver exception only in O'Berg-type cases where they would otherwise lose PCRA review entirely if not invoked imminently. Presentation of routine ineffectiveness claims on direct appeal in exchange for waiver of subsequent PCRA review would be unwise and highly prejudicial because the defendant would be forfeiting the extended time period allotted under the PCRA to investigate non-record-based ineffectiveness claims.

I. Limiting of the Bomar Exception

As recognized by the majority, this Court in Grant did not adopt a blanket rule prohibiting the presentation of ineffectiveness claims in post-trial motions or on direct

appeal, but rather held that, "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." 813 A.2d at 738. In support of our general rule favoring deferral of ineffectiveness claims to PCRA proceedings, we recognized that the obligations of appellate counsel may not, as a constitutional matter, include raising claims that are outside the record certified for appeal, and, assuming counsel had such obligation, the 30-day period for filing a direct appeal served as an obstacle to counsel's ability to investigate and develop extra-record claims of ineffectiveness. Id. at 737. We further noted that a record may not be developed sufficiently on direct appeal to permit adequate review of ineffectiveness claims, particularly the determination of the reasonableness of trial counsel's strategy or tactic. Id. Additionally, we emphasized that allowing unitary review of ineffectiveness claims was contrary to fundamental principles of appellate review, which require issue preservation in the trial court accompanied by a trial court opinion addressing the ineffectiveness claims. Id.

Five months after our opinion in Grant was filed, this Court decided Bomar, which involved a direct appeal of a capital sentence. Consistent with controlling precedent at the time, the defendant, represented by new counsel, filed post-sentence motions challenging trial counsel's ineffectiveness, which were litigated in the trial court prior to our pronouncement in Grant. The trial court conducted evidentiary hearings on such claims, and disposed of the ineffectiveness claims in its opinion. When presented with the same ineffectiveness claims on direct appeal, this Court did not defer them as suggested in Grant, but entertained them on the merits. We held that because: (1) the defendant had presented his ineffectiveness claims to the trial court; (2) the trial court had afforded the defendant an evidentiary hearing to develop such claims; and (3) the trial court disposed of such claims in its opinion, the concerns that led us to adopt

Grant's general rule deferring consideration of ineffectiveness claims to collateral review were not present. Bomar, 826 A.2d at 853.[1] This Court went on to hold that "this circumstance is an exception to the general rule of deferral in Grant." Id. at 855.

While the Court may have intended for the "Bomar exception" to apply only to cases litigated in the trial court prior to our announcement in Grant, as that was the factual predicate of Bomar, the opinion did not express such intent in its analysis of the issue.[2] Further, decisions of this Court filed after Bomar did not cite the pre-Grant trial litigation posture of the case as a prerequisite for application of the exception. Rather, we described the Bomar exception as applying where ineffectiveness claims had been preserved in the trial court on direct appeal, were the subject of an evidentiary hearing, and had been disposed of in the trial court's opinion. See e.g. Commonwealth v. Mitchell, 839 A.2d 202, 208 (Pa. 2003) (describing the Bomar exception as permitting consideration of "only those ineffectiveness claims where the lower court conducted a hearing and provided a full consideration of the issue"); Commonwealth v. Malloy, 856 A.2d 767, 780-81 (Pa. 2004) (describing Bomar as holding that "where the concerns highlighted in Grant did not exist -- *i.e.*, the claims of ineffective assistance of counsel were raised and fully developed at a hearing in the trial court at which counsel testified and the trial court addressed the claims in an opinion -- this Court would proceed to address the ineffectiveness claims on direct appeal"); Commonwealth v. Singley, 868 A.2d 403, 411 n.8 (Pa. 2005) (interpreting Bomar as holding that "direct appellate

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[1] The Court further noted that the difficulties facing appellate counsel in developing ineffectiveness claims within the limited time allotted for filing a direct appeal were not implicated as the defendant, at least to the claims presented, raised and developed fully such claims at the evidentiary hearings conducted by the trial court. Id. at 855.

[2] This author was not a member of the Court when Bomar was decided.

review of ineffective assistance of counsel is permitted where the issues were raised in the trial court, a hearing was held at which trial counsel testified, and the trial court passed on those claims").

Moreover, this Court continued to apply the Bomar exception in a capital appeal where the defendant's post-sentence motions alleging the ineffective assistance of trial counsel had been litigated in the trial court after Grant had been decided. Commonwealth v. Chmiel, 889 A.2d 501, 540 (Pa. 2005). We reiterated that the Bomar exception applied because the trial court held an evidentiary hearing on the claims, and disposed of the ineffectiveness claims in its opinion. Id.[3] See also Commonwealth v. Rega, 933 A.2d 997, 1018 (Pa. 2007) (wherein a plurality of the Court agreed that the Bomar exception may apply where ineffectiveness claims were litigated on direct appeal after Grant had been decided).

This author has favored application of the Bomar exception in post-Grant cases for several reasons. First, the reasoning of Bomar -- that Grant's primary concerns over impediments to developing and reviewing ineffectiveness claims on direct appeal are eliminated where the defendant preserved the ineffectiveness claims in the trial court, they were the subject of an evidentiary hearing, and were disposed of by the trial court in its opinion -- is equally persuasive in both the pre-Grant and post-Grant scenario. Second, entertaining ineffectiveness claims that had already been subject to an evidentiary hearing and reasoned disposition by the trial court appeared, at first blush, to save judicial resources and give finality to a defendant's judgment of sentence. Third, and most significantly, a broad application of the Bomar exception afforded trial courts discretion to consider a claim of ineffectiveness on direct appeal, which allowed

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[3] Our decision in Chmiel was written by this author. No responsive opinions were filed objecting to the consideration of ineffective claims under the Bomar exception.

for immediate vindication of a clearly meritorious claim without having the defendant await disposition of his direct appeal to assert a claim of ineffectiveness under the PCRA. Otherwise, a defendant with a claim of trial counsel ineffectiveness that was of obvious record-based merit would have to forego his direct appeal and proceed directly to PCRA review or wait an indeterminate amount of time until his direct appeal was decided before he could seek relief in a PCRA petition. Finding such "Hobson's choice" undesirable and absent any existing alternative to afford trial courts discretion to entertain only those ineffectiveness claims that warranted immediate review, this author supported a broad interpretation of the Bomar exception.

Admittedly, and as noted cogently by the majority, a broad application of the Bomar exception raised complications of its own. Application of the Bomar exception became arbitrary as there were no existing standards to channel the trial court's exercise of discretion as to when to entertain the ineffectiveness claims on direct appeal. See Rega, 933 A.2d at 1032 (Pa. 2007) (Castille, J., concurring) (recognizing that questions of arbitrariness arose because there were "no existing standards or guidelines governing when a trial judge should permit litigation of ineffectiveness claims, or other collateral claims, on post-verdict review or should defer to review at the collateral stage"). Concerns also arose because defendants who challenged trial counsel's performance on direct appeal could potentially receive a second round of collateral review by subsequently filing a PCRA petition after the direct appeal had been resolved. Id., at 1030 (Castille, J., concurring) (opining that "a defendant afforded such hybrid direct review faces no existing impediment in the PCRA, the Criminal Rules, or the case law to pursuing a second round of collateral claims under the PCRA, after a first round of direct/unitary review concludes").

Thus, I recognize that the difficulties arising from a broad application of the Bomar exception have become too problematic to ignore. In an effort to obtain consensus and provide guidance to the bench and bar, I now agree that the Bomar exception should be limited to its facts, where the claims of ineffectiveness were litigated in the trial court before this Court announced the general rule of deferral in Grant. My concern over trial courts lacking discretion to entertain the exceptional claim of ineffectiveness that would warrant the grant of immediate relief has been allayed by the majority's insightful adoption of the "extraordinary circumstances" exception. For the first time, trial courts will possess the requisite guidance to channel their discretion to entertain a claim of ineffectiveness on direct appeal that is apparent on the record and meritorious to the extent that immediate consideration of the claim best serves the interests of justice. While there may be litigation over what circumstance constitutes an extraordinary one, I am confident that the majority has narrowly crafted the exception, and that further elucidation will arise through the exercise of trial court discretion, as well as subsequent case law addressing specific claims of ineffectiveness in the appropriate cases. I further acknowledge that judicial resources will not be wasted by appellate courts deferring consideration of ineffectiveness claims that have already been adjudicated by the trial court because such procedure will ultimately eliminate circumstances where defendants obtain two rounds of collateral review. It is for these reasons that I depart from the position I have taken in prior cases, and now join the majority's mandate to limit the Bomar exception.

II. The Good Cause/PCRA Waiver Exception

The majority's adoption of the second exception to Grant's general rule of deferral applies where the defendant demonstrates good cause for unitary review of multiple or prolix ineffectiveness claims on direct appeal, and the defendant executes a

knowing and express waiver of his entitlement to seek subsequent PCRA review from his conviction and sentence. Under the PCRA, a petitioner 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(a)(1)(i). Accordingly, when defendants are precluded from litigating ineffective assistance of counsel claims on direct appeal, those defendants who have completed their sentences before their direct appeals have been decided have no opportunity for collateral review.

Our Court confronted this issue directly in Commonwealth v. O'Berg, 880 A.2d 597 (Pa. 2005), and the majority declined to adopt a "short sentence" exception to the Grant general rule of deferral. This author joined the dissenting opinion of Justice Saylor in O'Berg, which advocated recognition of an exception to Grant's general rule of deferral in circumstances involving sentences of short duration to ensure that defendants would have the opportunity to seek collateral review of their convictions. See O'Berg, 880 A.2d at 607-08 (Saylor, J., dissenting, joined by Baer, J.) (opining that "the majority's position that Grant's rationale justifies a policy of no review in the short sentence scenario rings hollow, since in crafting its rule of 'deferral,' the Grant Court expressly grounded its rationale on the availability of collateral review").

The majority's adoption of the good cause/PCRA waiver exception in the instant case offers that which the majority in O'Berg declined to provide -- a workable alternative method by which a defendant serving a short sentence could obtain collateral review.[4] At the same time, the majority's approach protects against the

[4] The majority acknowledges that one of the most important benefits of unitary review is that it "offers defendants who receive shorter prison sentences or probationary sentences the prospect of litigating their constitutional claims sounding in trial counsel ineffectiveness; for many of these defendants, post-appeal PCRA review may prove unavailable." Slip Op. at 27.

defendant obtaining a second round of collateral proceedings by requiring a mandatory waiver of subsequent PCRA review. [5]

While I join the majority's adoption of the good cause/PCRA waiver exception, in my view, defendants should be wary of invoking it absent circumstances where they will likely lose eligibility for PCRA review if not promptly invoked, as occurs in the short sentence scenario. We recognized in Grant that "[d]eferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel." Id. at 738. This sentiment, in part, was based on the fact that investigation and development of a claim of ineffectiveness, in the general sense, takes longer than the time necessary to present a claim on direct appeal. We explained that an appellate counsel who presents ineffectiveness claims on direct appeal "must not only scour the existing record for any issues, but also has the additional burden of raising any extra-record claims that may exist by interviewing the client, family members, and any other people who may shed light on claims that could have been pursued before or during trial and at sentencing." 813 A.2d at 737. Notably, we acknowledged that when ineffectiveness claims are raised on direct appeal, appellate counsel must perform this "Herculean task" in the thirty-day period for filing an appeal from the judgment of sentence, Pa.R.Crim.P. 720,

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[5] As the majority in O'Berg recognized, because the time for disposition of a particular appeal is indeterminable, a defendant is never certain whether he will still be serving his sentence at the time his appeal is adjudicated, and, thus, whether he will be eligible to obtain collateral review. 880 A.2d at 602. Accordingly, where the defendant proceeds to avail himself of the good cause/PCRA waiver exception in the short sentence scenario, he does so at his own peril because if he continues to serve his sentence after his judgment of sentence has become final, and thereby remains eligible to seek PCRA review, his mandatory waiver of PCRA review precludes him from obtaining a second bite of the proverbial apple.

rather than the one-year period from the date the judgment of sentence becomes final in which the defendant may file a PCRA petition. 42 Pa.C.S. § 9545(b). While the mandatory nature of the PCRA waiver resolves the problem of a defendant obtaining a second round of collateral review, it does not dissipate these remaining concerns articulated in Grant relating to the distinct and essential roles served by separate direct appeal and collateral criminal proceedings.

Thus, absent the short sentence scenario or other circumstances where the defendant would likely obtain no collateral review at all if not invoked imminently, I find it unwise for defendants to waive subsequent PCRA review, and the concomitant extended period of time it provides to investigate and develop off-record claims, in exchange for immediate resolution of multiple or prolix claims of ineffective assistance of counsel on direct appeal.[6] It was primarily for this reason and due to the absence of clear precedent of this Court requiring waiver of subsequent PCRA proceedings in exchange for unitary review of ineffectiveness claims that I previously resisted such approach. See Commonwealth v. Wright, 961 A.2d 119, 159 (Pa. 2008) (Baer, J., concurring) (opining that this Court has never held that invocation of the Bomar exception results in waiver of subsequent full PCRA review); Commonwealth v. Liston, 977 A.2d 1089, 1101-02 (Pa. 2009) (Baer, J., concurring) (opining that the Bomar decision has never required a forfeiture of subsequent PCRA review in exchange for litigating a claim of ineffectiveness on direct appeal).

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[6] The majority acknowledges the potential hazards of waiving PCRA review in exchange for immediate consideration of ineffectiveness claims on appeal. See Slip. Op. at 30-31 (footnote omitted) (providing that ""[u]nitary review should not be pursued where it may compromise the fullness of the defendant's options for collateral attack represented by the PCRA, absent an appropriate waiver. The more involved and complicated the case, no doubt, the less likely it may be a candidate to waive the defendant's PCRA rights in order to secure unitary review on post-verdict motions.").

With this Court's ruling herein, however, defendants will be on notice that in order to raise multiple or prolix claims of ineffectiveness on direct appeal, they must expressly and knowingly waive all subsequent PCRA review. Armed with this knowledge, defendants and their counsel can evaluate the nature of the ineffectiveness claims sought to be presented for consideration on direct appeal, and can proceed with caution in determining the appropriate case, if any, in which to employ such tactic to their advantage.[7]

[7] Finally, I agree with the majority that this Court should save for another day the question of whether and how to vindicate the right to effective PCRA counsel. My personal views on this issue have been set forth in Commonwealth v. Ligons, 971 A.2d 1125 (Pa. 2009), and Commonwealth v. Pitts, 981 A.2d 875 (Pa. 2009), and need not be reiterated in the context of this appeal.