

Good for the Goose, Good for the Gander: Waiver of a Waiver Objection

June 12, 2018

It is axiomatic that objections not presented to the trial court are deemed waived on appeal. What may come as a surprise, however, is that waiver arguments can also be waived. Thus, a party's failure to raise a waiver argument in its response to an opponent's post-trial motions may waive the waiver argument for appeal. That's what happened in *Commonwealth of Pennsylvania v. Chiquita Byrd*, No. 1357 MDA 2017, 2018 WL 2437575, at *1-2 (Pa. Super. Ct. May 31, 2018). After a bench trial, the trial court forgot to invite closing argument and pronounced the defendant guilty. Neither side objected to this procedure. After sentencing, the defendant filed a post-sentence motion for a new trial. The trial court granted the motion on the grounds that it had deprived the defendant of her rights to make closing argument and be heard under the Commonwealth's Constitution. In its order, the trial court noted that the Commonwealth had not argued that the defendant, by failing to object to the court's procedural shortcut during trial, had waived her right to closing argument. The Commonwealth appealed the grant of a new trial, asserting that the defendant waived the procedural issue when she failed to object at the time the trial court skipped closing argument. The appellate court rejected that argument, finding that the Commonwealth had waived *its* waiver argument by failing to raise it below. The court held that, absent unusual circumstances, rights effectively waived cannot be raised for the first time on appeal, and declared, "[w]hat's good for [the] goose is good for the gander." Because it had not raised its waiver argument below, the Commonwealth was precluded from raising it for the first time in the appellate court. **Preservation Tip** Make sure to raise all issues in the trial court, including waiver arguments based on your opponent's failure to timely object. Otherwise, you risk waiving a waiver issue for appeal.

Related Practices

Appellate & Trial Support Litigation and Trials

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.