

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
LASHLEY DACOSTA DOWNES, JR.,	:	No. 1204 MDA 2013
Appellant	:	

Appeal from the PCRA Order, June 26, 2013,
in the Court of Common Pleas of Lancaster County
Criminal Division at No. CP-36-CR-0004507-2007

BEFORE: FORD ELLIOTT, P.J.E., SHOGAN AND PLATT,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED DECEMBER 24, 2013**

Lashley Dacosta Downes, Jr., appeals from the order entered June 26, 2013, denying his petition for post-conviction collateral relief. We affirm.

On July 13, 2007, Detectives with the Lancaster County Drug Task Force executed a search warrant at 905 East King Street, Second Floor Apartment, Lancaster, PA, [appellant]’s residence. (Notes of Testimony, Trial (N.T.) at 19-21). Detectives found marijuana, packaging material, Inositol powder,^[1] knives with cocaine residue, and \$4,740 inside the residence. N.T. at 22, 189, 190-92. During the search, [appellant] arrived at the residence in a Chrysler Concord and subsequently gave consent to search that vehicle. N.T. at 43-44. A handgun that had been reported as stolen was found inside that vehicle. N.T. at 24, 140-41. Detectives also executed a search warrant on a Ford Expedition that was seized from the

* Retired Senior Judge assigned to the Superior Court.

¹ Inositol powder is commonly used as a cutting agent.

residence and found cocaine and a digital scale inside. N.T. at 217, 222.

Commonwealth v. Downes, 462 MDA 2010 at 1-2, unpublished memorandum (Pa.Super. filed April 18, 2011), quoting trial court opinion, 5/14/10 at 1-2.

On November 5, 2009, following a jury trial, appellant was convicted of one count each of receiving stolen property, possession with intent to deliver cocaine ("PWID"), possession of a small amount of marijuana, and possession of drug paraphernalia. On January 29, 2010, appellant received an aggregate sentence of 6 to 15 years' incarceration. This court affirmed the judgment of sentence, and on August 30, 2011, our supreme court denied appellant's petition for allowance of appeal. **Commonwealth v. Downes**, 29 A.3d 836 (Pa.Super. 2011), **appeal denied**, 611 Pa. 673, 27 A.3d 1014 (2011).

On May 24, 2012, appellant filed a timely **pro se** PCRA² petition. Counsel was appointed, and filed an amended petition on appellant's behalf. An evidentiary hearing was held on April 29, 2013, at which trial counsel, Herbert Crystle, Esq., testified. On June 26, 2013, the PCRA court denied appellant's petition, and this timely appeal followed.³

² Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546.

³ Appellant was not ordered to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the PCRA court relies on its prior opinion and order of June 26, 2013. (**See** order filed July 5, 2013.) (Docket #49.)

Appellant has raised the following issues for this court's review:

- A. Whether the lower court erred when he found that trial counsel was not ineffective when he did not object after the trial judge failed to instruct the jury that mere presence at the scene of a crime was insufficient to prove [appellant]'s guilt beyond a reasonable doubt?
- B. Whether the lower court erred when he found that trial counsel was not ineffective when he stipulated that [appellant] was incarcerated between February 8, 2009 and April []3, 2009 and he did not request a cautionary instruction that the mere fact that [appellant] had been incarcerated was irrelevant to whether he was guilty of these charges?

Appellant's brief at 4.

Initially, we set forth the general standard for counsel ineffectiveness:

"To prevail on a claim alleging counsel's ineffectiveness, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness." **Commonwealth v. Wallace**, 555 Pa. 397, 407, 724 A.2d 916, 921 (1999), citing **Commonwealth v. Howard**, 538 Pa. 86, 93, 645 A.2d 1300, 1304 (1994) (other citation omitted). In order to meet the prejudice prong of the ineffectiveness standard, a defendant must show that there is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." **Commonwealth v. Kimball**, 555 Pa. 299, 308, 724 A.2d 326, 331 (1999), quoting **Strickland v. Washington**, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A "[r]easonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." **Id.** at 309, 724 A.2d at

331, quoting **Strickland**, 466 U.S. at 694, 104 S.Ct. 2052.

Commonwealth v. Jones, 811 A.2d 1057, 1060 (Pa.Super. 2002), **appeal denied**, 574 Pa. 765, 832 A.2d 435 (2003).

In his first issue on appeal, appellant argues that trial counsel was ineffective for failing to request a “mere presence” jury instruction. It is well established that mere presence at a location where narcotics are found is insufficient to support a conviction. **See Commonwealth v. Valette**, 531 Pa. 384, 390-391, 613 A.2d 548, 551 (1992); **Commonwealth v. Keblitis**, 500 Pa. 321, 324, 456 A.2d 149, 151 (1983) (“The discovery of contraband substances in close proximity to a defendant, in a location equally accessible to others, cannot alone support a conviction.”) (citations omitted).

Attorney Crystle testified that he did not request a mere presence instruction because it was not relevant to the case. (Notes of testimony, 4/29/13 at 7.) Appellant was not even present when the warrant was served. (**Id.**) Furthermore, the instruction would have conflicted with appellant’s theory of the case which was that the drugs belonged to the individual who was actually present in the apartment when the warrant was served. (**Id.**) Clearly, trial counsel had a reasonable basis for not requesting such an instruction.

In his second issue on appeal, appellant complains that trial counsel was ineffective for stipulating that appellant was incarcerated in the county jail from February 8, 2009 to April 3, 2009. Appellant further argues that

counsel was ineffective for failing to request a cautionary instruction. (Appellant's brief at 17.)

At trial, Larissa Conner ("Conner"), appellant's ex-girlfriend, testified that he beat her up on March 20, 2009, at her apartment. (Notes of testimony, 11/3/09 at 113-114.) Conner testified against appellant and was the Commonwealth's star witness. Trial counsel explained that by stipulating to appellant's dates of incarceration, they could prove that she was lying. (Notes of testimony, 4/29/13 at 9.) If Conner was lying about the March 20 incident, then the jury would be more likely to disbelieve the rest of her testimony, including that appellant possessed the drugs. (*Id.*) Trial counsel explained that their theory of the case was that Conner was a jilted ex-girlfriend and was only testifying to get back at appellant. (*Id.*)

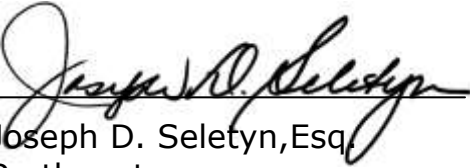
Clearly, trial counsel had a reasonable strategic basis for stipulating that appellant was incarcerated during the time that Conner claimed he beat her up. By proving that Conner was either lying or confused about the March 20, 2009 incident, he was attempting to cast doubt on her entire testimony, which was a logical strategy. Furthermore, although trial counsel did not request a limiting instruction, we cannot find that such omission was so prejudicial as to have affected the outcome of the trial. The jury was obviously aware that appellant was charged with serious crimes. The trial court did instruct the jury that appellant is presumed innocent and the mere fact he was arrested and accused of a crime is not evidence against him.

J. S63007/13

(Notes of testimony, 11/5/09 at 317.) Appellant's second claim of trial counsel ineffectiveness fails.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/24/2013