COMMONWEALTH OF PENNSYLVANIA Appellee v. JAMES E. TRIMMER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2170 MDA 2012

Appeal from the Order entered November 13, 2012
In the Court of Common Pleas of Adams County
Criminal Division at No(s): CP-01-CR-0000570-2007.

BEFORE: BENDER, J., DONOHUE, J., and STRASSBURGER, J.*

MEMORANDUM BY STRASSBURGER, J.: **FILED DECEMBER 18, 2013**

James E. Trimmer (Appellant) appeals from the order entered November 13, 2012, denying his petition under the Post Conviction Relief Act (PCRA).[1] Also before this Court is appointed counsel's ***Turner/Finley***[2] brief and an accompanying motion to withdraw as counsel. After review, we affirm the PCRA court's order and grant counsel's request to withdraw.

A prior panel of this Court set forth the relevant factual and procedural history of this case as follows.

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* Retired Senior Judge assigned to the Superior Court.

[1] 42 Pa.C.S. §§ 9541-9546.

[2] ***See Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

In late February, 2007, [Appellant] and his son, Jacob Burtner [(Burtner)], got into an argument, at [Appellant's] residence, which resulted in the appearance of the police. That incident proved fateful in that Burtner was well aware that [Appellant] had been growing marijuana in a mobile home located on the family property, which also was home to a family business named TAR Sales & Service. After the dispute, Burtner, apparently upset with [Appellant] and looking to "get even," approached law enforcement authorities in Adams County to implicate [Appellant].

Detective William T. Hartlaub, of the Adams County Drug Task Force, was contacted by Officer Rich Keefer of the Eastern Adams Regional Police Department, on March 2nd or 3rd of 2007, and told that there was a man, Burtner, who had information relating to drug activity. Burtner and Detective Hartlaub later contacted one another via telephone, and Burtner related the information he had regarding [Appellant's] marijuana activities. Upon listening to Burtner, Detective Hartlaub told Burtner that he believed the information was too stale to act upon and asked Burtner if he could participate in a "controlled buy" of marijuana from [Appellant]. Burtner stated that he could not. However, Burtner indicated that he was still working for his father and could obtain additional information/evidence. Detective Hartlaub replied that he could not direct Burtner to acquire any information and that "what he did was on his own."

On March 4, 2007, Detective Hartlaub met with Burtner, who told the detective that he had been on [Appellant's] land earlier in the day, at approximately 1:00 a.m. Not only did Burtner once again observe many live marijuana plants in various stages of growth, but Burtner took several photos with the camera on his cell phone to provide photographic proof of his observations. Burtner further provided Detective Hartlaub with a bud from a suspected marijuana plant, indicating that it came from one of the plants on [Appellant's] land. Burtner then accompanied Detective Hartlaub to the residence in question where, from the road, Burtner pointed out the residence and the mobile home in the back. The bud was later field tested and returned a positive test result for marijuana.

Based upon the above, Detective Hartlaub prepared and presented an application for a search warrant on March 6, 2007. The application was granted and the warrant was executed the

> following day. Execution of the search warrant yielded approximately 207 individual marijuana plants of various sizes/ages and a great deal of paraphernalia instrumental in the growing of marijuana. [Appellant] was subsequently charged with [manufacturing a controlled substance (marijuana), possession with intent to deliver (PWID) a controlled substance (marijuana), and possession of paraphernalia[3]] and later filed an omnibus pre-trial motion to suppress. A hearing was held on [Appellant's] motion on December 10, 2007, and after testimony was received, the motion was denied that day.

Commonwealth v. Trimmer, 678 MDA 2009, unpublished memorandum at 1-3 (Pa. Super. filed August 12, 2010). Appellant was convicted following a bench trial and, on February 23, 2009, he was sentenced, with respect to the manufacturing count, to a flat term of five years' imprisonment, and to a concurrent one to five-year term of imprisonment on the PWID count. Appellant's timely post-sentence motions were denied on March 17, 2009. A timely appeal was filed and a panel of this Court affirmed his judgment of sentence on August 12, 2010. ***Id.*** On April 26, 2011, our Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Trimmer***, 20 A.3d 1211 (Pa. 2011) (table).

On April 3, 2012, Appellant, through counsel, filed a timely PCRA petition alleging the ineffectiveness of trial and suppression hearing counsel. A PCRA hearing was held on October 15, 2012. Prior to the hearing, PCRA counsel withdrew certain of the ineffectiveness claims related to Appellant's waiver of his right to a jury trial. On November 13, 2012, the PCRA court

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[3] 35 P.S. §§ 780-113(a)(30) and (32), respectively.

issued an order denying Appellant's request for PCRA relief. This timely appeal followed. Both Appellant and the PCRA court complied with the requirements of Pa.R.A.P. 1925.

On April 17, 2013, counsel filed with this Court an ***Anders*** brief with her first petition to withdraw, which was not compliant with the ***Turner***/***Finley*** requirements. ***See Anders v. California***, 386 U.S. 738 (1967) (setting forth minimum procedural requirements for court-appointed counsel seeking to withdraw from representation in a **direct** appeal). By *per curiam* order dated October 1, 2013, this Court directed counsel to file an advocate's brief or a proper ***Turner***/***Finley*** no-merit letter with a renewed motion to withdraw. Counsel timely filed the instant no-merit letter on October 31, 2013.

Before considering the issues counsel asserts Appellant wants to raise, we first must consider whether counsel has complied with the requirements that our courts have established in order for counsel to withdraw pursuant to ***Turner*** and ***Finley***. We previously have explained this procedure as follows.

> …***Turner/Finley*** counsel must review the case zealously. ***Turner/Finley*** counsel must then submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.
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> Counsel must also send to the petitioner: (1) a copy of the "no-merit" letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.

> If counsel fails to satisfy the foregoing technical prerequisites of ***Turner/Finley***, the court will not reach the merits of the underlying claims but, rather, will merely deny counsel's request to withdraw. Upon doing so, the court will then take appropriate steps, such as directing counsel to file a proper ***Turner***/***Finley*** request or an advocate's brief.
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> However, where counsel submits a petition and no-merit letter that do satisfy the technical demands of ***Turner***/***Finley***, the court - trial court or this Court - must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief. By contrast, if the claims appear to have merit, the court will deny counsel's request and grant relief, or at least instruct counsel to file an advocate's brief.

Commonwealth v. Wrecks, 931 A.2d 717, 721 (Pa. Super. 2007).

Instantly, counsel's October 31, 2013 letter brief indicates that she examined the record, case law, and all relevant statutes; that he discussed the case with Appellant; and that after examining whether any claims were available to Appellant, counsel explained why she believes Appellant's issues lack merit. Counsel mailed copies of the ***Turner***/***Finley*** letter and petition to withdraw to Appellant, and advised Appellant that she may proceed *pro se* or through privately-retained counsel.[4] We conclude counsel has

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[4] On November 10, 2013, Appellant filed a response to counsel's ***Turner***/***Finley*** letter wherein he lambastes PCRA counsel's stewardship and her decision to file a ***Turner***/***Finley*** letter (but does not raise any specific claims of counsel's ineffectiveness). Appellant raises a single claim of trial court error "in determining that Burtner was legally living on Appellant's property on March 4, 2007." Appellant's Response to ***Turner***/***Finley*** letter, 11/10/2013, at 2, 3 (unnumbered). We are not persuaded by Appellant's
(Footnote Continued Next Page)

substantially complied with the mandates of ***Turner*** and ***Finley***; thus, we proceed with our own review of the merits of Appellant's claims.

According to counsel, Appellant wishes to raise the following issues for our review.

> 1. Did the [PCRA] court err in failing to find that suppression counsel and trial counsel were ineffective for failing to call Appellant's son Jacob Burtner [(Burtner)] as a witness at the suppression hearing or trial?
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> 2. Did the [PCRA] court err in failing to find that suppression counsel and trial counsel were ineffective for failing to produce at [the] suppression hearing or trial the telephone records of the prosecuting police officer?
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> 3. Did the [PCRA] court err in failing to find that trial counsel Cook was ineffective for agreeing to a stipulated waiver trial without the consent of [Appellant]?
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> 4. Did the [PCRA] court err in determining that Burtner was legally living on [Appellant's] property on March 4, 2007 at the time he obtained the evidence?
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> 5. Did the [PCRA] court err in failing to find that the district attorney violated Appellant's constitutional rights for not producing subpoena[ed] phone records at [the] suppression hearing?

Turner/Finley letter, 10/31/2013, at 1-2 (unnumbered).[5]

(Footnote Continued) ———————————

pro se response and we address his claim of trial court error in more detail below.

[5] We point out that the first two issues were raised in the PCRA petition and were the subject of the PCRA hearing. The final three issues were raised in Appellant's *pro se* response to counsel's original ***Turner/Finley*** letter.

When we review the propriety of the PCRA court's order, we are limited to determining whether the court's findings are supported by the record and whether the order in question is free of legal error. ***Commonwealth v. Grant***, 992 A.2d 152, 156 (Pa. Super. 2010) (citations omitted). This Court will not disturb the PCRA court's findings if there is any support for the findings in the certified record. ***Id.*** at 156.

Moreover, in order to obtain relief based on a claim of ineffective assistance of counsel under the PCRA, the petitioner must prove that:

> (1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) the ineffectiveness of counsel caused the petitioner prejudice. A chosen strategy will not be found to have lacked a reasonable basis unless it is proven that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's error or omission, the result of the proceeding would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding. A failure to satisfy any one of the three prongs of the test for ineffectiveness requires rejection of the claim.

Commonwealth v. Cam Ly, 980 A.2d 61, 73 (Pa. 2009) (internal quotation marks and citations omitted).

Appellant's first issue is that prior counsel were ineffective for failing to call his son, Burtner, as a witness either at the suppression hearing or during trial. ***Turner/Finley*** letter, 10/31/2013, at 5 (unnumbered). Specifically, Appellant contends that, if called to testify, Burtner would have admitted that (1) he was told he was not allowed on Appellant's property prior to

March 7, 2007; (2) he was cooperating with the Commonwealth in order to secure a favorable outcome for the charges pending against him; and (3) that he and Detective Hartlaub contacted each other via telephone multiple times. ***Id.*** at 7 (unnumbered).

In evaluating this claim, we bear in mind the following.

> When raising a claim of ineffectiveness for the failure to call a potential witness, a petitioner satisfies the performance and prejudice requirements of the [***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),] test by establishing that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial....
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> ***Commonwealth v. Sneed***, 45 A.3d 1096, 1108–09 (Pa. 2012). "To demonstrate ***Strickland*** prejudice, a petitioner must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case." ***Sneed***, 45 A.3d at 1109. Counsel will not be found ineffective for failing to call a witness "unless the petitioner can show that the witness's testimony would have been helpful to the defense. A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy." ***Id.*** (internal quotation marks and citations omitted).

Commonwealth v. Matias, 63 A.3d 807, 810-11 (Pa. Super. 2013), appeal denied, 74 A.3d 1030 (Pa. 2013).

Instantly, both suppression counsel and trial counsel testified that they were aware of the existence of Burtner, but admitted that they did not attempt to contact him because, due to his hostilities with Appellant, they

did not believe Burtner would testify favorably on Appellant's behalf. N.T., 10/15/2012, at 26-27, 41-43. Indeed, Burtner testified at the PCRA hearing and refuted all of Appellant's allegations, stating (1) that he was not working at Detective Hartlaub's direction when he gathered the evidence against Appellant, (2) that he was legally residing in Appellant's residence at the time of Appellant's arrest, (3) that he was not seeking leniency from the Commonwealth when he turned his father in, and (4) that he did not receive any benefit for doing so. ***Id.*** at 46-61. As the PCRA court pointed out, Burtner's testimony would have been "clearly harmful" to Appellant's argument at suppression and trial. Order, 11/13/2012. Accordingly, we agree with the PCRA court that, due to the damaging nature of Burtner's testimony, Appellant is unable to prove prejudice. Therefore, suppression and trial counsel were not ineffective for failing to call him as a witness.

Appellant's next issue is that that both suppression and trial counsel were ineffective for failing to obtain and present phone records for Detective Hartlaub. ***Turner/Finley*** letter at 9 (unnumbered). Again, Appellant's issue is meritless.

Appellant predicated his suppression motion (and his defense at trial) on the theory that the evidence against him was unlawfully obtained by Burtner because he was acting at the behest of Detective Hartlaub. Thus, Appellant contends that the phone records would have demonstrated that there was an "agency relationship" between Burtner and the detective

greater than what the detective's testimony portrayed at trial. ***Turner/Finley*** letter at 9 (unnumbered). A prior panel of this Court addressed this argument tangentially[6] on direct appeal stating that the phone records at issue demonstrate that "there is no evidence that Detective Hartlaub got involved in the actual securing of the evidence in question, but rather, Detective Hartlaub's involvement with the evidence was limited to receipt of the evidence **after** it was secured by Burtner, who acquired it of his own volition and for his own personal reasons." ***Trimmer***, ***supra*** at 10. This Court further noted that

> [a]lthough the phone records establish that there were seven total calls between Detective Hartlaub and Burtner, the records reveal that only two conversations, both on March 3, 2007, were initiated by Detective Hartlaub. Based upon the testimony at the suppression hearing, these calls reflect Detective Hartlaub's initial contact with Burtner during which Burtner was told that the information he possessed was too stale and was further advised that anything Burtner did with respect to acquiring fresher information "was on his own." The remaining five calls, all occurring March 4, 2007, were initiated by Burtner.
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> More importantly, the record revealed that Burtner had secured the evidence in question in the early morning hours of March 4, 2007, at approximately 1:00 a.m. Crediting that testimony as truthful, the five calls made by Burtner to Detective Hartlaub all occurred after the evidence in question had been

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[6] Appellant's sole issue on direct appeal was whether the trial court erred "in denying Appellant's motion to suppress evidence supplied to government agent by a private individual when the government agent participated in the improper the [sic] search and seizure by the said individual and which violated the laws of the United States Constitution and the Pennsylvania Constitution[?]"***Trimmer***, ***supra*** at 4.

> secured. Thus, the implication appellant seeks to support with the phone records simply does not add up.

Id. at 6-7.

Based on the foregoing, we agree with PCRA counsel that Appellant's claim lacks merit, particularly where the telephone records in question do not discredit Detective Hartlaub, but rather partially corroborate his testimony. Accordingly, counsel was not ineffective for failing to pursue a meritless claim.

In his third issue, Appellant wishes to contend that the PCRA court erred in failing to find trial counsel ineffective for agreeing to a stipulated waiver trial without Appellant's consent. Based on our review of the record, this issue does not appear to have arguable merit. This claim was raised in Appellant's PCRA petition, but was specifically withdrawn prior to the PCRA hearing. N.T., 10/15/2013, at 4. Accordingly, we agree with counsel that the issue lacks merit.

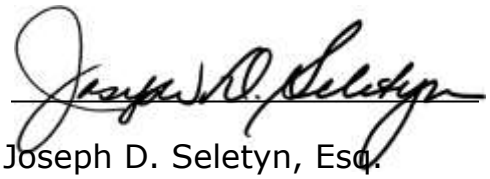
In his two final issues, Appellant raises issues of trial court error. The PCRA provides that a claim is waived when it could have been raised before trial, at trial, or on appeal. 42 Pa.C.S. § 9544(b). As Appellant's issues could have been raised on direct appeal, and as he makes no attempt to argue a derivative claim of trial counsel ineffectiveness that would be cognizable under the PCRA, we are compelled to find both claims waived. ***See Commonwealth v. Lesko***, 15 A.3d 345, 398 (Pa. 2011). Moreover, even if Appellant's final claim could be fairly read as a violation of the constitution of

the Commonwealth, and therefore cognizable under the PCRA, such claim is waived for Appellant's failure to address it in the court below. Pa.R.A.P 302(a).

Having concluded that all of Appellant's issues are without merit or waived, we grant counsel's petition to withdraw and deny Appellant relief.

Order affirmed. Motion to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/18/2013