

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

GILBERTO MELENDEZ

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 2187 MDA 2012

Appeal from the PCRA Order November 20, 2012  
In the Court of Common Pleas of York County  
Criminal Division at No(s): CP-67-CR-0000998-2011

BEFORE: FORD ELLIOTT, P.J.E., PANELLA, J., and FITZGERALD, J.\*

MEMORANDUM BY PANELLA, J.:

**FILED DECEMBER 13, 2013**

Appellant, Gilberto Melendez, appeals *pro se* from the order entered on November 20, 2012, in the Court of Common Pleas of York County, which dismissed his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 PA.CON.S.TAT.ANN. §§ 9541-9546. After careful review, we affirm.

On June 7, 2011, following a jury trial, Melendez was found guilty of possession with intent to deliver (heroin) and tampering with evidence. Thereafter, on August 1, 2011, Melendez was sentenced to an aggregate term of 3½ to 7 years' imprisonment. Melendez filed a direct appeal to this Court and we affirmed on April 20, 2012. On August 21, 2012, Melendez

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\* Former Justice specially assigned to the Superior Court.

filed the instant *pro se* PCRA petition, raising ineffective assistance of counsel claims. Christopher Moore, Esquire was appointed to represent Melendez in the PCRA proceedings. At the time of the PCRA hearing on November 20, 2012, counsel fully advocated for the issues which he believed had merit on Melendez's behalf. **See** N.T., PCRA Hearing, 11/20/12, at 1-38. Melendez, trial counsel, and appellate counsel all testified at the PCRA hearing.

At the conclusion of the hearing, the PCRA court denied Melendez's petition on the record after which an exchange took place between Attorney Moore, the PCRA court, and Melendez regarding the lack of any meritorious issues to be raised on appeal. **See id.**, at 45. Counsel stated on the record that he would be filing a **Turner/Finley** brief because the credibility issue which Melendez sought to raise lacked merit. **See id.**, at 46. Melendez then indicated, on the record, in the presence of the PCRA court, that he "[didn't] want [counsel] arguing against [him]" regarding the credibility issue and as such, wished to proceed *pro se* on appeal. **See id.**, at 47.

In accordance with Melendez's on the record request to proceed *pro se* to file an appeal to this Court from the denial of his PCRA petition, counsel filed a motion to withdraw on December 11, 2012. In his motion to withdraw, Attorney Moore states, in pertinent part:

5. The ruling of this Honorable [c]ourt and denial of PCRA relief in undersigned counsel's opinion was based on credibility determinations made by this Honorable [c]ourt.

6. At that time Counsel informed the defendant of his appeal rights and further advised the ruling, in undersigned counsel's opinion, was based on credibility determinations made by this Honorable [c]ourt.
7. At that time, after consultation with Mr. Melendez, he requested that he be able to proceed pro se and undersigned counsel not file appeal of This Honorable [c]ourt's Order as to avoid the filing a Turner/Finley brief arguing against Mr. Melendez.

Motion to Withdraw as Counsel, 12/11/12, at ¶¶ 5-7. Counsel's motion to withdraw was granted on December 12, 2012. Melendez subsequently filed a *pro se* notice of appeal.

On appeal, Melendez raises the following issues for our review:

1. Did the PCRA court err in denying Defendant PCRA relief where the PCRA court found that Appellate Counsel was not ineffective for not raising credibility challenges concerning Officer Pelton on appeal?
2. Did the PCRA court err in denying Defendant PCRA relief where the PCRA court found that Appellate Counsel was not ineffective for not raising credibility challenges concerning Officer Wentz on appeal.
3. Was Defendant denied effective assistance counsel where Appellate Counsel, after reviewing the record, determined that the credibility issues that Defendant wished to raise on direct appeal were meritless?

Appellant's Brief, at 4.

While Melendez lists three separate claims for our review, all three reiterate the same issue, *i.e.*, whether counsel was ineffective for failing to raise the issue of trial counsel's failure to question trial witnesses' inconsistent statements. **See** Appellant's Brief, at 8-24.

Our standard of review of a PCRA court's denial of a petition for post-conviction relief is well settled. We must examine whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. **See Commonwealth v. Hall**, 867 A.2d 619, 628 (Pa. Super. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. **See Commonwealth v. Carr**, 768 A.2d 1164, 1166 (Pa. Super. 2001). Our scope of review is limited by the parameters of the PCRA. **See Commonwealth v. Heilman**, 867 A.2d 542, 544 (Pa. Super. 2005).

To determine whether the PCRA court erred in dismissing Melendez's petition on the claims of ineffectiveness of counsel, we turn to the following principles of law:

In order for Appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place ... Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different.

**Commonwealth v. Johnson**, 868 A.2d 1278, 1281 (Pa. Super. 2005).

Moreover, "[w]e presume counsel is effective and place upon Appellant the burden of proving otherwise." **Commonwealth v. Springer**, 961 A.2d 1262, 1267-1268 (Pa. Super. 2008). "This Court will grant relief only if

Appellant satisfies each of the three prongs necessary to prove counsel ineffective.” ***Commonwealth v. Natividad***, 938 A.2d 310, 322 (Pa. 2007). Thus, we may deny any ineffectiveness claim if “the evidence fails to meet a single one of these prongs.” ***Id.***, at 321.

Here, Melendez argues that counsel was ineffective because he failed to raise credibility issues regarding the police officers’ testimony at trial. Namely that the police officers testified at trial that an unknown black male was conversing with Melendez and that the police officers failed to include this fact in the affidavit of probable cause. Further, Melendez avows that there are discrepancies in how the police officers retrieved the blue glassine bag from his mouth. **See** Appellant’s Brief, at 12-13, 19-20.

These claims lack arguable merit and fail to satisfy the first prong necessary to prove counsel’s ineffectiveness. As the PCRA court aptly states in its memorandum opinion filed pursuant to Pa.R.A.P. 1925(a), “the issue [Melendez] wished to raise was ... a credibility issue to be determined by the jury.” PCRA Court Opinion, 1/11/13, at 4. We agree.

It is axiomatic that questions concerning inconsistent testimony go to the credibility of the witnesses. **See, e.g., *Commonwealth v. Boxley***, 838 A.2d 608, 612 (Pa. 2003). The weight of the evidence is exclusively for the finder of fact, in this case, the jury, whom was free to believe all, part of or none of the evidence, and to assess the credibility of the witnesses. **See *Commonwealth v. Johnson***, 668 A.2d 97, 101 (Pa. 1995). We cannot

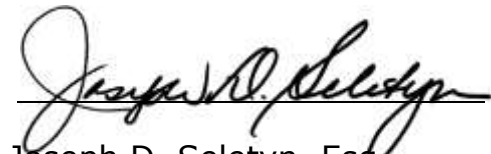
substitute our judgment for that of the jury on issues of credibility. **See Commonwealth v. DeJesus**, 860 A.2d 102, 107 (Pa. 2004). As such, assertions that inconsistencies rendered a witness not credible are for a jury to determine and, thus, not reviewable on appeal.

Here, the issues Melendez sought to raise on appeal centered upon the credibility of witnesses and could not be argued on direct appeal. As such, it is evident that Melendez's PCRA claims regarding the purported ineffectiveness of counsel for failing to raise issues related to the credibility of witnesses lack arguable merit. Accordingly, we can find no error on the part of the PCRA court in dismissing Melendez's petition.

Order affirmed. Jurisdiction relinquished.

Fitzgerald, J., concurs in the result, and Ford Elliott, P.J.E., files a dissenting memorandum statement.

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: 12/13/2013