

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

RICHARD LEE SMITH, SR.

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 228 WDA 2013

Appeal from the PCRA Order January 8, 2013  
In the Court of Common Pleas of Allegheny County  
Criminal Division at No(s): CP-02-CR-0004392-2007

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and OTT, J.

MEMORANDUM BY OTT, J.: FILED: November 27, 2013

Richard Lee Smith, Sr. appeals *pro se* from the order entered on January 8, 2013, in the Allegheny County Court of Common Pleas denying him relief on his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.* Smith seeks relief from the judgment of sentence of an aggregated 45 to 90 years' imprisonment imposed on October 15, 2008, following his conviction of multiple sexual offenses against his daughter. On appeal, Smith raises challenges to the ineffectiveness of counsel, prosecutorial misconduct and the lack of physical evidence. For the reasons set forth below, we affirm.

In January of 2007, Smith was charged with numerous sexual offenses for the sexual assault of his daughter in 2001, when she was 11 years old, and in 2004, when she was 13 years old. The case proceeded to a jury

trial.<sup>1</sup> On January 22, 2008, the jury returned a verdict of guilty on all charges, which included three counts each of involuntary deviate sexual intercourse (IDSI), aggravated indecent assault, and indecent assault, and two counts each of rape of a child, corruption of minors and endangering the welfare of a child.<sup>2</sup> On October 15, 2008, the trial court imposed an aggregate sentence of 45 to 90 years' imprisonment.<sup>3</sup>

Smith filed a direct appeal challenging the sufficiency of the evidence supporting the charges of aggravated indecent assault, the separate sentences for those convictions, and the discretionary aspects of his sentence. A panel of this Court affirmed his judgment of sentence, and the Pennsylvania Supreme Court denied his petition for review. *Commonwealth v. Smith*, 23 A.3d 1079 (Pa. Super. 2011) (unpublished memorandum), *appeal denied*, 25 A.3d 328 (Pa. 2011).

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<sup>1</sup> At the close of the Commonwealth's case, the trial court granted a motion for judgment of acquittal on two counts of rape of a child and one count of IDSI.

<sup>2</sup> 18 Pa.C.S. §§ 3123(b) and (a)(7), 3125(a)(1) and (8), 3126(a)(1), (7), and (8), 3121(c), 6301(a)(1), and 4304, respectively.

<sup>3</sup> The trial court imposed the following consecutive sentences: 10 to 20 years' for IDSI (child) and IDSI (under 16), and five to 10 years' for rape of a child (under 13), rape of a child (under 16), aggravated indecent assault (under 13), aggravated indecent assault (under 16), and aggravated indecent assault (no consent). The court imposed no further punishment on the remaining convictions.

On July 13, 2012, Smith filed a timely, *pro se* PCRA petition. Scott Coffey, Esquire, was appointed to assist Smith in litigating his claims. However, on November 28, 2012, Coffey filed a motion to withdraw from representation and accompanying ***Turner/Finley***<sup>4</sup> “no merit” letter. Thereafter, on November 29, 2012, the PCRA court sent Smith notice, pursuant to Pa.R.Crim.P. 907, of its intent to dismiss his petition without an evidentiary hearing, and of its decision permitting counsel to withdraw. Smith did not respond to the PCRA court’s notice, and, therefore, on January 8, 2013, the court entered an order dismissing Smith’s PCRA petition. This timely appeal followed.<sup>5</sup>

When reviewing an order dismissing a PCRA petition, we must determine whether the ruling of the PCRA court is supported by record evidence and is free of legal error. ***Commonwealth v. Burkett***, 5 A.3d 1260, 1267 (Pa. Super. 2010). “Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have

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<sup>4</sup> ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

<sup>5</sup> On January 23, 2012, the PCRA court directed Smith to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925. Smith complied with that order, and, in fact, filed two concise statements, the first on February 8, 2013, and the second on February 14, 2013.

no support in the certified record.” ***Commonwealth v. Carter***, 21 A.3d 680, 682 (Pa. Super. 2011) (citation omitted).

Preliminarily, we note that:

Although this Court is willing to liberally construe materials filed by a *pro se* litigant, *pro se* status confers no special benefit upon the appellant. To the contrary, any person choosing to represent himself in a legal proceeding must, to a reasonable extent, assume that his lack of expertise and legal training will be his undoing.

***Commonwealth v. Adams***, 882 A.2d 496, 498 (Pa. Super. 2005) (citations omitted). Here, Smith’s appellate brief fails to include a statement of questions involved. ***See*** Pa.R.A.P. 2116. Rather, his brief includes several different sections of issues, some without any citation to authority.<sup>6</sup> However, in the interests of justice, we will address the claims raised throughout Smith’s brief to the extent we can reasonably discern them.<sup>7</sup>

***See Adams, supra.***

Although Smith purports to raise 12 issues for our review, most of his claims are waived because he either neglected to include them in his PCRA

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<sup>6</sup> Smith’s appellate brief includes six numbered pages, followed by two unnumbered pages, and then three pages numbered 3a to 3c. ***See*** Smith’s Brief.

<sup>7</sup> We have reordered Smith’s claims for purposes of disposition.

petition,<sup>8</sup> or failed to list them in his court-ordered statement of errors complained of on appeal.<sup>9</sup> **See *Commonwealth v. Santiago***, 855 A.2d 682, 691 (Pa. 2004) (“We have stressed that a claim not raised in a PCRA petition cannot be raised for the first time on appeal.”); ***Commonwealth v. Castillo***, 888 A.2d 775, 780 (Pa. 2005) (“[a]ny issues not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived.”).

Therefore, the only issue preserved for our review is Smith’s claim that trial counsel was ineffective for failing to present evidence that the victim

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<sup>8</sup> Smith failed to include the following claims in his PCRA petition: (1) the verdict was against the weight of the evidence; (2) he was deprived of his constitutional right to Equal Protection because there was a lack of physical evidence; (3) the Commonwealth concealed evidence and engaged in a civil conspiracy to convict him; (4) the trial court showed judicial bias by permitting the prosecution to proceed absent physical evidence; (5) defense counsel had a conflict of interest because he “had Ex Parte communications with the [victim] by hugging the victim and showing compassion towards the victim;” and (6) the trial court acquitted him of some charges after the jury retired to its deliberations. **See** Smith’s Brief at 1-4, and unnumbered pages 1-2.

<sup>9</sup> The following allegations of the ineffectiveness of trial counsel are waived because Smith failed to include them in his court-ordered Pa.R.A.P. 1925(b) statement: trial counsel was ineffective for failing to (1) present character evidence; (2) present evidence that the victim falsely accused her mother of physical abuse; (3) object to the Commonwealth’s purported withholding of evidence of the victim’s prior false reports; (4) object to the prosecutor’s closing argument when she vouched for the truthfulness of the victim, and (5) object to the prosecutor’s closing argument when she allegedly lied about letters Smith stated he received from the victim. **See** Smith’s Brief at 3a-3c.

had, in the past, falsely accused her brother of rape.<sup>10</sup> Smith contends counsel was aware of this prior false report, and attached to his PCRA petition a memorandum from a defense investigator to his trial attorney which states that the victim reported to the police that her brother had sexually assaulted her, and that the result of the police investigation was that the victim had made a false accusation. **See** PCRA Petition, 7/13/2012, Exhibit 1 (Memorandum from Investigator to Defense Counsel dated 8/10/2007). Further, Smith argues “[t]his evidence should have been raised at trial to show how the victim would get mad and file falsely accuse (sic) against others.” Smith’s Brief at unnumbered page 1.

Our review of an allegation of counsel’s ineffectiveness is well-settled:

In Pennsylvania, counsel is presumed effective, and a defendant bears the burden of proving otherwise. In order to be entitled to relief on a claim of ineffective assistance of counsel, the PCRA petitioner must plead and prove by a preponderance of the evidence that (1) the underlying claim has arguable merit; (2) counsel whose effectiveness is at issue did not have a reasonable basis for his action or inaction; and (3) the PCRA petitioner suffered prejudice as a result of counsel’s action or

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<sup>10</sup> Smith also argues the prosecution obstructed justice by using the Rape Shield Law, 18 Pa.C.S. § 3104, to preclude this evidence at trial. **See** Smith’s Brief at unnumbered page 1. However, there is no indication that the defense even attempted to introduce evidence of the victim’s past false reports. Moreover, as this claim could have been raised on direct appeal, it, too, is waived. **See** 42 Pa.C.S. § 9544(b) (“For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.”).

inaction. When determining whether counsel's actions or omissions were reasonable, we do not question whether there were other more logical courses of actions which counsel could have pursued: rather, we must examine whether counsel's decisions had *any* reasonable basis. Further, to establish prejudice, a petitioner must demonstrate that but for the act or omission in question, the outcome of the proceedings would have been different. Where it is clear that a petitioner has failed to meet any of the three, distinct prongs of the [ineffectiveness] test, the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met.

***Commonwealth v. Steele***, 961 A.2d 786, 796-797 (Pa. 2008) (internal citations and punctuation omitted).

Here, Smith makes no attempt to address any of the ineffectiveness prongs, or cite any legal authority concerning the admissibility of a victim's prior false report in a sexual abuse case. Therefore, we conclude that the only claim preserved for our review is waived for lack of development.<sup>11</sup>

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<sup>11</sup> While an allegation that a sexual assault victim made a false accusation against a third party may be admissible in a sexual assault case, the admissibility of the evidence is subject to a three part test:

(1) whether the proposed evidence is relevant to show bias or motive or to attack credibility; (2) whether the probative value of the evidence outweighs its prejudicial effect; and (3) whether there are alternative means of proving bias or motive or to challenge credibility.

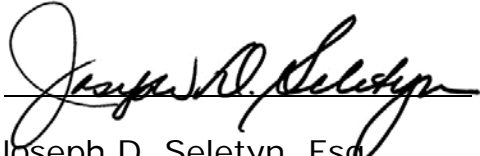
***Commonwealth v. Black***, 487 A.2d 396, 401 (Pa. Super. 1985) (*en banc*). ***See also Commonwealth v. Fink***, 791 A.2d 1235, 1242 (Pa. Super. 2002). Smith does not even attempt to argue the admissibility of the evidence *sub judice* under this standard.

(Footnote Continued Next Page)

***Commonwealth v. McLaurin***, 45 A.3d 1131, 1139 (Pa. Super. 2012),  
*appeal denied*, 65 A.3d 413 (Pa. 2013). ***See also Steele***, 961 A.2d at 804.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 11/27/2013

(Footnote Continued) \_\_\_\_\_

Moreover, notably, Smith did not attach to his PCRA petition an affidavit from trial counsel explaining why she did not introduce evidence of the victim's alleged prior accusation against her brother. We remind White it is the petitioner's burden to **plead and prove** his allegation of counsel's ineffectiveness. ***See Steele, supra.***

Finally, we note that PCRA counsel addressed this claim in his "no merit" letter and concluded it was meritless. ***See*** "No Merit" Letter, 11/24/2012, at 8-9.