

[J-028-99]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 0191 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Order entered July 16,
	:	1997 in the Court of Common Pleas,
v.	:	Philadelphia County, Criminal Division, at
	:	No. 1305, 1306 & 1308 June Term, 1985.
	:	
	:	
ARNOLD HOLLOWAY,	:	
	:	SUBMITTED: January 25, 1999
Appellant	:	
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OPINION

MADAME JUSTICE NEWMAN

DECIDED: October 1, 1999

Arnold L. Holloway (Appellant) appeals from the Order of the Court of Common Pleas of Philadelphia County (PCRA Court) denying his Petition for Relief pursuant to the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541, et seq. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Appellant was involved in a drug sales conspiracy with Shirley “Bones” Baker (Baker), Danny Freeman (Freeman), and Richard Caldwell (Caldwell), all of whom sold heroin for Leroy “Bubbles” Johnson (Johnson). Appellant was in charge of obtaining the

heroin from Johnson and supplying it to Freeman, Baker, and Caldwell for street sales. In May of 1980, Johnson informed his associates that he wanted Caldwell killed because Caldwell owed him money and owed money to a rival drug dealer with whom Johnson wanted to do business.

At about midnight on the night of May 16, 1980, Baker was selling heroin in a bar at 7th and Allegheny streets in North Philadelphia. Baker later met Johnson, Freeman, and Appellant at her apartment, where Freeman and Appellant asked Johnson if they could use his van. Johnson said that they could, and told them that Caldwell was already in the van and Appellant should “get on his job.” Appellant went to his apartment and got his shotgun, which Freeman placed down his pant leg.

Appellant and Freeman then entered Johnson’s van and tied up Caldwell. They drove to Third and Sedgley Streets in Philadelphia, where Appellant and Freeman pushed Caldwell from the van. They wrapped a trench coat belt around Caldwell’s neck and each pulled one end of the belt, thereby choking Caldwell. Appellant placed the shotgun to Caldwell’s head and fired one shot, and Freeman did the same. They returned to Baker’s apartment and informed Johnson that “it was done.”

Philadelphia Police Detective James Alexander discovered Caldwell’s body at approximately 2:00 a.m. Dr. Halbert Fallinger, the Assistant Medical Examiner for the City of Philadelphia, subsequently determined the cause of death to be homicide by two shotgun wounds to the head and strangulation by ligature. Approximately five years later,

on May 30, 1985, the Philadelphia police arrested Appellant. When he was taken into custody, Appellant verbally confessed to murdering Caldwell, but he later refused to sign a written statement and asked to speak to his attorney.

About one year before Appellant's trial began, Freeman was tried and acquitted of Caldwell's murder. Appellant moved to suppress his statement to the police, which the trial court denied, and the Commonwealth moved to preclude any discussion in front of the jury of Freeman's acquittal, which the trial court granted. At trial, the prosecution relied primarily on the testimony of Baker, who testified to the events of the evening of May 16, 1980. On May 22, 1986, the jury found Appellant guilty of first-degree murder,¹ criminal conspiracy,² and possessing an instrument of crime.³

At the penalty phase, the Commonwealth sought to prove two aggravating circumstances: (1) that Appellant had contracted with another person for the killing of the victim, 42 Pa.C.S. § 9711(d)(2); and (2) that the murder was committed by means of torture, 42 Pa.C.S. § 9711(d)(8). The defense presented two mitigating circumstances: (1) that Appellant had no history of prior criminal convictions, 42 Pa.C.S. § 9711(e)(1); and (2) other evidence of good character and record, 42 Pa.C.S. § 9711(e)(8). The jury found both the two aggravating circumstances and the two mitigating circumstances, and found that the aggravating circumstances outweighed the mitigating circumstances. Accordingly, the jury sentenced Appellant to death for the first-degree murder conviction.

¹ 18 Pa.C.S. § 2501.

² 18 Pa.C.S. § 903.

Appellant appealed his convictions and judgment of sentence directly to this Court, and in a unanimous opinion, we affirmed. Commonwealth v. Holloway, 524 Pa. 342, 572 A.2d 687 (1990). On May 3, 1991, Appellant filed a pro se PCRA Petition, and he was subsequently appointed counsel, who filed an amended PCRA Petition on June 21, 1993. On July 16, 1997, the PCRA Court issued an Order and Opinion denying the Petition.

II. ISSUES RAISED IN THIS APPEAL

Appellant raises the following issues for our consideration:

1. Whether the trial court improperly excluded evidence that Appellant and the investigating officers were aware of the acquittal of alleged accomplice Daniel Freeman, which was offered for the limited purpose of showing the state of mind of Appellant and the motivation of the interrogating officer at the time Appellant purportedly confessed to the crime.
2. Whether the prosecutor's guilt phase closing argument was egregiously improper and violated Appellant's rights to due process and a fair trial.
3. Whether Appellant is entitled to relief from his conviction and sentence because the Commonwealth used its peremptory strikes in a racially discriminatory manner.
4. Whether the jury instructions on accomplice liability were erroneous and relieved the Commonwealth of its constitutional obligation to prove every element of an offense beyond a reasonable doubt.
5. Whether Appellant's convictions and sentence must be vacated because the Commonwealth suppressed exculpatory evidence concerning a deal with its key witness and because it allowed her false testimony to go uncorrected.
6. Whether Appellant's trial counsel was ineffective at the guilt phase of his capital trial.

(...continued)

³ 18 Pa.C.S. § 907.

7. Whether the trial court erred in failing to instruct the jury that it could not consider Appellant's purported statement against him unless it found that he gave the statement voluntarily, and whether trial counsel was ineffective for failing to object or offer an appropriate instruction.
8. Whether the trial court erred when it gave the jury its opinion as to the appropriate verdict.
9. Whether Appellant was convicted of the crimes of conspiracy and possession of an instrument of crime although those charges were barred by the statute of limitations, and whether the failure of trial counsel and the court to quash the time barred conspiracy charges prejudicially affected the jury's guilt and capital sentencing deliberations.
10. Whether the PCRA Court erroneously denied Appellant's requests for discovery and for funds to obtain expert testimony, depriving Appellant of his rights to due process under the Pennsylvania and United States Constitutions and the effective assistance of post conviction counsel, and of his right to a full and fair evidentiary hearing on his post conviction claims.
11. Whether, at the penalty phase of Appellant's capital trial, counsel failed to investigate, develop and present evidence in mitigation of the offense and to rebut alleged aggravating circumstances, depriving Appellant of his right to the effective assistance of counsel.
12. Whether counsel's performance at the penalty phase of Appellant's capital trial was prejudicially deficient, in violation of Appellant's rights to the effective assistance of counsel under the Pennsylvania and United States Constitutions, in that counsel made affirmatively harmful arguments and failed to object to improper prosecutorial argument.
13. Whether Appellant is entitled to relief from his sentence of death because the jury instructions and the sentencing phase verdict slip indicated that the jury had to unanimously find any mitigating factor before it could give effect to that factor in its sentencing decision.
14. Whether Appellant is entitled to relief from his sentence of death because the trial court failed to adequately instruct the jury as to the "torture" aggravating circumstance and the prosecutor made improper argument regarding that aggravator.
15. Whether Appellant is entitled to relief from his sentence of death because the trial court failed to adequately instruct the jury concerning the "contract killing"

aggravating circumstance, because the prosecutor made improper argument in support of it, and because this court construed that aggravator in a way that failed to provide adequate notice and failed to limit the sentencer's discretion.

16. Whether the instructions of the trial court prevented the jury from considering and giving effect to relevant mitigating evidence.
17. Whether all prior counsel were ineffective to the extent that they failed to object to or timely and properly raise each of the above cited errors.
18. Whether Appellant is entitled to relief from his conviction and sentence because of the cumulative effect of the above-alleged errors.
19. Whether Appellant's statement to police should have been suppressed because it was not preserved by audio and/or video recording.
20. Whether the trial court's jury instructions regarding the burden of proof were erroneous.
21. Whether the trial court's jury instructions regarding Miranda were erroneous.

This Court addressed issues 11, 12, 14, 15, 16, and 21 in Appellant's direct appeal. See Holloway, *supra*. Consequently, Appellant is ineligible for PCRA relief on these claims. 42 Pa.C.S. § 9543(a)(3). Of the remaining issues, Appellant raised only issue 10 and a portion of issue 6 before the PCRA Court. Thus, all of Appellant's other claims are deemed waived. See Commonwealth v. Williams, 541 Pa. 85, 660 A.2d 1316 (1995), *cert. denied*, 516 U.S. 1051 (1996). Nevertheless, Appellant manages to preserve his claims for relief by alleging, in a most perfunctory manner, that all of his prior counsel were ineffective for failing to raise the above-listed issues. See Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998). Accordingly, except for the two issues raised before the PCRA Court, we will treat each of the remaining issues as a claim for ineffective assistance of counsel pursuant to Albrecht.

To obtain relief on a claim for ineffective assistance of counsel, Appellant must establish: (1) that there is merit to the underlying claim; (2) that counsel had no reasonable basis for his or her course of conduct; and (3) that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different. Commonwealth v. Jones, 546 Pa. 161, 175, 683 A.2d 1181, 1188 (1996). Counsel is presumed to be effective and Appellant has the burden of proving otherwise. Commonwealth v. Marshall, 534 Pa. 488, 633 A.2d 1100 (1993). Additionally, counsel cannot be considered ineffective for failing to raise a claim that is without merit. Commonwealth v. Peterkin, 538 Pa. 455, 649 A.2d 121 (1994), cert. denied, 515 U.S. 137 (1995). Finally, pursuant to the PCRA, an ineffectiveness claim may provide relief only where it “so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.” 42 Pa.C.S. § 9543(a)(2)(ii). Pursuant to Commonwealth v. Kimball, 1999 WL 22976 (Pa.), the prejudice standard applicable to ineffective assistance of counsel claims brought on direct appeal is substantively identical to the prejudice standard for ineffective assistance of counsel claims brought on collateral appeal pursuant to the PCRA.

III. DISCUSSION

A. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

1. Exclusion of Evidence Regarding Freeman’s Acquittal

Appellant first makes a convoluted argument that the trial court’s excluding evidence of Freeman’s acquittal deprived Appellant of due process. According to Appellant, the fact that he knew of Freeman’s acquittal at the time he made his statement to police is relevant

and admissible to prove his motive for confessing and/or the motive of the police to fabricate a statement. Thus, Appellant concludes, the trial court should have allowed him to tell the jury about his knowledge of Freeman's acquittal. This argument has no merit.

In Commonwealth v. Meredith, 493 Pa. 1, 425 A.2d 334 (1981), a plurality of this Court reaffirmed the longstanding rule that, "a person accused of a crime may not introduce evidence of the acquittal of another person charged in connection with the same episode to create an impression before the jury that the defendant is equally innocent." Meredith, 425 A.2d at 337. The Court in Meredith recognized only one narrow exception to this general rule -- the defendant may introduce evidence of another person's acquittal where that person testifies for the defense and the acquittal is introduced "for the limited purpose of removing the cloud of criminal charges over [the defense] witness, created by Commonwealth evidence. . . ." Meredith, 425 A.2d at 338.

Here, however, none of the elements of the Meredith exception are present because Appellant did not call Freeman as a witness. Consequently, there was no "cloud of criminal charges" over Freeman and no need to rehabilitate Freeman's credibility by reference to his acquittal. Cf. Commonwealth v. Rink, 393 Pa. Super. 554, 574 A.2d 1078 (1990), alloc. denied, 526 Pa. 654, 586 A.2d 922 (1991) (Meredith did not apply where defendant did not call acquitted accomplices as witnesses). Instead, Appellant would have used evidence of Freeman's acquittal to bolster his own credibility, which Meredith does not allow. Thus, Appellant's first claim lacks arguable merit and warrants no relief.

2. Prosecutor's Guilt Phase Closing Argument

Next, Appellant argues that the prosecutor made a number of improper comments during his closing argument in the guilt phase of the trial. None of these claims has arguable merit.

First, Appellant contends that the prosecutor improperly insinuated that Freeman had been convicted rather than acquitted by arguing to the jury as follows:

You didn't hear anything about Danny Freeman's case other than from the defendant and the defendant's wife.⁴ Take that testimony. Take it as you take the rest of the things that came out of both of their mouths. . . . Take that testimony from the defendant and put it right next to everything else he told you. See if it has the ring of truth to it. You don't know what happened to Danny Freeman, and I can't tell you. The law won't let me. If you base your verdict in this case, one way or the other, on what you think happened to Danny Freeman after never having the opportunity to hear the case against Danny Freeman, after not knowing what the verdict is against Danny Freeman, you're going to violate your oaths. And if you ever do find out, you might be surprised of what the verdict is.

We find nothing prejudicial about these remarks.

Appellant also claims that the prosecutor improperly stated his personal beliefs as to Appellant's guilt and the credibility of witnesses. Appellant's characterization of these arguments is flawed. The prosecutor did nothing more than invite the jury to consider Appellant's motives for testifying untruthfully and to contrast them with Baker's motives for her testimony. Again, we find no impropriety in these arguments.

⁴ Appellant made two references to Freeman's acquittal during his testimony, and Appellant's wife made one such reference in her testimony. The trial court instructed the jury to disregard all references to Freeman's acquittal and held both Appellant and his wife in contempt.

3. Batson Claim

Appellant next claims that the Commonwealth used its peremptory strikes in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986). However, Appellant has failed to make a record “identifying the race of venirepersons stricken by the Commonwealth, the race of prospective jurors acceptable to the Commonwealth but stricken by the defense, and the racial composition of the final jury selected.” Commonwealth v. Bronshtein, 547 Pa. 460, 691 A.2d 907, cert. denied, 118 S.Ct. 346 (1997). “Where an appellant fails to make a record for review of a Batson challenge, this Court is unable to consider a claim that the trial court failed to find a prima facie case under Batson.” Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993). Therefore, it is impossible to determine if Appellant’s claim has arguable merit. Moreover, Appellant does not even allege that counsel’s ineffectiveness with respect to this issue “so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.” 42 Pa.C.S. § 9543(a)(2)(ii). Accordingly, no relief is due.

4. Jury Instructions Regarding Accomplice Liability

Next, Appellant argues that in instructing the jury on accomplice liability, the trial court erroneously neglected to instruct the jury that they must find that Appellant himself had the specific intent to kill. Although this argument may have arguable merit, “given the charge as a whole and the evidence as presented, we cannot conclude that this charge alleviated the Commonwealth from its burden of proving that [Appellant] possessed the specific intent to kill [Caldwell].” Commonwealth v. Wayne, 720 A.2d 456, 465 (Pa. 1998)

(citing Commonwealth v. Prosdocimo, 525 Pa. 147, 578 A.2d 1273 (1990)). Therefore, Appellant is not entitled to relief.

5. Brady Claim

Appellant next claims that the Commonwealth violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose a “deal” with Baker in exchange for her testimony. This claim is based on pure conjecture, as Appellant presents absolutely no evidence of such a “deal.” Hence, this issue lacks arguable merit, and no relief is due.

6. Trial Counsel Ineffectiveness

Appellant challenges trial counsel’s stewardship in two respects, as follows:

a. Failure to Object to Admission of Appellant’s Unsigned Statement

First, Appellant argues that trial counsel was ineffective for failing to object to the admission of his unsigned statement to police, either as hearsay or as the fruit of an illegal arrest. Appellant’s hearsay argument relies on Commonwealth v. Cooley, 484 Pa. 14, 398 A.2d 637 (1979). In Cooley, the Commonwealth called a police detective to testify to the contents of interview sheets on which he recorded the defendant’s statement. Neither the detective nor the defendant had signed or initialed the interview sheets, and “the Commonwealth failed to establish that [the defendant] ever adopted the writing on the interview sheets as his own statement.” Cooley, 398 A.2d at 640-41. Thus, this Court held that the detective’s testimony should have been excluded as hearsay.

The case at bar, however, is distinguishable from Cooley, because here the Commonwealth did establish that Appellant adopted the statement as his own. Philadelphia Police Detective Harrison Graham testified that after Appellant gave his statement to Detective Ernest Gilbert and refused to sign it, Detective Graham and another officer read Appellant's statement back to him verbatim. At that time, Appellant told Detective Graham, "It's what I said, but I'm not going to sign it." Thus, notwithstanding the fact that Appellant refused to sign it, the statement constituted an admission by Appellant, and thus it was admissible. See Commonwealth v. Duncan, 473 Pa. 62, 373 A.2d 1051 (1977); Commonwealth v. Darden, 311 Pa. Super. 170, 457 A.2d 549 (1983). Consequently, trial counsel cannot be deemed ineffective for failing to object to the admission of the statement.

Appellant further argues that his arrest was illegal because the affidavit of probable cause was based on the statement of an unreliable witness, Baker. This argument has no merit. Baker's statement was reliable, and other witnesses corroborated it. Trial counsel was not ineffective for declining to raise this meritless issue.

b. Failure to Impeach Baker

Second, Appellant claims that trial counsel was ineffective for failing to impeach Baker's credibility by, inter alia, presenting evidence of Freeman's acquittal; presenting evidence that Baker could not have seen what she claimed to have seen; presenting evidence of a history of animosity between Baker and Johnson and between Baker and Appellant; and by comparing Baker's testimony at Appellant's trial to her allegedly

inconsistent testimony at Freeman's trial. Even if any of these claims had arguable merit, Appellant does not prove, or even allege, that counsel's errors "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). Accordingly, no relief is due.

7. Jury Instructions Regarding Appellant's Statement

Next, Appellant argues that he was entitled to a jury instruction that the jury could not consider his statement to police unless they made an independent determination that the statement was given voluntarily. This argument is without merit. Such an instruction would have been inconsistent with Appellant's claim that he never gave any statement to police; therefore, it was reasonable for trial counsel not to request the instruction. Moreover, there was no evidence that the police coerced Appellant in any way. Finally, Appellant cannot demonstrate that the absence of the instruction affected the outcome of the trial. Consequently, this claim warrants no relief.

8. Trial Court's Opinion Regarding the Appropriate Verdict

Appellant argues that it was error for the trial court to tell the jury, "[i]t is my opinion under the facts and circumstances of this case that voluntary manslaughter would not be an appropriate verdict." N.T., 5/21/86, at 140. However, Appellant does not explain why this statement was erroneous or how it prejudiced him. Hence, no relief is due.

9. Statute of Limitations Claims

Appellant next contends that he should not have been convicted of criminal

conspiracy and possession of an instrument of crime because those charges were barred by the statute of limitations. This argument has no merit. With regard to the conspiracy charge, 42 Pa.C.S. § 5551 provides that there is no statute of limitations on “[c]onspiracy to commit murder or solicitation to commit murder if a murder results from the conspiracy or solicitation.” Concerning the possession of an instrument of crime charge, Appellant does not allege that he suffered any prejudice because of the charge. Thus, no relief is warranted.

10. Jury Instructions Regarding Unanimity of Mitigating Circumstances

Next, Appellant claims that the trial court violated Mills v. Maryland, 486 U.S. 367 (1988), by failing to instruct the jury that mitigating circumstances need not be found unanimously. Mills, however, was decided two years after the trial in this case, and trial counsel cannot be held ineffective for failing to anticipate changes in the law. Commonwealth v. Gibson, 547 Pa. 71, 688 A.2d 1152, cert. denied, 188 S.Ct. 364 (1997).

11. Failure to Record Confession

Appellant next argues that his confession to police should have been suppressed because the police did not preserve Appellant’s statement by audio and/or video recording. This argument is patently meritless. Appellant acknowledges that no Pennsylvania case has ever required such a recording. Consequently, prior counsel could not have been ineffective for failing to argue this issue.

12. Jury Instructions Regarding Burden of Proof

Appellant argues that the trial court erroneously neglected to instruct the jury that the Commonwealth had the burden of proving each and every element of the charged offenses beyond a reasonable doubt. The record reveals, however, that the trial court did so instruct the jury. N.T., 5/21/86, at 105-06. (“[I]t is the Commonwealth that always has the burden of proving each and every element of the crime charged, and that the defendant is guilty of that crime beyond a reasonable doubt.”). Accordingly, this claim warrants no relief.

B. CLAIMS RAISED BEFORE THE PCRA COURT

1. Trial Counsel’s Failure to Call Freeman as a Witness

Appellant argues that trial counsel was ineffective for failing to call Freeman as a witness. To prove that counsel was ineffective for failing to call a witness, Appellant must show that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew 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 witness was so prejudicial as to have denied Appellant a fair trial. Commonwealth v. Henry, 500 Pa. 346, 706 A.2d 313 (1997). Here, Appellant cannot satisfy the prejudice prong. According to a March 12, 1991 affidavit, Freeman would have testified that on the night of the murder, he saw Appellant at a bar from five o’clock p.m. to nine or nine thirty p.m., and that he saw Appellant again briefly at approximately eleven thirty p.m. This testimony would have been useless to Appellant’s alibi defense because the murder occurred some time after midnight. Moreover, Freeman’s testimony easily could have incriminated Appellant. Trial counsel’s

decision not to call Freeman as a witness was reasonable and did not prejudice Appellant; therefore, this ineffectiveness claim fails.

2. PCRA Court's Denial of Request for Discovery and Expert Testimony

Finally, Appellant claims that he was denied his right to due process when the PCRA court denied his requests for discovery of police files and funds to obtain expert testimony regarding mental capacity. These arguments are meritless. With regard to the police files, Appellant alleges the personnel or internal affairs files of the detective who took Appellant's statement should have been disclosed, yet he identifies no specific information that would have been admissible in his case. Thus, the PCRA Court was within its discretion in denying Appellant's discovery request. See, e.g., Commonwealth v. Abu Jamal, 720 A.2d 79 (Pa. 1998).

Concerning the proposed expert testimony, Appellant argues that "the provision of mental health expert services . . . was necessary for counsel to identify, plead, and present mental health related claims for relief," particularly as mitigation evidence. On direct appeal, however, this Court found that Appellant himself chose not to present mitigating witnesses at trial. See Holloway, supra. Accordingly, he cannot now relitigate this issue under a new theory. See Commonwealth v. Senk, 496 Pa. 630, 437 A.2d 1218, 1220 (1981) (citing Commonwealth v. Jones, 488 Pa. 270, 412 A.2d 503 (1980)).

IV. CONCLUSION

Having determined that none of Appellants' claims merits relief, we affirm the Order of the PCRA Court.⁵

Mr. Justice Saylor files a dissenting opinion.

⁵ The Prothonotary of the Supreme Court is directed to transmit the complete record in this case to the Governor, 42 Pa.C.S. § 9711(i).