

APPENDIX 1

15

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

MICHAEL DEEP

Appellant

No. 966 WDA 2012

Appeal from the PCRA Order of May 22, 2012
In the Court of Common Pleas of Washington County
Criminal Division at No.: CP-63-CR-0001722-2005

CLERK OF COURTS
WASHINGTON COUNTY PA

14 APR 11 PM 3:17

FILED

BEFORE: ALLEN, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.:

FILED: September 13, 2013

Michael Deep ("Appellant") appeals the PCRA court's May 22, 2012 order, which dismissed Appellant's petition under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46. We affirm.

In 2009, we set forth the factual and procedural history as of that date as follows:

On August 7, 2005, K.D. arrived home and discovered her husband, [Appellant], sexually assaulting her daughter ([Appellant]'s step-daughter), H.D. (d.o.b. 4/14/89). H.D. asserted that [Appellant] had been sexually assaulting her since the age of 10. Police subsequently arrested [Appellant] and charged him with 87 counts each of sexual assault and corruption of minors. Police also charged [Appellant] with 87 counts each of statutory sexual assault, involuntary deviate sexual intercourse (victim less than 16 years of age), rape by

* Retired Senior Judge assigned to the Superior Court.

80

forcible compulsion, aggravated sexual assault, and endangering the welfare of children.² At the preliminary hearing, the Commonwealth dismissed all but six counts of each statutory violation set forth above.

On October 27, 2006, a jury convicted [Appellant] of the two counts each of sexual assault, endangering the welfare of children and corruption of minors. On March 22, 2007, the trial court subsequently sentenced [Appellant] to consecutive prison terms of five to ten years for each of [Appellant]'s convictions of sexual assault, one to seven years for each of his convictions of endangering the welfare of children, and one to five years for each of his convictions of corruption of minors. Thus, the trial court imposed an aggregate sentence of 14 to 44 years in prison.

² 18 Pa.C.S.A. §§ 3122.1, 3123(a)(7), 3121(a)(1), 3125, 4304(a).

Commonwealth v. Deep, 737 WDA 2007, Slip Op. at 1-2 (Pa. Super. April 15, 2009) (unpublished memorandum; hereinafter "**Deep I**"). In our April 15, 2009, memorandum, this Court affirmed Appellant's judgment of sentence. On October 20, 2009, our Supreme Court denied Appellant's petition for allowance of appeal. **Commonwealth v. Deep**, 982 A.2d 509 (Pa. 2009) (*per curiam*). Thus, after expiration of the 90-day time limit for seeking review in the United States Supreme Court, **see** U.S.Sup.Ct.R. 13, Appellant's judgment of sentence became final on or about January 18, 2010. 42 Pa.C.S. § 9545(a).

Appellant then timely filed a first PCRA petition on August 6, 2010. Thereafter, the PCRA court entered an order pursuant to Pa.R.Crim.P. 907 informing Appellant that the court intended to dismiss his PCRA petition without a hearing. Appellant filed an objection, but the PCRA court entered

its order dismissing Appellant's petition without a hearing on September 27, 2010. *See Commonwealth v. Deep*, 1592 WDA 2010, Slip Op. at 2 (Sept. 16, 2011) (hereinafter, "*Deep II*").

Appellant appealed the PCRA court's denial without a hearing of his PCRA petition, which was the subject of our *Deep II* decision. In *Deep II*, we affirmed the PCRA court's dismissal of Appellant's PCRA petition in part and vacated in part, remanding to the PCRA court for an evidentiary hearing more fully to test the merits of Appellant's allegations of ineffective assistance of trial counsel ("IAC"). In that connection, Appellant alleged that trial counsel: "(a) did not meet with [Appellant] at all prior to trial; (b) did not discuss potential witnesses with [Appellant] prior to trial; and (c) failed to request that the victim be examined by an independent expert." *Id.* at 8.

As directed by this Court, the PCRA court held an evidentiary hearing on December 19, 2011, and dismissed Appellant's petition in an order entered on May 22, 2012. Appellant filed a timely notice of appeal of the dismissal. According to Appellant, the PCRA court failed to provide an opinion under Pa.R.A.P. 1925(a) before the presiding judge "submit[ted] a resignation from his position although there was a substantial period of time between the Notice of Appeal being filed and the [j]udge's resignation." Brief for Appellant at 8-9. Our review of the record confirms the absence of such an opinion. However, in light of the two issues on appeal that we do not find to be waived, the PCRA court's May 22, 2012 Order and the

explanation included therein sufficiently responds to Appellant's arguments to enable our review.

Appellant raises the following issues on appeal:

- I. Whether the [PCRA court] erred as a matter of law when it dismissed [Appellant's] Petition for [PCRA] Relief after a hearing, where the Petition set forth specific allegations of ineffective assistance of counsel against trial counsel . . . concerning his refusal to prepare [Appellant] for testimony as a witness in his own defense, and the Court failed to acknowledge [Appellant's] testimony, and the corroborating testimony of his girlfriend [(“Girlfriend”)] that on the evening prior to his testimony, instead of being prepared for court by [trial counsel], they spent the evening together because [trial counsel] made no effort to meet with them to prepare testimony.

- II. Whether the [PCRA court] abused its discretion in dismissing the PCRA Petition, filed on August 6, 2010, by demonstrating prejudice, bias and utter disregard for the rights of [Appellant] by initially denying him a PCRA hearing, the Order having been issued on September 27, 2010, forcing him to appeal to the Superior Court for said hearing on October 14, 2010; waiting for months following remand, Ordered by the Superior Court on September 16, 2011, to schedule said PCRA hearing three months later on December 19, 2010[;] and for waiting five months after the hearing prior to rendering a decision on the petition by Order dated May 21, 2012, mischaracterizing the testimony of [Attorney Brady] and mischaracterizing [Appellant's] testimony and that of [Girlfriend], which supported his contention that he had not been prepared to testify by trial counsel.

Brief for Appellant at

Before considering the merits of Appellant's issues, we must address whether they properly have been preserved for our review. We note that, in order to preserve issues for our review, they must first have been raised

before the PCRA court. We will not review assertions of error not first submitted to the PCRA court for its consideration. **See** Pa.R.A.P. 302(a). Moreover, Pa.R.A.P. 1925(b) requires Appellant to raise all issues that he intends to pursue on appeal in his concise statement of errors complained of on appeal. "Any issues not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived." **See Commonwealth v. Castillo**, 888 A.2d 775, 780 (Pa. 2005) (citing **Commonwealth v. Lord**, 719 A.2d 306, 309 (Pa. 1998)). Issue preservation also requires compliance with the rules associated with the preparation of a brief before this Court. Pa.R.A.P. 2101. Ordinarily, under Pa.R.A.P. 2116, no question will be considered by this Court that is not raised in the issues stated or fairly suggested thereby. Pa.R.A.P. 2116(a); **see Krebs v. United Refining Co. of Penna.**, 893 A.2d 776, 797 (Pa. Super. 2006).

Appellant's Rule 1925(b) statement set forth two overarching errors, in language materially identical to that employed in his brief to this Court, as quoted above. Hence, our review is restricted to those issues as stated, as well as any questions fairly suggested by those issues. In his argument under the first issue, Appellant contends that trial counsel was ineffective for the following reasons:

1. [Trial counsel] did not meet with and prepare [Appellant] for his testimony prior to the commencement of trial or just prior to the date of his actual testimony as [Trial counsel] so testified, even though he was able and willing to do so; and

2. [Trial counsel] met with [Appellant] prior to the commencement of trial briefly to discuss potential witnesses, but did not review discovery, expert or detective reports with [Appellant]; and
3. [Trial counsel] failed to call [Girlfriend] as a character witness, among others who were available and willing to testify and failed to explain why these witnesses would not be used; and
4. [Trial counsel] also specifically refused to prepare [Girlfriend] to testify on [Appellant's] behalf even though she was ready, willing and able to do so and would have testified as to [Appellant's] character and on the issue of a sexually transmitted disease.

Brief for Appellant at 12. Sub-issues two, three and four are neither stated nor fairly suggested by Appellant's Rule 1925(b) statement. Similarly, any suggestion of these issues is absent from his statement of the questions involved in his brief to this Court. Accordingly, these sub-issues are waived. Thus, under the aegis of Appellant's first issue, we will consider his argument only to the extent that it challenges the adequacy of trial counsel's preparation of Appellant for his appearance as a witness in his own defense.

One aspect of Appellant's second issue also is waived. Appellant's argument in support of his assertion of PCRA bias includes various allegations, all of which are of a piece. In sum, Appellant alleges that "the PCRA court[]demonstrated bias, prejudice and utter disregard" for Appellant's rights in five enumerated sub-issues. **See** Brief for Appellant at 19-20.

In the first sub-issue asserted under his second issue, Appellant contends that the trial court imposed "a very harsh sentence in the

aggravated range.” Brief for Appellant at 19. To the extent that Appellant intends to raise the discretionary aspects of his sentence, we previously have found his challenge to be waived for failure properly to raise it in post-sentence motions, as required by **Commonwealth v. Williams**, 787 A.2d at 1085, 1087-88 (Pa. Super. 2001), and Pa.R.A.P. 302(a). **See Deep I**, Slip Op. at 4-6. Appellant makes no effort to suggest why, given our prior ruling, we should further consider this issue. As well, Appellant failed to raise this contention in his Rule 1925(b) statement and in his statement of the questions involved. Consequently, for the same reasons set forth above in connection with Appellant’s most of the points pressed in support of Appellant’s first issue, this aspect of Appellant’s second issue is waived and we will not consider it.¹

Setting aside the waived arguments specified above, two reviewable issues remain: Appellant’s allegation that trial counsel was ineffective for failing adequately to prepare Appellant for his testimony; and his contention that the PCRA court, acting out of bias or “contempt,” delayed Appellant’s PCRA proceedings and unfairly weighed the conflicting testimony of trial counsel, Appellant, and Girlfriend. We address these issues in turn.

¹ In our most recent decision in this case, we rejected Appellant’s argument that appellate counsel was ineffective for failing to preserve a challenge to the discretionary aspects of sentence. **Deep II**, Slip Op. at 11.

Our standard of review of a PCRA court's denial of relief calls upon us to assess "whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." **Commonwealth v. Garcia**, 23 A.3d 1059, 1061 (Pa. Super. 2011) (citations omitted). "Our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party" **Commonwealth v. Hanible**, 30 A.3d 426, 438 (Pa. 2011).

With respect to Appellant's IAC allegation, our review is governed by the following standard:

[I]n order to obtain relief based on [an IAC] claim, a petitioner must establish: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Reed, 971 A.2d 1216, 1221 (Pa. 2005) (citing **Commonwealth v. Pierce**, 527 A.2d 973, 975 (Pa. 1987)). The petitioner bears the burden of proving all three prongs of this test, and failure to establish any one prong is fatal to the claim. **Commonwealth v. Meadows**, 787 A.2d 312, 319-20 (Pa. 2001)

The PCRA court rejected Appellant's IAC claim based upon trial counsel's alleged failure adequately to prepare Appellant to testify at trial. The court reasoned as follows:

[Appellant's] argument that trial counsel failed to meet with him and sufficiently prepare for trial was refuted by [trial counsel's] credible testimony at the PCRA hearing. As [Appellant's] Memorandum in Support of Petition for Post Conviction Relief aptly states:

[Trial counsel] testified that he met with [Appellant] at least three or four times to prepare for trial and to review the discovery materials, and [Appellant] corroborated this testimony. Notes of Testimony, December 19, 2011, pp. 28-29 (hereafter "N.T."). [Trial counsel] also testified that he met with [Appellant] to prepare him for his trial testimony, albeit briefly. N.T., pp. 7-8. [Trial counsel] explained that for strategic reasons he did not spend a long time preparing [Appellant] to testify, to avoid the appearance that [Appellant] was "coached." N.T., p. 23. [Trial counsel] credibly testified that was his trial strategy regarding [Appellant's] testimony to the jury.

PCRA Court Opinion, May 22, 2012, at 2 (quoting Defendant's Memorandum in Support of Petition for Post Conviction Relief at 4).

Appellant's argument consists of a recitation of alleged contradictions and expressions of uncertainty by trial counsel during the PCRA hearing, ostensibly rendering any reliance on his testimony unjust, followed by bald allegations to the effect that Appellant and Girlfriend were the more credible witnesses. Brief for Appellant at 14-17. Despite trial counsel's testimony to the contrary, Appellant maintains that counsel did not meet with Appellant to go over his testimony in the several days before trial. Notably, Appellant does not dispute that the PCRA court's findings of fact were based upon the actual testimony of trial counsel. As noted above, we are bound by the PCRA court's findings of fact to the extent they are supported by the record.

Garcia, 23 A.3d at 1061. Consequently, we must decline Appellant's invitation to reject the PCRA court's conclusions.

Moreover, Appellant fails to plead and prove that, even if trial counsel did not meet with Appellant in an arbitrarily drawn four-day window before trial, the earlier meetings that the PCRA court found to have occurred were insufficient adequately to prepare Appellant for trial. As well, Appellant does not cite a single aspect of his own testimony that might have differed given a greater degree of preparation. Excluding assertions in support of issues that we have deemed waived, Appellant's entire argument in support of the prejudice arising from any deficiencies in preparing him as a witness is as follows:

I believe that it is safe to say that in a case where a defendant had . . . adequately prepare[d] him for testimony in his own defense would have made a difference. Appellant was not convicted on all charges as it is. Could he have been acquitted on the remaining charges? Had [trial counsel] given more than a cursory effort, would [Appellant] have been able to testify more effectively, knowing what had been done in his behalf, why counsel made certain decisions whether for pragmatism or for strategy, and had [he] received some training in what to expect, how better to effectively express himself and how to deal with potential problems on cross-examination[?] Isn't it more likely that he would have been able to give his best effort?

Brief for Appellant at 18 (errata in original). We submit that only Appellant can answer his own rhetorical questions – and indeed, that the governing standard imposes upon him the burden to do so, by reference to the record and actual evidence rather than bald allegations of prejudice. Having

submitted to this Court questions rather than answers, Appellant has failed to establish a basis for relief on this claim.

Turning to Appellant's second denominated issue, above, we found Appellant's first sub-issue under issue II (concerning the alleged excessiveness of his sentence) to be waived. However, Appellant also offers his excessiveness allegations as a basis for his claim that the trial court acted with bias and ill will, which is also the topic of the remainder of Appellant's sub-issues under issue II. **See** Brief for Appellant at 22 ("[W]hen taken in context with [the PCRA court's] other actions related to the Appellant [*sic*], [the excessive sentence] provides the foundation for his lack of impartiality, ill-will and bias that he continued to display throughout the case").

These supporting sub-issues, nominally divided into four categories, all are predicated upon the underlying claim that the PCRA court behaved toward Appellant and PCRA counsel "with contempt"; dealt with PCRA counsel in an "unduly harsh" manner; unreasonably delayed conducting the hearing on Appellant's PCRA petition; and then belatedly issued a PCRA opinion "of only four pages, laughably finding [trial counsel] to be credible." **Id.** at 19; **see also id.** at 24 ("During the course of testimony, [PCRA] counsel was repeatedly interrupted and/or rushed by [the PCRA court], often not being allowed to complete a question before being over-ruled or reprimanded"). Perhaps the best distillation of the essence of Appellant's argument is found in his concluding reference to "the

considerable evidence that [the PCRA court] had a demonstrable bias and prejudice against [Appellant] which detrimentally affected him in the form of a lengthy incarceration and extensive, continuous delays designed to extend [Appellant's] stay in incarceration for as long as possible." *Id.* at 28. In support of these sub-issues, Appellant recites at length alleged inconsistencies in trial counsel's PCRA testimony, his expressions of uncertainty and lack of memory, and Appellant's and Girlfriend's less equivocal, ostensibly more credible testimony.

Given his role as advocate, PCRA counsel's emphatic confidence in his client's testimony is laudable in the abstract, as is his attempt to impeach trial counsel's testimony as a foundation for the PCRA court's ruling. PCRA counsel's mode of expression, however, is regrettable in light of his oft-repeated and scandalous allegations regarding trial counsel, not to mention regarding the PCRA court's conduct. More times than we care to count, PCRA counsel explicitly or implicitly accuses trial counsel of perjury,² which is

² **See, e.g.,** Brief for Appellant at 15 ("[Trial counsel] could not recall the number of meetings he had with Appellant but was certain that they met a sufficient number of times to adequately prepare for trial. How convenient! [Trial counsel] proceeded to perjure himself Fascinating what a person remembers, isn't it?" (citations omitted)), 18 ("[Trial counsel] perjured himself on the witness stand, and on that basis alone, the case should be remanded for a new trial. There is no more ineffective attorney than a liar, willing to save himself while his client spends the rest of his life in the state penitentiary."). Although Appellant's appeal lacks merit independently of PCRA counsel's inappropriate tone and scurrilous allegations regarding trial counsel's veracity and ethics, we
(Footnote Continued Next Page)

at odds with Appellant's attempt to impeach trial counsel's memory, inasmuch as perjury requires the intent to deceive, not just inaccuracy. **See** 42 Pa.C.S. § 4902 (defining perjury as occurring when the witness statement or statements in question are "material" and the witness "**does not believe it to be true**" (emphasis added)). Regardless, we may not reweigh conflicting evidence, and will not do so now.

Finally, we must address Appellant's allegation of the PCRA court's bias. First, Appellant fails to provide any authority to suggest that such a claim is cognizable in this Court on review of a denial of PCRA relief. Second, with the sole exception of the time periods underlying Appellant's allegations of improper delay, which are available from the docket, the allegations underlying this claim are *dehors* the record, and hence fall outside the scope of our review. **See Commonwealth v. Preston**, 904 A.2d 1, 6 (Pa. Super. 2006); Pa.R.A.P. 1921, Note ("An appellate court may consider only the facts which have been duly certified in the record on appeal."). To the extent any evidence of PCRA court bias can be gleaned from the record, Appellant has failed to direct this Court to such evidence with citations to the certified record, which precludes our review under Pa.R.A.P. 2119(c). Finally, as to this issue as well as Appellant's IAC allegations, Appellant cites no on-point legal authority beyond that setting

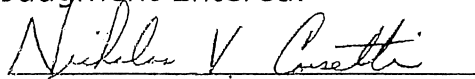
(Footnote Continued) _____

admonish counsel to consider adopting a more equanimous, or at least more restrained, tone in his future appearances before this Court.

forth the governing legal standards, in violation of Pa.R.A.P. 2119(a), which requires an appellant to furnish "such discussion and citation of authorities as are deemed pertinent." Accordingly, we find no merit in Appellant's second issue.

Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 9/13/2013

WESTMORELAND COUNTY
CLERK OF COURTS
BRYAN E. KLINE
2013 MAR 21 A 10:47
FILED