NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. MELVIN W. COWART, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1107 EDA 2012

Appeal from the PCRA Order February 28, 2012
In the Court of Common Pleas of Monroe County
Criminal Division at No.: CP-45-CR-0000781-2008

BEFORE: MUSMANNO, J., WECHT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: January 7, 2013

Appellant, Melvin W. Cowart, appeals from the order denying his first, counseled petition pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A §§ 9541-9546. We affirm.

Appellant was charged with four counts of aggravated assault for an incident on Stemple Street in East Stroudsburg, PA in which he used an aluminum baseball bat to club his victim and a bystander who tried to intervene. On May 6, 2009, he proceeded to a jury trial where he was identified by three witnesses, and testified in his own defense, claiming that he had an alibi and he was elsewhere at the time of the offense. The jury convicted Appellant of two counts of aggravated assault as a felony of the

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* Retired Senior Judge assigned to the Superior Court.

first degree, and two counts of aggravated assault as a felony of the second degree. On August 11, 2009, Appellant received an aggregate sentence of not less than nine nor more than eighteen years' incarceration. Appellant filed a direct appeal; this Court affirmed the judgment of sentence and the Pennsylvania Supreme Court denied his petition for allowance of appeal on March 30, 2011. (***See Commonwealth v. Cowart***, 13 A.3d 995 (Pa. Super. 2010) (unpublished memorandum), *appeal denied*, 19 A.3d 1049 (Pa. 2011)).

Appellant filed a timely *pro se* PCRA petition on June 27, 2011.[1] The PCRA court appointed counsel, who filed a brief on September 23, 2011, and a supplemental motion and brief on October 6, 2011. Appellant then filed a *pro se* Motion for Removal of Counsel and Allowance to Proceed *Pro Se* on October 11, 2011. After an evidentiary hearing, the PCRA court denied Appellant's motion and proceeded with the PCRA hearing. After the PCRA hearing, the court ordered Appellant to file a brief in support of his PCRA petition. Appellant's counsel complied on December 28, 2011. The PCRA court thereafter denied Appellant's petition on February 28, 2012. This timely, counseled appeal followed.[2]

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[1] ***See*** 42 Pa.C.S.A. § 9545(b)(1) ("Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final . . . .").

[2] Appellant filed a timely Rule 1925(b) statement on May 15, 2012, stating that "[t]he [lower] court erred in finding that trial counsel for [Appellant]
(Footnote Continued Next Page)

Appellant raises the following question for our consideration: "Whether the [trial] court erred in denying Appellant PCRA relief[?]" (Appellant's Brief, at 3). We note our concern at Appellant's failure to "state concisely the issues to be resolved, expressed in the terms and circumstances of the case." Pa.R.A.P. 2116(a) ("[O]rdinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby."). Although a deficient statement of questions involved may be sufficient to deem waived issues that might otherwise have been presented, "because we are able to extract [Appellant's] questions from the body of his brief, we proceed to the merits of his claims." ***Commonwealth v. Bell***, 901 A.2d 1033, 1034 (Pa. Super. 2006), *appeal denied*, 923 A.2d 409 (Pa. 2007).

Appellant therefore presents two issues for our review, challenging whether the PCRA court erred in denying relief when it found that trial counsel was not ineffective for failing to request an alibi instruction, or for failing to call two alibi witnesses. (***See*** Appellant's Brief, at 3, 5).[3]

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was not ineffective." (Concise Statement, 5/15/12). We observe that "[i]f a Rule 1925(b) statement is too vague, the trial judge **may** find waiver and disregard any argument." ***Commonwealth v. Reeves***, 907 A.2d 1, 2 (Pa. Super. 2006), *appeal denied*, 919 A.2d 956 (Pa. 2007) (citation omitted; emphasis added). Here, the trial court declined to find waiver and entered its Rule 1925(a) opinion on the merits of Appellant's case on May 29, 2012.

[3] Counsel for Appellant also purports to amend his brief at Appellant's request with the *pro se* petition of June 27, 2011, in which Appellant raises a
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> To begin, we note that the standard of review for review of an order denying a PCRA petition is 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. Johnston, 42 A.3d 1120, 1126 (Pa. Super. 2012) (citations omitted).

This Court follows the ***Pierce***[4] test adopted by our Supreme Court to review an appellant's claim of ineffective assistance of counsel:

> When a petitioner alleges trial counsel's ineffectiveness in a PCRA petition, he must prove by a preponderance of the evidence that his conviction or sentence resulted from 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." 42 Pa.C.S. § 9543(a)(2)(ii). We have interpreted this provision in the PCRA to mean that the petitioner must show: (1) that his claim of counsel's ineffectiveness has merit; (2) that counsel had no reasonable strategic basis for his action or inaction; and (3) that the error of counsel prejudiced the petitioner—*i.e.*, that there is a reasonable probability that, but for the error of counsel, the outcome of the proceeding would have been different. We presume that counsel is effective, and it is the burden of Appellant to show otherwise.

Commonwealth v. duPont, 860 A.2d 525, 531 (Pa. Super. 2004), *appeal*

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number of incomplete, unsupported "issues." However, this Court will not review the *pro se* filings of a counseled appellant. ***See*** Pa.R.A.P. 3304; ***Commonwealth v. Ellis***, 626 A.2d 1137, 1139 (Pa. 1993) ("[T]here is no constitutional right to hybrid representation either at trial or on appeal.") (citation omitted); ***see also Commonwealth v. Jette***, 23 A.3d 1032, 1044 (Pa. 2011) (applying ***Ellis*** to PCRA claim). Accordingly, we will not address any issues raised in Appellant's *pro se* petition.

[4] ***Commonwealth v. Pierce***, 527 A.2d 973 (Pa. 1987).

denied, 889 A.2d 87 (Pa. 2005), *cert. denied*, 547 U.S. 1129 (2006) (case citations omitted). "If an appellant fails to prove by a preponderance of the evidence any of the ***Pierce*** prongs, the Court need not address the remaining prongs of the test." ***Commonwealth v. Fitzgerald***, 979 A.2d 908, 911 (Pa. Super. 2009), *appeal denied*, 990 A.2d 727 (Pa. 2010) (citation omitted).

First, Appellant asserts that trial counsel was ineffective for failure to request an alibi instruction. (***See*** Appellant's Brief, at 7). We disagree.

> An alibi instruction is required if the defendant presents evidence which covers the time period when the crime was committed and which puts him at a different location than that of the crime scene. It is not necessary for an alibi defense to be corroborated in order to constitute an alibi. There is no minimum or threshold quantum of physical separation necessary for a defense to constitute an alibi, so long as the separation makes it impossible for the defendant to have committed the crime.

Commonwealth v. Mays, 675 A.2d 724, 728 (Pa. Super. 1996), *appeal denied*, 686 A.2d 1309 (Pa. 1996) (citations, emphasis and quotation marks omitted). "An alibi instruction is required only in cases where a defendant's explanation places him at the relevant time at a different place than the scene involved and so far away as to render it impossible for him to be the guilty party." ***Commonwealth v. Bookard***, 978 A.2d 1006, 1007-08 (Pa. Super. 2009), *appeal denied*, 991 A.2d 309 (Pa. 2010) (citation omitted). Our Supreme Court has further asserted that "the prerogative to request an alibi instruction [is vested] in the sound discretion of trial counsel and [we] analyze counsel's decision not to seek an alibi instruction under . . . our three-prong approach in ***Pierce***." ***Commonwealth v. Hawkins***, 894 A.2d 716, 732 n.21 (Pa. 2006).

Here, Appellant testified as to his own alibi, claiming that he returned to his mother's house at the Penn Estates, East Stroudsburg, between 8:00 and 9:00 p.m. on the night of the incident. (***See*** N.T., 5/06/09, at 107). The Penn Estates are less than seven miles away from Stemple Street, where the incident occurred around 10:30 p.m. (***Id.*** at 33).[5] "It certainly was not impossible for [Appellant] to have traveled that distance" before 10:30 p.m, which was when the crime was committed. ***Bookard***, ***supra*** at 1007. Therefore, an alibi instruction was not required. ***Id.*** at 1007-08; ***see also Commonwealth v. Kolenda***, 676 A.2d 1187, 1190 (Pa. 1996). Accordingly, Appellant's underlying claim is without merit, and trial counsel was not ineffective for failing to request an alibi instruction.[6] ***See Bookard***, ***supra*** at 1007-08; ***Fitzgerald***, ***supra*** at 911; ***duPont***, ***supra*** at 531. Appellant's first issue is without merit.

Second, Appellant asserts that trial counsel was ineffective for failure to call two alibi witnesses. (Appellant's Brief, at 7-8). We disagree.

> A failure to call a witness is not *per se* ineffective assistance of counsel as such decision generally involves a matter of trial strategy. To establish a claim that counsel was ineffective for

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[5] ***See*** http://www.mapquest.com; http://maps.google.com.

[6] The PCRA court determined that Appellant failed the second prong of the ***Pierce*** test because trial counsel had a reasonable strategic basis for failing to request an alibi instruction where he "thought he had negotiated a fair plea agreement with [the] Commonwealth rendering the need for alibi instructions moot." (PCRA Court Opinion, 5/29/12, at 6). However, "[t]his Court may affirm a PCRA court's decision on any grounds if the record supports it." ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa. Super. 2012), *appeal denied*, 54 A.3d 347 (Pa. 2012) (citation omitted).

> failing to call a witness, a defendant must establish that the witness existed and was available, that counsel was informed of the witness's existence, that the witness was ready and willing to testify and that the absence of the witness prejudiced the defendant to a point where the defendant was denied a fair trial.

Commonwealth v. Lauro, 819 A.2d 100, 105 (Pa. Super. 2003), *appeal denied*, 830 A.2d 975 (Pa. 2003) (citations and quotation marks omitted).

Here, Appellant identified two witnesses who he claimed could provide an alibi, Jessica Kaufman and Jeffrey Sabatur. (***See*** PCRA Ct. Op., 5/29/12, at 6). At the PCRA hearing, trial counsel testified that he hired a private investigator to speak with them and determine their reliability and credibility. (***See*** N.T., 12/07/11, at 12). The investigator informed trial counsel that Ms. Kaufman would not be a reliable witness because she was suffering from post-traumatic stress disorder as a result of being an eyewitness in an unrelated murder case. (***Id.***). Trial counsel, therefore, determined "that she was not going to be a favorable witness[, m]ostly because of her mental state at the time." (***Id.***). Therefore, trial counsel was not ineffective for failing to call Ms. Kaufman, because Appellant cannot establish that she was "ready and willing to testify." ***Lauro***, ***supra*** at 105. Furthermore, trial counsel articulated a reasonable basis for choosing not to call Ms. Kaufman, and Appellant's claim as it relates to Ms. Kaufman's alleged alibi testimony fails the second prong of the ***Pierce*** test. ***See Fitzgerald***, ***supra*** at 911.

Mr. Sabatur, however, expressed to the investigator that he was willing to testify, so trial counsel arranged for the investigator to pick him up

at home and drive him to court for Appellant's trial. (***See*** N.T., 12/07/11, at 5). When the investigator attempted to bring Mr. Sabatur to court, he was not home and, despite several attempts to reach him, could not be located. (***Id.*** at 5-6). Trial counsel asked for and was granted an extension to locate Mr. Sabatur, but was not successful. (***Id.*** at 6-7). Although Mr. Sabatur led trial counsel to believe he was willing to testify, he was not in fact willing to do so, because he failed to make himself available. Furthermore, trial counsel took reasonable steps to try and reach him. Therefore, Appellant cannot establish a claim that trial counsel was ineffective for failing to call Mr. Sabatur as a witness. ***See Lauro***, ***supra*** at 105.

Moreover, even if trial counsel had been able to secure Ms. Kaufman and Mr. Sabatur as witnesses, the PCRA court accurately notes that there is no proof they would have been able to provide Appellant with an alibi. As discussed above, by Appellant's own admission, Ms. Kaufman and Mr. Sabatur drove him to his mother's house before 9:00 p.m. on the night of the incident, the incident itself occurred around 10:30 p.m., and it was not impossible for Appellant to have travelled from his mother's house to the scene of the incident in the interim. ***See Bookard***, ***supra*** at 1007; (***see also*** N.T., 5/06/09, at 33, 107, 118; PCRA Ct. Op., 5/29/12, at 15). Therefore, Appellant cannot demonstrate that he was prejudiced by the absence of these witnesses. ***See Lauro***, ***supra*** at 105. Accordingly, the trial court did not err or abuse its discretion in determining that trial counsel

was not ineffective for failing to call them. ***See Johnston***, ***supra*** at 1126. Appellant's second issue is without merit.

Order affirmed.