J-S05009-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ANTONIO DARNELL CARROLL,	:	
	:	
Appellant	:	No. 1157 MDA 2012

Appeal from the Order Entered June 8, 2012,
In the Court of Common Pleas of Dauphin County,
Criminal Division, at Nos. CP-22-CR-0004862-2007;
CP-22-CR-0004863-2007; CP-22-CR-0004864-2007.

BEFORE: SHOGAN, OTT and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.: Filed: March 6, 2013

Appellant, Antonio Darnell Carroll, appeals from the order denying his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

In Appellant's direct appeal, a panel of this Court presented the facts of the case, as offered by the trial court, as follows:

> The evidence adduced at trial established that Carroll engaged in a series of drug sales with an undercover officer through a confidential informant. On the third of these, August 24, 2007, Carroll arrived at the site in an aqua-colored Ford Escort. He was alone. The [police] informant left the undercover vehicle and entered Carroll's car. A few minutes later the informant returned and provided $60 worth of crack cocaine to the officer. At that point other officers moved in to arrest Carroll, who immediately fled on foot. He was apprehended after a brief chase and returned to the scene of the drug sale.

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*Retired Senior Judge assigned to the Superior Court.

> A search warrant was then obtained for the vehicle which Carroll had driven to the scene. The search yielded a loaded semi-automatic handgun from the glove box, an electronic scale from behind the driver's seat, photographs of Carroll and others from the back seat area and a small bag of suspected crack cocaine from the driver's side door area.
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> Records indicated that the vehicle was registered to a third party, one Donald L. Barbour, who had not reported the car stolen. The gun was registered to a John Edward Sanchez, who had not reported the gun stolen. The gun was not submitted for latent fingerprint examination.

Commonwealth v. Carroll, 389 MDA 2009, unpublished memorandum at 1-2, 4 A.3d 672 (Pa. Super. filed June 2, 2010), *appeal denied*, 608 Pa. 628, 8 A.3d 897 (2010) (citing Trial Court Opinion, 2/3/09, at 2-3).

On August 24, 2007, Appellant was arrested and charged with possession of firearm prohibited, firearms not to be carried without license, unlawful delivery of a controlled substance, and possession with intent to deliver a controlled substance. Thereafter, Appellant was charged with two additional counts of unlawful delivery of a controlled substance.

On September 17, 2008, following a jury trial, Appellant was convicted of all charges. On October 23, 2008, the trial court sentenced Appellant to serve an aggregate term of incarceration of eight to nineteen years.

Appellant filed timely post-sentence motions, which were denied. Appellant filed a direct appeal and this Court affirmed the judgment of sentence on June 2, 2010. On October 15, 2010, the Supreme Court of Pennsylvania denied Appellant's petition for allowance of appeal.

On May 18, 2011, Appellant filed, *pro se*, the instant PCRA petition, and a Supplemental Memorandum of Law on August 24, 2011. The PCRA court then appointed PCRA counsel, who subsequently filed a motion to withdraw and a ***Turner/Finley***[1] "no merit letter," on November 18, 2011. On February 24, 2012, the PCRA court granted PCRA counsel's motion to withdraw and notified Appellant of its intention to dismiss the PCRA petition. On June 8, 2012, following *pro se* objections to the PCRA court's order of intent to dismiss, the PCRA court issued its order dismissing Appellant's PCRA petition. This timely appeal followed.

In his *pro se* brief, Appellant presents the following issues for our review:

> 1.) PCRA counsel was derelict by not raising trial counsel's ineffectiveness for failing to seek suppression and object to the admission of evidence that was obtained from a vehicle operated by [Appellant] in which the seizure was unreasonable/that the police did not have lawful custody of the vehicle and the chain of custody was not established, and the PCRA court abused its discretion by not concluding this error was not prejudicial to Appellant, and not affording a hearing?
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> 2.) PCRA counsel was derelict by not raising trial counsel's ineffectiveness for failing to object to impermissible hearsay, regarding lab reports, which were relayed by the police officer, rather than the technician whom [sic] examined the alleged controlled substance, and the PCRA court abused its discretion by not concluding this error was manifestly prejudicial to [Appellant], and not affording a hearing?

[1] ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

> 3.) PCRA counsel was derelict by not raising trial counsel's ineffectiveness for failing to object to the admission of the Commonwealth's evidence obtained by a fatally defective search warrant, and to investigate as to the existence of any warrant, or to establish whether the Commonwealth violated Brady vs. Maryland by not disclosing such warrant, and the PCRA court abused its discretion by not concluding this error was not manifestly prejudicial to [Appellant], and not affording a hearing?

Appellant's Brief at 6, 9, 13.

Our standard of review for an order denying PCRA relief is whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. ***Commonwealth v. Phillips***, 31 A.3d 317, 319 (Pa. Super. 2011), *appeal denied*, ___ Pa. ___, 42 A.3d 1059 (2012) (citing ***Commonwealth v. Berry***, 877 A.2d 479, 482 (Pa. Super. 2005)). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id***. (citing ***Commonwealth v. Carr***, 768 A.2d 1164 (Pa. Super. 2001)).

Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence. ***Commonwealth v. Jordan***, 772 A.2d 1011, 1014 (Pa. Super. 2001). A reviewing court on appeal must examine each of the issues raised in the PCRA petition in light of the record in order to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact and denying relief without an evidentiary hearing. ***Id***. In addition, we are

mindful that a PCRA hearing is not a matter of right. ***Commonwealth v. Morrison***, 878 A.2d 102, 109 (Pa. Super. 2005), *appeal denied*, 585 Pa. 688, 887 A.2d 1241 (2005).

Appellant's issues challenge the effective assistance of prior counsel. In order to succeed on a claim of ineffective assistance of counsel, an appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's performance lacked a reasonable basis; and (3) that the ineffectiveness of counsel caused the appellant prejudice. ***Commonwealth v. Pierce***, 567 Pa. 186, 203, 786 A.2d 203, 213 (2001). Prejudice requires proof that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. ***Id***. "A failure to satisfy any prong of the ineffectiveness test requires rejection of the claim of ineffectiveness." ***Commonwealth v. Daniels***, 600 Pa. 1, 18, 963 A.2d 409, 419 (2009) (citing ***Commonwealth v. Sneed***, 587 Pa. 318, 899 A.2d 1067 (2006)). When it is clear that an appellant has failed to meet the prejudice prong of his ineffective assistance of counsel claim, the claim may be disposed of on that basis alone, without a determination of whether the first two prongs have been met. ***Commonwealth v. Baker***, 880 A.2d 654, 656 (Pa. Super. 2005). Where a defendant is claiming his most recent counsel is ineffective for failing to challenge the representation of all prior counsel, the defendant must layer

his ineffectiveness claims. ***Commonwealth v. Edmiston***, 578 Pa. 284, 297-298, 851 A.2d 883, 891 (2004). Each layer of a layered claim of ineffective assistance of counsel must be separately pleaded and proved with a full discussion and supporting case law as to each prong at each layer. ***Commonwealth v. McGill***, 574 Pa. 574, 587, 832 A.2d 1014, 1022 (2003).

Appellant first argues that prior counsel was ineffective for failing to argue that the evidence seized by the Commonwealth after the search of the vehicle driven by Appellant should have been suppressed. ***See*** Appellant's Brief at 6-9. Specifically, Appellant contends that the Commonwealth failed to establish an adequate chain of custody of the vehicle in question and that trial counsel should have sought suppression of the evidence. However, we are mindful that the Pennsylvania Supreme Court has long stated that "gaps in the chain of custody go to the weight that is to be afforded evidence, not to its admissibility." ***Commonwealth v. Copenhefer***, 553 Pa. 285, 311, 719 A.2d 242, 256 (1998) (citing ***Commonwealth v. Dunston***, 496 Pa. 552, 437 A.2d 1178 (1981)).

In addressing Appellant's argument regarding prior counsel's effective assistance concerning the chain of custody, the PCRA court offered the following pertinent analysis:

> [Appellant] argues that counsel was ineffective by failing to seek suppression and object to the admission of evidence obtained during the search of [Appellant's] vehicle on chain of custody grounds. *See* Pro Se Supplemental Memorandum at 3.

Since any objection to the chain of custody in this case would only have affected the weight—not admissibility—of the evidence, and counsel questioned the [] weight of the evidence based on chain of custody grounds, [Appellant] has not established prejudice by a preponderance of the evidence.

For evidence to be admissible on chain of custody grounds, "it is sufficient that the evidence [] establish a reasonable inference that the identity and condition of the exhibits remained unimpaired until they were surrendered to the court." *Commonwealth v. Pedano*, [405 A.2d 525, 528] (Pa.Super.Ct. 1979). Every hypothetical possibility of tampering or identity need not be eliminated. *Id*. Any gaps in the chain of custody go to the weight, not admissibility, of the evidence. *See Commonwealth v. Copenhefer*, 553 Pa. 285, 312, [719 A.2d 242, 256] (1998).

The vehicle's chain of custody established at trial rendered the evidence seized from that vehicle admissible. Officer Levell Jenkins testified that after [Appellant's] arrest, the vehicle was secured for the purpose of obtaining a search warrant. *See* N.T. at 66. Officer Jenkins also testified that the vehicle was driven to a secure location. *See id*. at 92. The evening of [Appellant's] arrest, Officer Jenkins and Detective Sean Cornick searched the vehicle pursuant to a warrant. *See id*. at 66-67.

That the evidence found in [Appellant's] vehicle—including cocaine, an electronic scale, and several photos with [Appellant] in them—was present at [Appellant's] arrest is further strengthened by other evidence as well. For example, Officer Jose Martinez's [sic] testified that on July 10, 2007 [Appellant] sold suspected cocaine to a confidential informant who was seated directly beside him. *See id*. at 27, 67. Officer Martinez also testified that on August 9, 2007, [Appellant] again sold suspected cocaine to a confidential informant seated beside him. *See id*. at 28. Officer Martinez's testimony is substantiated by a video showing [Appellant] approaching the vehicle containing Officer Martinez and the confidential informant on those dates. *See id*. at 32.23-39.8. Officer Regis Vogel testified that on August 24, 2007, he observed [Appellant] engaging in the drug sale that led to his arrest that day. *See id*. at 48-49, 65.

> Although defense counsel did not contest the evidence's admissibility, he attacked its weight. Counsel asked multiple questions regarding the chain of custody and had Officer Jenkins admit that he was not sure who transported the vehicle to the secure location. *See id*. at 89-97. In any event, the evidence presented at trial established that [Appellant] was engaged in multiple sales of illegal narcotics and any objection to the chain of custody would not have changed the outcome of the proceedings.

PCRA Court Memorandum, 2/24/12, at 2-4.

Likewise, our review of the certified record reflects that Appellant's trial counsel thoroughly argued the issue regarding the chain of custody of the vehicle driven by Appellant. Officer Levell Jenkins testified at the trial that the vehicle driven by Appellant, as the sole occupant, on August 24, 2007, was secured following Appellant's arrest for the purpose of obtaining a search warrant. N.T., 9/16-17/08, at 65-66. During cross-examination of Officer Jenkins, defense counsel asked questions concerning the chain of custody of the vehicle and forced Officer Jenkins to admit that he was not certain as to the identity of the officer who transported the vehicle to the secure location. ***Id***. at 88-97. However, the Commonwealth presented evidence that on July 10, 2007, a sale of an illegal substance was made directly by Appellant to a confidential informant seated next to Officer Jose Martinez, who was working undercover. ***Id***. at 24-27. Also, Officer Martinez testified that on August 9, 2007, Appellant again sold cocaine to a confidential informant seated next to the officer. ***Id***. at 27-29. In addition, Detective Regis Vogel, III, provided testimony that on August 24, 2007, he

observed Appellant selling cocaine. ***Id***. at 47-49. Detective Vogel stated that Appellant arrived at the scene of the drug sale driving an aqua colored Ford. ***Id***. at 48. Appellant was arrested shortly after the August 24, 2007 drug sale. ***Id***. at 49. Specifically, Detective Vogel testified that police had stopped the correct car. ***Id***. at 50.

Appellant fails to establish that the alleged defects in the chain of custody of the vehicle would have caused the jury to weigh the evidence presented by the Commonwealth differently. Thus, Appellant has failed to establish prejudice and is not entitled to relief on this claim that prior counsel provided ineffective assistance.

In his second issue, Appellant claims that prior counsel was ineffective with regard to hearsay testimony. ***See*** Appellant's Brief at 9-12. Specifically, Appellant contends that the lab reports indicating that the items in question were in fact cocaine, as discussed at trial by Detective Jenkins and not the lab technicians who examined the evidence, was a violation of Appellant's right to confront witnesses. Although Appellant makes a compelling argument in this regard, under the circumstances of this case, we must conclude that Appellant did not suffer prejudice as a result of the actions of prior counsel.

It has long been established by this Court that circumstantial evidence, without scientific analysis, is adequate to identify illegal narcotic substances.

See Commonwealth v. Stasiak, 451 A.2d 520, 525 (Pa. Super. 1982) (rejecting the contention the Commonwealth can only prove an item is a controlled substance through expert testimony confirming the item's chemical composition); ***Commonwealth v. Leskovic***, 307 A.2d 357, 358 (Pa. Super. 1973) (holding the circumstantial evidence would sustain the possession with intent to deliver without the chemical analysis of the substance). In addition, in ***Commonwealth v. Carpio-Santiago***, 14 A.3d 903 (Pa. Super. 2011), when addressing whether a mandatory minimum sentence was applicable, this Court concluded that the trial court erred in finding the substance at issue was a controlled substance based on the circumstantial evidence. However, in ***Carpio-Santiago***, unlike in the present matter, the substance underwent a chemical test and the results were negative for the presence of a controlled substance. In ***Carpio-Santiago***, this Court continued to recognize that circumstantial evidence alone may be used to identify narcotics.

The PCRA court offered the following discussion in addressing this claim:

> [Appellant] argues that counsel was ineffective by failing to object to Detective Levell Jenkins' hearsay testimony concerning the opinions contained in two forensic analysts' reports that certain substances in possession of [Appellant] tested positive for cocaine. *See* Pro Se Memorandum at 7. This claim fails since [Appellant] has not established prejudice by a preponderance of the evidence.

> Even if counsel objected and the court sustained the objection, the Commonwealth had the option of calling one or both of the forensic analysts to testify that the drugs found in [Appellant's] possession were cocaine. Even if no one testified as to the contents of the lab reports, those reports were admitted into evidence and Detective Levell testified that the substances tested positive for cocaine after he conducted preliminary field tests. *See* N.T. at 70.4-10; 71.2-17; 72.1-9; 73.13-15; 76.20-77.4; 77.22-78.3. Additionally, defense counsel argued that [Appellant] did in fact deliver a controlled substance on each of the three occasions involved. *See id*. at 131.2-5; 132.11-15; 137.19-21; 146.22-23. Further, [Appellant] did not contest whether he possessed with intent to deliver the cocaine that fell out of his pocket while fleeing law enforcement on the day of his arrest. *See id*. at 133.21-134.4. This and other evidence establishes that, had counsel objected to Detective Levell's testimony, the outcome of the proceedings would not have been different. Ample alternative evidence existed showing that the substances tested by the forensic analysts were cocaine.

PCRA Court Memorandum, 2/24/12, at 4.

Likewise, our review of the certified record on appeal indicates that Officer Levell Jenkins testified regarding the circumstantial nature of the evidence presented, as well as the fact that he performed field-testing on the narcotics and analyzed the items before he submitted them for chemical testing, which indicated the presence of crack cocaine. N.T., 9/16-17/08, at 70, 71, 75. Thus, this evidence presented, aside from the lab reports in question, established the illegal nature of the items seized. Accordingly, we discern no prejudice to Appellant *via* admission of the lab reports. Hence, Appellant has failed to establish that prior counsel was ineffective in this regard.

In his final issue, Appellant claims that prior counsel was ineffective for failing to investigate an allegedly defective search warrant. ***See*** Appellant's Brief at 13-17. Essentially, Appellant contends that because he did not personally receive a copy of the search warrant until after his trial, the search warrant was stale.

Concerning Appellant's claim with regard to the search warrant procured by police, the PCRA court offered the following apt discussion:

> [Appellant] argues that counsel was ineffective by failing to investigate and challenge whether a search warrant to search his vehicle existed. *See* Pro Se Memorandum at 2. This claim fails since [Appellant] cannot establish prejudice.
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> Even if counsel filed a Motion to Compel Discovery or Motion to Suppress based on the absence of a valid warrant, the Commonwealth would have been able to produce the warrant, which was given to [Appellant] from his trial counsel. *See* Motion to Withdraw at Exh. B (copy of warrant).

PCRA Court Memorandum, 2/24/12, at 2.

Our review of the certified record reflects that a search warrant for the vehicle driven by Appellant was effectuated on August 24, 2007. According to PCRA counsel, it was Appellant who provided PCRA counsel with a copy of the search warrant in question. ***See*** Motion to Withdraw, 11/18/11, at 5, ¶ 12c. PCRA counsel appended a copy of the search warrant to his motion to withdraw which was filed with the PCRA court. ***See*** Motion to Withdraw, 11/18/11, at Exhibit B. Moreover, because a search warrant existed, we fail

to see how the proceedings would have been different in the event that Appellant had a copy of the search warrant sooner.

Here, the record belies Appellant's claims that his prior counsel was ineffective. As discussed above, Appellant has failed to present facts or legal argument to establish his claims of ineffective assistance of counsel, which would afford him relief. Thus, the record supports the PCRA court's determination pertaining to the claims of ineffectiveness. Consequently, an evidentiary hearing was not required.

Order affirmed.

COLVILLE, J., Concurs in the Result.