NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DONTEY JONES Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1169 EDA 2012

Appeal from the PCRA Order April 12, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0801891-2004

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY GANTMAN, J.: Filed: February 26, 2013

Appellant, Dontey Jones, appeals from the order entered in the Philadelphia County Court of Common Pleas, which denied and dismissed his first petition brought pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

This Court previously provided the relevant facts of this case as follows:

> Appellant and his wife, Michelle Jones, resided at 6970 Cedar Oak Avenue in Philadelphia. On May 19, 2004, at approximately 2:30 a.m., the police responded to a radio call and arrived at Appellant's home. Upon arrival, the police observed that Appellant's wife had been shot. Appellant informed police that an intruder had broken into the house and shot his wife. Appellant later told the police

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[1] 42 Pa.C.S.A. §§ 9541-9546.

that two men broke into the house and that one of the men had shot his wife. The victim was pronounced dead at Albert Einstein Hospital at 3:12 a.m. The cause of the victim's death was multiple gunshot wounds.

On May 19, 2004, at approximately 3:55 a.m., Appellant was taken to the homicide unit as a fact witness in the death of his wife. Appellant was not handcuffed, and he was not in custody. Appellant was questioned by several different officers. At approximately 1:00 p.m., Detective Gerald Lynch spoke with Appellant. Prior to commencing the interview, Detective Lynch verbally administered ***Miranda***[2] warnings. Appellant presented multiple versions of the facts and circumstances surrounding his wife's death. The forensic evidence and the fact witnesses contradicted rather than corroborated his versions of what had occurred. After being confronted with these discrepancies, Appellant offered to tell Detective Lynch what actually happened. At approximately 2:00 p.m., Appellant was advised of his constitutional rights verbally and in writing. He also signed and initialed the warnings and articulated he understood his constitutional rights and warnings. Appellant then voluntarily gave a statement to the police in which he confessed to shooting his wife. Appellant signed each page of the statement. The statement concluded at 5:55 p.m.

[2] ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Appellant was arrested and charged with murder and related offenses. On August 19, 2005, Appellant filed a motion to suppress his statement alleging, *inter alia*, that it was not knowingly, intelligently, and voluntarily made. At the hearing, Appellant also argued that his statement was involuntary because it did not contain the information the police had provided to him regarding their investigation before he decided to confess. Appellant also argued that the statement was incomplete. A hearing was held on the motion on September 26, 2005. Following the hearing, the [suppression] court denied the motion on the record. The case proceeded to a jury trial. On October 6, 2005, Appellant was convicted of first degree murder and possessing instruments of crime. On November 17, 2005,

> Appellant was sentenced to life imprisonment on the murder charge and a consecutive term of 2½ to 5 years for the possessing instruments of crime charge. Post sentence motions were filed and denied.

Commonwealth v. Jones, No. 863 EDA 2006, unpublished memorandum at 1-3 (Pa.Super. filed August 12, 2008) (some internal citations omitted).

The PCRA court set forth additional relevant facts and procedural history of this case:

> [Appellant] filed a timely direct appeal in [this Court]. [This Court] affirmed [Appellant's] judgment of sentence on August 12, 2008, and the Pennsylvania Supreme Court denied [Appellant's] petition for allowance of appeal on May 27, 2009.
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> On March 4, 2010, [Appellant] filed a *pro se* PCRA petition. John Cotter, Esquire, was appointed to represent [Appellant] and filed an amended PCRA petition on his client's behalf, alleging that [Appellant] is entitled to a new trial because trial counsel and appellate counsel rendered ineffective assistance.[2] The Commonwealth thereafter filed a motion to dismiss. In response to the Commonwealth's motion, [on March 23, 2012], Mr. Cotter filed a supplemental amended PCRA petition which requested that [the PCRA] court allow [Appellant] to file post sentence motions and/or a second direct appeal *nunc pro tunc*.
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> On April 12, 2012, after considering counsel's pleadings and the trial record, [the PCRA] court dismissed [Appellant's] PCRA petition for lack of merit.

(PCRA Court Opinion, filed June 13, 2012, at 1-2) (internal citations and footnotes omitted). On April 19, 2012, Appellant timely filed a notice of

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[2] On March 8, 2012, the court issued notice of its intent to dismiss Appellant's PCRA petition pursuant to Pa.R.Crim.P. 907.

appeal. The PCRA court ordered Appellant on April 24, 2012, to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) and Appellant complied.

Appellant raises the following issue for our review:

> DID THE [PCRA] COURT ERR IN DENYING APPELLANT AN EVIDENTIARY HEARING?

(Appellant's Brief at 2).

Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, ___ Pa. ___, 29 A.3d 795 (2011). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). A petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact, the petitioner is not entitled to PCRA relief, and no purpose would be served by any further proceedings. ***See Commonwealth v. Rios***, 591 Pa. 583, 920 A.2d 790 (2007) (citing ***Commonwealth v. Hardcastle***, 549 Pa. 450, 701 A.2d 541, 543 (1997)); Pa.R.Crim.P. 907.

In his sole issue, Appellant insists his confession to police was involuntary because he was awake for 30 hours and in police custody for

over 12 hours without food and water. Appellant asserts he had no criminal record, he later testified at trial, and suppression counsel provided ineffective assistance for failing to call Appellant as a witness to testify to the involuntariness of his confession. Specifically, Appellant argues his testimony at the suppression hearing would have demonstrated the involuntariness of his confession to police which serves to raise an issue of material fact that required the PCRA court to conduct an evidentiary hearing. Appellant contends that the PCRA court denied Appellant the opportunity to present this evidence on suppression counsel's ineffectiveness. Appellant concludes that he is entitled to an evidentiary hearing, and this Court should remand the case so the PCRA court can conduct one. We disagree.

The law presumes counsel has rendered effective assistance. ***Commonwealth v. Williams***, 597 Pa. 109, 950 A.2d 294 (2008). When asserting a claim of ineffective assistance of counsel, the petitioner is required to demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his action or inaction; and, (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Commonwealth v. Kimball***, 555 Pa. 299, 724 A.2d 326 (1999). The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. ***Williams, supra***.

"The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit…." ***Commonwealth v. Pierce***, 537 Pa. 514, 524, 645 A.2d 189, 194 (1994). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa.Super. 2004).

> Once this threshold is met we apply the 'reasonable basis' test to determine whether counsel's chosen course was designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective.

Pierce, supra at 524, 645 A.2d at 194-95 (internal citations omitted).

> Prejudice is established when [a defendant] demonstrates that counsel's chosen course of action had an adverse effect on the outcome of the proceedings. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In [***Kimball, supra***], we held that a "criminal defendant alleging prejudice must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Commonwealth v. Chambers, 570 Pa. 3, 21-22, 807 A.2d 872, 883 (2002) (some internal citations and quotation marks omitted).

"This Court will not consider claims of ineffectiveness without some showing of factual predicate upon which counsel's assistance may be evaluated." ***Commonwealth v. Thomas***, 783 A.2d 328, 333 (Pa.Super. 2001). "[T]o justify an evidentiary hearing with respect to assertions of

ineffectiveness of trial counsel, it is required that an offer of proof be made that alleges sufficient facts upon which a reviewing court can conclude that trial counsel may have been ineffective." ***Commonwealth v. Steward***, 775 A.2d 819, 832 (Pa.Super. 2001), *appeal denied*, 568 Pa. 617, 792 A.2d 1253 (2001). "Claims of ineffectiveness of trial counsel cannot be considered in a vacuum." ***Id.***

"Where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." ***Commonwealth v. Sneed***, ___ Pa. ___, ___, 45 A.3d 1096, 1107 (2012).

> A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. A claim of ineffectiveness generally cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued.

Sneed, supra at ___, 45 A.3d at 1107 (internal citations and quotation marks omitted).

"[T]o prevail on a claim of ineffectiveness for failing to call a witness, a [petitioner] must prove, in addition to meeting the three ***Pierce*** requirements, 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's testimony was so prejudicial

as to have denied him a fair trial." ***Commonwealth v. Wright***, 599 Pa. 270, 331, 961 A.2d 119, 155 (2008).

> To demonstrate…prejudice, a petitioner must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case. Thus, counsel will not be found ineffective for failing to call a witness unless the petitioner can show that the witness's testimony would have been helpful to the defense. A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy.

Sneed, supra at ___, 45 A.3d at 1109 (internal citations and quotation marks omitted).

Instantly, with respect to Appellant's claim of counsel's ineffectiveness for failure to call Appellant as a witness at the suppression hearing, the PCRA court stated:

> Trial counsel litigated a motion to suppress on petitioner's behalf in an attempt to prevent the Commonwealth from presenting [Appellant's] confession to the jury. [The suppression court] denied the motion to suppress and issued detailed findings of fact and conclusions of law. On appeal, [Appellant] argues that his statement was involuntary because it was made after he had been without sleep for over thirty hours and had been in police custody for twelve hours without food or water. The Superior Court noted that since [Appellant] (and his trial counsel) did not raise this specific theory during the suppression hearing or post-sentence motions, it had been waived. Nevertheless, [the Superior Court] went on to review the merits of [Appellant's] claim. Ultimately, the Superior Court rejected [Appellant's] claim and found that [Appellant] went to the police station voluntarily, and that his confession was lawfully obtained. ***Commonwealth v. Jones***, No. 863 EDA 2006, unpublished memorandum at 7-8 (Pa.Super. filed August 12, 2008). Since the Superior Court considered the merits of [Appellant's] suppression

> claim and found it meritless, [Appellant] cannot show that he was prejudiced by trial counsel's alleged error.

(PCRA Court Opinion at 5-6). Our review of the record confirms the PCRA court's findings. On direct appeal, Appellant argued his confession to police was involuntary. This Court determined that Appellant had waived the issue, but also addressed it on the merits and concluded Appellant had willingly gone to the police station and given his statements to the police voluntarily. ***See Jones, supra***. Thus, Appellant's present contentions to the contrary lack arguable merit. ***See Commonwealth v. Reed***, 601 Pa. 257, 265, 971 A.2d 1216, 1220 (2009) (finding: where this Court finds issue waived but also rules on the merits, merits ruling is valid holding). Appellant's suppression counsel cannot be ineffective for failing to pursue a baseless or meritless claim. ***See Poplawski, supra***. Thus, Appellant's ineffectiveness claim fails. ***See Kimball, supra***. Accordingly, Appellant raised no genuine issue of material fact that required a hearing on his PCRA petition. ***See Rios, supra***. Accordingly, we affirm the order dismissing Appellant's PCRA petition without a hearing.

Order affirmed.