

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

BRENTON JOSEPHS

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1206 MDA 2012

Appeal from the PCRA Order June 5, 2012
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0000772-2008

BEFORE: MUNDY, J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY MUNDY, J.:

Filed: March 19, 2013

Appellant, Brenton Josephs, appeals from the June 5, 2012 order dismissing his revised petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

The underlying facts of this case may be summarized as follows. On September 19, 2007, Appellant sold cocaine to an undercover criminal investigator working for the Reading Police Department. N.T., 10/2/08, at 12-15. Appellant was subsequently arrested and charged with multiple drug offenses in connection with this incident, and proceeded to a jury trial on

* Retired Senior Judge assigned to the Superior Court.

October 1, 2008. During jury selection, Assistant District Attorney Melissa Freeman (ADA)¹ posed the following question to the jury panelists.

Included in the list of people that I just read to you are the names of several police officers. One or more of those police officers may testify during the course of the trial. You will be instructed by Judge Parisi that the law requires you as jurors to evaluate the credibility of each witness independently, and set aside any favor or bias in listening to their testimony and weighing its credibility. This also applies to police officers. So in other words, no one comes before you with an automatic presumption of innocence that they are to be believed because of who they are or the job they have. With that in mind, would anyone be more likely to believe the testimony of a police officer, simply because he is a police officer?

N.T. Jury Selection, 10/1/08, at 33-34.

In response to this question, several panelists responded in the affirmative, including panelists 16 and 34, who later became jurors 5 and 11, respectively. *Id.* at 34. Panelists 16 and 34 also indicated that they had family members who worked in law enforcement, but that these relationships would not affect their ability to be fair and impartial. *Id.* at 26, 29-30. Following this inquiry, Appellant's trial counsel, John Fielding, Esquire (Attorney Fielding) did not ask any follow up questions or attempt to rehabilitate any of the panelists.

¹ The ADA in this matter is referred to as both "Melissa Noyes" and "Melissa Freeman" throughout the record.

The remaining procedural history of this case, as summarized by the PCRA court, is as follows.

[Appellant] was convicted of Delivery of a Controlled Substance,¹ Possession with Intent to Deliver a Controlled Substance,² and Possession of a Controlled Substance³ after a three[-]day jury trial ending on October 3, 2008. [Appellant] proceeded to sentencing on October 3, 2008 and received a sentence of three to ten years['] incarceration and a fine of \$10,000 for count one, Possession with Intent to Deliver a Controlled Substance.⁴ The remaining two counts were dismissed. [Appellant] was represented throughout his trial by [Attorney] Fielding] ("Trial Counsel"). Post sentence motions were timely filed by Trial Counsel and a hearing was held before [the trial court] on November 26, 2008. The motions were denied and [Appellant] appealed to the Superior Court of Pennsylvania. [Appellant]'s sentence was affirmed and a subsequent Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied. [**See Commonwealth v. Josephs**, 990 A.2d 47 (Pa. Super. 2009), *appeal denied*, 992 A.2d 887 (Pa. 2010).]

[Appellant] filed a *pro se* PCRA Petition on June 22, 2010. Lara Glenn Hoffert, Esquire ("PCRA Counsel") was appointed to represent [Appellant] throughout the P[CR]A process on June 28, 2010. PCRA Counsel filed a Petition for Relief under the Post Conviction Relief Act on August 9, 2011. A Revised Petition was filed on September 1, 2011.⁵ A hearing was held on the PCRA Petition before [the PCRA court] on October 6, 2011.

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780-113(a)(30).

³ 35 P.S. § 780-113(a)(16).

⁴ The Commonwealth invoked the mandatory minimum sentencing provision of 18 Pa.C.S.A.

§ 7508, providing for a minimum three year sentence and \$10,000 fine for a subsequent drug trafficking offense of delivery of at least two but less than ten grams of cocaine.

⁵ The Revised Petition of September 1, 2011 added claims regarding an outstanding Omnibus Pretrial Motion that was never ruled upon before trial. **See** Revised Petition ¶¶4-7.

PCRA Court Opinion, 6/5/12, at 1-2 (footnotes in original). Following the October 6, 2011 hearing, the PCRA court dismissed Appellant's revised petition by opinion and order dated June 5, 2012. This timely appeal followed on July 2, 2012.²

On appeal, Appellant raises the following issue for our review.

- A. Whether the PCRA Court erred in denying Appellant's Petition for Relief under the Post Conviction Relief Act where Trial Counsel rendered ineffective assistance of counsel in failing to strike members of the voir dire panel who stated they would always believe the word of a police officer. Trial Counsel likewise failed to question said voir dire panelists in an attempt to rehabilitate them by determining if they could still be fair and impartial despite their belief that they would always believe the word of a police officer. Trial Counsel's failure to strike said panelists permitted the placing of two (2) such tainted panelists on the jury, one of whom participated in deliberations and rendered a verdict against Appellant and in favor of the testimony of the member of law enforcement?

Appellant's Brief at 4.

² Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

“Our review of a PCRA court’s decision is limited to examining whether the PCRA court’s findings of fact are supported by the record, and whether its conclusions of law are free from legal error.” **Commonwealth v. Koehler**, 36 A.3d 121, 131 (Pa. 2012) (citation 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 at the PCRA court level.” **Id.** In order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). These issues must be neither previously litigated nor waived. 42 Pa.C.S.A. § 9543(a)(3). “The PCRA court’s credibility determinations, when supported by the record, are binding on this Court.” **Commonwealth v. Spatz**, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). “However, this Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” **Id.**

Appellant contends Attorney Fielding “was ineffective in failing to strike members of the voir dire panel [Panelists 16 and 34] who stated they would always believe the word of a police officer[,]” and in failing “to question said voir dire panelists in an attempt to rehabilitate them by determining if they could still be fair and impartial...” Appellant’s Brief at 4, 8-9. For the following reasons, we disagree.

To prevail on a claim of ineffective assistance of counsel under the PCRA, a petitioner must plead and prove by a preponderance of the evidence that counsel's ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. § 9543(a)(2)(ii). A petitioner must establish "(1) that the claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) the ineffectiveness of counsel caused the petitioner prejudice." ***Commonwealth v. Miller***, 987 A.2d 638, 648 (Pa. 2009), *citing Commonwealth v. Pierce*, 527 A.2d 973, 975 (Pa. 1987) (remaining citations omitted). "Counsel is presumed to be effective and Appellant has the burden of proving otherwise." ***Commonwealth v. Rivers***, 786 A.2d 923, 927 (Pa. 2001) (citations omitted).

Herein, our review of the record reveals no error on the part of the PCRA court in concluding that Attorney Fielding had a reasonable and legitimate basis for electing not to strike panelists 16 and 34 from the jury, or posing any additional questions to them. **See** PCRA Court Opinion, 6/5/12, at 7-8. At the PCRA hearing, Attorney Fielding testified that when faced with a panelist who indicates that he or she would be more likely to believe the testimony of a police officer, he typically uses peremptory strikes, rather than moving to have the panelist struck for cause, because there are many factors he considers in jury selection. N.T., 10/6/11, at 5-6. Attorney Fielding explained, "I have all kinds of things that I consider that --

more goes into it than just someone says they're more likely to do something. It can be their profession, it can be their age. It can be a number of factors that go into it." *Id.* at 9.³

Attorney Fielding further noted that although he was no longer in possession of all his notes from the jury selection, he was confident in his strategic decision to keep panelists 16 and 34 on the jury. *Id.* at 4-6, 8-9.

³ We note that Attorney Fielding also expressed a similar strategy on the record during the jury selection phase of Appellant's trial. Specifically, the following exchange took place at sidebar during a discussion on motions to strike specific panelists for cause.

[ADA]: Number 6 was for not believing a police officer.

The Court: Are you making a motion?

[ADA]: Yes.

The [trial c]ourt: Any objection?

[Attorney] Fielding: I mean I didn't strike the ones that say more likely, that is what I handle during peremptories myself. I think that the problem is that I think that if we start doing that just on that basis we are going to end up with nothing. So I think that ---

The Court: If we need to bring people in tomorrow if it is a legitimate objection. But you're not agreeing?

[Attorney] Fielding: No.

The [trial c]ourt: Very well.

N.T. Jury Selection, 10/1/08, at 47-48.

Attorney Fielding opined that he elected not to strike panelists 16 and 34 because there were likely other potential jurors on whom he wanted to use his peremptory strikes, and other factors during the voir dire process led him to believe that the two jurors in question were capable of rendering a fair and impartial verdict.

The only reason I can think of, there were others I got rid of that seemed more pressing at the time and other factors that led me to believe that these people could be fair and impartial during the totality of the questioning. And not only that, but because I believed when they said they could be fair and impartial and could observe the Judge's instructions, to be that way.

Id. at 12.

Based on the foregoing, Attorney Fielding had a reasonable and legitimate strategy for electing not to strike panelists 16 and 34 from the jury for cause, or pose additional questions to them. Accordingly, Appellant's ineffectiveness claims in this regard must fail. **See *Commonwealth v. Williams***, 899 A.2d 1060, 1064 (Pa. 2006) (stating, "[i]f counsel's chosen course had some reasonable basis, the inquiry ends and counsel's assistance is deemed effective[]").

We further note that Appellant has failed to demonstrate he was prejudiced by the presence of panelists 16 and 34 on the jury. "Prejudice in the context of ineffective assistance of counsel means demonstrating that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." ***Commonwealth v. Cox***, 863

A.2d 536, 546 (Pa. 2004). As noted, panelists 16 and 34 both indicated that they were capable of rendering a fair and impartial verdict in this case. N.T. Jury Selection, 10/1/08, at 26, 29-30. Moreover, Attorney Fielding requested that the jury be polled after the guilty verdict was rendered, and the verdict was unanimous on all counts. N.T., 10/1-3/08, at 82-88. Lastly, the record reveals the trial court instructed the jury on its role in evaluating the evidence presented, and the factors they must consider in assessing the credibility of witnesses. *See id.* at 36-37, 41-43, 73-75. It is well settled that “the law presumes that the jury will follow the instructions of the [trial] court.” *Commonwealth v. Philistin*, 53 A.3d 1, 18 (Pa. 2012), *citing Commonwealth v. Miller*, 819 A.2d 504, 513 (Pa. 2002).

For all the foregoing reasons, we conclude that Appellant’s ineffectiveness of counsel claim is devoid of merit. Accordingly, we affirm the PCRA court’s June 5, 2012 order dismissing Appellant’s revised petition.

Order affirmed.

Judge Olson Concurrs in the Result.

Judge Strassburger files a Dissenting Memorandum.