**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellee<br><br>v.<br><br>BRENTON JOSEPHS<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br>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.*

DISSENTING MEMORANDUM BY STRASSBURGER, J.: Filed: March 19, 2013

I respectfully dissent.

The Majority concludes that trial counsel was not ineffective for failing to move to strike panelists 16 and 34 from the jury for cause, or to pose additional questions to them. The Majority posits both that counsel had a reasonable and legitimate strategy for his actions, and that Appellant failed to demonstrate he was prejudiced by the presence of these panelists on the jury. I disagree as to both grounds.

During *voir dire*, eight panelists, including panelists 16 and 34, responded that they would "be more likely to believe the testimony of a police officer simply because he is a police officer[.]" N.T., 10/1/2008, at 34.

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* Retired Senior Judge assigned to the Superior Court.

The following question posed was whether anyone would "be less likely to believe a police officer simply because he or she is a police officer" and four panelists, panelists 6, 9, 13 and 20, responded affirmatively. ***Id.*** at 34-35. All twelve panelists were next asked if there was "anyone present that does not believe that they would be able to follow [the court's] instructions as to the law as it applies to this case." ***Id.*** at 35. The record reflected no response from any of the panelists. No further questions exploring the noted prejudices occurred at this time.

Subsequently, and as the Majority notes in footnote 3, a discussion took place on the record between counsel and the court, wherein the prosecution requested that the panelists who responded that they would be less likely to believe a police officer because he or she is a police officer, be stricken for cause. While Attorney Fielding at this juncture disagreed with the procedure for striking this group of panelists, stating that he preferred using peremptory strikes for such panelists, he subsequently agreed to the removal for cause of panelist 6[1] for this reason, on motion by the Commonwealth. Specifically, the following exchange occurred between counsel, the court, and panelist number 6 at sidebar.

> THE COURT: Ma'am, I believe that you answered the question indicating that you would be less likely to believe a police officer than some other witness; is that correct?

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[1] The other three panelists, panelists 9, 13 and 20, were removed for cause for unrelated reasons.

JUROR NO. 6: Um-hum.

THE COURT: Okay. If I specifically instructed you that every witness needs to be judged based upon what occurs in the courtroom, not based upon what their job may be, including a police officer, would you be able to judge each individual witness individually, not affected by what their profession is?

JUROR NO. 6: No.

THE COURT: Counsel, any further questions?

[THE COMMONWEALTH:] No.

MR. FIELDING: No.

[THE COMMONWEALTH:] Thank you.

THE COURT: Thank you, ma'am

(Whereupon, Juror No. 6 resumed her seat.)

THE COURT: Any motions?

[THE COMMONWEALTH]: Move to strike for cause.

MR. FIELDING: No objection.

THE COURT: Very well. …

N.T., 10/1/2008, at 50-51.

At this juncture, all panelists who acknowledged they were less likely to believe a police officer simply because he or she is a police officer had been questioned in more detail by the Commonwealth regarding their bias or had been removed for cause for another reason. Given these circumstances there is no reasonable basis for Attorney Fielding not to question further the panelists remaining who responded that they were more likely to believe the

testimony of a police officer simply because he or she is a police officer. This questioning could have conclusively determined whether panelists 16 and 34, among the other panelists in this category, could still be fair and impartial and, if not, the court had demonstrated its intention to remove any potential juror who exhibited such bias. While, I am cognizant that "[t]he mere fact that jurors may show some indicia of pretrial prejudice is not enough to require that they be stricken from the jury," the law requires that jurors after admitting a bias, "be able to put aside their prejudices and determine guilt or innocence on the facts presented." ***Commonwealth v. Blasioli***, 685 A.2d 151, 159 (Pa. Super. 1996). ***Compare Commonwealth v. Perry***, 657 A.2d 989 (Pa. Super. 1995) (holding that trial court should have excused a potential juror for cause when that juror testified that he was best friends with the arresting police officer and that he had no doubts regarding officer's veracity; these facts created a likelihood of prejudice that could not be ignored despite the juror's testimony that he could be impartial and assess the officer's credibility on the same basis as the credibility of the other witnesses). In this instance, because further questioning was not administered to these panelists, it is uncertain whether they met the minimal requirements of being able to set aside their prejudices in order to be a juror. Accordingly, I believe that Attorney Fielding had no reasonable basis or legitimate trial strategy for not posing additional questions in this regard.

Attorney Fielding's testimony that there were others who "seemed more pressing" at the time makes no sense. While that might be a valid reason not to use his limited number of peremptory challenges, it by no means answers the question of why he did not move to strike for cause. This is especially so when the court had already granted the Commonwealth's motion to strike for cause a panelist who admitted to being **less** likely to believe a police officer.

Additionally, I believe that Appellant has demonstrated prejudice by the presence of panelists 16 and 34 on the jury. Given that the disposition of the case centered upon a credibility determination between the version of the facts testified to by the undercover criminal investigator and that presented by Appellant, there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. Thus, I would find counsel ineffective.

Accordingly, I would reverse the PCRA court order and remand this action for a new trial.