NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellant v. FRANK JEFFS Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1232 EDA 2012

Appeal from the PCRA Order March 23, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0706111-2005

BEFORE: BOWES, J., GANTMAN, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, J.: **FILED MAY 23, 2013**

Appellant, the Commonwealth of Pennsylvania, appeals from the order entered in the Philadelphia County Court of Common Pleas, which granted in part the petition of Appellee, Frank Jeffs, brought pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm in part and reverse in part.

The relevant facts and procedural history of this appeal are as follows.

> On May 5, 2005, [the victim] was found in his Ford Expedition, at the intersection of 61st Street and Eastwick Avenue in southwest Philadelphia, having sustained a gunshot wound to his face.
>
> At around 11:00 a.m., firefighters were directed to the victim's vehicle at the intersection of 61st and Eastwick after the victim was observed, by the driver of a tractor-trailer, slumped over and bleeding inside of the vehicle.

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[1] 42 Pa.C.S.A. §§ 9541-9546.

The victim was taken to the Hospital of the University of Pennsylvania where he was pronounced dead on May 6, 2005 at 6:32 a.m.

Police Officer Clyde Frasier, from the Crime Scene Unit of the Philadelphia Police Department, conducted a search of the victim's vehicle at the scene. In the exterior of the vehicle, Officer Frasier located a "hump" on the roof of the vehicle which appeared to have been caused by a projectile. In the roof liner in the interior of the vehicle, Officer Frasier observed a hole which was consistent with being caused by a projectile. Based on his observations, Officer Frasier determined that the projectile traveled from the passenger side and ended in the roof of the victim's vehicle. Officer Frasier did not locate any bullet casings or firearms in the interior or exterior of the vehicle. A silver cellular phone with black trimming, which appeared to have a bloody substance, was located outside of the driver's door.

On May 9, 2005, [Appellee], who was an employee at the University of Pennsylvania, informed co-workers Anthony DeValerio and Cletus Mahalik of the incident that had occurred on May 5, 2005. [Appellee] informed his co-workers that he was driving home when the victim, who was driving an SUV, attempted to force him off of Passyunk Avenue. [Appellee] stated that the victim continued to chase him and that he shot at the victim a couple of times because he believed the victim was holding a gun. Edwin Muniz, another co-worker, heard [Appellee] telling Mr. DeValerio and Mr. Mahalik that the victim had cut him off and that he, in turn, cut the victim off. [Appellee] stated that the victim continued to follow him and grabbed something shiny. [Appellee] then shot the victim in the face and was able to observe that he had done so.

On May 24, 2005, with no leads as to who killed the victim, Homicide Detectives interviewed the victim's good friend, Joseph Criniti. In fact, the victim had been with Mr. Criniti shortly before he was killed. When asked if he would have "any idea as to what may have happened there at 61st and Eastwick," Mr. Criniti stated, "[t]he only thing that I can think of is, he had some bad habits when it

came to road rage." When asked for examples, Mr. Criniti amplified as follows: "He would often get into road rage spats with other drivers. He would do the normal cursing and things like that. But I have even seen him spit at the driver or the car that the other driver would be in. That would be a bit much. I warned him about doing things like that. In fact everybody warned him, but it didn't help, he continued."

On June 30, 2005, three months after the incident, detectives from the Philadelphia Police Department Homicide Unit contacted and interviewed Mr. DeValerio and Mr. Muniz regarding the incident on May 5, 2005. Based on these interviews, officers were directed to [Appellee's] apartment…. When officers arrived at [Appellee's] apartment, they identified themselves and informed [Appellee] that they needed to speak with him. [Appellee] opened his door, the officers entered, and [Appellee] then turned and ran up the stairs to his apartment. As officers ran behind [Appellee], he ran to a sofa which was located in his living room. Officers located [Appellee's] firearm collection underneath a cushion on which [Appellee] was sitting. [Appellee] was arrested at that time.

[Appellee] testified at trial that, at the top of the Passyunk Avenue Bridge, the victim drifted into his lane, and he responded by beeping his horn to let the other driver know he was next to him. The victim proceeded to roll down his window and began screaming at [Appellee] and threatened to kill him. [Appellee] testified that he went up 61st Street and the victim, driving an SUV, made an abrupt turn from Passyunk Avenue onto 61st Street to follow him. The victim then pulled his SUV up on [Appellee's] right-side and the victim continued to threaten to kill him while coming over into [Appellee's] lane. [Appellee] responded by speeding up to get in front of the SUV, to which the victim responded by moving into the left lane and pointing something black and shiny at [Appellee] while continuing to threaten him. [Appellee] testified that he feared for his life and retrieved the firearm he carried and shot it once, after which he sped up to get away from the SUV. The victim continued to pursue [Appellee] down 61st Street, and continued to threaten and curse at [Appellee]. When

the SUV driver raised his arm above the door, [Appellee] again saw something black and shiny in his hand and [Appellee] fired two more shots, one of which [Appellee] believed struck the victim in the face. [Appellee] then proceeded to drive home and testified that he did so because he continued to fear for his life. [Appellee] did not report this incident to the police and he placed the .22 caliber firearm in his locker at the University of Pennsylvania. A voluntary statement was given by [Appellee] to Homicide Detective Booker stating the same.

Officers later executed a search warrant of [Appellee's] locker at the University of Pennsylvania in search of the firearm, which was located inside of [Appellee's] boot. [Appellee's] vehicle was also searched and a projectile was located in the roof, above the passenger door.

Prior to trial, the Commonwealth presented a motion *in limine* to [the trial court], seeking to exclude the testimony of Joseph Criniti on the basis that [Appellee] did not have knowledge of the victim's reputation or specific acts of aggression. The Commonwealth subpoenaed Mr. Criniti and called him to testify at the motion hearing. Mr. Criniti testified that he had known the victim for about 15 years. He indicated that, while riding as a passenger in the victim's vehicle, he had observed the victim yelling out the window at other drivers, spitting at them, and giving other drivers the finger. Mr. Criniti was also questioned about his statement to the Homicide Detectives by defense counsel. Mr. Criniti further explained that aggressive behavior behind the wheel of a vehicle is what he meant by the term road rage. He confirmed that not only had he warned the victim about his behavior but that he had knowledge that a couple of the victim's friends had done so as well. Mr. Criniti testified that these incidents of road rage that he had observed had occurred about eight or nine years earlier. At the end of the testimony, trial counsel argued that Mr. Criniti's testimony as to the victim's reputation for aggressive driving should be permitted to prove that the victim was the initial aggressor.

The following day, the [c]ourt informed the parties that the defense could "inquire into the reputation and/or the

> specific acts of the decedent in terms of his driving habits" and the Commonwealth would be allowed to bring in evidence of a pertinent character trait to rebut the testimony. The [c]ourt also stated that the term "road rage" would not be permitted. The next day, defense counsel informed the [c]ourt that Mr. Criniti would not be called in the defense's case in chief. Trial counsel informed the [c]ourt that he would not call Mr. Criniti because, if he did, the Commonwealth had stated it would present rebuttal evidence of the victim's peaceful nature. The Commonwealth confirmed that [it] did intend to offer a rebuttal witness to testify as to the victim's character for peacefulness and non-violence around the time of this incident. [Appellee] was asked a number of questions by trial counsel and by the [c]ourt, and [Appellee] acknowledged that he and trial counsel discussed that if Mr. Criniti were called to testify as to the victim's aggressive driving it would open the door for rebuttal evidence…. Trial counsel specifically asked and [Appellee] confirmed that because of the potential for opening the door to this rebuttal evidence they had decided not to call Mr. Criniti. When asked by the [c]ourt whether he was in agreement with his attorney's decision not to call Mr. Criniti, [Appellee] responded, "[y]es."

(PCRA Court Opinion, filed July 6, 2012, at 2-7) (internal footnotes and citations to the record omitted).

Following trial, a jury convicted Appellee of first degree murder and possessing an instrument of crime. This Court affirmed the judgment of sentence on July 8, 2008, and our Supreme Court denied Appellee's petition for allowance of appeal on May 6, 2009. Appellee timely filed a counseled PCRA petition on May 4, 2010. In it, Appellee raised multiple claims of trial counsel's ineffectiveness, including one that counsel should have called Mr. Criniti to testify at trial to establish the victim had a reputation for being aggressive while driving. On December 10, 2010, the Commonwealth filed a

motion to dismiss the PCRA petition. The court conducted two evidentiary hearings on the matter in February 2012. On March 23, 2012, the court found trial counsel ineffective for failing to pursue evidence of the victim's aggressive tendencies while driving, and it granted relief in the form of a new trial. The court denied relief as to all other claims raised in Appellee's PCRA petition.

The Commonwealth timely filed a notice of appeal on April 13, 2012. That same day, the Commonwealth filed a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

The Commonwealth raises one issue for our review:

> DID THE PCRA COURT ERR IN GRANTING A NEW TRIAL ON THE GROUND THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT CALLING A WITNESS, WHERE: [APPELLEE] PERSONALLY DECIDED AT TRIAL NOT TO CALL THE WITNESS; THE PROPOSED TESTIMONY ALLEGING THE MURDER VICTIM'S VIOLENT PROPENSITIES WOULD HAVE BEEN INADMISSIBLE; NOT CALLING THE WITNESS REASONABLY AVOIDED OPENING THE DOOR TO EVIDENCE OF THE MURDER VICTIM'S REPUTATION FOR PEACEFULNESS AND NONVIOLENCE AND [APPELLEE'S] REPUTATION FOR VIOLENCE; AND [APPELLEE] FAILED TO PROVE ACTUAL PREJUDICE?

(Commonwealth's Brief at 3).

"Our standard of review in an appeal from the grant or denial of PCRA relief requires us to determine whether the ruling of the PCRA court is supported by the record and is free from legal error." ***Commonwealth v. Lesko***, 609 Pa. 128, 152, 15 A.3d 345, 358 (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).

On appeal, the Commonwealth contends a defendant, who informs the court of his decision to refrain from calling a witness, once convicted, cannot repudiate the statements made during an on-the-record waiver colloquy. The Commonwealth asserts the court conducted an extensive colloquy in this case, regarding Appellee's decision not to call Mr. Criniti as a trial witness. The Commonwealth maintains Appellee informed the court that he personally agreed with trial counsel's strategic decision in this regard. The Commonwealth emphasizes Appellee's comments that he had discussed the matter with trial counsel, and they agreed any testimony from Mr. Criniti would open the door to the admission of unfavorable rebuttal evidence. Under these circumstances, the Commonwealth argues Appellee's claim of ineffectiveness for failing to call Mr. Criniti amounts to an impermissible "attempt to retry the case with new tactics, on a hindsight evaluation of the record." (Commonwealth's Brief at 18). The Commonwealth concludes this Court must reverse the PCRA court's order to the extent it granted Appellee a new trial on this basis. For the following reasons, we agree.

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).

"[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). "Failure to call a witness is not *per se* ineffective assistance of counsel, for such a decision implicates matters of trial strategy." ***Commonwealth v. Washington***, 592 Pa. 698, 721, 927 A.2d 586, 599 (2007).

Significantly, "a defendant who makes a knowing, voluntary, and intelligent decision concerning trial strategy will not later be heard to complain that trial counsel was ineffective on the basis of that decision." ***Commonwealth v. Rios***, 591 Pa. 583, 606, 920 A.2d 790, 803 (2007) (quoting ***Commonwealth v. Paddy***, 569 Pa. 47, 82, 800 A.2d 294, 316 (2002)). "To do otherwise…'would allow a defendant to build into his case a ready-made ineffectiveness claim to be raised in the event of an adverse verdict.'" ***Rios, supra*** at 606, 920 A.2d at 803 (quoting ***Paddy, supra*** at 82, 800 A.2d at 316).

> In ***Paddy***, the defendant complained of trial counsel's ineffectiveness for failing to call alibi witnesses. We held that this ineffectiveness claim fails for the fundamental reason that Paddy agreed at trial to counsel's decision not to call the witnesses in question. …the trial court engaged Paddy in a colloquy as to the decision not to call the alibi witnesses. He replied that trial counsel had explained her decision not to call the witnesses and that he agreed. He further stated that he understood that he had a right to call the witnesses. We dismissed his claim, stating:
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> > As Paddy expressed the view that the decision not to call alibi witnesses was his as well as trial counsel's, and his decision has not been shown to have been unknowingly, involuntarily, or unintelligently made, this allegation of ineffectiveness lacks arguable merit.

Rios, supra at 606, 920 A.2d at 803 (internal citations and quotation marks omitted). ***See also Commonwealth v. Lawson***, 762 A.2d 753 (Pa.Super. 2000), *appeal denied*, 566 Pa. 638, 781 A.2d 141 (2001) (reiterating that defendant who voluntarily waives right to call witnesses during colloquy cannot later claim ineffective assistance and purport that counsel coerced decision).

Instantly, the parties addressed the issue of Mr. Criniti's proposed testimony immediately after the defense rested. At that time, trial counsel indicated Appellee did not wish to call Mr. Criniti or any other character witnesses, and the court conducted the following on-the-record colloquy:

> [COMMONWEALTH]: And Mr. Criniti has returned again today.
>
> THE COURT: Did you wish to call him?

[TRIAL COUNSEL]: Well, in light of the fact that once we call him as to [the victim's] reputation in the community for being violent or quarrelsome, it's my understanding of the law and the rules that we open the door to have rebuttal evidence, and I'm sure that the Commonwealth will have people come in and say that he's, you know, a choir boy and he's a personable guy, and he's fine and…he's not violent or quarrelsome. At this point, again, there are potential issues there that we decided we're not going to open up that potential can of worms.

[COMMONWEALTH]: He is correct. I would have had a rebuttal witness with regard to his character for peacefulness and nonviolence around the time of this incident which was more current.

THE COURT: That's [the victim]?

[COMMONWEALTH]: [The victim].

* * *

THE COURT: All right. So I guess we should begin with [trial counsel putting] on the record your strategic decision not to call Mr. Criniti and not to call character witnesses.

* * *

[TRIAL COUNSEL]: [Appellee], I've explained to you at this portion in the trial we've rested. But we have the opportunity, if we want, to offer character evidence to show that you're nonviolent and not aggressive, and we, for tactical reasons, have chosen not to pursue that.

Do you agree that we discussed that?

[APPELLEE]: Yes.

THE COURT: And you're in agreement with that?

[APPELLEE]: Yes.

THE COURT: Okay.

[TRIAL COUNSEL]: And we've also discussed calling Mr. Criniti?

[APPELLEE]: Right.

[TRIAL COUNSEL]: As to the violent propensities of [the victim]?

[APPELLEE]: Right.

[TRIAL COUNSEL]: And you understand that if we call him, most likely if we call witnesses on your behalf for character evidence, it opens up the door for rebuttal evidence?

[APPELLEE]: Yes.

[TRIAL COUNSEL]: That that character trait doesn't exist?

[APPELLEE]: Yes.

[TRIAL COUNSEL]: So for those reasons we decided not to pursue that?

[APPELLEE]: That's correct.

THE COURT: Well, the pertinent character trait would be aggressive. What was it that I had said? Aggressive propensities while driving.

[TRIAL COUNSEL]: Yes. And you understand if we did that, then we would open the door to have—

[APPELLEE]: Yes, I do.

[TRIAL COUNSEL]: —character evidence contrary to that?

[APPELLEE]: Right.

> THE COURT: In other words, that [the victim] had a peaceable character and law-abiding character while driving.
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> [APPELLEE]: I understand.
>
> THE COURT: So you were in agreement with your attorney's decision not to call him?
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> [APPELLEE]: Yes.
>
> THE COURT: That's fine. I just wanted the record to reflect that. Part of why we do this is should there be a conviction, [Appellee], later you won't be able to say that your attorney was ineffective for not doing those things because you were, in fact, in agreement with those.
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> * * *

(***See*** N.T. Trial, 3/30/06, at 141-46.)

Here, Appellee indicated that trial counsel had fully consulted with him, and they decided against calling Mr. Criniti to testify. The on-the-record colloquy confirms Appellee made a knowing, voluntary, and intelligent decision. Consequently, Appellee's current allegation of ineffectiveness for failing to call Mr. Criniti lacked arguable merit. ***See Rios, supra***; ***Paddy, supra***.[2] Based upon the foregoing, we conclude the PCRA court erred in

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[2] The PCRA court opinion cites ***Commonwealth v. Nieves***, 560 Pa. 529, 746 A.2d 1102 (2000) and ***Commonwealth v. O'Bidos***, 849 A.2d 243 (Pa.Super. 2004), *appeal denied*, 580 Pa. 696, 860 A.2d 123 (2004), for the proposition that the unreasonable advice of counsel can negate a defendant's knowing, voluntary, and intelligent waiver.

(Footnote Continued Next Page)

finding trial counsel ineffective for failing to call Mr. Criniti as a witness, as trial counsel's advice was both legally sound and rationally-based trial strategy. ***See Pierce, supra***; ***O'Bidos, supra***. Accordingly, we reverse that portion of the PCRA order granting Appellee a new trial, and we affirm the order in all other respects.

Order affirmed in part and reversed in part.

Judgment Entered.

Prothonotary

Date: 5/23/2013

(Footnote Continued) ———————————

The cases the PCRA court cited are inapposite. In ***Nieves***, the Supreme Court held the defendant's waiver of the right to testify was unknowing, involuntary and unintelligent because the defendant's decision was based on legally incorrect advice from trial counsel. In ***O'Bidos***, this Court actually affirmed the judgment of sentence on the *nunc pro tunc* appeal, because counsel's decision not to call certain witnesses was both legally sound and a rational trial strategy. Further, the ***O'Bidos*** Court recognized the trial court had conducted a full colloquy with the defendant regarding his decision not to testify and determined the defendant's waiver was voluntary and informed and based on a reasonable strategy. Hence, no relief was due on the defendant's claims.