

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

QURON BROWN,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1239 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-0303691-2005

BEFORE: BENDER, BOWES, and STRASSBURGER,\* JJ.

MEMORANDUM BY BOWES, J.:

**FILED SEPTEMBER 05, 2013**

Quron Brown appeals from the order entered March 23, 2012, denying his first counseled PCRA petition. Counsel has filed a petition to withdraw from representation and a brief pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (*en banc*) ("***Turner/Finley***"). We grant counsel's petition to withdraw and affirm.

After Appellant committed an armed robbery at a Philadelphia bar, a jury convicted him of nine counts of robbery and criminal conspiracy, but acquitted him of possession of an instrument of crime.<sup>1</sup> Specifically,

---

<sup>1</sup> Following his convictions, the Commonwealth *nolle prossed* eight of the conspiracy convictions.

\* Retired Senior Judge assigned to the Superior Court.

Appellant and his cohorts entered the bar on July 22, 2004, brandishing firearms and demanding the patrons to lie down on the floor. The men then stole cell phones, jewelry and wallets. Although Appellant covered part of his face with either a t-shirt or handkerchief for part of the robbery, three eyewitnesses were able to identify him as a participant in a photographic lineup and at trial.

The trial court sentenced Appellant to nine to eighteen years imprisonment. Appellant filed a timely post-sentence motion, which the court denied. A timely direct appeal followed, and this Court affirmed on August 13, 2008. ***Commonwealth v. Brown***, 961 A.2d 1270 (Pa.Super. 2008) (unpublished memorandum). Appellant did not seek permission for allowance of appeal with the Pennsylvania Supreme Court and filed the instant timely PCRA petition on July 2, 2009. The PCRA court appointed counsel, who submitted an amended petition on October 25, 2010. Therein, Appellant asserted that trial counsel was ineffective in failing to present known alibi witnesses.

Current PCRA counsel, with the aid of an investigator, conducted an investigation into the availability of those witnesses. At four separate PCRA listings, counsel was unable to secure the presence of the alibi witnesses. Accordingly, the court issued a boilerplate Pa.R.Crim.P. 907 notice of its intent to dismiss on February 16, 2012. The court did not enter a final order within twenty days of that notice and provided Appellant an opportunity to

produce the witnesses on March 23, 2012, which he was unable to do. Thereafter, the court dismissed Appellant's petition. This timely appeal ensued. The PCRA court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the PCRA court penned its Pa.R.A.P. 1925(a) memorandum. Counsel now files a petition to withdraw and **Turner/Finley** no-merit brief.

As we recently set forth, "[t]he **Turner/Finley** decisions provide the manner for post-conviction counsel to withdraw from representation." **Commonwealth v. Rykard**, 55 A.3d 1177, 1184 (Pa.Super. 2012). In order to withdraw, counsel must conduct an independent review of the record and file a "no-merit" letter or brief detailing the nature and extent of his review, listing each issue the petitioner wishes to raise and why those issues are meritless. **Id.** Where the no-merit letter or brief is filed with this Court, we then must conduct our "own independent evaluation of the record and agree with counsel that the petition is without merit." **Id.** Additionally, "counsel is required to contemporaneously serve upon his client his no-merit letter and application to withdraw along with a statement that if the court granted counsel's withdrawal request, the client may proceed *pro se* or with a privately retained attorney." **Id.** Counsel has complied with these directives. Accordingly, we proceed to independently review the record to determine whether Appellant's amended petition does not entitle him to relief.

The issue set forth in Appellant's amended petition was whether trial counsel was "ineffective for failing to interview two, [sic] known alibi witnesses, Chanel Elliot and Belinda Elliot, who would have testified that the Defendant was with them on July 22, 2004 at the time of the robbery in question?" **Turner/Finley** brief at 12; **see also id.** at 7.

This Court analyzes PCRA appeals "in the light most favorable to the prevailing party at the PCRA level." **Rykard, supra** at 1183. Our "review is limited to the findings of the PCRA court and the evidence of record" and we do not "disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error." **Id.** Similarly, "[w]e grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. However, we afford no such deference to its legal conclusions." **Id.** (citations omitted). "[W]here the petitioner raises questions of law, our standard of review is *de novo* and our scope of review is plenary." Finally, we "may affirm a PCRA court's decision on any grounds if the record supports it." **Id.**

Here, Appellant's issue concerns the effectiveness of trial counsel. "To plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act." **Id.** at 1189-1190 (citing **Commonwealth v. Chmiel**, 30 A.3d 1111, 1127 (Pa. 2011)). Where the petitioner "fails to

plead or meet any elements of the above-cited test, his claim must fail.” ***Commonwealth v. Burkett***, 5 A.3d 1260, 1272 (Pa.Super. 2010).

An issue will have arguable merit if the facts upon which the claim is based are true and the law on which the claim is premised could afford relief. ***See Commonwealth v. Jones***, 876 A.2d 380, 385 (Pa. 2005) (“if a petitioner raises allegations, which, even if accepted as true, do not establish the underlying claim. . . , he or she will have failed to establish the arguable merit prong related to the claim”). Phrased differently, a claim has arguable merit where the factual averments, if accurate, could establish cause for relief. Whether the “facts rise to the level of arguable merit is a legal determination.” ***Commonwealth v. Saranchak***, 866 A.2d 292, 304 n.14 (Pa. 2005).

The test for deciding whether counsel had a reasonable basis for his actions or inactions is whether no competent counsel would have chosen that action or inaction, or the alternative not chosen offered a significantly greater potential chance of success. ***Commonwealth v. Colavita***, 993 A.2d 874 (Pa. 2010). Counsel’s decisions will be considered reasonable if they effectuated his client’s interests. ***Commonwealth v. Miller***, 987 A.2d 638 (Pa. 2009). We do not employ a hindsight analysis in comparing trial counsel’s actions with other efforts he may have taken. ***Commonwealth v. Miller***, 987 A.2d 638, 653 (Pa. 2009). “Prejudice is established if there is a reasonable probability that, but for counsel's errors, the result of the

proceeding would have been different. ***Commonwealth v. Steele***, 599 Pa. 341, 961 A.2d 786, 797 (2008). A reasonable probability 'is a probability sufficient to undermine confidence in the outcome.' ***Commonwealth v. Rathfon***, 899 A.2d 365, 370 (Pa.Super. 2006)." ***Burkett, supra*** at 1272; ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

In addition, where the claim pertains to counsel's alleged failure in calling a witness, the petitioner must prove: (i) the witness existed; (ii) the witness was available to testify; (iii) counsel knew of, or should have known of, the existence of the witness; (iv) the witness was willing to testify; and (v) the absence of the testimony was so prejudicial as to have denied the defendant a fair trial. ***Chmiel, supra*** at 1143; ***Commonwealth v. Cox***, 983 A.2d 666, 692 (Pa. 2009).

PCRA counsel notes that he hired a private investigator to contact the alleged alibi witnesses. Appellant provided the addresses of those witnesses and the investigator sent letters to those addresses. PCRA counsel avers that both he and his paralegal attempted to contact the witnesses via a phone number provided to them by Appellant and the number was no longer in service. Since PCRA counsel could not contact or produce the alibi witnesses, and those witnesses never contacted him or his investigator, he cannot demonstrate that the witnesses were available to testify. In light of the witnesses' lack of availability for purposes of the PCRA proceedings, Appellant failed to establish that the witnesses existed or were willing to

testify at trial. Thus, our review of the record confirms that Appellant's issue necessarily fails and we agree with counsel's assessment that Appellant's issue is without merit.<sup>2</sup> Our independent review confirms that there were no other preserved issues raised by Appellant in his underlying amended petition. Accordingly, we affirm and grant counsel's petition to withdraw.

Order affirmed. Petition to withdraw granted.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Karen Gumbert", written over a horizontal line.

Prothonotary

Date: 9/5/2013

---

<sup>2</sup> We are cognizant that volume four of the trial transcripts was not provided with the certified record, despite PCRA counsel's transcript request. Notwithstanding the error on the part of the Philadelphia clerk of quarter sessions, the issue preserved below and set forth herein does not pertain to the testimony taken at trial on the date in question. Thus, any claim relative to that aspect of the trial would be waived since it was not included in the amended petition filed below.