

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
JOHN SPENCER,		
Appellant		No. 1266 EDA 2012

Appeal from the PCRA Order April 4, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s):CP-23-CR-0006107-2009

BEFORE: FORD ELLIOTT, P.J.E., BENDER, J., and SHOGAN, J.

MEMORANDUM BY BENDER, J.

Filed: January 15, 2013

John Spencer (Appellant), appeals *pro se* from the order denying his petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. After careful review, we affirm.

The facts adduced at Appellant's trial have been previously summarized by this Court as follows:

[Appellant] is an employee of Contract Callers Incorporated ("CCI"), an entity PECO hired to shut off electricity of customers for non-payment of electric bills. [Appellant] and a coemployee, Nelson Westcott, were a two-man field team called "Bucket No. 2" which performed service terminations.

On March 4, 2010, CCI gave Bucket No. 2 a work order to turn off the electricity of Aston Sign Company ("ASC") in Middletown Township. The field team told ASC's owner, Joseph Kvech, that they were PECO employees who were turning off ASC's power, and they showed Kvech bills identifying the amount in arrears as about \$329.00.

[Appellant] dismantled the electric meter and turned off the power. Kvech asked whether he could pay the arrears at that time, and [Appellant] replied that he could not accept a check or credit card. Kvech gave [Appellant] \$330.00 in cash and told him he could keep the change. [Appellant] accepted the payment, turned the electricity back on, and left the property with the other CCI employee. Later that day, [Appellant] returned a work order to CCI indicating that Bucket No. 2 had terminated electric service at ASC. Bucket No. 2 did not turn over any cash received at ASC. PECO prohibits field technicians such as [Appellant] from accepting cash payments. Commercial customers can pay field technicians by check; residential customers must pay PECO directly by check or credit card.

Kvech asked his daughter, who paid ASC's bills, about the unpaid bill, and she admitted that she forgot to pay it. But when she checked online the next few days, she found that Kvech's cash payment had not been credited to his account. Kvech contacted PECO to report that he had not received credit for his payment, and that the power was on even though the meter was not running. According to PECO records, power should not have been on at that time. The Commonwealth presented expert testimony that somebody had altered the meter with a screwdriver; the alterations were not the result of meter malfunction.

Five days after the incident at ASC, CCI gave [Appellant] a work order to shut off electricity at Keith Greiman's residence in Philadelphia. [Appellant] presented Greiman with a nonpayment shutoff notice but added that his power would remain on if he paid a \$70.00 reinstatement fee. Greiman offered a personal check, but [Appellant] stated that he could only accept cash. Greiman gave [Appellant] cash. [Appellant] entered the house and proceeded to the meter in the basement, conduct Greiman found strange since he had already paid [Appellant] the requested cash.

When [Appellant] left, Greiman called PECO, which informed him that what had transpired was not standard PECO operating procedure, since PECO did not accept on-site payment from residential customers. [Appellant], on the other hand, reported to CCI that he went to Greiman's residence alone, but that the resident denied him access to the interior meter. There was no mention in [Appellant]'s report that he accepted money from Greiman.

Commonwealth v. Spencer, No. 2871 EDA 2010, unpublished memorandum at 1 – 3 (Pa. Super. filed July 28, 2011) (quoting Trial Court Opinion, 1/20/11, at 1 – 3).

Following a non-jury trial, Appellant was convicted of four counts of theft of services, 18 Pa.C.S. § 3926, two counts of commercial corruption, 18 Pa.C.S. § 4108, and two counts of theft by deception, 18 Pa.C.S. § 3922. The trial court sentenced Appellant to an aggregate term of 15 – 30 months' incarceration and ordered him to pay restitution totaling \$370.00. Appellant filed a direct appeal challenging the sufficiency of the evidence of his two convictions for commercial bribery. This Court reversed the commercial bribery convictions and vacated the associated sentences, but because we did not disturb the overall sentencing scheme, this Court did not remand for resentencing. *Id.*

On October 20, 2011, Appellant filed a timely *pro se* PCRA petition,¹ his first, and PCRA counsel was subsequently appointed to represent him. PCRA counsel did not seek to amend the *pro se* PCRA petition, and instead filed a **Turner/Finley**² no-merit letter and sought to withdraw on February

¹ The primary allegation set forth in Appellant's *pro se* PCRA petition was that his appointed appellate attorney provided ineffective assistance of counsel when counsel failed to challenge the sufficiency of the evidence on direct appeal with respect to Appellant's theft convictions.

² *See Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988), and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

1, 2012. One month later, the PCRA court filed a notice of its intent to dismiss the PCRA petition pursuant to Pennsylvania Rule of Criminal Procedure 907. In response, on March 13, 2012, Appellant filed a timely, *pro se* response to the notice of intent to dismiss.³ The PCRA court dismissed the PCRA petition on April 4, 2012. Appellant filed a timely *pro se* notice of appeal to this Court challenging the PCRA court's dismissal of his petition.

Our standard of review for dismissals of PCRA petitions is well settled:

This Court's standard of review regarding an order dismissing a PCRA petition is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. In evaluating a PCRA court's decision, 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 trial level.

Commonwealth v. Brandon, 51 A.3d 231, 233 (Pa.Super. 2012) (citation and quotation marks omitted). The PCRA court's credibility determinations, when supported by the record, are binding on this Court. ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). However, this Court applies a

³ According to the PCRA court, in Appellant's response to the Rule 907 notice, he only raised the claim that PCRA counsel should not be permitted to withdraw since he failed to speak to either trial or direct appellate counsel prior to filing the no-merit letter. Though Appellant's answer was docketed and referred to in the PCRA court's opinion and by the Commonwealth in its Brief, the document is now missing from the record. Because Appellant does not dispute the PCRA court's characterization of the contents of the document, and because of our ultimate disposition in this matter, we conclude that it is unnecessary to review the document.

de novo standard of review to the PCRA court's legal conclusions. ***Commonwealth v. Rios***, 920 A.2d 790, 810 (Pa. 2007).

The heart of Appellant's claim, as it was first raised in his PCRA petition, is that direct appellate counsel rendered ineffective assistance of counsel by failing to raise claims challenging the sufficiency of the evidence with regard to his theft convictions.⁴ The PCRA court's primary reasoning for dismissing Appellant's PCRA petition was that Appellant failed to raise the issue of appellate counsel's ineffectiveness specifically in his response to the PCRA court's notice of intent to dismiss. PCRA Court Opinion (PCO), 8/9/12, at 1. The PCRA court concluded that Appellant's failure in this regard constituted waiver of the omitted issues on appeal from the court's dismissal of the PCRA petition. However, the claim at issue in the instant case was clearly articulated in Appellant's *pro se* PCRA petition, and PCRA counsel directly addressed the same matter in the ***Turner/Finley*** no-merit letter (in which PCRA counsel concluded that Appellant's proposed ineffectiveness of

⁴ This claim is articulated imperfectly by Appellant in his brief as a layered ineffectiveness claim. This appears to be largely due to confusion arising out of the manner in which the PCRA court disposed of the claim, and the fact that PCRA counsel filed a ***Turner/Finley*** no-merit letter in this case. PCRA counsel reviewed the claim of appellate counsel's ineffectiveness and concluded that it lacked merit. The PCRA court accepted the ***Turner/Finley*** letter, thus concluding that the claim of appellate counsel's ineffectiveness lacked merit. A layered ineffectiveness of counsel claim is superfluous because, by accepting the ***Turner/Finley*** letter and permitting PCRA counsel to withdraw, the PCRA court did, in fact, effectively rule on the merits of the issue of appellate counsel's ineffectiveness.

counsel claims, directed at appellate counsel for failure to raise sufficiency challenges on direct appeal to his theft convictions, were frivolous).

We conclude the PCRA court's dismissal of Appellant's PCRA petition based upon waiver was in error, as it emanated from the PCRA court's misreading or unjustifiable expansion of our Supreme Court's decision in *Commonwealth v. Pitts*, 981 A.2d 875 (Pa. 2009). In *Pitts*, the Supreme Court concluded that the PCRA petitioner in that case waived his claim that PCRA counsel provided ineffective assistance of counsel when the petitioner failed to raise the matter in his response to the PCRA court's Rule 907 notice.⁵ *Id.* at 880. The underlying claim of trial counsel's ineffectiveness had not been raised in Pitts' original PCRA petition, nor was it addressed in PCRA counsel's no-merit letter. *Id.*

Our Supreme Court, concerned by the fact that the PCRA court never had the opportunity to address the issue of PCRA counsel's ineffectiveness, rejected Pitts' argument that he had raised the issue at the first opportunity by raising it on appeal from the order dismissing the PCRA. *Id.* at 879 – 80. The claim could have been raised in the petitioner's response to the PCRA court's Rule 907 notice to dismiss.

⁵ In *Pitts*, the allegation was that PCRA counsel was ineffective for failing to raise the ineffectiveness of trial counsel who had failed to file a direct appeal on Pitts' behalf.

In this case, by contrast, Appellant raised the claim at issue in his *pro se* petition, and PCRA counsel addressed the issue in the no-merit letter. Thus, the holding in ***Pitts*** is inapplicable to this case. Appellant raised the claim concerning appellate counsel's ineffectiveness at the earliest possible instance. Accordingly, the trial court erred when it dismissed Appellant's PCRA petition due to waiver of the issue of ineffective assistance of appellate counsel.

Nevertheless, the PCRA court also ruled that Appellant would not have been entitled to relief even had the issue not been waived, because the court determined that the evidence was sufficient to support Appellant's theft convictions and, therefore, his ineffectiveness claim against direct appellate counsel lacked arguable merit. PCO, at 5. We agree.

It is well-established that counsel is presumed effective, and the defendant bears the burden of proving ineffectiveness. To overcome this presumption, Appellant must satisfy a three-pronged test and demonstrate that: (1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance. A claim of ineffectiveness will be denied if the petitioner's evidence fails to meet any of these prongs.

Commonwealth v. Ligon, 971 A.2d 1125, 1137 (Pa. 2009) (internal citations omitted).

When an appellant complains that a conviction is infirm due to lack of sufficient evidence, we review such claims under the following standards:

The standard we apply when reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence.

Commonwealth v. Nahavandian, 849 A.2d 1221, 1229-30 (Pa. Super. 2004) (citations omitted). Furthermore, when reviewing a sufficiency claim, our Court is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence. ***Commonwealth v. Robinson***, 817 A.2d 1153, 1158 (Pa. Super. 2003), quoting ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745 (2000). However, "the inferences must flow from facts and circumstances proven in the record, and must be of such volume and quality as to overcome the presumption of innocence and satisfy the jury of an accused's guilt beyond a reasonable doubt." ***Id.***, quoting ***Commonwealth v. Scott***, 409 Pa. Super. 313, 597 A.2d 1220, 1221 (1991). "The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fail even under the limited scrutiny of appellate review." ***Id.***

Commonwealth v. Matthews, 870 A.2d 924, 928 (Pa. Super. 2005).

Appellant's theft convictions stemmed from Appellant's alleged illegal activity concerning two customers of PECO, Kvech and Greiman. Appellant received a pair of convictions, one count of theft of services against PECO, and one count of theft by deception pertaining to the customer, for each of the two incidents, resulting in a total of four theft convictions.

Theft of services is defined by statute, in pertinent part, as follows:

(a) Acquisition of services.--

(1) A person is guilty of theft if he *intentionally obtains services for himself or for another* which he knows are available only for compensation, by deception or threat, *by altering or tampering with the public utility meter* or measuring device by which such services are delivered or by causing or permitting such altering or tampering, by making or maintaining any unauthorized connection, whether physically, electrically or inductively, to a distribution or transmission line, by attaching or maintaining the attachment of any unauthorized device to any cable, wire or other component of an electric, telephone or cable television system or to a television receiving set connected to a cable television system, by making or maintaining any unauthorized modification or alteration to any device installed by a cable television system, or by false token or other trick or artifice to avoid payment for the service.

18 Pa.C.S. § 3926(a)(1) (emphasis added).

Theft by deception is defined by statute as follows:

(a) Offense defined.--A person is guilty of theft if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally:

(1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;

(2) prevents another from acquiring information which would affect his judgment of a transaction; or

(3) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship.

(b) Exception.--The term "deceive" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.

18 Pa.C.S. § 3922.

The PCRA court reviewed the evidence adduced at trial and concluded as follows:

The evidence satisfies the elements of theft by deception under 18 Pa.C.S. § 3922(a)(1), since petitioner obtained cash from Kvech and Greiman through deception, *i.e.*, obtaining cash payments from them under the pretense that the payments would be credited to their PECO accounts and then pocketing the cash instead of giving it to PECO. The evidence also satisfies the elements of theft of services under 18 Pa.C.S. § 3926(a)(1). Petitioner obtained services for Kvech which he knew are available only for compensation by altering or tampering with Kvech's public utility meter, and petitioner obtained services for Greiman by deception or threat, *i.e.*, obtaining cash from Greiman by threatening to turn off Greiman's electricity and then keeping the cash instead of depositing it with PECO.

PCO, at 9.

The PCRA court's conclusions are supported by the record and free of legal error. Though there were contested facts at trial, as well as inferences drawn from circumstantial evidence, the fact-finder resolved those differences and inferences in favor of the Commonwealth, and in doing so substantially relied upon the credibility of the Commonwealth's witnesses. Appellant's argument, that the evidence supporting his theft convictions was

insufficient, largely arise out of his dispute with how these conflicts were resolved and his belief that the Commonwealth's witnesses did not testify credibly.

However, the inferences drawn by the trial court from the circumstantial evidence supporting the convictions were reasonable, and evidence was presented to satisfy each element of the crimes charged. Furthermore, regarding credibility determinations, appellate courts are precluded from weighing the evidence or substituting our judgment for the fact-finder. Accordingly, the PCRA court did not err when it concluded that Appellant's ineffective assistance of counsel claim against appellate counsel lacked arguable merit.⁶

Order affirmed.

⁶ Because the underlying claim lacks arguable merit, Appellant's ancillary allegation that PCRA counsel provided ineffective assistance of counsel by failing to interview trial or direct appellate counsel is baseless, as Appellant has failed to show how such communication could possibly affect the arguable merit of appealing the theft convictions based upon the sufficiency of the evidence. Failure to satisfy any prong of the ineffective assistance of counsel test is fatal to the claim. Furthermore, Appellant does not allege that any other issues could have been discovered had PCRA counsel interviewed those attorneys.