

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
GARY LEE GERBER, JR. a/k/a MUFFIN,	:	
	:	
Appellant	:	No. 1294 MDA 2012

Appeal from the Order Entered June 8, 2012,
In the Court of Common Pleas of Luzerne County,
Criminal Division, at No. CP-40-CR-0000525-2007.

BEFORE: SHOGAN, MUNDY and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED JUNE 05, 2013

Appellant, Gary Lee Gerber, also known as Muffin, appeals from the order entered June 8, 2012, dismissing his first petition for relief filed under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On April 23, 2008, a jury convicted Appellant of one count each of receiving stolen property ("RSP") and criminal conspiracy, both graded as third-degree felonies, and acquitted him of three counts of RSP and one count of hindering apprehension or prosecution. On June 12, 2008, trial counsel withdrew, and new counsel ("counsel 2") entered his appearance on June 16, 2008.

*Retired Senior Judge assigned to the Superior Court.

The court sentenced Appellant on June 30, 2008, to fourteen to thirty-six months of imprisonment for RSP and a consecutive term of incarceration of fourteen to thirty-six months for conspiracy to commit RSP. Appellant filed a motion to modify sentence, which was denied on July 11, 2008. On July 29, 2008, Appellant filed a direct appeal but withdrew it shortly thereafter. He filed a PCRA petition on September 8, 2009. Between October 2009 and June 2012, a hearing on the petition was rescheduled at least nine times for reasons unclear in the record.¹ Thereafter, due to a conflict, counsel 2 withdrew his appearance on November 14, 2011, and new counsel ("counsel 3") was appointed to represent Appellant. The PCRA hearing ultimately was held on June 8, 2012.

On June 12, 2012, the common pleas court denied Appellant's PCRA petition, and Appellant filed a notice of appeal on June 15, 2012. Three days later, the PCRA court directed Appellant to file a concise statement of matters complained of on appeal within twenty-one days of the date of the order pursuant to Pa.R.A.P. 1925(b), or by July 9, 2012. In the meantime, on June 19, 2012, counsel 3 withdrew and new counsel ("counsel 4") was appointed.

¹ The record does reveal that during that time, the case was reassigned from the Honorable Peter Paul Olszewski to the Honorable Tina Polachek Gartley. N.T., 6/8/12, at 2.

Appellant, *pro se*, on June 28, 2012, filed a motion for a hearing pursuant to ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998), which the PCRA court eventually denied as moot on July 18, 2012. Also on that date, counsel 4 withdrew his appearance, and new, current counsel (“PCRA counsel”) was appointed. Inexplicably, Appellant had filed a second, timely notice of appeal on July 6, 2012. By order dated September 7, 2012, this Court dismissed the first appeal as duplicative of the second appeal and stated, “Any and all properly preserved issues that Appellant intended to raise [in the first appeal] may be raised in the [second] appeal” Order, 10/23/12, at 1. On November 13, 2012, PCRA counsel filed a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b), and the PCRA court subsequently filed a Pa.R.A.P. 1925(a) opinion.

Appellant raises the following three issues in his brief to this Court:

1. Whether the lower court erred in denying Appellant’s PCRA petition where Appellant established all factors of ineffective assistance of counsel to support his claim?
2. Whether the lower court erred in conducting the underlying PCRA hearing when it was clear that neither counsel for the Commonwealth of Pennsylvania nor [Appellant’s] PCRA counsel were prepared for the hearing?
3. Whether the lower court erred in finding that Appellant had been provided a counseled PCRA petition?

Appellant’s Brief at 4 (*verbatim*).

Preliminarily, we address the late filing of the Rule 1925(b) statement. As noted previously, the PCRA court ordered the statement’s filing by July 9,

2012, but it was not filed until November 13, 2012. This Court repeatedly has held that the failure to file a Rule 1925 statement constitutes *per se* ineffective assistance of counsel. **See, e.g., Commonwealth v. McBride**, 957 A.2d 752 (Pa. Super. 2008) (holding that failure of defense counsel to file concise statement of errors complained of on appeal constituted *per se* ineffectiveness); **Commonwealth v. Scott**, 952 A.2d 1190 (Pa. Super. 2008) (holding counsel's failure to file concise statement is *per se* ineffectiveness). We have reached the same result when presented with an untimely filing. **See, e.g., Commonwealth v. Burton**, 973 A.2d 428 (Pa. Super. 2009); **Commonwealth v. Thompson**, 39 A.3d 335 (Pa. Super. 2012). However, when counsel has filed an untimely Rule 1925(b) statement and the trial court has addressed those issues, we need not remand and may address the merits of the issues. **Id.** at 340; **Burton**, 973 A.2d at 433.

In the present case, the untimely filing could have resulted from the multiple appointments of substitute counsel during the relevant period, the PCRA court's consideration of the **Grazier** motion, or the fact that the PCRA court's direction to file the Rule 1925(b) statement occurred after the filing of the first appeal, which this Court ultimately dismissed. Here, the PCRA court addressed the issues outlined in the late Rule 1925(b) statement. Thus, we need not remand pursuant to Pa.R.A.P. 1925(c)(3), and we will

consider the issues raised therein. **See Thompson**, 39 A.3d at 340 (“When counsel has filed an untimely Rule 1925(b) statement and the trial court has addressed those issues[,], we need not remand and may address the merits of the issues presented.”).

When reviewing the propriety of an order granting or denying PCRA relief, this Court is limited to determining whether the evidence of record supports the conclusions of the PCRA court and whether the ruling is free of legal error. **Commonwealth v. Anderson**, 995 A.2d 1184 (Pa. Super. 2010). We grant great deference to the PCRA court’s findings that are supported in the record, and will not disturb them unless they have no support in the certified record. **Commonwealth v. Rachak**, 62 A.3d 389 (Pa. Super. 2012).

PCRA relief may be granted for “ineffective assistance of counsel” that “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).

It is well-established that counsel is presumed effective, and the defendant bears the burden of proving ineffectiveness. **Commonwealth v. Cooper**, 596 Pa. 119, 941 A.2d 655, 664 (2007). 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. **Commonwealth v. (Michael) Pierce**, 567 Pa. 186, 786 A.2d 203, 213 (2001).

Commonwealth v. Martin, 5 A.3d 177, 183 (Pa. 2010). A claim of ineffectiveness will be denied if the petitioner's evidence fails to meet any one of these prongs. **Commonwealth v. Ali**, 10 A.3d 282, 291 (Pa. 2010).

In his brief, Appellant makes a generalized claim that his testimony at the PCRA hearing and that of his wife was "clear evidence constituting ineffective assistance of counsel." Appellant's Brief at 8. While he references his trial counsel's "action and inactions," *id.*, he wholly fails to identify any specific conduct by his trial counsel that allegedly constituted deficient performance. Given the paucity of a particularized argument, we would be forced to guess as to Appellant's claim. We have stated:

The . . . argument in support of these claims is, however, markedly insufficient, amounting to less than one half page and containing no analysis or case citation. **See** Brief for Appellant at 12. Under similar circumstances we have deemed appellants' [sic] related claims waived. **See Commonwealth v. Thomas**, 909 A.2d 860, 862 (Pa.Super. 2006) ("[G]iven . . . the complete absence of analysis, we are constrained to deem his claim waived."); **Commonwealth v. Hakala**, 900 A.2d 404, 407 (Pa.Super. 2006) ("Because Hakala fails to offer either analysis or case citation in support of the relief he seeks, we deem all of his questions waived.").

Commonwealth v. Bobin, 916 A.2d 1164, 1168 (Pa. Super. 2007). Thus, we conclude the issues are waived.

Even if not waived, Appellant alleged at the PCRA hearing that trial counsel: (1) did not call the witnesses that Appellant requested; (2) failed to hire a private investigator to (a) take pictures of the stolen Mitsubishi excavator that Appellant allegedly received, and (b) contact Western Union

to prove that there was no money transferred to Appellant's brother for the Mitsubishi excavator; (3) failed to object to the photographs of the Mitsubishi excavator admitted into evidence; (4) failed to interview witnesses; (5) failed to cross-examine witnesses; and (6) failed to object to a proffer agreement the Commonwealth offered into evidence. Assuming Appellant intended to raise the propriety of all of the claims addressed at the PCRA hearing, we would rely on the PCRA court's resolution of the issues as follows:

At the PCRA hearing Defendant argued that his trial counsel was ineffective because the red 1998 Mitsubishi excavator that was reported stolen by Elliot & Frantz was not the same Mitsubishi excavator that he was found guilty of receiving because the excavator he was found guilty of receiving had features that pre-dated a 1998 Mitsubishi excavator, specifically, it had features of a pre-1990 Mitsubishi excavator. Thus, Defendant claimed that his trial counsel was ineffective for failing to present the testimony of a private investigator, Daniel May, the Records Custodian of AAA Welding, Vincent Madonna, Steven White and Richard Gerber as their testimony would have supported his defense that he did not receive a 1998 Mitsubishi excavator. Defendant also testified, however, that he only figured out after trial or towards the end of trial that the Mitsubishi that was stolen had features that pre-dated a 1998 Mitsubishi excavator. Trial counsel cannot be held ineffective for failing to pursue a defense that Defendant himself never raised or brought to the attention of trial counsel. Nevertheless, based upon the testimony presented, this Court is unwilling to find that trial counsel was ineffective for not presenting the testimony of the foregoing witnesses or failing to take photographs of the excavator or objecting to photographs of the excavator when the testimony at trial and at the PCRA hearing revealed that the 1998 Mitsubishi excavator that was stolen from Elliot & Frantz was returned to Elliot & Frantz and then sold. Surely, Elliot &

Frantz would not have accepted a pre-1990 Mitsubishi excavator to replace a 1998 Mitsubishi excavator that was stolen.

The Defendant further claimed at the PCRA hearing that two additional witnesses, John Doran and Mike DeVino, should have been called to testify at trial in connection with his case. The testimony of John Doran and Mike DeVino anticipated by Defendant, however, would not have added to or provided a defense for Defendant. Defendant claimed that both John Doran and Mike DeVino purchased stolen equipment from his brother but were not prosecuted. In this Court's opinion, trial counsel had no reason to call these witnesses as their testimony had no probative value with respect to the charges pending against the Defendant.

Also, Defendant claimed that Daniel May, his brother-in-law and former employee, and Michael Horwith, the owner of Horwith Freightliner, should have been called as defense witnesses to testify with respect to the trade or purchase he made with his brother, Richard, of the Mitsubishi for the freightliner. This testimony, however, was already part of the record via the testimony of the Defendant and his brother, Richard, and would not have shed any light on the pending charge of receiving stolen property as the issue at trial was whether or not the Defendant knew that the excavator was stolen when he received the excavator not whether he paid any money for it or whether he traded it for a freightliner.

Defendant further claimed that he wanted trial counsel to hire a private investigator to contact Western Union to prove that there was no money transferred to his brother for the Mitsubishi excavator. Again, the issue at trial, however, was not whether the Defendant paid or didn't pay for the excavator but whether or not the Defendant knew that the excavator was stolen when he received the excavator. Consequently, it was unnecessary for trial counsel to retain a private investigator to elicit testimony that Defendant did not transfer money to his brother when the Defendant himself was capable of testifying and did in fact testify that he traded his brother the excavator for the freightliner.

Also during the PCRA hearing, Defendant admitted that his trial counsel effectively cross-examined all witnesses but later

testified that his trial counsel did not effectively cross-examine Steven White, Michael Fuller, or Stephen Turinski.

With respect to Steven White, Defendant claims that trial counsel failed to cross examine him regarding the year of the excavator. At trial, Steven White, of Elliot & Frantz Construction Equipment Company, testified that a 1998 Mitsubishi excavator, serial no. 9202, valued at \$10,000.00, was discovered missing from their property in 2004 and was ultimately returned to them by the Pennsylvania State Police. (April 21, 2008 N.T. pp. 51-55). Again, trial counsel had no reason to cross-examine Mr. White regarding the year of the excavator. Trial counsel cannot be found ineffective for failing to pursue a defense that Defendant himself never raised or brought to the attention of trial counsel during trial.

With respect to Agent Michael Fuller and Corporal Stephen Turinski, Defendant claims that trial counsel did not adequately cross-examine them because they testified that all the information that they received from Richard Gerber and Warren Gerber was good and accurate when, in fact, it was entirely false. As investigators in this case, they are able to testify whether or not the information that they received from Richard Gerber and Warren Gerber assisted in their investigation. The Defendant's opinion as to the veracity of the information provided by the Defendant's brothers does not determine the effectiveness or ineffectiveness of trial counsel.

Finally, Defendant claims that trial counsel was ineffective when he failed to object to the admission of Commonwealth Exhibit 18, the proffer letter. On cross-examination, however, Defendant acknowledged that his trial counsel was able to get before the Jury that the Defendant volunteered to meet with the agents and told them where they could find the excavator and that the Defendant thought he entered into a trade and did not know that the excavator was stolen. Without the benefit of the testimony of trial counsel, this Court can only infer that trial counsel did not object to the proffer agreement and intentionally pursued questions regarding the agreement because he believed that the probative value of Defendant's willingness to voluntarily be interviewed and provide information to the agents outweighed any prejudicial effect of the agreement itself.

Applying the legal standard applicable to ineffective assistance of counsel claims, this Court denied Defendant's PCRA Petition.

* * *

In the instant matter, having applied the legal standard, this Court determined that the Defendant failed to meet his burden to overcome the presumption of his trial counsel's competence. Although the Defendant presented numerous arguments why his trial counsel was ineffective, the record failed to demonstrate how the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests and that, but for counsel's alleged ineffectiveness, there was a reasonable probability that the outcome of the challenged proceeding would have been different.

In his Concise Statement of Errors, Defendant claims that this Court erred when it found arguable merit to Defendant's ineffective assistance of counsel claims but denied the PCRA petition. As previously noted, a failure to satisfy any prong of the test for ineffectiveness requires rejection of the ineffective assistance of counsel claim altogether. Consequently, satisfying the first prong of the test without satisfying the second and third prong requires rejection of the ineffective assistance of counsel claim.

Defendant also claims that this Court erred when it referred to the third prong of the ineffective assistance of counsel claim as an objective standard rather than as a subjective standard. Defendant misconstrues this Court's analyses. Specifically, this Court stated during the Post Collateral Relief Hearing the following:

Lastly, you must demonstrate actual prejudice. To get to actual prejudice by showing that there's a reasonable probability, but for Counsel's alleged error, this verdict would have been different; and, quite frankly, this is an objective standard. We know that it clearly is. The standard for judging the actions of Counsel is objective. (emphasis added). (T.P. p. 66).

In its analyses, when this Court was referring to the standard for judging the actions of Counsel, this Court was referring back to prong two of the ineffective assistance of counsel test. The reasonableness of counsel's actions must be viewed from an objective standard not a subjective one. It is only after the Court evaluates prong two can it evaluate under prong three whether the outcome of the challenged proceeding would have been different. Therefore, Defendant misconstrues this Court's analyses.

PCRA Court Opinion, 12/5/12, at 6-9.

Were we to review this issue, we would agree with the PCRA court that Appellant, who failed to call trial counsel as a witness, did not carry his burden of proving counsel's ineffectiveness; thus this issue has no merit.

Next, Appellant contends that the PCRA court abused its discretion and erred in conducting the underlying PCRA hearing because "it was clear that neither counsel for the Commonwealth . . . or [PCRA counsel] were prepared for the hearing." Appellant's Brief at 9. His specific claims are that the assistant district attorney "repeatedly indicated a lack of knowledge," and PCRA counsel failed to file a brief in the PCRA court.

Our review of the record reveals otherwise. Both counsel indicated at the PCRA hearing that they were prepared and ready to proceed. N.T., 6/8/12, at 3-4. Any "inability" of the Commonwealth to respond to specific claims raised by Appellant was actually the Commonwealth's representation that Appellant was attempting to address matters at the PCRA hearing that were not set forth in the PCRA petition. *Id.* at 20-24. Additionally, Appellant makes a bald, unsupported claim that PCRA counsel failed to file a

brief, without any reference to the record. “Appellant’s failure to . . . support his bald assertions with sufficient citation to legal authority impedes meaningful judicial review of his claims.” ***Commonwealth v. Rompilla***, 983 A.2d 1207, 1210 (Pa. 2009); ***Stimmler v. Chestnut Hill Hosp.***, 981 A.2d 145, 153 n.9 (Pa. 2009) (stating that argument portion of brief must contain “sufficient citation to the record”). The PCRA court, in its opinion, stated:

Although there was some discussion about a supplemental hearing being scheduled at the possible request of the Commonwealth due to the Defendant not giving pre-hearing notice of the issues being raised, no supplemental hearing was requested or necessary based upon the Defendant failing to meet his burden of proof on the ineffective assistance of counsel claim.

PCRA Court Opinion, 12/5/12, at 11. In the absence of any record support for Appellant’s assertion, the claim is denied.

Finally, in a three-sentence assertion, Appellant maintains that he was denied the opportunity to file a counseled PCRA petition in this case. The record reveals that PCRA counsel chose to proceed on the counseled petition filed by counsel 2, and that counsels 3 and 4 had the opportunity to file an amended petition but chose not to do so. We discern no error.

Order affirmed.

COLVILLE, J., Concur in the Result.

J-S25011-13

Judgment Entered.

Mary A. Graybill
Deputy Prothonotary

Date: 6/5/2013