

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

BRIAN PROUT,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1343 EDA 2012

Appeal from the PCRA Order of April 20, 2012,  
in the Court of Common Pleas of Philadelphia County,  
Criminal Division, at No. CP-51-CR-0808073-2004

BEFORE: OLSON, WECHT and COLVILLE\*, JJ.

MEMORANDUM BY COLVILLE, J.:

Filed: January 9, 2013

This case is an appeal from the order dismissing Appellant's petition under the Post Conviction Relief Act ("PCRA"). Appellant contends the PCRA court erred when it denied his numerous claims of ineffectiveness that he lodged against his trial and direct appeal counsel. Appellant asks us to grant him relief either by awarding a new trial or by remanding this matter for an evidentiary PCRA hearing. We affirm the dismissal of his petition.

Appellant was tried before a jury along with several codefendants in connection with a shooting death. The jury convicted him of first-degree murder and related offenses. On direct appeal, this Court affirmed his judgment of sentence. *Commonwealth v. Prout*, 974 A.2d 1189 (Pa.

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\* Retired Senior Judge assigned to the Superior Court.

Super. 2009) (unpublished memorandum). The Pennsylvania Supreme Court later denied his petition for allowance of appeal. ***Commonwealth v. Prout***, 985 A.2d 219 (Pa. 2009).

Appellant subsequently filed a timely PCRA petition; the PCRA court appointed counsel to represent him. After giving notice of its intent to dismiss the petition without a hearing, the PCRA court did so. Subsequent to the dismissal, Appellant filed this timely appeal.

The following principles are relevant to Appellant's issues. To establish ineffectiveness of counsel, a PCRA petitioner must plead and prove that the underlying claim has arguable merit, that counsel's actions lacked any reasonable basis, and that counsel's actions prejudiced the petitioner. ***Commonwealth v. Cox***, 983 A.2d 666, 678 (Pa. 2009). A court will not find that counsel's actions lacked a reasonable basis unless the petitioner proves that an alternative not chosen by counsel offered a potential for success substantially greater than the course actually pursued. ***Id.***

After giving proper notice of its intent to dismiss a PCRA petition, a court may dismiss the petition without a hearing if, based on the record and the petition, there are no genuine issues of material fact, no purpose would be served by further proceedings, and the petitioner is not entitled to PCRA relief. Pa.R.Crim.P. 907(1).

Our standard for reviewing PCRA orders is to determine whether the PCRA court's rulings are supported by the record and free of legal error.

***Commonwealth v. Bennett***, 19 A.3d 541, 543 (Pa. Super. 2011). It is an appellant's burden to persuade us that the PCRA court erred and that relief is due. ***Id.*** To satisfy this burden, the appellant must present arguments sufficiently developed for our review. ***Commonwealth v. Hardy***, 918 A.2d 766, 771 (Pa. Super. 2007). Those arguments must contain pertinent discussion, including references to facts of record. ***Id.***

Appellant first contends the PCRA court should not have dismissed his claim that trial counsel was ineffective for not seeking suppression of certain evidence (*i.e.*, handguns, a magazine for a handgun and bullet-proof vests). The evidence in question was seized during the search of a particular apartment. In its opinion, the PCRA court explained that the trial transcript showed the apartment was leased to an individual named Kevin Balow or Balou. The court also determined that, based on the trial evidence, some type of bill associated with the residence was in the name of William Meeks. The court went on to find that nothing in Appellant's PCRA pleadings reflected any facts suggesting Appellant had a privacy interest in the apartment.

After concluding that neither the evidentiary record nor Appellant's pleadings suggested he had a privacy interest in the apartment, the court reasoned there would not have been any merit to any suppression efforts that could have been made on Appellant's behalf. As such, the court determined Appellant could not prevail on his PCRA claim that counsel should have filed a suppression motion.

A defendant seeking suppression of evidence has the preliminary burden of demonstrating a privacy interest in the place searched. ***Commonwealth v. Benson***, 10 A.3d 1268, 1272 (Pa. Super. 2010). Indeed, the determination of whether the defendant has a privacy interest is part of the merits analysis of a suppression motion and, absent such an interest, the defendant is simply not entitled to suppression. ***Id.***

In his brief to us, Appellant correctly acknowledges that a defendant cannot secure the suppression of evidence without having a privacy interest in the place searched. Appellant then goes on to state baldly that he “had permission to use the apartment in question and showed sufficient connection to the property to afford him a reasonable expectation of privacy.” Appellant’s Brief at 27.

One deficiency in Appellant’s aforesaid statement is that he does not explicate it in any way. He does not tell us who supposedly gave him permission and he does not explain the type or extent of use that he was allegedly allowed to make of the apartment. Accordingly, his undeveloped assertion affords us no basis on which to conclude that, at any further proceedings (*i.e.*, a PCRA hearing), he could demonstrate he had a legitimate privacy interest which would have allowed him to seek suppression of evidence seized from the apartment.

Another problem with Appellant’s statement regarding his supposed permission to use the apartment and his claim the he had a privacy interest therein is that he does not cite any part of his PCRA pleadings or any other

part of the certified record which even suggests to us that there exists any issue of material fact on the question of whether he might have had an expectation of privacy in the apartment. That is, while he claims to have had some kind of permission to use the apartment, he cites neither a proffer of testimony made in his PCRA petition nor facts already of record (*e.g.*, trial testimony) that would tend to substantiate his claim.

Having given us no cause to believe he would be able to prove, at a PCRA hearing and/or at a suppression hearing, that he had some privacy interest in the apartment, Appellant has likewise given us no reason to find error in the PCRA court's conclusion that a suppression issue would have necessarily lacked merit. Because the underlying suppression issue would have lacked merit, Appellant cannot show that his trial counsel was ineffective for not filing such a motion. We therefore will not disturb the court's order denying PCRA relief.

In his next issue, Appellant maintains the PCRA court wrongly dismissed Appellant's claim that direct appeal counsel was ineffective for not arguing that the trial court erred in its "refusal to allow the defense to review Vincent Smithwick's presentence report" before or during Appellant's trial. Appellant's Brief at 4. Smithwick apparently shot the decedent in the head.

The PCRA court opined that Appellant's trial counsel did not object to Smithwick's testimony at trial and did not join the sidebar discussions wherein counsel for one or more codefendants asked to see the aforesaid presentence report. The PCRA court then concluded that, because

Appellant's trial counsel did not preserve a claim of trial court error regarding Smithwick's testimony and/or his presentence report, Appellant's direct appeal counsel could not have secured relief on such a claim. The court further reasoned that, because direct appeal counsel could not have secured relief on the claim, direct appeal counsel certainly could not be deemed ineffective for failing to raise it.

Issues not preserved in the trial court cannot be raised on direct appeal. Pa.R.A.P. 302(a). In his brief, Appellant cites no place in the record showing that his trial counsel preserved any Smithwick-related issue that Appellant claims direct appeal counsel should have pursued. As such, Appellant's brief does not persuade us the PCRA court erred when it concluded direct appeal counsel was not ineffective in choosing not to raise any such issue. Having not shown error by the PCRA court, Appellant is not entitled to relief.

Appellant next sets forth a litany of assertions that trial counsel was ineffective for not objecting to numerous ways in which the Commonwealth allegedly committed prosecutorial misconduct. He argues the PCRA court was wrong to reject those ineffectiveness claims.

As instances of prosecutorial misconduct, Appellant argues the Commonwealth failed to provide timely discovery materials regarding certain warrants, certain evidence seized by police and certain statements made by two witnesses (Hyneith Jacobs and Tiesha Williams). As further instances of misconduct, Appellant asserts that the Commonwealth gave improper

opening and closing statements (*e.g.*, by offering personal opinions and by referencing facts not in evidence) and that the Commonwealth inappropriately questioned at least six witnesses (*e.g.*, by leading them and/or by eliciting irrelevant and/or inflammatory evidence). Appellant further complains the Commonwealth violated a pretrial ruling intended to preclude a certain witness (Frank Tompkins) from offering his personal opinion that some sort of wrongdoing was happening or was about to happen at the time of the instant killing.

Appellant asserts that trial counsel could not have had a reasonable basis for failing to object to the aforesaid alleged instances of prosecutorial misconduct. However, Appellant develops no argument to support this assertion. He proffers no intended PCRA testimony from or about trial counsel that would relate to counsel's reasons for choosing not to object.

Merely asserting to us that counsel could have had no reasonable basis for not objecting is insufficient to warrant either a remand for an evidentiary PCRA hearing or any other type of PCRA relief. ***Commonwealth v. Jones***, 811 A.2d 994, 1003 (Pa. 2002). To obtain a remedy from us, Appellant must show us some evidentiary proffer regarding counsel (*e.g.*, what counsel would testify to, at a PCRA hearing, respecting his reasons for not objecting). ***Id.*** Appellant does not do so. Necessarily, therefore, Appellant fails to persuade us that he can prove his trial counsel was ineffective. Consequently, Appellant does not convince us we should disturb the PCRA court's order dismissing the PCRA petition without a hearing.

Appellant also argues the PCRA court should not have denied his claim that trial counsel was ineffective when counsel failed to object to the court's jury instructions regarding accomplices and cooperating witnesses. Once again, Appellant's brief submits that there could have been no reasonable basis for trial counsel's failure to object to the court's charge. However, the brief does not analyze or even reference any PCRA proffer concerning counsel's reasons for his choice not to object. Appellant wants us either to accept outright his pronouncement that no reasonable basis was possible or to remand for an evidentiary hearing at which he might attempt to adduce some type of testimony regarding counsel's conduct—testimony Appellant does not now identify. He has not given us grounds to do so. Accordingly, we will not disturb the PCRA court's ruling.

At various points in his brief, Appellant contends the PCRA court erred by dismissing his claims that direct appeal counsel was ineffective in connection with the aforesaid issue of the court's jury instructions and/or in connection with the issues of alleged prosecutorial misconduct that we discussed *supra*. To some extent, Appellant seems to be arguing that direct appeal counsel should have pursued those issues even though trial counsel did not lodge objections relating thereto. Insofar as Appellant is arguing in that fashion, his argument fails because appellate counsel could not have raised claims waived by trial counsel. Pa.R.A.P. 302(a). Accordingly, Appellant does not show us appellate counsel was ineffective or that the PCRA court was wrong to deny relief.



It may be, however, that Appellant is trying to say that direct appeal counsel was ineffective for not raising trial counsel's ineffectiveness (*i.e.*, trial counsel's failure to raise objections). To the extent Appellant is doing so, his position is unavailing because direct appeal is not the proper stage to challenge trial counsel's stewardship. ***Commonwealth v. Barnett***, 25 A.3d 371, 377 (Pa. Super. 2011). PCRA proceedings constitute the proper stage for ineffectiveness claims. ***Id.*** Appellant has raised such claims as part of his instant PCRA efforts.

The remaining issue raised by Appellant is that the PCRA court should not have dismissed Appellant's claim that trial counsel was ineffective for offering testimony from defense witness Nikisha Powell through a stipulation with the Commonwealth rather than calling Powell to testify. Powell's stipulated testimony indicated, *inter alia*, that the decedent called her at certain times on the date of the killing. Appellant appears to argue that Powell's live testimony would have somehow conflicted with, and thereby impeached, testimony from multiple Commonwealth witnesses regarding the time of the incident. He seems to maintain her stipulated testimony did not accomplish that impeachment.

Appellant references no proffered testimony that he would have adduced, at a PCRA hearing, from or about his trial counsel with respect to counsel's decision to offer stipulated testimony rather than to call Powell as a live witness. As such, Appellant gives us no reason to conclude he could have proven counsel ineffective had there been a PCRA hearing. Therefore,

Appellant does not persuade us the PCRA court was wrong to dismiss his petition.

Based on our foregoing discussion, Appellant has not met his burden to persuade us the PCRA court erred factually or legally in determining that he was not entitled to relief. Therefore, we affirm the court's order.

Order affirmed.