NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
ERIC J. LOVE,	:	
Appellant	:	No. 1355 MDA 2012

Appeal from the PCRA Order entered June 26, 2012,
in the Court of Common Pleas of Dauphin County,
Criminal Division, at No. CP-22-CR-0002537-2005

BEFORE: MUNDY, J., OLSON, J., AND STRASSBURGER, J.*

MEMORANDUM BY: STRASSBURGER, J. Filed: March 19, 2013

Eric J. Love (Appellant) appeals from the order of June 26, 2012, which denied his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Also before us are a petition for leave to withdraw as counsel and a brief pursuant to ***Anders v. California***, 386 U.S. 738 (U.S. 1967) and ***Commonwealth v. McClendon***, 945 Pa. 467 (Pa. 1981).[1] After careful review, we grant counsel leave to withdraw and affirm the order of the PCRA court.

Appellant was convicted of several offenses related to a burglary committed by a group of people in 2005, and was sentenced to an aggregate term of six to thirteen years of incarceration. Appellant's first direct appeal

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[1] As discussed ***infra***, we recognize that ***Commonwealth v. Turner,*** 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*) provide the requirements for withdrawal from representation of a PCRA petitioner, not ***Anders*** and ***McClendon***.

* Retired Senior Judge assigned to the Superior Court.

resulted in resentencing.[2] The new (identical) judgment of sentence was affirmed by this Court on July 10, 2009.[3]

Appellant filed a timely PCRA petition which was dismissed without a hearing. On appeal, this Court determined that a hearing was warranted on one of Appellant's eight PCRA claims: that trial counsel was ineffective for failing to request a limiting instruction regarding the introduction of his non-testifying co-defendant's statement. ***See Commonwealth v. Love***, No. 1321 MDA 2010 (Pa. Super. filed July 28, 2011) (unpublished memorandum) ("***Love II***"). Therefore, the case was remanded for the PCRA court to address that claim. On June 8, 2012, the PCRA court held a hearing on Appellant's outstanding claim, and on June 26, 2012, denied the petition. Appellant filed a timely notice of appeal. Both Appellant and the PCRA court complied with Pa.R.A.P. 1925.

Counsel for Appellant filed with this Court an application for leave to withdraw as counsel, and an "***Anders/McClendon*** Brief" in which counsel

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[2] Our Supreme Court held that the statute providing a mandatory minimum sentence of five years for committing a crime of violence while visibly possessing a firearm did not apply to an unarmed co-conspirator. ***See Commonwealth v. Love***, 926 A.2d 438 (Pa. 2007) ("***Love I***") (reversing and remanding for application of ***Commonwealth v. Dickson***, 918 A.2d 95 (Pa. 2007)).

[3] At resentencing, the Commonwealth produced an additional witness, whom the trial court found credible, who testified that Appellant visibly possessed a weapon during the robbery.

indicates that Appellant wishes to present the following question for our review.

> Whether the [PCRA] court erred in finding that trial counsel was not ineffective by failing to request a limiting instruction to the introduction of an inculpatory statement made by a non-testifying co-defendant which was elicited during the trial testimony of a Susquehanna Township police sergeant where the testimony never referred to Appellant by name and instead implicated other co[-]conspirators and used the pronouns "other male" and "another male" instead of Appellant's name?

Anders/McClendon Brief at 4 (some capitalization omitted).

Before considering Appellant's arguments, we must address counsel's petition to withdraw. We initially note that the requirements counsel faces in seeking to withdraw from representing a PCRA petitioner are governed by ***Turner*** and ***Finley***, not ***Anders*** and ***McClendon***.[4] ***See Commonwealth v. Wrecks***, 931 A.2d 717, 721 (Pa. Super. 2007). Those requirements are as follows.

> ...***Turner/Finley*** counsel must review the case zealously. ***Turner/Finley*** counsel must then submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.
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> Counsel must also send to the petitioner: (1) a copy of the "no-merit" letter/brief; (2) a copy of counsel's petition to

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[4] A prior panel of this Court also had to instruct Appellant's counsel that ***Turner*** and ***Finley*** provide the applicable requirements for PCRA cases. ***See Love II***, unpublished memorandum at 1 n. 2, 3. We hope that counsel will remember it this time.

> withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.
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> If counsel fails to satisfy the foregoing technical prerequisites of ***Turner/Finley***, the court will not reach the merits of the underlying claims but, rather, will merely deny counsel's request to withdraw. Upon doing so, the court will then take appropriate steps, such as directing counsel to file a proper ***Turner/Finley*** request or an advocate's brief.
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> However, where counsel submits a petition and no-merit letter that do satisfy the technical demands of ***Turner/Finley***, the court - trial court or this Court - must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief. By contrast, if the claims appear to have merit, the court will deny counsel's request and grant relief, or at least instruct counsel to file an advocate's brief.

Id.

In his petition, counsel has detailed a thorough review of the case. Counsel's brief filed with this Court asserts the issue Appellant wishes to raise on appeal, with citations to the record, and details with citations to authority as to why counsel believes the issue lacks merit. Counsel sent Appellant the brief and petition to withdraw, and advised Appellant that he may retain other counsel or proceed *pro se*. Therefore, we conclude that counsel's filings satisfy ***Turner*** and ***Finley***.

We now proceed to our independent review of the merits of Appellant's argument, mindful of the following standard of review.

> On appeal from the denial of PCRA relief, our standard of review calls for us to determine whether the ruling of the PCRA court is supported by the record and free of legal error. The PCRA

> court's findings will not be disturbed unless there is no support for the findings in the certified record. The PCRA court's factual determinations are entitled to deference, but its legal determinations are subject to our plenary review.

Commonwealth v. Nero, 58 A.3d 802, 805 (Pa. Super. 2012) (quotations and citations omitted).

In reviewing the PCRA court's denial of Appellant's claims of ineffective assistance of counsel, we bear in mind that counsel is presumed to be effective. ***Commonwealth v. Martin***, 5 A.3d 177, 183 (Pa. 2010). To overcome this presumption, Appellant bears the burden of proving the following: "(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." ***Id.*** Appellant's claim will be denied if he fails to meet any one of these three prongs. ***Id.***

During the joint trial of Appellant and his co-defendant, Otis Eiland, Sergeant James Nelson testified that Eiland offered an out-of-court statement regarding the robbery. In his narrative about the events of the evening of the crime, Eiland identified the two females and the other four males who participated in the robbery (some of whom were juveniles). As read by Sergeant Nelson at trial, all participants were identified by name except Appellant; on the three occasions Eiland mentioned Appellant,

Sergeant Nelson substituted either "another male" or "the other male." ***See*** N.T., 12/12, 12/14, and 12/15/2005, at 180-182.

This Court determined that the statement, as redacted, did not offer any "direct and powerful implication of Appellant in the crime." ***Love II***, ***supra***, at 20. Therefore, the introduction of the statement of Appellant's co-defendant did not violate Appellant's confrontation rights pursuant to the rule of ***Bruton v. United States***, 391 U.S. 123 (1968). However, the majority of the panel of this Court noted

> ***Bruton***, and the cases that interpret its holding, all begin with the premise that the trial court gave a proper limiting instruction to the jury, advising that a statement from a non-testifying co-defendant is inadmissible hearsay as against the other defendant and may not be considered as evidence against him or her.

Love II, ***supra***, at 21. Because the trial court did not give a limiting instruction in Appellant's case, and trial counsel neither requested one nor objected to its absence, this Court remanded the case to the PCRA court to determine counsel's reasons for so acting, and whether Appellant was prejudiced by the lack of the appropriate instruction.[5]

The PCRA court, following the ordered hearing, found that Appellant was not prejudiced.

> [Appellant] was implicated in the crimes by two additional co-conspirators, both of whom testified during the trial and were

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[5] Judge Bowes filed a dissenting memorandum in which she opined that the order dismissing Appellant's PCRA petition should be affirmed *in toto*, as the additional, untainted evidence of Appellant's guilt precluded a finding of prejudice. ***See Love II, supra*** (Bowes, J. dissenting).

> subject to rigorous cross-examination by the defense. Despite this cross-examination, the witness[es]' testimony unequivocally established that [Appellant] participated in the underlying crimes and alone constituted ample evidence upon which the jury could convict him of the charges.

PCRA Court Opinion, 7/26/2012, at 3.

The PCRA court's findings are supported by the record. Both of the juvenile females involved in the robbery testified at trial. ***See*** N.T., 12/12, 12/14, and 12/15/2005, at 110-178. Neither wavered in her identification of Appellant as one of the five males who participated. The young women on cross-examination admitted to lying to the police initially because they were afraid for themselves: both denied any personal involvement in the robbery, stating that they had just been visiting the victims when five men burst into the apartment. At trial, one admitted, and the other confirmed, that the robbery was her idea to get revenge on the victims for showing her disrespect.

The other inconsistencies in the testimony of the female co-conspirators related to, for example, whether one of the cars that the conspirators used to drive to the victim's apartment was green or silver. ***Id.*** at 141, 144. The PCRA court, who also presided over the trial of this case, was in the best position to judge the credibility of these witnesses, and concluded that these inconsistencies were not sufficient to create doubt as to their identification of Appellant at trial. ***See Martin***, 5 A.3d at 197 ("[F]act-based findings of a post-conviction court, which hears evidence and passes

on the credibility of witnesses, should be given great deference, ... particularly where, as here, the PCRA court judge also served as the trial court judge.").

Therefore, because Eiland's statement did not directly and powerfully implicate Appellant, but merely corroborated the testimony of the female co-conspirators whose testimony did directly and powerfully identify Appellant as a participant in the robbery, we agree that Appellant is unable to establish that he was prejudiced by counsel's failure to request a limiting instruction regarding Eiland's statement. ***See, e.g., Commonwealth v. DuPont***, 860 A.2d 525, 535 (Pa. Super. 2004) (holding PCRA petitioner failed to establish he was prejudiced by counsel's failure to request a limiting instruction because the evidence in question was merely cumulative of properly admitted evidence). Accordingly, Appellant is entitled to no relief.

Petition to withdraw as counsel granted. Order affirmed.