NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DAMEON WEBB, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 139 EDA 2013

Appeal from the PCRA Order of December 13, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at Nos: CP-51-CR-0000293-2007 and
CP-51-CR-0000294-2007

BEFORE: GANTMAN, DONOHUE AND OLSON, JJ.

MEMORANDUM BY OLSON, J.: **FILED DECEMBER 04, 2013**

Appellant, Dameon Webb, appeals from the order entered on December 13, 2012 dismissing his petition filed under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

We previously summarized the facts of this case as follows:

> On July 9, 2006, Officer Kimyatta Chaney, badge number 2485, and Officer Andrew Campbell, badge number 5594, responded to a radio call at approximately 2[:00] a.m. at the 5200 block of Locust Street, Philadelphia. Both officers were traveling in marked vehicles, and were dressed in full police uniform. Upon arrival in the area, they noticed an unknown woman waving both of her hands in the air. The officers stopped their vehicles as the woman positioned her body in front of the lead patrol vehicle. Once stopped, Officer Chaney observed a bystander yelling in the direction of the officers, seemingly in a state of panic. Two black males, including the [Appellant], were near the bystander and impeding his path. Officer Chaney noticed [Appellant] was holding a black semiautomatic handgun. Moments later, the two males began running together southbound on 52nd Street.

> Both officers pursued by vehicle, and observed the two males crouch down behind a row of hedges. The officer[s] exited their vehicles, and issued a verbal command for the [Appellant] and his companion to raise their hands and come out. The officers were positioned approximately [40] to [50] feet from the hedges. One male initially complied by standing up. The [Appellant] then jumped up, pointing the barrel of the handgun in the officers' direction. Believing the [Appellant] was going to open fire, both officers discharged their weapons toward the [Appellant]. [Appellant] jumped over the bushes and ran westbound on Locust Street, out of sight of the officers.
>
> [Appellant] was apprehended one block away at 53rd and Locust by two additional officers who arrived on scene. Officer Lawrence Tevelson, one of the arresting officers, had an obstructed view of the bushes, and could not initially see the [Appellant]. [Appellant] eventually came into Officer Tevelson's view at some point after fleeing the bushes. Officer Tevelson pursued the [Appellant] briefly by vehicle before stopping him. Officer Tevelson, whose view was partially obscured by parked vehicles, did not observe a handgun in [Appellant's] possession [and did not recover a handgun from Appellant's person].
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> After [Appellant] was apprehended and identified, he said "you [sic] never going to find no [sic] gun." Officer Tevelson surveyed the immediate area for a gun, and roped off the area for further investigation. By stipulation, any and all fired cartridges that were recovered from the 5200 block of Locust Street were from Officer Campbell's and Officer[] Chaney's firearms. If Officer Hines were called to testify, he would testify that he searched for [30] minutes to an hour and did not recover any weapon. The rooftops were also searched with no results.

Commonwealth v. Webb, 981 A.2d 938 (Pa. Super. 2009) (unpublished memorandum), at 2-3, *appeal denied*, 986 A.2d 151 (Pa. 2009), *quoting* Trial Court Opinion, 9/12/08, at 1-3 (internal alterations omitted).

The relevant procedural history of this case is as follows. Appellant waived his right to be tried by a jury of his peers. After a bench trial on

April 21, 2008, Appellant was convicted of aggravated assault,[1] persons not to possess firearms,[2] carrying firearms on public streets in Philadelphia,[3] and possessing instruments of crime.[4] He was subsequently sentenced to an aggregate term of 10 to 20 years' imprisonment. We affirmed the judgment of sentence. ***Webb***, 981 A.2d at 938.

Appellant filed a *pro se* PCRA petition on June 9, 2010. The PCRA court appointed counsel, and counsel filed an amended petition ("the petition") on July 26, 2010. On September 12, 2012, the Commonwealth filed a motion to dismiss the petition without a hearing. On November 13, 2012, the PCRA court issued notice pursuant to Pennsylvania Rule of Criminal Procedure 907(1) that it intended to dismiss the petition without an evidentiary hearing. On December 13, 2012, the trial court granted the Commonwealth's motion and dismissed the petition without an evidentiary hearing. This timely appeal followed.[5]

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[1] 18 Pa.C.S.A. § 2702(a)(6).

[2] 18 Pa.C.S.A. § 6105.

[3] 18 Pa.C.S.A. § 6108.

[4] 18 Pa.C.S.A. § 907.

[5] On February 5, 2013, the PCRA court ordered Appellant to file a concise statement of errors complained of on appeal ("concise statement"). ***See*** Pa.R.A.P. 1925(b). On February 19, 2013, Appellant filed his concise statement. On March 19, 2013, the PCRA court filed its Rule 1925(a)
(Footnote Continued Next Page)

Appellant presents two issues for our review:

1. Whether the [PCRA court erred] in denying the Appellant's PCRA petition without an evidentiary hearing on the issues raised in the amended PCRA petition regarding trial counsel's ineffectiveness[?]

2. Whether the [PCRA court erred] in not granting relief on the PCRA petition alleging counsel was ineffective[?]

Appellant's Brief at 8.

We will consider Appellant's two issues together as they both raise the same issue, *i.e.*, whether the PCRA court erred in granting the Commonwealth's motion to dismiss. Appellant requests that we reverse the dismissal, and, if we decline to reverse the PCRA court's order, requests that we vacate the order and remand for an evidentiary hearing. Appellant presents five arguments as to how his trial counsel was ineffective: (1) failing to object to the Commonwealth's closing argument; (2) failing to move to suppress statements made by Appellant to police; (3) advising Appellant not to testify; (4) failing to call Lateef Atkins ("Atkins") as a witness; and (5) advising Appellant not to take two plea offers.

As most PCRA appeals involve mixed questions of fact and law, "[o]ur standard of review of a [PCRA] court order granting or denying relief under the PCRA calls upon us to [consider] whether the determination of the PCRA

(Footnote Continued)

opinion. Both issues raised by Appellant on appeal were included in his concise statement.

court is supported by the evidence of record and is free of legal error." ***Commonwealth v. Barndt***, 74 A.3d 185, 191-192 (Pa. Super. 2013) (internal quotation marks and citation omitted). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. Cintora***, 69 A.3d 759, 762 (Pa. Super. 2013) (citation omitted).

All of Appellant's claims are related to the purported ineffectiveness of his trial counsel. A "defendant's right to counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution is violated where counsel's performance so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Commonwealth v. Simpson***, 66 A.3d 253, 260 (Pa. 2013) (internal quotation marks and citation omitted). "Counsel is presumed to be effective." ***Commonwealth v. Bennett***, 57 A.3d 1185, 1195 (Pa. 2012) (citation omitted).

In order to overcome the presumption that trial counsel was effective, Appellant must establish that "(1) the underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his client's interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different." ***Commonwealth v. Luster***, 71 A.3d 1029, 1039 (Pa. Super. 2013) (internal alterations, quotation

marks, and citation omitted). "The burden of proving ineffectiveness rests with the appellant," and "[t]he failure to satisfy any one of the prongs of the test for ineffective assistance of counsel requires rejection of the claim." ***Commonwealth v. Hill***, 42 A.3d 1085, 1089-1090 (Pa. Super. 2012), *appeal granted on other issue*, 58 A.3d 749 (Pa. 2012) (citations omitted).

Appellant first argues that his trial counsel was ineffective for failing to object to the Commonwealth's closing argument, in which the assistant district attorney stated, "[t]hat is speculation. What is in his mind when he's being shot at, why he's running. He has a constitutional right to take the stand, a constitutional right not to take the stand." N.T., 4/21/08, at 81. "Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the factfinder, forming in his mind a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a true verdict." ***Commonwealth v. Thomas***, 783 A.2d 328, 335 (Pa. Super. 2001) (internal alterations omitted), *quoting* ***Commonwealth v. Bronshtein***, 691 A.2d 907, 922 (Pa. 1997).

In ***Thomas***, the petitioner argued that his trial counsel was ineffective for failing to object to the prosecutor's statement regarding the absence of a witness on behalf of the defense at a bench trial. ***Thomas***, 783 A.2d at 335. We recognized that "it has long been held that trial judges, sitting as factfinders, are presumed to ignore prejudicial information in reaching a

verdict." ***Id.***, *quoting* ***Commonwealth v. Irwin***, 579 A.2d 955, 957 (Pa. Super. 1990); ***see also Commonwealth v. Brown***, 886 A.2d 256, 258 (Pa. Super. 2005), *appeal denied*, 902 A.2d 969 (Pa. 2006), *citing* ***Commonwealth v. Gonzales***, 609 A.2d 1368, 1371 (Pa. Super. 1992) ("When the court is sitting as the finder of fact, it is presumed that inadmissible evidence is disregarded and that only relevant and competent evidence is considered."); ***In re M.J.M.***, 858 A.2d 1259, 1262 (Pa. Super. 2004), *appeal dismissed*, 886 A.2d 1136 (Pa. 2005) (citation omitted) (same).

The trial court was aware that Appellant had the constitutional right to testify and the constitutional right not to testify. Assuming a*rguendo*, the statement made by the assistant district attorney in the case *sub judice* was potentially prejudicial, "[w]e must presume that the trial judge, sitting as factfinder, would ignore any potentially prejudicial information and remain objective in weighing the evidence in order to render a true verdict." ***Thomas***, 783 A.2d at 336 (citations omitted). Therefore, we conclude that the PCRA court's determination that Appellant was not prejudiced by his trial counsel's failure to object to the Commonwealth's closing argument is supported by the record and free of legal error.

Appellant's second argument for relief is that his trial counsel was ineffective for failing to seek the suppression of Appellant's statement to police that "you [sic] never going to find no [sic] gun." Appellant argues

that counsel should have sought suppression of the statement because Appellant was not given ***Miranda*** warnings prior to making the statement. Our Supreme Court has explained that "[a]s a general rule, the prosecution may not use statements, whether inculpatory or exculpatory, stemming from a custodial interrogation of a defendant unless it demonstrates that he was apprised of his right against self-incrimination and his right to counsel. Interrogation is defined as questioning initiated by law enforcement officials." ***Commonwealth v. DeJesus***, 787 A.2d 394, 401 (Pa. 2001) (internal quotation marks and citations omitted), *abrogated on other grounds*, ***Commonwealth v. Cousar***, 928 A.2d 1025 (Pa. 2007).

Furthermore, interrogation includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980). "Volunteered or spontaneous utterances by an individual are admissible even without ***Miranda*** warnings." ***Commonwealth v. Kunkle***, 2013 WL 5935275, *6 (Pa. Super. Nov. 6, 2013), *quoting* ***Commonwealth v. Gaul***, 912 A.2d 252, 255 (Pa. 2006).

Appellant does not cite any facts which demonstrate that he was being interrogated (or functionally interrogated) when he made the statement to police that they would not be able to find a gun. Rather, the record reflects that Appellant's statement was voluntary and spontaneous. ***See*** N.T.,

4/21/08, at 61 (Appellant gave statement while being patted down and before being placed under arrest). Thus, Appellant's statement was not subject to suppression. "As the underlying claim lacks arguable merit, counsel cannot be deemed ineffective for failing to raise it." ***Commonwealth v. Koehler***, 36 A.3d 121, 140 (Pa. 2012).

Furthermore, the statement did not prejudice Appellant. As the PCRA court stated, "the [trial] court attached significant weight to the testimony of police officers detailing their observations of the Appellant. Conversely, the [trial] court did not find the Appellant's ambiguous statement to be meaningful . . . the [trial] court viewed the statement as a singular incomplete thought." PCRA Court Opinion, 3/19/13, at 4. Therefore, we conclude that the PCRA court's determination that Appellant's trial counsel was not ineffective for failing to seek the suppression of Appellant's statement is supported by the record and free of legal error.

Appellant's third argument is that his trial counsel was ineffective for advising him not to testify at trial. As we have explained:

> The decision of whether or not to testify on one's own behalf is ultimately to be made by the defendant after full consultation with counsel. In order to sustain a claim that counsel was ineffective for failing to advise the appellant of his rights in this regard, the appellant must demonstrate either that counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf.

Commonwealth v. Michaud, 70 A.3d 862, 869 (Pa. Super. 2013), *quoting* ***Commonwealth v. Nieves***, 746 A.2d 1102, 1104 (Pa. 2000).

In this case, Appellant attached to his petition the following statement:

> I then moved to discuss with [trial] counsel whether or not my desire to testify in my own defense [was] safe. [Trial c]ounsel advised me that my testimony wouldn't be taken serious[ly] and [would] get overshadowed by my record being exposed. I replied [that] I [] would be supplying the court[] with the truth that I didn't possess a gun on the day in question and that it was only while I was urinating when I saw a civilian waving the officers down pointing in my direction that I took off running. After counsel insisted it was not good for me to take the stand because of my record being exposed, I declined to take the stand.

Amended PCRA Petition, Ex. A. This statement by Appellant demonstrates that trial counsel did not interfere with Appellant's right to testify. Rather, Appellant considered trial counsel's advice and chose not to testify on his own behalf.

Appellant had two prior robbery convictions that the Commonwealth would have been able to introduce had he taken the stand. ***See*** Pa.R.Crim.P. 609; ***Commonwealth v. Cascardo***, 981 A.2d 245, 254 (Pa. Super. 2009), *appeal denied*, 12 A.3d 750 (Pa. 2010). An evidentiary hearing was not necessary as Appellant avers that his counsel advised him not to testify in order to avoid the introduction of those robbery convictions. Such advice is reasonable. ***See Commonwealth v. O'Bidos***, 849 A.2d 243, 250-251 (Pa. Super. 2004), *appeal denied*, 860 A.2d 123 (Pa. 2004) (advice to client not to testify on his own behalf because of prior convictions was reasonable); ***see also Commonwealth v. Hall***, 701 A.2d 190, 205 (Pa. 1997) (decision not to call witness because of prior convictions was

reasonable). Therefore, we conclude that the PCRA court's determination that Appellant's trial counsel was not ineffective for advising Appellant against testifying on his own behalf is supported by the record and free of legal error.

Appellant next argues that his trial counsel was ineffective by failing to call Lateef Atkins to testify on his behalf. As we have explained:

> To establish ineffectiveness for failure to call a witness, Appellant must establish that: (1) the witness existed; (2) the witness was available; (3) counsel was informed of the existence of the witness or counsel should otherwise have known him; (4) the witness was prepared to cooperate and testify for Appellant at trial; and (5) the absence of the testimony prejudiced Appellant so as to deny him a fair trial.

Commonwealth v. Todd, 820 A.2d 707, 712 (Pa. Super. 2003), *appeal denied*, 833 A.2d 143 (Pa. 2003), *quoting* ***Commonwealth v. Khalil***, 806 A.2d 415, 422 (Pa. Super. 2002); ***see*** 42 Pa.C.S.A. § 9545(d)(1) (When seeking an evidentiary hearing, petitioner required to "include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible."); Pa.R.Crim.P. 902(A)(15) (same).

Attached to Appellant's petition was an unsigned, undated, unsworn document alleging to be authored by Atkins. Amended PCRA Petition, Ex. B. The document is not complete, with many places left blank. For example, it

states "(date of the shooting)" where the date of the shooting should be included and "   :   a.m." where the time of the incident is to be included. ***Id.*** Furthermore, as the PCRA court stated, "[t]he legitimacy of the alleged witness affidavit is further questionable considering it appears to share the identical form of [Appellant's alleged affidavit]." PCRA Court Opinion, 3/19/13, at 6. Finally, the document does not contain Atkins' address and date of birth as required by statute and rules of court.

"[I]neffectiveness for failing to call a witness will not be found where a defendant fails to provide affidavits from the alleged witnesses indicating availability and willingness to cooperate with the defense." ***Commonwealth v. McLaurin***, 45 A.3d 1131, 1137 (Pa. Super. 2012), *appeal denied*, 65 A.3d 413 (Pa. 2013), *quoting* ***Khalil***, 806 A.2d at 422; ***see O'Bidos***, 849 A.2d at 249; ***see also Commonwealth v. Davis***, 554 A.2d 104, 111 (Pa. Super. 1989), *appeal denied*, 571 A.2d 380 (Pa. 1989).

Appellant did not comply with the PCRA's requirement that he provide a certification from Atkins setting forth that he was willing and able to testify at trial and the substance of that testimony. Instead, it appears that Appellant prepared a document for Atkins to sign that would substantially meet the requirements set forth above. However, Atkins never signed the document. These issues were brought to Appellant's attention in the Commonwealth's motion to dismiss the petition. ***See*** Commonwealth's

Motion to Dismiss at 9-10. Appellant has yet to respond to those deficiencies, either before the PCRA court or on appeal.

As no testimony could be presented at an evidentiary hearing because Appellant failed to comply with 42 Pa.C.S.A. § 9545(d)(1), the PCRA court did not err by denying Appellant's request for an evidentiary hearing. Furthermore, "we will not grant relief based on an allegation that a certain witness may have testified in the absence of an affidavit from that witness to show that the witness would, in fact, testify." ***McLaurin***, 45 A.3d at 1137 (internal quotation marks and citation omitted). Thus, we conclude that the PCRA court's determination that Appellant's trial counsel was not ineffective for failing to call Atkins is supported by the record and free of legal error.

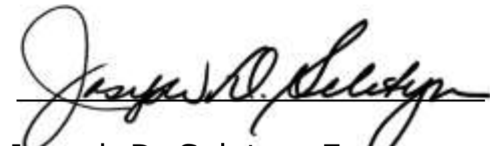
Appellant's final argument is that trial counsel was ineffective for advising him to reject two plea offers made by the Commonwealth. Appellant contends he was offered two plea deals, one for four to eight years' imprisonment and one for 4½ to 9 years' imprisonment, that he rejected because counsel advised him the Commonwealth could not prove its case.

As discussed *supra*, when requesting an evidentiary hearing a petitioner is required to "include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this

paragraph shall render the proposed witness's testimony inadmissible." 42 Pa.C.S.A. § 9545(d)(1). Appellant's statement that is attached to his petition does not mention the plea deals allegedly offered to him by the Commonwealth. ***See*** Amended PCRA Petition, Ex. A. Furthermore, Appellant does not provide a certification detailing the testimony that would be given by trial counsel regarding the contents of any plea offers or his discussions with Appellant regarding whether he should accept or reject those plea offers. As such, Appellant was not entitled to an evidentiary hearing on the issue. ***See Commonwealth v. Malone***, 823 A.2d 931, 936 (Pa. Super. 2003) (failure of petitioner to provide certifications relating to the testimony of himself and plea counsel was sufficient for PCRA court to decline to hold an evidentiary hearing). Therefore, we conclude that the PCRA court's determination that Appellant's trial counsel was not ineffective for advising him to reject the Commonwealth's plea offers is supported by the record and free of legal error.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013