NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
LARRY TRENT ROBERTS, Appellant	No. 1401 MDA 2012

Appeal from the PCRA Order of June 28, 2012,
in the Court of Common Pleas of Dauphin County,
Criminal Division at No. CP-22-CR-0001127-2006

BEFORE: PANELLA, SHOGAN and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: Filed: March 20, 2013

This case is an appeal from the order dismissing Appellant's petition under the Post Conviction Relief Act ("PCRA"). Appellant raises several issues relating to the alleged ineffectiveness of his trial counsel, trial court error and PCRA court error in not granting an evidentiary hearing on the PCRA petition. We affirm the order in part, vacate it in part and remand for proceedings consistent herewith.

On direct appeal, this Court recounted the case facts as follows:

> In late 2005, [Appellant] spoke to Layton Potter, an alleged drug dealer, about a Duwan ("Wubb") Stern, the victim in this case. Potter knew Stern, and Stern had been supplied crack by

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* Retired Senior Judge assigned to the Superior Court.

[Appellant] and his brother. [Appellant] was angry because he had not been paid by Stern for cocaine, which [Appellant] felt could be sold on the street for about $10,000. [Appellant] wanted Potter to "shake him down" to get whatever Stern had in his possession. Potter told [Appellant] that he "wasn't into that any more". In one conversation, [Appellant] told Potter he was going to "go B.C. on Wubb" referring to Brian Charles, who Potter knew from prison to be serving a life sentence for murder.

On December 21, 2005, a Thomas Mullen and an acquaintance, Ebersole, were in Harrisburg in the vicinity of 20th and Swatara Streets with the intention of buying drugs. Mullen knew Stern, having bought drugs from him in the past. At approximately 9:10 p.m., Ebersole dropped Mullen off, and Mullen waited about one half block away from 20th and Swatara Streets while Ebersole went to meet his dealer.

At approximately 10:00 p.m., the victim, Stern, drove to where Mullen was standing. He had a passenger in the car. Stern made an offer to sell Mullen drugs. However, because Ebersole had the money, it was necessary for [Mullen] to go around the corner and talk to Ebersole. Ebersole rejected the idea of buying drugs from someone else, so Mullen walked back toward the location of Stern's car. As he did so, he heard the motor of Stern's car revving as if the tires were spinning on a patch of ice. At about the same time, Mullen heard 2-3 gunshots in quick succession. As he arrived at the car, the left front tire was slowly spinning and a person was standing at the driver's side of the car. Mullen asked the person if Stern was stuck on the ice; the person pulled a gun out and said, "Yeah, he's stuck". Mullen looked at Stern and saw that he was sitting in the driver's seat, staring straight ahead, not moving, with blood on his lips and neck. The person standing by the driver's door said he needed help getting Stern out of the car. Mullen did not want to argue since the person had a gun. Since Stern was a large person, Mullen did not know how he was going to get the body out of the car. He walked to the passenger side with the man, and got into the car, crouching on the seat. After pushing the body out of the car, Mullen backed out of the car, got onto the sidewalk and left quickly, hoping he would not get shot. He got into Ebersole's car and left to find a dealer from whom they could buy drugs. Mullen did not initially contact police because he was in violation of parole by being out past curfew, and feared that he would be charged with a crime. He and Ebersole contacted police at around 12-12:30 that night.

Mullen told police what occurred, but initially did not say that he moved the body. He was charged with Hindering Apprehension and Tampering with Evidence. While in a holding cell at the police station, Mullen was asked to look at a photo array. He looked, but refused to cooperate because he was angry that he was charged with a crime, having cooperated. Mullen saw a photograph of [Appellant] in the array. Eventually, he gave a statement in February 2006, in which he told police everything. He identified the person with the gun as [Appellant].

Stern's body was found by Harrisburg Police who responded to a call of shots fired at 20th and Swatara Streets. Wayne Ross, M.D., of the Dauphin County Coroner's Office, testified that an autopsy revealed that Stern died of a gunshot wound above the right ear which came from the right side.

Commonwealth witness Lisa Starr, who lived in an apartment at 20th and Swatara Streets in Harrisburg, testified that at approximately 10:00 p.m., she heard two gunshots in quick succession. Upon hearing squealing of tires, Ms. Starr looked out of her window and saw an African American man with his head in an older car, with his [] hand braced on the car. The man then walked around the front of the car. She observed the person in front of the headlights for a minute or two. The person crossed the street, and walked up the street, in Ms. Starr's direction. She saw him from her window approximately 3-4 feet away. By the time Ms. Starr was able to call police, officers were arriving at the scene. She gave a statement to police very early in the morning of December 22, 2005. Ms. Starr identified [Appellant] as the person she saw that night.

Jacqueline Wright also lived on Swatara Street and looked out her window upon hearing gunshots and the squeal of tires. * * * * [She observed two men near a car at the corner of 20th and Swatara Streets, seeing one man in the headlights on two occasions, and heard both speak. She saw a body fall from the car and noticed blood. She called 911 and later gave a statement to police but would not cooperate in viewing a photo array] because she did not want to be involved, particularly with her grandchildren at home. Ms. Wright asked the police to leave her home, and they left.

Approximately three weeks later, on January 12, 2006, City of Harrisburg Police Detective Lau called Ms. Wright and asked her

> to come downtown to see if she could identify a person. She was reluctant ... [but identified Appellant by sight and by his voice as] the same person she saw outside her window on the night of the incident.

Commonwealth v. Roberts, 974 A.2d 1190 (Pa. Super. 2009) (unpublished memorandum at 1-3).

Appellant was eventually arrested and charged with homicide in connection with the foregoing events. He gave statements indicating he knew the victim and had been at the location of the shooting after it occurred. He later proceeded to a jury trial, was convicted of first-degree murder, was sentenced, and then filed a direct appeal. We affirmed the judgment of sentence. ***Roberts***, 974 A.2d 1190 (unpublished memorandum). The Pennsylvania Supreme Court denied his petition for allowance of appeal. ***Commonwealth v. Roberts***, 983 A.2d 727 (Pa. 2009).

In 2011, Appellant filed the PCRA petition giving rise to this case. Proceeding under Pa.R.Crim.P. 907, the PCRA court issued a notice of its intent to dismiss the petition. Appellant filed a response thereto. Thereafter, the court dismissed the petition without a hearing. Appellant lodged this appeal.

The following principles will be helpful to our resolution of this case. To establish ineffectiveness of counsel, a PCRA petitioner must show the underlying claim has arguable merit, counsel's actions lacked any reasonable

basis, and counsel's actions prejudiced the petitioner. ***Commonwealth v. Cox***, 983 A.2d 666, 678 (Pa. 2009). Counsel's actions will not be found to have lacked a reasonable basis unless it is proven that an alternative not chosen by counsel offered a potential for success substantially greater than the course actually pursued. ***Id.*** Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different. ***Id.*** The law presumes counsel was effective. ***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 court's rulings are supported by the record and free of legal error. ***Cox***, 983 A.2d at 679. It is an appellant's burden to persuade us that the PCRA court erred and that relief is due. ***Commonwealth v. Wrecks***, 931 A.2d 717, 722 (Pa. Super. 2007).

Appellant first argues his trial counsel was ineffective for not calling an expert witness to testify regarding the unreliability of eyewitness testimony. Along these lines, Appellant points out what he maintains were inconsistencies and/or other infirmities in the testimony from

Commonwealth witnesses who purported to describe the shooter. Appellant asserts that, because of these infirmities, and because misidentification was Appellant's defense, counsel should have called an expert to inform the jury that eyewitness testimony is not reliable. Appellant's claim fails.

An expert may not testify to the credibility of witnesses. ***Commonwealth v. Selenski***, 18 A.3d 1229, 1232 (Pa. Super. 2011). Doing so would intrude on the jury's province of assessing credibility. ***Id.*** Indeed, this Court has held that such expert testimony is inadmissible. ***Id.*** The inadmissibility of such testimony was the basis for the PCRA court's determination that Appellant was not entitled to relief.

Because the type of expert testimony in question would not have been admissible at Appellant's trial, there is no merit to Appellant's underlying claim that trial counsel should have called such an expert. There being no merit to the underlying claim, Appellant cannot establish his counsel was ineffective on this point. Therefore, the PCRA court did not err in denying relief on this claim.

Appellant also argues his trial counsel was ineffective for not objecting to the following remark by the Commonwealth during its closing argument:

> But to suggest that this [d]etective, dedicated, accomplished, hard-working would put a life's work, his family, everything on the line to set somebody up, that suggestion is appalling.

N.T., 11/14/07, at 974.

Appellant contends this remark was objectionable because it improperly vouched for the detective's credibility. The PCRA court reasoned that Appellant had cross examined the detective in an effort to show he had failed to investigate the crime carefully, had not prepared a thorough report and had improperly targeted Appellant for arrest. As such, the court further reasoned that the Commonwealth's remark was an allowable comment in response to Appellant's defensive efforts and, to the extent the Commonwealth used the term "appalling," that word constituted permissible oratorical flair. Having concluded the Commonwealth's remark was unobjectionable, the court determined trial counsel was not ineffective in failing to object thereto.

Comments by the Commonwealth amount to reversible error only if their unavoidable effect is to prejudice the jurors, forming in their minds a fixed bias and hostility toward the defendant such that the jury cannot weigh the evidence objectively and render a fair verdict. ***Commonwealth v. Tedford***, 960 A.2d 1, 33 (Pa. 2008). The Commonwealth's statements are not objectionable if they are based on the evidence or proper inferences therefrom, or if they represent mere oratorical flair. ***Id.*** Additionally, the Commonwealth is allowed to respond to the defense. ***Id.***

The record reveals that, both during cross examination of the detective in question and during closing argument, Appellant attempted to show the detective had conducted a faulty investigation and had improperly targeted Appellant for arrest. Appellant's questions were intended to show, *inter alia*,

that the detective arrested Appellant before he had been identified by one or more witnesses. The questions also suggested the detective ignored the possibility of other suspects. In his closing, Appellant argued that the detective ignored "suspect after suspect" and engaged in a "rush to judgment." N.T., 11/14/07, at 926.

The portion of the Commonwealth's closing argument about which Appellant now complains was not objectionable. It was responsive to Appellant's defensive cross examination and argument and, to some extent, it constituted oratorical flair. We see nothing in this part of the Commonwealth's closing argument that would unavoidably prejudice the jurors by forming in their minds a fixed bias and hostility toward Appellant such that they could not weigh the evidence objectively and render a fair verdict.

Accordingly, there is no merit to the claim that trial counsel should have objected to the remark in question. As such, trial counsel cannot be deemed ineffective for not making that objection. Consequently, the PCRA court did not err in dismissing Appellant's claim.

Appellant next contends his conviction was obtained in violation of due process. In this vein, he complains the Commonwealth violated the dictates of ***Brady v. Maryland***, 373 U.S. 83 (1963), by not providing pretrial discovery of information relating to various phone calls, including calls made to the victim's phone. In his brief, Appellant indicates that he learned of the

alleged ***Brady***/discovery violations during trial. He appears to suggest the trial court erred by not ordering the Commonwealth to disclose the information in question. Appellant also complains the trial court improperly limited his cross examination of one or more witnesses. Additionally, Appellant argues the trial court erred by ruling that only part of a certain recorded statement could be played to the jurors. The recorded statement in question was apparently given by a person named Quinta Samuels.

Appellant's claims regarding any ***Brady***/discovery violations and regarding the limitation on his cross examination are waived for at least two reasons. First, Appellant does not indicate to us where these claims were raised in the PCRA court. Thus, he may not obtain relief on them. Pa.R.A.P. 2117(c), 2119(e). Moreover, there is a more fundamental reason why these points are waived. They could have been raised on direct appeal but were not. ***See Commonwealth v. Rhodes***, 54 A.3d 908, 910, 914 (Pa. Super. 2012) (addressing ***Brady*** claim on direct appeal); ***Commonwealth v. Kouma***, 53 A.3d 760, 768-71 (Pa. Super. 2012) (addressing scope of cross examination on direct appeal). Being waived, Appellant's contentions do not warrant relief. 42 Pa.C.S.A. § 9544(b).

On Appellant's direct appeal, we found the trial court did not err in ruling that only part of the recording from Samuels could be played. ***Roberts***, 974 A.2d 1190 (unpublished memorandum at 16). Accordingly, as the PCRA court correctly found, this claim has been previously litigated for

PCRA purposes and Appellant cannot obtain a PCRA remedy thereon. 42 Pa.C.S.A. § 9544(a)(2).

In his next issue, Appellant maintains his trial counsel was ineffective for not calling two witnesses, Bernard Lyde and Tyisha Williams, to offer an alibi for Appellant. The PCRA court determined Appellant's PCRA proffer did not establish an alibi and, as such, did not warrant a hearing or other relief. Appellant's claim regarding Lyde fails. Regarding Williams, while we make no determination as to whether counsel was, in fact, ineffective, we find the PCRA court's basis for dismissing the claim without a hearing was erroneous.

An alibi defense places the defendant, at the relevant time, in a different place from the crime scene and so removed therefrom as to render it impossible for the defendant to be guilty. ***Commonwealth v. Hawkins***, 894 A.2d 716, 717-18 (Pa. 2006).

Appellant fails to indicate where in the PCRA petition he pled that Lyde would be an alibi witness. Having not shown us where he preserved this claim in the PCRA court, Appellant cannot raise it now. Pa.R.A.P. 2117(c), 2119(e).

As to Williams, Appellant's proffer to the PCRA court was that Williams would testify that she called Appellant at roughly 10:20 p.m. on the night of the incident and that Appellant answered his phone. According to the proffer, Williams would also testify: (1) when she called Appellant, he

indicated he was at home or was arriving at home; and (2) thereafter, he picked her up and drove her to a Target store where, together with him, she returned a certain item at 10:46 p.m. As part of the PCRA proffer, Appellant submitted a Target receipt showing the return of an item at the aforesaid time.

The PCRA court reasoned that the trial testimony indicated the killing occurred at approximately 10:00 p.m. and that Williams' testimony would not constitute an alibi because the proffer did not account for Appellant's whereabouts at the time of the shooting.[1] Thus, the court essentially concluded the PCRA petition did not demonstrate any arguable merit to the underlying claim that counsel should have called Williams to testify at trial. Consequently, the court declined to hold a hearing on this claim.

Appellant does not dispute the court's finding that the time of the offense was roughly 10:00 p.m. However, while his brief is not particularly clear, the brief seems to suggest grounds for relief as follows. Although Williams cannot specifically indicate Appellant had his phone at exactly

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[1] In its notice of intent to dismiss under Pa.R.Crim.P. 907, the court indicated Appellant's contentions regarding Williams did not warrant a hearing because, in violation of Pa.R.Crim.P. 902(A)(15), Appellant had not attached to his PCRA petition any certification regarding Williams' intended testimony. When Appellant responded to the 907 notice, he filed a certification as to her intended testimony in substantial compliance with Rule 902(A)(15). In its later order dismissing the PCRA petition, the court acknowledged the certification and opined that the proffered testimony would not establish an alibi because it did not show Appellant's whereabouts at the relevant time.

10:00 p.m., her testimony that Appellant had his phone at roughly 10:20 p.m. could reasonably lead to an inference that Appellant may have had his phone at or very near the time of the killing—a time which, itself, was approximated to be roughly 10:00 p.m. Both times were approximated. Thus, if Appellant had his phone at approximately 10:20 p.m. and the killing occurred at approximately 10:00 p.m., an arguably reasonable inference could be that Appellant had his phone during or close to the approximated time of the killing.

Appellant then points to trial testimony from Donald Strickland, an employee of Sprint/Nextel, that indicated Appellant's phone received incoming calls at 9:57 p.m. and 10:08 p.m. on the night of the incident. The calls bounced off a particular Nextel tower. Apparently based on the location of the tower, Strickland seemed to testify it was impossible for Appellant's phone to have been at the murder scene at those times.

In light of the foregoing, Appellant appears to take the following position. When Strickland's testimony that Appellant's phone could not have been at the shooting scene at 9:57 p.m. or 10:08 p.m. is linked with Williams' proffered testimony that arguably suggests Appellant had his phone at or very near the time of the offense (at approximately 10:00 p.m.), the link could arguably create the combined inference that Appellant was in possession of his phone and that he and his phone were not at the scene when the victim was killed.

It appears that much, though not all, of the testimony in this trial regarding time was approximated. The same is true of Williams' proffered testimony regarding the time she called Appellant. In light of the approximate nature of the evidence, both adduced and proffered, we find it was erroneous to conclude that there were no genuine issues of material fact and that no purpose would have been served by further PCRA proceedings. At present, based on the evidence and **proffer**, it is at least arguable that Appellant may not have been present at the crime. We are persuaded that testimony from Williams at a PCRA hearing may serve not only to explicate and focus her contentions but also to elucidate what significance those contentions have, if any, in light of all the other trial evidence and/or in light of trial counsel's basis, whatever it might now be shown to have been, for not calling Williams to testify.

To be clear, we are not holding that Williams' testimony, if offered at a PCRA hearing, will necessarily demonstrate an alibi by showing Appellant was not at the crime scene during the shootings and/or will necessarily lead to a finding that trial counsel was ineffective for not calling her as a witness and/or will otherwise lead to PCRA relief. We are only finding that there appears to be some genuine issue of material fact, at this point, on the questions of Appellant's location during the offense and of counsel's ineffectiveness as it relates to counsel not having called Williams as a trial witness. A PCRA hearing on these questions would serve the purpose of

helping to provide a more certain basis on which the PCRA can issue a decision as to whether Appellant is entitled to PCRA relief on this claim.[2]

Accordingly, we hold that the PCRA court erred by dismissing this claim without a hearing on the grounds the court stated in its dismissal order.[3] We will remand for proceedings consistent herewith.

In his final issue, Appellant argues the PCRA court erred in dismissing his petition without an evidentiary hearing on one or all of the issues we have discussed herein. Aside from the issue regarding counsel not having called Williams at trial, the record and relevant law support the PCRA court's conclusions that none of Appellant's other issues involved genuine issues of material fact. Moreover, it is plain that, on those other issues, no purpose would have been served by an evidentiary hearing and Appellant was not entitled to PCRA relief. Because Appellant has not convinced us the court's

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[2] We recognize the PCRA court also indicated in its dismissal order that Appellant told police he was present at the crime scene after the shooting. Testimony from an officer did, in fact, reveal that Appellant stated he was at the scene around or after 11:00 p.m. when police were there. This testimony does not militate against the fact that Williams' proffered testimony appears to present some genuine dispute about Appellant's location, at least at this juncture in these proceedings.

[3] Because this appeal involves a dismissal under Pa.R.Crim.P. 907 without a hearing, we have considered only the grounds stated by the PCRA court for its dismissal. ***See Commonwealth v. Robinson***, 947 A.2d 710, 711 (Pa. 2008); Pa.R.Crim.P. 905, 907. It would be improper at this juncture for us to consider, for example, whether counsel had a reasonable basis for his conduct and/or whether Appellant suffered prejudice from counsel's actions. ***Robinson***, 947 A.2d at 711.

ruling on those issues involved factual or legal error, we will not disturb those parts of court's order.

However, having determined the PCRA court erred in denying relief on the grounds that Williams' proffered testimony was insufficient to warrant a hearing, we vacate the court's order. We remand with instructions that the court conduct further proceedings consistent herewith.

Order affirmed in part and vacated in part. Case remanded for proceedings consistent herewith. Jurisdiction relinquished.